

2010

Classroom Storytelling

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Recommended Citation

Alafair S. Burke, *Classroom Storytelling*, 78 UMKC L. Rev. 1031 (2010)

Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/804

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CLASSROOM STORYTELLING

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I remember the class. It was Criminal Law. We were studying defenses.

Like so many other students who were comfortable doing so, Mark Cooper raised his hand, and the professor acknowledged him. Before the days of laptops in classrooms, I placed my pen on the table, confident that one of only a handful of conversational variants was coming.

Sometimes a student with a raised hand would ask the professor to repeat the material. *Could you explain the difference between knowledge and recklessness again? What was the thing you just said about the degree of certainty for knowledge?* Or in another form, the question might request clarification through example. *So if the defendant is nearly certain that the girl's only fifteen, that's knowledge? But if he thinks she's probably eighteen, but might be fifteen, that's recklessness?* Some students begged for clear rules and firm lines to divide black from white where only gray existed. *What if there's a seventy percent chance she's only fifteen? Is that knowledge or recklessness?*

I was still a 1L, but I had been in law school long enough to know that student questions rarely elicited the kind of dense, methodical material warranting frenzied scribbles in my spiral notebook. It was better (for me, at least) to sit back, listen, and process the material internally. I used the time to work out the kinks in my right wrist.

But there's a reason I still remember this class nearly twenty years later.

"So is it true that if you shoot a person on your property, it's legal as long as the police find the body inside your house?"

To be honest, I don't remember the professor's initial response. My guess is he said something to the effect that the Model Penal Code and a majority of states do not allow an unqualified justification to use deadly force in defense of property. A jury would have to conclude that the defendant reasonably believed that his life, or the life of another, was in jeopardy. Maybe he went on to say something about the possibility that a legislature could certainly create such a defense if it wanted. Maybe this would have raised the subject (once again) of the differences between rules and standards.

But Cooper wasn't done with the topic. What was the law in California, he wanted to know. And, even without an automatic rule justifying self-defense within one's castle, wouldn't the defendant have a better chance of acquittal if the person he shot were physically on his property?

I don't remember how Cooper's comments transitioned from the hypothetical to the personal. Perhaps the professor finally responded the same way I probably would now as a professor, if faced with persistent student questioning about such a specific topic: *Why such curiosity about this issue, Mr. Cooper? Are you planning on shooting someone on your property?*

* Professor of Law and Associate Dean of Faculty Research, Hofstra Law School. Professor Burke is also the author of six crime novels. [Eds. Note: ALAFAIR BURKE, 212 (Harper 2010); ALAFAIR BURKE, ANGEL'S TIP (Harper 2009); ALAFAIR BURKE, CLOSE CASE (St. Martin's 2006); ALAFAIR BURKE, DEAD CONNECTION (Henry Holt & Co. 2007); ALAFAIR BURKE, JUDGMENT CALLS (St. Martin's 2004); ALAFAIR BURKE, MISSING JUSTICE (St. Martin's 2005).]

As it turned out, Cooper was not planning a shooting. At least, not anymore.

For the next ten minutes, the entire class—our professor included—sat attentive while a fellow student told us about the day he almost became a killer.

My girlfriend and I were living in Berkeley, and we both worked at night. The first time it happened, we weren't even sure there had been a break-in. Some items in the bedroom seemed out of place. Jenna was pretty sure she'd made the bed before she left the house, but the sheets were flipped back when we got home. The second time was a couple of weeks later, and this time we were sure. Jenna said her things had been moved in the dresser—you know, like her underwear and stuff.

As a few students quietly vocalized their disgust, I wondered whether the word “ewww” had just experienced its first utterance in a law school course.

We called our landlord to install better locks on our windows, but he didn't seem to be in any hurry. We called the police, but they told us that with nothing missing, it was only a misdemeanor and they'd never put in the kind of resources it would take to find the guy. Over the next few weeks, it kept happening. It got to the point where we almost expected to find signs he'd been there whenever we were both gone at night. Jenna hid her personal stuff, but he found them and laid a couple on the bed for display.

More ewww's.

So one night I decided I was going to catch him myself. I turned out all the lights and told Jenna to come with me, like we were leaving. We drove off in my car, but then I stopped two blocks away and parked on the street. We snuck back to the house through our neighbor's yard and climbed through our bedroom window. I had a gun I'd bought when I was living in Oakland. I sat there on the bed waiting for him to come.

Jenna eventually fell asleep, but I couldn't. I was too wired. I just lay there on the bed with the gun on my chest. I was finally thinking about giving up when I heard him at the window. I couldn't see his face, but I could see his form against the backlighting of the street lamp outside our house. I knew he was there. I saw him place one foot inside the window—the same one we'd climbed through ourselves. I had the gun pointed right at him. I remember watching his shape and waiting for him. I saw his shoulders tip toward me. Then all of the sudden, Jenna rolled over in her sleep. He must have heard her, because he hauled—he jumped backwards. The guy never came back again.

The professor asked Cooper what his intention was as he waited in the bedroom.

