Who did what to whom? And why? And what is going to happen because of it? These are the questions that every story told throughout time rest upon and run on answering. Human beings are drawn to narrative, it’s an organizing principle. Stories fill the gaps in our experiential knowledge with cautionary or informative information gained cheap and quick, from the comfort of the primordial fireside, second hand. We love stories like we love sugar and fat, as elements which keep us safe and well stocked for the next day’s trials and unpredictabilities. “Dry” or “impregnable” material is “enlivened” and “made accessible” by narrative, by varnishing a story onto it: a through line, characters, defined interactions, repetitions, themes. We tell our children stories through books, fairytales, movies and television, live theater, and magic-carpet-storybook-time hours. Why? Because stories, dressed in the carapace of plot, character, and narrative form, are the metaphoric cheese around a pill that we hope will inoculate our newest social members to our cultural expectations, memes, tropes, archetypes, and values, a memorable little linear package. Stories are, in short, the messages humanity tries to pass itself. “Dear Future Self, Here are things to remember: War and Possessions; Fathers and Sons; the Joy and Pain of Love; Trojan Horses.”

Writers of fiction are often accused of being sneakthieves of other peoples’ lives, detached gatherers of real material for their fabrications, to build the fleshy but imagined on, the assembled skeletal bits of the actual. Writers can hardly be blamed for their trespass, however, and only when the untrue is being passed off as true, and not the reverse, are charges usually drawn up. All any of us can do, in our private lives and in our professions, is draw from what we know, from what is already in our lives, so as to gain direction and context on which to base future decisions. This is why we read children storybooks, and take them to the theater. This is why teenagers are so drawn to urban-myth cautionary tales and why we are all drawn to romantic comedies. We watch sitcoms, which look like our lives and so are funny to us, and dramas, which do not resemble our lives for the most part and so are riveting in the new “information” they provide our still-primate inner-resource libraries. We are trying to figure the world out ahead of time, before we are enmeshed and in over our heads.

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As pointed out in an essay on the influence of television on consumer’s perceptions of reality:

It is hard for us to realize how little of our information comes from direct experience with the physical environment, and how much of it comes only indirectly, from other people and the mass media. Our complex communication systems enable us to overcome the time and space limitations that confined our ancestors, but they leave us with a greater dependence on others for shaping our ideas about how things are in the world. While becoming aware of places and events far from the direct experience of our daily lives, we have given up much of our capacity to confirm what we think we know.¹

We have been audience to legal creations through theater, radio, movies, TV, and books for as long as those mediums have been available. Court cases have been staged as far back as the Greeks. Shakespeare, one of our most closely studied creators of cultural fiction, created many courtrooms on the Globe’s stage, most famously perhaps the courtroom scene in The Merchant of Venice. These courtroom scenes serve as plot resolution and dramatic tension in the fictional productions, but also these scenes serve as community discussion sessions on the moral and legal questions the dramatization presents. The concepts of “right,” of citizenship, and what the law will allow are discussed outside of a true legal process, but within the context of performed law and meting out of social justice. This theater of justice is usually as close as lay people come to a real courtroom, and the machinations of actual law.

In more contemporary circumstances, the Greeks and Shakespeare are largely forgotten for their influence on the popular concept of law. But law in fiction does consistently make an early appearance in any discussion about how to become a lawyer, and the advice rings one consistent warning: “It’s not like Matlock.” Matlock? What does a TV show from the 1980s that one can sometimes still find playing on syndication have to do with the practice and application of the Law? If anyone goes through the protracted, expensive, demanding, and multi-parted process of applying to law school and still expects Matlock at the end of it, I certainly hope that misguidance shows up in his personal statement. The Matlock warning comes down as primary advice because that is the example of what most non-lawyers “know” about the law. The Matlock television series is essentially the “father” of every modern American courtroom procedural, though it was based on the Perry Mason stories, which were originally a book series starting in 1932, and then became one of the most popular television shows of the mid-twentieth century. The story’s genre is based primarily on one character type: the lone (or lightly garnished) defense attorney entrusted with an almost certainly guilty client, who identifies the real guilty party (usually a murderer) and is thus charged legally and ethically with the duty to clear his client’s name. Then, by skillful courtroom examination, the

attorney extracts the confession from the witness, and receives a guilty verdict from the jury—in nearly every episode, and always in under an hour.\(^2\)

