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## THE WAR STORY AS ESSENTIAL PEDAGOGY: CONSTRUCTION, TELLING, AND USE

*Michael P. Maslanka*<sup>1</sup>

### I. THE ESTABLISHING SHOT<sup>2</sup>

The Carnegie and Stuckey Reports<sup>3</sup> on legal education stress the importance of practical education; the Academy resists, especially if reforms tinker with the Socratic method in substantive courses. Why the resistance? Part of the reason is the understandable concern of turning a law school into a trade school. And part is also an entrenched belief that the Langdellian model is the alpha and omega of classroom instruction. Learning solely through induction, however, is a "pedagogical straitjacket."<sup>4</sup> Not all lessons worth learning can be

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<sup>1</sup> Michael P. Maslanka is an Associate Professor of Law at the UNT Dallas College of Law. The author thanks Research Assistant Rossina Ortega and Carmen Coreas for their invaluable assistance and input.

<sup>2</sup> The establishing shot is the first shot in the movie that sets the tone of the movie. See "Establishing Shot: Everything You Need to Know," ("An establishing shot is the first shot in a scene that provides an overview of the setting."). *Establishing Shot: Everything You Need to Know*, NASHVILLE FILM INST., <https://www.nfi.edu/establishing-shot/> (last visited Mar. 5, 2023).

<sup>3</sup> CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, *THE CARNEGIE CLASSIFICATION OF INSTITUTIONS OF HIGHER EDUCATION* (7th ed. 2010); ROY STUCKEY ET AL., *BEST PRACTICES S FOR LEGAL EDUCATION: A VISION AND A ROADMAP* (1st ed. 2007).

<sup>4</sup> HOWARD E. KATZ & KEVIN F. O'NEILL, *STRATEGIES AND TECHNIQUES OF LAW SCHOOL TEACHING: A PRIMER FOR NEW (AND NOT SO NEW) PROFESSORS* (2009), [https://www.aspenpublishing.com/file%20library/faculty-resources/katzandoneill\\_lawschoolteaching.pdf](https://www.aspenpublishing.com/file%20library/faculty-resources/katzandoneill_lawschoolteaching.pdf).

taught using the Socratic method, can they? Why devote class time only to case discussions and legal principles? Who decided—and why—that direct and regular communication between professors and students about a professor's relevant practice experience is verboten classroom territory?

This essay thus proposes an additional pedagogical feature be baked into courses alongside learning objectives, reading assignments, and other syllabi stalwarts. Enter stage right: the war story, a narrative based on a professor's up close and personal encounters, experiences, and interactions with life in the law. Let me be clear: not as the occasional opportunity for sideline relief but rather as an intentional effort to make the war story an integral part of every course. There are pedagogical benefits.

*First*, a thoughtfully constructed and well-told war story complements the substantive materials. It acts as a fusion of the actual world and its theoretical counterpart. A new element enters the dynamics of group learning. The antiseptic lessons from a casebook become flesh, with a well-told and pertinent story channeled through a here-and-now person. And, importantly, a person with whom the students interact daily, not occasionally as with a guest lecturer who zooms in and out of the classroom. The most effective war stories are not cameo appearances.

*Second*, the war story reveals personal facets of a professor's career, interjecting humanity into the classroom experience. We must never forget that we serve as role models for students,<sup>5</sup> inviting them to imagine themselves as future sisters and brothers of the bar. Human beings select other relatable human beings as role models, making selections based on a person's humanity, not on their scholarship, titles, or paper credentials. Because students listen intently to their role models, a war story operates to transfer professional values and actionable substantive knowledge from one generation of lawyers to the next. Students yearn for guidance on how they should conduct themselves as lawyers. (Didn't all of us?) A law professor can meet that genuine and unserved need. We can—through a war story—lay claim to this part of their education and not abdicate it to the vagaries of practice.

*Third*, the lawyer lives of professors are an untapped natural resource. As of 2017, there were 10,232 full-time law professors and 17,021 part-time faculty; in other words, a minimum of 27,253 war

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<sup>5</sup> Lisa G. Lerman, *First Do No Harm: Law Professor Misconduct Toward Law Students*, 56 J. LEGAL EDUC. 86, 91 (2006).

stories with the potential to be told.<sup>6</sup> And each of us has several to tell. This resource is a balance sheet asset in a pedagogical sense, just as real as the more corporeal assets of an endowed professorship or a renovated classroom. But it is here, now, ready for exploration.

Saying there is an undiscovered natural resource is intriguing though useless without the proper tools to mine, process, and deliver to the end-users, our students. Thus, this essay. It details the resistance to the use of war stories and overcoming same; explains why storytelling is a powerful pedagogical tool; sets out the "Five Cardinal Cues" of telling a war story; provides blueprints on how to construct one; and closes with a personal war story that ties together these lessons.

## II. OVERCOMING RESISTANCE TO THE WAR STORY

There will be resistance to this proposal. I imagine it will arrive in three forms.

*First*, Patrick J. Schiltz argues<sup>7</sup> that many law school professors intensely dislike war story use because they can waste time and take the place of hard thinking by both professor and student. Schlitz makes a solid point. When confronted with the rigors of using an unadulterated—or even modified—Socratic method, inexperienced professors can lapse into war stories to run out the class clock and, therefore, cha-cha around *teaching*.

Second, a professor can also misuse a war story for self-aggrandizement. Stories can devolve into just such a self-love fest, with the teller's ego eclipsing essential lessons to be effectively delivered. And I agree: validation is for parking. As Paul Tomlinson asserts in his book, plot comes before character: "Yes, you must have three dimensional characters and sparkling dialogue. And deep themes and fully realized settings. But none of these will [tell] your story if it doesn't have a fully functioning plot."<sup>8</sup> Story first, ego second.

