

**REHUMANIZING LAW: A NARRATIVE THEORY  
OF LAW AND DEMOCRACY**

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## Introduction

“*Law is institutional normative order.*”<sup>1</sup> Nothing about this statement seems controversial. Indeed, it is hard to imagine any three-word definition of “law” that would be more accurate. But each of those three words carries a second-order connotation that reveals as much about law’s nature as its first-order denotation. To wit: Institutions have walls—sometimes literal, sometimes figurative—that keep things out. Norms are abstractions, distillations, and purifications that leave things out. Orders are systems, and systems seal things out. What are these “things” that wind up outside the law (or, perhaps more to the point, must fight to get in)? There are many possible answers, but the one that I am concerned to examine in this work arises from *narrative*, which is one of the most fundamental modes of human expression. By keeping narratives at a distance or delay, law loses some of its essential humanity. My project is, then, an attempt to explain the relationship between law and narrative, and—in the end—to suggest ways to (re)humanize law by (re)connecting it to its narrative roots and certain cognates in the humanities.

The process of packaging law in bundles of rules is an exercise in relentless reduction. By the time a common-law rule is stated or a statute is codified, it’s impossible to tell from the face of that rule or statute what went into the mix that created it. What that mix includes, I submit, is a healthy dose of narrative. Thus, any account of law that ignores or skims over this fact is neither wholly valid nor completely accurate. The contention that I will advance is designed to fill this lacuna, not to upend or supplant other descriptions of the law and its operation. In

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<sup>1</sup> NEIL MACCORMICK, *INSTITUTIONS OF LAW: AN ESSAY IN LEGAL THEORY* 1 (2007).

essence, I intend to do nothing more than peel back law's normative veneer just far enough to reveal its narrative foundation. To do this, I offer four related (and ultimately converging) propositions. First, although law is often posited to be "autonomous," that autonomy is not necessarily absolute, though it is quite potent. It is, therefore, a force requiring active resistance. Second, narratives often stand in the formative background of laws. This is true for statutory and common law alike. Third, the ability of a legal system to absorb and digest extra-systemic narratives serves democratic ends. Fourth, educating lawyers to think of law "narrativistically" (i.e., as something more than a system of rules to be extracted from texts) can help to ameliorate the dehumanizing effect of the Rule of Law's inherent drive to universalize all that comes before it. This is the case that I hope to make throughout the remainder of this book, which is broken into four parts, each of which engages one of the four central themes. The first three parts are essentially descriptive and designed to show different aspects of the relationship between laws, legal actors, and ordinary citizens and demonstrate the significance of this relationship for both law and democracy. The fourth is prescriptive and suggests ways to improve legal education and, thereby, the entire justice system.

Part One begins with a look across the spectrum between full-blown theories of legal autonomy (like autopoiesis) and humanities-based accounts (like Percy Shelley's belief that legislation has a literary basis). Although it is impossible fully to reconcile the two extremes, narrative is a possible bridge between them because both law and the humanities often take a storytelling form. To illustrate this point, I offer a reading of Camus' *The Stranger*. Taking Shelley as a cue, I next consider whether literature can in fact prompt legislation. I conclude that it can, but the

process is neither as simple nor as direct as Shelley would have it. By tracing Upton Sinclair's *The Jungle* and Rachel Carson's *Silent Spring* through legislative history, I am able to show that literary works can figure in the adoption of important legislation. I then take the first step towards explaining the process of literature-becoming-law by looking at an elaboration of Margaret Somers' seminal work on the interaction of personal narratives with higher-order, public narrative forms. This feeds into a discussion of narrative interaction based, once again, on *The Jungle* and *Silent Spring* and the historical record surrounding the principal actors (e.g., Teddy Roosevelt) involved in the legislative offshoots of the two works. Along the way I stop to consider whether the "factual" versus "fictional" nature of a narrative is conclusive as to its potential to impact law-making. (It is not.)

Part Two first considers Bernard Jackson's narrativistic account of rule formation and observes that account at work in specific case law. I follow that discussion with a reading of *Antigone* that cautions against dominant public narratives that—though consistent with a narrow definition of the Rule of Law—do not offer paths along which new narrative material can be absorbed into the system. I then move to a concrete application of my theoretical observations and show how personal narratives can become institutionalized as new (or modifications of old) rules. The cases that I examine to demonstrate this process ultimately suggest a link to Ronald Dworkin's chain novel metaphor and Stanley Fish's attack on it. I conclude that—although Dworkin's metaphor is not a complete description of rule-building in all cases—it holds in at least some cases. But Fish is correct as well: law is a conservative institution—and one packed with generic constraints that cause it to lag behind other institutions in the face of change. We can see this at a



linguistic level by looking at how slowly Scots law anglicized compared to other genres in the Sixteenth and Seventeenth Centuries or, more recently, how scientific evidence gained currency in legal proceedings much later than when it was considered conclusive in other spheres. This elides into the question of what it means to “find facts,” and I turn to Robert Browning’s *The Ring and the Book* as a tool for answering that question and the related question of what it takes to “justify” a decision.

Part Three is concerned with the relationship between law and democracy. It begins with an exploration of two concepts that are often linked in both popular and theoretical discussions: “democracy” and the “Rule of Law.” To show that the latter is not sufficient to the former, I offer a reading of Melville’s *Billy Budd* that demonstrates the problematic nature of legal rules untempered by notions of proportionality, mitigation, and a larger sense of morality. This leads to an articulation of what a *democratic* Rule of Law must entail and how that can be achieved. For general insight, I invoke Jürgen Habermas’ discourse theory of democracy and show how that “discourse” can take a narrative form. Specifically, I show how the American jury system adds a democratic dimension to the legal system by assuring that non-elites participate in matters of public import. Stanley Fish’s theory of “interpretive communities” provides the theoretical backdrop for this discussion, which is focused on the famed O.J. Simpson and Rodney King cases. This Part concludes with observations on “objectivity” in the interpretation of legal narratives and how a proper conception of objectivity can have pro-democratic consequences.

Part Four spins together two strands generally related to education, one being the popular notion that education should serve democratic ends, the other being the more particular observation that American legal education suffers from a dearth of imagination. To help conceptualize the discussion, I ask us to reconsider the myth of Bellerophon's taming of Pegasus and its suggestion that taming (i.e., educating) can be either a process of binding one to a democratic social order or an instrument of strangulation. I then anchor the discussion by examining some of the recurring criticisms lodged against legal education (e.g., those raised in the recent *Carnegie Report*). I attend in particular to the casebook method of instruction and identify a paucity of narrative in that method as a serious deficiency. But this deficiency is not one unique to legal education; in fact, it arises not from law schools per se but from their primary object of study: the appellate opinion. By studying appellate opinions—which by design already squeeze narratives beyond recognition—to extract rules, law students are trained to read (and think) in a narrowly instrumental way. I demonstrate this pedagogical defect at work through a close reading of cases and several casebooks. I conclude with a practical (and relatively simple) suggestion for ameliorating this problem and speculate how the solution will not only improve legal education but strengthen democratic institutions.

This, in outline, is the account of law that I will offer in this work. I stake no claim to a Grand Unified Theory of either law or humanities, but I do believe that story telling—when considered as a method of arguing—can expand our understanding of how some laws come to be, other laws come to be changed, and how many laws come into democratic institutions in ways that strengthen and perpetuate those institutions. But stories are not everything. Although they help us

make the world intelligible by suggesting agency and causation, they suffer the inherent limits of all things metaphoric. Other accounts—physics, for example—often offer more complete and accurate pictures (almost inevitably, another metaphor) of “how things really are.” Most of us do not, however, have the mathematical skills to understand physics in anything other than an indirect, trope-laden way. So we must do with what works, all the while realizing that our descriptions are incomplete.

And what holds at the universal level holds at the narrative level as well: our law-stories can be incomplete in devastating ways. Let me illustrate and close—appropriately enough, I think—with a story about a story (infected with multiple levels of hearsay and attendant unreliability). A few years ago, I represented a number of the defendants in an antitrust class action. The case settled, and—as the law requires—the judge to whom the case was assigned held a final fairness hearing to assure that the settlement was fair, adequate and reasonable to the members of the class. Some small detail that I can’t even remember now caused the judge to want to modify the proposed judgment that the parties had negotiated; this occasioned a brief delay in the hearing. While the papers were being edited and copied, the judge decided to divert us with a yarn about his first murder trial, which had taken place many years before when he was a newly minted prosecutor. It was an open-and-shut case. The defendant had viciously knifed his victim multiple times, and there was overwhelming evidence of his guilt. The judge told us about his meticulous preparation, masterful handling of the actual trial, and—as a crowning achievement—his brilliant summation, in which he stood before the jury and, in a final flourish, pretended to plunge the knife into his own chest over and over again.

He then sat down, at once exhausted and pleased. His opposing counsel slowly rose and—addressing the court—said, “Move to dismiss the indictment, Your Honor; the State hasn’t proved that anyone died.” Alas! Our fearless young prosecutor had forgotten an element of his case and thereby learned a lesson that should serve to caution us as well: a good story is not always a legally sufficient story. (Oh, by the way, the court allowed our young friend to reopen his case and prove that the victim had died, which shows, I guess, that even a good lawyer sometimes needs a good editor.)

## I. Law and Narrative: Reexamining the Relationship

### Introduction

Is law an autonomous discipline? That question animates much that follows here, and my answer—an equivocal “it depends on whose definition of ‘autonomy’ we’re using”—gets at much of the theoretical disagreement about what law is and what it can reasonably be expected to achieve in complex modern societies. I despair that law may have become more closed than I believe desirable; this despair flows from a deep-seated belief that law has suffered from overreaching experiments that have tried to refashion every area of human inquiry into a “science.”<sup>1</sup> Now I do not mean to deny that law is not “different” in meaningful ways from what we think of as the humanities or the social sciences, but I will argue—and I hope demonstrate—that law shares common, fundamental features with them, the most important being a narrative element. But first, let me stake some metes and bounds. Two decades ago, Charles Fried struck back at the ascendance of what is now broadly referred to as “interdisciplinarity” in legal studies and practice by arguing that judges and law professors had lost sight of the signal, yet unassuming, role that lawyers had traditionally played in the social order:

I would like to propose the picture of lawyers, not as the architects of society, but as its janitors. I would like to suggest that we are modest people, laboring in the basement of the building of society, doing really important

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<sup>1</sup> It seems to me that Richard Rorty is exactly right when he says that “[t]he rhetoric of scientific objectivity, pressed too hard and taken too seriously, has led us to people like B.F. Skinner on the one hand and like Althusser on the other—two equally pointless fantasies, both produced by the attempt to be ‘scientific’ about our moral and political lives.” Richard Rorty, *Solidarity or Objectivity*, in *FROM MODERNISM TO POSTMODERNISM* 573, 585 (Lawrence Cahoon ed., 1996). The human calculus is, I think, more complicated than a deterministic behaviorist’s rat-in-a-box experiments or a structuralist Marxist’s hypotheticals would suggest.

work, while the great things that happen, happen up in the upper stories, and that they are done by entrepreneurs, by businessmen, by artists, by painters, by politicians, by poets, and by philosophers and economists, as well. One of the really bad things that has happened is that we have tried to get out of the basement. In an earlier day, a kind of bargain was struck with lawyers. If they would stay in the basement, doing something rather boring and technical (the picture is of *Bartleby, the Scrivener*), then we would be partially left alone, honored after a fashion and paid quite well. Now I think we have welshed on the deal. We insist, these days, on being paid well and running the show too. I think law studies should once more be hard, rigorous, full of memorization and that we should see far fewer citations in law reviews to Derrida and Foucault.<sup>2</sup>

As the references to Derrida and Foucault suggest, Fried's target here was the Critical Legal Studies (CLS) movement that had found some traction in the 1970s and '80s. But that is not, in my view, the (sole) ground upon which law's autonomy should be adjudicated. For even if we concede that some mischief has been done in the law reviews in the name of deconstruction or some other faddish theory, lawyers have continued to learn and apply rules, and judges have continued to justify their decisions with precedent and principles of logic. What I am proposing is that law and the humanistic disciplines share certain deep structures and that some of law's features can be explained by insights derived from the humanities, especially the literary humanities. My ultimate aim is to give a partial explanation of what law is, how it works, and how it changes, and—in the end—to suggest how a properly institutionalized and humanistically informed legal order contributes to democracy.

To be clear, I am not proposing that law *is* one of the humanities. To that extent, I agree with the position that Judge Richard Posner has taken from time to

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<sup>2</sup> Charles Fried, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 331, 333-34 (1987-88).

time in his influential critiques of the law and literature movement.<sup>3</sup> But I don't agree with his further belief that law is just "a technique of government."<sup>4</sup> I think, rather, that law is in some respects an "applied" humanity, in much the same way that, for instance, electrical engineering is applied physics.<sup>5</sup> James Boyd White comes close to the mark when he states that both judicial and literary texts can each be seen "as a kind of argument with its culture, or, better, as an argumentative reconstitution of it . . ."<sup>6</sup> In other words, White proposes that the two types of text run on parallel tracks and, moreover, that the arrow of cultural influence is not mono-directional. The humanities and the law both inform and sustain culture, but they are themselves in the process reciprocally refreshed by that culture and (perhaps only indirectly) by one another.

But before we can begin to reach conclusions (or even see them off on the horizon), we must stop to consider what "autonomy" may or may not mean when applied to the law. Let's return to Fried's jeremiad for a moment. He is not (really)

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<sup>3</sup> See, e.g., Richard Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351, 1392 (1986).

<sup>4</sup> *Id.*

<sup>5</sup> Cf. David Howarth, *Is Law a Humanity (or is it more like Engineering)?*, 3 ARTS & HUMANITIES IN HIGHER EDUC. 9 (2004). Howarth argues that

law is connected with the Humanities, but it is no more connected by those means than any other creative or practical activity. Otherwise, law stands in relation to the Humanities and the Social Sciences as engineering does to the Sciences. . . . Law is a user of the Humanities and the Social Sciences, albeit sometimes a reluctant and covert user.

*Id.* at 23.

<sup>6</sup> James Boyd White, *The Judicial Opinion and the Poem*, reprinted in LAW AND LITERATURE 5, 21 (Lenora Ledwon ed., 1996).

saying that law is or should be hermetic—his complaint is that with the Realists and after philosophy and economics “erupted” into the law in ways that led to false conceptions of it (e.g., that “it is not possible to work with doctrines and precedents and texts”). I’m not sure that anyone ever seriously advanced such a claim as an absolute (or that very many people took such a claim seriously if it was even made), but we need to keep in mind that Fried’s underlying lament is that much of the “interdisciplinary” work that he had reviewed was in fact “undisciplined”: “I think one of the worst effects . . . of the huge amount of philosophy and economics and political science and sociology leaking into law is the poor quality of the philosophy and the economics and the sociology which we see there.”<sup>7</sup> And this should stand, I think, as an indictment of poor scholarship, teaching and opinion writing, not as proof that law is better off when it is in some sense sealed off from other disciplines.

Perhaps the simplest way into a discussion of law’s autonomy is to look at the impetus for Fried’s argument, an influential article by Judge Posner that had then recently appeared in the *Harvard Law Review*.<sup>8</sup> In that article, Posner traded on the notion that law historically had been (more accurately, I should probably say, “law historically had been treated *as if it were*”) an autonomous discipline, both in practice and as a matter of training:

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<sup>7</sup> *Id.* at 331.

<sup>8</sup> Richard A. Posner, *The Decline of Law and an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987); *see also* Richard A. Posner, *Conventionalism: The Key to Law as an Autonomous Discipline?*, 38 TORONTO L. J. 333 (1988) (describing efforts to refurbish the idea that law is best left in the hands of those trained in law and only law as “conventionalism,” and concluding that this conventionalism does not effectively compete with or refute contending interdisciplinary theories of law’s nature and operation).



The idea that law is an autonomous discipline, by which I mean a subject properly entrusted to persons trained in law and in nothing else, was originally a political idea. The judges of England used it to fend off royal interference with their decisions, and lawyers from time immemorial have used it to protect their monopoly of representing people in legal matters. Langdell in the 1870s made it an academic idea. He said that the principles of law could be inferred from judicial opinions, so that the relevant training for students of the law was in reading and comparing opinions and the relevant knowledge of what those opinions contained. He thought that this procedure was scientific, but it was not in the modern sense at any rate.<sup>9</sup>

Posner suggests that the Langdellian project was really just a form of Platonism (e.g., a contract decision embodies the concept of a contract) and that—even in its heyday—it was properly assailed by Holmes, “who pointed out that law is a tool for achieving social ends, so that to understand law requires an understanding of social conditions.” But Posner also notes that Holmes’ assault fell short: it took another sixty year or so for serious breaches to appear in the law’s citadel. In the end, Posner traces the relatively recent decline of law’s autonomy to a variety of sources, ranging from, among others, the shattering of political consensus in the Vietnam era, to the proclivity of the United States Supreme Court to stray into areas that had traditionally been marked off as “political,” and to—most important for our discussion—“a boom in disciplines that are complementary to the law, particularly economics and philosophy.”

As Posner’s analysis indicates, the question of law’s autonomy resolves into a couple of overlapping inquiries, one having to do with how law functions (i.e., how lawyers and judges go about doing the business of law), the other with what legal teacher-scholars-theorists do. The first inquiry looks at law from a process perspective and asks questions like: How are legal arguments constructed? How are

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<sup>9</sup> *Id.* at 762.

legal decisions made and justified? And, even more telling, are legal arguments and decisions different from other types of arguments and decisions? The second inquiry looks at law as an object of study and pedagogy and asks questions like: Should legal scholarship and teaching focus on anything other than doctrine? Can legal thought be enriched by insights and approaches developed in other disciplines? Should a law student be taught “to think like a lawyer” (and little else) and what does that mean anyway?

### **1. Describing Law in Terms of Autonomy**

Brian Bix proposes that law’s autonomy (or lack thereof) should be viewed through three lenses: one descriptive, one analytic, one prescriptive.<sup>10</sup> This multi-perspective approach ensures that an investigation of a particular legal system will describe the level of autonomy assumed or encouraged by that system, analyze whether claims of autonomy can withstand heavy scrutiny, and prescribe greater or lesser interdisciplinarity in legal reasoning, decision-making or education. This makes sense to me, and I have loosely adopted it as a method of testing my own predilection in favor of interdisciplinary enterprises. I do this in recognition that the case in favor of interdisciplinarity can never be more than partial. For at bottom I agree with Neil MacCormick that “[l]aw is an argumentative discipline” and that “[l]egal arguments are always in some way arguments about the law, or arguments about matters of fact, of evidence, or opinion, as these have a bearing upon the law,

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<sup>10</sup> Brian H. Bix, *Law as an Autonomous Discipline*, in THE OXFORD HANDBOOK OF LEGAL STUDIES (Peter Cane & Mark Tushnet eds., 2003), available at [http://ssrn.com/abstract\\_id=315719](http://ssrn.com/abstract_id=315719) at 1.

or as the law has a bearing on them.”<sup>11</sup> But MacCormick’s description is, I think, just a statement of limitation—he doesn’t mean it as a statement of law’s wholesale autonomy.

At this point, it may be useful to consider theories that—at least facially—tend towards either the “autonomous” or “non-autonomous” pole of our discussion. In “A Declaration of Rights,” the Romantic poet Percy Shelley proposed that “Law cannot make what is in its nature virtuous or innocent, to be criminal, any more than it can make what is criminal to be innocent. Government cannot make a law, it can only pronounce that which was law before its organization, viz. the moral result of the imperishable relations of things.”<sup>12</sup> In other words, law is anterior to Government. Is anything anterior to law? Shelley would say “yes” and draw our attention to the literary humanities, poetry in particular. In what Paul Fry calls Shelley’s most famous hyperbole, Shelley asserted that

The progress that culture owes to poetry and that poetry partakes in consists in the forging of ever new and better legislation. Shelley’s favorite example of how this progress works is the literature of ‘chivalry’ in the Middle Ages, mainly that of Dante, which advanced the conditions both of slaves and of women towards equality.<sup>13</sup>

Behind this assertion was Shelley’s bedrock belief that “[i]nstitutionalized laws, whether scientific, moral, or political, cannot change . . . because they are inert. They can be altered only from without, by revolution or by some kind of

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<sup>11</sup> NEIL MACCORMICK, *RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING* 14 (2005).

<sup>12</sup> Percy Shelley, *A Declaration of Rights* (1812), available at <http://www.otal.umd.edu/~msites/devil/declright.html>.

<sup>13</sup> PAUL H. FRY, *THE REACH OF CRITICISM: METHOD AND PERCEPTION IN LITERARY THEORY* 145 (1983).

revolutionary poetry.”<sup>14</sup> Shelley’s positions are of course indefensible in their breadth, but they are of a sort not unique to him. White, for example, has much more recently argued that “law can be best understood as a set of literary practices that at once create new possibilities for meaning and action in life and constitute human communities in distinctive ways.”<sup>15</sup> Defensible in whole or not, positions like those of Shelley and White nonetheless raise at least a couple of related questions worth investigating—namely, can law be changed in important ways from without, and do the humanities in some sense forge larger cultural institutions via the mediating force of law-as-instrument?<sup>16</sup>

Before seeking answers to these questions, we should glance towards the other end of the spectrum and one of the cases that has been advanced in favor of law as an insular system. “Autopoiesis” is the notion that many systems (biological, ecological, and even social) contain self-reflexive mechanisms that allow those systems to self-govern.<sup>17</sup> Put broadly, “[a]n autopoietic system produces and

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

<sup>15</sup> White, *supra* note 6, at 21.

<sup>16</sup> I should probably state what I have in mind when I apply the label “humanities.” For present purposes, I propose that we think of the humanities as imaginative representations (I would include the descriptive and analytical under this umbrella) of the human condition. This roughly coincides with Nietzsche’s definition of truth: i.e., “a mobile army of metaphors, metonyms, and anthropomorphisms—in short a sum of human relations, which have been enhanced, transposed, and embellished poetically and rhetorically and which after long use seem firm, canonical, and obligatory to a people.” Rorty, *supra* note 1, at 584 (quoting Nietzsche). So conceived, the humanities are a storehouse of morals, values and standards of right conduct across cultures and over time.

<sup>17</sup> I offer autopoiesis as *an* example. Other theories of law’s relative autonomy would serve to illustrate the point just as well. For instance, Kelsen’s

reproduces its own elements by the interaction of its elements.”<sup>18</sup> When applied to law, as Zenon Bankowski maintains, this means that

The law is a system of meaning which creates its own objects and criteria of truth. It is those that determine its cognition. All input coming from other systems such as the economy, politics and even individual actors (psychic systems for the theory) is filtered through these criteria. It cannot properly be called knowledge of the other system at all since the legal system has transformed it into *legal* knowledge. It does not even perceive the input as knowledge. Rather it senses an irritation, a noise, to which it adapts.<sup>19</sup>

I think that the law’s adaptability in the face of “noise” suggests a middle ground between the law-as-humanity and law-as-closed-system camps. Hugh Baxter signals this possibility when he discusses the idea of “relative autonomy”:

While [Niklas] Luhmann [one of the seminal autopoietic theorists] expressly refuses the term “relative autonomy,” his work can nonetheless be understood as an attempt to capture theoretically the intuition behind that enigmatic phrase. Despite his emphasis on “operative closure,” Luhmann readily acknowledges that social subsystems, among them the legal system, are at the same time “cognitively open” and able to “observe” one another. He insists, further, that the legal system is connected—“structurally coupled”—to other social subsystems, particularly the economic and political systems. Luhmann’s account of the law’s simultaneous openness and closure, and its simultaneous distinction from and “coupling” to other

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“pure theory” and neo-formalism are often cited for the proposition. See Bix, *supra* note 10, at 9.

<sup>18</sup> Gunther Teubner, *Introduction to Autopoietic Law*, in *AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY* 3 (Gunther Teubner ed., 1988); see also NIKLAS LUHMANN, *SOCIAL SYSTEMS* (John Bednarz, Jr. & Dirk Baecker trans., 1995).

<sup>19</sup> Zenon Bankowski, *How Does it Feel to Be on Your Own? The Person in the Sight of Autopoiesis*, 7 *RATIO JURIS* 254, 256 (1994). See also Howarth, *supra* note 5, at 23 (“Law’s central activity of making structures and devices out of legal rules has its own internal logic and standards, an activity that cannot be taught by reference to any other discipline, just as one cannot become an engineer merely by knowing mathematics and the relevant sciences.”).

systems, corresponds to the opposing impulses that the phrase “relative autonomy” expresses.<sup>20</sup>

If law remains open to other systemic influences, can one of those influences be the humanities and, if so, exactly how does this process work?<sup>21</sup> And, even more interesting, I think, does such an influence have a collateral influence on the institutions necessary to assure the possibility of democracy?

## **2. Narrative as the Basis of Law and the Humanities**

My answers to these just-posed questions are in the affirmative and turn on the fact that both the law and the humanities often transmit information in a narrative form. In the end, I conclude that law may be conservative and resistant to outside influence, but it is not autonomous in the sense of “hermetically sealed.” This is not to say that narrative “noise” from another system can automatically be transcribed as legal norms or, more generally, legally useful information, but narratives can and do “get through” to the system. They do so through a process of translation and assimilation, not direct absorption. Accordingly, a legal system cannot comprehend a “story” in its raw, natural form, be that in the form of a play, a

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<sup>20</sup> Hugh Baxter, *Autopoiesis and the “Relative Autonomy” of Law*, 19 CARDOZO L. REV. 1987, 1992 (1997-98).

<sup>21</sup> Although the humanities are not a system of the same order as, say, the economy or the ecology, they exhibit a degree of self-reflexivity, structure, and generic constraint sufficient to qualify as a system for purposes of this discussion. Indeed, it is the systemic nature of literature that postmodernist writers like John Barth (who crafts a short story from a Möbius strip that endlessly loops, “ONCE UPON A TIME THERE WAS A STORY THAT BEGAN ONCE UPON A TIME THERE WAS A STORY THAT BEGAN . . .”) have parodied and pilloried. John Barth, *Frame-Tale*, in *LOST IN THE FUNHOUSE* 1-2 (1968).

novel, or personal confession.<sup>22</sup> It must first be massaged into a legal shape through things like questions-and-answers at trial, cross examination, and compliance with the rules of evidence—in short, it must undergo an alchemic process<sup>23</sup> through which it is transformed into a *legal* narrative.<sup>24</sup> What this suggests is that legal narratives are subject to generic restrictions only slightly less stringent than those associated with literature. They are not as structured as, say, sonnets, but they are nonetheless conventional.

As a further complicating factor, we must remember that a narrative has not only an author (or many) but an auditor or reader (or many) as well. Thus, the “meaning” and consequent legal significance of a narrative is a function of the interpreter, the context, and author’s selection of facts and construction of those

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<sup>22</sup> Gunther Teubner makes this point, I think, in arguing that “[t]he law autonomously processes information, creates worlds of meaning, sets goals and purposes, produces reality constructions, and defines normative expectations—and all this quite apart from the world constructions in lawyers’ minds.” Gunther Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 L. & SOC’Y REV. 727, 739 (1989).

<sup>23</sup> I intend the metaphor to capture not only the notion of changing one thing into another but also the fact that there is often a gap between the aims and ends of such a process.

<sup>24</sup> See MICHAEL H. GRAHAM, EVIDENCE: TEXT, RULES, ILLUSTRATIONS & PROBLEMS 567-68 (rev. 2d ed. 1989). Graham notes that certain questions (e.g., “Tell us everything that was said that night?” or “How did the accident happen?”) are objectionable because they call for a “narrative” answer that may include irrelevant or hearsay matters. *Id.* at 567. Nonetheless, “[t]here is . . . some scientific indication that a spontaneous narration is more accurate, while interrogation by specific questions is said to present a more complete picture of the facts.” *Id.*; see also *Goings v. United States*, 377 F.2d 753, 762-63 (8th Cir. 1967) (“Ritualistic formality in presenting evidence should not deter untrained witnesses from telling their story in their own words. We hold here, it is only when evidence which is traditionally considered unworthy or unreliable, assumes the stature of undue significance that we must recognize error.”).

facts into a story. (This is of course just an application of Aristotle's rhetorical triangle of ethos-pathos-logos.) To make this a little more concrete, let's look at an example. Albert Camus' *The Stranger* neatly illustrates both the power of narrative forms and the danger inherent in them.<sup>25</sup> This danger arises because, simply put, we are gullible. We too quickly equate a coherent narrative with a complete (or truthful) narrative. But that is not always the case, as Camus shows us through the process of what might be called comparative renarration. Here's how it works as a matter of structure. The novel is broken into two parts, each of which—among other things—casts the same series of facts into a different narrative form and within a different interpretive context.

Part One of the novel is told from the first-person point of view of the protagonist, Meursault. It begins with one of the most famous opening paragraphs in western literature, a paragraph that immediately alienates readers from Meursault:

Maman died today. Or yesterday maybe, I don't know. I got a telegram from the home: "Mother deceased. Funeral tomorrow. Faithfully yours." That doesn't mean anything. Maybe it was yesterday.<sup>26</sup>

By carefully accreting details of his behavior at the vigil, funeral, and period of mourning for his mother, Meursault confirms our first impression of him: he is an outsider. In his conversations with others and in his description of the events leading up to Maman's funeral, he reveals that he didn't know her age, that he put her in a retirement home against her will, that he didn't want to see her body before the burial, and that he slept and breached other social conventions during the vigil:

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<sup>25</sup> ALBERT CAMUS, *THE STRANGER* (Matthew Ward trans., Vintage 1989) (1942).

<sup>26</sup> *Id.* at 3.



The caretaker turned the switch and I was blinded by the sudden flash of light. He suggested I go to the dining hall for dinner. But I wasn't hungry. Then he offered to bring me a cup of coffee with milk. I like milk in my coffee, so I said yes, and he came back a few minutes later with a tray. I drank the coffee. Then I felt like having a smoke. But I hesitated, because I didn't know if I could do it with Maman right there. I thought about it; it didn't matter. I offered the caretaker a cigarette and we smoked.<sup>27</sup>

Even at this early point in the novel, we understand that Meursault will be judged on his indifference. We learn as much when his mother's friends come into the vigil and are seated as if they were a jury: "It was then that I realized they were all sitting across from me, nodding their heads, grouped around the caretaker. For a second I had the ridiculous feeling that they were there to judge me."<sup>28</sup> And so they were, just as all of us are in our daily social interactions.

After Meursault returns home from the funeral, he continues to violate social norms. He goes swimming at a public beach, where he meets up with his soon-to-be lover, Marie, and then takes in a movie—a comedy. Soon thereafter, he helps a neighbor of dubious character (he's a reputed pimp), Raymond, execute a plan to exact revenge on Raymond's former mistress, an Arab. Raymond winds up beating the woman and getting himself arrested. To get out of this fix, Raymond needs Meursault to testify "that the girl had cheated on him," a fact of which Meursault has no personal knowledge. But Meursault readily agrees to testify anyway, and Raymond gets off with a warning because the police "didn't check out [Meursault's] statement." Despite Meursault's willingness to flout convention at the urging of his physical appetites and to comply blindly with improper requests on behalf of others,

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<sup>27</sup> *Id.* at 8.

<sup>28</sup> *Id.* at 10.

we learn that he is not a scofflaw. In fact, he's actually something of a rule-follower: he worries about breaking even petty dictates like the general prohibition in his office against taking personal phone calls, and he declines to accompany Raymond to a whorehouse "because," as he explains, "I don't like that."<sup>29</sup> From all this we conclude that Meursault is perhaps selfish and egoistic—maybe even something of a lout—but we don't see him as a sociopath or menace to society. Unfortunately for Meursault, though, his real troubles have not yet begun.

Soon after the incident with the Arab woman, Raymond invites Meursault and Marie to spend a Sunday at the beach house of Raymond's friend, Masson. It will not be a relaxing day, though, because they have been followed by the Arab woman's brother and a friend. They meet three times on the beach. In the first encounter, Raymond and Masson provoke a fight that results in the Arabs being thrashed until one of them pulls a knife, with which he slashes Raymond. Once Raymond is bandaged, he sets off again for the beach, this time with a gun. Meursault follows him, and they again encounter the Arabs at the far end of the beach, lying next to a spring. Raymond reaches for his gun, but Meursault wisely counsels Raymond to reconsider:

Raymond asked me, "Should I let him have it?" I thought that if I said no he'd get himself all worked up and shoot for sure. All I said was, "He hasn't said anything yet. It'd be pretty lousy to shoot him like that. . . ." Then Raymond said, "So I'll call him something and when he answers back, I'll let him have it." I answered, "Right. But if he doesn't draw his knife, you can't shoot." Raymond started getting worked up. . . . "No," I said to Raymond, "take him on man to man and give me your gun. If the other one moves in, or if he draws his knife, I'll let him have it."<sup>30</sup>

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<sup>29</sup> *Id.* at 38.

<sup>30</sup> *Id.* at 55-56.

Here, Meursault evinces at least some sense of morality (it would be “lousy” to shoot an unarmed man), as well as a tacit feel for the law of self-defense. His stance is nonetheless equivocal because—once the gun is in his hand—he “realized that you could either shoot or not shoot.” None of this is yet put to the test, though, because the Arabs slip away, and Meursault and Raymond head back towards Masson’s bungalow.

But Meursault makes it no farther than the steps leading from the beach up to the bungalow. Echoing his statement about shooting/not shooting, Meursault finds himself “unable to face the effort it would take to climb the wooden staircase and face the women again. . . . To stay or go, it amounted to the same thing.”

Throughout the entire time on the beach, the sun’s intensity has risen like a drumbeat that impels him back down the beach to his doom. Accompanied by a final burst of synesthesia (the sun not only dazzles his eyes but presses on his back, burns his skin, and crashes like cymbals), a disoriented Meursault again confronts the Arab:

The sun was the same as it had been the day I’d buried Maman, and like then, my forehead especially was hurting me, all the veins in it throbbing under the skin. It was this burning, which I couldn’t stand anymore, that made me move forward. I knew that it was stupid, that I wouldn’t get the sun off me by stepping forward. But I took a step, one step, forward. And this time, without getting up, the Arab drew his knife and held it up to me in the sun. The light shot off the steel and it was like a long flashing blade cutting at my forehead. . . . All I could feel were the cymbals of sunlight crashing on my forehead and, indistinctly, the dazzling spear flying up from the knife in front of me. The scorching blade slashed at my eyelashes and stabbed my stinging eyes. That’s when everything began to reel. . . . My whole being tensed and I squeezed my hand around the revolver. The trigger gave; I felt the smooth underside of the butt; and there, in that noise, sharp and deafening at the same time, is where it all started. . . . I knew that I had shattered the harmony of the day, the exceptional silence of the beach where I’d been happy. Then I fired four more times at the motionless body where

the bullets lodged without leaving a trace. And it was like knocking four quick times on the door of unhappiness.<sup>31</sup>

Part One of the novel thus ends with Meursault having narrated two key events: his mother's funeral (and its immediate aftermath) and the killing of the Arab. Part Two examines the relationship of the former to the latter within a larger narrative context.

As I think the discussion thus far has shown, Part One involves two types of acts by Meursault, those observed by others and reported by Meursault-as-narrator (e.g., the vigil and funeral) and those that are unobserved by others yet narrated by Meursault (e.g., the shooting on the beach). Part Two complicates this structure by placing another interpretive and narrative lens between the "facts" and our interpretation of them. And lenses always both refocus and distort what passes through them. In *The Stranger*, this happens in two ways. First, in the investigation phase of Meursault's case, he learns from his lawyer that "there had been some investigations into [his] private life," and that "[t]he investigators had learned that [he] had 'shown insensitivity' the day of Maman's funeral."<sup>32</sup> Meursault is unable to rebut the charge of insensitivity, and he makes matters rather worse for himself in the trying:

He asked if I felt any sadness that day. . . . I answered that I had pretty much lost the habit of analyzing myself and that it was hard for me to tell him what he wanted to know. I probably did love Maman, but that didn't mean anything. At one time or another all normal people have wished their loved ones were dead. Here the lawyer interrupted me and he seemed very upset.

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<sup>31</sup> *Id.* at 58-59.

<sup>32</sup> *Id.* at 64.

He made me promise I wouldn't say that at my hearing or in front of the examining magistrate.<sup>33</sup>

Meursault is of course correct in noting that “none of this had anything to do with my case,” but he grossly miscalculates the power of a narrative that is coherent (though irrelevant) and the ability of others to read this narrative as anything other than evidence of a black heart.

Meursault fares no better with the examining magistrate, who is willing to help him but demands an explanation for the group of four shots that Meursault fired after the Arab was already down (and probably dead). That is an explanation that Meursault cannot give, especially since the Magistrate demands that it be in the form of a Christian confession, lest Meursault's narrative infect his own:

I vaguely understood that to his mind there was just one thing that wasn't clear in my confession, the fact that I had hesitated before I fired my second shot. . . . I was about to tell him that he was wrong to dwell on it, because it didn't really matter. But he cut me off and urged me one last time, drawing himself up to his full height and asking me if I believed in God. I said no. . . . He said it was impossible; all men believed in God, even those who turn their backs on him. That was his belief, and if he were ever to doubt it, his life would become meaningless. “Do you want my life to be meaningless?” he shouted. As far as I could see, it didn't have anything to do with me, and I told him so.<sup>34</sup>

After this meeting, “[t]he magistrate seemed to have lost interest in me and to have come to some sort of decision about my case.” That decision is, of course, that Meursault should be tried for premeditated murder.

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<sup>33</sup> *Id.* at 65. This would appear to be a problem invariant across legal systems. What practicing lawyer has not had a client seemingly determined to say exactly the wrong thing—or to say something in exactly the wrong tone—in his defense? I admit to my share.

<sup>34</sup> *Id.* at 68-69.

Meursault's trial in some sense tracks—in reverse order—the narratives first constructed in Part One of the novel. Thus, the trial begins with the presiding judge simply reading from a dossier the narrative of what Meursault had done and verifying its accuracy with Meursault every few sentences. Those facts are undisputed, and so the remainder of the trial is focused on the issue of intent and collateral questions like why Meursault had returned to the spring and why he was armed when he did. The prosecutor's approach is to elicit testimony—and thereby sponsor evidence—that he can recraft into a narrative of evil. He therefore calls to testify people who were present with Meursault at his mother's vigil and funeral and in the days thereafter.<sup>35</sup> For example, the prosecutor elicits testimony from an unwitting Marie that he is able to summarize in a single damning sentence at the end of her examination: "Gentlemen of the jury, the day after his mother's death, this man was out swimming, starting up a dubious liaison, and going to a movie, a comedy, for laughs."<sup>36</sup> Armed with this and other similar building blocks, the

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<sup>35</sup> To those reading with eyes trained under an "adversarial" system, this type of testimony seems strange, erroneous even. But under a French-influenced system, a deep exploration of a defendant's individual background is both relevant and necessary:

The first phase of a trial in the *Cour d'assises* reflects the French interest in the psychology and personal circumstances of the defendant, and is called the "personality" (*personnalité*). The defendant's life history and personality are explored over the course of a day or two. . . . The French do not share American concerns about character evidence and poisoning the well, reflected in the United States' elaborate rules of evidence.

Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D'Assises*, 2001 U. ILL. L. REV. 791, 822 (2001).

<sup>36</sup> CAMUS, *supra* note 25, at 94.

prosecutor, in his summation, constructs a narrative edifice that even Meursault concedes is coherent and plausible:

He reminded the court of my insensitivity; of my ignorance when asked Maman's age; of my swim the next day—with a woman; of the Fernandel movie; and finally of my taking Marie home with me. It took a few minutes to understand the last part because he kept saying "his mistress" and to me she was Marie. Then he came to the business with Raymond. I thought his way of viewing the events had a certain consistency. What he was saying was plausible. I had agreed with Raymond to write the letter in order to lure his mistress and submit her to mistreatment by a man "of doubtful morality." I had provoked Raymond's adversaries at the beach. Raymond had been wounded. I asked him to give me his gun. I had gone back alone intending to use it. I had shot the Arab as I planned. I had waited. And to make sure I had done the job right, I fired four more shots, calmly, point-blank—thoughtfully, as it were.<sup>37</sup>

All the basic facts underlying this narrative are true, but it is not *the* truth. How do we know this? It's because we've already read the story and reached our own conclusions. Those conclusions may vary from reader to reader, but more often than not readers convict Meursault of rather venal sins, not ones that lead the presiding judge to declare, after receiving the jury's verdict of guilty, "that [Meursault] was to have [his] head cut off in a public square in the name of the French people."<sup>38</sup> What, then, is the difference between the readerly and judicial judgments? Context, I think. That is, readers have more context within which to view Meursault's behavior and to assess it as odd, yet relatively benign, and certainly not conclusive (or even relevant) proof that Meursault acted with murderous intent on the beach. Readers believe Meursault because he gains our narrative trust through his brutal

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<sup>37</sup> *Id.* at 99.

<sup>38</sup> *Id.* at 107.

honesty, which is aimed—more often than not—at himself. The jurors do not have the advantage of this critical perspective.

The point here is that good stories—and even legally cognizable stories—are not always true stories. So if we are to improve the odds of doing justice, we must always—because the warp and woof of law is so often of narrative origin—be on the lookout for additional facts, contexts, and perspectives that can help us better to weave and interpret stories in ways that are truthful (or, if that is an ideal that must remain merely aspirational, then at least accurate). Where better to start this excursion than with a consideration of the discipline-artform that is mainly concerned with stories: literature?

### **3. Shelley's Case, Part 1: Law of *The Jungle***

One of the principal criticisms of the law and literature movement has been that it doesn't really prove anything meaningful about the relationship between the two.<sup>39</sup> Yes, *To Kill a Mockingbird* has a trial in it and understanding law can add a subtle dimension to a reading of the novel. Yes, Justice Cardozo and Lord Denning wrote with what might be called a literary flourish and recognizing their effective use of tropes and other rhetorical devices leads to a better understanding of why some case law is more persuasive than others. And yes, critical theory offers valuable insights into modes of interpretation that are as applicable to legal texts as to literary texts. But none of this demonstrates a typical claim of the movement: that literature plays a noteworthy role in the development of the law. In the following pages, I hope to contribute something concrete to the discussion. My

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<sup>39</sup> See, e.g., Posner, *supra* note 3.



claim at this point is a narrow one: sometimes literary works at least partially *cause* the enactment of legislation.

Shelley was not the first literary figure to suggest that literature influences the development of the law. Ben Jonson had made the same claim nearly two centuries before:

I could never think the study of Wisdom confined only to the Philosopher; or of Piety to the Divine: or of State to the Politic: but that he which can feign a Commonwealth (which is the Poet), can govern it with counsels, *strengthen it with laws*, correct it with judgments, inform it with religion, and morals, is all these. We do not require in him mere Elocution, or an excellent faculty in verse, but the exact knowledge of all virtues, and their contraries; with ability to render the one loved, the other hated, by his proper embattaling them.<sup>40</sup>

This accords with what most serious writers think about their work (i.e., that it rises above mere entertainment), but how do we move from the level of assertion to that of accomplishment? An answer—but perhaps not the only answer—can be found in legislative history, which has been kept with increasingly meticulous care in the United States since the late Nineteenth Century.

In 1906, Upton Sinclair published *The Jungle*, a socialist screed aimed specifically at the Chicago meat-packing industry and more generally at the plight of American workers.<sup>41</sup> Although the novel often descends into melodrama, episodes in the first few chapters are crafted with a stark realism that effectively portrays the ghastly conditions in which much of the United States' meat supply was then produced. These few pages stir the reader's conscience—and raise her ire—on a number of fronts: the horrors of animal slaughter, the back-breaking misery of work

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<sup>40</sup> Ben Jonson, *Discoveries in 3 THE WORKS OF BEN JOHNSON* 403 (Francis Cunningham ed., Chatto & Windus 1903) (emphasis supplied).

<sup>41</sup> UPTON SINCLAIR, *THE JUNGLE* (Penguin 1985) (1906).

on an ever-quickenning production line, the lack of competition in the packing industry, the open and wanton environmental pollution practiced by the packers, and the disgusting genesis of processed food. To make this all a bit more tangible, it is perhaps wise to pause and look carefully at a few groups of excerpts from the novel, each directed to a particular ill associated with Chicago's Union Stockyards.