That Stevenson and James could be thought of as “types” of lawyers in Woiwode’s essay belies our enculturation into there being a “lawyerly type” at all—the Perry Mason, Ben Matlock, Alley McBeale, Elle Woods, Matthew McConaughey attorney character. We thus lay open to the risk of also “typing” our defendants, our plaintiffs, our victims, and witnesses, based on fictionalized composites, on psychologically-driven character fabrications that we’ve picked up from television and movies. A dated but relevant anecdote runs that a defense attorney unexpectedly lost a case, and distraught, asked a juror what he had failed to do in presenting his client’s side. The juror responded, “When you cross-examined the prosecution’s key witness, you did not get him to confess.” A statement indicating a well-seasoned _Perry Mason_ fan, as well as a juror totally unplugged from the concepts and normalcies of actual juried litigation.\(^3\)

That Stevenson’s tumultuous real life, as Woiwode writes in his essay, looked to Henry James like suitable fodder for a character in a novel is analogous to the way script writers turn to "true crime" nonfiction narratives to feed their fiction-making craft. All any of us have to go on is what we know, and as fact is often decried as fiction because it is too “unbelievable,” then headlines, police records, legal doings, and the other ephemera of actual events are close enough already to the fantastic to be fodder for fantasy. This has the effect of the “very note and trick”\(^4\) of verities glosing onto a story just as Stevenson recommended it should. As fiction is consumed, it influences those who feast on it. The familiar becomes conflated with the real. Human beings, from infancy, learn about the world through narrative, through the stories we listen to, and that informs us, arms us, however fallibly, for the real life we must encounter. Thus, the American viewing public’s concept of lawyers and the law has been unduly influenced by fictions featuring and drawing creative inspiration from the legal realm; and then, and goosing it up a bit, condensing the process, leaving out the boring bits, and aggrandizing the good, the bad, and the condemned for those viewers just now tuning in.

It really is no great amazement that the typical American’s vision of the judicial system might be shaped more by _The Practice_ than by televised hearings on C-SPAN. “The yes versus no of a trial in an ascending line of suspense is the very stuff of drama,” but the stuff of law is firstly procedure.\(^5\) Procedure may be to the law what the scientific method is to science, but procedure, because it largely lacks exciting plot points and is generally quiet, studious work, is


not made for television. The law as it actually is, is often boring, complicated, longwinded, dry, showing an annoying tendency toward Latin jargon, and keeps to its own standards and tropes in passing down the rule of law, which is often not the rule of what some citizens regard as common sense. The law in practice also rarely takes less than an hour start to finish, lacks the structure of exposition, development, suspense, and denouement, and does not always wrap up the issues of an individual case into a satisfactorily moral digestive, even after the opinion has been written and delivered sometimes months after closing arguments. By this I mean, that on television or in movies the viewer is assured that the wrong-doer has been definitely identified and brought to legally and morally satisfying justice through the presentation of the story—a wrapped up, unambiguous, loose-end free story, not subject to appeal or remand. The bad guy gets caught, the victim gets “justice.” This is in contrast to trials which end in hung juries, or cases where it is later discovered that the prosecution withheld crucial evidence, or that the police failed to conduct due diligence. There is a popular lack of confidence in the court system, especially in light of criminal convictions that are later overturned, sometimes after the miscarriage of justice has gone on for decades.⁶ There are examples of narratively unsatisfying verdicts in the white-collar crime arena as well. While many executives in the Enron scandal of the early 2000’s where brought to court and sentenced to jail time, the company’s auditor, Arthur Andersen, (arguably the most responsible for covering up the company’s cooked books) was convicted of obstruction of justice in District Court. The judgment was later overturned by the Supreme Court, however, based on a technicality: the jury had not been properly informed on the charges.⁷ Technicalities do not make for good storytelling. They are unsatisfying to an audience acculturated to cause-and-effect narratives, and irksome when what feels “fair” does not match up with what is “legal.” The law in retelling, however, is gripping, because of the extensive editing down and pulping of the process to make for a compelling narrative, with all the swerve, conflict, gaming, eloquence, and ideological wrestling-matches that make young people say, “I want to be a lawyer!” The ABA might send a thank you note to Dick Wolf, creator of Law and Order, for the positive image branding, followed by a cease and desist letter for the false advertising of what the profession entails. “When law is portrayed on television, the abstract elements [of the law] disappear and are replaced by a personification of law. . . . By doing this, television portrays a system in which personalities—not rules—promote the solving of disputes.”⁸ Very few cases actually go to trial, and fewer of those are juried. The population of courtroom dramas would convince the lay-viewer otherwise: there’s a new trial every week, after all, on every program. This creates the first false impression about the actual court system, the misunderstanding concerning the rareness of trials, and the misunderstanding about what the court system spends most of its time doing. However, because courtroom dramas are based on an actual system that most citizens will never see the inside of, we are prone to count the counterfeit as actual when it is presented with no indications otherwise.