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<sup>6</sup> *Section of Legal Education - ABA Required Disclosures: 509 Required Disclosures*, AM. BAR ASS'N (2017), <https://www.abarequireddisclosures.org/Disclosure509.aspx> (number of professors in 2017 was found by selecting *faculty* resources for the year 2017); Eugene Kuznetsov, Comment to *How many law professors are there in the USA?*, QUORA (Oct. 7, 2018), <https://www.quora.com/How-many-law-professors-are-there-in-the-USA>.

<sup>7</sup> Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999).

<sup>8</sup> PAUL TOMLINSON, PLOT BASICS: PLOT YOUR NOVEL OR SCREENPLAY IN EIGHT SEQUENCES (2017).

The third leg of the resistance stool is an amalgamation of disparate objections: students can enroll in clinical courses to learn the rough and tumble of practice; class time is too valuable to spend on a war story, even the professor's own; and students are indifferent to that which is not to be tested.

None of these objections are sufficiently persuasive to derail their use, separately or in concert. As for the first and second objections, war stories are simply one form of pedagogy, and, like other forms, their telling and use is a learned skill. As to the third, students are driven by an overriding desire to learn lawyering skills, not only the substantive law, and to do so frequently, not sporadically.

But the most persuasive reason to use a war story is its inherent power to educate. More than any other single pedagogical method, it engages students. As we will see, the use of narrative affects each of us on many levels: cognitively, emotionally, and pedagogically. Let's look now at the source of its strength and influence, cues on its delivery, and the classroom mindset required for effective telling.

### III. THE POWER OF A STORY

Any storytelling – war story or otherwise – is as powerful a tool for teachers as it is for novelists, short story writers, poets, playwrights, and screenwriters. Stories are vivid and therefore memorable; textured and therefore full of narrative hooks; linear and therefore easy to follow. The elements of an effective story: The protagonist is rollicking along just fine; an event occurs, changing the continuation of the protagonist's (here a lawyer) trajectory; the protagonist enters the arc of the story and must meet the challenge – and this is key – come away with a clear payoff, a teachable moment, an actionable insight.<sup>9</sup> The trajectory is not merely restored; it is improved. As this regular storytelling goes, so goes the war story. To put it differently, all story arcs can be divided into the following elements: exposition, rising action, climax, and falling action/denouement.

Jack Hart sums up storytelling's power:

The possibility that a biology of a story was somehow hardwired into the human brain also would explain research findings that demonstrated that test subjects displayed better grasp of narrative than other forms,

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<sup>9</sup> WILL STORR, *THE SCIENCE OF STORYTELLING: WHY STORIES MAKE US HUMAN AND HOW TO TELL THEM BETTER* (2020).

that narrative delivered a clearer message to a majority of readers, and that audience members preferred narrative presentations. Research also demonstrated that we remember facts more accurately if we're exposed to them in a story, rather than a list, and that we're more likely to buy the arguments that lawyers make in a trial if they present them as part of a narrative.<sup>10</sup>

Consider this perspective: is a student more likely to respond personally to:

- (A) a war story told by a flesh-and-blood lawyer they know, their professor?
- (B) a case with two-dimensional characters?
- (C) an article with a strong point of view that lectures rather than reminds?
- (D) a dry recitation of important values but not lived ones?

To ask the question is to answer it.

#### IV. LIGHTS, CAMERA, ACTION: DELIVERING THE WAR STORY

What follows are five suggestions (cues in film lingo) on the mechanics of delivering the war story in the classroom. They are designed to provide an actionable framework for the professor to integrate a war story into classes.

##### A. PEDAGOGICAL CUE NO. 1: USE A WAR STORY SPARINGLY<sup>11</sup>

This rule is the first because, as stated, it is tempting to fill a course with nothing but war stories, which defeats their purpose of casting illumination and engendering discussion. Repeated use though of war stories, though, negates these purposes. If everything that happened to the professor is a lesson, then nothing comes across as a lesson. The pedagogical goal is for the students to look forward to the story, not think to themselves, bubble suspended above their heads,

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<sup>10</sup> JACK HART, *STORY CRAFT: THE COMPLETE GUIDE TO WRITING NARRATIVE NONFICTION* (2d ed. 2021).

<sup>11</sup> See Michael L. Seigel, *The Effective Use of War Stories in Teaching Evidence*, 50 ST. LOUIS U. L. J. 1191, 1195 (2006).

"Oh, here the professor goes again!" Or worse, "I guess I'm going to have to teach myself this material," as one student candidly shared with me about a class composed mainly of war stories. A war story should be an anticipated treat, not a dreaded recitation.

## B. PEDAGOGICAL CUE NO. 2: GRAPPLE FIRST, STORY SECOND<sup>12</sup>

A war story told without context is akin to asking a student to parachute into a dense forest without a compass. The student will be lost. At best, the story becomes a pointless interruption; at worst, an irritating distraction. In fulfilling a pedagogical role, the war story provides lessons, and students only hold lessons dear if the students first struggle with the challenges presented by the substantive material.

By way of example, the law consists of numerous knotty concepts that run counter to a student's civilian (pre-law school) understandings. Here is an example of struggle and then enlightenment. In his evidence course, Professor Michael L. Seigel writes about teaching the fundamental concepts of relevance, the use of inference in establishing relevance, and the argument that—even if relevant—the evidence should be excluded because of unfair prejudice.<sup>13</sup> Cases are discussed, hypos are drawn, and debates are forthcoming.<sup>14</sup> And, to a certain extent, confusion reigns as with almost all classes, especially those in which students naturally resort to their default understanding of civilian life.

He then interjects in class a story of two criminal defendants, Nicedemo Scarfo and Nicholas Virgilio, on trial for participating in the murder of a federal judge.<sup>15</sup> The U.S. Attorney seeks to introduce evidence from Kenneth McNair that he gave the murder weapon, a gun, to a friend, Joseph Palumbo.<sup>16</sup> The defense essentially objected with a "so what?" There is no relevance because there is no connection between the gun transfer and the defendants.<sup>17</sup> But it turns out Joseph has a brother named John, and John is a member of the crime family to which the defendants also belong.<sup>18</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 1196.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 1197.

