

The Medium is the Message: Client Voice, Story, Narration, and Form
Nancy Cook

"In a culture like ours, long accustomed to splitting and dividing all things as a means of control, it is sometimes a bit of a shock to be reminded that, in operational and practical fact, the medium is the message. This is merely to say that the personal and social consequences of any medium - that is, of any extension of ourselves - result from the new scale that is introduced into our affairs by each extension of ourselves, or by any new technology."

Marshall McLuhan¹

"Every writer has to be able to answer two questions: What is the story, and whose story is it?"

Grace Paley²

Introduction

Most lawyer work originates with a story. Often "story" can be understood as a question of what happened. A client might say, for example, "I was at a party and everyone was smoking marijuana"; "My boss was hitting on me"; "The tenants disappeared leaving a mess"; or "I was knocked down by an asteroid." Even in transactional law, a story hovers in the background. That story might be anything from "This company was started by my great-grandfather during the Great Depression" to "I want to remember my teacher in my will...." Most stories are told repeatedly and appear in multiple versions inside and outside the legal system.

Much has been written about the importance of client story,³ about how client stories get heard,⁴ and about lawyers' obligations in using and telling client stories.⁵ This discussion generally takes place in the comfort zone of legal academe – in law journals. Meanwhile, the discourse of the legal academy has itself been the subject of critical theory, analyzed for bias and presumptions that are often incompatible with the experience of "Other."⁶ Relatedly, a call to recognize the value of difference in experience, perception, and perspective has fueled a movement in narrative theory.⁷ When the threads of these three broad conversations come

¹ Understanding Media: The Extensions of Man (1964)

² Comments made at Omega Writers Workshop, Rhinebeck, NY (1998) Notes on file with the author.

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together, questions that can reasonably be asked include, what do the critiques of privilege-based scholarship convey about the way client stories, in particular, get represented in professional discourse? What happens to client narrative when the space of legal discourse gets reconfigured and the contents are shaken up and altered? Does the structure of the text or the composition of the language make a difference to those whose stories are at the core of law's operations as well as to those who are in the position of telling?

In this article, I explore various literary forms in which client narratives are produced by storytellers – lawyers, judges, journalists, academics, and poets – in an effort to answer these questions. I hope to demonstrate that the choice of form says a great deal about the story that is being told, that the characteristics of the form dictate to a great extent what story is revealed, and that the literary structure has significant impact on intellectual and behavioral processes. Form, therefore, is as important as, if not more important than, the content of the narrative. This has obvious implications for those engaged in telling client stories or in opening channels for client stories to be told. Specifically with respect to legal academic discourse, and in particular with respect to how legal scholarship can be understood or defined, recognition of the significance of form is enlightening. Ultimately, in both law practice and legal scholarship there are complex choices to be made about the mode of storytelling.

The stories utilized for this purpose are those of Samuel Holmes Sheppard and Karla Faye Tucker. Sheppard and Tucker were convicted of murder in two completely unrelated cases thirty years apart, Sheppard in the 1954 slaying of his wife, Marilyn Reese Sheppard, and Tucker in the 1984 slaying of Jerry Lynn Dean, an acquaintance of Tucker's. Sheppard's conviction was overturned by the U.S. Supreme Court in 1966 and shortly thereafter he was acquitted in a retrial. Sheppard died of natural causes in 1970. Tucker's conviction and death sentence were upheld through subsequent appeals and pleas for clemency; she was executed by the State of Texas in 1998.

The stories of these two people and the facts of their cases are different in many ways, but they provide useful comparisons. Importantly, both stories have been told in multiple forms: court documents, testimony, judicial opinions, news articles, memoirs, academic texts, online blogs,

fictionalized scripts, and poetry. The stories as told vary in many ways, with respect to, for example: the chronological scale and sequencing of events; the logical and causal structure of the story (i.e., plot); characterization, especially in terms of agents, victims, or beneficiaries of action; who has control of the text (i.e., narration); and point of view and voice. They therefore provide a rich lode of narrative material from which to draw for comparative purposes.

“Client” experience is the focus of Part I of this article. Elements of story and discourse are considered in the context of the Sheppard and Tucker murder episodes that gave rise to multiple narratives. Looking at examples of character portrayals, descriptions of setting, and plot narratives, and drawing comparisons of such components as imagery, sound, mood, theme, and linguistics, it is possible to see not only how stories are distinctly transformed in the process of formation, but how a reader’s response might be subliminally influenced by the form that is put into the service of telling.

Part II of this article examines narratology, the theory of the structures of narrative. This overview of legal and literary narrative products, with identification and description of the primary elements of story and of literary composition,⁸ is not intended to be exhaustive or even erudite; it provides basic conceptual background for understanding the operations of particular forms in the presentation of client narrative.⁹ Analyzing this breakdown is a prelude to understanding how client stories are presented, used, and understood.

In Part III, implications or real consequences are discussed. The basic point is that to the extent that narrative is relational, it is also the catalyst for action. That action takes many turns, affecting reader’s agency and relationship building. More systemically, action affects power relationships, including those embedded in future narratives. The ways in which experiences are transformed through different story-telling processes or discourses demonstrates the potential impact of form on action. Thus, the conclusion is that form matters, and in telling client stories, or in opening channels for client stories to be told, there are complex choices to be made.

⁸ The exploration I undertake here seems to demand some divergence from conventional form, and I do take the liberty of drifting into nontraditional formats, particularly at the end of the article; but for the most part I stick with a familiar pattern of analysis.

⁹ note using term client to refer to generic client, not in sense of personal client.

Part I: The Stories

Marilyn Sheppard

The story of Marilyn Sheppard's murder could be told as simply as E.M. Forster's famously simple example of a plot:¹⁰ "Marilyn Sheppard died, and then Sam Sheppard was accused of killing her." As the story came to be told, however, the variations in chronological scale, logical sequencing, and coherence of action sequence that constitute plot were wide-ranging. Looking at only two particulars in the chronology, where the story begins and the moment of Marilyn's death, this becomes obvious.