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⁶ Cf. The Innocence Project, http://www.innocenceproject.org (This national group has exonerated hundreds of individuals through litigation and reexamination of evidence).
As an example, let us cue the longest-running crime and many-times spun off television series (the original now retired) *Law and Order*, whose opening monologue contained the familiar phrase “ripped from the headlines.” Crime, the overdub would lead us to believe, is common enough to be the subject of a weekly program (and its four spin offs), and thus the court system that is apparently designed to confront every crime, is full of the trial-centric dispensation of justice. And although a textual disclaimer in the opening sequence explains the characters and plots to be fictional, at least one of the plotlines proved to be ripped too closely to an actual headline, and the show received a libel suit against it. Additionally, “hundreds” of people report being the real-life victims of stories eerily similar to a *Law and Order* episode. The closeness of real and fictional experience creates an unheimlich sensation in the ordinary person, awash in knowledge, memory, fact and fiction. In a world of fictionalized representations of the real, reality in an unfamiliar state can take on the flavor of fiction, all parts of an individually-experienced narrative stew. What we encounter new is filtered through what we already carry with us.

For the majority of Americans called to serve on a jury, the experience is less gripping than a production of *Twelve Angry Men*. The lights are florescent, the attorneys are ordinary looking people, the lives discussed are often as ordinary as your own save for the difference of legal examination. And the law is territory unknown for most people, sometimes including those entering the profession. The problem is, of course, that while the law is fueled by human stories, by the grist of reality, it cannot carry that blood to the courthouse steps and hope to retain the sacred balance of blind and equal justice. “These phantom reproductions of experience, even at their most acute, convey decided pleasure, while experience itself, in the cockpit of life, can torture and slay.” And that really does get to be the point. While we are entertained by courtroom dramas and screenplays “based on actual events,” there is unseen reality, on another side entirely, weighing influence on the real lives of people in the real legal system. To the watcher, real or fiction is no matter, as long as the story is grippingly told. But to the actual players, the story is experience itself, consequential, dire.

The trial lawyer enters the nonfiction of a trial, carrying sworn fidelity to and identity with the structured, artificial, bound world of the Law, while also charged with the task of convincing the jury the version of facts and law he or she is about to present are to be believed. The jury, meanwhile, plucked from the common citizenry and newly deputized into the exercise of justice, can rely only on what it is told in the courtroom, and, more importantly, by what each individual carries into the courtroom from outside: the amalgam of personal experience and received information, carried, since childhood, in the form of narratives. He’s,

11. Id.
12. Woiwode, supra note 4, at 52 (quoting GRAHAM GREENE, COLLECTED ESSAYS 60-62 (1970)).
She’s, Them’s, I’s, and We’s, the characters and plots the jury carries in with them sit in the jury box informing their carriers. To ignore their attendance at every day’s proceedings is to ignore the jury’s understanding of the world; to decline the use of narrative as a communication tool is to render the reality of the legal issues alien and flat, tasteless to the narrative-nursed laity.