Honestly?

Yes, honestly.

I was going to kill him. I think Jenna thought I was trying to catch him for the cops. Or maybe scare him. But I was going to shoot him. As I watched him from the bed, I kept waiting for him to be far enough inside the house that, if I shot him, he'd fall forward into our bedroom instead of backwards outside the window. I was staring at him, trying to anticipate when the balance of his weight would shift. I was just about to pull the trigger when Jenna scared him off.

Other students might remember that single class for any one of several legal issues raised by Mark Cooper's surprising confession. The difference between intent and motive. The difference between justification and excuse. The difference between common law provocation and the more relaxed California standard based on the Model Penal Code's defense of extreme emotional disturbance. The difference between what really goes on in an actor's mind and the self-defense version a jury might be willing to believe.

The class might also be remembered for the debate it sparked among the students. Did Cooper have an understandable reaction to the legal system's inability to help him and his girlfriend? Or was he an unstable vigilante? Was he exaggerating his intentions or had we caught him in a moment of unfiltered candor? Had he added to the class discussion with his comments, or was the entire story just plain creepy?

The day was noteworthy on many levels. But I remember that discussion for a specific reason: It was the moment I realized I belonged in law school.

Unlike some of my classmates, I had come to law school with no clear reason for being there. Like most of my classmates, I'd seen law school as an escape from a job market that would have a liberal arts major only behind a Starbuck's counter, a safer (and shorter) alternative than graduate school. Maybe I'd follow my love of pop culture and become an entertainment lawyer. Maybe I'd go into politics. Maybe I'd work for my hero, Morris Dees, at the Southern Poverty Law Center. Maybe I'd be a professor. Whatever the case, I knew I could figure it out later. The first year was for learning.

But as I soaked in the material, I couldn't help but wonder what I would eventually do with it. As friends basked in the glory of landing on-campus interviews with top-tier firms, I knew I could never put in those kinds of hours fighting about other people's money. I checked out the public interest clinic for battered women, but walked out when I learned we weren't supposed to tell the clients to leave their batterers. Even at a meeting of the Entertainment Law Society, I knew I wasn't reading *Variety* with the same interest as the other members.

But when a fellow student spoke about sitting in a darkened room, forming the intention to kill while wondering if the law would allow him to do it, I knew I belonged in law school.

I grew up in Wichita, Kansas, when a killer who called himself BTK—Bind, Torture, Kill—terrorized an entire city by murdering seven people and then writing letters to reporters and police to gloat about his crimes. He eluded police for more than thirty years.

When I was in high school, two young girls and their father were found murdered in their home. Their contractor, a man named Bill Butterworth, was reported missing, along with the family car. When Butterworth turned up with the car in Florida, he claimed a four-day bout of amnesia. After undergoing hypnosis, he claimed to remember fleeing from the home after walking into the murder scene. A Wichita jury acquitted him.

For as long as I could remember, I had watched crime television shows, read mystery novels, and followed every major crime story to make headlines.

But until that class, criminal *law* was just the study of actus reus, mens rea, and statutory interpretation. It wasn't about the human condition.

It is often said that the first year of law school is for learning how to think like a lawyer. As a 1L, I certainly experienced that cognitive evolution. But ideally students should see a connection between the law and real people. They should see how the story of the men who contracted for the purchase of a pregnant cow¹ might affect a first-time entrepreneur starting her own business. They should realize how the tale of Mrs. Palsgraf² might affect someone injured by the sale of a gun to a minor.³ They should recognize how singer Connie Francis' lawsuit after her rape has made hotels safer for guests.⁴ And, most ideally of all, they should have a moment when they recognize how they might as future lawyers help make those connections between the law in the abstract and the realities of human lives.

I had that moment when Mark Cooper told us about the night he almost killed a man.

¹ I refer, of course, to *Sherwood v. Walker*, 33 N.W. 919 (Mich. 1887). Hiram Walker, a successful distiller and cattle rancher, agreed to sell a cow called "Rose 2d of Aberlone" to banker Theodore Sherwood for eighty dollars, with both men believing Rose to be sterile. *Id.* at 919-20. When Walker discovered Rose was pregnant, he refused to honor the contract price. *Id.* at 923. The appellate court sided with Walker, *see id.* at 924, and the case is now a standard first-year contracts chestnut for the doctrine of mutual mistake.

² Here I refer to *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928). Anyone reading this essay who is not familiar with Mrs. Palsgraf's most unfortunate luck and Judge Cardozo's dismissal of her complaint must have picked up this collection of stories by accident.

³ See the hypothetical raised by philosopher Andreas Teuber for his students at Twenty-One Legal Puzzlers, <http://people.brandeis.edu/~teuber/puzz6.html> (last visited Mar. 18, 2010).

⁴ See *Garzilli v. Howard Johnson's Motor Lodges, Inc.*, 419 F. Supp. 1210 (E.D.N.Y. 1976) (rapist broke into plaintiff's motel room through sliding glass doors). I thank my colleague, Larry Kessler, for reminding me of this case.