A guided tour of one of the plants in the Stockyards offers the occasion for readers to witness the carnage visited upon an array of unwitting hooved creatures, which—through personification—portends still greater ills to be suffered by the novel's protagonist (Jurgis Rudkus), his family and his fellows:

[O]nce started upon [the mechanized death] journey, the hog never came back; at the top of the wheel he was shunted off upon a trolley, and went sailing down the room. And meantime another was swung up, and then another, until there was a double line of them, each dangling by a foot and kicking in frenzy—and squealing. . . . [O]ne by one, they hooked up the hogs, and one by one with a swift stroke they slit their throats. There was a long line of hogs, with squeals and lifeblood ebbing away together; until at last each started again, and vanished with a splash into a huge vat of boiling water.<sup>42</sup>

It is the mechanized nature of the slaughter (in an eerie anticipation of World War I) that Sinclair finds most disturbing. He sees it as a breach of a grand social contract, one extending beyond humans and including animals:

It was all so very businesslike that one watched it fascinated. It was porkmaking by machinery, porkmaking by applied mathematics. And yet somehow the most matter of fact person could not help thinking of the hogs; they were so innocent, they came so very trustingly; and they were so very human in their protests—and so perfectly within their rights! They had done nothing to deserve it; and it was adding insult to injury, as the thing was done here, swinging them up in this cold-blooded, impersonal way, without a pretense at apology, without the homage of a tear. Now and then a visitor wept, to be sure; but this slaughtering-machine ran on, visitors or no visitors.

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<sup>42</sup> *Id.* at 44.

It was like some horrible crime committed in a dungeon, all unseen and unheeded, buried out of sight and out of memory.<sup>43</sup>

Sinclair goes on to describe ever-more-horrifying atrocities, including the “knocking pens” in which cattle are stunned with sledge hammers, then rolled onto “killing beds” to be disemboweled while still alive. Through textual juxtaposition and elaboration, this callous indifference to life foreshadows the protagonist’s own doom. And because Jurgis is a sort of Everyman, the animals-to-the-slaughter imagery extends and applies with equal force to an entire class of American worker.

Sinclair pointedly develops this aspect of his critique by widening his scope beyond Jurgis. The humiliations of workers in the packing yards are manifold and—even in some literal sense—equal to those of the animals. First, there are the physical injuries:

There was another interesting set of statistics that a person might have gathered in Packingtown—those of the various afflictions of the workers. . . . The workers in each [part of the plant] had their own particular diseases. [A] wandering visitor . . . could not be skeptical about these, for the worker bore the evidence of them about on his own person—generally he had only to hold out his hand. . . . Worst of any, however, were the fertilizer men, and those who served in the cooking rooms. These people could not be shown to the ordinary visitor, —for the odor of a fertilizer man would scare any ordinary visitor at a hundred yards, and as for the other men, who worked in tank rooms full of steam, and in some of which there were open vats near the level of the floor, their particular trouble was that they fell into the vats; and when they were fished out, there was never enough of them left to be worth exhibiting, —sometimes they would be overlooked for days, till all but the bones of them had gone out to the world as Durhams’ Pure Leaf Lard!<sup>44</sup>

These physical ailments are, of course, merely symbolic of a more general maleficence:

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<sup>43</sup> *Id.* at 44-45.

<sup>44</sup> *Id.* at 118-19.

The peculiar bitterness of all this was that Jurgis saw so plainly the meaning of it. In the beginning he had been fresh and strong, and he had gotten a job, the very first day; but now he was second-hand, a damaged article, so to speak, and they did not want him. They had got the best of him—they had worn him out, with their speeding-up and their carelessness, and now they had thrown him away! And Jurgis would make the acquaintance of others of these unemployed men and find that they had all had the same experience. . . . They had been overworked and underfed so long, and finally some disease had laid them on their backs; or they had cut themselves, and had blood poisoning, or met with some other accident. When a man came back after that, he would get his place back only by courtesy of the boss. To this there was no exception, save when the accident was one for which the firm was liable; in that case they would send a slippery lawyer to see him, first to try to get him to sign away his claims, but if he was too smart for that, to promise him that he and his should always be provided with work. This promise they would keep, strictly and to the letter—for two years. Two years was the “statute of limitations,” and after that the victim could not sue.<sup>45</sup>

In the beginning, however, Jurgis is thrilled to be part of the Durham meatpacking firm and is swelled with corporate pride. The business represents for him the apotheosis of freewheeling American capitalism, a portal to the American Dream: “[N]ow he had been admitted—he was part of it all! He had the feeling that this whole huge establishment had taken him under its protection, and had become responsible for his welfare.”<sup>46</sup> We, of course, know better, and Jurgis himself later learns the truth: namely, that the entire meatpacking industry is—in antitrust terms—nothing short of a massive horizontal conspiracy targeting its workers, its suppliers, and its customers:

So guileless was he, and ignorant of the nature of business, that he did not even realize that he had become an employee of Brown’s, and that Brown and Durham were supposed by all the world to be deadly rivals—were even

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<sup>45</sup> *Id.* at 149-50.

<sup>46</sup> *Id.* at 51.

required to be deadly rivals by the law of the land, and ordered to try to ruin each other under penalty of fine and imprisonment.<sup>47</sup>

Once or twice there had been rumors that one of the big houses was going to cut its unskilled men to fifteen cents an hour, and Jurgis knew that if this was done, his turn would come soon. He had learned by this time that Packingtown was really not a number of firms at all, but one great firm, the Beef Trust. And every week the managers of it got together and compared notes, and there was one scale for all the workers in the yards and one standard of efficiency. Jurgis was told that they also fixed the price they would pay for beef on the hoof and the price of all dressed meat in the country . . .<sup>48</sup>

The narrator also reports of collateral consequences flowing from the meatpackers' socially casual way of conducting business. We learn, for instance, of air thick with soot and other pollutants and a landscape that recalls the bareness of winter even at high summer. But the Stygian vision of the Chicago River that he summons is the most stunning:

“Bubbly Creek” is an arm of the Chicago River, and forms the southern boundary of the yards; all the drainage of the square mile of packing houses empties into it, so that it is really a great open sewer a hundred or two feet wide. One long arm of it is blind, and the filth stays there forever and a day. The grease and chemicals that are poured into it undergo all sorts of strange transformations, which are the cause of its name; it is constantly in motion, as if huge fish were feeding in it, or great leviathans disporting themselves in its depths. Bubbles of carbonic acid will rise to the surface and burst, and make rings two or three feet wide. Here and there, the grease and filth have caked solid, and the creek looks like a bed of lava; chickens walk about on it, feeding, and many times an unwary stranger has started to stroll across, and vanished temporarily. The packers used to leave the creek that way, till every now and then the surface would catch on fire and burn furiously, and the fire department would have to come and put it out.<sup>49</sup>

Ultimately, Sinclair is most effective in his food polemic. He makes what is essentially a two-pronged attack on food quality, one directed to regulatory

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<sup>47</sup> *Id.* at 51-52.

<sup>48</sup> *Id.* at 133.

<sup>49</sup> *Id.* at 115.

misfeasance, another to corporate malfeasance. First, he criticizes lax inspection and ineffective legislation:

It was late, almost dark, and the government inspectors had all gone . . . That day they had killed about four thousand cattle, and these cattle had come in freight trains from far states, and some of them had got hurt. There were some with broken legs, and some with gored sides; there were some that had died, from what cause no one would say; and they were all to be disposed of, here in darkness and silence. “Downers,” the men called them; and the packing house had a special elevator upon which they were raised to the killing beds, where the gang proceeded to handle them, with an air of businesslike nonchalance which said plainer than any words that it was a matter of everyday routine. It took a couple of hours to get them out of the way, and in the end Jurgis saw them go into the chilling rooms with the rest of the meat, being carefully scattered here and there so that they could not be identified.<sup>50</sup>

Although condemned meat slips through the net because of the packer’s chicanery, Sinclair makes it clear that inspection laws of the day were deeply, conceptually flawed and easily circumvented anyway:

The people of Chicago saw the government inspectors in Packingtown and they all took that to mean that they were protected from diseased meat; they did not understand that these hundred and sixty-three inspectors had been appointed at the request of the packers, and that they were paid by the United States government to certify that all the diseased meat was kept in the state. They had no authority beyond that; for the inspection of meat to be sold in the city and state the whole force in Packingtown consisted of three henchmen of the local political machine.<sup>51</sup>

But even if the laws had not been drafted so as to be meaningless in application, the haphazard system of inspection would have eviscerated them:

Before the carcass was admitted [to the dressing line], it had to pass a government inspector, who sat in the doorway and felt the glands of the neck for tuberculosis. This government inspector did not have the manner of a man who was worked to death; he was apparently not haunted by a fear that the hog might get by him before he had finished his testing. If you were a

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<sup>50</sup> *Id.* at 77-78.

<sup>51</sup> *Id.* at 115-16.

social person, he was quite willing to enter into conversation with you, and to explain to you the deadly nature of the ptomaines which are found in tubercular pork; and while he was talking with you you could hardly be so ungrateful as to notice that a dozen carcasses were passing him untouched. This inspector wore a blue uniform, with brass buttons, and he gave an atmosphere of authority to the scene, and, as it were, put the stamp of approval upon the things which were done at Durham's.<sup>52</sup>

The second prong of Sinclair's attack on food quality was the one that resonated most deeply with the public. And it is the depictions of adulterated and unsanitary foodstuffs that are to this day most often invoked in the popular press when the novel is recalled at all. In due course, we will explore why this might be so. For now, it is enough to note how skillfully Sinclair weaves metaphor, irony and naturalistic detail into a rhetorically powerful appeal to shared values and experience:

They were regular alchemists at Durham's; they advertised a mushroom-catsup, and the men who made it did not know what a mushroom looked like. . . . And then there was the "potted game" and "potted grouse," "potted ham," and "deviled ham"—de-vyled, as the men called it. "De-vyled" ham was made out of the waste ends of smoked beef that were too small to be sliced by the machines; and also tripe, dyed with chemicals so that it would not show white; and trimmings of hams and corned beef; and potatoes, skins and all; and finally, the hard cartilaginous gullets of beef, after the tongues had been cut out. All this ingenious mixture was ground up and flavored with spices to make it taste like something.<sup>53</sup>

There was never the least attention paid to what was cut up for sausage; there would come all the way back from Europe old sausage that has been rejected, and that was moldy and white—it would be dosed with borax and glycerine, and dumped into the hoppers, and made over again for home consumption. There would be meat that had tumbled out on the floor, in the dirt and sawdust, where the workers had tramped and spit uncounted billions of consumption germs. There would be meat stored in great piles in rooms; and the water from leaky roofs would drip over it, and thousands of rats would race about on it. It was too dark in these storage places to see well,

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<sup>52</sup> *Id.* at 46.

<sup>53</sup> *Id.* at 117-18.

but a man could run his hand over these piles of meat and sweep off handfuls of the dried dung of rats. These rats were nuisances, and the packers would put out poisoned bread for them; they would die, and then rats, bread, and meat would go into the hoppers together. This is no fairy story and no joke; the meat would be shoveled into carts, and the man who did the shoveling would not trouble to lift out a rat even when he saw one—there were things that went into the sausage in comparison with which a poisoned rat was a tidbit.<sup>54</sup>

As these excerpts plainly show, *The Jungle* was (and is) a comprehensive indictment of American business practices. In theory, then, the work could have inspired cries for reform in each of the regulatory areas that correspond to the passages that we just reviewed: animal rights, workers' rights, antitrust, environmental standards and pure food requirements. Sinclair himself sought to effect radical change across the board and, in especial, to improve the lot of the working class. To that end, the bulk of the work is devoted to following the devolution of a representative, hapless immigrant, one quickly eaten up and spitted out by the meat packers. But as Sinclair later bemoaned, he missed the mark with respect to the largest target: "I aimed at the public's heart and by accident hit it in the stomach."<sup>55</sup> For as we will presently see, there is a direct and demonstrable connection between publication of *The Jungle* and adoption of the Meat Inspection Act and the Pure Food and Drugs Act, both of 1906, but no others.

From a literary and rhetorical perspective, Sinclair's various commentaries on the wide range of bad acts that constitute the packing industry are narrated with equal skill (even if you conclude, as have many critics, that Sinclair was not

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<sup>54</sup> *Id.* at 63.

<sup>55</sup> *Quoted in* JAMES HARVEY YOUNG, PURE FOOD 229 (1989) [hereinafter PURE FOOD].



particularly skillful). Why, then, did *The Jungle* take hold in only one relatively narrow area? In other words, why didn't Sinclair's novel—which plainly had a considerable impact on the public imagination and concomitant political ramifications—lead to immediate, widespread legislation? What we find, instead, is that landmark legislation that would have reformed an array of practices in the packing industry (or, in some cases, in business generally) did not follow close on the heels of *The Jungle*. For example, the Packers & Stockyards Act (antitrust) was not adopted until 1921, the Occupational Safety and Health Act (worker's health and safety) until 1970, the Clean Water Act (putting teeth into older environmental legislation like the Water Pollution Control Act of 1948) until 1972, and the Humane Slaughter Act (abolishing certain gruesome butchering practices like “knocking”) until 1972. I will ultimately suggest that—as I hinted at before—it is all a matter of context. Literature—even persuasively powerful literature—does not operate in a void: conditions must be ripe if it is to draw energy from the social milieu and thereby attain a kinetic force capable of influencing the law. This, as I shall argue, requires an alignment of narratives: the literary narrative with the larger cultural narrative within which it subsists. But before turning to that subject later in this chapter, we must first take a closer look at how a literary work can actually “cause” legislation and, even more important, demonstrate that this in fact happens.

The late-Eighteenth and all of the Nineteenth Centuries witnessed massive changes to social structures in the West. As societies industrialized and urbanized, attendant changes appeared in widely disparate areas, from the rise of the novel as a

literary form to the rise of the modern regulatory state as a method of governance.<sup>56</sup> Single causes are always difficult to isolate in the context of social change, but there is general agreement that scientific and technological advances were the principal impetus behind the movement from rural, agrarian structures to urban, industrial structures. With these “advances” came a host of consequences, many unanticipated and, therefore, unintended. “Discoveries in chemistry, for example, led to new synthetic medicines and altered radically both the growing and the processing of food. Transportation developments brought processed food to an increasingly national market, making the growth of giant cities possible. The residents of those cities lost the ability villagers had possessed of being first-hand judges of the food they ate.”<sup>57</sup>

It was within this temporal gap between raw food (meat on the hoof/vegetables in the ground) and the table that much mischief could be worked. Some of chemistry’s impact on food production was benign—even salutary in many cases—but it also permitted unscrupulous latter-day alchemists to transform vile, inedible dross into slightly less vile, semi-edible (and marketable) dross. Think, for instance, of Sinclair’s descriptions of “ham” with no ham in it, spoiled sausage treated with borax then recycled, or rancid butter “oxidized” to remove its smell before being returned to grocery shelves. None of this was completely lost on

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<sup>56</sup> With respect to the novel see, e.g., IAN WATT, *THE RISE OF THE NOVEL: STUDIES IN DEFOE, RICHARDSON AND FIELDING* (1957); with respect to the regulatory state see, e.g., LISA HEINZERLING & MARK V. TUSHNET, *THE REGULATORY AND ADMINISTRATIVE STATE* (2006).

<sup>57</sup> James Harvey Young, *The Long Struggle for the 1906 Law 1 FDA CONSUMER*, June 1981, available at <http://www.cfsan.fda.gov/~lrd/history2.html> [hereinafter *The Long Struggle*].

lawmakers or the public—even prior to Sinclair’s emergence on the scene. For example, a Senate report from 1890 cautioned that “it has only been since the great opportunity for fraud provided by modern science . . . that the sophistication of articles of commerce has reached its present height.”<sup>58</sup> But it is equally clear that—prior to publication of *The Jungle*—“pure food crusaders” had had little success in pushing effective legislation through Congress, despite numerous journalistic exposés (including Sinclair’s own 1905 serial publication of what was to become *The Jungle* in a socialist newspaper) recounting the horrors of Chicago’s Union Stockyards.<sup>59</sup>

All this changed in 1906, with the publication of *The Jungle* in book form, which “spurred a mighty reaction in the body politic that, in four months, led to the enactment of two laws.”<sup>60</sup> The confluence of several factors contributed to the novel’s rapid public acceptance. As historian James Harvey Young capably demonstrates, both Sinclair and his publisher, Doubleday, extensively and effectively promoted the novel.<sup>61</sup> But even more important, Sinclair, Doubleday, and two key political figures, James R. Garfield and Senator Alfred J. Beveridge, put the novel into the hands of President Theodore Roosevelt.<sup>62</sup> The trust-busting Roosevelt—still stinging from failed attempts to dismantle the beef trust under the Sherman Act—was predisposed to read the (perhaps any) novel that offered another

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<sup>58</sup> *Quoted in id.*

<sup>59</sup> *Id.*

<sup>60</sup> PURE FOOD, *supra* note 55, at 229.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

opportunity to bring the packers to heel. And after Roosevelt's own investigators independently verified the major contours of Sinclair's allegations (and in some instances supplemented them),<sup>63</sup> the road to legislation was cleared.<sup>64</sup>

At this point, one may ask: in what sense did *The Jungle* "cause" passage of the Meat Inspection Act and Pure Food and Drugs Act? The novel was not, of course, what in legal parlance would be termed the "sole proximate cause," but the record makes it reasonably clear that it was a significant contributing cause. For evidence of this type of causation, we can look first to the legislative history of the acts. Although Sinclair is never mentioned by name in the floor debates attendant to the Meat Inspection Act, at least one Senator alluded to him and his novel.<sup>65</sup> There is, moreover, a wealth of indirect evidence of provocation in the legislative history. In the House hearings, much energy was devoted to attacking or buttressing the conclusions of the Neill-Reynolds Report, which was created at Roosevelt's request either to confirm or to refute the factual assertions upon which Sinclair based his

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<sup>63</sup> One of the most contentious items taken up in the House hearings involved the now infamous "pig that fell into a privy":

As an extreme example of the entire disregard on the part of employees of any notion of cleanliness in handling dressed meat, we saw a hog that had just been killed, cleaned and washed, and started on its way to the cooling room fall from the sliding rail to a dirty wooden door and slide part way into a filthy men's privy. It was picked up by two employees, placed upon a truck, carried into the cooling room and hung up with other carcasses, no effort being made to clean it.

*Id.* at 242 (quoting *Conditions in the Stockyards*, 59th Cong. 1 sess., House Doc. 873).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 251 (quoting Senator Lodge's reference to "a man who wrote a book").

book. Roosevelt ordered the independent investigation at Sinclair's behest, as his directive to Secretary Wilson reveals: "I would like a first-class man to be appointed to meet Sinclair, as he suggests; get the names of witnesses, as he suggests; and then go to work in the industry, as he suggests."<sup>66</sup> Sinclair himself hoped that the ultimate report would give "a sort of governmental sanction to *The Jungle*."<sup>67</sup> Thus, the official report became something of a stalkinghorse for the novel: criticism or praise leveled at it was in essence criticism or praise of its original impetus, the novel. Of this, there is ample evidence in the legislative history, including the report itself and the testimony of its two authors.<sup>68</sup>

There is also considerable contemporaneous evidence of the novel's influence existing outside the official record. Roosevelt's correspondence cited above is, of course, germane, as are the recollections of many of the key players in the political scene of the time.<sup>69</sup> These include, for example, Harvey W. Wiley, the

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<sup>66</sup> *Id.* at 233 (quoting from Roosevelt's papers).

<sup>67</sup> *Id.* at 235.

<sup>68</sup> *Id.* at 235-46 (discussing, among other things, the Neill-Reynolds Report and the testimony of its two authors).

<sup>69</sup> Interestingly, Roosevelt almost immediately sought to distance himself from Sinclair once his legislative agenda was achieved. The correspondence between Roosevelt and Sinclair shows that Roosevelt always saw Sinclair as a mixed blessing—a useful tool, yet constant irritant. Once the usefulness was past, only the irritant (mostly Sinclair's strident socialism, with which Roosevelt had little sympathy) remained. This explains the position that Roosevelt took in a letter to Kansas newspaper editor William Allen White:

Thus in the beef packing business I found that Sinclair was of real use. I have an utter contempt for him. He is hysterical, unbalanced, and untruthful. Three-fourths of the things he said were absolute falsehoods. For some of the remainder there was only a basis of truth. Nevertheless, in this particular crisis he was of service to us, and yet I had to explain again and again to

Chief of the Bureau of Chemistry, and Sinclair himself.<sup>70</sup> Most historians, after combing the relevant archives, have ascribed a “causal” relationship between *The Jungle* and the Meat Inspection Act and, perhaps as a collateral consequence, the Pure Food and Drugs Act.<sup>71</sup> Case law is to similar effect.<sup>72</sup> And two economists

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well-meaning people that I could not afford to disregard ugly things that had been found out simply because I did not like the man who had helped in finding them out.

*Id.* at 251 (quoting THEODORE ROOSEVELT, *THEODORE ROOSEVELT: AN AUTOBIOGRAPHY* 443 (1920)).

<sup>70</sup> According to Wiley, *The Jungle* “brought public opinion to the pitch of indignant excitement” at a time when “President Roosevelt was eagerly in quest of a law supervising the packing of our animal food products.” HARVEY W. WILEY, *THE HISTORY OF A CRIME AGAINST THE FOOD LAW*, Chapter 7 (1929), available at [www.soilandhealth.org/03sov/0303critic/030305wylie/030305toc.html](http://www.soilandhealth.org/03sov/0303critic/030305wylie/030305toc.html). Although Sinclair was initially disappointed that he had not ameliorated the overall plight of the workers, he later conceded with some pride that he “helped to clean up the yards and improve the country’s meat supply.” *Quoted in* PURE FOOD, *supra* note 55, at 252.

<sup>71</sup> *See, e.g., The Long Struggle, supra* note 57 (Sinclair’s “few pages describing filthy conditions in Chicago’s packing plants, widely reported and confirmed by government inquiry, cut meat sales in half, angered President Roosevelt, and pushed a meat inspection bill aimed at protecting the domestic market through the Congress.”); C. C. Regier, *The Struggle for Federal Food and Drugs Legislation*, *L. & CONTEMP. PROBL.* 3, 13 (1933) (Roosevelt “had received the Neill-Reynolds report on June 2, and two days later he sent . . . the first part of the much feared report [to the House], which was immediately broadcast by the press. This compelled favorable action on the part of the committee.”); Thomas A. Bailey, *Congressional Opposition to Pure Food Legislation, 1879-1906*, 36 *AM. J. OF SOCIOLOGY* 52, 62 (1930) (“Roosevelt sent . . . the first part of the Neill-Reynolds report [to the House]. Startled by the revelations given forth in this manner, an indignant public, which flooded the House with telegrams, would not thereafter permit further dilatory action on the part of Congress.”).

<sup>72</sup> *See, e.g., Baur v. Veneman*, 352 F.3d 625, 645 n.1 (2d Cir. 2003) (dissenting op.) (“It bears noting . . . that the federal government’s initial efforts to regulate American meat quality were motivated in no small part by public reaction to *The Jungle*, Upton Sinclair’s 1906 novel about Chicago’s meat packing plants.”); *IBP, Inc. v. Alvarez*, 339 F.3d 894, 898-89 (9th Cir. 2003) (“[P]ublication of Upton Sinclair’s novel *The Jungle* provoked President Theodore Roosevelt to secure

recently concluded—after performing an econometric analysis of Senate voting patterns—that “[t]he muckraking press [including Sinclair] eventually galvanized widespread consumer interest in food and drugs regulation and broke the [then-existing] impasse, allowing the [food and drugs] law to be finally enacted.”<sup>73</sup>

What this proves, then, is that literature can have a demonstrable—not merely posited—impact on the law. I could pile up dozens of other examples from the humanities and social sciences (Harriet Beecher Stowe, Karl Marx, Ralph Nader, Jonathan Swift, and on and on), but there would little point now that the basic point is made. I do think, however, that one more fairly detailed example will prove useful, if only because it will figure prominently in the next stage in my argument—i.e., the question of *why* certain humanistic works serve as legislative flash points. That work, Rachel Carson’s *Silent Spring*, differs from *The Jungle* both in genre (literary broadside as opposed to novel) and in purpose (reforming a single area as opposed to fomenting a wide-ranging socialist revolution).

#### 4. Shelley’s Case, Part 2: *Silent Spring*

In 1962, Rachel Carson published *Silent Spring*, a call to arms aimed specifically at the by-then widespread use of pesticides, more generally at the civil

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passage of the Meat Inspection Act of 1906. . . .”); U.S. v Espy, 145 F.3d 1369, 1371 (D.C. Cir. 1998) (“The [Meat Inspection] Act was passed in response to Upton Sinclair’s famous book *The Jungle* . . .”).

<sup>73</sup> Gary D. Libecap & Mark T. Law, *Corruption and Reform? The Emergence of the 1906 Food and Drug Act and the 1906 Meat Inspection Act* 31 (Int’l Ctr. for Econ. Research, Working Paper No. 20, 2003), available at <http://www.icer.it/docs/wp2003/Libecap20-03.pdf>. With respect to the narrower issue of the impact of the *Jungle* on the Meat Inspection Act, Law and Libecap state that “[t]he direct result of Upton Sinclair’s muckraking was the 1906 Meat Inspection Act, which significantly expanded the USDA’s inspection of the slaughtering, packing, and canning of meats.” *Id.* at 20.

responsibilities of scientists, and even more generally at the post-Enlightenment belief in technological progress. Although her work has a more than sufficient scientific basis, it gains its greatest force from its “literary” qualities. It begins with an epigraph from Keats (“The sedge is wither’d from the lake / and no birds sing”) before opening the text proper with what Carson herself dubbed a “fable,” a cautionary vision of middle-America stricken not by the then-feared nuclear holocaust, but by the insidious—and purposeful—use of pesticides:

There was once a town in the heart of America where all life seemed to live in harmony with its surroundings. The town lay in the midst of a checkerboard of prosperous farms, with fields of grain and hillsides of orchards where, in spring, white clouds of bloom drifted above the green fields. . . . The countryside was, in fact, famous for the abundance and variety of its bird life, and when the flood of migrants was pouring through in spring and fall people traveled from great distances to observe them. Then a strange blight crept over the area and everything began to change. Some evil spell had settled on the community: mysterious maladies swept the flocks of chickens; the cattle and the sheep sickened and died. Everywhere was a shadow of death. . . . There was a strange stillness. The birds, for example—where had they gone? . . . It was a spring without voices. On mornings that had once throbbled with the dawn chorus of robins, catbirds, doves, jays, wrens, and scores of other bird voices there was now no sound; only silence lay over the fields and woods and marsh. On the farms the hens brooded, but no chicks hatched. . . . The apple trees were coming into bloom but no bees droned among the blossoms, so there was no pollination and there would be no fruit. The roadsides, once so attractive, were now lined with browned and withered vegetation as though swept by fire. These, too, were silent, deserted by all living things. Even the streams were now lifeless. No witchcraft, no enemy action had silenced the rebirth of new life in this stricken world. The people had done it themselves.<sup>74</sup>

What Carson brought to the debate was a keen sense of literary style, coupled with a jargon-stripped exposition of scientific principles. Even a general reader of the time could understand the salient features of her argument: namely, that synthetic chemicals indiscriminately kill life forms, often with unimagined

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<sup>74</sup> RACHEL CARSON, *SILENT SPRING* 1-3 (Mariner 2002) (1962).



consequences, and that, moreover, these chemicals circulate—and move up through the food chain—far beyond their intended targets:

[S]prays, dusts, and aerosols are now applied almost universally to farms, gardens, forests and homes—nonselective chemicals that have the power to kill every insect, the “good” and the “bad,” to still the song of birds and the leaping of fish in the streams, to coat the leaves with a deadly film, and to linger on in soil—all this though the intended target may be only a few weeds or insects. Can anyone believe that it is possible to lay down such a barrage of poisons on the surface of the earth without making it unfit for all life? They should not be called “insecticides” but “biocides.”<sup>75</sup>

In the less than two decades of their use, the synthetic pesticides have been so thoroughly distributed throughout the animate and inanimate world that they occur virtually everywhere. . . . They have entered the bodies of fish, birds, reptiles, and domestic and wild animals so universally that scientists find it almost impossible to locate subjects free from such contamination. They have been found in fish in remote mountain lakes, in earthworms burrowing in soil, in the eggs of birds—and in man himself. For these chemicals are now stored in the bodies in the vast majority of human beings, regardless of age. They occur in the mother’s milk, and probably in the tissues of the unborn child.<sup>76</sup>

No dry scientific treatise this. It reads, from a rhetorical standpoint, much like Sinclair’s meat packing exposé, full of tropes, literary allusions, and appeals to shared values. Her technique is transparently literary, weaving into her fabric a host of mini-narratives ranging from the pathetic (a boy and his dog stricken by the insecticide endrin; two small boys—cousins, even—killed at play by another insecticide, parathion) to the archetypal (retelling the myth of the sorceress Medea and her robe of “death-by-indirection” to illustrate the mechanics of “systemic insecticides”). In an excerpt worth quoting at some length, she even slyly invokes

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<sup>75</sup> *Id.* at 7-8.

<sup>76</sup> *Id.* at 15-16.

the authority of law when she appropriates a story from the outdoor biography of a United States Supreme Court Justice:

Justice William O. Douglas, in his recent book *My Wilderness: East to Katahdin*, has told of an appalling example of ecological destruction wrought by the United States Forest Service in the Bridger National Forest in Wyoming. Some 10,000 acres of sagelands were sprayed by the service, yielding to pressure of cattlemen for more grasslands. The sage was killed, as intended. But so was the green, lifegiving ribbon of willows that traced its way across these plains, following the meandering streams. Moose had lived in these willow thickets, for willow is to the moose what sage is to the antelope. Beaver had lived there, too, feeding on the willows, felling them and making a strong dam across the tiny stream. Through the labor of the beavers, a lake backed up. Trout in the mountain streams seldom were more than six inches long; in the lake they thrived so prodigiously that many grew to five pounds. . . .

But with the “improvement” instituted by the Forest Service, the willows went the way of the sagebrush, killed by the same impartial spray. When Justice Douglas visited the area in 1959, the year of the spraying, he was shocked to see the shriveled and dying willows—the “vast, incredible damage.” What would become of the moose? Of the beavers and the little world they had constructed? A year later he returned to read the answer in the devastated landscape. The moose were gone and so were the beaver. Their principal dam had gone out for want of attention by its skilled architects, and the lake had drained away. None of the large trout were left. None could live in the tiny creek that remained, threading its way through a bare, hot land where no shade remained. The living world was shattered.<sup>77</sup>

Powerful as the contrast between the pastoral lyric prose and its antithesis might be, Carson does not rest her argument solely on her ability to persuade through rhetorical devices and logic. Indeed, she raises the ante a few pages later and locates the overarching issue *in law*—specifically, as a clash of competing private commercial and public environmental rights. Once again, she cloaks herself in Justice Douglas, but this time using his words to make the operative point, not her own:

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<sup>77</sup> *Id.* at 67-68.

Justice Douglas tells of attending a meeting of federal field men who were discussing protests by citizens against plans for the spraying of sagebrush. . . . These men considered it hilariously funny that an old lady had opposed the plan because the wildflowers would be destroyed. “Yet, was not her right to search out a banded cup or a tiger lily as inalienable as the right of the stockmen to search out grass or a lumberman to claim a tree?” asks this humane and perceptive jurist. “The esthetic values of the wilderness are as much our inheritance as the veins of copper and gold in our hills and the forests in our mountains.”<sup>78</sup>

Although Carson herself had little hope that *Silent Spring* would make a deep impact (she wrote to a friend that “[i]t would be unrealistic to believe that 1 book could bring a complete change”), reality proved otherwise.<sup>79</sup> Just as Sinclair struck the mark with respect to unsanitary and adulterated food, Carson found it with respect to pesticides and—even more generally—the whole range of environmental issues. Like Sinclair, she was vilified by the industry whose products she impugned, but—also like Sinclair—she found a powerful reader in the form of the then-sitting President, John F. Kennedy. At a press conference in the summer of 1962—in response to the question whether he would ask a government agency to investigate the long-term effects of DDT—Kennedy stated, “Yes, and I know that they already are. I think particularly, of course, since Miss Carson’s book, but they are examining the matter.”<sup>80</sup> In fact, Kennedy asked his Scientific Advisory Committee to investigate Carson’s claims. The Committee’s report, which issued in May of 1963, largely vindicated Carson’s work, particularly in the report’s condemnation of indiscriminate pesticide use and call for additional research into potential health

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<sup>78</sup> *Id.* at 72.

<sup>79</sup> *Quoted in* PAUL BROOKS, *THE HOUSE OF LIFE: RACHEL CARSON AT WORK* 13 (1972).

<sup>80</sup> *Quoted in id.* at 305.

hazards.<sup>81</sup> The Chair of the Committee, Dr. Jerome Wiesner, minced no words, calling the uncontrolled use of poisonous chemicals a “potentially . . . much greater hazard” than radioactive fallout.<sup>82</sup>

Where did all this lead? By the end of 1962, dozens of state legislatures had taken up bills regulating pesticides and by the end of the decade at least three states banned DDT.<sup>83</sup> Of greater ultimate importance, however, were the wheels set in motion at the federal level. First, the Committee’s report exposed loopholes in the federal regulatory scheme through which, for example, pesticides that had been denied approval by the United States Department of Agriculture could still slip through and reach the market and, thereby, the environment. The more gaping loopholes of this type were almost immediately closed.<sup>84</sup> Second, Government-sponsored research on pesticides markedly increased after the publication of *Silent Spring*; these studies led to agency regulations sharply curtailing DDT use.<sup>85</sup> Third, Senator Abraham Ribicoff introduced a bill (S. 2792) proposing omnibus federal control over pesticide use and manufacturing. Carson testified before the Senate

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<sup>81</sup> President’s Science Advisory Committee, *Use of Pesticides* (1963); see also CHRISTOPHER J. BOSSO, *PESTICIDES & POLITICS* 122 (1987) (The PSAC panel “clearly vindicated Carson.”).

<sup>82</sup> Quoted in LINDA LEAR, *RACHEL CARSON: WITNESS FOR NATURE* 452 (1997).

<sup>83</sup> Terence Kehoe & Charles Jacobson, *Environmental Decisionmaking and DDT Production at Montrose Chemical Corporation of California*, 4 *ENTERPRISE & SOC’Y* 640, 662 (2003).

<sup>84</sup> See BOSSO, *supra* note 81, at 125-32.

<sup>85</sup> See Kehoe & Jacobson, *supra* note 83, at 661-62.

subcommittee holding hearings on the bill,<sup>86</sup> and—although that bill did not become law—Carson’s suggestions were ultimately adopted in subsequent legislation, including the ban on DDT and the establishment of the Environmental Protection Agency.<sup>87</sup> Finally, and in some ways most interesting, *Silent Spring*’s influence did not stop at the U.S. border: Carson’s work was cited several times in 1963 before the House of Lords, resulting in significant controls on a number of chlorinated

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<sup>86</sup> *Hearings on S. 1250 and S. 1251 Before the S. Comm. on Commerce*, 88th Congress 1 sess. (1963) (Statement of Rachel Carson). In the hearings, both Senators Ribicoff and Gruening compared Carson to Harriett Beecher Stowe. Ribicoff’s opening remarks even echoed Lincoln’s (legendary) remark to Stowe that she was “the little woman who wrote the book that started this Great War!”

“Miss Carson . . . we welcome you here. You are the lady who started all this. Will you please proceed. . . .

There can be no doubt that you are the person most responsible for the current public concern over pesticide hazards.”

Senator Gruening (D-Alaska) also compared her to Stowe (at the close of testimony). In addition, Carson testified before another Senate subcommittee. *See Interagency Coordination in Environmental Hazards (Pesticides): Hearings Before the U.S. Senate Subcommittee on Reorganization and International Organizations of the Committee on Government Operations*, June 4, 1963, 88th Congress 1 sess. (1963) (testimony of Rachel Carson); *see also*, LEAR, *supra* note 82, at 454-55.

<sup>87</sup> *See, e.g., Environmental Defense Fund v. Environmental Protection Agency*, 598 F.2d 62, 72 n.32 (D.C. Cir. 1978) (“One of the most influential publications in the eventual enactment of the 1972 [Federal Water Pollution Control] Act [Amendments] was R. Carson, *Silent Spring* (1962), which devoted considerable attention to the carcinogenic nature of some heavy metals and some chlorinated hydrocarbon pesticides.”); Mary Jane Angelo, *Embracing Uncertainty, Complexity, and Change: An Eco-pragmatic Reinvention of a First-Generation Environmental Law*, 33 *ECOLOGY L. Q.* 105, 155 (2006) (“Rachel Carson’s 1962 book *Silent Spring* first brought to the public’s attention the downside of the seemingly miracle pesticide DDT. . . . Carson’s book led to a public outcry against the threats of DDT and other persistent pesticides.”).

hydrocarbons (e.g., aldrin and dieldrin), and the book is generally credited with provoking environmental legislation in dozens of countries.<sup>88</sup>

How is it that literary works like *The Jungle* and *Silent Spring* can have a deep and direct impact on a process as formalized as the legislative? Or just as interesting, why is it that those works succeeded so well in some areas, but not in others? After all, Sinclair had the Chicago River in flames in 1906, but it took a relatively minor oil fire on the Cuyahoga River in 1969 to spur Congress to take serious action to clean up America's waterways. The answer, I submit, lies in *narrative*—or, more specifically, in an alignment or misalignment of narratives, as the case may be. To that subject, and a new sub-section, we will now turn.

## 5. What Is Narrative?

Roland Barthes once remarked that narrative “is simply like life itself . . . international, transhistorical, transcultural.”<sup>89</sup> This cultural invariance thus invites us to consider what it is about culture or—indeed—human nature that impels the narrative turn. For Hayden White, “[s]o natural is the impulse to narrate, so inevitable is the form of narrative for any report of the way things really happened, that narrativity could appear problematical only in a culture in which it was absent—absent or, as in some domains of Western intellectual and artistic culture,

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<sup>88</sup> See Caula A. Beyl, *Rachel Carson, Silent Spring, and the Environmental Movement*, 2 HORTTECHNOLOGY 272, 275 (1992); BROOKS, *supra* note 79, at 311-12.

<sup>89</sup> ROLAND BARTHES, *IMAGE MUSIC TEXT* 79 (Stephen Heath trans., Noonday 1988) (1977).

programmatically refused.”<sup>90</sup> One domain that has resisted—even if it has not quite refused—narrative accounts of its operation is the law.

Some have suggested that the conceptual coupling of law and narrative is of recent vintage—i.e., that it is just another outcrop from the law and literature vein.<sup>91</sup> That is probably true, if one is thinking purely in terms of volume of legal scholarship. But it is equally true that, at least as far back as the Romans, lawyers have recognized the central importance of facts to legal decisions: *Da mihi facta, dabo tibi ius* (give me the facts, then I will give you the law).<sup>92</sup> Not surprisingly, then, most scholars have focused on “storytelling” in the litigation context, particularly as a strategy for “outsiders” to achieve legal ends that would not be

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<sup>90</sup> Hayden White, *The Value of Narrativity in the Representation of Reality*, 7 CRITICAL INQUIRY 5, 5 (1980).

<sup>91</sup> See, e.g., Peter Brooks, *Narrativity of the Law*, 14 L. & LITERATURE 1, 1 (2002).

<sup>92</sup> Jan M. van Dunne, *Narrative Coherence and Its Function in Judicial Decision Making and Legislation*, 44 AM. J. COMP. L. 463, 466 (1996). Van Dunne goes on to recount a modern equivalent:

In Dutch literature there is the intriguing story told by Ter Haar, the specialist on the “Adat law” of then the Netherlands East Indies, now Indonesia. On one of his field trips in Java, he interviewed the local village chief and judge, and wanted to know the rule of law according to the indigenous law, say, for example on inheritance. The chief looked blank and told him he could not tell him. Ter Haar persisted, and repeated his question. Finally, the village chief said: “Give me a case, then I will tell you what the law is. There was no *Adat* law tradition based on abstract, general rules. Incidentally, in my experience, legal practitioners in Europe will have the same response when asked what the substantive law in a certain field is (e.g., the rule on *force majeure* in contract law).

available solely with reference to rules and logic.<sup>93</sup> But this, it seems to me, cuts the potential for a narrative-based jurisprudence far short and sets an easy target for those critics—like Judge Posner—who hold the law and literature movement to be something of an oversell.<sup>94</sup>

But the biggest detriment, in my view, of cabining narrative legal theory within an advocacy-based “storytelling” framework is that it misses a larger conceptual and practical point: law is a system existing within and along side other systems. It exerts its own force over those systems, but it is also subject to the gravitational forces of the others. The graviton here is narrative. And like all natural forces, narrative is morally neutral. There are good narratives and bad narratives. Narrative is not just a method for the oppressed to receive justice. Hitler slipped his genocidal programs quite easily into the myth of Lohengrin and the related narrative of a glorious and heroic Teutonic past (as well as the post-1918 “stab in the back” theory of Germany’s defeat in World War I). The aim, then, should be to develop an understanding of how narratives work on and within the law generally—not just within the courtroom.

“Narrative” is a slippery concept, one capable of generalization to the point of functional meaninglessness. It is therefore necessary to look carefully at some of the competing definitions offered in (mostly) recent scholarship and then arrive at a definition that will serve as the starting point for further discussion:

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<sup>93</sup> See, e.g., Daniel A. Farber & Suzanna Sherry, *Telling Stories out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (discussing claims of various “storytelling” schools of scholarship).

<sup>94</sup> See RICHARD A. POSNER, *LAW AND LITERATURE* (rev. ed. 1998).



- “a story of events arranged in time sequence and offering some sort of meaning”<sup>95</sup>
- “the organization of material in a chronologically sequential order and the focusing of the content into a single coherent story . . . its arrangement is descriptive rather than analytical and . . . its central focus is on man not circumstances”<sup>96</sup>
- “first a ‘selective appropriation of past events and characters;’ second, a temporal ordering that presents these events with a beginning, a middle and an end; and third, an overarching structure that contextualizes these events as part of an opposition or struggle”<sup>97</sup>
- “a recognizable discourse or operation . . . that . . . can be abstracted from [its] medium [of expression] . . . as in the plot summary”<sup>98</sup>
- a story<sup>99</sup>
- “a metacode, a human universal on the basis of which transcultural messages about the nature of a shared reality can be transmitted”<sup>100</sup>

The common thread here is the basic idea of a “story,” a relational and temporal ordering of *human* events that culminates in “closure.” Although we may refine this a bit as we go on, this is a serviceable definition for most of our purposes.

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<sup>95</sup> David Ray Papke & Kathleen H. McManus, *Narrative and the Appellate Opinion*, 23 LEGAL STUD. F. 449, 449 (1999).

<sup>96</sup> Lawrence Stone, *The Revival of Narrative: Reflections on a New Old History*, 85 PAST & PRESENT 3, 3 (1979).

<sup>97</sup> Mark A. Clawson, *Telling Stories: Romance and Dissonance in Progressive Legal Narratives*, 22 LEGAL STUD. F. 353, 364 (1998) (citing and partially quoting Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Towards a Sociology of Narrative*, 29 L. & SOC’Y REV. 197, 200 (1995)).

<sup>98</sup> Brooks, *supra* note 91, at 1.

<sup>99</sup> Van Dunne, *supra* note 92, at 463.

<sup>100</sup> White, *supra* note 90, at 6.

By further way of groundwork, we must make an additional distinction between categories of narrative falling under the general definitional umbrella. There are, for instance, larger cultural narratives and smaller individual narratives. This is not to suggest that there is a bright line between narratives big and small—to the contrary, I hope to show that one influences the other in ways essential to the making of law. Jonathan Hearn—following Margaret Somers—has developed a useful framework within which to examine narrative forms and how particular narratives interact.<sup>101</sup> For Hearn and Somers, narrative is an antidote to “identity politics,” a way of explaining human experience and interaction without wholesale resort to arbitrary or ambiguous labels like race, ethnicity, class and gender. The focus thus shifts away from labels and onto a picture of the narratives that both individuals and groups participate in and the web of social relationships upon which this picture hangs. Under the Hearn-Somers rubric, narrativity has two aspects: “emplotment” and “evaluative criteria.” Emplotment—unlike, for instance, an “annal,” which is nothing more than a list of dates and events—locates events within a contextual matrix: “To make something understandable in the context of narrative is to give it historicity and relationality. This works for us because when events are located in a temporal (however fleeting) and sequential plot we can then explain their relationship to other events. Plot can thus be seen as the logic or syntax of narrative.”<sup>102</sup> Embedded within emplotments are “evaluative criteria,” which serve

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<sup>101</sup> Jonathan Hearn, *Narrative, Agency, and Mood: On the Social Construction of National History in Scotland*, 44 *COMP. STUD. SOC’Y & HIST.* 745 (2002); Margaret R. Somers, *The Narrative Constitution of Identity: A Relational and Network Approach*, 23 *THEORY & SOC’Y* 605 (1994).