<sup>17</sup> *Id.* at 1198.

<sup>18</sup> *Id.* at 1197.

The very junior member of the trial team is charged with preparing a trial memo to argue that this evidence should be admitted.<sup>19</sup> In a self-deprecating manner (I imagine), Professor Seigel asks the class, "and who do you think was the junior-most trial team member?" (Intrigued, the class gets that answer right!) After pulling an all-nighter, he then uses the memo he wrote to get the evidence into the record.<sup>20</sup> The memo clarifies the issues the class struggled with in a very personal way. His sum up: "Thus, my nearly infinitesimal role in the prosecution...provides the quintessential war story; one that recaps a week of learning in an interesting and practical setting and stretches the students' understanding of concepts already introduced."<sup>21</sup>

### C. PEDAGOGICAL CUE NO. 3: "TRY IT, YOU'LL LIKE IT"<sup>22</sup>

Marvin Gaye is crooning about love; I am warbling about education. His message is to the general populace; mine is to professors/students. The message, though, works in each circumstance. It likely is not surprising to the reader that many students resist the "try it, you'll like it" struggle with class engagement.

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<sup>19</sup> *Id.* at 1196.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 1200; in teaching Employment Discrimination, I sometimes use the same structure patterned after my casebook, MASLANKA & MARTINEZ, EXPERIENCING EMPLOYMENT DISCRIMINATION LAW (2021). The challenge for students is understanding that not all discrimination is unlawful discrimination no matter how egregious the facts. The civilian mindset brought to law school conflates the two concepts; rather, a lawyer mindset says that such facts do not result in a cognizable claim if there is a statute of limitations issue, or the harm befalling the employee is not substantial, or if there is no standing because the worker is an independent contractor and not an employee. I provide a war story from my training in my first legal position as a Field Attorney for the National Labor Relations Board (different statute, same basic principles as Title VII). The Training Officer asks the following: "A worker is called into a manager's office. The manager states "I understand you are trying to organize a labor union. Are you? The worker acknowledges that she is and the manager states: "In that case you are fired." The Training Lawyer then asks the new lawyers: is this termination *always* a violation of the National Labor Relations Act (which I have been taught protects an employee's right to advocate for a union at work) and why or why not?" I struggled with my answer as a new lawyer. This type of war story can be used at the start of the material to be gone over or, as in the evidence example, at the end. In either event, the key similarity is that the class struggles with ideas and concepts so that the lessons take root.

<sup>22</sup> MARVIN GAYE, TRY IT, YOU'LL LIKE IT (ATV Music Publishing, LLC 2001).

Recent cognitive research demonstrates that this very struggle imparts lasting lessons.

Consider this experiment: students in a college-level science class are taught using the lecture method for the first 11 weeks of a 15-week course. Then, in week 12, half of the class is randomly assigned to small groups with “active learning,” in which students participate with the professor in discussing and dealing with challenging concepts. The other half attended highly polished lectures.

The outcome? Initially, students believed that they learned more from the lecture method. And that's understandable. It is what they are most familiar with. My experience in teaching 1L contracts for two years bears this belief out, with many students lamenting that they needed PowerPoints to understand the material; that lectures work just fine for them; and that the Socratic struggle is, well, alien to them.

But the objective data from the experiment proved otherwise. Scores on the multiple-choice exam were much higher in the active engagement group than in the lecture group. The bonus room: overall course evaluations were higher, with the students exposed to active learning.<sup>23</sup> And a war story is the essence of engagement if told well and delivered compellingly. The lesson: a war story coupled with struggle is a more effective teaching tool than a war story alone or substantive content alone. Two plus two does equal five.

#### D. PEDAGOGICAL CUE NO. 4: PIVOTING TO THE WAR STORY: THE ART OF TRANSITION

As with transitions in a movie, the transition in class to the war story is an art form.<sup>24</sup> While the professor can have an abrupt cut—“now let me tell you what happened to me!”—doing so is very jarring and does not allow time for students to prepare to absorb the coming

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<sup>23</sup> Peter Reuell, *Lessons in Learning*, THE HARV. GAZETTE (Sept. 4, 2019), <https://news.harvard.edu/gazette/story/2019/09/study-shows-that-students-learn-more-when-taking-part-in-classrooms-that-employ-active-learning-strategies/>. For a detailed explanation of how the mind processes struggle in the learning process, I recommend Rishi Sriram, *The Neuroscience Behind Productive Struggle*, GEORGE LUCAS EDUC. FOUND. (Apr. 13, 2020), <https://www.edutopia.org/article/neuroscience-behind-productive-struggle>.

<sup>24</sup> Jodie Francis, *Film Transition: Different Types of Transitions in Film*, MUSIC GATEWAY: HOW TO (May 2, 2021), <https://www.musicgateway.com/blog/how-to/film-transition>.

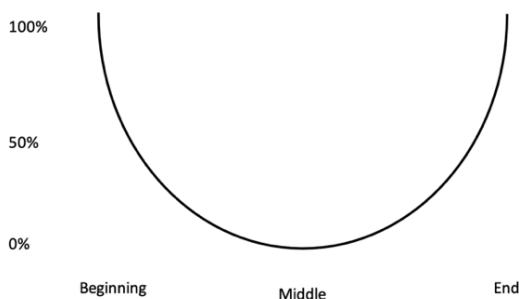


story. To maximize the war story's effect, it must be teed up *before* being told.