With respect to the beginning point, different narrators start at the end of a "stressful week,"¹¹ or on the morning of July 3, when Sam pulls into the Bay View Hospital mansion in his Jaguar and Marilyn is at home, angry.¹² Or they begin later in the day, with Sam and Marilyn at home with their seven-year-old son;¹³ or later, when they are entertaining and having a pleasant dinner.¹⁴ In some versions, the story begins shortly after midnight on July 4,¹⁵ or between 5:00 and 6:00 a.m. on that date,¹⁶ or hours later, when Marilyn is discovered lying in a pool of blood.¹⁷

The moment of Marilyn's death is described in these terms: she was struck 35 blows by an instrument not ascertained;¹⁸ she was beaten to death, her face unrecognizable;¹⁹ she was bludgeoned.²⁰ These descriptions, although in the passive voice, utilize action verbs. In many of the stories, however, no action verbs are used to narrate the moment of death. Rather, Marilyn is found by neighbor Esther Houk;²¹ twin beds stand in the room, one empty; Marilyn's body is in an odd position;²² her body, colorfully detailed, simply *is*.²³ Neither killing nor dying is mentioned at all.²⁴

¹⁰ Forster's example: "The king died, and then the queen died."

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Considering plot from the perspective of its logical and causal structure,²⁵ components such as setting, mood, tense, and language become important. With respect to setting, for example, the Sheppard story narrators have made many different choices. A judge, looking back, creates mood by references to the times: Eisenhower is president, there is no freeway, the decision in *Brown v Board of Education* is just a few weeks old, Earl Warren has been Chief Justice for only a year, *Miranda v. Arizona* has not yet been decided.²⁶ The Sheppards' son, Sam Reese Sheppard, portrays the setting as Cleveland, characterized by an east-side, west-side divide.²⁷ The attorney who defended the State of Ohio against Reese Sheppard's wrongful imprisonment claim²⁸ places the action in Bay Village, Ohio, "affluent," "charming," "idyllic," "safe," and "snug."²⁹ The U.S. Supreme Court briefly notes that the action takes place in the Sheppards' "lakefront home,"³⁰ while the Ohio appellate court locates it in Marilyn's bedroom.³¹

In every story, themes, hinting at the "why" of plot, appear early on, usually in the first few paragraphs. Sam Reese Sheppard and co-author Cooper open their story with several volleys: they suggest the investigating police were incompetent, observing that the Bay Village police had never investigated a murder of this sort; and they introduce Sam as their hero by pointing out that in this friendly, safe, upper middle class suburb populated by young families, accidents were not uncommon and Dr. Sheppard, the police surgeon, was there to make things all right. A very different mood is set by Pollack who uses multiple colorful adjectives and selective details (martini, blueberry pie, dimpled chin) interlaced with unsupported generalizations (invariably turned female heads, nurses trailed eagerly after him, young and old would frequently shout 'Hi Dr Sam'). Selective adverbs are used by the Ohio Appeals Court (evidently, unquestionably, untruthfully) to set the tone. The United States Supreme Court opts to write its opinion entirely

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²⁵ Again, to use Forster's example: "The king died, and then the queen died of grief."

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²⁸ In 19—Sam Reese Sheppard instituted a wrongful imprisonment claim on behalf of his deceased father against the state of Ohio. See...

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in the active voice, while Sheppard's attorney in the Supreme Court, a young F. Lee Bailey, begins his brief in the active voice, but switches to passive voice partway through the narrative.

Causal aspects of plot are character driven. Characters are frequently cast in roles as agents (causing an event), victims (adversely acted upon), or beneficiaries (being affected by an event).³² Looking specifically at Sam and Marilyn as characters in the story, the impact of character description and development on plot can easily be seen. In the Sheppard story, Sam Sheppard most often appears as the beneficiary: He "had it made,"³³ a popular surgeon driving a Jaguar, in love.³⁴ He was born to privilege, lived a sheltered life, the youngest son who made excellent grades, was a star athlete, but was not satisfied.³⁵ The details vest the young doctor with agency: He was 6'0, athletic,³⁶ a successful thirty-year-old surgeon;³⁷ he talked of divorce, was involved with "a lady patient," was also seen in the company of another "young lady," and before Marilyn's death had been "intimate" with a co-worker for a year.³⁸ As events unfold before Marilyn's death, only one narrator – his lawyer -- depicts Sam as a possible victim;³⁹ on the other hand, many, if not most, story lines that develop after the point of Marilyn's death infuse Sam with victim characteristics.⁴⁰

Marilyn Sheppard is most often portrayed in relation to Sam, as a foil or a plot device. She is "his sweetheart,"⁴¹ "his wife of nine years,"⁴² his "pregnant wife."⁴³ In some stories, the details suggest a role as victim; she is the *devoted* wife, the mother, a churchgoer;⁴⁴ she'd had an insecure childhood, was "used to having her feelings hurt," and just wanted to be "a good

³² Linguists further make a distinction between verbs which signal volitional acts (*What does X do?* -- jump from a bridge, watch a show) and verbs which signal nonvolitional acts or experiences (*What does X experience?* -- falling from a bridge, seeing an accident).

³³ Holmes

³⁴ McGunagle

³⁵ Mason; Neff

³⁶ Pollack

³⁷ Handman;

³⁸ Ohio App

³⁹ Bailey. Bailey notes that Sheppard was 30 years of age, a practicing osteopathic neurosurgeon who, with his brothers and father, operated a clinic, and was on staff of Bay View Hospital.