<sup>102</sup> Somers, *supra* note 101, at 617.

to extract the important from the trivial and bring about narrative coherence: “in the face of a potentially limitless array of social experiences deriving from social contact with events, institutions, and people, the evaluative capacity of emplotment demands and enables *selective appropriation* in constructing narratives. A plot must be thematic.”<sup>103</sup>

Thus conceived, narrative is a tool that mediates between raw experience and efforts to articulate that experience by, as Barthes explains it, “ceaselessly substitut[ing] meaning for the straightforward copy of the events recounted.”<sup>104</sup> In other words, narrative is a way to make sense of it all. But making sense is not a one-size-fits-all proposition. To help sort all this out, Hearn and Somers identify four main dimensions to narrativity: ontological, public, metanarrative, and conceptual. Ontological narratives are narratives that individuals use for making sense of their lives, sometimes fabricating new narratives, sometimes investing in existing ones. Hearn explains that this process often involves “appropriating and customizing ‘public narratives’”: those narratives attached to cultural and institutional formations larger than the single individual, to intersubjective networks or institutions, however local or grand . . . .”<sup>105</sup> By way of example, a public narrative might trace the ups and downs of families like the Medici, the Churchills or the Kennedys, the rise and fall of empires, or periods of great prosperity or famine. Metanarratives “are meant in much the sense made popular by Lyotard

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<sup>103</sup> *Id.*

<sup>104</sup> BARTHES, *supra* note 89, at 79.

<sup>105</sup> Hearn, *supra* note 101, at 748.

(1989), as master narratives that encompass much or all of human history—either as master frameworks for explanation, for example, the Individual versus Society, or progressive stories of the rise (and sometimes fall) of Nationalism, Liberalism, Socialism, Globalization, and the like.”<sup>106</sup> The final dimension, the conceptual, concerns the modes of analysis that social scientists conceive in their efforts to understand society, both past and present. As Hearn aptly notes, conceptual “narratives often interpenetrate with metanarratives.”<sup>107</sup> Indeed, Somers’ entire enterprise seems designed to extend the notion of metanarrative to a purely conceptual plane, one “that is more sensitive to human variability, one that recursively appreciates the role of narrativity both in social theory and throughout social life.”<sup>108</sup>

But Somers does not intend to leave things at the level of concept; her ultimate goal is to offer a description of agency that traces social interaction down through the ever-more specific narrative dimensions until ultimately arriving at the ontological level: “So basic to agency is ontological narrativity that if we want to explain—that is, to know, to make sense of, to account for, perhaps even to predict, anything about the practices of social and historical actors, their collective actions, their modes and meanings of institution-building and group-formations, and their

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 748-49.

<sup>108</sup> *Id.* at 749.

apparent incoherencies—we must first recognize the place of ontological narratives in social life.”<sup>109</sup>

It is at this point that Hearn begins to diverge from Somers, if only to supplement her scheme in two key respects. First, Hearn tasks himself with putting forth a more concrete description of how the various dimensions of narrativity interact. He accordingly offers a redefinition of agency, one that strives for a fuller apprehension of how agency works in practice: “for persons, agency is not simply either raw potential for action, or the actual expression of action, but something that is deeply felt as an existential need to act, that is either being frustrated or realized in general. We need another, mediating concept that directs our attention to this middle ground between the potential for and performance of agency, to our dispositions towards agency.”<sup>110</sup> Second, Hearn notes that narratives—in addition to emplotments and evaluative criteria—also typically have protagonists. And it is the protagonist that gives a narrative shape and texture—the features that permit individuals to invest and participate in higher-order narratives. For Hearn, a troping process is at work: “A metaphorical link is forged between individual and collective identities. It is because public and meta-narratives have key protagonists—the nation, the class, the race, the gender, the members of the profession, the leaders and employees of the corporation, the great people of ‘this city’—that individuals identify with them. It is through an isomorphism between the individual and the

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

collective as protagonist that people become attached to narratives.”<sup>111</sup> We can often observe shifting narrative sands by watching protagonists move on and off the stage of great public legal debates as they are embodied in case law. Let’s take as an example the continuing battle over abortion at the United States Supreme Court.

In *Roe v. Wade*, the Court sought to free itself of “emotion” and “predilection” by inquiring into and placing emphasis on “medical and medical-legal history.”<sup>112</sup> The Court considered a range of non-legal materials, including the Hippocratic Oath, the then-current position of the American Medical Association, and advances in medical technology that had reduced the risk of physical harm associated with abortion procedures. Almost inevitably, then, “The Physician” emerges as the protagonist in the drama, a looming presence with whom a woman must consult in weighing all the factors that go into an abortion decision. And indeed, the Court aims its holding as much at a physician’s right to practice as at a woman’s right to privacy: “The decision vindicates the right of the physician to administer medical treatment according to his professional judgment . . .”<sup>113</sup> Within two decades, opponents of abortion mounted an assault on *Roe*. In the Supreme Court’s opinion in that case, *Planned Parenthood of Southeastern Pa. v. Casey*, the physician all but disappears into the background, replaced by “The Woman,” whose “personal decisions,” “right,” and “liberty” are at stake.<sup>114</sup> In some cases, she is a

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<sup>111</sup> *Id.* at 749-50.

<sup>112</sup> 410 U.S. 113, 117 (1973).

<sup>113</sup> *Id.* at 165.

<sup>114</sup> 505 U.S. 833 (1992).

tragic victim, one who might suffer bodily injury from an abusive spouse were she to have only a fettered right to abortion (the statute at issue had, *inter alia*, a spousal notification provision). In the Court's most recent foray into the thicket, *Gonzales v. Carhart*, the woman, who must be protected from a choice that she may come to regret, gives way to the "Unborn Child" (a/k/a "The Infant Life" and "The Baby"), who is on a quest to enter the world but must be protected along the way (by Congress-as-St. George) from a barbaric procedure known as a partial-birth abortion.<sup>115</sup> Interestingly, the physician takes another turn across the boards, but this time in the role of villain, not protagonist. No longer is he the reasonable and compassionate "consultant"; now he is a comrade of Hitler's infamous Angel of Death, Dr. Josef Mengele:

Dr. Haskell went in with forceps and grabbed the baby's legs and pulled them down into the birth canal. Then he delivered the baby's body and the arms—everything but the head. The doctor kept the head right inside the uterus. . . . The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall. The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp. . . . He cut the umbilical cord and delivered the placenta. He threw the baby in a pan, along with the placenta and the instruments he had just used.<sup>116</sup>

These cases illustrate quite well, I think, Hearn's point that a narrative's rhetorical power flows just as much from *who* it is about as *what* it is about.

Hearn goes on to suggest that ontological narratives can bind with higher-order narratives because the higher-order narratives "appeal to us according to how

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<sup>115</sup> 127 S. Ct. 1610 (2007).

<sup>116</sup> *Id.* at 1622-23.

they explain, justify, and resonate with our actual experiences of agency, of empowerment and disempowerment.”<sup>117</sup> This means, I think, that there is much to learn from examining narratives with a “nexus” approach—i.e., to measure narratives at any given time against one another to see whether they are congruent, complementary, or contradictory. For law, this means that lower-order narratives can become actualized only when they align with a higher-order, dominant narrative. This is not to say, however, that the accretive force of lower-order narratives cannot incrementally shift dominant higher-order narratives into an ultimate position of alignment:

Ontological narratives are, above all, social and interpersonal. Although psychologists are typically biased toward the individual sources of narrative, even they recognize the degree to which ontological narratives can only exist interpersonally in the course of social and structural interactions over time. To be sure, agents adjust stories to fit their own identities, and, conversely, they will tailor “reality” to fit their stories. The intersubjective webs of relationality sustain and transform narratives over time. Charles Taylor calls these “webs of interlocution,” others call them “traditions,” I call them “public narratives.”<sup>118</sup>

To illustrate how this plays out in practice, let’s turn to some specific examples, including our two literary works.

## **6. How Narratives Interact to Influence Legislation**

As I already demonstrated, *The Jungle* is composed of a number of mini-narratives, each of which could in theory have led to legislative reforms. Each is as compelling as its fellows, at least in terms of rhetoric and style. And, taken collectively, the overall narrative could have inspired a socialist revolution, a

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<sup>117</sup> Hearn, *supra* note 101, at 750.

<sup>118</sup> Somers, *supra* note 101, at 618.



complete revamping of the legal and social systems in the United States. But this didn't happen. The question is "Why?" The answer is complicated, but it turns on narrative.

First, let's revert to the adulterated food issue and the legislation that *The Jungle* inspired. Federal food and drug regulation was a long time coming in the United States. From the early years of the republic, health and safety regulation was presumed to reside in the states; consequently, most federal officials thought (to the extent that they thought about it at all) that the federal government lacked legislative jurisdiction over the subject matter.<sup>119</sup> But two overlapping narratives were destined to converge in Congress and to clash with the dominant narrative of Nineteenth Century America: *laissez-faire* capitalism.<sup>120</sup> The unlikely narrative partnership arose from, on the one hand, a series of fragmented, yet slowly coalescing, consumer-oriented stories, and from, on the other hand, entrepreneurial businesses trying to elbow their way to a seat at the table of commerce. Young puts it this way:

The attempt to secure a broad national law to protect citizens of the United States from the expanding threat of adulterated food, drink, and drugs began in 1879 and continued through a quarter century, by turns waxing and waning in intensity, before reaching fruition in 1906. During this extended campaign, two kinds of voices urged the necessity for action. The reform voice, sometimes shrill, concerns itself with the welfare of consumers, and, while bemoaning the way in which adulteration cheats the public, puts major stress on hazards to health. The business voice speaks in less frenetic tones, downplays danger, exempts from regulation harmless adulterants sanctioned

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<sup>119</sup> Regier, *supra* note 71, at 4-5 ("[T]here were those who objected on constitutional grounds. They did not wish to have the federal government extend its police power into the states.").

<sup>120</sup> Bailey, *supra* note 71, at 64 ("[T]here were those who were personally interested in the perpetuation of frauds that would be illegal under a pure food statute. . . . [T]his group was the most dangerous, for it fought most persistently and most insidiously.").

by long trade practice, and defines more serious secret adulteration as a morally indefensible economic practice that pinches the consumer's purse and pushes the honorable entrepreneur, unable to compete, to the brink of bankruptcy. The reform and business voices criticize each other, as well as castigating their mutual enemies.<sup>121</sup>

This dance of narratives continued throughout the closing years of the Nineteenth Century, with the partners drawn closer by a confluence of key persons and events. First, it is hard to overestimate the work of Dr. Wiley, who was the chief chemist in the Department of Agriculture from 1883 until 1912. His obituary in *Science* described him as both a tenacious crusader and astute observer of the human condition: “a very mountain among men, a lion among fighters,” a “keen student of human nature,” and a “prince of good fellows.”<sup>122</sup> Wiley was by all accounts not only a solid scientist but as well—and probably more important—a capable bureaucrat and an effective public speaker and writer. He skillfully used the press, and his “Poison Squad,” whose human volunteers experimented on themselves with food preservatives, enlivened the public imagination. But, according to his biographer, Oscar Anderson, Wiley's greatest contribution was his ability to stay the course: “He was the one individual who gave continuity to the struggle for pure food and drugs, the one leader who consistently saw the big picture. Wiley was in large part responsible for the fact that food and drug legislation came when it did and in the form that it did.”<sup>123</sup>

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<sup>121</sup> PURE FOOD, *supra* note 55, at 40-41.

<sup>122</sup> *Quoted in* Regier, *supra* note 71, at 6.

<sup>123</sup> *Quoted in* PURE FOOD, *supra* note 55, at 174.

Wiley's concern with chemical food adulteration and with the quackery associated with patent medicines at some point soon after the turn of the century converged with the interests of the muckraking press. Chief among Wiley's muckraking collaborators was Samuel Hopkins Adams, who penned a widely followed polemic aimed at the patent medicine industry. The first installment of Adams' series appeared in *Collier's* magazine in October of 1905 and ran through February of 1906. While collecting information for his articles, Adams consulted with Wiley and later—when Congress took up the pure food and drug bill—he traveled to Washington to support Wiley's efforts to secure passage of the legislation.<sup>124</sup> But, as Robert Crunden has shown, Adams left Roosevelt, who felt that journalistic hyperbole had poisoned the pure-food issue, unpersuaded.<sup>125</sup> This, coupled with Roosevelt's suspicion of science in general and of Wiley's science in particular, might have kept Roosevelt on the legislative sidelines had the food and drug bill arrived in a vacuum. It did not, however: "Furor over The Jungle, and public identification of meat and food bills as a 'single effort' . . . led Roosevelt to push hard for them both."<sup>126</sup> An unanswered question hovers above here: Why did the meat legislation resonate with Roosevelt in a way that the food and drug legislation did not? An answer may be found—to return to Somers' vocabulary—in Roosevelt's ontological narrative.

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<sup>124</sup> PURE FOOD, *supra* note 55, at 201.

<sup>125</sup> PURE FOOD, *supra* note 55, at 289.

<sup>126</sup> *Id.* at 290.

In April of 1898, the United States declared war against Spain. An expeditionary force decamped for Cuba in June and won two major battles on July 1. Soon thereafter, the Americans devastated the Spanish fleet in Santiago harbor, thereby bringing a quick end to the Spanish-American War. The American forces stayed on for a few weeks and in the process suffered nine times as many casualties from disease as from the period of combat. The reason? In almost every respect, the army was ill-prepared to wage a tropical war. Provisions in general and bad beef in particular formed an area of special complaint, as one mother of a soldier wrote in a letter to President McKinley: “We are living under a generous Government, with a good, kind man at its head willing to give the Army the best possible, and yet thieving corporations will give the boys the worst.”<sup>127</sup>

McKinley, who had already been reading newspaper accounts of the food scandal, quickly appointed a special commission (the “Dodge Commission,” named for its head, General Grenville M. Dodge) to investigate the Cuban food debacle. Based on testimony before that commission, McKinley subsequently established a court of inquiry (the “Wade Court,” named for its head, Major General James Wade) to probe the mounting evidence of malfeasance in the provisioning of beef. In testimony before the Dodge Commission, Major General Nelson A. Miles coined the catch-phrase by which army beef would thereafter be referred:

There was sent to Porto Rico 337 tons of what was known as, or called, refrigerated beef, which you might call embalmed beef, and there was also

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<sup>127</sup> *Id.* at 135 (quoting Exhibit 18, *Food Furnished by Subsistence Department to Troops in the Field*, 56 Cong. 1 sess., Senate Doc. 270 (1898)).

sent 198,508 pounds of what is known as canned fresh beef, which was condemned . . . by nearly every officer whose commands used it.<sup>128</sup>

In his autobiography, *Always the Young Strangers*, the poet Carl Sandburg recalled with little relish his own experiences with “embalmed beef”:

What we called “Red Horse” soon had all our country scandalized with its new name of “Embalmed Beef.” It *was* embalmed. We buried it at sea because it was so duly embalmed with all flavor of life and every suck of nourishment gone from it though having nevertheless a putridity of odor more pungent than ever reaches the nostrils from a properly embalmed cadaver.<sup>129</sup>

Sandburg was not the only soon-to-be public figure to have suffered the torments of embalmed beef. Indeed, the embalmed beef fiasco left a life-long impression on someone crucial to our larger discussion of consumer legislation: Theodore Roosevelt.

Roosevelt was a Lieutenant Colonel at the time of the Spanish American War, which brought him into the limelight as the daring leader of a group of volunteers known as the Rough Riders. Prior to that group’s famed charge up San Juan Hill, Roosevelt was faced with grousing from his troops about canned roast beef. Roosevelt later (by then Governor of New York) recounted these incidents in testimony before the Wade Court. Roosevelt particularly recalled challenging a red-haired Kentuckian that he caught in the act of discarding his meat ration. “I can’t eat the meat,” the soldier explained. Roosevelt retorted, “If you are a baby, you had better not have come to the war. Eat it and be a man,” whereupon the soldier

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<sup>128</sup> *Id.* at 136.

<sup>129</sup> *Id.* at 138 (quoting CARL SANDBURG, *ALWAYS THE YOUNG STRANGERS* 417 (1952)).

attempted to comply and vomited.<sup>130</sup> Roosevelt first suspected that the problem was confined to the delicate stomachs of the volunteers, but he soon found that the regular cavalry also despised canned beef. He even “tried to eat some of it myself when I was hungry and found that I could not,” finding the substance “slimey . . . stringy and coarse, . . . like a bundle of fibers.”<sup>131</sup> And upon returning from the war, the only surprise Roosevelt felt in learning of the raging public debate over “embalmed beef” was that there was any debate at all, given that he had never heard an affirmative argument put forward:

I never, in the cavalry division, or in the few infantrymen with whom I came in contact, from the generals down to the privates, heard anybody speak of the canned roast beef when they did not take it as a matter of course that it was a bad ration.<sup>132</sup>

At the end of the day, the findings of the Dodge Commission and the Wade Court were inconclusive and in many key respects exonerated the packers: yes, there had been problems with the food supplied during the Spanish American War, but no, the packers had not poisoned the beef supplied to the expeditionary force with preservatives. But none of that really mattered. For as Young aptly remarks, “[f]ew Americans, certainly not Theodore Roosevelt, forgot ‘embalmed beef.’” In fact, the embalmed-beef story was simply absorbed into a growing, anti-packer public narrative, as it was into Roosevelt’s own ontological narrative. And there it lay dormant for several years, awaiting an impetus like Upton Sinclair’s *The Jungle*

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<sup>130</sup> *Id.* (quoting *Food Furnished by Subsistence Department*, *supra* note 127, at 1100-07).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 138-39.

to reinvigorate it. Against this backdrop, we can thus see that the 1906 legislation was possible only because of a felicitous alignment of three narratives: Roosevelt's ontological narrative, which contained an "embalmed beef" strand, a public narrative that increasingly portrayed the beef packing industry as corrupt, and a literary narrative that sparked these other narratives to life (in the form of legislation).

## 7. What's Truth Have to Do with It?

If narrative alignments can cause shifts in the law, what is it about a literary narrative that "gets it in the game?" Some have suggested that literature is most effective when it is "truthful." That seems a dubious proposition, given literature's (mostly) fictional nature, but it is not something that we need resolve for purposes of our present discussion. I would submit, rather, that a literary work can effect great change when it is *plausible* under a public narrative that is on the cusp of becoming dominant. In other words, a story doesn't need to be *true* to be an agent of change; mere plausibility is sufficient.<sup>133</sup> This much may reasonably be derived from our discussion of the pure food narratives, but it may be more instructive to discuss an example in which a legislation-inducing narrative is demonstrably false.

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<sup>133</sup> In the next chapter, I will discuss the central importance of coherence to the plausibility of narratives. For now, we can simply register Neil MacCormick's observation that "[n]arrative coherence . . . is a necessary but not a sufficient condition of real-world credibility." MACCORMICK, *supra* note 11, at 227; *cf.* BERNARD S. JACKSON, LAW, FACT AND NARRATIVE COHERENCE 71-76 (1988) (critiquing Bennett and Feldman's account of fact construction at trial). For MacCormick, the difference between a fictional and a non-fictional narrative is that the non-fictional narrative must be "anchored" in reality. But he also notes the warning of others against "too ready reliance on a good story as solidifying belief in 'facts' established by it." And that is exactly the situation in the next example that we will take up: a good story that is anchored, but the anchor is false evidence.

In the middle of a summer's day in 1969, a stretch of the Cuyahoga River passing through Cleveland, Ohio burst into flames. Former Environmental Protection Agency Administrator Carol Browner spoke for many of us of a certain age when she said, "I will never forget a photograph of flames, fire, shooting right out of the water in downtown Cleveland. It was the summer of 1969 and the Cuyahoga River was burning."<sup>134</sup> The photograph in question then stood and still stands as graphic proof that the then-current system of environmental regulation (mostly state/local legislation and common law) was woefully deficient, which militated in favor of sweeping new legislation at the federal level:



Firefighters battle the 1969 Cuyahoga River fire. The blaze symbolized years of environmental neglect and, in turn, helped spur grassroots activism that resulted in a wave of legislation devoted to clean air, clean water, and natural resource protection.<sup>135</sup>

And that legislation quickly followed in the form of, inter alia, the Federal Water Pollution Control Act of 1972.<sup>136</sup> Even today, the image of the fire is

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<sup>134</sup> Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 *FORDHAM ENVTL. L.J.* 89 (2002).

<sup>135</sup> Photograph and caption as they appeared until recently on the National Oceanic & Atmospheric Administration (a subdivision of the Department of Commerce) web site, <http://www.celebrating200years.noaa.gov/events/earthday>.



regularly invoked both as a cautionary tale and as a yardstick against which to measure how far we have come in our efforts to reclaim the environment. For example, as a testament to the continuing iconic status of the Cuyahoga fire, CNN broadcast this report on the thirtieth anniversary of the conflagration:

Three decades ago, an event occurred that would galvanize the U.S. environmental movement: the Cuyahoga River became a river of fire. A nauseating brew of flammable pollutants from steel mills, paint factories, chemical plants and sewage burst into flame. Today, mother ducks swim in the Cuyahoga with their offspring, blue herons have returned to the river banks, and rowing teams practice -- all testament to an astonishing ecological [re]covery.<sup>137</sup>

This contrasts nicely with media reports of the pre-duck era, including this one from the August 1, 1969 issue of *Time*:

Some River! Chocolate-brown, oily, bubbling with subsurface gases, it oozes rather than flows. "Anyone who falls into the Cuyahoga does not drown," Cleveland's citizens joke grimly. "He decays." . . . The Federal Water Pollution Control Administration dryly notes: "The lower Cuyahoga has no visible signs of life, not even low forms such as leeches and sludge worms that usually thrive on wastes." It is also -- literally -- a fire hazard.<sup>138</sup>

A tidy narrative, this. Except that it never happened—at least not like we think it happened. The Cuyahoga was indeed polluted in 1969, as were all American rivers in the rust belt. They had been since the Nineteenth Century. And the Cuyahoga did briefly catch fire on June 22, 1969, as it had from time to time for

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<sup>136</sup> *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 351 U.S. 159, 174-75 (2001) (Stevens, J. dissenting) ("In 1969, the Cuyahoga River in Cleveland, Ohio, coated with a slick of industrial waste, caught fire. Congress responded to that dramatic event, and to others like it, by enacting the Federal Water Pollution Control Act of (FWPCA) Amendments of 1972.").

<sup>137</sup> <http://www.cnn.com/NATURE/9906/22/saving.cuyahoga/>.

<sup>138</sup> *Quoted in* Ohio Historical Society, "Cuyahoga River Fire," Ohio History Central: An Online Encyclopedia of Ohio History. <http://www.ohiohistorycentral.org>.

over a hundred years.<sup>139</sup> But the fire, which arose when sparks from a passing train ignited a small oil slick and debris, was relatively minor, was quickly extinguished, and caused only about \$50,000 in damage to two train trestles.<sup>140</sup> How can that be, one might ask, especially in light of the famous photograph of a wall of flames, a towering plume of smoke, and valiant firefighters pouring tens of thousands of gallons of water onto the inferno? The answer is simple. That’s a photograph of the 1952 fire, a serious fire that caused over \$1.5 million in damage.<sup>141</sup>

Why is it, then, that the 1969 fire provoked such outrage when its much more significant predecessors like the 1952 fire (or Sinclair’s fictional fires on the Chicago River in the early 1900s) hardly registered? Jonathan Adler suggests—correctly, I think—that it was all a matter of timing:

The 1969 fire was a catalyst for change because it was the wrong event at the right time. It was neither an impressive fire, nor one with a significant ecological impact. It may have brought greater attention to the serious environmental problems of the time, but it did not represent a continuing decline in water quality, let alone worsening environmental degradation nationwide. Contrasted with the relevant [sic] indifference to burning rivers in decades past, the public outcry over the 1969 fire signified that increasingly wealthy Americans now wanted to devote greater resources to environmental protection — and they likely would have even in the absence of federal regulations.<sup>142</sup>

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<sup>139</sup> *Id.* (“Fires occurred on the Cuyahoga River in 1868, 1883, 1887, 1912, 1922, 1936, 1941, 1948, and in 1952.”).

<sup>140</sup> Adler, *supra* note 134, at 96.

<sup>141</sup> Adler, *supra* note 134, at 98; Ohio Historical Society, *supra* note 138.

<sup>142</sup> Jonathan H. Adler, *Smoking Out the Cuyahoga Fire Fable: Smoke and Mirrors Surrounding Cleveland*, NAT’L REV. ONLINE (June 22, 2004), <http://www.nationalreview.com/adler/adler200406220845.asp>; *see also* Adler, *supra* note 134, at 139-40.

Put differently, a public environmental narrative sufficient to flower into legislation in the presence of a catalyst like the 1969 fire did not exist prior to the 1960s. And even then, the putative narrative catalyst was not itself sufficient without some dressing up—some supplemental narrativizing—as we have seen.<sup>143</sup>

## 8. Whose Story to Believe?

If the Cuyahoga example shows that a narrative must be fleshed out (from time to time with fiction) to have legal consequences, sometimes the issue is one of contradictory narratives competing for legal recognition. *Silent Spring* presents one such case. As we already noted, the book challenged one of the prevailing myths of the Industrial Revolution and its successors: the notion of technological progress. It came as no surprise, then, that the chemical industry and its allies deployed that prevailing narrative as a block against *Silent Spring*'s potential to influence legislation. Monsanto Chemical Company, which was a major producer of DDT, published a “fable” that parodied the introduction to *Silent Spring* and presented an apocalyptic vision of a world overrun with insects.<sup>144</sup> An industry spokesman, Robert White-Stevens, invoked a typical image of devolution: “If man were to faithfully follow the teachings of Miss Carson, we would return to the dark ages, and

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<sup>143</sup> As Hearn has already reminded us, narratives usually have protagonists. The Cuyahoga had some help in achieving this status, at least in part, through the efforts of Randy Newman:

Cleveland, even now I can remember  
'Cause the Cuyahoga River  
Goes smokin' through my dreams  
Burn on, big river, burn on

RANDY NEWMAN, *Burn On, on SAIL AWAY* (Warner Bros. Records 1972).

<sup>144</sup> See JOHN WARGO, *OUR CHILDREN'S TOXIC LEGACY: HOW SCIENCE AND LAW FAIL TO PROTECT US FROM PESTICIDES* 80 (2d ed. 1998).

the insects and diseases and vermin would again inherit the earth.”<sup>145</sup> And even government officials warned of crops that could not be grown, staples that could not be maintained in abundant supply, and public health standards that could not be maintained in the absence of pesticide use.<sup>146</sup> Again, all this seems expected.

But it is not all. The most virulent criticism of *Silent Spring* came packaged in two of the era’s most dominant public narratives: gender differences and communism.<sup>147</sup> Former Secretary of Agriculture Ezra Taft Benton is “credited” with launching these lines of attack in a letter to Dwight Eisenhower, in which he wondered “Why a spinster with no children was so concerned with genetics?” The answer: she was “probably a Communist.”<sup>148</sup> As Linda Lear explains, Benton’s opening volley had serious consequences in the court of public opinion: “The question reflected increasing attention on Carson’s gender by those who commented on *Silent Spring* and its reserved author. The press was inordinately interested in Carson’s marital status. She was, after all, physically attractive, quiet, and feminine.”<sup>149</sup> In the end, Carson’s sex came to color every argument against her scientific conclusions:

Finally, mixed in with all the other arguments was Carson’s gender. She kept cats and loved birds. She was a nature writer, a mystic, a devotee of the balance of nature. Her arguments were exaggerations born of hysteria at

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<sup>145</sup> *Quoted in id.* at 81.

<sup>146</sup> *Id.* (quoting Secretary Freeman).

<sup>147</sup> The feminine public narrative was radically revised over the course of the Twentieth Century. It is difficult to overestimate the impact that these revisions had on law. More on that will follow.

<sup>148</sup> LEAR, *supra* note 82, at 429.

<sup>149</sup> *Id.*

worst and an overly sensitive nature at best. Reason had been sacrificed to sentiment. Behind these charges was understandable resentment of Carson's aggressive attack on the scientific establishment and on male dominated technology. Among her other errors, Miss Carson had overstepped her place.<sup>150</sup>

Carson's narrative ultimately swamped those of her critics, but her struggle is in many respects representative. In the next chapter, we will look more closely at narrative combat and how the winners come to be institutionalized, sometimes for good, sometimes for ill, and sometimes at great cost. For now, it is enough that we remain both open to and on guard against narrative's raw power, especially where that power is actuated through forms in which the human dimension has either atrophied or become wholly stereotyped. And we must be mindful, too, that narratives exist in a web-like complex; advancing one can summon up others far different from those predicted or intended, as Rachel Carson and her acolytes learned. On that note, I close this section with an appropriate admonishment from Robert Penn Warren's *All the King's Men*:

The world is all of one piece. . . . [T]he world is like an enormous spider web and if you touch it, however lightly, at any point, the vibration ripples to the remotest perimeter and the drowsy spider feels the tingle and is drowsy no more but springs out to fling the gossamer coils about you who have touched the web and then inject the black, numbing poison under your hide. It does not matter whether or not you meant to brush the web of things. Your happy foot or your gay wing may have brushed it ever so lightly, but what happens always happens and there is the spider, bearded black and with his great faceted eyes glittering like mirrors in the sun, or like God's eye, and the fangs dripping.<sup>151</sup>

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<sup>150</sup> *Id.* at 430.

<sup>151</sup> ROBERT PENN WARREN, *ALL THE KING'S MEN* 188-89 (Bantam Books 1971) (1946).

## II. Institutionalizing Narratives

### Introduction

In the last chapter, we observed how narratives interact with one another and with legal institutions to influence legislation. Now, we'll move out onto a broader plane to consider the similar—but not fully congruent—question of how narratives figure in common-law decisions. This will allow us to examine the process by which narratives can actually *become* (not just influence) legal rules. This process of narrative institutionalization is complicated, but we can tease out at least some of the knots by looking both at specific case-law examples and at useful theoretical accounts from inside and outside the law. As a launching point, it may prove helpful to consider one of the most common ways in which legal philosophers account for the application of law: the “normative syllogism,” the major premise of which is a universal and normative rule of law, the minor allegations or findings of fact.<sup>1</sup>

#### 1. Narrative and the Normative Syllogism

In his *Law, Fact and Narrative Coherence*, Bernard Jackson offers a narrativistic account of law that challenges the notion that legal decision-making and justification can properly proceed via deductive reasoning.<sup>2</sup> The thrust of Jackson's argument is two-fold. First, he asserts a “strong” objection to the traditional view based on a structuralist linguistic argument that reference is merely a pragmatic truth-claim. For example, a witness's testimony does not actually “refer” to past events; rather, that testimony is a present, rhetorical construct

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<sup>1</sup> See, e.g., Neil MacCormick, *Notes on Narrativity and the Normative Syllogism*, 4 INT'L J. SEMIOTICS L. 163, 168-69 (1991).

<sup>2</sup> See BERNARD S. JACKSON, *LAW, FACT AND NARRATIVE COHERENCE* 37-60 (1988).

designed to convince others that it corresponds to “what really happened.”

Testimonial evidence is therefore never more than an unverifiable claim to truth.

Jackson recognizes that this represents “a highly skeptical epistemology,” and he appears to offer it as little more than a provocative throw-away.

Second, he asserts a “weak” objection that does not entail wholesale acceptance of the radical conclusions (e.g., rejection of any correspondence theory of truth) inherent in the “strong” objection. The weak objection turns not on the relationship between present testimony and past events but between what a legislator has pronounced and facts that are subsequently adjudicated. His essential point is that there is an inevitable mismatch between the facts adjudicated and the law applied. This is so, he argues, because laws nowadays are expressed in universal and abstract terms that do not refer to particular cases; rather, they do no more than tie abstract legal conditions to specified legal consequences. Thus, according to Jackson, there is a fatal flaw in the traditional mode of legal reasoning because the major premise cannot be said to “refer” to the facts in the minor premise, for the simple reason that the major premise exists first in time.

As Neil MacCormick has effectively demonstrated, this criticism is misplaced, for the following reason. Jackson takes as his working example the classical textbook case of Socrates and blasphemy:

All persons who blaspheme the gods are liable to be executed;

Socrates has blasphemed the gods;

Therefore Socrates is liable to be executed.<sup>3</sup>

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<sup>3</sup> *Id.* at 37.

The problem, as Jackson sees it, is that the major premise, as a universal, does not refer to any particular case, yet the minor one does. How then, can the former authorize a conclusion as to the latter without risking violence to the Rule of Law, in particular its insistence on prospectivity?<sup>4</sup> MacCormick concedes that there is a problem here, but he identifies it as one of “sense,” not “reference.”<sup>5</sup> Thus, in the adjudicative context, the Rule of Law is upheld so long as the dictate of the major premise and the facts of the case at hand are used in the same sense. This presents, then, not an irresolvable problem of reference, but a mandate to *interpret* the standards set forth in the major premise and to *classify* the facts set forth in the minor premise in a manner that ensures that an adverse conclusion arises only if the general and the particular are used in the same sense.<sup>6</sup> To return to Jackson’s example, Socrates is liable to be executed only if his particular conduct (“blasphemed the gods”) qualifies as an instance of the general conduct proscribed (“blasphemed the gods”), with the operative phrase, “blasphemed the gods,” used in the same sense in each premise.

Despite this problem in Jackson’s criticism of the normative syllogism, his predicate assumptions involving the narrative roots of law—whether expressed in

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<sup>4</sup> Jackson’s concern here is with one of the eight requirements of the Rule of Law as enunciated by Lon Fuller. See LON L. FULLER, *THE MORALITY OF LAW* 39 (rev. ed. 1969) (“Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule . . . that came into existence only after he had acted.”).

<sup>5</sup> NEIL MACCORMICK, *RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING* 57-59 (2005) [hereinafter *RHETORIC AND THE RULE OF LAW*].

<sup>6</sup> For a thorough discussion of classification/categorization, see ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 17-109 (2000).



legislation or in common-law rules—are well taken and signal a path along which we may discover how narratives become institutionalized as laws. In especial, we may learn a great deal from what Jackson tells us about the narrative form of rules:

In almost any collection of ancient or medieval laws, the predominant form of expression we find is that commonly called by legal historians the “casuistic” form—the conditional sentence in which the protasis expresses a hypothetical situation (the conditioning facts), while the apodosis states the conditioned consequences. . . . The following verse from the bible is typical: “If a thief is found breaking in, and is struck so that he dies, there should be no blood guilt for him . . .” . . . The assumption is often made that the origin of the pattern reflects actual adjudication: a case of this kind actually came up for decision, and as a result a rule was stated applying to everyone.<sup>7</sup>

Jackson expresses some doubt about this final proposition—at least as a universal—but for our purposes it doesn’t matter whether a narrative embedded in a rule is adjudicative, literary, or of some other stripe. For the question that we want to answer turns not the origin of law-producing narratives, but rather on how narratives come to produce laws at all.

## 2. The Narrative Nudge

We can look first to Justice Holmes, who understood that logic and narrative are not simply labels for competing paradigms: they are instead complementary facets of a single enterprise. In *The Common Law*, he noted a “paradox” inherent in the development of the law that remains worthy of consideration:

In form its growth is logical. The official theory is that each new decision follows syllogistically from existing precedents. But just as the clavicle in the cat only tells of the existence of some creature to which a collar-bone

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<sup>7</sup> JACKSON, *supra* note 2, at 97-98. Anthony Amsterdam and Jerome Bruner make a similar point in arguing that each category of common-law writ is essentially a plot précis: “the very writs that defined causes of action at common law (quare clausum fregit and so forth) were rather like plot summaries of the founding narratives of various myth-like genres.” AMSTERDAM & BRUNER, *supra* note 6, at 112.

was useful, precedents survive in law long after the use they once served is at an end and the reason for them has been forgotten. . . . On the other hand, in substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. . . . Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and our traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.<sup>8</sup>

By locating legal developments in “public policy” and in “adopting new principles from life,” Holmes in some sense anticipates Jackson’s narrative theory of rule formation and emendation. For what are life-principles if not compact expressions of life-stories? A couple of specific examples, followed by a more general discussion suggested by Zenon Bankowski and Martha Nussbaum’s readings of *Antigone*, should help us close this loop.

The appellate opinions in the famed case of *Hynes v. New York Central Railway Company* are instructive. At the intermediate appellate level, the court began its opinion with a brief description of the case as an “action . . . for alleged negligence, in causing the death of plaintiff’s intestate, by being struck by electric wires which fell from a cross-arm of a pole maintained by defendant along its railroad . . .,” followed by a rote statement of facts:

Decedent, a boy 16 years old, with two other boys, had swum across this ship canal from the Manhattan bank on July 8, 1916. He had climbed upon defendant’s wooden-faced bulkhead, and finally walked out on a springboard projecting over the water. It was a plank 2” x 12” spiked down on the bulkhead, from which it ran back about 4 feet, so that the shore end was let into the soil. About 11 feet overhung the water. Its front end was about 3 feet above high tide. As Decedent was about to dive from the end, the wires

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<sup>8</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881), excerpted in STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY* 731 (2d ed. 1989).

came down. One struck him; others, falling on the plank, broke it off at the bulkhead; deceased was thrown into the water and died. The front of the plank protruded beyond defendant's boundary line from 3 to 6 feet. Who had manually placed this springboard did not appear. It had been there about three years. Employees of defendant and others had used it. On the land side defendant had maintained a fence along its right of way. Warnings that it was not a thoroughfare had also been posted along the railroad track, near this waterfront.<sup>9</sup>

From this pedestrian factual recitation, Putnam, J. quickly disposes of the case by agreeing with the trial court's holding that

The plank was part of defendant's property, and was so annexed as to become part of the realty. Decedent's entry upon defendant's close from the waters of the ship canal was an unlawful intrusion. On this plank, he was still a trespasser—even when he stepped outward across defendant's technical boundary line and stood near the outer end, over the waters of the ship canal.<sup>10</sup>

As justification for this conclusion, Putnam, J. offers a series of rules designed to defeat the argument that the plank—or at least the part upon which Hynes was standing when struck by the wires—was not actually part of the railroad's property because it extended out over the property line. This series includes (1) the ancient rule that tree branches overhanging a property line belong to the owner of the tree, (2) the rule that the owner of a wharf or pier that runs out beyond the proper exterior line has a good right against trespassers, and (3) the rule that possession—even without title—is good against a trespasser.<sup>11</sup> As a consequence of these rules, Hynes was a trespasser and, therefore, the railroad owed him no duty of care upon which to predicate a negligence claim.

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<sup>9</sup> Hynes v. New York Cent. R. Co., 176 N.Y.S. 795, 795 (N.Y. App. Div. 1919).

<sup>10</sup> *Id.* at 796.

<sup>11</sup> *Id.* at 796-97.

This holding is deeply dissatisfying, principally because there is a misalignment of what Jackson calls “narrative frameworks.”<sup>12</sup> In other words, one intuitively knows that the rule about tree branches arose from facts very different from those presented in *Hynes* (most often, to hazard a guess, having to do with neighbors fighting over the ownership of fruit on branches hanging over a property line). On subsequent appeal, Justice Cardozo recognized that blindness to the narratives in which abstract rules are grounded can work an injustice no less than a refusal to hear the full narrative offered at trial. Accordingly, Cardozo begins his opinion with a very different narrative, one putting life to the abstractions of the lower-court opinion (notice, e.g., in the following excerpt that the “plaintiff’s intestate” becomes “a lad of 16,” the “plank” becomes a “springboard,” the “deceased . . . struck and thrown into the water” becomes a “diver . . . flung . . . from the shattered board and plunged . . . to his death.”):

On July 8, 1916, Harvey Hynes, a lad of 16, swam with two companions from the Manhattan to the Bronx side of the Harlem River, or United States Ship Canal, a navigable stream. Along the Bronx side of the river was the right of way of the defendant, the New York Central Railroad, which operated its trains at that point by high-tension wires, strung on poles and cross-arms. Projecting from the defendant’s bulkhead above the waters of the river was a plank or springboard, from which boys of the neighborhood used to dive. One end of the board had been placed under a rock on the defendant’s land, and nails had been driven at its point of contact with the bulkhead. Measured from this point of contact the length behind was 5 feet; the length in front 11. The bulkhead itself was about 3 1/2 feet back of the pier line as located by the government. From this it follows that for 7 1/2 feet the springboard was beyond the line of the defendant’s property and above the public waterway. Its height measured from the stream was 3 feet at the bulkhead, and 5 feet at its outermost extremity. For more than five years swimmers had used it as a diving board without protest or obstruction.

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<sup>12</sup> JACKSON, *supra* note 2, at 116.

On this day Hynes and his companions climbed on top of the bulkhead, intending to leap into the water. One of them made the plunge in safety. Hynes followed to the front of the springboard, and stood poised for his dive. At that moment a cross-arm with electric wires fell from the defendant's pole. The wires struck the diver, flung him from the shattered board, and plunged him to his death below.<sup>13</sup>

Once Cardozo completes the factual picture, he turns to matters of logic, first by showing the absurdity of the lower court's decision to draw an outcome-determinative distinction between a boy standing on the end of the springboard and one standing directly beneath it in the water:

The defendant was under a duty to use reasonable care that bathers swimming or standing in the water should not be electrocuted by wires falling from its right of way. But to bathers diving from the springboard, there was no duty, we are told, unless the injury was the product of mere willfulness or wantonness--no duty of active vigilance to safeguard the impending structure. Without wrong to them, cross-arms might be left to rot; wires highly charged with electricity might sweep them from their stand and bury them in the subjacent waters. In climbing on the board, they became trespassers and outlaws. . . . Rights and duties in systems of living law are not built upon such quicksands.<sup>14</sup>

But Cardozo does not end with this *reductio ad absurdum*. He constructs yet another argument, this one buttressed with a pair of hypothetical mini-narratives, one revealing a logical gaff in the lower court's opinion, the other revealing the absence of a causal connection between the facts proven (*viz.*, Hynes was killed by the railroad's improperly maintained wires) and the defense offered (*viz.*, because Hynes was standing on the plank, he was a trespasser to whom the railroad owed no duty of care):

Bathers in the Harlem River on the day of this disaster were in the enjoyment of a public highway, entitled to reasonable protection against destruction by

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<sup>13</sup> Hynes v. New York Cent. R. Co., 231 N.Y. 229, 230-32 (N.Y. 1921).

<sup>14</sup> *Id.* at 232-33.

the defendant's wires. . . . A plane of private right had been interposed between the river and the air, but public ownership was unchanged in the space below it and above. . . . Duties are thus supposed to arise and to be extinguished in alternate zones or strata. Two boys walking in the country or swimming in a river stop to rest for a moment along the side of the road or the margin of the stream. One of them throws himself beneath the overhanging branches of a tree. The other perches himself on a bough a foot or so above the ground. Both are killed by falling wires. The defendant would have us say that there is a remedy for the representatives of one and none for the representatives of the other. We may be permitted to distrust the logic that leads to such conclusions.

There will hardly be denial that a cause of action would have arisen if the wires had fallen on an aeroplane proceeding above the river, though the location of the impact could be identified as the space above the springboard. The most that the defendant can fairly ask is exemption from liability where the use of the fixture is itself the efficient peril. That would be the situation, for example, if the weight of the boy upon the board had caused it to break and thereby throw him into the river. There is no such causal connection here between his position and his injuries.<sup>15</sup>

Cardozo concludes with a brief discussion of the limits of rules in hard cases.<sup>16</sup> Although he does not use the phrase “hard cases,” I think he is concerned with both senses of the phrase as we currently use it (i.e., the older usage that refers to cases in which application of a legal standard would lead to particular hardship on a losing party and the Dworkian usage that refers to cases posing particular difficulties of interpretation).<sup>17</sup> And this concern intersects with that of Jackson and Holmes, in that it exhorts judges to recall the animating force—the narratives—that gave birth to particular laws and to be keenly attuned to changes in public narratives. In *Hynes*, the narrative roots of rules are of critical importance in two respects: in

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<sup>15</sup> *Id.* at 234-35.