Here are some suggestions:

- "Let me tell you a story." Simple but effective. Recall that we are storytelling creatures. We are wired to learn from stories and therefore anticipate their telling. Student attention is funneled from the struggle to anticipated illumination.
- "How should a lawyer deal with this situation? How would you deal with it?" This is the power of a question, usually asked rhetorically in class. It invites students to pause and think. Engagement is the goal.
- "I am loath to close." Ok, not me but President Lincoln in his first inaugural address. Recall that the country is on the verge of civil war. Lincoln intuitively understands that what he says first and what he says last will get the most attention from the crowd outside the partially finished U.S. Capitol.<sup>25</sup> Cognitive science now supports Lincoln's insight. We see it in the following chart, which correlates the listeners' attention to a story with their retention of it:<sup>26</sup>

Attention & Retention



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<sup>25</sup> Kevin J. Wood, *Lincoln's First Inaugural Address: Constitution and Union*, WORD PRESS: MRLINCOLN.COM (Mar. 4, 2015), <https://www.mrlincoln.com/blog/?m=201503&lang=en>.

<sup>26</sup> PATRICK RENVOISE & CHRISTOPHE MORIN, *NEUROMARKETING: UNDERSTANDING THE BUY BUTTONS IN YOUR CUSTOMER'S BRAIN* (2007).

- So, think about this fourth transition: "Let me finish this topic with a story. One from my practice." The segment in class is soon to be over, and attention is focused on what is to come next.

Transitions are a form of "framing" that screenwriters and playwrights use to move along the action of their plots. Their purpose is to present a seamless and fluid narrative.<sup>27</sup>

#### E. PEDAGOGICAL CUE NO. 5: ESCHEW BEING THE G.O.A.T., EMBRACE BEING TRUTH TELLER

So now, let's look at the teller of the story, the professor. A useful war story runs aground when the teller does not adhere to certain basics. The first is that effective stories do not make the teller the G.O.A.T. ("Greatest of All Time"). This notion is a corollary to the idea that the classroom is not for validation, that authenticity is a virtue worth cultivating, and that openness to alternate teaching methods is essential to teacher effectiveness.

Moreover, what works on the sets of elaborate Hollywood studios likewise works in Room 340 of your law school. The undergirding principles are the same as famous movie producer Peter Gruber pointed out.<sup>28</sup> Gruber explains that great storytellers are driven by a desire for the listener to feel as the teller feels.<sup>29</sup> But doing so, Gruber cautions, requires generosity on the part of the storyteller, which, in turn, requires vulnerability.<sup>30</sup> And this mindset is anything but that of those imaging themselves as the G.O.A.T.

Gruber asserts that this mindset is essential because while our minds are relatively open, our hearts are relatively closed off too many.<sup>31</sup> Well, they are closed off to most. The first is not guarded at all, while the second is guarded with zeal. This mindset pries open the

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<sup>27</sup> Kristen Keiffer, *How to Frame Scenes Like a Filmmaker*, WELL-STORIED (Jan. 27, 2018), <https://www.well-storied.com/blog/how-to-frame-scenes-like-a-filmmaker>.

<sup>28</sup> Peter Gruber, *The Four Truths of the Storyteller*, HARVARD BUS. REV. (Dec. 2007), <https://hbr.org/2007/12/the-four-truths-of-the-storyteller#:~:text=The%20stories%20that%20move%20and,the%20moment%2C%20and%20the%20mission..>

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

heart. The law is an emotional undertaking, not merely an intellectual endeavor – authenticity matters.<sup>32</sup>

Professor Melissa J. Marlowe sums up this mindset:

It has been said that 'true authenticity is a lack of perfection. 'These, of course, are not the words of a successful law professor, but of a noteworthy architect. Other disciplines see value in loosening the grip of control, of being willing to experience the authenticity that comes without perfection. If law schools continue to be tethered to the Kingsfield persona, through overly controlled teaching of the law, how can law students of today ever truly know us as teachers, as individuals, and as human beings?<sup>33</sup>

Research from the business, scientific, and medical realms support the concept she so aptly describes.

#### a. Business School Insights

A 2022 article in the *Harvard Business Review* relies on several studies to support this proposition: a manager performing reviews of subordinates should share critical facets with the subordinate of the manager's *own* review. Doing so creates a psychological safety zone for the subordinates in which one normalizes vulnerability.<sup>34</sup> The result? Greater subordinate trust and more effective interaction between manager and subordinates. As with those in business, so too with those in the business of legal instruction.

#### b. Cognitive Science Insights

The most effective stories cause students, upon hearing them, to think to themselves, "I so see myself in that situation when I am a lawyer." (Think back to Professor Seigel's war story and its genesis.)

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<sup>32</sup> See Susan A. Bandes, *Feeling and Thinking Like a Lawyer: Cognition, Emotion, and the Practice and Progress of Law*, 89 *FORDHAM L. REV.* 2427 (2021).

<sup>33</sup> Melissa J. Marlow, *Does Kingsfield Live?: Teaching with Authenticity in Today's Law Schools*, 65 *J. LEGAL EDUC.* 229, 236 (2015).

<sup>34</sup> Laura Delizonna, *High-Performing Teams Need Psychological Safety. Here's How to Create It*, *HARV. BUS. REV.* (Aug. 24, 2017), <https://hbr.org/2017/08/high-performing-teams-need-psychological-safety-heres-how-to-create-it>.

This insight is intuitively appealing, and research in neurobiology now supports it. Paul Zak writes that the key is the release of oxytocin, a hormone, into our brains when we feel empathy for another.<sup>35</sup> And the trigger to release is a compelling narrative/plot accompanied by character-driven stories with emotional content.<sup>36</sup> The story's point is more vivid as a result and is, therefore, more memorable, more appreciated, and more credible.<sup>37</sup> "In terms of making [an] impact, this blows the standard PowerPoint presentation to bits."<sup>38</sup> As we will see, story structures with a built-in tension and then a resolution of that tension works best in achieving these results.