As Woiwode’s essay comes around to address, the use of pronouns, the question of who can talk about whom or even about themselves, is a mark of modern narrative — the “violation of narrative voice” gets editors, creative writing teachers, and book reviewers of all stripes all atwitter. “Who’s talking now?” Narrative shift reorders the narrative experience, and the reader has to decide who has taken over the narrative and what the individual’s motivations are in the telling. This point-of-view scrambling, while edgy and often effective in modern literature, is in direct opposition to the goal of a courtroom trial, which is to lay out and discover the clearest possible version of an event or an occurrence, as in a criminal adjudication where the goal is to render a guilty or not-guilty verdict as stripped of complication as possible to give the correct verdict and avoid mistrial or cause for appeal.\textsuperscript{13}

To keep control over the narrative of the unfolding case, there are limitations in the court system on who can use what personal pronoun. A friend of mine, as a law student, was very proud of his closing remarks in mock trial, which were framed with a personal anecdote, until he was informed that using the personal “I” in such a situation — in a “real life” courtroom — would render him disbarred or subject to disciplinary action, under the American Bar Association’s \textit{Model Rules of Professional Responsibility} (and potentially their state counterparts, depending on the jurisdiction). Attorneys can use, under strict construction, “you” and “he/she/they” but not “I,” save for specific instance such as “I object.” Witnesses can use “I” and “he/she/they” as long as pointing to other people isn’t perjury, but can’t use “you,” as they can only address the lawyer questioning them, and cannot make any statement as entangling as “you” statements automatically become - “But you said! You told me to!” The jury can only reference itself as a pronoun “we,” and talks about the defendant as if she or he weren’t in the room. The jury is the most abstracted and removed element with its limited pronoun budget, as befits the element that must maintain absolute objectivity. The judge can use all of the pronouns. Access or barriers to language in the courtly discussion becomes an issue of graduating access to the narrative of the trial. The judge, the overseer, the impartial omnipotent element of the mechanism has the most range. The attorneys have equal parts, and the people called to speak by counsel on the witness stand have the least: they can talk about themselves and other people directly related to them, but only within the guidelines of the proffered questions. Finally, the jury, who make the ultimate call, have virtually none, able to “speak” only to and through the judge until the ultimate “we” statement is pronounced, rendering them watching eyes and listening ears, but not voiced, opinionated individuals. Who says what becomes the legal balance, as language alone encapsulates and contextualizes events, persons, and objects in the setting of a courtroom.

\textsuperscript{13} Cf. \textit{Fed. R. Civ. P. 12 (Motion to Dismiss)} and \textit{56 (Summary Judgment)}.
“The art of fiction being able to ‘compete’ with life” is the competition of every court case: the battle to determine which presentation of facts, evidence, witness testimony, and argument by the litigators is closest to truth. But is it not more so that law determines less juicy matters: Who, in the face of what has been said or done, in the time and manner they have allegedly and evidently been, gets the ruling in their favor? It’s much less satisfying, the reality of the law in legal proceedings. The public wants to know the “human story.” The charges, what is legally at stake? You can tell us, but we’ll probably boil it down to love or money. For the human heart, there is no legal precedent; there is a new special story in every instance, and we want all the juicy details. The law may want to propagate the cultural concept of a “government of laws, not men,” but the human element is all over and irreversible, especially in the jury system, where the Court’s officers are presenting a case by humans, to humans. Usually the stories we are fed through the fictional presentations support the idea of the law as equal and just, but there's more story, more pulp, more ad revenues generated by a titillated public, when the scales of justice look either a little rigged, or alternately, steadfast and uncontrovertibly true. The defendant is often the winner in fictionalized accounts, or rather the defense attorney. It is very hard to effectively “play” or “act” a defense at trial, however. The Law cannot stand shenanigans, however entertaining. The disconnect between what is “known” by the citizen-juror and what is actually true creates cynicism in the public, rather than elucidation; real trials, in the real court system, are often protracted affairs, with sometimes inconclusive or technical resolutions. This creates dissonance with the authoritarian right-over-wrong court system in fiction that the public often believes is truer than the truth.