<sup>16</sup> Of course, Cardozo's decision remains something of a “gut” (rather than tightly reasoned) reaction to the facts of the case. Judge Posner has criticized Cardozo on this count. RICHARD POSNER, *CARDOZO: A STUDY IN REPUTATION* 53 (1990) (stating that Cardozo gives “no reason” for the *Hynes* decision).

<sup>17</sup> See RHETORIC AND THE RULE OF LAW, *supra* note 5, at 49-52.

the selection of the rule of decision (is the tree-branch doctrine really pertinent?) and in the adaptation or extension of existing rules to fit a new situation (has the public narrative that valorizes property rights above all shifted?):

There are times when there is little trouble in marking off the field of exemption and immunity from that of liability and duty. Here structures and ways are so united and commingled, superimposed upon each other, that the fields are brought together. In such circumstances, there is little help in pursuing general maxims to ultimate conclusions. They have been framed *alio intuitu*. They must be reformulated and readapted to meet exceptional conditions. Rules appropriate to spheres which are conceived of as separate and distinct cannot both be enforced when the spheres become concentric. There must then be readjustment or collision.<sup>18</sup>

### 3. When Narratives Clash

What Cardozo has identified here is the dilemma posed when narratives clash, a subject that both Zenon Bankowski and Martha Nussbaum have treated effectively in the context of *Antigone*.<sup>19</sup> To dress the stage, I offer a brief summary of the play's plot. The play begins in *mediis rebus*. Oedipus's sons, Eteocles and Polynices, had agreed to rule Thebes by turns. Eteocles breaches the agreement and remains in power. Polynices flees to Argos and there raises a force with which he attacks Thebes. In the ensuing battle, both brothers are killed. Creon, the brothers' uncle, reluctantly takes the throne. His first official act is to deny funeral rites to Polynices, on the ground that he is an enemy of the city. But Antigone, the brothers' sister, disregards this decree in favor of what she sees as a superior family obligation. Creon sentences her to death by entombment, even though she is

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<sup>18</sup> *Id.* at 235-36.

<sup>19</sup> ZENON BANKOWSKI, *LIVING LAWFULLY: LOVE IN LAW AND LAW IN LOVE* 28-43 (2001); MARTHA NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* 51-82 (1986).

betrothed to Creon's son, Haemon. The blind prophet Tiresias ultimately convinces Creon of his folly, but it is too late: Antigone has already hanged herself, Haemon has committed suicide upon finding her dead, and Euridice, Haemon's mother and Creon's wife, then kills herself as well.

In law and literature courses, *Antigone* is typically read as a dramatization of the systemic clash of two legal regimes: positive law and natural law. As Bankowski notes, Nussbaum's reading differs from the traditional readings in that she does not view Antigone as an unalloyed heroine or the conflict simply as one between different orders of laws. Thus, in Nussbaum's telling—as with that of Hegel, to which she is in part reacting—Antigone is also flawed. In his earlier reading, Hegel had cast the drama as a dialectical struggle between the family and state, with Creon standing for the state, Antigone for the family. Under this view, each is bound to the other, right in his or her own terms but wrong in those of the other's system.<sup>20</sup>

Both Creon and Antigone clearly articulate what each sees as a cardinal virtue. Creon believes that concern for the civic well being is paramount:

And whoever places a friend  
above the good of his own country, he is nothing:  
I have no use for him. Zeus my witness,  
Zeus who sees all things, always—  
I could never stand by silent, watching destruction  
march against our city, putting safety to rout,  
nor could I ever make that man a friend of mine  
who menaces our country. Remember this:  
our country *is* our safety.  
Only while she voyages true on course  
Can we establish friendships, truer than blood itself.  
Such are my standards. They make our city great.

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<sup>20</sup> BANKOWSKI, *supra* note 19, at 29.



Closely akin to them I have proclaimed,  
just now, the following decree to our people  
concerning the two sons of Oedipus.  
Eteocles, who died fighting for Thebes,  
excelling all in arms: he shall be buried,  
crowned with a hero's honors, the cups we pour  
to soak the earth and reach the famous dead.

But as for his blood brother, Polynices,  
who returned from exile, home to his father-city  
and the gods of his race, consumed with one desire—  
to burn them roof to roots—who thirsted to drink  
his kinsmen's blood and sell the rest to slavery:  
that man—a proclamation has forbidden the city  
to dignify him with burial, mourn him at all.  
No, he must be left unburied, his corpse  
carrion for the birds and dogs to tear,  
an obscenity for the citizens to behold!

These are my principles. Never at my hands  
will the traitor be honored above the patriot.  
But whoever proves his loyalty to the state—  
I'll prize that man in death as well as life.<sup>21</sup>

Creon is well aware of the evaluative terms with which fifth-century Athenians staked out the world of praxis: good/bad, pious/impious, just/unjust, friend/foe and the like. According to Nussbaum, this terminology would have been familiar to and employed by the spectators of the play. Moreover, the spectators would have understood that these terms can conflict with one another (friendship may require one to be unjust) and even a single virtue may place different demands in different contexts (justice of the city may conflict with justice of the dead).<sup>22</sup> One would expect, therefore, the play to open with Creon suspended in an irresolvable

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<sup>21</sup> SOPHOCLES, *ANTIGONE*, in *THE THREE THEBAN PLAYS* (Robert Fagles trans., Penguin Classics 1984), at ll. 203-35.

<sup>22</sup> I'll turn more directly in the next chapter to the question of how members of particular groups interpret what they see, hear, or read.

tension between his duties as ruler and as relative. But Creon appears to have no conflict at all, no painful tension and deliberation. How is this, Bankowski asks? The answer lies in the passage I just quoted: all virtues are subordinated to the welfare of the city. Thus what is good, pious and just is that which serves the welfare of the city.

Though to our eyes Antigone makes morally superior choices, she is not wholly blameless. Her views are as one-sided and narrow as Creon's:

It wasn't Zeus, not in the least,  
Who made this proclamation—not to me.  
Nor did that Justice, dwelling with the gods  
beneath the earth, ordain such laws for men.  
Nor did I think your edict had such force  
that you, a mere mortal, could override the gods,  
the great unwritten, unshakable traditions.  
They are alive, not just today or yesterday:  
they live forever, from the first of time,  
and no one knows when they first saw the light.  
These laws—I was not about to break them,  
not out of fear of some man's wounded pride,  
and face of the retribution of the gods.  
Die I must, I've known it all my life—  
your death-sentence ringing in my ears.  
And if I am to die before my time  
I consider that a gain. Who on earth,  
alive in the midst of so much grief as I,  
could fail to find his death a rich reward?  
So for me, at least, to meet this doom of yours  
is precious little pain. But if I had allowed  
my own mother's son to rot, an unburied corpse—  
that would have been an agony! This is nothing.  
And if my present actions strike you as foolish,  
let's just say I've been accused of folly  
by a fool.<sup>23</sup>

At bottom, Antigone is as guilty as Creon of what Nussbaum calls “ruthless simplification.” She, too, selects only those facts that produce the outcomes she

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<sup>23</sup> *Id.* at ll. 499-525.

desires under the rules she valorizes. To hear her talk, as Bankowski observes, we would not know that there had been a war, caused by one of her brothers. All we know is that her brother has been desecrated and that cannot stand *as a matter of family*.

What does all this mean for the law generally and for our discussion in particular? First, I would suggest that we are presented with more than a simple clash of legal systems. It is, rather, a clash of narratives (when Antigone refers to “the great unwritten, unshakeable traditions” she is—as Somers has taught us—using a phrase that is synonymous with “public narratives”) born of overweening, false piety. This uber-piety leads to legal formalisms that result in disastrous consequences. Second, and more important, Creon and Antigone offer up what prove to be impenetrable ontological narratives. The problem here is that—because he is the sole arbiter of the law—Creon’s ontological narrative *is* the law (and in some sense the only public narrative, or at least the only one capable of receiving official sanction). But for positive law to be more than a matter of taste, bias or whim, it must be permeable enough to allow the interpenetration of other narratives. We will return to this issue in greater detail when we more fully take up the question of how narratives become institutionalized in ways congenial to democracy. For now, though, it is enough to recognize the mischief that arises when a hermetic ontological narrative is coterminous with law. That is, in the public sphere, a dominant narrative consistent with the Rule of Law must bear receptors that allow the addition of new narrative material. It must, in Bankowski’s terms, “bring[] the

outside in.”<sup>24</sup> For example, in the case of *Antigone*, if Antigone’s narrative could have even slightly injected itself into Creon’s, perhaps both could have been satisfied by allowing Polynices to be buried, but beyond the city walls.<sup>25</sup>

#### 4. Changes in Narrative, Changes in Law

Although legal narratives often directly clash (as in *Antigone*), there are many cases in which the intersections are much more oblique and multifarious—messy even. In substantial part, this is because common laws are made via a process that is somewhat like that by which literature is made and very much like that by which history (in the sense of historical writing) is made. Depending on one’s

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<sup>24</sup> Zenon Bankowski, *Legal Reasoning from the Inside Out*, in *STRESSING LEGAL DECISIONS* 27-46 (Tadeusz Biernat et al. eds., 2003). In this piece, Bankowski discusses, among other things, Nussbaum’s recent work on narrative in legal proceedings. Nussbaum has argued that current death-penalty cases insufficiently account for defendants’ overall life-narratives. See Martha Nussbaum, *Equity and Mercy*, in *SEX AND SOCIAL JUSTICE* (1999). Interestingly, Robin West has made the (somewhat) opposite (but not inconsistent) point—namely, that too much narrative appears in death-penalty cases at the U.S. Supreme Court level because they often recite grisly, yet legally irrelevant, details of crimes tacitly to justify affirmance of death-penalty convictions. See ROBIN WEST, *NARRATIVE, AUTHORITY, & LAW* 428-39 (1993). In any event, the Supreme Court acknowledges that both logic and narrative are essential threads in the adjudicative fabric:

In sum, the accepted rule that the prosecution is entitled to prove its case free from any defendant’s option to stipulate the evidence away rests on good sense. A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story’s truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.

Old Chief v. United States, 519 U.S. 172, 189 (1997).

<sup>25</sup> NUSSBAUM, *supra* note 19, at 55.

orientation that perhaps is or is not a bold statement, but it is one that I think I can in the main defend. To push us down this avenue, let's pick up with one of the themes with which we ended the last chapter: the growing (some times grudging) institutional receptiveness to feminine narratives throughout the Twentieth Century. Two of the largest struggles of that period involved pro-business, *laissez-faire* capitalist narratives, on the one hand, and anti-feminist, paternalistic narratives on the other. The two crossed from time to time, often to weird effect. For instance, in *Lochner v. New York*, the United States Supreme Court struck down a state statute providing that no employee in a bakery could work more than sixty hours in one week or ten hours in one day.<sup>26</sup> The reason? The statute interfered with "the freedom of master and employee to contract with each other . . ."<sup>27</sup> Three years later, the same court was asked to pass on the constitutionality of another state law limiting to ten the number of hours per day that a woman could work in a laundry.<sup>28</sup> Same result? Of course not. And why not? To protect women from the rapacious instincts of men *and* to insure the continued well-being of the entire human race!

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical wellbeing of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race. Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior

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<sup>26</sup> 25 S. Ct. 539 (1905).

<sup>27</sup> *Id.* at 546.

<sup>28</sup> *Muller v. Oregon*, 208 U.S. 412 (1908).

physical strength, and this control in various forms, with diminishing intensity, has continued to the present. . . . It is impossible to close one's eyes to the fact that she still looks to her brother, and depends upon him. Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions -- having in view not merely her own health, but the wellbeing of the race -- justify legislation to protect her from the greed, as well as the passion, of man. . . . The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future wellbeing of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her.<sup>29</sup>

We'll see how the paternalistic narrative that underlies *Muller* began to be erased over time, but first, a word or two on a few assumptions that I'll make regarding trial practice and fact-finding may prove helpful.

In the United States, most crimes are defined by state statute, many of which are simply codifications of the common law. This is especially so with statutes pertaining to acts that have been considered crimes throughout history—e.g., murder, as opposed to, say, wire fraud or internet gambling. Thus, a person charged with a particular crime comes to trial under the terms of an indictment that identifies the acts allegedly committed and the statute(s) allegedly violated. Statutes also broadly lay out available defenses, as well as the elements necessary to prove each defense. At trial, both the prosecution and defense offer testimonial and physical evidence in support of or in opposition to the competing positions. At the close of

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<sup>29</sup> *Id.* at 421-23.

evidence, the judge instructs the jury as to the law, and the jury retires to deliberate, weigh evidence, and (unless deadlocked) make a determination of guilt or non-guilt.

Plainly, this architecture offers many outcroppings upon which the various participants may hang narratives, a fact that has been well-enough documented by others and that I will not belabor here.<sup>30</sup> Suffice it to say that all the actors at a trial have a story to tell—even the judge, who does so through rulings on the admissibility of evidence and in the selection and ordering of the jury charge. What is important for our purposes is *how* a jury processes the various competing narratives, constructs its own, and arrives at a decision that (at least in important cases) is subject to endorsement, qualification, or rejection by courts of appeal and that feeds back into the body of rules upon which it was based.

To illuminate and contextualize these points, we can refer to a couple of cases that are representative in several key respects. In *State v. Hundley*, the Kansas Supreme Court was presented with a homicide conviction involving a defendant who had failed in her effort to mount a defense based on proof that she suffered from what is now generally referred to as “battered person syndrome.”<sup>31</sup> There was no factual dispute that the married life of Carl and Betty Hundley had been tumultuous. Throughout their ten-year marriage, Carl regularly abused Betty. The Court reported that “[h]e had knocked out several of her teeth, broken her nose at least five times, and threatened to cut her eyeballs out and her head off. Carl had

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<sup>30</sup> For a useful compendium of various approaches to law and narrative, see *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* (Peter Brooks & Paul Gewirtz eds., 1996).

<sup>31</sup> 693 P.2d 475 (Kan. 1985).

kicked Betty down the stairs on numerous occasions and had repeatedly broken her ribs.”<sup>32</sup>

Betty, finally having enough, moved into a motel in Topeka, Kansas. This did not, however, break Carl’s pattern of harassment, which culminated in the incident giving rise to his death:

On January 13, 1983, the day of the shooting, Betty had seen Carl early in the day, at which time Carl told Betty he was going to come over and kill her. That night she heard a thumping on her motel door while she was in the bathroom. By the time Betty got out of the bathroom Carl had broken the door lock and entered the room. His entry was followed by violence [, which the Court recounts in graphic detail]. . . . Even after that, Carl continued to threaten Betty. She was sobbing and afraid. He pounded a beer bottle on the night stand and threw a dollar bill toward the window, demanding she get him some cigarettes. Betty testified Carl had hit her with beer bottles many times in the past. Therefore, feeling threatened by the beer bottle, she went to her purse, pulled out the gun and demanded Carl leave. When he saw the gun, Carl laughed tauntingly and said, “You are dead, bitch, now!” As he reached for the beer bottle, Betty shut her eyes and fired her gun. She fired it again and again. There were five spent shells in the gun when it was seized. At the time of the shooting the deceased had his back to Betty and was paying attention to the beer bottle. She was not physically blocked from going to the door.<sup>33</sup>

The Court emphasized that none of the facts were in dispute; the only issue on appeal was whether the trial court improperly instructed the jury as to the elements of self-defense. To facilitate our discussion of the Court’s analysis of the facts as given, a brief aside regarding jury instructions is warranted.

Kansas, like most states, has developed “pattern” jury instructions, which are to be used verbatim, absent unusual circumstances:

We highly encourage courts to follow the language found in the Pattern Instructions for Kansas (PIK) unless the facts of the case dictate otherwise.

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<sup>32</sup> *Id.* at 475.

<sup>33</sup> *Id.* at 476.



The uniform use of the PIK instruction language is a highly desirable goal, a goal which takes very little effort to effectuate. Use of the PIK instruction language helps to protect the rights of criminal defendants in our courts and significantly reduces the number of criminal appeals and issues raised in appeals of criminal cases.<sup>34</sup>

The motivations behind this rule are at least two: first, uniform instructions assure a measure of invariance across judging subjects and second, they make statutes (more) intelligible to lay juries. They are, thus, definitive statements of the law for most cases, and their practical authority is greater than the statutes from which they derive because they provide the sole standard against which jury members are to measure a defendant's conduct.<sup>35</sup>

One of the most frequent criticisms of pattern jury instructions is that “they are too abstract,” by which these critics mean that “[b]ecause they are written generally to apply in all cases, it can be argued that that they do not apply effectively to the facts of any case in particular.”<sup>36</sup> Cast in these terms, we see that this is an instantiation of a larger theoretical debate: viz., whether legal decisions can be

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<sup>34</sup> *State v. Scott*, 21 P.3d 516 (Kan. 2001). In Kansas, a Syllabus point is a statement of law prepared by the Justice delivering the opinion and is often cited as such.

<sup>35</sup> Judges typically decline to elaborate on the law once the jury is charged. The privileged status of instructions is underscored when a trial judge declines to answer inquiries from a jury other than with a directive to review the instructions. *See State v. Lawrence*, 135 P.3d 1211 (Kan. 2006).

<sup>36</sup> Susie Cho, *Capital Confusion: The Effect of Jury Instructions on the Decision to Impose Death*, 85 J. CRIM. L. & CRIMINOLOGY 532, 549 (1994) (also noting that “[d]rafters of standard instructions do not rely on a specific set of facts, and courts use those instructions in all cases involving the issue which they cover”); *see also* Lawrence J. Severance et al., *Toward Criminal Jury Instructions That Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198, 201 (1984).

justified by reference to universal criteria.<sup>37</sup> I don't propose to resolve this debate, but I think I can show that a narrative account of jury instructions can deflect some particularist attacks on the universalist position.

The crowning feature of the Rule of Law is its rules of law. Indeed, as Jeremy Waldron puts it, “we should not describe a system of governance as a system of law unless it does the sort of thing that the Rule of Law celebrates—for example, unless it regulates and controls state power and resolves disputes among individuals and firms (and between individuals and firms and the state) using clear, general, stable norms, promulgated in advance so that they can be used as a basis on which individuals and firms can figure out what they owe to one another and to the state.”<sup>38</sup> In addition to this predictive benefit, clear, general, and stable norms bring regularity to adjudicative processes by providing yardsticks against which to measure particular conduct and to justify consequent remedies.<sup>39</sup> This is so because, as Neil MacCormick submits, “[t]here is . . . no justification without universalization; motivation needs no universalization; but explanation requires generalization. For particular facts—or particular motives—to be justifying reasons they have to be

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<sup>37</sup> See, e.g., THE UNIVERSAL AND THE PARTICULAR IN LEGAL REASONING (Zenon Bankowski & James MacLean eds., 2006); RHETORIC AND THE RULE OF LAW, *supra* note 5, at 78-100.

<sup>38</sup> Jeremy Waldron, *The Concept and the Rule of Law* 12-13 (NYU Law Sch. Colloquium in Legal, Political & Social Philosophy, Paper No. 2, 2006), available at <http://www.law.nyu.edu/clppt/program2006/readings/Concept%20and%20Rule%20of%20Law%20WALDRON.pdf>.

<sup>39</sup> Cf. Joseph Raz, *The Rule of Law and Its Virtue*, 93 L. Q. REV. 195 (1977) (“There cannot be institutions of any kind unless there are general rules setting them up. A particular norm can authorize adjudication in a particular dispute, but no number of particular norms can set up an institution.”).

subsumable under a relevant principle of action universally stated, even if the universal is acknowledged to be defeasible.”<sup>40</sup> Against the universalist flow, particularists assert that—although rules may deliver formal justice—substantive justice can never be insured without overriding attention to the facts of each case. But is it fair to assume that cases—even difficult cases that present problems of classification or novelty—suffer under a system of universal rules?<sup>41</sup> I think not, as revealed by an examination of how legal rules are *applied* in the jury system.

If we assume that juries attend to their instructions, and there is evidence that they try to, then they engage in a process akin to that of the normative syllogism that we have previously discussed.<sup>42</sup> In other words, jury members take the rule embedded in each instruction, evaluate the evidence presented, and engage in a matching process to determine whether that evidence squares with the rule (to some appropriate standard like “beyond a reasonable doubt”). In *Hundley*, the question

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<sup>40</sup> RHETORIC AND THE RULE OF LAW, *supra* note 5, at 99.

<sup>41</sup> The trick is to hold the particular and the universal in our gaze at the same time. It will not do to focus solely on the universal and evaluate justice only at that level. Justice cannot be assured if “micro counterexamples do not tell.” ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 205 (1974).

<sup>42</sup> The real problem with jury instructions is not that jurors do not try to apply them but that they often don’t understand them. For this reason, judges, practitioners and scholars have devoted considerable effort over the past few decades to developing comprehensible jury instructions. See Cho, *supra* note 36, at 551-52 (“Researchers who have conducted experiments to test juror comprehension have found that psycholinguistic principles can be applied to jury instructions to eliminate confusing language, simplify meaning, and present instructions clearly and logically.”); Severance, *supra* note 36, at 233 (“Our findings demonstrate that simplified language and organized presentations of legal concepts can effectively help jurors, particularly when coupled with the opportunity to discuss and deliberate. Proper attention to devising jury instructions that are meaningful to lay people, as well as legally accurate, can accomplish the important task of informing jurors of the relevant legal concepts.”).

was not whether Betty’s conduct matched the elements of some type of homicide; rather, the issue was whether all the facts and circumstances matched the rule allowing exceptions for self-defense, and, more important, whether the rule—as embodied in the jury instruction—required modification to incorporate Betty Hundley’s situation, *her narrative*, if you will.

In Betty’s case, the trial court had used the then-standard PIK instruction on self-defense, which read:

The defendant has claimed his conduct was justified as (self-defense) (the defense of another person).

A person is justified in the use of force against an aggressor when and to the extent it appears to him and he reasonably believes that such conduct is necessary to defend himself or another against such aggressor’s immediate use of unlawful force. Such justification requires both a belief on the part of defendant and the existence of facts that would persuade a reasonable person to that belief.<sup>43</sup>

On appeal, Betty’s counsel argued that the use of the word “immediate” in the PIK instruction (rather than “imminent,” as stated in the statute) prevented the jury from considering (even though it had been copiously presented at trial) the evidence concerning the long-term violence that Carl visited on Betty. For the Court, then, the question became “what instruction should accompany this evidence in order to charge the jury with the proper manner in which such evidence should be considered?”<sup>44</sup> In other words, the Court wanted to insure that Betty’s status as a

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<sup>43</sup> 693 P.2d at 477. The statutory source of the instruction was KAN. STAT. ANN. § 21-3211, which stated: “A person is justified in the use of force against an aggressor when and to the extent it appears to him and he reasonably believes that such conduct is necessary to defend himself or another against such aggressor’s imminent use of unlawful force.”

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

battered woman figured into the self-defense equation. And to do so, it undertook a somewhat strained analysis of the difference between “immediate” and “imminent”:<sup>45</sup>

Thus, the question is whether the instruction allows the jury to consider “all the evidence” or whether the use of the word “immediate” rather than “imminent” precludes the jury’s consideration of the prior abuse. “Immediate” is defined in Webster’s Third New International Dictionary (1961): “Occurring, acting or accomplished without loss of time.” p. 1129. “Imminent” is defined as: “Ready to take place ... or impending.” p. 1130. Therefore, the time limitations in the use of the word “immediate” are much stricter than those with the use of the word “imminent.”<sup>46</sup>

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<sup>45</sup> “The PIK committee explained ‘immediate’ was inserted in the self-defense instruction for ‘imminent’ because it is a ‘better understood term.’ PIK Crim.2d 54.17, Comment.” 693 P.2d at 478. This makes good sense. It is implausible that the jury made the fine distinction that the majority opinion posits. This was not, after all, a case in which the defendant was not allowed to put on evidence in support of a self-defense claim. Indeed, the jury seems to have largely credited her story in declining to convict her of the charged offense (second-degree murder) and choosing instead to convict her of a lesser-included offense (involuntary manslaughter).

<sup>46</sup> *Id.* at 478. In dissent, Justice McFarland, the only woman on the Court, conceded that there is a “fine” distinction between “imminent” and “immediate” and that there are situations in which that distinction might control. But she did not believe that Betty Hundley’s story constituted such a case because Betty was in neither imminent nor immediate danger. Justice McFarland sought to demonstrate this by juxtaposing two hypotheticals, one an alternative version of how Betty’s story could have played out:

Probably it would be better to utilize the statutory term “imminent” rather than “immediate” in a self-defense instruction. In a factual situation involving matters of seconds the distinction could be significant and the use of “immediate” could constitute reversible error. An example of such situation would be two men arguing in the middle of a parking lot. One man sees the other reach for the door of his automobile while stating he is going to kill him and he knows the man has a gun or a knife therein. The danger in such circumstances may be imminent but not immediate. But the facts before us do not show imminent or immediate danger of harm.

There were only two persons in the motel room. One admits killing the other. The only version of what transpired is that of the defendant herein. Taking this as true, the deceased told the defendant to leave the premises,

Despite the appeal to semantics, the Court quickly showed its hand: Betty's ontological narrative coincided with a dark narrative that had remained hidden beneath social convention for centuries:<sup>47</sup>

The issue is dramatized by the nature of this case. This is a textbook case of the battered wife, which is psychologically similar to hostage and prisoner of war cases. Betty Hundley had survived her husband's brutal beatings for ten years. Her bones had been broken, her teeth knocked out and repeated bruises inflicted, but she did not leave him. She called the police occasionally but would continue to stay with Carl Hundley. The mystery, as in all battered wife cases, is why she remained after the beatings. The answer to that question can only be gleaned from the compiled case histories of this malady. It is not a new phenomenon, having been recognized and justified since Old Testament times. It goes largely unreported, but is well documented. It is extremely widespread, estimated to affect between four and forty million women.<sup>48</sup>

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giving her money to buy cigarettes. The deceased then sat on the bed in his shorts, not even looking in defendant's direction. The defendant reached for her purse by the door, took a gun therefrom and fired five shots at the deceased. The parties were in a motel room in a busy part of the city of Topeka in the early evening hours. They were not in some remote area where help would be difficult to obtain. At the very least, defendant would have had a five minute head start on the defendant [sic, "deceased"] had she failed to return with the cigarettes. I fail to see how, in this factual situation, it could be reversible error to use "immediate" rather than "imminent" in the self-defense instruction as it would not have altered the outcome.

*Id.* at 470.

<sup>47</sup> The Court specifically located the underlying problem as one rooted in historical prejudice:

Wife beating is steeped in the concept of marital privacy, and the belief wives are the personal property of the husband. In Blackstone's Commentaries the theory of coverture was advanced, making punishment for mistreatment of a wife impossible since husband and wife were considered one. 1 Blackstone, Commentaries on the Laws of England 432, 442-44 (3rd ed. 1884).

*Id.* at 479.

<sup>48</sup> *Id.*

From this historical synopsis, the Court generally concluded that “[b]attered women are terror-stricken people whose mental state is distorted and bears a marked resemblance to that of a hostage or a prisoner of war. . . . They become disturbed persons from the torture.”<sup>49</sup> And from this general conclusion, coupled with the specific facts of the case, the Court reasoned (1) that the objective component of the self-defense instruction should comprehend “how a reasonably prudent battered wife would perceive Carl’s demeanor” and (2) that “‘immediate’ in the instruction on self-defense places undue emphasis on the immediate action of the deceased, and obliterates the nature of the buildup of terror and fear which had been systematically created over a long period of time.”<sup>50</sup> This latter point remains something of a non sequitur (and freights a single word with a weighty narrative), but that simply underscores how generative the alignment of public and personal narratives proved to be in the case. In any event, the case had immediate—and unintended—consequences, once Betty Hundley’s narrative had been absorbed into the PIK instructions and, thereby, was passed onto future juries.

In the wake of *Hundley*, courts began to give broad, “battered-woman” self-defense instructions, juries began to acquit defendants, and the Kansas Supreme Court found no errors in those acquittals.<sup>51</sup> This all changed with the arrival of the first “burning-bed” case (i.e., a case in which an abused spouse kills her husband

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Although the State may not appeal an acquittal, Kansas law permits the State to reserve questions for appeal, but only if those questions are of state-wide interest and essential to the administration of criminal justice. *State v. Martin*, 658 P.2d 1024, 1024 (1983).

while he is sleeping) at the Kansas Supreme Court. That case, *State v. Stewart*, presented background facts not unlike those presented in *Hundley*: a marriage troubled from the outset, a cruel, unpredictable, and physically abusive husband, attempted flights by the battered wife, . . . and a gun.<sup>52</sup> At trial, the court gave the jury a standard self-defense instruction (duly modified to reflect the *Hundley* holding that imminence rather than immediacy was the proper standard for judging temporal proximity), but he also added what we might call a *Hundley* tag: “You must determine, from the viewpoint of the defendant’s mental state, whether the defendant’s belief in the need to defend herself was reasonable in light of her subjective impressions and the facts and circumstances known to her.”<sup>53</sup>

The Court was thus faced with two related questions: first, whether a person in Stewart’s shoes should be entitled to a self-defense instruction *at all* and, second, whether the *Hundley* tag was an appropriate statement of the law of self defense. It answered these questions by turn, holding first that

In order to instruct a jury on self-defense, there must be some showing of an imminent threat or a confrontational circumstance involving an overt act by an aggressor. There is no exception to this requirement where the defendant has suffered long-term domestic abuse and the victim is the abuser. In such cases, the issue is not whether the defendant believes homicide is the solution

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<sup>52</sup> 763 P.2d 572 (1988).

<sup>53</sup> *Id.* at 579. “This addition was apparently encouraged by the following language in *State v. Hodges*, 716 P.2d 563 (1986):

Where the battered woman syndrome is an issue in the case, the standard for reasonableness concerning an accused’s belief in asserting self-defense is not an objective, but a subjective standard. The jury must determine, from the viewpoint of defendant’s mental state, whether defendant’s belief in the need to defend herself was reasonable.”

*Id.*



to past or future problems with the batterer, but rather whether circumstances surrounding the killing were sufficient to create a reasonable belief in the defendant that the use of deadly force was necessary.<sup>54</sup>

Given this holding, it was probably superfluous to consider the form and content of the self-defense instruction that the jury considered, but the Court did so anyway, apparently to emphasize two key points: viz., that “battered woman’s syndrome” is not in itself a defense to murder (rather, evidence of the syndrome may be introduced in support of a defense of self-defense) and that the defense of self-defense has both objective and subjective elements:

We first use a subjective standard to determine whether the defendant sincerely and honestly believed it necessary to kill in order to defend. We then use an objective standard to determine whether defendant’s belief was reasonable--specifically, whether a reasonable person in defendant’s circumstances would have perceived self-defense as necessary. In *State v. Hundley* . . . , we stated that, in cases involving battered spouses, “[t]he objective test is how a reasonably prudent battered wife would perceive [the aggressor’s] demeanor.”<sup>55</sup>

This turn to objectivity (a subject that we will consider in greater detail near the end of the next chapter) is troublesome, in no less than two respects. First, notions of objective reasonableness depend on notions of common sense. But as *Hundley*, *Stewart*, and a host of other cases make clear, there is no “common sense” when it comes to battered women—they exist in a condition outside the ordinary juror’s ability to know. Justice Herd (the author of the *Hundley* opinion) explicitly makes that point in dissenting from the *Stewart* majority.<sup>56</sup> Second, by removing a

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<sup>54</sup> *Id.* at 577; *see also id.*, Syl. § 4.

<sup>55</sup> *Id.* at 579.

<sup>56</sup> 763 P. 2d at 582 (Herd, J., dissenting) (citations omitted):

whole category of cases from the province of the jury, the Court effectively cut off (for now) the quasi-public part of the rule-building process upon which the *democratic* growth (again, more on that in the next chapter) of the American common-law depends—namely, the testing of narratives in front of judges and juries.

As *Hundley* and *Stewart* show, legal rules develop through an accretive process, slowly absorbing and deflecting narratives on a case-by-case basis. But is the influence of individual narratives ephemeral? Or do they become formally institutionalized? They do, at least with respect to pattern jury charges. We can plainly see this in the current version of the PIK pertaining to self defense:

PIK 54.17 Use of Force in Defense of a Person

The defendant has claimed his conduct was justified as self defense. A person is justified in the use of force against an aggressor when and to the extent it appears to him and he reasonably believes that such conduct is necessary to defend himself against such aggressor's imminent use of unlawful force. Such justification requires both a belief on the part of defendant and the existence of facts that would persuade a reasonable person to that belief.

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The majority implies its decision is necessary to keep the battered woman syndrome from operating as a defense in and of itself. It has always been clear the syndrome is not a defense itself. Evidence of the syndrome is admissible only because of its relevance to the issue of self-defense. The majority of jurisdictions have held it beyond the ordinary jury's understanding why a battered woman may feel she cannot escape, and have held evidence of the battered woman syndrome proper to explain it. The expert testimony explains how people react to circumstances in which the average juror has not been involved. It assists the jury in evaluating the sincerity of the defendant's belief she was in imminent danger requiring self-defense and whether she was in fact in imminent danger.

## Comments

In *State v. Hundley*, 236 Kan. 461, the Court disapproved PIK 2d 54.17 in the use of “immediate” in lieu of the statutory term “imminent.” The Court held it to be reversible error to use the word (sic) immediate in the self-defense instruction in that it places undue emphasis on the immediate action of the aggressor whereas the nature of the buildup of terror and fear which has been going on over a period of time, particularly in battered spouse instances, may be most relevant. The word imminent would describe this defense more accurately, as the definition implies impending or near at hand, rather than immediate.

The existence of the battered woman syndrome in and of itself does not operate as a defense to murder. In order to instruct a jury on self-defense, there must be some showing of an imminent threat or a confrontational circumstances (sic) involving an overt act by an aggressor. *State v. Stewart*, 243 Kan. 639.<sup>57</sup>

Both Betty Hundley and Peggy Stewart’s stories are fossilized—along with thousands of others—in the present rule of self-defense. Theirs are noteworthy only because we can still see them in the sediment, like the occasional leaf that is apparent between layers of limestone.<sup>58</sup> Others are mere traces, but their influence is still vital, even as they are buried deeper each day with a fresh layer of narratives, some compelling, some less so, some not at all.

Thus conceived, jury instructions are a representation of two things: the state of the law and a collage of a multitude of individual narratives as they have been institutionalized. They are of course not permanent in either respect and can never be more than “stabilized for now.”<sup>59</sup> But they nonetheless stand at important

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<sup>57</sup> Pattern Instructions in Kansas, 3d.

<sup>58</sup> This process is not unique to jury instructions. Indeed, that’s how the common law has always worked. It’s just that we forget that, for example, “The Rule in *Shelley’s Case*” or “The Rule in *Spencer’s Case*” grew out of stories.

<sup>59</sup> Amy Devitt, *Integrating Rhetorical and Literary Theories of Genre*, 62 C. ENG. 696, 710 (2000) (quoting Catherine F. Schryer with respect to genre stability).

theoretical crossroad—namely, a place where normative and narrative coherence meet. This is important because one could plausibly posit that these types of coherence are different in an exclusive sort of way: i.e., a proper system of norms must be coherent in a snapshot sort of way (synchronically); a narrative must be coherent in a storybook sort of way (diachronically).<sup>60</sup> As Neil MacCormick suggests, however, “this picture . . . ignores the way in which legal doctrines and norms themselves develop through time.”<sup>61</sup> As a general example of this temporal development, MacCormick cites to the feminist critique of self-defense doctrines in the context of domestic violence—in other words, the sort of situation that *Hundley* and *Stewart* so concretely represent. To amplify this theme, we can think of the current iteration of a jury instruction—and indeed of any legal rule—as the most-complete-to-date version of what Ronald Dworkin has referred to as a “chain novel.” Dworkin’s analogy has not gone unchallenged, but it is nonetheless illuminating in many respects germane to our present discussion, and we therefore need to consider it.

## 5. Law’s Constraints: Generic or Precedential?

In *Law’s Empire*, Dworkin develops an extended metaphor likening the development of the law to a multi-author serial novel—i.e., one in which each

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<sup>60</sup> I have found it useful to think of coherence in two ways. The first, and more familiar, is that of a chain. The problem with that metaphor is that a story may be said to fail if any link breaks or doesn’t fit. I think a logician must have first coined the trope, for as we all know, storytellers spin yarns, not chains. Anyway, yarn does not depend on the integrity of any single strand. Mosaics and tapestries are also appropriately analogous, I think, in that they can lose pieces or threads and still convey a message.

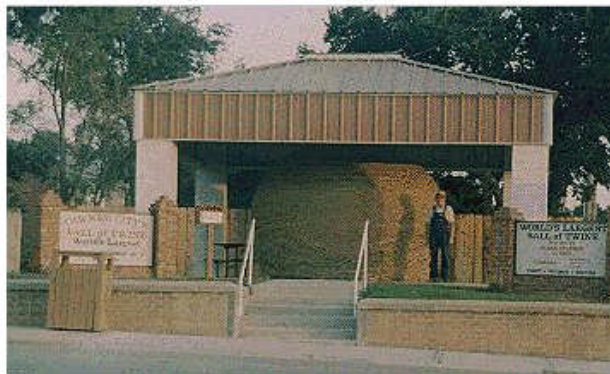
<sup>61</sup> RHETORIC AND THE RULE OF LAW, *supra* note 5, at 233.

chapter is authored by a different person.<sup>62</sup> The metaphor is imperfect<sup>63</sup>—most obviously because the novel is a relatively closed-ended form and the law is an open-ended one<sup>64</sup>—but in the main it captures a salient feature of the law: viz., that it develops through a series of sequential narratives, most of which are told by and feature different actors. This narrative aspect is not the one most often discussed (at least not directly) in the back-and-forth as to whether the metaphor is actually functional or beside the point. Instead, the debate usually centers on whether the metaphor is descriptive of the constraining power of precedent. This question seems

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<sup>62</sup> RONALD DWORKIN, *LAW'S EMPIRE* 228-38 (1986).

<sup>63</sup> As a native Kansan, I would have offered the World's Largest Ball of Twine (to which farmers have been adding segments for over 50 years) as more apt:



<http://skyways.lib.ks.us/towns/Cawker/twine.html>. But alas, I was not the first author to enter on the scene.

<sup>64</sup> Poststructuralists would deny that the novel is a closed form because it remains open to interpretation. *See, e.g.*, TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 138 (1983) (arguing that the shift from structuralism to post-structuralism is a movement from seeing “the poem or novel as a closed entity, equipped with definite meanings which it is the critic’s task to decipher, to seeing it as irreducibly plural, an endless play of signifiers which can never be finally nailed down to a single centre, essence or meaning”). For our purposes, I mean only that a novel has left its author’s hands.

irresolvable at present<sup>65</sup>—at least to any reasonable degree of certainty—but I believe that the metaphor has a greater utility, one with which both chain and anti-chain commentators might agree. But before presenting that position, we must first sketch out Dworkin’s thesis and that of his most ardent critic (on this point), Stanley Fish.

“All those who have studied the law have at least an intuitive notion of precedent or *stare decisis*.”<sup>66</sup> This intuition is easy to articulate in the abstract: when a court has held that a principle of law is applicable to a certain set of facts, it will adhere to that principle, and apply it to all future cases, where the facts are substantially the same.<sup>67</sup> But this definition is devilishly difficult to apply in concrete instances because determining whether facts are “substantially the same” is not always an easy task. And although there is widespread disagreement as to *when and why* courts should treat like cases alike, there is, nonetheless, general agreement that courts *should* treat them alike absent unusual circumstances. That is, I think that most would agree that “objectivity” is a cardinal virtue of the Rule of Law and that any rational account of objectivity demands that judgments be invariant across

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<sup>65</sup> See, e.g., Stefanie A. Linquist & Frank B. Cross, *Empirically Testing Dworkin’s Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156-57 (2005) (finding only limited support for chain-novel theory and concluding that Dworkin’s “thesis does not describe fully the operation of U.S. law”).

<sup>66</sup> *Id.* at 1158.

<sup>67</sup> BLACK’S LAW DICTIONARY 1443 (8th ed. 2004) (definition of *stare decisis*).

judging subjects.<sup>68</sup> The rub comes when precedent is the tool employed to insure invariance. Some argue that precedent is simply a mask behind which judicial manipulation takes place.<sup>69</sup> But others quite persuasively point to the predictability of outcome—and attendant systemic stability—that comes with “coherence in interpretation of particular provisions over many cases.”<sup>70</sup> Were the situation otherwise, a legal system “would be a sham if the law were subject to varying interpretation from case to case, for it would only be nominally the same law that applied to different cases with essentially similar features.”<sup>71</sup>

Dworkin casts his chain-novel hypothesis in the foreground of the historical debates over the efficacy and desirability of a jurisprudence built on *stare decisis*. And his mission is, as Linquist and Cross have noted, both normative and descriptive.<sup>72</sup> As a description, Dworkin offers the metaphor to show how precedent constrains judges. Here’s how Dworkin’s ideal chain novel is produced: a group of

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<sup>68</sup> See, e.g., ROBERT NOZICK, *INVARIANCES: THE STRUCTURE OF THE OBJECTIVE WORLD* 75-114 (2001); Gerald Postema, *Objectivity Fit for Law*, in *OBJECTIVITY IN LAW AND MORALS* 99, 108 (Brian Leiter ed., 2001).

<sup>69</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (Scalia, dissenting) (“I do not myself believe in rigid adherence to *stare decisis* in constitutional cases; but I do believe that we should be consistent rather than manipulative in invoking the doctrine. Today’s opinions in support of reversal do not bother to distinguish—or indeed, even bother to mention—the paeon to *stare decisis* coauthored by three Members of today’s majority in *Planned Parenthood v. Casey*.”).

<sup>70</sup> Zenon Bankowski et al., *Rationales for Precedent*, in *INTERPRETING PRECEDENTS* 481, 487 (D. Neil MacCormick & Robert S. Summers eds., 1997); see also *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 844 (1992) (“Liberty finds no refuge in a jurisprudence of doubt.”).

<sup>71</sup> *Id.* at 488; see also *id.* at 487 (linking predictability to the Rule of Law by suggesting that it is “definitive for the idea of a rational legal discourse”).

<sup>72</sup> Linquist & Cross, *supra* note 65, at 1167.

coauthors agree each to write a separate chapter of a work. They draw lots to determine the order of writing, after which the

lowest number writes the opening chapter of a novel, which he or she then sends to the next number who adds a chapter, with the understanding that he is adding a chapter to that novel rather than beginning a new one, and then sends the two chapters to the next number, and so on. Now every novelist but the first has the dual responsibilities of interpreting and creating because each must read all that has gone before in order to establish, in the interpretivist sense, what the novel so far created is. He or she must determine what the characters are “really” like; what motives in fact guide them; what the point or theme of the developing novel is; how far some literary device or figure, consciously or unconsciously used, contributes to these, and whether it should be extended or refined or trimmed or dropped in order to send the novel further in one direction rather than another.<sup>73</sup>

This conceit is apt, in Dworkin’s view, because it is analogous to the development of the common law. Thus, just as the novelists become increasingly constrained as the plot thickens (because each new chapter must “fit” with its predecessors in terms of plot, character and style), common-law judges become constrained by the build-up of precedent:

Deciding hard cases at law is rather like this strange literary exercise. The similarity is most evident when judges consider and decide common-law cases; that is, when no statute figures centrally in the legal issue, and the argument turns on which rules or principles of law “underlie” the related decisions of other judges in the past. Each judge is then like a novelist in the chain. He or she must read through what other judges in the past have written not simply to discover what these judges have said, or their state of mind when they said it, but to reach an opinion about what these judges have collectively *done*, in the way that each of our novelists formed an opinion about the collective novel so far written. Any judge forced to decide a lawsuit will find, if he looks in the appropriate books, records of many arguably similar cases decided over decades or even centuries past by many

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<sup>73</sup> Stanley Fish, *Working on the Chain Gang: Interpretation in the Law and in Literary Criticism*, 9 CRITICAL INQUIRY 201, 202 (1982) (quoting Ronald Dworkin, *Law as Interpretation*, 9 CRITICAL INQUIRY 179, 192-93 (1982)); see also DWORKIN, *supra* note 62, at 229 (“[A] group of novelists writes a novel, *seriatim*; each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on.”).



other judges of different styles and judicial and political philosophies, in periods of different orthodoxies of procedure and judicial convention. Each judge must regard himself, in deciding the new case before him, as a partner in a complex chain enterprise of which these innumerable decisions, structures, conventions, and practices are the history; it is his job to continue that history into the future through what he does on the day. He *must* interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own.<sup>74</sup>

Fish chides Dworkin for missing the point. That is, although Fish agrees that textual interpretation is always constrained, he vigorously dissents from Dworkin's location of precedent as the source of interpretive restraints. Instead, Fish identifies (without using the term) what rhetoricians call "genre constraints" as the actual dampers on full interpretive license. Thus, whereas Dworkin posits that successive writers become increasingly constrained by the text already produced, Fish argues that the first author is already constrained by the genre in which he or she has chosen to write:<sup>75</sup>

[Dworkin's] idea is that the first author is free because he is not obliged "to read all that has gone before" and therefore doesn't have to decide what the characters are "really" like, what motives guide them, and so on. But in fact the first author has surrendered his freedom . . . as soon as he commits himself to writing a novel, for he makes his decision under the same constraints that rule the decisions of his collaborators. He must decide, for example, how to begin the novel, but the decision is not "free" because the very notion "beginning a novel" exists only in the context of a set of practices that at once enables and limits the act of beginning. . . . He is free to begin whatever kind of novel he decides to write, but he is constrained by the finite (although not unchanging) possibilities that are subsumed in the notions "kind of novel" and "beginning a novel."<sup>76</sup>

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<sup>74</sup> *Id.* at 205-06 (quoting Dworkin).