### c. Medical School Insights

I hear the question now: but are you advocating that we acknowledge our mistakes right out in the open? Won't this diminish us in the eyes of our students? No. A mistake is not professional negligence. It is a mistake, an error in judgment, a zipping when you should have zipped. Dr. Atul Gawande writes about this in *When Doctors Make Mistakes*<sup>39</sup> and draws such a distinction. He makes an analogy to baseball (a sport he enjoys) and explains that a shortstop bobbles a grounder a small percentage of the time and therefore flubs the throw to first base.<sup>40</sup> The player is not negligent.<sup>41</sup> It is simply that he will err in his judgment on how fast the ball is coming toward him or how best to handle an unexpected bounce.<sup>42</sup> As with ballplayers, so too with doctors (and lawyers). He explains that doctors teach other doctors in medical debriefs on patients that die.<sup>43</sup> They ask one another: why did the patient die? Could the result have been different? The goal is not preserving egos. Rather, the communal message is that the more knowledge we share, the better we get, and the better doctors serve patients.<sup>44</sup>

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<sup>35</sup> Paul J. Zak, *Why Your Brain Loves Good Storytelling*, HARV. BUS. REV. (Oct. 28, 2014), <https://hbr.org/2014/10/why-your-brain-loves-good-storytelling>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Atul Gawande, *When Doctors Make Mistakes*, NEW YORKER, (Jan. 24, 1999), <https://www.newyorker.com/magazine/1999/02/01/when-doctors-make-mistakes>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

## V. RAISING THE CURTAIN ON WAR STORY CONSTRUCTION: ACT 1

How do we go about the construction of a war story? Here is a representative sampling from a variety of sources applicable to a variety of courses. To paraphrase Tolstoy, war stories all draw from common issues; effective war stories are all unique in their own way. While the topics of war stories always share a certain universality (trial and litigation practice, contract drafting, client selection), the details of a war story always vary. Why is this so? Because a human being experiences the events generating the story in varying circumstances. Story permutations are infinite. Here are three war stories covering not untypical issues, each unique. Each story ends with actionable ideas on distilling career events into a usable war story.

### A. STORY NO. 1: ONE QUESTION TOO MANY

A professor in evidence or trial advocacy/clinic tells the following to students learning cross-examination skills: in a trial, do not ask a question to which you do not know the answer. True, to an extent. However, the art is knowing when to take your winnings and walk away from the gaming table. This truth can be explicitly stated (which is good) but only fully comprehended through a war story (which is better).

The plaintiff, a nurse, alleges she opposed poor safety procedures at her employer, a hospital, and was terminated as a result. By contrast, the hospital asserts it terminated her for poor performance. At trial, a fellow nurse testifies on her behalf. The hospital lawyer has not taken this nurse's deposition. The direct was not all that damaging: caring nurse; her co-workers got along with her; the nursing staff missed her. The cross-examination begins, and the hospital lawyer achieves her goal: an admission that the testifying nurse, too, speaks out over safety concerns yet is not subject to retaliation for doing so. The cup is full, but the lawyer keeps pouring. She gets greedy, however, because all is going so well. "Forget a triple," she thinks. "Let's swing instead for the fences and hit a home run," or so she thinks. The lawyer's next question is: "...and the plaintiff too complained, and she was not retaliated against for it just like you were not, correct?" The witness smiles,

knowing she has the lawyer, and the lawyer does not smile and knows it too. At this moment, the lawyer just wants to get away from it all. Then follows a speech from the stand on all the reasons why the hospital retaliated against the plaintiff.

As it turns out, the jury sided with the hospital, likely because of a favorable jury charge but the lawyer's brush with disaster was very real. Near disasters and full-fledged ones illustrate a point in a way that no abstract concept—no matter how often repeated or fervently declared—can ever do. Disaster and near disaster carve new neural pathways in our brains. They are remembered vividly by the lawyer and transmitted to the student, who will also remember disasters, not best practices.<sup>45</sup>

*The Construction Capper:* Consider lessons learned from trials and hearings. Begin with the lesson you seek to teach in the forefront of your mind, then reverse engineer from the lesson to the narrative. As you create the narrative, consider the elements of a story discussed in earlier sections of the article (which we will revisit in the last section). Here, the lesson worth teaching is how the cross-examiner decides that "enough is enough" in asking questions on cross or, perhaps, asking how a lawyer checks her ego at the courtroom door. It is often difficult for lawyers to acknowledge their law license is not a magic wand à la Harry Potter. This story can be a platform to launch a discussion of this latter topic. The story has multiple lessons.

## B. STORY NO. 2: THE RECORD, THE RECORD, THE RECORD

This war story cuts across several subject areas: litigation, trial, appellate law, administrative law, and family law. It deals with the ubiquitous importance of the record of a proceeding. As with the first story, one can tell it in the first person or the third person.

It is a sexual harassment trial. The female plaintiff is testifying on direct. When an especially sensitive issue arises about the nature of the harassment, she starts to cry. At first, a little, then a lot. Her lawyer asks for a recess and the judge grants it. The jury appears to be moved. Her lawyer thinks that the testimony is going well and that the crying (which is authentic) is helping

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<sup>45</sup> MICHAEL USEEM, *THE GO POINT: WHEN IT'S TIME TO DECIDE—KNOWING WHAT TO DO AND WHEN TO DO IT* (2006).

her case. Everyone in the courtroom—from the judge to the jury to the litigants to the court reporter—knows what just happened. But who does not know? (A professor can pause and ask for an answer.) The answer: the appeals court. No questions are asked of the plaintiff on whether she was crying and why; no statement is made on why the reason for the recess; no effort is expended to "make a record," as the expression goes. On appeal, the testimony is scant on facts to uphold the jury verdict on mental anguish, and the amount awarded for mental anguish damages is therefore reduced.