⁴⁰ Eg,

⁴¹ Holmes

⁴² McClish

⁴³ Sup Ct

⁴⁴ McGunagle

doctor's wife."⁴⁵ In a few versions, there are hints that Marilyn set the plot in motion, either from a fear of sex⁴⁶ or as the controlling mistress of the house⁴⁷

Variations in the structural aspects of narration are not always obvious, but affect how the story is heard. For example, the narrator in some versions of the story is apparently omniscient;⁴⁸ in some, the narrator speaks as self, covertly⁴⁹ or overtly;⁵⁰ and in still other others, the narrator appears to be speaking for an "Other," without overtly appearing to do so.⁵¹ Because narration in non-fiction works tends to be covert,⁵² the question of whose story it is becomes particularly important. A review of the Sheppard narratives reveals that the vast majority tell the story as Sam Sheppard's story. But several could be viewed as narrating the "people's" story,⁵³ or combining Sam's story with Marilyn's,⁵⁴ or even as telling it as no one's story.

Jerry Lynn Dean

TO BE ADDED

If we look at various aspects of story contained in the multiple versions of these particular historical events and consider the ways in which each story has been transformed through different story-telling processes or discourses, it is possible to draw comparisons not only about the "what" of the stories – the variations on sequencing of events involving characters – but about the "how" of discourse as evidenced in structure or form.

Part II Narratology

Narrative Form and Function.

The term narrative signifies story, a phenomenon common to all peoples and existing in countless forms. Narratology is concerned with all types of narratives, literary and nonliterary,

⁴⁵ Neff

⁴⁶ Cooper/SR Sheppard

⁴⁷ Pollack

⁴⁸ E.g., Pollack, McClish, Linder

⁴⁹ Holmes, Robertson

⁵⁰ Mason, Cooper

⁵¹ Ohio App, Sup Ct, Bailey

⁵² See e.g., Pollack, Mcgunagle, Linder, Ohio App, Sup Ct, Bailey, Neff, Berger

⁵³ (eg Ohio App, Robertson)

⁵⁴ Neff

fictional and nonfictional, verbal and nonverbal. Anything that tells a story, in whatever genre, constitutes a narrative. According to Roland Barthes,

There are countless forms of narrative in the world... Among the vehicles of narrative are articulated language, whether oral or written, pictures, still or moving, gestures, and an ordered mixture of all those substances: narrative is present in myth, legend, fables, tales, short stories, epic history, tragedy, *drame*, comedy, pantomime, paintings (in *Santa Ursula* by Carpaccio, for instance), stained-glass windows, movies, local news, conversation. Moreover, in this infinite variety of forms, it is present at all times, in all places, in all societies; indeed narrative starts with the very history of mankind; there is not, there has never been anywhere, any people without narrative; all classes, all human groups, have their stories, and very often those stories are enjoyed by men of different and even opposite cultural backgrounds”⁵⁵

Narratives are found in different kinds of media and can be classified in multiple ways;⁵⁶ but the overarching distinction in narrative typologies is that between fictional and nonfictional narratives. A fictional narrative presents an imaginary narrator's account of a story that happened in an imagined world. Often appreciated for its entertainment and educational value, the fictional narrative also can provide a vision of potentialities and possibilities, characters who might exist or might have existed, and events that might happen or could have happened. Although a fictional narrative may freely refer to actual people, places and events, or may be a vehicle for the expression of essential truths, it cannot be used as evidence of what happened in the real world.

A nonfictional narrative, or factual narrative, presents a living person's account of actual events. A factual narrative can serve as evidence of what happened in the real world. Narratives in the legal context are almost invariably nonfictional. In principle, the author of a factual narrative is subject to judgments about her credibility and is in some way accountable for the truth of statements made in the text. A legitimate question for the nonfictional narrator is always, how do you know?

⁵⁵ Barthes, *Communications* 8 1975 [1966], 237; see also Chatman 1990, Bal 1985. Note that some theorists, among them Gérard Genette, opt for a narrow meaning of the term 'narrative', restricting narratives to verbally narrated texts. Genette 1988 [1983] at 17

⁵⁶ Thwaites *et al.* 1994, 112. Traditional rhetoric distinguishes four kinds of discourse: *exposition*, *argument*, *description* and *narration* (Brooks & Warren 1972, 44). These four forms, which relate to primary purposes, are often referred to as different genres (Fairclough 1995, 88). However, it may be misleading to treat them as genres partly because texts may involve any combination of these forms. In particular, *narrative* is such a fundamental and ubiquitous form that it may be especially problematic to treat it as a genre.

Narratologists tell us that every story has elements. In investigating a structure, the narratologist dissects narrative phenomena into their component parts and then attempts to determine functions and relationships. Virtually all theories of narrative distinguish between *what* is narrated (the story and its meaning) and *how* it is narrated (the discourse and its form). Those concerned with discourse narratology analyze stylistic choices that determine the form or realization of a narrative text.⁵⁷ In linguist terms, every narrative text, or complex sign, consists of a “signifier” and a “signified,”⁵⁸ the signifier being a discourse or mode of presentation, and the signified being a story, or an action sequence involving characters. Discourse generally refers to the technical, structural, and stylistic aspects of the narrative. Story, on the other hand, alludes to a sequence of events involving characters. Story analysis examines the chronological scale and coherence of the action sequence. Characters get involved by being, for example, agents (causing an event), victims (adversely acted upon), or beneficiaries (being affected by an event).⁵⁹ Thus, Sam Sheppard might appear as the killer, causing death; as the victim, wrongly accused; or as the beneficiary, receiving the privileges earned by his father and brothers. Karla Faye Tucker can similarly be portrayed as the killer, causing death; as the victim, abused and addicted to drugs; or as the beneficiary, brought to redemption because of her incarceration.