<sup>75</sup> *Id.* at 203.

<sup>76</sup> *Id.* What Fish has in mind here, I think, is the notion that different literary modes carry with them different sets of conventions. For example, in Ian Watt's famous study of the early development of the realistic novel, he catalogues the shared expectations of both readers and writers of realistic novels:

Fish goes on to assert that not only is the first novelist generically constrained but that the subsequent novelists are generically free. Indeed, the “last author is as free . . . as is the first.”<sup>77</sup> This seems counterintuitive because one would “think that the more information one has (the more history) the more directed will be one’s interpretation.”<sup>78</sup> But Fish slips this knot (or at least tries to do so) by arguing that all information always comes in interpreted form and that, therefore, information/history cannot act as a check on interpretation.<sup>79</sup> For support, Fish resorts to a hypothetical debate among the serial novelists as to the specific sub-genre to which they will contribute: where one sees a straightforward piece of realism, another sees a social satire, and yet another sees a comedy of manners. He

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The narrative method whereby the novel embodies [a] circumstantial view of life may be called its formal realism; formal, because the term realism does not here refer to any special literary doctrine or purpose, but only to a set of narrative procedures which are so commonly found together in the novel, and so rarely in other literary genres, that they may be regarded as typical of the form itself. Formal realism, in fact, is the narrative embodiment of a premise that Defoe and Richardson accepted very literally, but which is implicit in the novel form in general: the premise, or primary convention, that the novel is a full and authentic report of human experience, and is therefore under an obligation to satisfy its reader with such details of the story as the individuality of the of the actors concerned, the particulars of the times and places of their actions, details which are presented through a more largely referential use of language than is common in other literary forms.

Ian Watt, *Realism and the Novel Form*, excerpted in *LAW AND LITERATURE* 463, 464 (Lenora Ledwon ed., 1996).

<sup>77</sup> Fish, *supra* note 73, at 204.

<sup>78</sup> *Id.*

<sup>79</sup> This seems wrong to me, or at least an overstatement. Although I agree that information comes in interpreted form, interpretation also comes in light of other interpretations. Absent misreading of what has come before, this additional context should indeed guide (or constrain) future interpretations, if they are to be coherent.

is thus able to pin Dworkin with the weight of his own argument: “If Dworkin’s argument is to hold, that is, if the decisions he talks about are to be constrained, in a strong sense, by an already-in-place text, it must be possible to settle this disagreement by appealing to that text. But it is precisely because the text appears differently in the light of different assumptions as to what is its mode that there is a disagreement in the first place.”<sup>80</sup>

To some extent, Dworkin is the author of his own misfortune here. This is so because he deploys his metaphor as a description of how judges should resolve hard cases, which—by definition it would seem—arise against an unsettled historical record or extraordinary facts. The very reason that cases are “hard” is that (1) the body of law to which a judge should refer is either so ambiguous or so vague on a particular point as to leave resolution of the exact legal question presented open to debate or (2) the factual scenario presents problems of classification and categorization (e.g., a matter of first impression). Put in novelistic terms, hard cases are hard because the novel is not yet coherent—it is unfinished.<sup>81</sup> So just as no rational writer could come to pen the last chapter of *The Grapes of Wrath* thinking that the novel is a comedy of manners, no rational judge could come to an ordinary

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<sup>80</sup> *Id.* at 204.

<sup>81</sup> Derrida’s notion of “supplement”—which carries the sense of both “addition to” and “substitution for”—helps explain this relationship. See JACQUES DERRIDA, *OF GRAMMATOLOGY* 144-52 (Gayatri Chakravorty Spivak trans., 1976). If, for example, I pull a volume of the Federal Digest off the shelf, I have in my hand a “complete” statement of the law on a particular subject. But every so often, the publisher puts out a new edition (and every year puts out a new pocket part) that updates the cases previously digested and adds new ones. Each new edition thus “adds to” and “substitutes for” its predecessor in a never-to-be-completed cycle. See Jack M. Balkin, *Deconstructive Practice and Legal Theory*, 96 *YALE L.J.* 743, 758-59 (1987).

slip-and-fall case thinking that “duty” is not an element of a negligence claim. The point here is that none of Fish’s objections holds true in run-of-the-mill cases, in which the “novel” is essentially complete and subject to only occasional revisions or glosses.<sup>82</sup> Typically, a lengthy series of cases covering a wide distribution of facts has already established legal rules (and their constituent elements that must be pled and proven) against which the facts of a particular case can be assessed. A judge has little latitude in this situation, and it matters not at all whether the reason is styled a genre restraint or precedential restraint.<sup>83</sup>

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<sup>82</sup> Novelists occasionally revise their work after publication. The New York edition of Henry James’ novels is an example. Those novels are in most respects the same as their predecessors—they are still recognizable as the same works—but they are different (and by most accounts hardly improved). The same is true of black-letter law: judges no longer need to add substantive chapters; at most, they edit a bit, add a footnote here and there, or—occasionally—slap on an afterward. There is not, of course, a bright line between actual novelizing and mere editing, but we know that the legal novel is essentially finished once courts begin to quote settled precedent, with no further pretense of pronouncement. But when times change, there’s always room for a sequel.

<sup>83</sup> I actually think Fish overstates the power of genre constraints, in one important respect. He uses as an example a judge who deems a defendant guilty of a crime for no reason other than that the defendant has red hair. This is not “striking out in a new direction,” according to Fish. Rather, this person “would simply not be acting as a judge because he could give no reasons for his decision that would be seen as reasons by competent members of the legal community.” Fish, *supra* note 73, at 206. The problem here is that there is no line to be drawn between “bad” decisions made within the legal genre and “extrajudicial” decisions made without it. To return to the analogy to fiction, literary history is replete with examples—from A. Conan Doyle’s Sherlock Holmes detective series to Aaron Spelling’s *Dallas* television series—in which characters have been killed off in one episode only to reappear later in the series. And this happens within sub-genres that are ostensibly in a “realistic” vein. Are the implausible contrivances that bring the dead back to the page or screen generic breaches or merely bad realism? I don’t think one could construct a test that would satisfy all members of the interpretive community any more than one could devise a rubric for separating “bad” or “stupid” or “wrong” judicial decisions from those that Fish would identify as extrajudicial.

## 6. Novelizing Law

What gets lost in the Dworkin-Fish debate is the aptness of Dworkin's metaphor to how common-law rules are built through narrative accretion over time. We have seen this process at work in self-defense jury-instruction cases, but it may be useful to catch a novel-building exercise in mid-flow. I've chosen a simple example—one with a fairly circumscribed universe of case law available—for the sake of brevity; nonetheless, the principle at work holds across the board.

In the United States, many of the individual states have a “savings statute” that preserves a plaintiff's right in certain circumstances to commence a lawsuit that would otherwise be time barred under an applicable statute of limitations. Generally, these statutes allow a plaintiff to file a lawsuit outside the limitations period if (1) he had previously commenced the suit within the limitations period and (2) that suit had been dismissed for reasons other than the merits. Kansas adopted such a statute in 1868; Oklahoma did so when it adopted the Kansas code of civil procedure, of which the Kansas savings statute was a part, shortly after achieving statehood in 1907.<sup>84</sup> Each state's version of the statute has been recodified and slightly amended over the years, but both largely maintain their original character.<sup>85</sup>

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<sup>84</sup> See KAN. STAT. ANN. § 60-518; 12 OKLA. STAT. tit. 12, § 100; *see generally* Lepak v. McClain, 844 P.2d 852 (1992) (Opala, J., concurring) (discussing issues relating to Oklahoma statutes adopted from Kansas).

<sup>85</sup> The current versions of the statutes read as follows:

If any action be commenced within due time, and the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if the plaintiff die, and the cause of action survive, his or her representatives may commence a new action within six (6) months after such failure. KAN. STAT. ANN. § 60-518.

Fairly early on in the last century, courts began to face an unanticipated (probably) scenario—viz., one in which a plaintiff timely filed a suit in state “A,” had it dismissed for some non-substantive reason (like lack of personal jurisdiction or improper venue), and then refiled the suit in state “B” after the statute of limitations had run but within the period allowed under state B’s savings statute. This presents the question whether a state’s savings statute should apply to a case first filed in another state.

Oklahoma was the first of the two states to take up the question, holding in *Herron v. Miller* that Oklahoma’s statute would not “save” a case that was first filed in another jurisdiction.<sup>86</sup> The very next year, Kansas, in *Jackson v. Prairie Oil & Gas*, approved—in dictum—of the rule announced in *Herron*.<sup>87</sup> There the matter rested for decades as a matter of little controversy; indeed, the *Herron* rule squared with “the general rule among older cases” across the country.<sup>88</sup> This began to change after mid-century, though, as the American national narrative shifted from one based on rural roots (Jefferson’s nation of small farmers) to widespread migration brought on by increasing industrialization. Thus, by the 1980s, courts were divided on the issue, and with increasing frequency they were finding “no

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If any action is commenced within due time, and a judgment thereon for the plaintiff is reversed, or if the plaintiff fail in such action otherwise than upon the merits, the plaintiff, or, if he should die, and the cause of action survive, his representatives may commence a new action within one (1) year after the reversal or failure although the time limit for commencing the action shall have expired before the new action is filed. 12 OKLA. STAT., tit. 12, § 100.

<sup>86</sup> 220 P. 59 (Okla. 1923).

<sup>87</sup> 222 P. 1114 (Kan. 1924).

<sup>88</sup> *Prince v. Leeson Corp., Inc.*, 720 F.2d 1166, 1168 (10th Cir. 1983).

significant policy to be furthered by interpreting the statute to exclude actions filed outside” the forum state.<sup>89</sup> In short, a developing sense that there was a fundamental *interstate* right of access to the courts came to outweigh outmoded parochial concerns.<sup>90</sup>

As between Oklahoma and Kansas, Oklahoma was the first state to revisit the *Herron* rule. But with not even a nod to changing times, the Oklahoma Supreme Court simply announced—with a citation to *Herron*—that “[w]e adhere to the rule that the provisions of this section accrue only to actions filed within the State of Oklahoma.”<sup>91</sup> The Oklahoma Supreme Court continues to acknowledge this precedent.<sup>92</sup> The Kansas Supreme Court, on the other hand, has still not firmly resolved the issue, although it has signaled that it will adopt the modern view when called upon to do so. In the relevant case, *Goldsmith v. Learjet, Inc.*,<sup>93</sup> the Court noted as background for a related issue that the United States Court of Appeals for the Tenth Circuit already had predicted that the Kansas Supreme Court would

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<sup>89</sup> *Allen v. Greyhound Lines, Inc.*, 656 F.2d 418, 422 (9th Cir. 1981).

<sup>90</sup> *Id.* at 422-23.

<sup>91</sup> *Morris v. Wise*, 293 P.2d 547, 550 (Okla. 1955).

<sup>92</sup> *Grider v. USX Corp.*, 847 P.2d 779, 788 n.7 (Okla. 1993) (Opala, J., concurring) (“*Morris* holds § 100 uninvocable to save an action which was originally brought in federal district court in Texas and was later recommenced in an Oklahoma state court.”).

<sup>93</sup> 917 P.2d 810 (Kan. 1996) (discussing with apparent approval the position that the trend against applying savings statutes to cases first filed in other jurisdictions had “reversed.”).

extend the benefit of the Kansas savings statute to cases first filed in another state,<sup>94</sup> a holding that United States District Courts in Kansas have since followed.<sup>95</sup>

What we have, then, are two independent systems that have started from the same point and yet have created “novels” that stand in direct opposition. Kansas was able to move more quickly to bring its law into phase with the modern cultural narrative because it was not freighted with unequivocal precedent. Oklahoma has found itself constrained by previous chapters even though other courts have criticized its rulings and have themselves moved in the opposite direction.<sup>96</sup> This is not to say that Oklahoma is stuck with a novel that everyone hates. Plot twists—even reversals—are just as permitted within the legal genre as in the novelistic genre, so long as those twists make sense at that point in the chain. In fact, at least one Oklahoma Supreme Court justice has obliquely suggested that it is time write a new chapter.<sup>97</sup> He did this in two ways: first, by indicating that Oklahoma’s rule had been strongly criticized and, second, by focusing attention on *Morris*, not

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<sup>94</sup> *Prince v. Leeson Corp.*, 720 F.2d 1166 (10th Cir. 1983).

<sup>95</sup> *Harnett v. Parris*, 1995 WL 55036 at \*6 (D. Kan.) (“This court is bound to follow the Tenth Circuit’s decision” in *Prince*.). By way of full disclosure, I was one of counsel in *Harnett*, a case with its own interesting narrative twists. The case involved a number of racing greyhounds allegedly stolen from Harnett, an Irish citizen, by a once prominent (but by then imprisoned) former Oklahoma legislator, Parris, and others through the use of forged registration documents. For details of the alleged scheme, see *Harnett v. Parris*, 925 F. Supp. 1496 (D. Kan. 1996). But I digress . . .

<sup>96</sup> *See, e.g., Bockweg v. Anderson*, 402 S.E.2d 672, 633 (1991).

<sup>97</sup> *Grider v. USX Corp.*, 847 P.2d 779, 788 n.7 (Okla. 1993) (Opala, J., concurring) (“The teaching of *Morris* came under severe criticism . . . for affording out-of-state dismissals dehors the merits a different treatment from that which is accorded in-state federal-court dismissals.”).



*Herron*. This second point raises an interesting back-narrative that makes it all the more likely that *Morris* will one day be overruled. For that opinion was authored by Justice Nelson Corn, who was at the epicenter of a major Oklahoma Supreme Court scandal in the early 1960s. Justice Corn was convicted and imprisoned for evading federal income tax on bribes that he had taken while sitting on the Supreme Court in the late 1950s (i.e., at about the time that *Morris* was decided).<sup>98</sup> And as all Oklahoma practitioners and jurists know, every case from that period bears the trace of the scandal; consequently, each lacks the persuasive force that would otherwise be its due.<sup>99</sup>

## 7. Resisting Narratives: Keeping the Outside Out

There is probably no great dispute that law is a conservative institution. The cases that we have just reviewed exemplify that. But in the context of our examination of how narratives can influence the law, what does this mean? One could simply posit that legal institutions will react more slowly to shifts in public narratives and move on, but that seems unsatisfactory. On the other hand, attempting to trace the ebb and flow of particular narratives across a range of social institutions is an exercise in history far beyond our present scope. There is a middle course, however, one that reveals traces of clashing narratives in the form of

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<sup>98</sup> See <http://www.time.com/time/magazine/article/0,9171,841846.00.html>.

<sup>99</sup> This is an example of an interpretive community having a subcommunity—one whose members are aware of important context not even inferable by someone outside that subcommunity. This is to say that a lawyer sitting in a library in New York would be unlikely to discover that Oklahoma authority from the late 1950s is tainted, absent resort to non-legal materials. Plainly, the normal resources used for evaluating the subsequent history of a case (e.g., Shepard's or KeyCite) would raise no cautionary flags.

particular linguistic features and, more important, the speed with which various institutions bow to forces that represent a newly dominant narrative. What we find—consistent with our hypothesis—is that legal institutions prove more resistant to shifting narratives than do other institutions.

The Sixteenth and Seventeenth Centuries were a period of great change in the relations between Scotland and England, marked on one end with relative independence between the parties and on the other with a relative unification. And although the period was punctuated with moments of great upheaval, the larger arc traces a gradual shift in political influence from Edinburgh to London. This is not to say that the Scottish national narrative was stamped out—it remains quite strong today—but the English current plainly overwhelmed certain Scottish institutions. One measure of Scottish institutional resilience can be found at the level of language, an area capably investigated by Amy Devitt in her language-based study of the period from 1520 to 1659.<sup>100</sup>

Devitt’s methodology is one tied to genre, which she elsewhere describes as “a nexus between an individual’s actions and a socially defined context.”<sup>101</sup> With respect to her study of Scotland, she thus looks at particular types of writing associated with particular social contexts to see whether, to what extent, and how

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<sup>100</sup> AMY DEVITT, *STANDARDIZING WRITTEN ENGLISH: DIFFUSION IN THE CASE OF SCOTLAND, 1520-1659* (1989) [hereinafter *STANDARDIZING WRITTEN ENGLISH*].

<sup>101</sup> AMY DEVITT, *WRITING GENRES* 31 (2004).

rapidly standard Anglo-English forms superseded traditional Scots-English forms.<sup>102</sup>

What she finds is that there was wide variation in the rate and depth of anglicization across contexts. Of particular interest are the variations between the genres associated with the two major institutions that she studies: viz., Church and State. Of signal importance is her observation that religious treatises anglicized quickly and almost completely, whereas public records (mostly legal documents) did so slowly and only partially. The explanation for these divergent phenomena is found in the institutional settings that gave rise to the generic writings under examination.

Religious treatises became rapidly anglicized for a number of reasons: they were directed to (and intended to persuade) both English and Scottish readers, they

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<sup>102</sup> Devitt evaluated five different English forms in five different genres in twenty-year tranches over the period in question. Specifically, she looked at how quickly certain Anglo-English forms replaced Scots-English forms:

“-ing” replacing “-and” as the inflection marking the present participle;

“no/not” replacing “na/nocht” as the negative particle;

indefinite article “a” before consonants and “an” before vowels replacing “ane” in all environments;

“-ed” replacing “-it” as the inflection marking the past tense; and

“wh-” replacing “quh-” in the spelling of relative pronouns.

As genres, she examined

religious treatises;

official correspondence;

private records (mostly diaries);

private correspondence; and

national public records (e.g., records of the Scots Privy Council).

were aimed at a general audience, they were meant to be kept rather than discarded (i.e., they were more like books than newspapers), and they were expositions of a version of the Bible that was written in Anglo-English (a translation of the Geneva Bible). One might therefore expect public records to take a similar standardization turn, given that they, too, were highly formal, addressed a serious subject matter (legal affairs) and were intended for a general audience and for posterity. But, as Devitt shows, this was not the case:

A fuller understanding of the situation offers a fuller understanding of the records' resistance. Anglo-English may have been becoming the new standard for the Scots, but Scots-English had been the standard for centuries. . . . The writers had no obligation to persuade their readers, but they did have an obligation to preserve the proceedings of the government. In addition to encouraging linguistic conservatism, the situation may have encouraged linguistic nationalism. These public records were, after all, national records: their purpose was to record the activities of groups which represented Scotland. As these groups were increasingly undermined by the political unification of Scotland and England, the perhaps unconscious nationalism of the authors, who were writing documents to preserve Scottish laws and actions, might have expressed itself quite readily in use of the Scottish language, in conformity with the Scots-English Standard.<sup>103</sup>

Devitt goes on to posit that the public-records genre, which was largely legal in nature, itself afforded a degree of immunity to the otherwise pervasive influence of Anglo-English:<sup>104</sup>

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<sup>103</sup> STANDARDIZING WRITTEN ENGLISH, *supra* note 100, at 65.

<sup>104</sup> The specific records that Devitt examined were:

Ancient criminal trials;

Records of the Convention of the Royal Burghs;

Register of the Privy Council;

Trials for witchcraft; and

[T]he genre itself was so well established as to have served as a constraint on writers of the genre, to have strengthened intertextuality. The Acts of the Privy Council and other national records had been written for centuries, though not always preserved. They constituted a long-standing and highly traditional genre. [A] genre can become a part of the situation itself if that genre becomes so conventionalized that certain formal characteristics are expected of all instances of the genre, whether appropriate or not. The national records had become so conventionalized. Long before Anglo-English became prestigious, the Scottish records had not only adopted the Scots-English language standard, but also developed their own expected style, full of established formats and traditional phrases . . . . The established convention of the genre thus constrained *any* change in the genre, including a change in usage. This effect of the tradition reveals itself especially in the traditional phrases, the stock phrases which seem to have maintained Scots-English forms even more strongly than the rest of the genre.<sup>105</sup>

All this accords with Fish's account of the constraints inherent in the common-law genre, and I think it in good part accounts for the lag that we often sense in legal developments. But I don't want to stop right there because I believe that a swerve back into narrative can help us develop a more comprehensive explanation of how law builds upon itself. That is not really the stretch that it might seem at first blush, once we recall that narrative is itself a genre (or perhaps even a sort of meta-genre). In any event, I hope to show—by analogy to Devitt's linguistic data and arguments—that narratology offers a compelling institutional account of how and why legal systems react more slowly to shifts in public and metanarratives than do institutions of popular culture.

For sociologists and social historians, “[i]t is a commonplace in the study of nationalism that the construction of national identity inevitably relies on the creation

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Selected judiciary cases.

*Id.* at 78 (Appendix II).

<sup>105</sup> *Id.* at 65-66.

and use of narratives—part history, part myth—that imbue nations and nationalist projects with coherence and purpose.”<sup>106</sup> If this is so (and I think it is), how then can we use this fact to explain institutional resistance to *incoherent* influences of the sort that we just observed in Devitt’s study? For explanation, we should first turn to the specifics of the Scottish nationalism that Devitt notes and that others have explored across a broader historical topography, especially in the context of legal institutions.

Nineteenth Century Scotland provides an interesting case study because of its complicated narrative relationship with England. Many have likened this to a colonial relationship, but one with an almost defining twist: the colonization was effected via cultural leveling, not military conquest. And this came as something of a surprise, given that the 1707 Act of Union ostensibly reserved to the Scots sufficient autonomy within key cultural institutions to remain separate from but to gain equality with their southern neighbors:

Had they not carefully set aside a space for difference and thus for equality rather than subservience within the Union by retaining their own law and religion? But by the beginning of the nineteenth century, the Scots began to realize that the London parliament was encroaching on their legal and religious sovereignty. As N.T. Phillipson writes: “it became increasingly clear . . . that assimilation was not something which could be sought in [the Scots’] own time and on their own terms. . . . Assimilation was a force for change which rendered existing institutions inefficient or even redundant.” He continues: “lawyers [began] to think of assimilation in rather broad terms, as something capable of damaging the whole quality of national life.” The Scots, indeed, began to realize that through subtle encroachment upon and erasure of their Scottish difference, they had come to occupy a decidedly secondary, if not irrelevant position in the Union.<sup>107</sup>

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<sup>106</sup> Jonathan Hearn, *Narrative, Agency, and Mood: On the Social Construction of National History in Scotland*, 44 *COMP. STUD. SOC’Y & HIST.* 745, 745 (2002).

<sup>107</sup> Caroline McCracken-Flesher, *Thinking Nationally/Writing Colonially? Scott, Stevenson and England*, 24 *NOVEL* 296, 296-97 (1991) (quoting N.T.

This cultural erosion did not go unnoticed, but it accelerated at a time when Scotland began to enjoy the economic fruits of the Union—i.e., at a time when Scotland came to be written into England’s narrative of economic prosperity. This, coupled with the theme of constitutional evolution, fused to form what Hearn and the Scottish historian Michael Fry have identified as the classic “whig” narrative. “In this narrative, constitutionalism, democracy, and economic ‘improvement’—in other words, all things good—seemed to flow from England to Scotland and the empire, to the rest of the world. It is in many of its essentials the antecedent of modernization theory in the twentieth century.”<sup>108</sup> Hearn goes on to trace various iterations of and engraftments on the whig narrative up to the present, including a turn towards a decidedly Marxist vocabulary after the 1970s (e.g., adoption of Franz Fanon’s anti-colonial voice). But his main point—one shared by other commentators as well—is that both individual Scots and Scottish institutions have found themselves trapped between clashing public narratives: the economic-whig narrative and nationalistic-Scots narrative.

McCracken-Flesher believes—a sentiment with which I concur—that Walter Scott offers a particularly good example of the national confusions that have plagued Scots ever since the border marked by the Tweed began to erode practically, if not jurisdictionally.<sup>109</sup> In fact, Scott’s ontological narrative may fairly be said to embody

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Phillipson, *Nationalism and Ideology*, in GOVERNMENT AND NATIONALISM IN SCOTLAND 177 (J.N. Wolfe ed., 1969)).

<sup>108</sup> Hearn, *supra* note 106, at 753; *see also* Michael Fry, *The Whig Interpretation of Scottish History*, in THE MANUFACTURE OF SCOTTISH HISTORY 72-89 (Ian Donnachie & Christopher Whatley eds., 1992).

<sup>109</sup> McCracken-Flesher, *supra* note 107, at 298.

the narrative clash to which I just adverted. On the one hand, Scott's writing brought him both regard in and a substantial livelihood from the English market. But on the other hand, Scott's novels are infused with distinctly Scottish historical subject matter, and—even more important for our discussion—Scott was both a practicing lawyer and an official in the legal system at a time when it came under siege from the English parliament. McCracken-Flesher reports that “[d]uring 1806-7, when Scott was Clerk to the Court of Session, Westminster started to impinge on its powers. And Scott actively, if hopelessly, resisted English incursions on Scottish law.”<sup>110</sup> I will return in a moment to McCracken-Flesher's choice of the adverb “hopelessly” and focus on what she means by “actively.” One of Scott's biographers, J.G. Lockhart, recounts that after a debate on proposed legislation in the Faculty of Advocates, Scott

Made a speech much longer than any he had ever before delivered in that assembly. . . . [I]t had a flow of energy of eloquence for which those who knew him best had been quite unprepared. When the meeting broke up . . . his reforming friends . . . complimented him on the rhetorical powers he had been displaying, and would willingly have treated the subject-matter of the discussion playfully. But his feelings had been moved to an extent far beyond their appreciation: he exclaimed, “no, no—'t is no laughing matter; little by little, whatever your wishes may be, you will destroy and undermine, until nothing of what makes Scotland Scotland shall remain.” And so saying, he turned round to conceal his agitation—but not until Mr. Jeffrey saw tears gushing down his cheek—resting his head until he recovered himself on the wall of the Mound.<sup>111</sup>

Returning to the word “hopelessly,” we may now ask whether that label is apt. Even if we concede that individual acts of resistance like Scott's often prove

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<sup>110</sup> *Id.*

<sup>111</sup> McCracken-Flesher, *supra* note 107, at 298-99 (quoting J. G. LOCKHART, MEMOIRS OF THE LIFE OF SIR WALTER SCOTT, BART. 223-24 (Houghton Mifflin 1901)).



futile (but I wouldn't go so far as to say that they always do), what about the inherent power of legal institutions to resist incongruent extrasystemic narratives? In Devitt's linguistic study we saw this at work vis-à-vis language; now we may ask whether this holds for matters of substance. For proof, we can look to certain aspects of Scots law.

As noted above, it is well known that a condition of the Act of Union between England and Scotland was that the Scottish educational, legal, and religious systems would remain separate. And although the economic pressures represented by the whig narrative have diminished the practical import of this separation, that is not so across the full range of Scots law. For as Lindsay Farmer has illustrated,

The criminal law . . . has succeeded in remaining resolutely independent from its English neighbor. The more serious offences are still to be found in the common law not statute. There has been stubborn resistance to the idea of codifying the substantive law. The system has its own courts, rules of procedure and evidence, and even punishment. And, perhaps most significantly of all, unlike the civil law it is completely self-contained, there being no appeal to the House of Lords on criminal questions. This independence has not occurred accidentally but is rather the result of specific and deliberate resistance . . .<sup>112</sup>

Farmer locates the source of this resistance, at least in significant part, in the Scottish national narrative of independence, of difference from England. For support, Farmer turns to Baron Hume, who explained in the introduction to his *Commentaries on the Law of Scotland Respecting Crimes* that he was motivated to write by “the desire of rescuing the law of my native country from that state of declension in the esteem of some part of the public, into which, of late years, it

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<sup>112</sup> Lindsay Farmer, “*The Genius of our Law . . .*”: *Criminal Law and the Scottish Legal Tradition*, 55 MOD. L. REV. 25, 25 (1992).

seems to have been falling.”<sup>113</sup> As Farmer further demonstrates and wryly concludes,

The cause of this falling esteem is clearly identified as “those multiplied references to the criminal law of England.” He proceeds to devote some pages to an enumeration of the Scottish system, although as a firm supporter of political union he points out that this is not intended to disparage the English system. There is a slightly provocative edge to his declaration that he regards the English system as “liberal and enlightened” due to the “much greater number of dissolute and profligate people” and “the greater progress . . . of every sort of corruption.” The English courts, in other words, get more practice!<sup>114</sup>

Farmer conducts his discussion in the context of what is often thought (but nearly as often disputed) as the defining characteristic of the Scottish criminal system: viz., the power of the High Court to declare acts criminal. As one court put it nearly 200 years ago, “[t]he genius of our law rests on a principle diametrically opposite to that of England; the Courts of criminal jurisdiction being authorized to punish crimes without positive enactment.”<sup>115</sup> Farmer is concerned—using the declaratory power of the High Court as a fundamental example—to show that Scottish criminal law rests on an “invented tradition,” an “imaginary past.”<sup>116</sup> For our purposes, it is immaterial whether the High Court does or should have declaratory power or whether Scottish lawyers have deluded themselves into basing their traditional beliefs and practices on fiction rather than fact. What is material, however, is that statements articulating differences between English and Scottish

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<sup>113</sup> *Id.* at 32 (quoting Baron Hume, 1 COMMENTARIES ON THE LAW OF SCOTLAND RESPECTING CRIMES 12-13 (B. Bell ed., 4th ed. 1844)).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 26.

<sup>116</sup> *Id.* at 42.

law “represent part of a successful attempt to assert national identity through institutions such as law in the century following the Union with England. The very tangible economic benefits of the Union could be obtained, but some sense of Scottishness preserved.”<sup>117</sup> And although Farmer decries aspects of this conservative nationalism and its consequences, he nonetheless concedes the sustaining power of nationalistic public narratives once they set up behind institutional walls.<sup>118</sup>

None of this is unique to Scotland. I would argue that all legal institutions tend to preserve existing public narratives and to adopt new ones only slowly. This temporal lag has the salutary benefit of reducing legal volatility, but it also leads to decisions that appear quaint or even downright silly. As an example we can examine how the law has dealt with one of the most potent metanarratives of last

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<sup>117</sup> *Id.* at 33-34.

<sup>118</sup> In particular, Farmer points to the work of Lord Cooper and Professor T. B. Smith, which he capsules as follows:

The story of development since 1800 is that the effect of the Union has been felt as the smaller Scottish system has come under the assimilating influence of the English. Criminal law alone has resisted this intrusion, largely due to the institutional separation from the House of Lords, but also because the “native genius” of the Scots gave rise to a system of sufficient flexibility to make legislative intervention unnecessary in the face of social change. It thereby avoided the harshness and confusion that was the hallmark of the English criminal law in the early nineteenth century. As the High Court has developed and renewed its own precedents, the English system has come to benefit through the statutory adoption of concepts developed in Scotland. . . . The implications of this nationalism start to become clear when we set this thesis beside the familiar concern, shared by Cooper and Smith, that the profusion of statute law threatens to undermine the principles of the common law. Here the threat is not only statute law but United Kingdom statute law. What is being threatened is an idea of Scotland and Scottish identity—the native genius of our law.

*Id.* at 34.

couple of hundred years—namely, the popular belief that “scientific” evidence is evidence of truth. “The idea that scientific inquiry is objective is unquestionably among the ruling ideas of our epoch, and it represents science as not serving the interests of a particular class, but a purely general interest in the understanding of nature. Indeed, the idea of scientific objectivity has often been invoked on behalf of the claim that the attitude of modern science is ‘the only rational, universally valid’ one.”<sup>119</sup>

In the early 1940s, the silent film star Charlie Chaplin found himself embroiled in a paternity suit.<sup>120</sup> Following commencement of the suit (and prior to birth of the child), Chaplin and the soon-to-be mother, Joan Berry, entered into a stipulation (agreed to by the child’s guardian ad litem and approved by the superior court) under which Chaplin agreed to pay Berry’s pre- and post-natal medical expenses and attorney’s fees and Berry agreed

[that she would] voluntarily submit said child after its birth to medical tests for the purpose of determining its paternity and that she would make herself and said child available at all times so that said tests could be made by competent medical experts; . . . that one physician shall be named by defendant, one by the guardian ad litem, and the two so chosen shall select a third “who shall be especially skilled in such matters, who shall make a blood test or other tests accepted by medical science for the purpose of proving and establishing paternity . . .”<sup>121</sup>

The parties further agreed that if two of the three physicians determined that Chaplin was not the father, then plaintiff’s attorneys would dismiss the suit or—upon

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<sup>119</sup> Peter Railton, *Marx and the Objectivity of Science*, in *THE PHILOSOPHY OF SCIENCE* 763 (Richard Boyd et al. eds., 1991).

<sup>120</sup> *See Berry v. Chaplin*, 169 P.2d 442 (Cal. App. 1946).

<sup>121</sup> *Id.* at 445-46.

presentation of a proper medical report from the two physicians—the court would dismiss the case with prejudice.

In keeping with what I think of as the Burns rule of contract (“The best-laid schemes o’ mice an’ men / Gang aft a-gley”), *all three* physicians concluded that Chaplin was not the father, but plaintiff’s counsel refused to dismiss the case and two judges presiding over later stages of the matter declined to enforce the parties’ stipulation.<sup>122</sup> The case then proceeded to trial, at which Joan Berry put on wholly circumstantial evidence of her child’s paternity:

She testified that she and defendant had had four acts of sexual intercourse at or about the date when, in the ordinary course of nature, the child must have been begotten. . . . Her testimony was corroborated by defendant’s butler as to the fact that she arrived at defendant’s home on the evening of December 23d and remained there until some time in the afternoon of December 24th, occupying either defendant’s room or a room connected therewith by a bathroom, and that defendant was present in the room during at least a portion of the night of the 23d and in the morning of the 24th.<sup>123</sup>

Against this evidence, Chaplin offered considerable counter-circumstantial evidence, some of which offered other candidates for fatherhood, some of which tended to undermine Berry’s credibility. But his principal argument was scientific: namely, that the blood tests proved that he was not the father:

The qualifications, competency, and integrity of the physicians designated to make the blood tests are not questioned. After the tests were completed they made a report reading as follows:

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<sup>122</sup> On appeal, the Court agreed with the decision of the lower court not to enforce the stipulation. In a nutshell, the Court found that the parties had no power to enter into the stipulation and the judge had no power to approve it, absent evidence that the stipulation was fair and reasonable and in the best interests of the child. The Court also found that the parties were improperly attempting to manipulate the judicial system by agreeing as to the force that particular evidence was to carry. *Id.* at 446-48.

<sup>123</sup> *Id.* at 449.

Examination of the bloods of Charles Chaplin, Joan Berry and Carol Ann Berry give the following results.

	Group	Type
Charles Chaplin	O	MN
Joan Berry	A	N
Carol Ann Berry	B	N

Conclusion reached as the result of these blood grouping tests is that in accordance with the well accepted laws of heredity, the man, Charles Chaplin, cannot be the father of the child, Carol Ann Berry. The law of heredity which applies here is “The agglutinationgens A and B cannot appear in the blood of a child unless present in the blood of one or both parents.”

Two of the physicians testified at the trial that the report truly represented their findings from the tests made. They and one other physician testified that by reason of said tests defendant was not and could not have been the father of [Carol Ann]. *The report and the evidence of the physicians were not controverted by any scientific evidence . . .*<sup>124</sup>

Despite this uncontroverted scientific evidence, the jury determined that Chaplin was the father of Carol Ann Berry. On appeal, the Court conceded “the immutability of the scientific law of blood grouping,” but held (based on an unfortunate precedent) that blood-test evidence is merely “expert opinion” and that “[t]he law makes no distinction between expert evidence and that of any other character.”<sup>125</sup> Thus, the jury was entitled to valorize Joan Berry’s circumstantial proof over the unrebutted scientific proof. In a concurring opinion, Justice McComb

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<sup>124</sup> *Id.* at 450-51 (emphasis supplied). Although no scientific evidence was offered to rebut the blood-group evidence, the trial court did allow a cruder form of hereditary testing: it made Chaplin stand in front of the jury next to Joan Berry with the baby cradled in her arms so that the jury could compare features. Chaplin unsuccessfully advanced this as a point of error on appeal, the Court holding that the salacious testimony presented at trial would have disabused the jury of any inclination to envision a Madonna and Child. *Id.* at 452. This begs the real question presented: i.e., whether lay phenotyping is a proper rebuttal to professional genotyping.

<sup>125</sup> *Id.* at 451.

pointedly remarked how out of step the majority opinion was with the scientific metanarrative—and indeed the metanarrative of Modernity itself—that had already come to dominate other corners of public discourse:

It is possible that in view of the advances made in the medical profession since the decision by the Supreme Court in the Arais case, the present court may see fit to review the rule announced in the previous decision and establish a rule of jurisprudence on this subject consonant with the principle uniformly recognized without question by the medical profession of the United States and Europe. . . .

Ascertainment of the factual truth in the adjudication of any controversy is a consummation devoutly to be wished. Time was when the courts could rely only upon human testimony. But modern science brought new aids. The microscope, electricity, X-ray, psychology, psychiatry, chemistry and many other scientific means and instrumentalities have revised the judicial guessing game of the past into an institution approaching accuracy in portraying the truth as to the actual fact where, in the pursuit of which, scientific devices may be applied. The chemical tests for learning the presence of poisons in the blood stream, application of the Roentgen ray in defining the fracture of a bone, the use of the microscope in acquiring exact knowledge of the authorship of documents, or the presence of bacteria or the prevalence of white corpuscles—all argue eloquently for a reliance upon scientific devices for ascertaining the truth. If the courts do not utilize these unimpeachable methods for acquiring accurate knowledge of the pertinent facts they will neglect the employment of available, potent agencies which serve to avoid miscarriages of justice.

In the case at bar a widely accepted scientific method of determining parentage was applied. Its result were definite. To reject the new and certain for the old and uncertain does not tend to promote improvement in the administration of justice.<sup>126</sup>

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<sup>126</sup> *Id.* at 453. Interestingly, one of the leading evidentiary authorities of the time had already moved to the position that negative blood-type evidence (or at least unchallenged negative blood-type evidence) should inferentially resolve the issue of paternity. See JOHN HENRY WIGMORE, 1 EVIDENCE IN TRIALS AT COMMON LAW § 165b (3d ed. 1940) (“But at this point comes into play the great discovery of science (emerging after many years of patient research by numerous scientists, but now accepted as correct by all) viz. that no particular gene A, B, or O, will appear in the progeny unless it was present in one of the parents. This universal negative truth of heredity is the basis of the inferences to be examined later.”).

This conservative tendency in the law—i.e., this resistance to shifting higher-order narratives—does not, of course, mean that law is unresponsive to cultural change. It just means that there is a cycle that must be completed before changes can occur. First, a sufficient number of individual narratives must through their collective weight effect a change in higher-order narratives. By this I mean that a public narrative or metanarrative on a particular subject must absorb enough individual narratives to change the direction of the story. Sometimes this amounts to the wholesale displacement of a dominant narrative. By the time of *Berry v. Chaplin*, metanarrative change had already happened: Western culture had already seized on the idea of science as truth. But that wasn't enough, because law's tipping point is higher than that of cultural narratives—i.e., the law's rate of narrative absorption is lower than that of the culture at large. So there is a second, critical, step in legal evolution—viz., more individual narratives must work their way through the legal system before rules change.<sup>127</sup> To cast this in evidentiary terms, cultural narratives change on a “preponderance” standard, whereas laws change on something higher—perhaps “clear and convincing” or “beyond a reasonable doubt.” We can see this process at work over time in any set of thematically related cases. Cases based on racial relations provide a particularly good example.

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<sup>127</sup> As it turned out, *Berry v. Chaplin* was on the tipping point: the California legislature acted fairly quickly to give conclusive weight to undisputed blood-test evidence of nonpaternity. See *Dodd v. Henkel*, 84 Ca3d 604, 609 (Cal.App. 1978) (“[T]he California statutes authorizing a determination of nonpaternity based upon undisputed findings of the ‘experts’ were enacted in the wake of considerable criticism of the holding . . . followed in the celebrated case of *Berry v. Chaplin*.”).



## 8. Absorbing Narratives: Letting the Outside In

Slavery was legally institutionalized—albeit obliquely and euphemistically (the word “slave” and its cognates appear nowhere)—in the United States Constitution.<sup>128</sup> This does not mean, however, that there was a clear consensus—an unambiguous public narrative, if you will—about the morality or practical desirability of slavery. In fact, much evidence suggests that the Constitution’s drafters were so divided on the subject that that they could do little more than agree to disagree and await the emergence of a dominant view:

The framers [dealt] with slavery by seeking, so far as possible, to take it out of the national political arena. They were unable in 1787 to settle the issue, one way or the other. They could not establish straightforward Constitutional guarantees against emancipation, as the South Carolinians desired, because many Northerners, and perhaps some Southerners, would not permit it. Nor could they give Congress power to regulate slavery in any way, much less abolish it, because Southerners refused to yield control over the institution. Realizing that it was utterly beyond their power to fashion a national consensus on slavery, or to “govern” the issue in the absence of one, they had contented themselves with measures aimed at preventing friction over slavery between the states and sections. Thus, when it was decided to tie representation to population, it became necessary to set a date when the slave trade could be terminated, because of the relationship it now bore to the balance of political forces in the union. And when Pierce Butler raised the question of escaped slaves, the Convention was willing to oblige, because most Northerners were as reluctant for blacks to flee north as Southern slave owners were to lose their property. The fugitive-slave clause, like the slave-trade clause, was intended to remove a potential sore point between the states. . . .

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<sup>128</sup> Three Constitutional provisions recognize—and therefore arguably legitimize—slavery. U.S. CONST. art. 1, § 2, cl. 3, directs that the apportionment of legislators and direct taxes among the several states be “determined by adding to the whole Number of free Persons, . . . three fifths of all other Persons.” Art. 1, § 9, prohibits Congress from outlawing the slave trade (the “Migration or Importation of . . . Persons”) before 1808. Art. 4, § 2, cl. 3—the fugitive-slave clause—holds that a slave (“a Person held to Service or Labour”) escaping from one state to another “shall be delivered up” on claim of his or her owner.

There is no evidence that any framer thought the Constitution contained power to abolish slavery. They all knew how deep the Southerners felt, and however much some of them may have regretted the hold that slavery had on the South, they were all fully sympathetic with the determination of the Deep Southerners to resist abolition in the present circumstances. . . . But there was no guarantee that powers of emancipation were forever denied to the federal government. The evidence there is permits the conclusion that the future, with respect to possible public action against slavery, was left open on purpose. [The] framers, as of 1787, agreed unanimously to place the institution of slavery, as it existed within the South, not “in the course of ultimate extinction,” as Lincoln argued, but beyond national regulation.<sup>129</sup>

Given the equivocal public stance towards slavery that we find institutionalized in the Constitution, it is thus not surprising that we see developments in the public narrative over time. We can trace these developments through case law, a forum in which shifting racial narratives have been regularly tested.