*The Construction Capper:* Always preserve the record. If it is not on the record in some form or fashion, it never occurred and does not exist except in the memories of those there. And that is not good enough. The class could start with an abstract discussion of what a record is, why we have a record at trial, and how to ask for a record to be made in hearings. These are all important concepts and are all important to know. But what will be remembered first by the students? The damage award gets hacked away because there is no "record." The texture and details of the story make this lesson stick because it makes it memorable. And yes, this war story is one in which the professor is not the hero.

### C. STORY NO. 3: THE LITERATE PROFESSOR

Professors are lawyers, but we are also human beings with interests, thoughts, and beliefs, some of which apply to the classroom. Consider the contracts professor in the following story. It is a war story that the professor did not consider as one in the telling, but a student did. Now it's part of his lesson plan. Here is the setup. The professor is teaching the concept of unconscionability. He has spent the semester discussing consent to a contract through acceptance. Now, he comes to those concepts that vitiate consent and thus negate the enforcement of the contractual obligation. In short, what he calls "contract erasers." Some in the class balk, arguing that consent was given, an agreement was made, and the deal stands.

How do we communicate that sometimes mercy trumps a cramped and formalistic view of justice? The professor was a Shakespeare lover since high school. He quotes a passage memorized from the trial scene in the "Merchant of Venice." A young man who fancies himself



an entrepreneur wants to do a deal in which goods are exchanged. But he needs financing. He goes to Shylock, a Jewish moneylender, for a loan. Sure, says Shylock, but if you default on repayment, the bond price is a pound of your flesh. The would-be entrepreneur is also an anti-Semite who mistreats Shylock until he needs him. But the deal is struck. The ship carrying the goods sinks, the bond is defaulted upon, and Shylock demands his pound of flesh. A trial is held, and Shylock spurns offers from the friends of the borrower amounting to three times the monetary value of the bond. The judge urges Shylock to take the deal; Shylock says no, whereupon the judge tells Shylock, "Though justice be thy plea/consider this/ that in the course of justice/none of us should see salvation/we all do pray for mercy and that same pray/doth teaches us to render the deeds of mercy."<sup>46</sup> (Full disclosure: the professor is me.)

Fast forward several years. The professor enters the law school. From behind, the professor hears a male voice. And what does he hear? The passage quoted is from a former contracts student, now an assistant district attorney, who explains that he used the passage in recommending leniency for a juvenile offender.

*The Construction Capper:* Here, students learn some Shakespeare and – more crucially – the humanity inherent in being a day-to-day lawyer. That the lesson, when created, is an unintended one does not matter. In constructing war stories, think of those times you impacted or even touched a student's life. What did you say or do that resonated with the student? Was it when you used something in your teaching that went beyond the casebook or substantive law? Were you trying to explain a complex concept by putting the concept into human terms? This area is a target-rich source of war stories, perhaps personal and non-law related but still all too real and important to tell.

## VI. RAISING THE CURTAIN ON WAR STORY CONSTRUCTION ACT 2: MY WAR STORY

In the spirit of showing, and not merely telling, here is one of my war stories. It is on the value of diversity, equity, and inclusion (D.E.I.) in the practice of law. I tell it in my employment discrimination

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<sup>46</sup> WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1.



and professional responsibility classes. In keeping with this article's template, I start with the struggle, move on to the story itself, chart out the story's arc, and conclude with the types of lessons learned. It is a suggested format, and professors can modify it as they see fit.

### A. THE STRUGGLE



47

There are different entry points for "the struggle." We saw one with the evidence class of Professor Seigel. This cartoon is another. I ask the students to come to class with a caption for it. I give them a week to complete the assignment and then discuss it in class. The struggle to write one provokes thought and, at times, heated discussion. Some students conclude that she is a woman of color being mistreated by a group of young white men in a job interview (asking her, "what can you possibly bring to our organization that we do not already have?!?"; others take the position that *she* is the interviewer, not them ("Gentlemen, welcome to the future!"); still others are like Switzerland, ignore the color difference and write in a neutral caption ("So let me explain the punch line to you!").

We then launch into a discussion of the value, if any, of D.E.I in the workplace or the legal profession. Some argue that all should be treated identically, that all should be judged on job

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<sup>47</sup> Will McPhail, *Describe What You Can Bring To This Company*, <https://www.willmcphail.com/store/tyb4jgvohv7i1c37ksnclmsba6a368> (last visited March. 12, 2023).

knowledge/performance, and that no one has a unique value to bring to the table. And others, by contrast, disagree strongly.

## B. THE STORY

The story construction is based on the arc as explained earlier: exposition; rising action; crisis; climax; falling action/denouement.

It is 1994. I am a fairly new 41-year-old equity partner in a boutique labor and employment boutique firm in Dallas. I consider myself open-minded, a friend to diversity in law firms, and an all-around exemplary guy. A large and important client is sued for race discrimination in the Rio Grande Valley in Texas. The city is directly on the border with the Republic of Mexico. You can leave your hotel, walk across the border, and be in a different country. I went to the Valley, as we call it in Texas, with an associate. She was born in Central America and came to the United States, with her family, as a teenager. Spanish is her native language; Hispanic culture is her native mindset. We were preparing our key witness, the employer's decision-maker, for her deposition. The witness was in her early 30s, born and schooled in Mexico; she worked her way up to a managerial position. The associate's responsibility: watch, learn, mimic (the time-honored method by which lawyers transmit knowledge).

The deposition is the following day at the office of the plaintiff's lawyer. I sit next to the witness. The lights are on. The video is soon to roll. The associate observes. And the deposition starts to go awry from the start. Chalking it up to witness nerves, I let it go on for a while. But the answers are now becoming markedly different from what she told us less than 24 hours earlier. The case is in danger. So, at an appropriate time, I ask for a break. The three of us – me, the witness, and the associate – troop into a side conference room. I'm about to show the associate how to deal with a wayward witness. I will be "*El Jefe*" (the boss). Lessons will be taught today! But who will be the teacher and who will be the student? As I start to speak, my colleague quietly says, "I'll handle this." A choice confronts me: assert "my authority" – à la

the character Eric Cartman in *South Park*<sup>48</sup> – and stick to my imagined role or let her run with whatever she is planning to do. Perhaps out of surprise at the turn of events in how I expected the deposition to be going or confusion at her audacity, the second option is in play. She spins around and starts to speak Spanish to the witness; the witness responds in kind. I gather from their respective tones of voice that an argument is brewing.