Story, it should be noted, is also distinguishable from plot.⁶⁰ Story is used in reference to *what* happens and the sequencing of events; plot touches on the underlying *why* of the action, which is character driven. The basic question concerning story is “What happens next?”⁶¹ A narrative's discourse does not have to present the story in purely chronological fashion and may, for example, begin with action in one scene, execute a flashback, then jump forward.⁶² Plot refers to the logical and causal structure of a story, and thus implicates character. The basic question concerning plot structure is “Why does this happen?”⁶³ There is general agreement among

⁵⁷ or performance, in the case of films and plays.

⁵⁸ See Ferdinand de Saussure (Swiss linguist/structuralist)

⁵⁹ Linguists further make a distinction between verbs which signal volitional acts (*What does X do?* -- jump from a bridge, watch a show) and verbs which signal nonvolitional acts or experiences (*What does X experience?* -- falling from a bridge, seeing an accident).

⁶⁰ The terms 'story' and 'plot' were originally introduced in E.M. Forster's *Aspects of the Novel* (1976, 1927).

⁶¹ Forster's example: "The king died, and then the queen died"

⁶² E.M. Forster: Ideally, one should distinguish *three* action-related aspects: (i) the sequence of events as ordered in the discourse; (ii) the action as it happened in its actual chronological sequence; and (iii) the story's causal structure.

⁶³ Forster's example: "The king died, and then the queen died of grief." Texts can have widely differing degrees of plot connectivity: some are tightly and linearly plotted (typically, every action unit is the causal consequence of something that happened before -- the characters want to fulfill dreams, go on a quest, realize plans, overcome

narratologists that a story should contain within it the answer to that question, that it is meant to explain and/or represent experience.⁶⁴ Accordingly, one person's version of the Sheppard story may seek to show the killer got away; another may condemn Sheppard's lifestyle. Tucker's story can be told as one about forgiveness, about capital punishment, or about women and crime. Each in its own way addresses the why question.

Normally, therefore, a story will have a point, teach a lesson, present an interesting experience or provide the reader with a high degree of experientiality, whether direct or vicarious.⁶⁵ A narrator's task is to arrange the story in an interesting progression to insure this, to focus on the action units that emplot, or arrange a stream of events into a trajectory of themes, motives and action lines.⁶⁶ At its most basic level, narrative makes intelligible our experiences and feelings; it is a "perceptual activity that organizes data into a special pattern which represents and explains experience," notes Branigan.⁶⁷ Jerome Bruner, too, considers tellability and experientiality essential to narrative:

[Narrative] deals in human or human-like intention and action and the vicissitudes and consequences that mark their course. It strives to put its timeless miracles into the particulars of experience, and to locate the experience in time and place.... [S]tory must construct two landscapes simultaneously. One is the landscape of action, where the constituents are ... agent, intention or goal, situation, instrument.... The other landscape is the landscape of consciousness: what those involved in the action know, think, or feel, or do not know, think or feel....⁶⁸

Such notions are familiar to many attorneys who engage listeners in the course of advocacy during negotiations, communications with juries, case conferences, brief writing, and countless other activities. There is a logical sequencing of events that the listener understands at a

problems, pass tests etc.); others make use of 'mosaic plots' (Scanlan 1988: ch. 7) whose causal coherence is not immediately obvious; others again are loosely plotted, episodic, accident-driven, and others avoid plotting altogether. See Forster (1976 [1927]); Bremond (1970); Rimmon-Kenan (1983: ch. 1); Pavel (1985a); Ryan (1991); Gutenberg (2000).

⁶⁴ In the literature, language used in reference to narrative, story, plot, and discourse is often confusing, with the terms frequently used interchangeably. In this article, I use narrative to mean story and discourse together; discourse consists of structural aspects and story incorporates the sequencing of events plus character-driven plot.

⁶⁵ Fludernik 1996

⁶⁶ This notion of emplotment plays a crucial role in the work of theorists like the historian Hayden White (1996 [1981]) and cultural philosophers such as Paul Ricoeur (1991) and Michel Foucault, which is of importance to issues raised in Part

⁶⁷ Branigan 1992, 3

⁶⁸ Bruner 1986, 13-14

cognitive level; but there is also an appeal to emotions or values that resonate at a subconscious level of memory and experience.

The Narrator

In narratology, the narrator is the speaker or 'voice' of the narrative,⁶⁹ the agent who establishes communicative contact with the reader, manages the exposition, decides what is to be told, how it is to be told, from what point of view and in what sequence, and what is to be left out. In some circumstances, the narrator defends the tellability of the story or comments on its lesson, purpose, or message.⁷⁰ The first voice question in any narrative, therefore, is "Who speaks?" The question goes not to authorship so much as to inherent credibility or control of the text.

Every narrative has a narrator or several narrators. The narrator may be the speaker or the teller of the entire narrative, or may be the teller of the story only. Narrators generally fall into one of two categories: overt or covert. An overt narrator is one who is self-referential, often speaking in the first-person. Overt narrators can also be identified by evidence of reader-oriented exposition, distinctive voice, demonstrable slant or bias toward characters and events, or intrusions into the narrative in the form of philosophical or metanarrative comments. A covert narrator, in contrast, exhibits none of these features. The covert narrator has a relatively neutral or nondistinctive voice and style, is sexually indeterminate, shows no connotive solicitude, and provides no exposition. The covert narrator lets the story events unfold in their natural sequence and tempo and engages in no obvious expressive functions. These distinctions can be easily seen in different types of discourse. Narration in the legal context leans heavily toward the covert. Although narratives may be self-referential, even first-person narratives such as police reports, judicial opinions, testimony, and complaints are often stripped of distinctiveness.

Analysts often use the term "voice" in discussing such literary elements as mood, vocal characteristics, overt or covert narration, monologism and dialogism.⁷¹ Voice may be understood

⁶⁹ Genette 1980 [1972], 186.