By the mid-Nineteenth Century, pressures from the North-South sectional conflict began to mount as the United States began to expand westward, which raised the question whether slavery would be allowed to expand along with it. Various political solutions had failed to ease these pressures, and public sentiment increasingly leaned in favor of “leaving it to the Supreme Court.”<sup>130</sup> The Court—which was the only major branch of government that had not tried its hand at resolving the conflict—itsself came to accept the view that it could simply command away the growing sectional rift.<sup>131</sup> This belief proved profoundly, devastatingly wrong.

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<sup>129</sup> GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 436-37 (1986) (quoting Robinson, *SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS 1765-1820* 209, 210, 244-46 (1971)).

<sup>130</sup> *Id.* at 440 (quoting D. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 192-94, 206-08 (1978)).

<sup>131</sup> *Id.*

The Court entered the slavery fray in *Dred Scott v. Sanford*, which has proved to be one of the most vilified decisions in Supreme Court history. The decision is wrong on many levels, but for our purposes the Court's narrative blunders are the most instructive. The case arose from the intersection of Dred Scott's personal narrative and the larger public narrative that had yet to explain a nation divided both literally and philosophically over slavery. Dred Scott, who had admittedly once been a slave, brought a trespass suit in federal court against John Sanford. He claimed that the federal court had "diversity" jurisdiction over the suit because he was a citizen of Missouri and Sanford was a citizen of New York.<sup>132</sup> In the early 1830s Scott's former owner took him from Missouri to Illinois, where they resided for two years, then on to Minnesota, which was at that time part of the Louisiana Territory. Within about four years, they returned to Missouri and Scott was sold to Sanford as a slave. During this period, slavery was legal in Missouri, but prohibited in Illinois by state law and in the Louisiana Territory by the Missouri Compromise.<sup>133</sup> Scott asserted that he became free by virtue of his residence in two states in which slavery was banned. Sanford countered that even if Scott were free, that did not make him a "citizen" of Missouri and, therefore, the federal court had no jurisdiction to hear Scott's case. Moreover, merely residing in a free state or territory could not emancipate a slave in derogation of his or her owner's property rights upon returning to a slave-permitting state.

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<sup>132</sup> The United States Constitution enumerates the categories of cases over which federal courts have jurisdiction. One of those categories is "Controversies . . . between Citizens of different States." U.S. CONST. art. 3, § 2.

<sup>133</sup> Act of March 6, 1820, 3 Stat. 545.

As we have seen, America was born in a state of narrative suspension, dangling between a commitment to social equality and the looming paradox of slavery. Chief Justice Roger Taney’s majority opinion in *Dred Scott* misrepresents this past, claiming universality for a public narrative in which blacks figured only as members of a “subordinate and inferior class of beings”:

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.<sup>134</sup>

In dissent, Justice McLean demonstrated that Justice’s Taney’s majority opinion rested on a false premise because slavery was not a universally recognized institution—even at the time that Constitution was adopted:

There is no nation in Europe which considers itself bound to return to his master a fugitive slave, under the civil law or the law of nations. On the contrary, the slave is held to be free where there is no treaty obligation, or compact in some other form, to return him to his master. The Roman law did not allow freedom to be sold. An ambassador or any other public functionary could not take a slave to France, Spain, or any other country of Europe, without emancipating him. A number of slaves escaped from a

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<sup>134</sup> 60 U.S. 393, 407 (1857).

Florida plantation, and were received on board of ship by Admiral Cochrane; by the King's Bench, they were held to be free. . . .

The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws. This was fully recognised in *Somerset's case*, (Lafft's Rep., 1; 20 Howell's State Trials, 79,) which was decided before the American Revolution. . . .

No case in England appears to have been more thoroughly examined than that of *Somerset*. . . .

In giving the opinion of the court, Lord Mansfield said:

The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself, from whence it was created, is erased from the memory; it is of a nature that nothing can be suffered to support it but positive law.<sup>135</sup>

This eviscerates Taney's only serious attempt at justification—viz., the “originalist” appeal to the meaning of the Constitution when adopted. Thus unmasked, we see Taney's opinion as nothing more than a raw and unanchored exercise of power, one consciously declining to endorse the ever-strengthening narrative of America as a land of freedom. And I choose the word “consciously” quite deliberately. For Taney acknowledges that public opinion has changed, even though he is not going to be the one to act on it: “It is not the province of the court to decide upon the justice or injustice, the policy or impolicy of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution.”<sup>136</sup>

A civil war, three Constitutional Amendments, and a host of enabling acts later, there was no longer doubt that blacks were legal persons entitled to the full

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<sup>135</sup> *Id.* at 534-35.

<sup>136</sup> *Id.* at 405.

range of Constitutional protections.<sup>137</sup> But what that range entailed was a different matter. *Plessy v. Ferguson*, which was decided nearly forty years after *Dred Scott*, showed how the narrative of difference had not been erased and could still trump the grand public narrative of America as a bastion of freedom and equality.<sup>138</sup> In 1890, Louisiana passed a statute requiring railroads to provide “equal but separate accommodations for the white and colored races.” Criminal liability attached to a passenger of one race using the facilities intended for the other race. Plessy, who claimed to be seven-eighths white, was prosecuted for refusing to leave a “white” passenger car. The gravamen of Plessy’s suit was that Louisiana’s legislation could not be justified under even a minimal “reasonableness” standard.<sup>139</sup> But the majority disagreed, holding that anything negative about the law came not from the law itself but from the defective construction that blacks placed on it!

We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the

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<sup>137</sup> See, e.g., U.S. CONST. amends. XIII (abolishing slavery), XIV (conferring citizenship on all persons born or naturalized in the United States) and XV (conferring the right to vote on all citizens, without regard to race, color, or previous condition of servitude).

<sup>138</sup> 163 U.S. 537 (1896).

<sup>139</sup> See *id.* at 549-50:

[I]t is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men’s houses to be painted white, and colored men’s black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color.

colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. . . . Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.<sup>140</sup>

In dissent, Justice Harlan pounced on the sophistry underlying the majority's pronouncements, as well as the sharp disconnect between those pronouncements and the notions of liberty and equality that animated the adoption of the Civil War

Amendments:

It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. . . . But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful.<sup>141</sup>

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<sup>140</sup> *Id.* at 551-52.

<sup>141</sup> *Id.* at 557, 559.

Going further, he presciently observed that *Plessy* would stand to feed narratives of “race hatred” and give government sanction to “more or less brutal and irritating” encroachments upon “the admitted rights of colored citizens.” This would in turn, he argued, “create and perpetuate a feeling of distrust between these races” because it rests “on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens . . . .”<sup>142</sup> Thus, states must be debarred from attempts to turn back the pages of history to the antebellum period when the national narrative accepted not just social inequality but slavery itself:

The sure guaranty of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, national and state, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States, without regard to race. State enactments regulating the enjoyment of civil rights upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned.<sup>143</sup>

It took another fifty-plus years for the Supreme Court to undo the separate-but-equal mischief wrought by *Plessy* and its progeny. That happened in *Brown v. Board of Education of Topeka*, a case in which the plaintiffs challenged the constitutionality of state laws permitting schools segregated by race.<sup>144</sup> That case is important because it (mostly) closes the narrative loop opened in *Dred Scott* and refashioned in *Plessy*, but in our context it is more important *how* the Court did so

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<sup>142</sup> *Id.* at 560.

<sup>143</sup> *Id.* at 560-61.

<sup>144</sup> 347 U.S. 483 (1954).



than *why*. To recall the majority opinions in the two earlier cases, the justices there took flat-footed, monolithic positions about what the respective framers had in mind when they drafted the Constitution and the Civil War Amendments. Justice Warren, writing for a unanimous Court, started from the premise that the historical record surrounding adoption of the Fourteenth Amendment was generally “inconclusive” and—because of a developing public narrative concerning the importance of public education—largely irrelevant:

The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among “all persons born or naturalized in the United States.” Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty. . . . An additional reason for the inconclusive nature of the Amendment’s history, with respect to segregated schools, is the status of public education at that time. . . . Education of Negroes was almost nonexistent, and practically all of the race were illiterate. . . . Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.<sup>145</sup>

For support, the Court turned not to the particular narratives of the individual plaintiffs, but to a growing body of sociological evidence, especially that growing out of the work of Kenneth Clark.<sup>146</sup> This tacitly signals, I think, that the Court

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<sup>145</sup> *Id.* at 489-94.

<sup>146</sup> *Id.* at 494 n.11. The Court also cited a similarly generalized finding by one of the Kansas courts below:

accepted that the public racial narrative had tipped decidedly in favor of Constitutional standards that would support broad social equality for blacks.<sup>147</sup> In other words, the national race-narrative had been revised—even reconstructed—in a way that ultimately leveraged the *Plessy*-era legal narrative into sync with the evolved public narrative.<sup>148</sup>

## 9. What Law Can Learn from Literature (and History)

Now that we have seen the process of narrative evolution at work within the law, it behooves us to explain it. As I mentioned before, legal narratives are not

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Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.

<sup>147</sup> None of this means that *Brown* put matters of race to rest in the United States. Even today, race bedevils the courts and many social institutions. Most recently, the debate has moved into the arena of affirmative action and onto topics like, for instance, whether educational institutions can grant preferences to members of minority groups that have been historically underrepresented in those institutions. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (in approving a preferential admission system at the University of Michigan Law School, the Court (somewhat wistfully) opined that race-based preferences would not be necessary in another generation: “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

<sup>148</sup> To put this in the terminology of legal theory, the ideal of racial equality had hardened into what Dworkin calls an “interpretive” fact. See Dworkin’s discussion of Edmund Cahn’s position in Ronald Dworkin, *Social Sciences and Constitutional Rights—The Consequences of Uncertainty*, 6 J. L. EDUC. 3, 5 (1977):

We don’t need evidence for the proposition that segregation is an insult to the Black community—we know it; we know it the way that a cold causes snuffles. It is not that we don’t need to know it nor that there isn’t something there to know. There is a fact of the matter, namely that segregation is an insult, but we need no evidence for that fact—we just know it. It’s an interpretive fact.

different in kind from other types of narratives; to the degree that they are different, it is only because they are made according to a particular set of conventions. Ian Watt has made this point in examining the contours of the “realistic” novel:

Here, however we are concerned with a much more limited conception, with the extent to which the analogy with philosophical realism helps to isolate and define the distinctive narrative mode of the novel. This, it has been suggested, is the sum of literary techniques whereby the novel’s imitation of human life follows the procedures adopted by philosophical realism in its attempt to ascertain and report the truth. These procedures are by no means confined to philosophy: they tend, in fact, to be followed whenever the relation to reality of any report of an event is being investigated. The novel’s mode of imitating reality may therefore be equally well summarised in terms of the procedures of another group of specialists in epistemology, the jury in a court of law. Their expectations, and those of the novel reader coincide in many ways: both want to know ‘all the particulars’ of a given case—the time and place of the occurrence: both must be satisfied as to the identities of the parties concerned, and will refuse to accept evidence about anyone called Sir Toby Belch or Mr. Badman—still less about a Chloe who has no surname and is ‘common as the air’; and they also expect the witnesses to tell the story ‘in his own words’. The jury, in fact, takes the ‘circumstantial view of life’, which T.H. Green found to be the characteristic outlook of the novel.<sup>149</sup>

Now whether particular narrative conventions actually serve the ends of truth is a topic that we must defer for a moment. But for now, suffice it to say that Watt sees it as an open question: “Formal realism is, of course, like the rules of evidence, only a convention; and there is no reason why the report on human life which is presented by it should be in fact any truer than those presented through the very different conventions of other literary genres.”<sup>150</sup>

To get us closer to the question of “truth” and what that might mean when we speak of legal narratives, Paul Veyne’s description of how history is (re)constructed seems an apt analogy. In his view,

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<sup>149</sup> Watt, *supra* note 76, at 463-64.

<sup>150</sup> *Id.* at 464.

History is an account of events: all else flows from that. Since it is a direct account, it does not revive, any more than the novel does. The actual experience, as it comes from the hands of the historian, is not that of the actors; it is a narration, so it can eliminate certain erroneous problems. Like the novel, history sorts, simplifies, organizes, fits a century into a page. This synthesis of the account is not less spontaneous than that of our memory when we call to mind the last ten years through which we have lived. To speculate on the interval that always separates the actual experience and the recollection of the event would simply bring us to see that Waterloo was not the same thing for a veteran of the Old Guard and for a field marshal; that the battle can be related in the first or third person; that it can be spoken of as a battle, as an English victory, or as a French defeat; that from the start one can drop a hint of the outcome or appear to discover it. These speculations can produce amusing experiments in aesthetics; to the historian, they are the discovery of a limit.<sup>151</sup>

Not only is history a synthesis and condensation, it is driven by *perspective*: it is never unmediated “fact.” And this is so even for direct actors, whose memories and perceptions are never more than partial and are subject to distortion, even delusion:

That limit is that in no case is what historians call an event grasped directly and fully; it is always grasped incompletely and laterally, through documents or statements, let us say through *tekmeria*, traces, impressions. Even if I am a contemporary and a witness of Waterloo, even if I am the principal actor and Napoleon in person, I shall have only a perspective of what historians will call the event of Waterloo; I shall be able to leave to posterity only my statement, which, if it reaches them, they will call an impression. Even if I were Bismarck deciding to send the Ems dispatch, my own interpretation of the event would perhaps not be the same as that of my friends, my confessor, my regular historian, and my psychoanalyst, who may have their own version of my decision and think they know better than I do what it was I wanted. In essence, history is knowledge through documents. Thus, historical narration goes beyond all documents, since none of them can be the event; it is not a documentary photomontage, and does show the past “live, as if you were there.”<sup>152</sup>

In law, this means that we must attend closely to how narratives are constructed. In even a simple case—a minor fender-bender at an intersection—we

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<sup>151</sup> PAUL VEYNE, *WRITING HISTORY* 4-5 (Mina Moore-Rinvolutri trans., 1984).

<sup>152</sup> *Id.*

can never “know” whether the traffic light was red or green when the cars crashed. The best we can do is to fashion a narrative reconstruction of the event, one that sorts, sifts and synthesizes the competing narratives offered by the actors and witnesses, along with physical evidence and any accompanying expert testimony interpreting that evidence. In difficult cases, this involves both choosing among competing narratives and building a coherent adjudicative narrative from among narrative fragments—i.e., a narrative that will stand to justify the ultimate decision in a case. For instruction and for an extended rumination on what it means to find “facts,” we now turn to Robert Browning’s *The Ring and the Book*.<sup>153</sup>

In June of 1860, Robert Browning bought an “old yellow book” at a flea market in Florence. This book was actually a collection of legal materials (briefs, letters, and the like) pertaining to a late-Seventeenth-Century trial of an Arentine nobleman/ churchman for the murder of his young wife and her parents. Over the next few years, Browning fashioned this raw material—through a process that warrants closer examination—into the twelve dramatic monologues (by nine different speakers) that collectively constitute his monumental poem.

The basic story behind *The Ring and the Book* is fairly simple. In 1693 Guido Franceschini, a nobleman who had had a disappointing career in the Church, married a thirteen-year-old girl, Francesca Pompilia, who had been raised in Rome by her ostensible parents (more on that in a minute), a couple named Comparini (Pietro and Violante). After the marriage, which was unhappy from the start, the Comparini visited Guido’s palace in Arezzo, which they found much poorer than

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<sup>153</sup> ROBERT BROWNING, *THE RING AND THE BOOK* (Richard D. Altick & Thomas J. Collins eds., Broadview Literary Texts 2001) (1868-69).

expected. Because Guido had misrepresented his financial condition at the time of the marriage, they brought suit against him in Rome for the return of Pompilia's dowry. As grounds, the Comparini argued that Pompilia was really the daughter of a prostitute, from whom Violante had purchased the infant Pompilia to satisfy a condition precedent (having a child) to the vesting of an inheritance. As a result of this suit, the marriage deteriorated further and Guido became intolerable. Pompilia sought relief from local authorities, to no avail, and she eventually made an escape with the help of a young canon, Giuseppe Caponsacchi. Guido gave chase and overtook the fleeing couple about fifteen miles from Rome, at Castelnuovo. The couple were subsequently tried at Rome; Caponsacchi was banished to Civita Vecchia for three years; Pompilia was sent to a convent. But because Pompilia was pregnant, she was soon returned to the Comparini. Several months later, she gave birth to a boy, Gaetano. Shortly after Gaetano's birth, Guido and four henchmen gained entrance to the Comparini's home by claiming to bear a message from Caponsacchi and then murdered the Comparini and left Pompilia for dead with twenty-two stab wounds, from which she died four days later. Guido and his cohorts were captured, charged with murder, and tried.

In the criminal trial, Guido did not claim that he had not committed the acts charged; rather, he argued that a husband should be allowed to kill his adulterous wife and those who aided her. Guido's justification defense thus called upon the court to pass on the relationship between Pompilia and Caponsacchi (which was never fully resolved in the earlier proceeding), as well as the conduct and motivations of everyone involved. Ultimately, the court decided against Guido and condemned him to death by beheading. But Guido, who held minor orders in the

Church, appealed to Pope Innocent XII to set aside his sentence under canon law.

The Pope declined to intervene; Guido was executed on February 22, 1698. Quickly thereafter, the court ruled Pompilia innocent and declared Gaetano the legal heir to her property.

When we look at specifics in a minute, we will see that Browning took this basic set of facts, passed them through the lens of his own imagination, and projected them into a work of art. Book I, whose narrator is something of a stand-in for Browning, is a general introduction. In Book II, “Half-Rome,” the speaker is an older man with his own matrimonial difficulties; he takes up Guido’s cause. The speaker in Book III, “The Other Half-Rome,” is a young man, with obvious sympathies for Pompilia. The narrator of Book IV, “Tertium Quid,” strives for a neutral tone and to balance the arguments put forth by the two speakers immediately preceding him. Book V, Guido’s first of two monologues, comes close on the heels of the murder. He is speaking to his judges and defends himself through a series of thinly disguised appeals to shared values and experiences. The narration of Book VI, which Caponsacchi delivers, is full of grief for Pompilia, hatred for Guido and scorn for the judges, who—after all—had treated the earlier proceeding with juvenile humor. Book VII is “Pompilia,” a deathbed confession in which she struggles to make sense of all that has happened to her. Books VIII and IX belong to the two lawyers, Dominus Hyacinthus de Arcangelis and Juris Doctor Johannes-Baptista Bottinius, the former representing Guido, and the latter prosecuting him. After the relatively lighthearted interlude of the two lawyers, the Pope takes center stage and renders a damning judgment on Guido. In Book XI, Guido is given a chance to say his last words. He appears in a form much different from that of his

previous monologue, this time showing not solicitousness but unvarnished bitterness and hatred. Book XII, “The Book and the Ring,” closes the cycle of narratives with the reappearance of the speaker from Book I. Its closing observations about the relationship between “facts” and “meaning” are critical to an understanding of the work as whole and—indeed—all narrative reconstruction: “So write a book shall mean, beyond the facts, / Suffice the eye and save the soul beside.”<sup>154</sup>

A full-blown explication of this enormous work would capsize us, so we must content ourselves with an examination of just a few key “facts” that we can assess from multiple perspectives. In Book I, the narrator alerts us to the fundamental—yet unstable—relationship between fact and narrative. He finds the “old yellow Book,” which he characterizes as “pure crude fact,” and becomes so transfixed by it that in the time it took to walk home from the market he “had mastered the contents, knew the whole truth.”<sup>155</sup> From the outset, though, we know that Browning is up to something more than merely “reporting” the “facts.” For he describes to us the work of the goldsmith, who blends gold (fact) with an alloy (artistic imagination) to make the gold workable, then removes the alloy to reveal a finished ring (the work of art):

The trick is, the artificer melts up wax  
With honey, so to speak; he mingles gold  
With gold’s alloy, and, duly tempering both,  
Effects a manageable mass, then works:  
But his work ended, once the thing a ring,  
Oh, there’s repristination! Just a spirt  
O’ the proper fiery acid o’re its face,  
And forth the alloy unfastened flies in flume;

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<sup>154</sup> *Id.*, bk. XII, ll. 866-67.

<sup>155</sup> *Id.*, bk. I, ll. 86, 117.



While, self-sufficient now, the shape remains,  
The rondure brave, the liliated loveliness,  
Gold as it was, is, shall be evermore:  
Prime nature with an added artistry—  
No carat lost, and you have gained a ring.<sup>156</sup>

This fact-plus-artistry-equals-ring formula that Browning establishes is worth testing a bit to see how well it generalizes to and explains (if at all) the formation of the adjudicative narratives that we have been examining so far. Along the way, we will of necessity need to consider what “facts” are, what “truth” is, and how those concepts subsist within (and are perhaps only derivable from) a narrative framework. Browning is at some labor to characterize both his source material as “fact” and his own work as “truth”—or at least “fact” of a different order. Of the Old Yellow Book, he says:

Now, as the ingot, ere the ring was forged,  
Lay gold, (beseech you, hold that figure fast!)  
So, in this book lay absolutely truth,  
Fanciless fact, the documents indeed,  
Primary lawyer-pleadings for, against,  
The aforesaid Five; real summed-up circumstance  
Adduced in proof of these on either side,  
Put forth and printed, as the practice was . . .<sup>157</sup>

Here, Browning facially overstates the purity of the facts set forth in the Old Yellow Book—after all, the documents making up that compendium were *authored*, which necessarily means that “what really happened” has been interpreted—but I think Browning knows this. His claim is that there are different modes of interpretation and that the one that he practices may swerve closer to “truth” than

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<sup>156</sup> *Id.*, bk. I, ll. 18-30.

<sup>157</sup> *Id.*, bk. I, ll. 141-48. To similar effect, Browning writes, “This is the bookful; thus far take the truth, / The untempered gold, the fact untampered with, / The mere ring-metal ere the ring be made!” *Id.*, bk. I, ll. 364-66.

others. He stakes this claim by first defending his process against the common charge of art-as-fiction:

“Do you tell the story, now, in off-hand style,  
Straight from the book? Or simply here and there,  
(The while you vault it through the loose and large)  
Hang to a hint? Or is there book at all,  
And don’t you deal in poetry, make-believe,  
And the white lies it sounds like?”

Yes and no!  
From the book, yes; thence bit by bit I dug  
The lingot truth, that memorable day,  
Assayed and knew my piecemeal gain was gold,—  
Yes; but from something else surpassing that,  
Something of mine which, mixed up with the mass,  
Made it bear hammer and be firm to file.  
Fancy with fact is just one fact the more;  
To wit that fancy has informed, transpierced,  
Thriddled and so thrown fast the facts else free,  
As right through ring and ring runs the djereed  
And binds the loose, one bar without break.<sup>158</sup>

Browning sees his mission as one mimetic on—if somewhat paler by comparison than—the Creation: “Man . . . / Repeats God’s process in man’s due degree, / Attaining man’s proportionate result,— / Creates, no, but resuscitates, perhaps.”<sup>159</sup> Thus anticipating Veyne, he sees this process of recuperation as constituting *a* truth, one potentially closer to *the* truth than that revealed in the dry facts ossified in the pages of the Old Yellow Book. This is so, he argues, because temporal distance—in the right hands—can manufacture an interpretation richer than that delivered by the direct observation of the senses, “Which take at best imperfect cognizance, / Since, how heart moves brain, and how both move hand, /

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<sup>158</sup> *Id.*, bk. I, ll. 451-68.

<sup>159</sup> *Id.*, bk. I, ll. 710, 717-19.

What mortal ever in entirety saw?"<sup>160</sup> This is of course counterintuitive and counter to trial practice (e.g., the rule against hearsay and the "best evidence" rule), so Browning pauses to take a gentle satiric swipe at our common pre-(mis?)conceptions:

Then, since a Trial ensued, a touch o' the same  
To sober us, flustered with frothy talk,  
And teach our common sense its helplessness.  
For why deal simply with divining-rod,  
Scrape where we fancy secret sources flow,  
And ignore law, the recognized machine,  
Elaborate display of pipe and wheel  
Framed to unchoke, pump up and pour apace  
Truth till a flowery foam shall wash the world?  
The patent truth-extracting process,—ha?<sup>161</sup>

Although legal fact-finding is not always as painful as a trip to the dentist, Browning makes a fair point, the same one that Cardozo made when attacking "mechanical jurisprudence" in the *Hynes* case. That is, things get lost when we come to look on the law as a machine, ranging from injustice in an individual case or a class of cases to the opportunity to explore the subtleties and complexities of human motivation.<sup>162</sup> To guard against this, Browning counsels us to reach beyond a single-minded approach to interpretation and suggests instead that acts can only be understood through a multiplicity of perspectives—through the clash of narratives that we earlier considered through the work of Bankowski and Nussbaum.<sup>163</sup> To

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<sup>160</sup> *Id.*, bk. I, ll. 827-29.

<sup>161</sup> *Id.*, bk. I, ll. 1105-14.

<sup>162</sup> *See id.*, bk. XII, ll. 76-78 (noting "The inadequacy and inaptitude / Of that self-same machine, that very law / Man vaunts, devised to dissipate the gloom . . .").

<sup>163</sup> For Browning, it is error to accept any single piece of testimonial evidence at face value because it is always already infected with bias, blindness, or confusion:

explore this fully, we would need to explicate the poem line by line, which, as I had mentioned before, would plainly engulf our discussion. As an alternative, I propose that we look at two types of fact-finding that take place in the poem: *what*-facts and *why*-facts. As a specific example of the former, we will look at the question of whether Pompilia sent the letters to Caponsacchi that stand as evidence of an adulterous affair; of the latter, we will look at Guido's stated reason for the murders—i.e., he killed as a matter of honor.

Whether Pompilia could write is one of the dominant issues in the Old Yellow Book, for the answer to that question potentially eviscerates the most damaging evidence of an affair between Pompilia and Caponsacchi: the love letters that Guido claimed to have found when he caught up with the fleeing couple at Castelnuovo.<sup>164</sup> Half-Rome, the pro-Guido narrator of Book II, is the first to take up the issue of the letters. He believes that “the case was clear” and rendered so by the “love-letters”:

Mad prose, mad verse, fears, hopes, triumph, despair,  
Avowal, disclaimer, plans, dates, names,—was nought  
Wanting to prove, if proof consoles at all,  
That this had been but the fifth act o' the piece  
Whereof the due proemium, months ago  
These playwrights had put forth, and ever since  
Matured the middle, added 'neath his nose.<sup>165</sup>

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“who trusts / To human testimony for a fact / Gets this sole fact—himself is proves a fool . . .” *Id.*, bk. XII, ll. 601-03. This explains, at least partially, his faith in narrative interplay.

<sup>164</sup> See *id.*, Appendix A, General Note 5 at 771-72.

<sup>165</sup> *Id.*, bk. II, ll. 1075-81.

Nor, for two reasons, is Half-Rome swayed by the assertion that Pompilia was illiterate and, therefore, could neither have written letters to Caponsacchi nor read letters received from him. First, he finds it difficult to reconcile Pompilia's claim to illiteracy with her admission that she received letters from Caponsacchi. Second, he finds it equally damning that Caponsacchi admits receiving letters that he believed to be from Pompilia.<sup>166</sup> At a minimum, then, Half-Rome—who by no coincidence has suspicions about his own wife's fidelity—concludes that the letters would have justified Guido in killing the couple on the road to Rome.<sup>167</sup>

Other Half-Rome, a young man with romantic tendencies, takes Pompilia's part. For him, something in the "tale" of a long-standing affair rings false. He, like Half-Rome, has reasons for thinking the way he does. First, Pompilia has been consistent in her denials:

For her part,  
Pompilia quietly constantly avers  
She never penned a letter in her life  
Nor to the Canon nor any other man,  
Being incompetent to write and read . . .<sup>168</sup>

Second, he finds the admitted "romance-book" character of Pompilia's version of the story credible because "she avers this with calm mouth / Dying . . .,"<sup>169</sup> which squares with the common belief that statements made upon imminent death are truthful. (This belief is institutionalized in the rule of evidence that privileges death-

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<sup>166</sup> *Id.*, bk. II, ll. 1130-60; see also Albert Borowitz, *The Ring and the Book and the Murder*, 29 *LEGAL STUD. F.* 849 (2005) (comparing commentaries on evidence of Half-Rome and Other Half-Rome).

<sup>167</sup> *Id.*, bk. II, ll. 1500-03.

<sup>168</sup> *Id.*, bk. III, ll. 907-11.

<sup>169</sup> *Id.*, bk. III, ll. 923-25.

bed statements over ordinary instances of hearsay.) Third, Other Half-Rome sees Caponsacchi's admission (when a flat denial would have served him better) of sending letters to Pompilia as evidence of general veracity. Fourth, and most important, Other Half-Rome believes that there is unequivocal evidence that Guido had earlier forged a letter from Pompilia to his brother, so one can safely assume he acted in conformity with his past conduct and did the same with the letters that he allegedly "found" at the inn:

The ins and outs o' the rooms were searched: he found  
Or showed for found the abominable prize—  
Love-letters from his wife who cannot write,  
Love-letters in reply o' the priest—thank God!—  
Who write and confront his character  
With this, and prove the false thing forged throughout:  
Spitting whereat, he needs must spatter whom  
But Guido's self?—that forged and falsified  
One letter called Pompilia's, past dispute:  
Then why not these to make sure still more sure?<sup>170</sup>

As pure partisans, both Half-Rome and Other Half-Rome construct factual conclusions from unspecified source material (including, presumably, gossip) to suit their larger sympathies, pro-Guido and pro-Pompilia. They thus make no reasoned analysis of *all* the evidence, perhaps because they stand to bear no real consequences for overstating their respective cases. By contrast, the prosecutor, Johannes-Baptista Bottinius (the Fisc), takes care to argue no more than necessary from the (admittedly equivocal) evidence because he need not take the unreserved position that Pompilia could not have written the letters to disable Guido's claim of justification. That is, he need only show that even if Pompilia did write the letters, she did so with a motive that was sufficiently pure. Thus, the Fisc first suggests that Guido forged the

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<sup>170</sup> *Id.*, bk. III, ll. 1308-17.

letters and planted them on the couple at Castelnuovo and then offers good reason why the letters were excusable even if she wrote them:

Grant the tale  
O' the husband, which is false, were proved and true  
To the letter—or the letters, I should say,  
Abominations he professed to find  
And fix upon Pompilia and the priest,—  
Allow them hers—for even though she could not write, . . .  
So she, though hunger after fellowship,  
May well have learned, though late, to play the scribe . . .  
Concede she wrote (which were preposterous)  
This and the other epistle,—what of it?  
Where does the figment touch her candid fame?  
Being in peril of her life—“my life,  
Not an hour's purchase,” as the letter runs,—  
And having but one stay in this extreme,  
Out of the wide world but a single friend—  
What could she other than resort to him,  
And how with any hope resort but thus? . . .  
From all which I deduce—the lady here  
Was bound to proffer nothing short of love  
To the priest whose service it was to save her. . . .

Licit end  
Enough was found in mere escape from death,  
To legalize our means illicit else  
Of feigned love, false allurement, fancied fact.<sup>171</sup>

This throws into sharp relief the difference between advocacy and judgment. The advocate's job is to cast evidence in the light most favorable to his case and in a way that satisfies his burden of proof. His goal is thus to present evidence in a way that enhances the chance that the finder of fact will actually find facts that support his claim or defeat those of his opponent. The judge (or jury, as the case may be), in contrast, has a more difficult task: she must consider the full range of evidence, weigh it, contextualize it, and then narrate it in a way that justifies the ultimate decision. This does not mean, however, that she can resolve every point of

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<sup>171</sup> *Id.*, bk. IX, ll. 443-48; 457-58; 473-81; 509-11; 525-28.

ambiguity or contradiction. The best she can do is to tell the best story possible. In *The Ring and the Book*, that role falls to the Pope.

Guido's case arrives at the office of the Pope with a nearly complete record. All the principal players have spoken (save Guido for the second time). With respect to the letters, therefore, Guido, Caponsacchi, and Pompilia have each given their testimony. To briefly recap: Guido sticks to the story that he had told in the proceeding leading to Caponsacchi's three-year banishment and Pompilia's confinement: viz., he caught them together at Castelnuovo and found the letters on them.<sup>172</sup> Caponsacchi tells a more nuanced tale. He says that he knew from the start that the supposed letters from Pompilia were but a "transparent trick" of Guido's. He also learned that she was illiterate, that Guido had forged letters in Caponsacchi's hand, and that the messenger ("She who brought letters from who could not write . . .") and principal witness in Guido's favor was a common prostitute and thus not credible.<sup>173</sup> In the main, Pompilia's deathbed rendition of the facts coincides with Caponsacchi's, amplifying and in no way undermining it. If anything, her plainspoken version underscores the insidious nature of Guido's scheme.<sup>174</sup>

The Pope begins his analysis from the raw evidentiary record, which he finds deficient in itself (a mere semblance or shadow of fact), but from which the truth is "evolvable":

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<sup>172</sup> *Id.*, bk. V, ll. 1867-77.

<sup>173</sup> *Id.*, bk. VI, ll. 528-38; 725-38; 1650-93.

<sup>174</sup> *Id.*, bk. VII, ll. 688-710; 1093-1186.



I have worn through this sombre wintry day,  
With winter in my soul beyond the world's,  
Over these dismalest of documents  
Which drew night down on me ere eve befell,—  
Pleadings and counter-pleadings, figure of fact  
Besides fact's self . . .  
Truth, nowhere, lies yet everywhere in these—  
Not absolutely in a portion, yet  
Evolvable from the whole: evolved at last  
Painfully, held tenaciously by me.<sup>175</sup>

With respect to the letters, the Pope ultimately deems them forgeries, not because of any physical evidence but because the idea of an adulterous affair between Pompilia and Caponsacchi doesn't hang together with the rest of the evidence—it makes the story incoherent:

Hence this consummate lie, this love-intrigue,  
Unmanly simulation of a sin,  
With a place and time and circumstance to suit—  
These letters false beyond all forgery—  
Not just handwriting and mere authorship,  
But false to body and soul they figure forth—  
As though the man had cut out shape and shape  
From fancies of that other Arentine,  
To paste below—incorporate the filth  
With Cherub faces on a missal-page!<sup>176</sup>

If pinning down physical facts (e.g., whether Pompilia wrote any of the letters) is a daunting task, then reaching conclusions about psychological facts (e.g., Guido's motive) is doubly difficult. Guido's initial position, which is echoed in the monologues of Half Rome and Guido's lawyer, is that the murders were a matter *honoris causa*.<sup>177</sup> The Pope, however, locates Guido's motives elsewhere: "All is

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<sup>175</sup> *Id.*, bk. X, ll. 212-17; 229-32.

<sup>176</sup> *Id.*, bk. X, ll. 647-56. The "other Arentine" to which the Pope refers is Pietro Arentino, a lewd sonneteer of the Sixteenth Century.

<sup>177</sup> *See, e.g., id.*, bk. VIII, l. 425.

the lust for money: to get gold,— / Why, lie, rob, if it must be, murder!”<sup>178</sup> In so recognizing this in Guido, the Pope bars him access to the mitigating cloak of honorable vengeance:

So plans he,  
Always subordinating (note the point!)  
Revenge, the manlier sin, to interest  
The meaner,—would pluck pang forth, but unclench  
No gripe in the act, let fall no money-piece.<sup>179</sup>

In divining Guido’s animating force and intent—and those of the other actors, for that matter—the Pope relies on the experience of a lifetime (“eyes grow[n] sharp by use”), not any particular analytical method. This experience leads him to “find the truth.”<sup>180</sup> As Robert Langbaum explains it, “[t]he Pope does not weigh argument against argument, fact against fact, but cuts right through the facts to a sympathetic apprehension of the motives and essential moral qualities behind the deeds.”<sup>181</sup> I don’t disagree with this assessment, but I think we can sharpen it even further by recontextualizing it within our earlier discussion of particulars and universals. What the Pope achieves, I submit, is a proper balance between the particular facts presented in the pleadings and the universal rule to which Guido seeks resort (justifiable homicide). That is, Guido’s ontological narrative—which embodies an unbroken pattern of acts driven by greed—is not subsumable under the then-existing rule justifying homicide in cases of adultery. Neither the physical facts

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<sup>178</sup> *Id.*, bk. X, ll. 543-44.

<sup>179</sup> *Id.*, bk. X, ll. 598-602.

<sup>180</sup> *Id.*, bk. X, ll. 1242-44.

<sup>181</sup> Robert Langbaum, *The Ring and the Book: A Relativist Poem*, 71 *PMLA* 131, 141 (1956).

(e.g., Guido killed not just Pompilia, but her parents as well; he killed not by himself or in the heat of passion but after cold reflection and with four hirelings) nor the psychological facts (e.g., Guido was motivated by avarice) fit within the set of honor-killing narratives that had been reduced to a universally stated rule.

If there is a single lesson to be learned from *The Ring and the Book*, it is that multiple narrative perspectives can aid the search for truth. Some commentators have suggested that truth can be “induced” from a multiplicity of viewpoints.<sup>182</sup> I would not go quite so far, but I do believe that Browning’s poem shows us that—given a large enough range of narrative viewpoints—there is something of a narrative inevitability to the final version of the story (i.e., the findings of fact supporting a judgment), at least when the author of that version carefully attends to both particulars and universals.

Over the course of this chapter, we have seen how narratives become rules and how narratives compete with one another to become or remain institutionalized. In the next chapter, we will elaborate on this idea of a narrative marketplace and explore how this marketplace contributes not just to the development of the law but to laws and institutions congenial to democracy.

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<sup>182</sup> *Id.* at 140-41.

### III. Law, Narrative and Democracy

#### Introduction

In the previous chapters, we explored how narratives influence laws and the institutions in which they are housed. Now it is time to explore the other half of the equation that I established at the outset—i.e., how legal systems that are generally receptive to narratives facilitate the development of democracy. As the following discussion will show, narrative receptivity is a condition precedent to the development and maintenance of at least some democratic institutions. And this is so, I think, because narrative is one of the tools with which complex societies harmonize the overlapping—sometimes competing—drives of democracy and the Rule of Law.<sup>1</sup> To anchor the line of reasoning to which this conclusion is tied, I need to explain what I mean by “democracy” and “Rule of Law,” both of which are disputed terms.<sup>2</sup>

Democracy, in its most basic formulation, could mean something quite narrow, something like “majority rule.”<sup>3</sup> So conceived, a democracy might have

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<sup>1</sup> See, e.g., Jose Maria Maravall, *The Rule of Law as a Political Weapon*, in DEMOCRACY AND THE RULE OF LAW 261-66 (Maravall and Przeworski eds., 2003) (demonstrating how “the rule of law and democracy can undermine each other through politics”).

<sup>2</sup> See, e.g., RICHARD POSNER, LAW, PRAGMATISM AND DEMOCRACY 15, 280 (2004) (discussing various meanings of both terms).

<sup>3</sup> See Neil MacCormick, *Jurisprudence, Democracy, and the Death of the Weimar Republic*, 77 TEX. L. REV. 1095, 1096 (1999). MacCormick notes the difficulties inherent in any attempt to define what we popularly think of as a constitutional democracy. He helpfully precedes this observation with a catalogue of what a representative democracy is not: a “people’s democracy” of the Chinese sort, fascism, or military dictatorship. The common thread in the “nots” is that each of these other forms has tended to result in personal (or at best oligarchical) dictatorships.

little to do with the Rule of Law, as we will presently describe it, because all decisions of a “legal” nature could be made ad hoc, retrospectively, and with wide variance. But this is not what we have in mind when we think of democracy. Instead, we have in mind constitutional democracies in which—no matter the precise form of government—there is a baseline expectation of universal and equal suffrage, majority rule, and competing political parties, as well as a broad range of legally enforceable civil rights that inure to the benefit of all members of the society (not the least of which are members of identifiable minorities). This set of characteristics—especially with respect to the latter point—begins to define what Ronald Dworkin calls the “partnership view” of democracy.<sup>4</sup> The partnership view assumes (because it depends on more than unenforceable statements of aspirations) responsive and accountable institutions, and thus it begins to reveal a nexus between democracy and law.<sup>5</sup> To comprehend this nexus, we must have a common understanding of the features of the Rule of Law, given that most would agree that

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<sup>4</sup> RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE 131-47 (2006) (broadly contrasting features of “majoritarian” and “partnership” views of democracy); *see also* Ronald Dworkin, *Moral Reading*, in LAW AND DEMOCRACY 113 (Tom Campbell & Adrienne Stone eds., 2003) (distinguishing “majoritarian” from “constitutional” conception of democracy).

<sup>5</sup> NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING 2 (2005) (“Respecting the Rule of Law is of profound political value in states or confederations of states . . . . To have properly published and prospective laws, equality of citizens before them, and limitation of official power with respect to them, are foundations for democratic liberty and essentials for a stable economy.”).

“[t]he rule of law is among the essential pillars upon which any high-quality democracy rests.”<sup>6</sup>

## 1. The Rule of Law and Its Limits

“Rule of Law” (like its partial cognates “Rechtsstaat” and “état de droit”)<sup>7</sup> in its most basic articulation means that a state is accountable to and exercises its power according to law.<sup>8</sup> In an often cited definition from the Nineteenth Century, A. V. Dicey established a three-part test for the rule of law: “the absolute predominance of regular law, so that the government has no arbitrary authority over the citizen; the equal subjection of all (including officials) to the ordinary law administered by the ordinary courts; and the fact that the citizen’s personal freedoms are formulated and protected by the ordinary law rather than by abstract constitutional declarations.”<sup>9</sup> This, I think, is the conception of the Rule of Law in

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<sup>6</sup> Guillermo O’Donnell, *The Quality of Democracy: Why the Rule of Law Matters*, 15 J. OF DEMOCRACY 32, 33 (2004).

<sup>7</sup> The German and French expressions emphasize the link between the “law” and “state.” See, e.g., JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* at xxxv (William Rehg trans., MIT Press 1996) (1992) (“When contrasted with the English equivalent, “rule of law,” *Rechtsstaat*—which literally means “law-state”—reveals the greater emphasis that the German legal tradition places on the state. Depending on the context, I translate *Rechtsstaat* either as “rule of law” or “constitutional state.” I also use “government by law,” as a way to split the difference.”); Marise Cremona, *The European Neighborhood Policy: Legal and Institutional Issues* 10 (CDDRL, Working Paper No. 25, 2004), available at <http://cddrl.stanford.edu>.

<sup>8</sup> See O’Donnell, *supra* note 6, at 33.

<sup>9</sup> Cremona, *supra* note 7, at 10 (citing A. V. DICEY, *AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (London 1885)). According to Cremona, Dicey’s approach is reflected in current EU policy. See *id.* at 10 (quoting Council Common Position 98/350/CFSP on human rights, democratic principles, the rule of law and good governance in Africa OJ 1998 L 158/1: “the rule of law, which permits citizens to defend their rights and which implies a legislative and judicial

which Thomas More places his faith in Robert Bolt's *A Man for All Seasons*, as this exchange between More and William Roper illustrates:

- MORE           The law, Roper, the law. I know what's legal not what's right. And I'll stick to what's legal.
- ROPER           Then you set man's law above God's!
- MORE           No, far below; but let me draw your attention to a fact—I'm *not* God. The currents and eddies of right and wrong, which you find such plain sailing, I can't navigate. I'm no voyager. But in the thickets of the law, oh, there I'm a forester. I doubt if there's a man alive who could follow me there, thank God.
- ROPER           [Y]ou'd give the Devil benefit of law!
- MORE           Yes. What would you do? Cut a great road through the law to get after the devil?
- ROPER           I'd cut down every law in England to do that!
- MORE           Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.
- ROPER           I have long suspected this; this is the golden calf; the law's your god.
- MORE           Oh, Roper, you're a fool, God's my god . . . . But I find him rather too subtle . . . I don't know where he is nor what he wants.<sup>10</sup>

But the sort of naked faith in legal rules that More espouses (even admitting that a system of rules is preferable to a Hobbesian state of nature or the whims of a Tudor

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power giving full effect to human rights and fundamental freedoms and a fair, accessible and independent judicial system . . .”).

<sup>10</sup> ROBERT BOLT, *A MAN FOR ALL SEASONS* 65-67 (Vintage 1990) (stage directions and other characters' interjections omitted).

monarch) does not go quite far enough to modern eyes. *Something* is missing, but it's not always immediately clear what that something is. A literary counterfactual should aid us in the task of conceptualizing (at least part of) the problem.