My colleague says firmly to the witness, "*¡Mira!*" (Look!). Rinse and repeat the cycle three more times, with some bickering, followed again with "*¡Mira!*" some explanation in Spanish by my colleague, and then less bickering. Finally, my colleague and the witness engaged in the following exchange, the only time I understood what was being said: "*¿Entiendes?*" (Understand?) and the answer "*Si*" (Yes). The witness returns to resume the deposition and does just fine. As the expression goes, she sings like a canary.

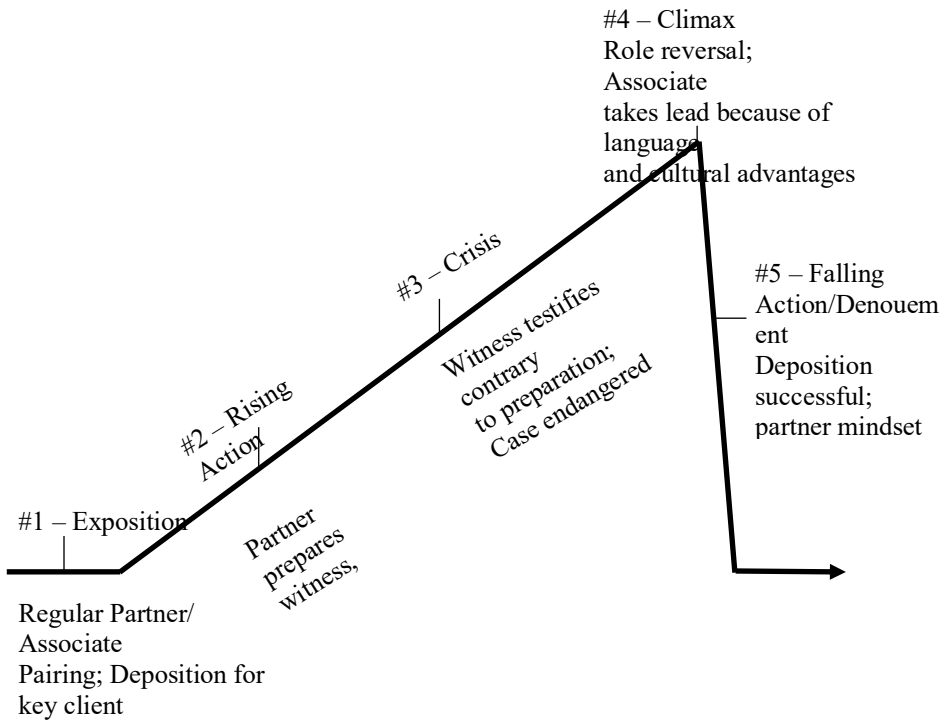
*Construction Capper*: In the debrief, my colleague tells me, albeit respectfully, that I failed to understand the drama that was unfolding for the witness: she needed more time to assimilate the power dynamics of a deposition, to grasp exactly who I was and who the lawyer for the other side was (to her, we were both authority figures), and to digest her role. My ignorance made me ineffective.

Hart suggests that the storyteller graphically illustrates the narrative of any story to be told. Below is a graphic representation of my war story.<sup>49</sup>

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<sup>48</sup> *South Park* (Comedy Central 1997).

<sup>49</sup> HART, *supra* note 10.



Consider diagramming out the war story per the above chart in preparation for class. The professor has already determined the entry point for the story; the students have struggled with the issue at hand, and now comes the preparation and delivery of the story itself. The most effective war stories are those that are planned out and rehearsed but do not sound planned out or rehearsed. Only the professor, though, can bring to the story a sense of immediacy, a "this is happening right now to me" tone, a sense of a challenge being met and learned from. But this tone depends—and this is a key point—on the story's underlying structure that compels it forward. Otherwise, it is just a collection of facts, something that happened to you, and not much more. So, let's match the elements to the story.

#### a. Exposition

Hart explains that this segment of the arc informs the listener who the protagonist(s) is (here, me and the less experienced associate);

the situation in which they find themselves (a pending deposition with a manager from a different cultural background); and foreshadows the possible challenges they will face (pending deposition). The storyteller must overcome the natural urge to dump all the facts into the exposition. Hart writes: "Good exposition provides just enough backstory to explain how the protagonist happens to be in a particular place, at a particular time, with the wants that will lead to the next phase of the story." He quotes the novelist Cormac McCarthy, "where all is known, no narrative is possible."

### b. Rising Action

Hart writes that this section takes up the bulk of a story. "Rising action creates the dramatic tension that will be released only when the story's climax leads to the resolution." A subset of this part of the story is the fall and rise of hope. The key deposition is going not just sideways but down the drain; I am about to solve the problem by teaching the new and ostensibly unskilled lawyer a lesson; she stops me. Will I allow her to take over? What will she do if I allow her to intervene? Why should I step aside? What exactly is she going to do? In short, the storyteller asks what events set up the resolution of the crisis and describes them here. This section of the war story ends with a cliffhanger: will her way work? If so, why? Will justice be served?

### c. Climax

This is the event, or series of events, that resolves the crisis. Here, the use not merely of fluency with language but the intimacy with culture turns the witness around. Hart asserts a nonfiction story is often not as complete a story as a Hollywood production. A fiction piece might have me asking for assistance or intuiting the witness's dilemma, but war stories are true stories, and that is often their saving grace: "(Here is a ) central point about nonfiction narrative: You may be a piece or two short of a complete story structure, but the power of a... true story, the (listener's) knowledge that the story is true is enough to entice (listeners) through the complete narrative arc." I would add that law professors have an ingrained advantage in telling a war story because of a student's desire to understand how the law operates in practice, not only in theory.