⁷⁰ Labov 1972

⁷¹ Monologism is the effect created when all voices sound basically the same, and dialogism is the effect created when a text contains a diversity of authorial, narrative, and character voices creating significant contrasts and tensions. See *infra*, p ____.

as "the relation of the subject of the verb to the action which the verb expresses"⁷² A verb is either active or passive, a framing choice that has considerable impact on the discourse.⁷³ The term "voice" invokes elements of tense and mood, affecting plot and story, as well as distinctive vocal or tonal qualities projected through a text. In literature particularly, vocal characteristics can be profitably investigated by analyzing characters' and narrators' dialects, speech patterns that might be characteristic of a social group, or their individual idiosyncrasies. In law, monologism is the norm, and vocal idiosyncrasies are discouraged. The construction of voice is subtle, and its impact, therefore, more difficult to discern and unpack.

Voice can only enter into a text through a reader's perception; therefore, unless the text is essentially an oral narrative, or is performed in the context of a public reading, voice is primarily a function of the reader's interpretative capacities. "Voice" is often associated with the narrator's voice but, increasingly, narrative scholars credit multiple narrative agents with at least potential voices. It has become common to speak in terms of textual, intratextual, and extratextual voices. Textual or intratextual voices are those of narrator and characters; while the extratextual voice is that of the author.⁷⁴ The author's voice may be more or less identical to that of the narrator, as is often the case in nonfictional, true-life, or historiographic narratives; conversely, the authorial and narrative voices may be significantly different, as when the author intentionally uses a narrative voice distinct from his or her own in fiction, drama, humorous essay, or childhood memoir.⁷⁵ While not as obvious in law, there are certainly situations in which the author may be expected to channel another voice, as when an attorney speaks for a client in writing a brief, or when a judge speaks for a party or other members of the court in rendering an opinion. There are many other situations, particularly in the scholarship domain, in which the author's voice is detached or rendered with an air of neutrality and the teller behind the narration is not apparent; in such circumstances, the work of identifying the voice behind the narration can be difficult.

To some extent, modern conceptions of narration and voice come out of historiographic critiques that view human subjectivity as "constructed by cultural codes which position and limit all of us

⁷² Webster's *Collegiate*.

⁷³ Genette 1980 [1972], 213

⁷⁴ These developments are largely attributable to Mikael Bakhtin. See Bakhtin 1981 [1973]

⁷⁵ Genette (1980 [1972]: ch. 5) [voice = narrator's voice]; Lanser (1981) [extra- and (intra)textual voices]; Aczel (1998) [voice and intertextuality].

in various and divided ways."⁷⁶ Here, the applications in the law context may be clearer. There is, for example, a scholarly voice associated with the legal academy, as well as a professional voice that is taught in first-year legal writing courses in most U.S. law schools. Critics speak of subject positions that are socially and linguistically constructed, created by various discourses of a given culture. According to Mikael Bakhtin, as members of particular cultures, writers adopt culturally influenced discourse styles, producing two basic voice effects that can characterize a narrative text: monologism, the effect created when all voices sound basically the same, and dialogism, the effect created when a text contains a diversity of authorial, narrative, and character voices creating significant contrasts and tensions.⁷⁷

In Bakhtinian terms, the polyphony of multiple voices – what he calls heteroglossia -- suffuses most discourse. The concept stresses the fact that language is never truly owned, private, or official since every text relies on language elements inherited or learned from others. Bahktian also introduces the concept of alterity, which refers to the degree of otherness or strangeness that may be injected into text, confronting the reader with the unfamiliar, especially in relation to the reader's ego and identity.⁷⁸ There is more of this in legal discourse than might at first be apparent. [to be developed]

Attempts to Classify Narratives: Formalism and Genres

The conventions of discourse, as well as the subject positions of writer and reader, constrain the meaning of any given story, particularly if the story is one originating with someone else and is being retold. Multiple voices may suffuse the text, but the authenticity of the voices and the reliability of their sources are not necessarily established by the mere fact of the recognition of multiple voices. In fact, the opposite may be true. The extratextual voice of author, conforming to cultural mandates of which she may not even be aware, can overwhelm the intratextual voices of clients and others, even when the intention is to do otherwise. In other words, even the intention to make room for other voices does not guarantee that those voices will come through. The striving for authentic alterity, in Bakhtian terms, is frustrated to some extent by the drive to classify and formalize the narrative forms, to lock in the discourse.

⁷⁶ Judith Newton, "History as Usual?: Feminism and the 'New Historicism,'" *Cultural Critique* 9 1988 at 88.

⁷⁷ Bahktin1981 [1973]

⁷⁸ Id. Fowler (1983) analysis of polyphony and dialect/sociolect in Dickens's *Hard Times*; Fludernik (1993, 324) on heteroglossia

Systemic attempts to classify narratives on the basis of form, function, and other characteristics have been undertaken throughout modern western history. Theorists have long sought "a coherent system of some kind; ... a theoretical model that offers a comprehensive list of genres and an explanation of the relations between them."⁷⁹ Genre theory has historically been most closely associated with critical approaches to the study of literature, with the broadest divisions in literature identified as poetry, prose and drama,⁸⁰ although the concept has much more general applicability. The breakdown of literary genre is most often along lines of discourse, rather than story; the operative question is not what happens in the narrative, but how is it told.

Genre theories describe and help explain how elements of narrative and story can be combined. As with other types of genres, the distinctions between and among literary genres are not necessarily clear. While there is no general agreement on actual genre classifications, no undisputed 'maps' of the system of genres within any medium, theorists generally agree that genre is dynamic in the sense that classifications are constantly in flux and highly dependent on such considerations as reader's perspective, social/historical context, intended purposes, and actual reading outcomes. Thus, one theorist's genre may be another's sub-genre or even super-genre, and what is technique, style, mode, formula or thematic grouping in one taxonomy may be treated as a separate genre in another. Classification theories range from a formalist approach, in which text is viewed as contained within itself, to models underlying many contemporary theories that suggest a triangular relationship exists among the text, its producers and its interpreters.