This is the push and pull of the law in the trial system, the human and the legal. The public is generally uninterested by the run of the mill typical legal, procedural system, in part because their exposure to actual trials is very often what I would call “violation of narrative voice” and a blowing up of the presentation of austere orderly procedure in the proceedings. For my first example, I will cite the O.J. Simpson trial. This trial lasted over a year and was televised and widely watched and commented on. Henry James’s edict that the narrative form the story starts with should last throughout the story’s telling was wildly broken, as every player and non-player in the case stepped forward to add his and her narrative voice, splicing and dicing the form. The exercise of law became secondary, from the public perspective, to the exercise of a lurid national narrative. A media circus with a courtroom plot swinging on the through-line—and, all the while, on the reality of a Grand Jury double homicide trial. The much-disputed juried “not guilty” verdict was directly contradicted in the pursuant civil trial, which only brought more notoriety to the process of “justice” in this very public case. Although the public knew the defendant was being tried in a different type of trial in the sequel, it was not in the thrust of popular coverage to explain the difference between the types

14. Id.
of litigations. The court, while following procedure internally, was made to look biased, and all too human through the multi-voice of its public coverage. The trial became an exercise in judging personalities, just as it is in fictional courtrooms, where the players are easily recognizable and psychologically driven “types.” An emphasis on personalities resolving disputes, rather than the law, obscures the very basis and rationalization of the legal system.16

“A Literary Guide to Litigation” is the title of Larry Woiwode’s article. But the literary — the artful — is what the courtroom — indeed the entire legal system — must battle against in defense of equal justice under the law. But if the law is a human mechanism, how can human workings be totally barred? The courtroom becomes a stage featuring the lawyers as competing narrators; on the witness stand, the case’s real life players become third party storytellers, describing events that happened somewhere else. From the witness stand, spectators’ gallery, counsels’ tables, or other influences outside the courtroom, the narrative will be discussed, examined, and, finally, ruled upon. The jury watches in the same physical attitude of an audience (well, an audience with second-rate seats, the side orchestra section) watching, absorbing the presentations that are ultimately prepared for their benefit alone in making the correct, just, final decision. On television, often a juror’s only previous conditioning for a real trial, the importance of dialogue is heightened because the dull stretches of an actual trial are eliminated. As a medium that relies heavily on close-ups, television is particularly well suited to transmit the face-to-face communications, which are so important in discerning the behaviors of lawyers and witnesses.17 There are no close ups or revelatory looks built into a real trial, however some witnesses are classified as “cold” or “unfeeling” and thus more likely to be distrusted by a jury, and kept off the stand by the lawyers, than the ones who are deemed to have a “warm” or “sympathetic” presentation. In terms of courtroom trial law, it becomes ironic that the education of lawyers is largely out of casebooks, which are legal accounts of trials, in pure text with no visual illustrations. In the courtroom, there is very little written information given to the jury; almost all information is delivered aurally (to the ears) or visually (evidence, illustrations, demonstrations, etc.), as it is in most forms of popular entertainment, and as the most accessible forms of courtroom presentations.18 The essential ways the lawyers and the jury have been trained to absorb and disseminate information are utterly opposite. The lawyer, arguably dependent on swaying the jury, must therefore acknowledge his audience’s predispositions and work to communicate through them while remaining in the narrative and procedural rules dictating his position.

The victor is the one who best controls the story.

James’s narrative style dictated that a narrative which “begins with third-person point of view must retain that point of view in every movement to its end, for aesthetic and

conceptual veracity to adhere.”