### d. Falling Action/Denouement

The protagonists are now transformed in some way, large or small. There is a new status quo, and life will never be the same. Ideally, this leads to a seamless transition to lessons learned that the article addresses next. Hart writes that journalists call this phase "the kicker." But here, I believe the war story differs from traditional storytelling because war stories have complex, continuing, and sometimes ambiguous lessons, while Hollywood and fiction narratives tend to wrap up unanswered questions, provide a neater package of lessons, and slap on the "The End."

### C. THE LESSONS

But the end of the story is only the beginning of the professor's job. I then discuss—and suggest other war storytellers do as well—lessons that I learned and aspired to transmit to the students. This brings the war story to closure. I further suggest dividing the lessons into the ones you immediately learned and those with more transcendent implications. Doing so provides a framework for class discussion and interaction. Here are mine, culled from my lecture notes. Before lecturing on the lessons learned, the professor might ask the class: where did I go wrong? The telling of the story opens the door to students being emboldened sufficiently (depending on the class personality) venturing opinions and speculations.<sup>50</sup> As Michael Useem explains, we, as human beings, learn more lasting lessons from studying disaster than success.<sup>51</sup> When we study the first and not the second, new neural pathways are cut into our brains. Ask the class: where did I go right? Why? What attributes does it take to change your mind?

#### a. "The Immediate Lesson": Where did I go wrong?

In preparing the witness, I was ignorant of the cultural ways that those raised in Mexico and Central America perceived lawyers and the legal system. In short, their culture. I went on automatic pilot, defaulting to how I normally prepared a witness without first thinking about the needs of *that* witness. The dynamics of the deposition were lost on the witness, not because of her failings but because of mine. She testified through her cultural lens. I was clueless, and my less experienced—but much wiser colleague—needed to set me straight.

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<sup>50</sup> While I realize that a war story in which things went well is a teaching tool, we learn more from disasters than we do from best practices.

<sup>51</sup> USEEM, *supra* note 45.

When the corrective action occurred, the deposition went ahead, the witness did well, and (most importantly) our client was the beneficiary.

Another immediate lesson is that diversity is different from inclusion. Diversity is essentially a place at the table, whereas inclusion is actually listening when another comes to the table. Recent scholarship, however, confirms that well-meaning diversity does not – without effort – translate into true inclusion.<sup>52</sup>

But there are two protagonists in this story: me and the associate. She found the courage to speak up, didn't she? Where did that courage come from in the moment? She had the choice to remain silent, as do many new lawyers. But she picked the more difficult and challenging path.

b. "The Transcendent Lesson": Where did I go right?

I learned that day the true value of a firm embracing D.E.I. I learned much more, as goes with most war stories. As my mother often remarked, every experience in life is a good one, but only if you draw the right lesson from it; otherwise, well, it is just something that happened to you. Here a junior lawyer found the courage to speak, and the senior lawyer had the moxie (after much hesitation) to listen or perhaps just listen because he was out of fresh ideas.

And also that lawyers must adapt. How did I think of myself in the 1990s? Open-minded, an ostensible friend of diversity, a good human being. I had – up to that point – been fooling myself about who I was because my frames of reference – my mindsets – were too narrow, overly cabined, and self-referential. A journey from ignorance to understanding started that day. My frames were reset, and thus my horizon both broadened and deepened.<sup>53</sup>

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<sup>52</sup> Sheen S. Levine et al, *Racial Attention Deficit*, 7 SCI. ADVANCES 38 (2021). Some of the research is summarized in Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV. (July-Aug. 2022), <https://hbr.org/2016/07/why-diversity-programs-fail>.

<sup>53</sup> We see markedly similar challenges in our sister profession of medicine. By way of example, people of color are often misdiagnosed by dermatologists. Why? Varying bodily functions manifest themselves differently on black skin than on white skin. But dermatologists are trained almost exclusively on, yes, you guessed it, white skin. Broaden the frame of reference and you increase the accuracy of a diagnosis. As with medicine, do too with law. Helen M. Epstein, *Why the Color of Your Skin Can Affect the Quality of Your Diagnosis*, SOC'Y TO IMPROVE DIAGNOSIS IN MED., <https://www.improvediagnosis.org/dxiq-column/why-the-color-of-your-skin-can-affect-the-quality-of-your-diagnosis/> (last visited Nov. 5, 2021).

Finally, a frame that was expanded was also the one in which I understood that it is my job to foster an atmosphere of permission to speak freely; to encourage candor for the benefit of the client; to subordinate my ego to the greater good.

## VII. THE END?

Most stories, in whatever medium, start with an establishing shot and wrap up with "The End," in which the storyteller ties all loose ends up. There can be a sequel, perhaps in which the same characters appear, usually acting out the same or similar story. But a war story is different in a fundamental pedagogical way.

When I was about to enter the Academy in 2015, a seasoned law professor from another local law school wished me well. He remarked that I would enjoy a surprise fringe benefit that he had experienced many times in his career. He told me this: when students run into you years after graduation, they will express gratitude for a remark made, a vivid story told, or a moment where an idea crystallized from class involvement. Relish those moments, he urged, because they provide a wonderful sense of fulfillment.

His words now resonate with me. I imagine most law professors fully agree. Yet, the gift of a story is not a one-way benefit. How so? Once a professor launches a story into the classroom, it stops being solely your story, with your lessons, with your agenda, with your perspective. Rather, it starts being the student's (now the lawyer's) story. A story made fresh, new, and viable through *their* life in the law. A lesson they go out to teach and use for the benefit of those you'll never meet or even know — a war story all their own.