This is important because genres provide frameworks within which texts are produced and interpreted. Boris Tomashevsky observes that a genre's "demarcation is always historical, that is to say, it is correct only for a specific moment of history."⁸¹ Current genres go through phases or

⁷⁹ A genre, according to David Duff, is "a recurring type or category of text, as defined by structural, thematic, and/or functional criteria." *Modern Genre Theory* (pp. xiii)

⁸⁰ Theoretical models notably arose with the systematic classifications of Aristotle's *Poetics*. As recently as mid-twentieth century, Northrup Frye (*Anatomy of Criticism*; 1957) posited that genre offers one of four "synoptic" views of a related set of texts (the other views are modes, symbols, and myths). His "mode" roughly corresponds to Aristotle's dramatic genres (e.g. comedy and tragedy) while his "genre" encompasses the remaining generic categories from the *Poetics*. The term genre has recently been applied to non-literary texts, such as film and media. (Duff, pp. xiii) Note that mass media genres do not correspond to established literary genres (Feuer 1992, 140)

⁸¹ Boris Tomashevsky, cited in Bordwell 1989, 147.

cycles of popularity, sometimes becoming dormant for a period rather than disappearing. There are, however, genre hierarchies, and the classification and hierarchical taxonomy of genres is not a neutral and objective procedure. Some genres are more powerful than others: they differ in the status which is attributed to them by those who produce texts within them and by their audiences. Indeed, “in the interaction and conflicts among genres we [find that] genres in institutions which are 'primary definers' (such as news reports in the mass media) help to establish the frameworks within which issues are defined.”⁸² Understanding the genre debates is important in the law context because classifications are based on judgments regarding conformance to standards and such judgments subject the work to further judgments. Conformity may be an issue in scholarship, and the stakes for client populations are real.

Post-structural influence: Relationship to Text

To varying extents, the formal features of genres establish the relationship between producers and interpreters of text. The more recent redefinitions of genre focus broadly on the relationship between the makers and audiences of texts,⁸³ placing them in a rhetorical tradition. The reader will have ideological convictions and understandings as well, often unrecognized, that condition and direct the reading and the application of the reading. In a legal context, this means more than that factfinders bring their own experiences and biases into play when reading or hearing a story. It means that in the act of constructing or reconstructing a story, the narrator will seek out those elements of story that are familiar or fit pre-existing narrative paradigm and will utilize the comfortable discursive form. The story of Marilyn Sheppard's death, told in a legal brief, is reduced to a single sentence or two deemed to be relevant: she died, was killed by another who used a blunt instrument. By the time her death is recorded in a law journal, even this much is backstory. Sam Sheppard, whose characterization as agent, beneficiary or victim is of significance to journalists, prosecutors, defense lawyers, and family members, is a minor character in the stories told by courts and law professors. Narrators cling to their favorite genres, without regard to claims of story ownership or concerns about what voices are gaining access to story readers.

⁸² Tony Thwaites

⁸³ Texts include statements, assumptions, attitudes, which are intrinsically ideological, i.e. express attitudes towards and beliefs about certain sets of social and political realities, relations, values and powers.

Thus, one modern approach redefines genre in terms of authorial purposes. John Swales states that “the principal criterial feature that turns a collection of communicative events into a genre is some shared set of communicative purposes.”⁸⁴ Similarly, Carolyn Miller argues that “a rhetorically sound definition of genre must be centered not on the substance or form of discourse but on the action it is used to accomplish.”⁸⁵ Miller further asserts that within genres both writers and readers apprehend purposes appropriate to the genre; indeed, in relation to certain media it could be argued that particular genres develop, frame and legitimate particular concerns, questions and goals.⁸⁶ Embedded within texts are assumptions about characteristics of the “ideal reader,” including class, age, gender, ethnicity, as well as preferred attitudes towards the subject matter.⁸⁷ Some scholars believe that the conventions or structural patterns associated with genre are even the result of tacit agreements between author and reader.⁸⁸ Again the applicability of these ideas in the context of law is evident; those who control the genre – whether journalists, litigators, judges, academics, or others – create reader expectations, and reader expectations create pressure for continued conformity with those very expectations. A loop is created in which the person or persons at the center of the story’s genesis may be evicted from the story altogether.

In post-structuralist analysis, reader perspective is primary. The reader can only approach the text with her own presuppositions, which are grounded in personal history. In Stanley Fish's view, this reader belongs to an interpretive community which will have taught the reader to see a certain set of forms, topics and reading conventions.⁸⁹ Meaning is indeterminate, being not in the text but in the play of language and the nuances of conventions in which the reader is immersed. Thus it is not the reader per se who has ultimate control; rather, the reader’s world of discourse is the determining factor in interpretation.⁹⁰

⁸⁴ Swales 1990, 46.

⁸⁵ Carolyn Miller 1984, in Freedman & Medway 1994, 24.

⁸⁶ Miller, *supra*.

⁸⁷ Miller, *supra*.

⁸⁷ Id

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⁸⁹ Tony Bennett, from a more Marxist position, sees readers as belonging to “reading formations.” All of these reader-oriented approaches undermine the definition of genres as purely textual types, with their intentional exclusion of any reference even to intended audiences.

⁹⁰ Fish

In the course of this process an interaction between the world of the text as it was constructed and the world of the reader takes place. Because, like the reader, the text is grounded in history, and because often much in – and omitted from -- the parallel histories is shared, there is both identity and strangeness. The reading process may involve the reader's countering or re-interpreting prevailing views; as the reader experiences or sees that the language of the text implicitly undermines its own assumptions, the reader constructs a text driven by the semantic and rhetorical aspects of the text. The text means differently because the reader decodes it according to her world view and goals, yet with the understanding that the text may be operating within a different context.