Herman Melville's *Billy Budd, Sailor (An Inside Narrative)* well illustrates that the Rule of Law has limits in a society that strives for more than rote, formal "justice."<sup>11</sup> The story ultimately teaches that justice cannot be communicated by rules alone: a receptiveness to fully rounded narratives is equally important. And it is an insistence on narrative completeness that I would like us to consider more closely. For it is the rare case indeed that neatly grades from black to white—the "whole story" is usually much more complicated, as *Billy Budd* illustrates.

The plot of the novella is straightforward. A twenty-one-year-old sailor, Billy Budd, is impressed from a merchant ship, the *Rights of Man*, onto an English warship, the *Bellipotent*. Billy is an incarnation of a stock nautical character, the Handsome Sailor. Wherever he goes, others adore him and are improved just by making his acquaintance, although his mere presence drives men of a certain type to an inner fury. As Billy's superior on the *Rights* explains to the lieutenant of the *Bellipotent*,

Before I shipped that young fellow, my fore-castle was a rat-pit of quarrels. . . . But Billy came; and it was like a Catholic priest striking peace in an Irish shindy. Not that he preached to them or said or did anything in particular; but a virtue went out of him, sugaring the sour ones. They took to him like hornets to treacle; all but the buffer of the gang, the big shaggy chap with the fire-red whiskers [who is finally won over after Billy gives him "a terrible drubbing"].<sup>12</sup>

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<sup>11</sup> HERMAN MELVILLE, *BILLY BUDD AND OTHER STORIES* (Penguin Classics 1986) (1924).

<sup>12</sup> *Id.* at 295.



This pattern repeats itself on the *Bellipotent*, where Billy is generally beloved, save by Claggart, the malevolent master-at-arms.

Billy's involuntary enlistment into the *Bellipotent* came in the summer of 1797, just weeks after the infamous Nore and Spithead mutinies and at a time when fears that the French Revolution would spread to Great Britain still lingered. "To the British Empire the Nore Mutiny was what a strike in the fire brigade would be to London threatened by general arson."<sup>13</sup> Accordingly, British navel officers were on heightened alert for signs of discontent amongst members of their crews. It was this sensitivity to revolt that Claggart was able to exploit, as we shall soon see. But first, it will be helpful to detour for a word or two on the *dramatis personae*.

Much of the novella is cloaked in allegory, albeit undermined in some respects by ambiguity. Billy is presented as a Christ and Adam figure, but an invisible defect mars his perfection: under stress, he is unable to speak. Claggart, on the other hand, is more or less flatly portrayed as evil (though looking "like a man of high quality"), variously described as "the direct reverse of a saint," "depraved," a "madman," and "the scorpion for which the Creator alone is responsible." The ship's captain, Edward Fairfax Vere, whose name suggests truth, is, even more than Billy, of a divided nature. He is a "sailor of distinction even in a time prolific of renowned seamen" but he oscillates between "a certain dreaminess of mood" and the rigorous nature of a "martinet." It is the gap between Claggart's "antipathy spontaneous and profound" and Vere's "queer streak of the pedantic" in which Billy soon finds himself ensnared.

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<sup>13</sup> *Id.* at 303.

After surreptitiously visiting various minor plagues on Billy via his subordinates, Claggart ups the ante and accuses Billy of conspiring to mutiny. Vere is unimpressed with Claggart's tale, finding it in sharp discord with his own impression of Billy and Claggart himself lacking in credibility. Vere thus determines to investigate the issue in as private a manner as possible and summons Billy to his cabin to confront Claggart and his accusation. Billy, upon hearing Claggart out, is—in keeping with his vocal defect—dumbstruck. Vere, sensing the nature of Billy's difficulty, attempts to sooth him and encourages him to take his time in responding:

Contrary to the effect intended, these words so fatherly in tone, doubtless touching Billy's heart to the quick, prompted yet more violent efforts at utterance—efforts soon ending for the time in confirming the paralysis, and bringing to his a face an expression which was as a crucifixion to behold. The next instant, quick as the flame from a discharged cannon at night, his right arm shot out, and Claggart dropped to the deck.<sup>14</sup>

The single blow kills Claggart; within seconds his body is like “a dead snake.” Vere immediately summons the ship's surgeon, who confirms that Claggart is dead, and then sends the surgeon to inform the ship's other senior officers (with a “charge . . . to keep the matter to themselves”) of the death and of his intent to call a drumhead court.

From the outset of the story, we have been preconditioned to know that “justice” on a warship will be different from justice in other contexts. When Billy departs the merchant ship for the *Bellipotent*, he cries out (without irony on his part, but otherwise dripping it), “And good-bye to you too, old *Rights-of-Man*.”<sup>15</sup> Now

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<sup>14</sup> *Id.* at 350.

<sup>15</sup> *Id.* at 297.

whether this justice should be delivered swiftly and in secret is another matter, as the surgeon and other officers conclude. “As to the drumhead court, it struck the surgeon as impolitic, if nothing more. The thing to do, he thought, was to place Billy Budd in confinement, and in a way dictated by usage, and postpone further action in so extraordinary a case to such time as they should rejoin the squadron, and then refer it to the admiral.”<sup>16</sup> Vere thinks otherwise, “[f]eeling that unless quick action was taken on it, the deed of [Billy], so soon as it should be known on the gun decks, would tend to awaken any slumbering embers of the Nore among the crew, a sense of the urgency of the case overruled in Captain Vere every other consideration.”<sup>17</sup>

Vere thus immediately calls the drumhead court, knowing full well that the martial code under which Billy is to be judged supplants ordinary notions of blame and responsibility:

In a legal view the apparent victim of the tragedy was he who had sought to victimize a man blameless; and the indisputable deed of the latter, navally regarded, constituted the most heinous of military crimes. Yet more. The essential right and wrong involved in the matter, the clearer that might be, so much the worse for the responsibility of a loyal sea commander, inasmuch as he was not authorized to determine the matter on that primitive basis.<sup>18</sup>

Given this framework, the only facts relevant to Billy’s trial are those directly tied to Billy’s act of striking Claggart. On this point, there is no dispute: Vere “concisely narrated all that had led up to the catastrophe,” and Billy confirms the accuracy of Vere’s account: “Captain Vere tells the truth. It is just as Captain Vere says, but it

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<sup>16</sup> *Id.* at 352.

<sup>17</sup> *Id.* at 355.

<sup>18</sup> *Id.* at 354.

is not as the master-at-arms said.” Answering further, Billy states that he had no intent to harm Claggart:

No, there was no malice between us. I never bore malice against the master-at-arms. I am sorry that he is dead. I did not mean to kill him. Could I have used my tongue I would not have struck him. But he foully lied to my face and in presence of my captain, and I had to say something, and I could only say it with a blow, God help me!<sup>19</sup>

To this Vere responds, “I believe you, my man.”

But Billy’s *moral* justification in killing Claggart is not a *legal* justification in this context. For as Vere counsels the members of the court, “Quite aside from any conceivable motive actuating the master-at-arms, and irrespective of the provocation to the blow, a martial court must needs in the present case confine its attention to the blow’s consequence, which consequence justly is to be deemed not otherwise than as the striker’s deed.”<sup>20</sup> Vere understands, nonetheless, that this rule runs counter to “natural justice,” which would not permit the “summary and shameful death [of] a fellow creature innocent before God, and whom we feel to be so . . . .”<sup>21</sup> And Vere even concedes that Billy’s plea that he “proposed neither mutiny nor homicide” would elsewhere prove a good defense: “before a court less arbitrary and more merciful than a martial one, that plea would largely extenuate. At the Last Assizes it shall acquit.”<sup>22</sup> Why not here?

The answer is twofold—part interpretive, part narrative. First, mitigation of Billy’s penalty in the face of a clear rule would lead to interpretation by the crew,

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<sup>19</sup> *Id.* at 357.

<sup>20</sup> *Id.* at 358.

<sup>21</sup> *Id.* at 361.

<sup>22</sup> *Id.* at 363.

which could perhaps foment mutiny and thereby undermine the very purpose of the code. Hence, Vere feels an institutional compulsion to block interpretation of Billy's story beyond the level of act-and-consequence.<sup>23</sup> Second, as Vere explains to the other officers, the Mutiny Act "resembles in spirit the thing from which it derives—War." By this he means, I think, that warfare and its adjuncts are carried out under a public narrative very different from the ones that order general civil society:

[I]n receiving our commissions we in the most important regards ceased to be natural free agents. When war is declared are we the commissioned fighters previously consulted? We fight at command. If our judgments approve the war, that is but coincidence. So in other particulars. So now.<sup>24</sup>

This martial narrative commands complete hegemony. Because it is hermetic, it does not allow other narratives—public or private—to infect it. In practice, this means that martial judges must leave their interpretative predilections at the bench.

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<sup>23</sup> This is of course only possible in the short run because legal narratives often escape that container and assume a non-legal shape. One way of thinking about this phenomenon is by recalling Robert Ferguson's concept of a publication continuum—i.e., that although a criminal case may begin with an indictment, it may end with any manner of publication, things like newspaper reports, historical accounts or even fictionalizations. See Robert A. Ferguson, *Untold Stories in the Law*, in *LAW'S STORIES* 84, 84 (Peter Brooks & Paul Gewirtz eds., 1996). These subsequent publications are manifestations of how different groups have interpreted legal narratives (to make sense to them). For example, *Billy Budd* doesn't end with Billy's death. There is a report in "a naval chronicle of the time" that shoehorns Billy's story into the British maritime narrative and thereby applauds Claggart as a hero and condemns Billy as a villain. MELVILLE, *supra* note 11, at 382-83. The sailor class, on the contrary, "instinctively felt that Billy was a sort of man as incapable of mutiny as of willful murder." They thus carry slivers of the spar from which he was hung as if they were from the True Cross, and they celebrate his end in a ballad, "Billy in the Darbies." *Id.* at 383-84. For an interesting discussion of the multiple endings (a natural result of what Melville called the "ragged edges" of truth) of *Billy Budd*, see BARBARA JOHNSON, *The Execution of Billy Budd*, in *THE CRITICAL DIFFERENCE* 79 (1980).

<sup>24</sup> MELVILLE, *supra* note 11, at 362.

In other words, the judge's interpretation of the facts is irrelevant to the extent that it extends beyond the narrowest sphere: narrative completeness is no virtue in this context.

In narrative terms, *Billy Budd* is about the consequences of individual and systemic narrative failure. Billy is a failed narrator (he can't tell his story); the system of martial law makes judges into failed narratees (they can't listen). We find all this disquieting, above all—perhaps—because it cuts off what we see as an essential characteristic of judging and, therefore, of justice. I'm thinking here of what Zenon Bankowski and others have referred to as "attention," which requires, among other things, listening before judging.<sup>25</sup> Put differently, I think we expect justice to consist of law and narrative in somewhat equal measures.<sup>26</sup> When we find the balance lacking, we get the same sense of dissatisfaction that we feel when we

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<sup>25</sup> See Zenon Bankowski, *In the Judgment Space*, in *THE UNIVERSAL AND THE PARTICULAR IN LEGAL REASONING* 25, 33-35 (Zenon Bankowski & James MacLean eds., 2006).

<sup>26</sup> Vere's strict application of the law in Billy's case is not a one-off; rather, it is consistent with his larger world-view, which is itself founded on an absolute faith in the power of rules:

With mankind, he would say, forms, measured forms, are everything; and this is the import couched in the story of Orpheus with his lyre spellbinding the wild denizens of the wood. And this he once applied to the disruption of forms going on across the Channel and the consequences thereof.

MELVILLE, *supra* note 11, at 380. On this count, Vere veers close to the quasi-Hobbesian position of Shakespeare's Angelo in *Measure for Measure*:

We must not make a scarecrow of the law,  
Setting it up to fear the birds of prey,  
And let it keep one shape, till custom make it  
Their perch and not their terror.

WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* act 2, sc. 1, ll. 1-4.

consider the fate of Billy. Of course the circumstances are neither so extreme nor the consequences so dire in the quotidian world, but if we attend closely to cases that strike us “unfair,” or “unreasonable,” or “unjust,” I think we will very often find a judgment that was made without due consideration for “the whole story.”<sup>27</sup>

## 2. Toward a Democratic Rule of Law

As *Billy Budd* exemplifies, laws and institutions that faithfully execute those laws are not alone sufficient to insure a society that we would consider just, fair, or democratic. And this is so beyond the military context within which Melville places his narrative. For as Guillermo O’Donnell posits (drawing examples from Latin American countries), “an act that is formally according to law may nonetheless entail the application of a rule that is invidiously discriminatory or violates basic rights.”<sup>28</sup> Indeed, totalitarian regimes often pay rough homage to some cramped vision of the Rule of Law.<sup>29</sup> These types of deficiencies in the narrow Dicey articulation of the Rule of Law have called others to offer further definitional refinements, a task attempted by several notable theorists, including Lon Fuller, Joseph Raz, and—more recently—Neil MacCormick. Fuller, in his characteristic fashion, casts his criteria in the form of a parable, “The Problem of the Grudge

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<sup>27</sup> Cf. MACCORMICK, *supra* note 5, at 31 (emphasizing the “dynamic aspect” of the Rule of Law, which is “illustrated by the rights of the defence, and the importance of letting everything that is arguable be argued”).

<sup>28</sup> O’Donnell, *supra* note 6, at 34.

<sup>29</sup> But as Colleen Murphy skillfully illustrates, totalitarian governments aren’t really living up to even modest standards. For instance, the use of terror in repressive regimes is effective because it is so arbitrary. And that violates the fundamental prohibition against arbitrary authority over citizens. See Colleen Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, 24 L. & PHILOSOPHY 239, 252-54 (2005).

Informer.”<sup>30</sup> In this hypothetical narrative, a dictatorship has been overthrown.

Under that regime, there was a legal system, but it encouraged the use of state power to settle old scores. Now, there is an appetite among the liberated citizenry to dispense a bit of vigilante justice against the “grudge informers.” Fuller leaves it to the reader to determine how to handle the problem: viz., how presently to treat acts that were legal under a displaced regime. To blunt the force of an inclination to sanction punishment in these circumstances, Fuller offers the tale of King Rex, whose “laws” were waylaid along eight different routes:

The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure to achieve congruence between the rules as announced and their actual administration.<sup>31</sup>

Most commentators—including Fuller himself—have recast this list of “don’ts” into a list of “dos,” which holds that laws must be general, promulgated, prospective, understandable, consistent, performable, continuous, and congruently administered.

Fuller’s set of eight is not universally accepted, of course. Raz, for instance, places as much emphasis on the architecture of the state that interprets and applies laws as on the laws themselves:

1. All laws should be prospective, open, and clear;
2. Laws should be relatively stable;
3. The making of particular laws . . . must be guided by

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<sup>30</sup> LON FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

<sup>31</sup> *Id.* at 39.



open, stable, clear, and general rules; 4. The independence of the judiciary must be guaranteed; 5. The principles of natural justice must be observed (i.e., open and fair hearing and absence of bias); 6. The courts should have review powers . . . to ensure conformity to the rule of law; 7. The courts should be easily accessible; 8. The discretion of crime preventing agencies should not be allowed to pervert the law.<sup>32</sup>

This emphasis on state actors and institutions takes us closer to what we would expect from a legal system in a democratic regime, but we have still not closed the circle. What remains to consider is how we conceptualize a *democratic* Rule of Law.<sup>33</sup> MacCormick gets to the nub of the matter (i.e., to the *Billy Budd* problem) when he suggests that:

If the Rule of Law is to be actually a protection against arbitrary intervention in people's lives, it seems clear that it is not in practice enough to demand that the operative facts did on some occasion actually happen or obtain. It is necessary that some specific and challengeable accusation or averment of relevant facts be made to the individual threatened with action. This in turn must be supported by evidence in an open proceeding in which the party charged may contest each item of evidence both one at a time and in the cumulative effect of the totality of items adduced, and may offer relevant counter-evidence as she/he chooses. Moreover, it must also be possible to challenge the relevancy of the legal accusation or claim. Such a challenge is to the effect that, whatever may be the facts of the matter, the legal materials

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<sup>32</sup> Joseph Raz, *The Rule of Law and Its Virtue*, 93 L. Q. REV. 195, 196 (1977).

<sup>33</sup> O'Donnell conceives the rule of law as "the legally based rule of a democratic state." He goes on to propose that

[T]his entails that there exists a legal system that is itself democratic, in three senses: 1) It upholds the political rights, freedoms, and guarantees of a democratic regime; 2) it upholds the civil rights of the whole population; and 3) it establishes networks of responsibility and accountability which entail that all public and private agents, including the highest state officials, are subject to appropriate, legally established controls on the lawfulness of their acts.

O'Donnell, *supra* note 6, at 36. I do not at all disagree with this assessment, but I am more interested in the process by which these ends come to be realized than how they are framed. Hence, the swerve into Habermas.

that supposedly warrant the assertion of a rule governing the case do not warrant it at all in the alleged, or the actually proven, state of the facts.<sup>34</sup>

If we take this as a challenge, how do we answer it? In other words, how do we craft a system that respects the Rule of Law yet adequately responds to our democratic sensibilities?

There are many points of entry into this inquiry, perhaps none more convenient than Jürgen Habermas' "discourse theory" of law and democracy—a concept set forth in his *Between Facts and Norms*. His argument is difficult to capsule, but we know that Habermas links the informal sources of democracy with the formal decision-making institutions that any complex society needs for the Rule of Law to flourish. In this scheme, the constitutional state is the mechanism that converts the citizenry's democratic desires into legitimate administrative activity: law "represents . . . the medium for transforming communicative power into administrative power." This perspective helps us account for the various principles and institutions of the constitutional state, "such as the separation of powers, majority rule, statutory controls on administration, and so forth."<sup>35</sup>

Habermas also carefully links the Rule of Law to the democratic process. In his view, "laws are legitimate if (1) they are agreed to in a fair and open participatory process, (2) citizens agree to each law in the sense of continued cooperation, and (3) this process makes the public deliberation of the majority the

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<sup>34</sup> MACCORMICK, *supra* note 5, at 25-26.

<sup>35</sup> William Rehg, *Habermas' Discourse Theory of Law and Democracy: An Overview of the Argument*, in *THE HANDBOOK OF CRITICAL THEORY* 166, 181 (David M. Rasmussen ed., 1996).

source of sovereign power.”<sup>36</sup> Laws so conceived preserve democracy by resisting the twin bureaucratic urges to totalize and to decide increasing numbers of issues outside the public sphere.<sup>37</sup> This makes sense as an abstraction and partially explains the formation of statutory law, but one may ask how these standards apply to a system that is not wholly code driven and, even then, how individual wills figure in the “participatory process.”<sup>38</sup> In other words, how do citizens participate in a democracy other than by casting a ballot every few years? In a discussion of constitutional provisions born of revolution, Habermas marks a trail that should seem familiar to us:

As we have seen, by generalizing and abstracting from the adjudication of cases, legal theory gains distance without giving up the participant perspective as such. By contrast, the objectifying gaze of the historian focuses on the social contexts in which the law, as a system of action, is embedded—and from which the implicit background assumptions of adjudication and contemporary legal doctrine are nourished. . . . In some prominent places, the text of the law itself reveals these implicit diagnoses of the times, for example, in the “bill of rights” section of constitutions that have emerged from political upheavals or revolutions. In contrast to the professionally formulated or developed law of legal scholars, even the style and wording of these declarations display an emphatic statement of will from

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<sup>36</sup> *Id.*; see also, Michel Rosenfeld, *Review: Law as Discourse: Bridging the Gap between Democracy and Rights*, 108 HARV. L. REV. 1163, 1175 (1995) (“[T]he proceduralist paradigm of law animated by the discourse principle, is, above all, elegantly simple. Starting from a picture of equal ‘consociates’ under law as autonomous and as reciprocally recognizant of each other’s dignity, Habermas postulates that these consociates would have to regard as legitimate any laws of which they were both the authors and the addressees.”).

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

<sup>38</sup> Although Habermas is principally concerned with legislation, he “does acknowledge the need for interpretation in the course of the ‘discourse of application,’ as he terms the basic function of the judiciary, and he accepts the propriety of the pressure to achieve internal legal coherence in the process of applying norms.” Tom Campbell, *Legal Positivism and Deliberative Democracy*, in LAW AND DEMOCRACY, *supra* note 4, at 342.

citizens who are reacting to concrete experiences of repression and humiliation. Most articles in a bill of rights resonate with a suffered injustice that is negated word for word, as it were.<sup>39</sup>

In speaking of “concrete experiences” and so forth, I think Habermas is allowing that the “discourse” that is central to his conception of law and democracy may take a narrative shape. And in certain key respects, I would go so far as to say that this is often the case. For examples, we can circle back around to certain of the Fuller-Raz-MacCormick criteria, and place them within the context of what we have learned from Habermas, O’Donnell and others about democratic institutions. Specifically, I have in mind the common emphasis on access to and administration of the legal system, not just laws themselves. That is, laws are by themselves insufficient to establish either the Rule of Law or democracy: in addition, courts, legislatures and administrative agencies must be *accessible*—and in a meaningful way.

For contrast to the ideal, we can look to Franz Kafka’s short story “Before the Law,” which is something of a parable of the antiseptic, unresponsive law of the early modern bureaucratic state.<sup>40</sup> The story is very brief: a man from the country comes seeking entry to the law, but a gatekeeper bars him entrance. After the gatekeeper tells him that “it is possible” that he will one day be admitted, the man decides to wait by the side of the gate, not wishing to challenge the fierce gatekeeper

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<sup>39</sup> HABERMAS, *supra* note 7, at 388-89.

<sup>40</sup> FRANZ KAFKA, *Before the Law*, in THE PENAL COLONY: STORIES AND SHORT PIECES 148, 148-150 (Willa and Edwin Muir trans., Schocken 1961) (1919). Although Kafka separately published the story, it also appears in a slightly different form near the end of his unfinished novel, *The Trial*. For an interesting take on the democratic aspects of the story, see Rachel Potter, *Waiting at the Entrance to the Law: Modernism, Gender, and Democracy*, 14 TEXTUAL PRACTICE 253 (2000).

or the increasingly powerful gatekeepers to be found at subsequent steps inside. He waits “for days and years,” spending everything he brought with him in the vain attempt to gain entrance. Finally, he grows weak with age and asks the gatekeeper one last question: “Everyone strives to reach the Law,” says the man, “so how does it happen that for all these many years no one but myself has ever begged for admittance?” The gatekeeper sees that the man is already dying and, to reach his diminishing sense of hearing, he shouts at him, “No one else could ever be admitted here, since this gate was made only for you. I am now going to shut it.”

This image of the law can be read in a number of ways, from the fairly literal to the highly metaphorical. For instance, the infinite regress of gatekeepers could represent the law’s maddening procedural hurdles, the man’s status as a “country-man” could say something about the status before the law of outsiders in general, or—more interestingly—the seeming impenetrability of the law could stand for the need to mediate it, to *interpret* it. I’ll say more on this latter point in a minute, but for now I would like to focus on the literal fact that the man from the country never got to tell his story (whatever it was—Kafka doesn’t say). And that—the ability to hear, adjudicate and legislate from narratives—is a hallmark of all truly democratic regimes, as even proponents of “minimalist” democracy (like Judge Posner) would likely concede.<sup>41</sup> It thus remains for us to identify—and begin to map the features of—institutions whose democratic missions are facilitated by narrative interaction.

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<sup>41</sup> See, e.g., RICHARD POSNER, *LAW, PRAGMATISM AND DEMOCRACY* 109 (2004) (“[P]eople’s interests, preferences, and opinions influence governments, certainly, through the electoral process and otherwise.”).

A modern constitutional democracy is a system of dizzying complexity.

Within such a system, law—as Habermas would have it—has come to play a central role for no reason other than that older, simpler orders have been overwhelmed. As Michel Rosenfeld explains,

Habermas conceives of law functionally, as filling gaps “in social orders whose integrative capacities are overtaxed.” In our increasingly complex societies, the common cultural traditions, beliefs, practices and normative assumptions, which emerge from what Habermas calls the “lifeworld” of a historically situated social group, can no longer furnish comprehensive normative justification for all the existing modes of social interaction. At the same time, such interactions are increasingly mediated through largely autonomous systems, like the market economy and the administrative bureaucracy of the state, which largely escape control by social actors who depend on them. . . . Under these circumstances, Habermas maintains that law is the only legitimate means for society-wide normative integration, a “hinge between system and lifeworld.”<sup>42</sup>

What this implies is that the health of a democracy depends on more or less continuous acts of mediation, balancing, and adjustment. Absent these acts, a disjunction develops between system and lifeworld, and the system becomes a Kafkaesque edifice unto itself. How, then, does a viable democracy maintain a proper system/lifeworld flow through law?

### **3. The Jury as a Structural Safeguard of Democracy**

As we have already seen, both low-order and high-order narratives—when they align—can create new laws (recall *The Jungle* and the Meat Inspection Act) or reconfigure old ones (recall *Hundley* and the law of self-defense). Is there a democratic angle to this process? I think there is—or at least there can be. But first, we must state the problem that narrative solves. In a representative democracy like that of the U.S., individual citizens play virtually no direct role in government other

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<sup>42</sup> Rosenfeld, *supra* note 36, at 1172.

than to exercise (or mostly not) the right to vote. High offices tend to be held by members of a highly educated political elite (the last four Presidents have been graduates of Columbia, Harvard and/or Yale), a situation exacerbated by a system of campaign finance that favors the entrenched elites. As Posner puts it, American political figures “are by no means ordinary men and women but instead belong to an elite of intelligence, cunning, connections, charisma, and other attributes that enable them to present themselves to the public plausibly as ‘the best.’”<sup>43</sup> If we juxtapose this with Posner’s discussion of the “elite” conception of democracy, which views the American electorate as “ignorant and apathetic,” then what is there in the system to brake a slide to oligarchy?<sup>44</sup> The answer: a legal system receptive to the narratives of even the “ignorant and apathetic.”

In the United States, courts serve at least two important and related democratic functions: (1) insuring the legal rights and liberties of ordinary citizens, oppressed minorities, and others and (2) making the other branches of government “horizontally” accountable for their acts.<sup>45</sup> Federal courts enjoy a large degree of independence from the other branches of government, given the life tenure of judges and the wide range of powers granted under Article III of the Constitution.<sup>46</sup> Many

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<sup>43</sup> POSNER, *supra* note 41, at 109. To leave no doubt as to what “other attributes” might entail, Posner later specifically mentions wealth: “Successful candidates are not random draws from the public at large. They are smarter, better educated, more ambitious, and wealthier than the average person.” *Id.* at 154.

<sup>44</sup> *Id.* at 16.

<sup>45</sup> O’Donnell, *supra* note 6, at 37.

<sup>46</sup> See THE FEDERALIST No. 78 (Alexander Hamilton): “If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the

state-court judges also enjoy a fair amount of insulation from day-to-day political jostling through lengthy terms and “appointment-and-retention” rather than “election” systems. This scheme is facially countermajoritarian—and thus in one sense anti-democratic—but it guards against one of democracy’s greatest pitfalls: the “tyranny of the majority.” Its net effect, then, is—paradoxically—to preserve democratic values through nonmajoritarian means.

Although judges are of course drawn from the same pool of elites as other officials (a problem that we will discuss in a moment), judges can stand against the tide in ways that elected officials never could. This gives them the freedom to police and protect core democratic values that executives and legislatures may be unable or unwilling to police and protect (or, in some cases, may be willing to infringe).<sup>47</sup> We can see this in cases like *Brown v. Board of Education*. But that aspect of the courts is not my main concern here. For as I suggested in the last chapter, the jury system has an institutionalized, democratizing influence on the law, one that we can now explore more deeply.

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permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges as which must be essential to the faithful performance of so arduous a duty.”

<sup>47</sup> *Id.*:

The independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.



Despite the significant check that an independent judiciary places on its fellow branches of government, it does nothing to ameliorate the rule-by-elites phenomenon that is in some ways a natural consequence of the architecture established in the pre-amendment Constitution. For as Michael Parenti suggests,

Whatever conjectures we might make about the motivations of the Framers, the more important task is to judge the end product of their efforts. And the Constitution they fashioned tells us a good deal about their objectives. It was and still is largely an elitist document, more concerned with the securing of property interests than with personal liberties.<sup>48</sup>

The Constitution does not end, however, with the Constitution-proper: the Bill of Rights was soon appended. And although these amendments do not “democratize” the federal bench, they do significantly assure broad participation in the legal system itself. This is so in two respects. First, broad rights to speak were institutionalized.<sup>49</sup> These rights assure that—unlike Kafka’s man from the country—all persons have an opportunity to tell their stories and seek “a redress of grievances.” Second, and even more important, I think, specific rights to hear and be heard were also institutionalized, none more important than expansion to civil cases of the right to trial by jury.<sup>50</sup> These rights are amplified in the civil context by prohibitions against reexamination of jury findings and in the criminal context by the bar against double jeopardy.<sup>51</sup> What this means in practice is that lay juries have enormous power in

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<sup>48</sup> MICHAEL PARENTI, *DEMOCRACY FOR THE FEW* 53 (1974).

<sup>49</sup> *See, e.g.*, U.S. CONST. amend. I (setting out rights to free speech, free press, and petition).

<sup>50</sup> *See* U.S. CONST. art. 3, § 2, cl. 3 (providing for trial by jury in criminal cases); U.S. CONST. amend. VII (preserving trial by jury in suits at common law).

<sup>51</sup> *See* U.S. CONST. amends. V (no double jeopardy) & VII (no reexamination of facts tried by jury).

particular (especially criminal) cases, cases that can in turn have universalizing consequences. We earlier saw this at work in the *Stewart* case, in which the appeal's only impact was on *future* cases because Peggy Stewart had been acquitted and therefore could not be retried, even though the appellate court found that her acquittal was improper. It now remains for us to consider the broader social implications of the jury's institutionalized role in the democratic constitutional order.<sup>52</sup>

The notion that juries serve a democratic purpose is not new. Alexander Hamilton saw trial by jury (at least in criminal cases) as one of few points upon which there was general agreement amongst the Founders, albeit for slightly different—but altogether democratic—reasons:

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government. For my own part, the more the operation of the institution has fallen under my observation, the more reason I have discovered for holding it in high estimation; and it would be altogether superfluous to examine to what extent it deserves to be esteemed useful or essential in a representative republic, or how much more merit it may be entitled to as a defense against the oppressions of an hereditary monarch, than as a barrier to the tyranny of popular magistrates in a popular government. Discussions of this kind would be more curious than beneficial, as all are satisfied of the utility of the institution, and of its friendly aspect to liberty.<sup>53</sup>

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<sup>52</sup> John Ferejohn & Pasquale Pasquino, *Rule of Democracy and Rule of Law*, in *DEMOCRACY AND THE RULE OF LAW*, *supra* note 1, at 242, 243 (noting that jury trials are one of the few places “where law and democracy come into close contact”).

<sup>53</sup> *THE FEDERALIST* No. 83 (Alexander Hamilton).

By the mid-Nineteenth Century Alexis de Tocqueville could observe that the American jury system has “political” and “educational” dimensions that may be more important than the obvious one (viz., deciding individual cases). Indeed, he believed that the jury system was as “direct and extreme a consequence of the dogma of the sovereignty of the people as universal suffrage.”<sup>54</sup> For support, he cites instances in which absolute monarchs (Napoleon and the Tudors) destroyed or weakened the jury system as a means of consolidating their power. Given this history, Tocqueville asserts that it begs the question to concern oneself with issues of juror qualification and such because that type of inquiry focuses on the administrative function of juries and thereby overlooks the jury system’s larger institutional roles:

When the question is from what elements the list of jurors should be composed, discussion is limited to the enlightenment and capacities of those to be chosen, as if one was concerned with a purely judicial institution. But, in my view, that is really the least important aspect of the matter; the jury is above all a political institution; it should be regarded as one form of the sovereignty of the people; when the sovereignty of the people is discarded, it too should be completely rejected; otherwise it should be made to harmonize with the other laws establishing that sovereignty. The jury is part of the nation responsible for the execution of the laws, as the legislature assemblies are the part with the duty of making them; for society to be governed in a settled and uniform matter, it is essential that the jury lists should expand or shrink with the lists of voters. This aspect of the matter, in my opinion, should always be the lawgivers’ main preoccupation. All the rest is, so to say, frills.<sup>55</sup>

No less important than this “political” function is what Tocqueville describes as the broad participatory function that jury service affords, which inculcates in the

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<sup>54</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 273 (J.P. Mayer ed., George Lawrence trans., Harper 1988) (1835 & 1840).

<sup>55</sup> *Id.* at 273.

citizenry democratic values, respect for judicial decisions, personal responsibility, a sense of shared governance, and an equitable turn of mind.<sup>56</sup> In short, jury service—particularly civil jury service—has “a great influence on national character,” even though Tocqueville is ultimately unsure whether “a jury is useful to the litigants!”<sup>57</sup> This “influence” that Tocqueville identifies is but another name for “education.” In the U.S., “ordinary” citizens have virtually no opportunities to participate directly in the workings of the government. Jury service is a notable exception, one allowing an important interface between specialized elites and a cross-section of the citizenry: “It should be regarded as a free school which is always open and in which each juror learns his rights, comes into daily contact with the best educated and most-enlightened members of the upper classes, and is given practical lessons in the law, lessons which the advocate’s efforts, the judge’s advice, and also the very passions of the litigants bring within his mental grasp.”<sup>58</sup> To this education Tocqueville attributes as a consequence the “practical intelligence and the political good sense of the Americans.” Some wags would claim that this is a condition contrary to fact, but we need not accept it to endorse Tocqueville’s larger point: “The jury is both the most efficient way of establishing the people’s rule and the most efficient way of teaching them how to rule.”<sup>59</sup>

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<sup>56</sup> *Id.* at 274.

<sup>57</sup> *Id.* at 274-75.

<sup>58</sup> *Id.* at 275. In light of Tocqueville’s position, query whether current methods of alternative dispute resolution (e.g., private arbitration) are antidemocratic because they take place outside the public’s gaze, are effected without public participation, and (usually) result in no public decision.

<sup>59</sup> *Id.* at 276.

The idea of the jury as a cauldron into which elites and non-elites are stirred as part of the democratic recipe is attractive, but it calls for greater scrutiny than Tocqueville provides. What is missing is a theoretical account of how lay jurors impact particular cases in ways that impact universal rules in democratic ways. For that account, I want to return to an issue noted but not discussed in the last chapter: Stanley Fish's concept of "interpretive communities."

#### 4. The Democratic Role of Interpretive Communities

Many theories of interpretation privilege text over reader. Those theories hold that a text has a single meaning (or at most a finite set of meanings) that is there for a reader to ferret out. Interpretations that do not accord with this meaning are—in polite scholarly discourse—labeled "extratextual" or—in less polite discourse, in descending order—"erroneous," "lame," or "stupid." The apotheosis of literary interpretation of this mode came packaged in the form of American "New Criticism," which called for the "close reading" of texts.<sup>60</sup> This phrase, "close reading," is pregnant with meaning. It means much more than that a critic should read a text carefully and completely. In fact, I think the phrase is something of a misnomer because it implies a methodology built on *focus* (attending only to the words on a page) when it operates by a process of *exclusion* (disregarding everything not on the page).<sup>61</sup> This method rescued literary criticism from a great

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<sup>60</sup> Although New Criticism was given its name by John Crowe Ransom and is associated with him and a group of Southern intellectuals including Allen Tate and Cleanth Brooks, it sweeps in a much wider cast of characters, including T. S. Eliot, I. A. Richards, and others. It held sway in from the 1930s to the 1950s and—in my view—continues to color the way literature is taught in the United States.

<sup>61</sup> Cf. TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 43 (1983) (making the same point with respect to the work of F. R. Leavis).

deal of precious and trivial biographical criticism.<sup>62</sup> (To this day, I remember a fellow graduate student who was studying Fitzgerald's novels complaining of the reams of paper he had to wade through to get past books and articles that stopped and started with commentary of the Scott-got-drunk-and-did-such-and-such type.) But the rescue came at a price: namely, texts became reified and divorced from both authors and readers.

There is no school of legal interpretation that is perfectly analogous to New Criticism, although there are certainly "textualists" who believe that interpretation of constitutional and statutory provisions should be performed within their four corners and "originalists" who seek to interpret such provisions in light of their intent and meaning when drafted. We will soon look more carefully at legal interpretation, but for now it is enough to showcase the position of Justice Antonin Scalia of the United States Supreme Court:

How upsetting it is, that so many of our citizens (good people, not lawless ones, on both sides of this abortion issue, and on various sides of other issues as well) think that we Justices should properly take into account their views, as though we were not engaged in ascertaining an objective law but in determining some kind of social consensus. The Court would profit, I think, from giving less attention to the *fact* of this distressing phenomenon, and more attention to the *cause* of it. That cause permeates today's opinion: a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls "reasoned judgment," which turns out to be nothing but philosophical predilection and moral intuition. . . . What makes all this relevant to the bothersome application of "political pressure" against the Court are the twin facts that the American people love democracy and the American people are not fools. As long as this Court thought (and the people thought) that we

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<sup>62</sup> Perhaps the most influential articulation of the principle of authorial irrelevance may be found in W. K. WIMSATT & MONROE C. BEARDSLEY, *The Intentional Fallacy*, in *THE VERBAL ICON: STUDIES IN THE MEANING OF POETRY* 3 (1954) ("[T]he design or intention of the author is neither available nor desirable as a standard for judging the success of a work of literary art . . .").

Justices were doing essentially lawyers' work up here—*reading text and discerning our society's traditional understanding of that text*—the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily of making value judgments . . . , then a free and intelligent people's attitude towards us can be expected to be (*ought to be*) quite different.<sup>63</sup>

In contradistinction to text-based interpretive theories, other theories privilege the reader, holding that all texts contain lacunae that only readers can fill. For purposes of concision, I'm going to refer to reader-based theories under the generic label "reader response theory," but there are a multitude of theoretical strands at issue, a good part of which cannot be so easily bundled. As a point of departure, we should at least nod to the "reception" theory of Hans Robert Jauss, who elaborates on Edmund Husserl's idea that reality is understood through "horizons," yokes it to Thomas Kuhn's observation that scientific facts are generated by dominant paradigms, and takes it to the level of technique through application of Hans Georg Gadamer's philosophical hermeneutics.<sup>64</sup> Jauss' central point is that—contrary to the central tenet of New Criticism—texts are interpreted differently over time: "A literary work is not an object which stands by itself and which offers the same face to each reader in each period. It is not a monument which reveals its timeless essence in a monologue."<sup>65</sup> We can see this at the macro level as the

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<sup>63</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 1000-01 (1992) (Scalia, J., dissenting) (bolded emphasis supplied). For a fuller theoretical description of his position, see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

<sup>64</sup> See RAMAN SELDEN, *A READER'S GUIDE TO CONTEMPORARY LITERARY THEORY* 106-16 (1985).

<sup>65</sup> *Id.* at 115 (quoting Jauss).

literary fortunes of writers rise and fall over time<sup>66</sup> and at the micro level as the meaning of words and phrases change. This explains why, for example, Shakespeare's plays must be heavily annotated and why the following quotations make no immediate sense to many modern readers (for those playing along at home, the answers are in the footnote):

- "Mice, rats and such small *deer*." (*King Lear*)
- "Thy head is as full of quarrels as an egg is full of *meat*." (*Romeo and Juliet*)
- "I'll make a ghost of him who *lets* me." (*Hamlet*)
- "I dreamt a dream *tonight*." (*Romeo and Juliet*)
- "Doth she not count her blest . . . that we have wrought so worthy a gentleman to be her *bride*?" (*Romeo and Juliet*)
- "My ships are safely come to *road*." (*Merchant of Venice*)
- "Heaps of pearl, inestimable stones, *unvalued* jewels, all scattered in the bottom of the sea." (*Richard III*)
- And in a meta-example: "O Captain! God's light, these villains will make the word as odious as the word *occupy*, which was an excellent word before it was ill-used." (*2 Henry IV*).<sup>67</sup>

Other reader-response theorists—while agreeing with Jauss that texts have no predetermined meanings—have pushed interpretive responsibility even further into the domain of the reader. Wolfgang Iser, for example, submits that a text is a

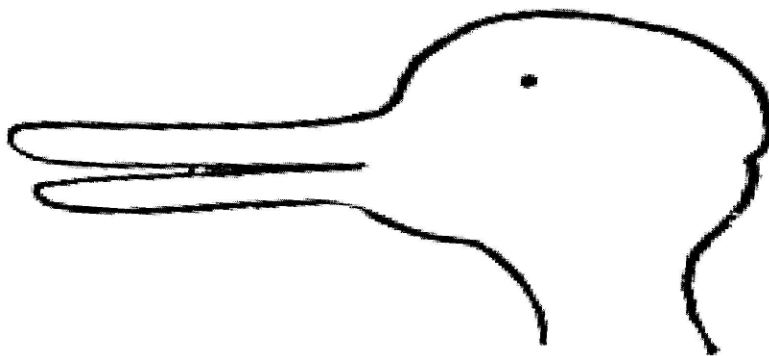
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<sup>66</sup> For instance, Robert Southey was a well-regarded contemporary of the great Romantic poets, so much so that he was awarded the laureateship in 1813. But by the time that I was an undergraduate, he warranted only a single poem of two-dozen lines in the fourth edition of the *Norton Anthology of English Literature*.

<sup>67</sup> PATRICK HARWELL WITH ROBERT BENTLEY, *OPEN TO LANGUAGE* 352 (1982). Answers: (1) deer—a small mammal; (2) meat—edible part of something as opposed to its shell; (3) lets—hinders or prevents; (4) tonight—during last night; (5) bride—bridegroom; (6) road—anchorage (7) occupy—fornicate.



“network of response-inviting structures” that encourages certain “implied” readings. But each “actual” reader brings an “existing stock of experience” that necessarily colors her interpretation.<sup>68</sup> Umberto Eco, who approaches the subject from a semiotic angle, argues that texts tend to construct two “Model Readers”: a “semantic” reader who “wants to know what happens” and a “semiotic” reader who “wants to know how what happens has been narrated.”<sup>69</sup> The common thread winding through Jauss, Iser, and Eco is that the perceiver is at least as important as the perceived, which suggests that valid interpretations may exist across a spectrum (which is not to say across infinity). To illustrate this process, let’s examine Wittgenstein’s famed duck-rabbit puzzle:



Is it a duck looking left or a rabbit looking right?<sup>70</sup> The answer is, of course, that it depends on who is looking at the picture. Everyone has an immediate take on it, (usually) one way or the other, and when informed of the other possible interpretation, everyone I’ve ever shown it to says something like, “Oh, yeah, I can

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<sup>68</sup> SELDEN, *supra* note 64, at 112.

<sup>69</sup> UMBERTO ECO, ON LITERATURE 222-23 (Martin McLaughlin trans., 2004) (2002).

<sup>70</sup> LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 166 (G.E.M. Anscombe trans., 3d ed. 2001) (1953).

see that, but I still think it's a [duck or rabbit]." But I have never had someone say that the picture is of a trout steam, a lawnmower, or a Gothic Cathedral, although I have had an occasional person identify a particular species of duck or something more general, like "a bird." I don't want to make too much of any of this, however, because this is an example that is designed to be ambiguous and, consequently, is far different from most interpretive dilemmas faced in the legal context. But before turning to Fish's particular take on reader-response theory, I want to round out our preliminary discussion by considering one poetic example and one legal example. Since I already referred to Robert Burns' "To a Mouse" in the last chapter, I'll start with it:

WEE, sleekit, cow'rin, tim'rous beastie,  
 O, what a panic's in thy breastie!  
 Thou need na start awa sae hasty,  
     Wi' bickering brattle!  
 I wad be laith to rin an' chase thee,      5  
     Wi' murd'ring pattle!

I'm truly sorry man's dominion,  
 Has broken nature's social union,  
 An' justifies that ill opinion,  
     Which makes thee startle      10  
 At me, thy poor, earth-born companion,  
     An' fellow-mortal!

I doubt na, whiles, but thou may thieve;  
 What then? poor beastie, thou maun live!  
 A daimen icker in a thrave      15  
     'S a sma' request;  
 I'll get a blessin wi' the lave,  
     An' never miss't!