For the through-line of the legal argument’s narrative to stay intact, this Jamesian insistence applies onto running a trial. A litigator wants there to be one narrative, or at least a united universe of multiple narratives; she want no loose ends or outlying, unincorporated points of view. This is why the “expert” is so esteemed—he or she is like the limited third perspective narrator—personally removed, and yet seemingly all-knowing of the facts pertaining to the case, called to answer completely and competently the questions put across in trial. The expert as a “professional” is arguably much more interested in keeping his name and reputation clean as an expert and professional, thus we can imagine the expert is less inclined to give false or assailable testimony. Also, as the expert arguably isn’t personally connected to either defendant or prosecutor, as a character witness might be, the expert will arguably give less biased testimony—he or she doesn’t care personally about the outcome. This allows a human narrative to enter the courtroom with reduced risk of upsetting the litigator’s overarching narrative flow with possibly contradictory and duplicitous personal testimony. The expert becomes like a trustworthy narrator, live but safe, scientifically clean and exact but still possibly warm and relatable. This is why, also, lab reports, autopsy reports, so clinical, so dry, so often written with technical jargon, are often animated by the lawyer, or the expert is asked to act out the wound’s infliction, to make the evidence human and messy and good theater once again. We need our law to stay dry, but we want our stories wet and three-dimensional.

James was careful with his pronouns so as not to break the narrative spell he set for his readers. He was careful in creating his fictions so that they came close enough to feeling real, so that they did indeed delight, and chill, and infuriate the reader to sympathy, and to scorn. James was writing warning signs in his fiction about the strictures of civil society, the bounds there are not legal but cultural, based on pure, hot, human, blood-emotion, none of Justice’s blindfolds to be had. The innocent are not presumed guilt free, justice is not evenly applied to all. This makes for very good storytelling; the conflict is built in, as are the emotional buy-ins. The author wants, at specific junctures, to break his readers’ hearts a little, to make them feel as the character is feeling, to cause the reader to reach, mentally, through the medium of paper and ink to stand next to the character in a realm of the author’s creation and to feel whatever he intended. The dramatic actor on the stage holds the same goal, eight shows a week: to charm, lull, and bring the audience members into such a suspension of disbelief, into such forgetfulness of reality and fiction, that they will weep for someone who doesn’t really exist, whose pains and trials are but machinations and fabrication. Likewise, the trial lawyer knows that she needs to win hearts and minds to the concept of her case and her client, through the facts of the case, and more importantly through the presentation of those facts. Narrative is powerful. The personal “I” is powerful. The listener’s imagination is powerful. As carefully caged as pronouns are in the courtroom, the human element persists.

This is precisely why an attorney would want to press the advantage of an irreproachably sympathetic witness on the stand, to make that version of the argument’s

19. Woiwode, supra note 4, at 40.
narrative more real, accessible, assessable, and inviting. Those jury members, warned to harden their hearts in pursuit of justice, have been subject to the power of personal narrative much longer than they’ve been under the spell of enforced judicial parsing, and juries become emotional animals as much as any other group of strangers forced together under strict decision-making situations. As much as voir dire is intended to weed out predisposition to one side of the argument or another, how much can a person be screened, really, by the legal system? To be declared fit to serve as both an impartial member of the jury? As a member of the defendant’s peer group? And as a member of modern society so influence-filled?

The American judicial system is huge, and in order to follow the intention of the Constitution it must be an open, democratic, and equalized “fair” system. It cannot be a system of only those trained in the law operating upon the lay. The law must involve the public, the everyday citizen, and yet, the ordinary citizen is so unprepared for the rigors of the system. Part of the hurdle is the necessity and also the alienness of “the legal mind,” because it looks on the world through law, a created edifice, an inorganic thing, in encountering the human stories. Criminal and civil trials alike inherently contain the human element, which law in its procedural austerity and innocent state of the average juror, and the potentially false knowledge and expectations inherited from any pretrial television, movie, theater, or book consumption will not translate reliably to a just verdict, without the legal, lawyerly elements of the experience acknowledging and perhaps even retraining the jurors’ brought-in expectations, blind spots, and narrative needs. The messy and inexact world is where most of us come from: “street justice,” common sense, self-created social etiquette, the made up half-truth of fictional dramas. We are all prejudiced in a way that voir dire is not able to account for. A jury of one’s peers, as rarely as that assembly is actually called, must be a properly informed group as well. It lies with servants of the law to provide the real life version of trials with as open and revelatory a narrative of justice as possible, so we do not cast justice as a “type” in a real life story.