Thus a basic conceptual component underlying contemporary theory is that of a triangular relationship among the text, its producers and its interpreters. Within genres, texts embody authorial attempts to position readers using particular “modes of address.” Gunther Kress observes that:

Every genre positions those who participate in a text of that kind: as interviewer or interviewee, as listener or storyteller, as a reader or a writer, as a person interested in political matters, as someone to be instructed or as someone who instructs; each of these positionings implies different possibilities for response and for action.⁹¹

A critical reading will demystify the ideologies of the text within the frame of the ideologies of the reader while maintaining awareness of the reader's ideologies. Without such a critical reading, the text may reinforce potentially pernicious aspects of the reader's culturally induced ideology, or the reader may miss meanings and connections for want of an understanding of the ideological structure of the text. Ultimately, however, within a personal, albeit socially shared, world of discourse that has been discursively and socially constructed, the real agent of meaning is the reader who is open to multiple meanings and to the interplay of signs.

These textual analyses borrow from and rely heavily on theories of phenomenological hermeneutics⁹² and its key concepts that reality is shared through common signs and that any

⁹¹ Kress 1988, 107

⁹² Phenomenology is the study of structures of consciousness as experienced from the first-person point of view. The central structure of an experience is its intentionality, its being directed toward something, as it is an experience

understanding of another's reality takes place through the mediation of the symbolic world, *i.e.*, through texts. One "understands" another by assimilating what is said into one's own contexts and set of symbolic referents. The experience of reality occurs in the encounter between the reader and the text; it is the result of the dialectic between work and reader. The experience is relational; the end result is human connection. "Thanks to the linguistic nature of all interpretation," notes Hans Georg Gadamer, "every interpretation includes the possibility of a relationship with others. There can be no speech that does not bind the speaker and the person spoken to."⁹³

Thus form is a way of structuring the symbolic world so that there is shareability. An essential function of form is to open up the text for dialogue. The more exacting a text's form, the greater the opportunity for interactivity. Ultimately, action's genesis is text, and the process of textual creation involves the intermixture of form, history, the reading experience, and the interpreter's self-reflection.⁹⁴ The importance of this in the legal context cannot be understated. In a client-centered environment, awareness of client should influence textual content, and, perhaps more importantly, should be taken into account in decisions about form since that is what will have the greatest impact on the interactivity involving text, readers, and authors.

Part III Implications: Real Consequences for Client Populations

As social beings, we share reality through common signs, chief of which is language. It is through the mediation of our symbolic world, produced as text, that we find connection. The frame for story is text and every text, in turn, exists inside its own context. Thus, to achieve understanding as fully as possible, it is important to engage in dialogue with the text, recognize the process of creation in a story's telling and re-telling, and examine explicitly the origins and validity of the discourse. With this comes an appreciation of what it means to live in community and how to locate meaning for ourselves and our clients in relation to particular, concrete, historical existence. In a very real way, the process is one of relationship building.

of or about some object. An experience is directed toward an object by virtue of its content or meaning (which represents the object) together with appropriate enabling conditions. Distinct from but related to other key disciplines in philosophy, such as ontology, epistemology, logic, and ethics, phenomenology has been practiced in various guises for centuries, but it came into its own in the early 20th century in the works of Husserl, Heidegger, Sartre, Merleau-Ponty, among others.

⁹³ Gadamer, *Truth and Method*

⁹⁴ Valdes, *Phenomenological Hermeneutics and the Study of Literature*

To the extent that text is a relational phenomena, it can be a catalyst for action and development. The conceptualization of text as a catalyst of mental events carries with it a reconceptualization of the reader, reinforcing the idea that the reader is not the passive recipient of ideas that an author has planted in a text. "The reader is *active*," Louise Rosenblatt insists.⁹⁵ Stanley Fish makes the same point: "Reading is . . . something you *do*."⁹⁶ Fish argues that any school of criticism that sees a literary work as an object, claiming to describe what it is and never what it does, misconstrues the very essence of literature and reading. Literature exists and signifies when it is read, Fish suggests, and its force is an affective one. Furthermore, reading is a temporal process, not a spatial one as formalists assume.⁹⁷ In the same vein, Wolfgang Iser argues that texts contain gaps (or blanks) that powerfully affect the reader, who must explain them, connect what they separate, and imagine aspects of a work that aren't *in* the text but are incited by the text. This is a prelude to action or change.

Paul Ricoeur puts it this way:

On the one hand, self-understanding passes through the detour of understanding the cultural signs in which the self documents and forms itself. On the other hand, understanding the text is not an end in itself; it mediates the relation to himself of a subject who, in the short-circuit of immediate reflection, does not find the meaning of his own life. Thus it must be said . . . that reflection is nothing without the mediation of signs and works, and that explanation is nothing if it is not incorporated as an intermediary state in the process of self-understanding. In short, in hermeneutical reflection -- or in reflective hermeneutics -- the constitution of the *self* is contemporaneous with the constitution of *meaning*.⁹⁸

Since we live in the perceptible world, in history, in corporeality, all meaning is meaning in relation to that particular, concrete, historical existence. If what follows from narration is communication or understanding, it will not be because writer and reader share a language in the sense of knowing the meanings of individual words and the rules for combining them; it will be because a way of thinking, a form of life, encompasses reader and writer, implicating them in a world of already-situated objects, purposes, goals, procedures, and values. It is in reference to

⁹⁵ Rosenblatt

⁹⁶ *Literature in the Reader: Affective Stylistics* (1970)

⁹⁷ Wolfgang Iser, *The Implied Reader: Patterns of Communication in Prose Fiction from Bunyan to Beckett* (1974) and *The Act of Reading: A Theory of Aesthetic Response* (1976).

⁹⁸ Paul Ricoeur, *What is a Text?*

that world that words will be read or heard. Action takes place in the here and now, in this moment of history and, with respect to the legal context in particular, in the spaces shared by attorneys, attorneys and clients, or attorneys and client populations.

Mikael Bakhtin discusses this idea in terms of dialogue, or the dialogic, asserting that all words or utterances are directed toward a response. In everyday speech, words are understood by being taken into the listener's own conceptual system, filled with specific objects and emotional expressions, and operating in relation to these; the understanding of an utterance is inseparable from the listener's response to it. All speech is thus oriented toward what Bakhtin calls the "conceptual horizon" of listener. Thus if, for example, a "cultural" defense is raised, those whose experience overlaps with that of the narrator's are likely to respond far differently than those who have no parallel experience. The texts that constitute a symbolic world of "reality" have limits, or horizons, beyond which the reader cannot see. The text itself as an intentional symbolic structure – as form – incorporates within itself the world in view of which it was written. This difference of horizons presents problems of historical and cultural interpretation.⁹⁹

The author or speaker, in Bakhtin's view, will either try to push all language into a single form of discourse, addressing the audience in "monologic" language,¹⁰⁰ or to move language toward plurality by including a variety of ways of speaking, rhetorical strategies, and vocabularies, in what Bakhtin calls "heteroglossia."¹⁰¹ The former is meant to eliminate differences among languages (or rhetorical modes) so as to present one standard or "official" language, by whose norms all discourse is measured or analyzed. The latter directs narration toward the possible responses of readers so that readers can understand and act on what is being said.¹⁰² This is what occurs in academia¹⁰³ and in many professional settings.¹⁰⁴

⁹⁹ This horizon is comprised of the various social languages the listener absorbs or uses; dialogism is the term he uses to describe an orientation toward the interaction between the various languages of a speaker and the languages of a listener. Accordingly, Bakhtin says, "discourse lives on the boundary between its own context and another, alien, context. 672 - 673

¹⁰⁰ He refers to this also as a centrifugal or a centripetal orientation to the text.
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¹⁰² 675. Bakhtin argues that the sense of boundedness, historicity, and social determination found in dialogic notions of language is alien to poetic style. Id at 674.

¹⁰³ Boyer

¹⁰⁴

Stanley Fish's concept of interpretive communities dovetails with this analysis. Fish shares the belief that knowledge is not objective but socially conditioned. One's thoughts are made possible by normative presuppositions of the community in which one lives, and the socially conditioned individual cannot think beyond the limits made possible by the culture. Fish also believes that interpretive communities, like languages, are purely conventional, arbitrarily agreed upon constructions. Of particular importance here is the notion that interpretive communities are made up of those who share interpretive strategies not for reading but for writing texts, for constituting their properties. This initially situates power in the writer, or in the interpretive community of which the writer is a part.¹⁰⁵

The fact that "human subjectivity is constructed by cultural codes which position and limit all of us in various and divided ways"¹⁰⁶ means critics need to look not only at the historical causes of literary works, but also at their consequences. What we call literature is not such because of some abiding principle of truth or art that exists in an atemporal state, nor even because the culture values it for interests of its own, but because it reflects the culture's values and beliefs in some way.¹⁰⁷ In addition, literary works intersect and interact with many other cultural phenomena, including the discourse of "popular culture" and of areas like economics, law, medicine and politics.¹⁰⁸ The representation of truth and reality through text "makes things happen" by "shaping human consciousness."¹⁰⁹ Accordingly, forms of discourse ought to be examined in relation to each other and in relation to non-discursive texts in much the same way other events are.¹¹⁰

The idea that literature is a reflection of communal values that are subject to change (just as cultures are) raises questions about the extent to which power relationships and political dynamics in the culture are manifested in narrative.¹¹¹ Narratives, informed and to some extent determined by culture which is historically conditioned, can be seen, at least in some

¹⁰⁵ Fish

¹⁰⁶ Judith Newton, "History as Usual?: Feminism and the 'New Historicism,'" *Cultural Critique* 9, 88 (1988).

¹⁰⁷ Fish

¹⁰⁸ See Abrams, discussion of technique of "thick description" (249).

¹⁰⁹ Source? Newton?

¹¹⁰ Judith Newton, "History as Usual?: Feminism and the 'New Historicism,'" *Cultural Critique* 9, 88-89 (1988).

¹¹¹ Judith Newton, "History as Usual?: Feminism and the 'New Historicism,'" *Cultural Critique* 9, 88 (1988) ("[W]e experience the 'world' in language, and ... all our representations of the world, our readings of texts and of the past, are informed by our own historical position, by the values and politics that are rooted in them.")

circumstances, as the expression of ideology. Recognizing that literature proceeds from a collective decision as to what will count as literature, a decision that will be in force only so long as a community of readers or believers continues to abide by it underscores the importance of focusing on the specificities of a particular historical and cultural context. This has important implications for the “people in the footnotes,”¹¹² the clients and communities we serve as lawyers

To achieve understanding as fully as possible, the reader must not only engage in a dialogue with the text but examine explicitly the origin and validity of one’s personal belief system. The individual thereby reads not as an autonomous self, but as an individual aware of the subject positions that are socially and linguistically constructed, created by various discourses of a given culture. Reading is not a detached “rational” process, but an investment in meaning practices. The recognition that all understanding inevitably involves some prejudice permits the reader to revise inherited as well as intentionally developed belief systems.¹¹³ It is the encounter with an other, the contextual, linguistic, historical, fusion of horizons that, although linguistic, allows for escape from the confines of language. The ways in which experiences are transformed through different story-telling processes or discourses has a profound effect on how stories are understood, whose stories are validated and how meaning is constructed. The form of story as well as the content has an impact on what happens next and how people think about it. Thus, in telling client stories, or in opening channels for client stories to be told, great care must be taken to maximize client participation in the community created by text.

¹¹² Michelle Jacobs

¹¹³ Gadamer. See in these ideas the influence of the French theorist Michel Foucault, who focused upon the intricately structured power relations in a given culture at a given time to demonstrate how that society controls its members through constructing and defining what appear to be “universal” and “natural” truths.