Thy wee bit housie, too, in ruin!  
 It's silly wa's the win's are strewin!      20  
 An' naething, now, to big a new ane,  
     O' foggage green!  
 An' bleak December's winds ensuin,  
     Baith snell an' keen!

Thou saw the fields laid bare an' waste,      25  
 An' weary winter comin fast,  
 An' cozie here, beneath the blast,  
                   Thou thought to dwell—  
 Till crash! The cruel coulter past  
                   Out thro' thy cell.                              30

That wee bit heap o' leaves an' stibble,  
 Has cost thee mony a weary nibble!  
 Now thou's turn'd out, for a' thy trouble,  
                   But house or hald,  
 To thole the winter's sleety dribble,              35  
                   An' cranreuch cauld!

But, Mousie, thou art no thy lane,  
 In proving foresight may be vain;  
 The best-laid schemes o' mice an' men  
                   Gang aft agley,                                      40  
 An'lea'e us nought but grief an' pain,  
                   For promis'd joy!

Still thou art blest, compar'd wi' me  
 The present only toucheth thee:  
 But, Och! I backward cast my e'e.              45  
                   On prospects drear!  
 An' forward, tho' I canna see,  
                   I guess an' fear!

This poem, in scarcely four dozen lines, fairly represents a range of problems common to both legal and literary interpretation. The first, and most obvious, difficulty is the language, which is recognizable as English but full of Scots-English forms that are no longer in everyday use. Thus, to understand the poem on a basic linguistic level, one must either (1) know the dialect or (2) have a secondary source at hand (e.g., a glossed or footnoted text). The second, and more interesting, difficulty is figuring out what the poem means, given that an absolutely literal reading takes us only so far—and not very far at that (assuming that even the sharpest of Scottish mice do not understand any English, be it Scots or Anglo). So

the first textual gap that the reader must fill is to identify the addressee (typically referred to in reader-response literature as the “narratee.”)

Ostensibly, the speaker is addressing a mouse whose nest he had turned up with a plow in November of 1785. If we leave aside certain basic issues—such as whether the speaker is Burns himself<sup>71</sup> or merely a character created for dramatic effect (*cf.* Browning’s narrators)—we see that the poem breaks into three sections, each of which has a different tone and sense of urgency. The first section—which is the longest, running from lines 1-36—recounts the actual events and expresses the poet’s sorrow for frightening the mouse and destroying her nest and, more generally, for man’s breaking of nature’s grand social bond that once connected all creatures great and small. In the penultimate stanza (lines 37-42), the poet shifts from a tone of regret to one of empathy—something like: “Mouse, my friend, I know how you feel—you’re not the only one to have had your hopes dashed.” And by the final stanza (lines 43-48), the order is reversed: by comparison, the mouse has it good because she always lives in the present, with no sense of past disappointments and trepidation at what may come.

As readers, we’re left to wonder what the progression of the poem is supposed to mean. Is it a statement of the human condition? The penultimate stanza is general in scope, speaking of “men” and “us,” which hints at something larger than a personal dilemma. —But could it be something more idiosyncratic, perhaps a statement of personal disappointment? The final stanza has five personal references

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<sup>71</sup> According to the notes to the poem, “Burns’s brother said that this poem was composed on the occasion it describes.” 2 THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 92 (M.H. Abrams ed., 4th ed. 1979).

(I/my/me), which suggests an individual discouragement. Does any of this turn on the fact that the poet is a *poet* stuck behind a plow on a dreary November day? Reader-response theorists would tell us that we can't answer these questions with reference solely to the text—the reader must engage the text to produce meaning. Take the last question I posed. Is that even an important point? Why did I raise it? Would every reader raise it? Did I raise it because it made me remember feeding cattle on bitter January mornings, picking up hay in oppressive July heat, and a host of other things that I would rather not have been doing as a boy on the Great Plains of western Kansas? Perhaps. I can't say because I can't stand outside myself as a neutral observer.<sup>72</sup> But I can say that I feel a sense of partnership every time I read this poem and mull it over. And that, I think, is what response theory tries to conceptualize.

Legal texts raise analogous issues. Nowhere is this more true than with respect to the United States Constitution, which is now over 200 years old. The problem is essentially a conflict between the original meaning of particular Constitutional provisions and contemporary mores. This issue typically arises in one of two ways: either a practice that was clearly permissible at the time that the Constitution was adopted is now condemned or vice versa. For example, much current litigation involves the Eighth Amendment's prohibition of "cruel and unusual punishments." The United States Supreme Court recently held that neither

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<sup>72</sup> It is equally difficult to trace influences from the writer's side of the equation. In a couple of fascinating essays on the subject of influences, Umberto Eco describes the difficulties inherent in trying to determine whether, how, and to what extent other texts and personal experiences have impacted his own work. See UMBERTO ECO, *Borges and My Anxiety of Influence & Intertextual Irony and Levels of Reading*, in *ON LITERATURE*, *supra* note 69, at 118-35, 212-35.

mildly retarded nor minor convicted murderers can be executed because that would constitute a “cruel and unusual” punishment.<sup>73</sup> In both cases, the Court followed a similar course of reasoning:

The prohibition against “cruel and unusual punishments,” like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to “the evolving standards of decency that mark the progress of a maturing society” to determine which punishments are so disproportionate as to be cruel and unusual.<sup>74</sup>

What is most interesting in this formulation is that it first pretends to a textualist interpretive mode (note the references to “text,” “history,” “tradition,” “precedent”) but then sweeps that mode aside in favor of an ex post facto one that substitutes current “standards of decency” for the original meaning of the phrase “cruel and unusual punishments.” To be clear, there was no dispute that the phrase, when drafted, would not have barred the execution of 16- or 17-year-old minors. Indeed, the Court had held—only a decade and a half before—that “cruel and unusual punishments” did *not* include the execution of minors (at least above a certain age) within its meaning.<sup>75</sup> Setting aside whether a Supreme Court opinion is the best vehicle for enacting constitutional changes in a democracy (there are good arguments on either side of the issue), there is no doubt that cases like *Roper* demonstrate that modern readers of the Constitution are in some sense “making” its

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<sup>73</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002) (retarded defendant); *Roper v. Simmons*, 125 S. Ct. 1183 (2005) (minor defendant).

<sup>74</sup> *Roper*, 125 S. Ct. at 1190.

<sup>75</sup> *Stanford v. Kentucky*, 492 U.S. 361 (1989).

meaning. And that is the point that reader-response theorists have been making all along.

Stanley Fish's contribution to this debate has been to posit that the textualists and the receptionists are both right (or both wrong, I suppose). For Fish, constraints on textual interpretation do not reside solely within the text (they are not self-constraints) but at the same time a reader's interpretive license is not unconstrained.<sup>76</sup> How do we explain this paradox? In *Is There a Text in This Class?*, Fish sets out to show that

it is interpretive communities, rather than either the text or the reader, that produce meanings and are responsible for the emergence of formal features. Interpretive communities are made up of those who share interpretive strategies not for reading but for writing texts, for constituting their properties. In other words these strategies exist prior to the act of reading and therefore determine the shape of what is read rather than, as is usually assumed, the other way around.<sup>77</sup>

The point here is that we are all members of (many) interpretive communities, each of which authorizes only certain ways of seeing, of fact-finding if you will. We will examine the consequences of Fish's theory in a legal context more closely in a bit, but for now, I want to look at the process more generally.

Susan Glaspell's one-act play *Trifles* (also published as a short story, "A Jury of Her Peers") opens in the gloomy and disordered kitchen of Nebraska farmhouse of a century ago. The owner of the farm, John Wright, has been murdered—

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<sup>76</sup> There are of course ways to cast this discussion other than in the terms of reception theory. One could, for instance, think in terms of the interaction between "legal subject" and "legal object." For a very interesting and wide-ranging analysis that takes this approach, see J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105 (1993).

<sup>77</sup> STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* 14 (1980).

strangled—and his wife has been taken into custody. Five characters occupy the stage as the curtain rises: County Attorney Henderson, Sheriff Peters and his wife, and two neighbors, Mr. and Mrs. Hale. Mr. Hale had stopped by the farmhouse the day before and found Mrs. Wright sitting in the kitchen looking “queer.” She told him that Mr. Wright had “died of a rope around his neck” and that she didn’t know who did it because—although she slept in the same bed—she “sleep[s] sound.” Because of that story’s incredibility, Mrs. Wright was arrested and held for murder. From the opening lines, though, we sense that this will be a story less about murder than about gender. Glaspell first puts this in spatial terms, showing how the men set about to discover clues upon which they can construct a story of Mrs. Wright’s guilt: “what was needed for the case was a motive; something to show anger, or—sudden feeling.”<sup>78</sup> But they take up this task from a decidedly masculine point-of-view, looking only at the immediate crime scene and masculine spaces like the barn:

COUNTY ATTORNEY: [*Looking around*] I guess we’ll go upstairs first—and then out to the barn and around there. [*To the Sheriff*] You’re convinced that there was nothing important here—nothing that would point to any motive.

SHERIFF: Nothing here but kitchen things.<sup>79</sup>

The men denigrate everything feminine, unable to see feminine artifacts as anything other than “trifles.” But these “trifles” hold the key to the mystery, to the *narrative*:

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<sup>78</sup> SUSAN GLASPELL, TRIFLES, in *LAW AND LITERATURE: TEXT AND THEORY* 151-64 (Lenora Ledwon ed., 1996). Glaspell based the play on a notorious farmland murder that she covered as a reporter in 1900. For further background on that murder, see Patricia Bryan, *Stories in Fiction and in Fact: Susan Glaspell’s A Jury of Her Peers and the 1901 Murder Trial of Margaret Hossack*, 49 *STAN. L. REV.* 1293 (1997).

<sup>79</sup> *Id.* at 154.



MRS. PETERS: She was piecing a quilt.

MRS. HALE: . . . I wonder if she was goin' to quilt it or just knot it?

SHERIFF: They wonder if she was going to quilt it or just knot it!

*[The men laugh, the women look abashed.]*

MRS. HALE: *[resentfully]* I don't know as there's anything so strange, our takin' up our time with little things while we're waiting for them to get the evidence. I don't see as it's anything to laugh about. . . . Mrs. Peters, look at this one. Here, this is the one she was working on, and look at the sewing! All the rest of it has been so nice and even. And look at this! It's all over the place! Why, it looks as if she didn't know what she was about!

*[After she has said this, they look at each other, then start to glance back at the door. After an instant Mrs. Hale has pulled at a knot and ripped the sewing.]*

MRS. PETERS: Oh, what are you doing, Mrs. Hale?

MRS. HALE: Just pulling out a stitch or two that's not sewed very good. *[Threading a needle]*. Bad sewing always made me fidgety.

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MRS. PETERS: Why, here's a birdcage. Did she have a bird, Mrs. Hale?

MRS. HALE: Why, I don't know whether she did or not—I've not been here for so long. There was a man around last year selling canaries cheap, but I don't know as she took one; maybe she did. She used to sing real pretty herself.

MRS. PETERS: Seems funny to think of a bird here. But she must have had one, or why should she have a cage? I wonder what happened to it?

MRS. HALE: I s'pose maybe the cat got it.

MRS. PETERS: No, she didn't have a cat. She's got that feeling some people have about cats—being afraid of them. My cat got in her room, and she was real upset and asked me to take it out. . . . Why, look at this door. It's broke. One hinge is pulled apart.

MRS. HALE: Looks as if someone must have been rough with it.

MRS. PETERS: Why, yes.

MRS. HALE: I wish if they're going to find any evidence they'd be about it. I don't like this place. . . . Did you know John Wright, Mrs. Peters?

MRS. PETERS: Not to know him; I've seen him in town. They say he was a good man.

MRS. HALE: Yes—good; he didn't drink, and kept his word as well as most, I guess, and paid his debts. But he was a hard man, Mrs. Peters. Just to pass the time of day with him. [*Shivers.*] Like a raw wind that gets to the bone. . . . I should think she would 'a wanted a bird. But what do you suppose went with it?

MRS. PETERS: I don't know, unless it got sick and died.

[*She reaches over and swings the broken door, swings it again; both women watch it.*]

MRS. HALE: She—come to think of it, she was kind of like a bird herself—real sweet and pretty, but kind of timid and—fluttery. How—she—did—change. . . . Tell you what, Mrs. Peters, why don't you take the quilt in with you? It might take up her mind.

MRS. PETERS: Why, I think that's a real nice idea, Mrs. Hale. There couldn't possible be any objection to it, could there? Now, just what would I take? I wonder if her patches are in here—and her things.

[*They look in the sewing basket.*]

MRS. HALE: Here's some red. I expect this has got sewing things in it (*Brings out a fancy box.*) What a pretty box. Looks like something somebody would give you. Maybe her scissors are in here. (*Opens box. Suddenly puts her hand to her nose.*) Why— (MRS. PETERS *bends nearer, then turns her face away.*) There's something wrapped up in this piece of silk. . . . Oh, Mrs. Peters—it's—

MRS. PETERS: It's the bird.

MRS. HALE: But, Mrs. Peters—look at it. Its neck! Look at its neck! It's all—other side to.

MRS. PETERS: Somebody—wring—its neck.

[*Their eyes meet. A look of growing comprehension of horror. Steps are heard outside. Mrs. Hale slips box under quilt pieces, and sinks into her chair. . . .*]

MRS. HALE: She liked the bird. She was going to bury it in that pretty box.

MRS. PETERS: When I was a girl—my kitten—there was a boy took a hatchet, and before my eyes—and before I could get there—If they hadn't

held me back, I would have—(*Catches herself, looks upstairs, where steps are heard, falters weakly.*)—hurt him.<sup>80</sup>

MRS. HALE: I wonder how it would seem never to have had any children around. No, Wright wouldn't like the bird—a thing that sang. She used to sing. He killed that, too.

MRS. PETERS: We don't know who killed the bird.

MRS. HALE: I knew John Wright. . . .

MRS. PETERS: We don't know who killed him. We don't *know*.

MRS. HALE: If there'd been years and years of nothing, then a bird to sing to you, it would be awful—still, after the bird was still. . . .

MRS. PETERS: My, it's a good thing the men couldn't hear us. Wouldn't they just laugh! Getting all stirred up over a little thing like a—dead canary. As if that could have anything to do with—with—wouldn't they laugh!

MRS. HALE: Maybe they would—maybe they wouldn't. [Mrs. Hale soon hides the canary and its box.]<sup>81</sup>

The men end the play as they began it: literally and figuratively clueless.

They are so trapped within their masculinity that they cannot read the signs that are so obvious to the women. In other words, they cannot construct a text—a coherent narrative—that will make sense of the crime. As a result, the murderer will likely go free, as the County Attorney predicts: “No, Peters, it's all perfectly clear except a reason for doing it. But you know juries when it comes to women. If there was some definite thing. Something to show—something to make a story about—a thing that would connect up with this strange way of doing it—.”<sup>82</sup> The women, on the

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<sup>80</sup> This image of masculine cruelty is not unique in female-authored literature of the time. An incident in Willa Cather's *A Lost Lady*, in which a boy slits the eyes of a woodpecker, comes to mind as a parallel.

<sup>81</sup> *Id.* at 157-63.

<sup>82</sup> *Id.* at 163.

other hand have not only solved the murder but justified it to their own satisfaction as well. In other words, as the play's final line ironically suggests, they have tied up all the loose ends:

COUNTY ATTORNEY: [*Facetiously*] Well, Henry, at least we found out that she was not going to quilt it. She was going to—what is it you call it, ladies!

MRS. HALE: [*Her hand against her pocket*] We call it—knot it, Mr. Henderson.<sup>83</sup>

*Trifles* teaches us that membership in an interpretive community in some sense controls what types of evidence we can find and what types of narrative we can construct to explain a terminal fact. The consequences of this are profound, as we will now see in the context of trials. As I mentioned before, most legal actors are members of an educational and social elite. In nearly all cases in the U.S., judges and counsel are lawyers, which normally implies at least seven years of higher education, including—most importantly—three years of law school. Law school culture differs in many ways from other graduate education (and even other professional training), in that its primary mission is to teach students to what is often referred to as “think like a lawyer.” As a result of this training, which Philip Kissam has likened (echoing Michel Foucault) to a “discipline,” lawyers accede to membership in a specialized interpretive community.<sup>84</sup>

But lawyers are not the only interpreters in the judicial system. Juries, which only rarely include lawyers, are an important, if imperfect, counterweight. Different

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<sup>83</sup> *Id.* at 164.

<sup>84</sup> PHILIP C. KISSAM, *THE DISCIPLINE OF LAW SCHOOLS: THE MAKING OF MODERN LAWYERS* 7 (2003).

mythologies have grown up around jury practice, so I think it is probably worth a moment to map out some borders. Over the course of American history, pressure from two sources conspired to push jury membership away from elite interpretive communities and into the hands of the laity: a belief that juries should represent a cross-section of society and a suspicion that certain types of jurors may be too knowledgeable and too sophisticated to be impartial. Both of these positions are important to our discussion of interpretive communities, so we need to consider each of them in greater detail. First, the notion that a jury should represent a cross-section of society is of much more recent vintage than is typically assumed. Indeed, less than 50 years ago, federal courts still impaneled “blue-ribbon” juries. According to Jeffrey Abramson, “[t]he theory was that justice required above average levels of intelligence, morality, and integrity. In place of random selection, therefore, jury commissioners typically solicited the names ‘of men of recognized intelligence and probity’ from notables or ‘key men’ of the community.”<sup>85</sup> In short, jurors were often drawn from the group of cultural elites of which lawyers were a subset.

Congress swept this system aside with the 1968 Jury Selection and Service Act, which declared that it would henceforth be “the policy of the United States that all litigants in Federal courts entitled to a trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community.”<sup>86</sup>

The Supreme Court soon extended this policy to state courts as a matter of

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<sup>85</sup> JEFFREY ABRAMSON, *WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 99 (1994 & 2000).

<sup>86</sup> *Id.* (quoting 28 U.S.C., §§ 1861-69).

constitutional law.<sup>87</sup> As an immediate consequence, the “elite,” all-white jury disappeared, replaced by one more (although not perfectly) representative of the community at large.<sup>88</sup> In some ways, this movement mirrors the larger cultural movement that has successively extended the democratic franchise to larger and larger groups. But the secondary consequences of replacing elite jurors with truly lay jurors are profound. This is so because, as we will soon see, members of non-elite interpretive communities sometimes evaluate trial narratives in ways that seem extratextual to members of the elite, legal interpretive community. In thinking this through, we must therefore ask whether interpretive perspective (necessarily) comes at the expense of interpretive expertise.

We can now turn to the second force that has served to level the interpretive sophistication of jurors—the passion for “impartiality.”<sup>89</sup> *Jurors should be impartial.* As stated, I don’t think that this proposition would draw much fire. But if we begin to unpack the word “impartial,” we see connotations that probably should be viewed as problematic. On the one hand, the term means things that could be labeled as universal virtues, things like “unbiased,” “not prejudiced,” and

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<sup>87</sup> Taylor v. Louisiana, 419 U.S. 522, 528 (1975).

<sup>88</sup> The cross-sectional ideal has never been fully realized, in part because jury pools tend to be based on public records (like voting rolls) that underrepresent certain groups and because peremptory challenges still have a palpable influence on the composition of seated juries, even though they can no longer be used to strike prospective jurors solely for racial or gender reasons. See ABRAMSON, *supra* note 85, at 11-12; Batson v. Kentucky, 476 U.S. 79 (1986) (banning race-based peremptory challenges).

<sup>89</sup> Abramson persuasively argues that this is a recent phenomenon: “To look at the history of juries in the United States is to see that insistence on disqualifying prospective jurors for knowing or caring too much about a case was not always typical of jury selection.” *Id.* at 21.

“evenhanded.” On the other hand, though, impartiality too often gets defined as “ignorance.”<sup>90</sup> As Abramson notes, it is this view of impartiality that Mark Twain burlesques to great effect in *Roughing It* when he charges that “[t]he jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity and perjury.”<sup>91</sup> To illustrate this point, Twain tells the story of a particular jury trial:

I remember one of those sorrowful farces, in Virginia, which we call a jury trial. A noted desperado killed Mr. B., a good citizen, in the most wanton and cold-blooded way. Of course the papers were full of it, and all men capable of reading, read about it. And of course all men not deaf and dumb and idiotic, talked about it. A jury-list was made out, and Mr. B. L., a prominent banker and a valued citizen, was questioned precisely as he would have been questioned in any court in America:

“Have you heard of this homicide?”

“Yes.”

“Have you held conversations upon the subject?”

“Yes.”

“Have you formed or expressed opinions about it?”

“Yes.”

“Have you read the newspaper accounts of it?”

“Yes.”

“We do not want you.”

A minister, intelligent, esteemed, and greatly respected; a merchant of high character and known probity; a mining superintendent of intelligence and unblemished reputation; a quartz mill owner of excellent standing, were all questioned in the same way, and all set aside. Each said the public talk and the newspaper reports had not so biased his mind but that sworn testimony

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<sup>90</sup> *Id.* at 22.

<sup>91</sup> However true this may be, it runs counter to the historical roots of the jury system, in which the original British juries were comprised of “men drawn from the neighborhood who were taken to have knowledge of all the relevant facts (anyone who was ignorant was rejected) . . .” PATRICK DEVLIN, *TRIAL BY JURY* 8 (1966).

would overthrow his previously formed opinions and enable him to render a verdict without prejudice and in accordance with the facts. But of course such men could not be trusted with the case. Ignoramuses alone could mete out unsullied justice.

When the peremptory challenges were all exhausted, a jury of twelve men was impaneled--a jury who swore they had neither heard, read, talked about nor expressed an opinion concerning a murder which the very cattle in the corrals, the Indians in the sage-brush and the stones in the streets were cognizant of! It was a jury composed of two desperadoes, two low beer-house politicians, three bar-keepers, two ranchmen who could not read, and three dull, stupid, human donkeys! It actually came out afterward, that one of these latter thought that incest and arson were the same thing.

The verdict rendered by this jury was, Not Guilty. What else could one expect?<sup>92</sup>

The logical fault underlying this type of jury selection is that it equates knowledge with bias. I think that Abramson is exactly right to state that cases in which the parties go to extraordinary lengths to find ignorant jurors “illustrate what we might call a process of deselecting well-informed citizens, as if civic engagement, concern for the issues on trial, and interest in reading the papers were enemies of fair-mindedness.”<sup>93</sup> It remains to be seen whether this prejudice against the well-informed can have a salutary social impact. It certainly may (assuming that juries are not packed with absolute dolts), but—in any event—I think that we can learn a great deal from studying the ways in which non-elite jurors interpret trial narratives and construct narratives that justify (to them) verdicts in particular cases.

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<sup>92</sup> MARK TWAIN, *ROUGHING IT* Ch. 48 (Hartford: American 1873), *available at* [http://www.mtwain.com/Roughing\\_It/49.html](http://www.mtwain.com/Roughing_It/49.html).

<sup>93</sup> ABRAMSON, *supra* note 85, at 53. Abramson goes on to identify the trial of Oliver North on charges stemming from the Iran-contra scandal as the “high-water mark” of the ignorance-as-impartiality theory of jury selection. There, “[t]he only persons whose impartiality was intact were those rarities who could say that they ‘saw North on television but it was like watching the Three Stooges or something’ or that all they remembered was ‘that it was about something overseas.’” *Id.* at 21.



The results are sometimes surprising, most often, I think, when and because jurors are members of minority (and I don't mean this just in the racial and ethnic sense, though that is certainly an important part of it) interpretive communities that are under the sway of ontological and public narratives very different from those of the mainstream majority. And as we will see in the examples that follow, particular cases can have universal consequences.

### **5. A Study in Contrasts: The Rodney King and O.J. Simpson Juries**

In keeping with many of the cases that we have reviewed to this point, controversial jury verdicts pop up more often than not in cases with a strong racial undercurrent. Perhaps nothing can illustrate this principle better than a comparison of the famed Rodney King and O.J. Simpson trials, both of which took place at about the same time and in about the same place. It is the second “about” that I want us to keep in mind as we consider the two cases. For as I think the cases bear out, a difference of a few miles between actual communities can represent a manifold gulf between interpretive communities.

Most of the salient facts of the Rodney King case were never in dispute. King, a recent parolee, and two friends were cruising one of Los Angeles' freeways on a Saturday night “looking for some action.”<sup>94</sup> At some point, King tried to elude a California Highway Patrol car, leading the officers, who were soon joined by, among others, several officers of the Los Angeles Police Department, on a high-speed chase through the Los Angeles foothills. After the police forced the car to a

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<sup>94</sup> JEWELLE TAYLOR GIBBS, *RACE AND JUSTICE: RODNEY KING AND O. J. SIMPSON IN A HOUSE DIVIDED* 28 (1996).

halt, King “came out of the car mugging and dancing a little jig.”<sup>95</sup> He did not immediately submit to the officers, and the confrontation between King and the officers escalated. A crowd began to gather, one member of which, George Holliday, turned a video camera on the scene. What Holliday’s video camera captured was a large black man on the ground, closely ringed by four police officers. While one officer shot him with taser darts, the others struck him with their batons and kicked him. The officers then pulled him around with the wires from an electric harpoon, with which they ultimately tied him. Throughout the eighty-one-second video, the officers can be heard yelling at King, who at least twice can be seen getting to his hands and knees. The video also shows a number of other officers looking on but neither intervening nor participating. Throughout the incident, King’s two companions lay stretched out in a prone position, watched by two officers.

Within a couple of days, Holliday’s video tape had made its way onto the national news. Politicians, civil rights activists, and ordinary citizens immediately expressed outrage at what appeared to be an open-and-shut case of police brutality. In accordance with this tide of public opinion, the Los Angeles district attorney quickly convened a grand jury, which even more quickly found that there was sufficient evidence to indict the four officers for criminal assault and use of excessive force. The four officers did not, however, crumple in the face of the indictments. Rather, they went on the offensive, successfully challenging both the

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<sup>95</sup> *Id.* at 29. Unless otherwise noted, the following factual recitations are drawn from Gibbs’ account; I have tried, however, to strip them of at least some of Gibbs’ pro-King diction.

original judge assigned to the case and then—most important for our purposes—the Los Angeles venue for which the trial was slated (on the ground that pretrial publicity made a fair trial impossible in Los Angeles).

Simi Valley, the Los Angeles suburb to which the King-beating trial was transferred, is a bedroom community about thirty-five miles northwest of downtown Los Angeles. At the time of trial, the area was “predominantly white, middle-class, and native-born,” with “a well-earned local reputation as a bastion of law and order, family values, and conservative political views.”<sup>96</sup> Not surprising, then, the court seated a jury that reflected the population of Simi Valley (which was less than 2% black): ten whites, one Asian, and one Hispanic. And moreover, the jury shared significant attributes of the defendants:

The majority of the jury (nine of twelve) had served in the military or been employed in the defense industry. Five men had served in the Navy, and two women had been in the armed forces. There were over two thousand police families living in the Simi Valley area, and one of the jurors was the brother of a retired police sergeant. Three members of the jury were members of the National Rifle Association. This was a jury who would resonate to the themes of law and order, to protect and serve, to support the local police.<sup>97</sup>

All trials involve the competing personal narratives of the primary actors, as well as the larger cultural narratives that frame them. In the King-beating case, this meant that the jury’s task was, for the most part, to interpret the “text” of the videotape and determine whether it represented the story of a “gentle giant” wrongfully attacked by goonish LAPD officers or that of a feral “gorilla in the mist” who presented a danger to not only the officers on call that night, but to society as

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<sup>96</sup> *Id.* at 38.

<sup>97</sup> *Id.* at 49.

well.<sup>98</sup> To some degree, the interpretive die was cast when the prosecution made the tactical decision not to call Rodney King to the stand, which meant that the defendants were able to give an essentially un rebutted interpretation of the damning videotape. A benign interpretation of the tape was first supported by an unbroken line of testimony implying that not only had King been drunk that night, but that he was “dusted” (i.e., under the influence of PCP, a drug known to make users superaggressive and violent). But the most powerful evidence turned out to be the tape itself, which the defense cleverly “renarrated” through the use of slow motion, no sound, and a frame-by-frame analysis.<sup>99</sup> This renarration was supplemented by expert testimony, which—as critical race theorists Kimberle Crenshaw and Gary Peller posit—served to recontextualize the incident within recognized and appropriate police procedure:

The defense attorneys . . . had frame-by-frame stills made of each video, which were mounted on clean white illustration board, and then used as a basis for questions to “experts” on prisoner restraint. . . . Once the video was broken up like this, each still picture could then be reweaved into a different narrative about the restraint of King, one in which each blow to King represented, not beating one of the “gorillas in the mist,” but a police-approved technique of restraint complete with technical names for each baton strike (or “stroke”).<sup>100</sup>

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<sup>98</sup> Shortly before the beating, one of the four officers had been called to investigate a domestic-violence incident involving a black family. That officer sent a computer message to officers in another car stating that he had been dealing with “gorillas in the mist.” *Id.* at 42. The prosecution in the King-beating case and subsequent commentators picked up on the phrase as evidence of rampant racism in the LAPD.

<sup>99</sup> For an interesting discussion of the “story” told by a videotape, compare the majority and dissenting opinions of Justice Scalia and Justice Stevens in *Scott v. Harris*, 127 S. Ct. 1769 (2007).

<sup>100</sup> *Id.* at 46 (quoting Kimberle Crenshaw & Gary Peller, *Reel Time/Reel Justice*, in *READING RODNEY KING* 56-70 (Robert Gooding-Williams ed., 1993)).

In their closing arguments, the defense lawyers were tasked with assuring that the deconstructed version of the videotape would be accepted as “what really happened” and that it would thus be interpreted in a way tending to support not-guilty verdicts. In other words, they had to make sure that their narrative version of the facts plausibly fitted within a high-order narrative shared by the jurors. They did this in two related ways, one particular, one general. First, they dehumanized King by referring to him with a thinly veiled racial vocabulary: “bull,” “bear” and—with no little irony—“gorilla.” Second, they repeatedly reminded the jury of “the ‘thin blue line’ that separates law-abiding citizens from criminals, that separates ‘civilization from chaos,’ and, by inference, that separates middle-class suburbs from the inner-city jungle.”<sup>101</sup> All this was calculated to summon white, conservative fears of marauding inner-city blacks overrunning the suburbs and, as Gibbs puts it, “destroying their way of life.”<sup>102</sup>

This tactic proved successful: the jury—after only six hours of deliberation—acquitted three of the four officers of all charges and found the fourth guilty of only one count of use of excessive force. In some sense, this outcome was—if not inevitable—something that the jury was predisposed to render. Why?

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The presence (some would say omnipresence) of experts in trials adds a layer of interpretive complexity to a jury’s task. That is, a typical jury these days must not only interpret and evaluate “ordinary” trial narratives but the supposedly disinterested meta-narratives of expert authority figures. For a very interesting evaluation of this issue (with a particular focus on the King-beating case), see Curtis E. Renoe, *Seeing Is Believing?: Expert Testimony and the Construction of Interpretive Authority in an American Trial*, 9 INT’L J. SEMIOTICS 115 (1996).

<sup>101</sup> *Id.* at 51.

<sup>102</sup> *Id.*

The jurors were not just members of a geographic community; they were members of an interpretive community. In other words, the jury members were constrained to read the videotape in the context of their own shared values and experiences. Thus, as Gibbs astutely observes,

They had processed the infamous videotape according to their own interactions with the police, which was the only way that they were able to make sense of what they saw and what they heard. Just as Rodney King's thoughts, feelings, and actions had been irrevocably shaped by his experiences as a black man in America, so too had these jurors' thoughts, feelings, and actions been shaped by their very different sets of experiences. They were all—the victim, the defendants, the jurors, and the judge—captives of their past racial history in the American society.<sup>103</sup>

Of course these actors—although the principal ones in the trial itself—were not the only people to read and interpret the video, as subsequent events soon showed. Within hours, violence erupted in South Central Los Angeles; the riots lasted for four days. The verdict in the King-beating case certainly triggered these riots, but they were representative of greater social ills. In fact, many black Angelenos saw the King videotape as a commonplace example of police brutality practiced against members of their minority community and the verdict as a majority exoneration of those practices. The riots were, then—as John Mack, the then-president of the Los Angeles Urban League, explained—“a manifestation of a whole lot of things—injustice in the criminal justice system, reaction to the rampant police brutality that is so blatant in our community, particularly in relation to young African-American males. It was an expression, an acting-out of the have-nots.”<sup>104</sup>

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<sup>103</sup> *Id.* at 51-52.

<sup>104</sup> *Id.* at 54 (quoting interview with John W. Mack (Oct. 29, 1993)).

Put differently, it answered the rhetorical question that Langston Hughes poses at the end of “Dream Deferred”:

What happens to a dream deferred?

Does it dry up  
like a raisin in the sun?  
Or fester like a sore—  
And then run?  
Does it stink like rotten meat?  
Or crust and sugar over—  
like a syrupy sweet?

Maybe it just sags  
like a heavy load.

*Or does it explode?*<sup>105</sup>

I’ll come back to the consequences of the sort of social combustion generated by friction between interpretive communities, but another example—this one based on a jury that mirrored a very different community from that of the King-beating case—will round out the context of our discussion.

Just a couple of years after the King-beating trial, another racially charged case captured headlines across the country. Football star-cum-general celebrity O. J. Simpson was charged with murdering his ex-wife, Nicole Brown Simpson, and a friend, Ronald Goldman, outside her west-Los Angeles condominium. There was a mountain of circumstantial evidence against Simpson, much of it based on the type of scientific evidence (blood and other forensic evidence linking Simpson to the crime) that is routinely sufficient to convict less famous and less affluent defendants. But as a counterweight, the defensive Dream Team (which included Johnnie Cochran, Robert Shapiro, F. Lee Bailey, Alan Dershowitz, Barry Scheck, and Peter

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<sup>105</sup> Langston Hughes, *Dream Deferred* (1951) (italics original).

Neufeld) was able to construct a compelling narrative built on evidence of police bungling, racism, and cover-ups.<sup>106</sup> And all this was presented to a jury that was very different from the Simi Valley jury that heard the King-beating case: nine blacks (eight of whom were women), two white women, and one Hispanic man.<sup>107</sup>

From the outset, the Simpson trial was infused with a racial subtext, a subtext deeply informed by the narrative that grew out of the King-beating case: “jury consultants on both sides considered a person’s race to be an important indicator of preconceptions about the case. The defense expert Jo-Ellan Dimitrius compiled survey results showing that the Rodney King episode had increased distrust of the police among all demographic groups in Los Angeles, but that African Americans were off the chart.”<sup>108</sup> Thus, the defense lawyers were charged with a fairly narrow mission: give the predominantly African-American jury a credible narrative upon which the jury members could hang their predilection to doubt the bona fides of the LAPD. As Abramson explains,

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<sup>106</sup> GIBBS, *supra* note 94, at 164-79. For example, Mark Fuhrman, the detective who was responsible for much of the incriminating evidence found on Simpson’s estate, was exposed at trial as an extreme racist and a perjurer. And other detectives could not adequately explain the chain of custody for much of the damning blood evidence, which credible defense experts further undermined with testimony of contamination.

<sup>107</sup> These numbers reflect the final jury that rendered the decision (i.e., after certain jurors were excused and replaced with alternates). *Id.* at 218-19. In another reversal of the King-beating case, the district attorney chose to try Simpson “downtown” rather than in relatively affluent Santa Monica, which was the courthouse closest to where the crimes took place. As a consequence of that decision, the jury pool automatically diversified. Nonetheless, the number of blacks selected as jurors and alternates (fifteen of twenty-four) surprised many. See ABRAMSON, *supra* note 85, at xiii.

<sup>108</sup> ABRAMSON, *supra* note 85, at xiii.



The key here was to disturb the jury with a story that begins with arresting officers jumping to the conclusion that Simpson must be guilty from the moment they learn the murdered woman is his ex-wife. So certain are the officers that they do not bother to conduct a thorough search. Maybe they make it easy on themselves by planting evidence to frame a man they presume guilty.<sup>109</sup>

This narrative proved controlling: the jury found Simpson not guilty in less than four hours, despite the nine-month trial and correspondingly lengthy trial transcript (running some 45,000 pages).

As with the King-beating verdict, public reaction to the Simpson trial and subsequent verdict was sharply divided along racial lines.<sup>110</sup> An overwhelming number of whites found the notion of a police conspiracy against Simpson preposterous; a corresponding percentage of blacks saw the verdict as a legitimate expression of reasonable doubt, especially in light of the LAPD's treatment of Simpson in particular and African-Americans in general.<sup>111</sup> As subsequent events were to show, each group's position had merit: in 1997 Simpson was found

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<sup>109</sup> *Id.* at xi.

<sup>110</sup> Compare, for instance, the contemporaneous reactions of author Shirlee Haizlip and political/social commentator George Will:

The verdict stunningly affirmed the recognition that, along with the nonblacks, the black people on the jury practiced the law-abiding behavior that they had been socialized by and conditioned to: they believed they were obligated to follow both the judge's instructions and the letter of the law. For them, the "mountain of evidence" was, at best, a sand castle of possibilities.

Incited by Johnnie Cochran to turn the trial into a political caucus, the jurors did that instead of doing their duty of rendering a just verdict concerning two extremely violent deaths. The jurors abused their position in order to send a message about racism or political corruption.

GIBBS, *supra* note 94, at 218, 219-20.

<sup>111</sup> *Id.* at xii.

responsible for the deaths of his ex-wife and Ronald Goldman in civil suits brought by the Goldman and Brown families; the so-called “Rampart-division” scandals of the late 1990s revealed wide-spread corruption (including evidence planting and perjury) in the LAPD’s anti-gang unit.<sup>112</sup> But most of us who followed the case even slightly remember the divide in terms of the endlessly looped television footage of law-student reaction at mostly black Howard University (jubilation) juxtaposed with that of mostly white students at another school (somber mourning).<sup>113</sup> Abramson is right, I think in holding that this “juxtaposition of cheers and tears showed that the trial of O. J. Simpson had ceased to be a murder case. Somewhere along the line, the trial turned into a political event . . . .”<sup>114</sup>

What this signals is the volatility that ensues when large swaths of the population belong to interpretive communities so vastly different that they cannot read ordinary events in the same way. At the interpretive level that takes place at trial and in the jury room, the jurors must reconstruct the evidence they have heard in a way that is not just internally coherent but externally coherent with the larger cultural narratives in which they believe. Patrick Hogan explains how this process works as a matter of cognitive science.<sup>115</sup> First, a jury is bombarded with a host of

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<sup>112</sup> With respect to the wrongful death judgment against Simpson, see *Brown v. Simpson*, Case No. SC036876 (LA Sup. Ct.); *Goldman v. Simpson*, Case No. SC036340 (LA Sup. Ct.). With respect to the Rampart scandal, see [www.pbs.org/wgbh/pages/frontline/shows/lapd/scandal/](http://www.pbs.org/wgbh/pages/frontline/shows/lapd/scandal/).

<sup>113</sup> This is another example of the public reinterpretation of legal narratives that we discussed in connection with the multiple endings of *Billy Budd*.

<sup>114</sup> ABRAMSON, *supra* note 85, at xii.

<sup>115</sup> PATRICK COLM HOGAN, *COGNITIVE SCIENCE, LITERATURE, AND THE ARTS: A GUIDE FOR HUMANISTS* (2003).

fragmentary and decontextualized “discourse.” In the Simpson case, the jurors heard months of testimony and viewed dozens of exhibits. From the prosecution side, for instance, they learned about bloody gloves found at the murder scene and behind Simpson’s estate that resembled gloves he had previously worn and about footprints at the crime scene that were made by unusual shoes that Simpson was known to have owned, as well as that Simpson had previously beaten his wife and had “dreamed” about killing her. From the defense side, the jury members learned that the blood evidence may have been tainted, that the police could not explain why they entered Simpson’s estate without a warrant and that one of the key prosecution witnesses was a racist and a liar. Second, from this disjointed “discourse” the jury had to create a “story,” just as a reader of a literary text would:

In life as in art we only have the discontinuous, partially disordered fragments of experience. We are in much the same cognitive situation in the two cases. Unsurprisingly, then, we follow the same cognitive procedures. Specifically, given an array of fragments, we construct agents, objects, action, events, and causal sequences, hoping we “get the story straight.” Here, as elsewhere, the human mind proceeds in the same way, whether it is dealing with nature or with art.<sup>116</sup>

Drawing on insights of narratologists David Bordwell and Richard Gerrig, Hogan explains that we transmute discourse into narrative through the agency of a cognitive *tertium quid* that he calls “procedural schemas.”<sup>117</sup> These schemas are “cognitive structures of action,” by which he refers to the way in which the mind works and is structured. “They allow us to do everything from walk to play music.

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<sup>116</sup> *Id.* at 116.

<sup>117</sup> *Id.* at 117.

In the case of narrative, they allow us to construct the story from the discourse.”<sup>118</sup>

Most important for us, these structures are at least partially subjective, idiosyncratic, and experience based. For example, if I hear someone say the word “pet,” my mind usually summons up the word “dog” and—depending on the context—the name and images of my childhood dog, a sable collie named Laddie, or one of our two current dogs, dachshunds named Sallie Ann and Senior. Someone else’s mind would have a different cognitive structure and consequent lexical links, links that might not make a first-order connection between “pet” and “dog”—perhaps “cat” instead. This is not to suggest, however, that the range is open-ended—very few people, I think, would immediately connect “pet” with “giraffe” and even fewer (I hope) with “vacuum cleaner” or “nuclear reactor.” But we must bear in mind that interpretive narratives (narratives constructed to make sense of raw data or competing narratives) are always partially a function of the interpreter’s experience:

[Narrative] construction involves, first of all, the application of a vast wealth of information—prominently including an array of representational schemas—from our experience in the real world. Speaking of literary narrative, Gerrig points out that “readers . . . must construct . . . situation models, which integrate information from the text with broader real-world knowledge.” Indeed, we evidently follow “a *principle of minimal departure*,” according to which we assume maximum continuity between the real world and the world of fiction. In other words, we basically assume that the world of the story is identical with the world of our lived experience except in those specific cases where there is a direct contradiction from the narrative.<sup>119</sup>

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<sup>118</sup> *Id.*; see also WILLIAM SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 25 (2007) (discussing mastery of “schemas” as a hallmark of expertise).

<sup>119</sup> *Id.* at 117.

To put this in the context of the Simpson case, the jury members were required to draw upon the world of their “lived experience” to determine, for instance, whether the infamous bloody gloves fit better within a narrative in which (a) Simpson dropped the gloves in his haste to flee the crime scene and surreptitiously reenter his estate without detection or (b) overzealous and racist LAPD officers planted the gloves to enhance the possibility of convicting the suspect that they had already deemed guilty. Similarly, the jurors in the King-beating case were asked to decide whether the infamous tape showed an out-of-control “gorilla” who refused to be subdued or out-of-control police officers having sport with a hapless “gentle giant.” Gibbs concludes, in conceptual agreement with Hogan’s cognitive theory of narrative interpretation, that each of these juries was constrained by its respective community to interpret the facts as it did:

[T]here is a famous principle in psychology that governs the way all human beings process new information—the principle of cognitive dissonance. This principle states that people more easily assimilate information that fits in with or is consistent with their prior knowledge, beliefs, and experiences and will tend to reject information that is not consistent with their prior understanding of the world. Thus the jurors in Simi Valley were *inclined to believe* the police officers’ defense because it was consistent with their prior experiences and beliefs about the police. In contrast, the jurors in the Simpson case were *inclined to disbelieve* the testimony of the police because of their prior experiences and beliefs about police misconduct. In both cases, these jurors viewed the evidence, processed it, and evaluated it in terms of their own worldview and personal experiences.<sup>120</sup>

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<sup>120</sup> GIBBS, *supra* note 94, at 227. The idea that different geographic communities may constitute separate interpretive communities would seem to be one that courts and legislatures tacitly accept. For example, certain types of cases (obscenity and medical malpractice come quickly to mind) must be decided according to “community standards.” See, e.g., *Miller v. California*, 413 U.S. 15, 37 (1973) (“obscenity is to be determined by applying ‘contemporary community standards’”); Tresa Baldas, *Movement Building to Abolish ‘Locality Rules’ in Med-Mal Litigation*, NAT. L.J. (July 23, 2007), available at <http://www.law.com/jsp/article.jsp?id=1184956607754> (finding that “21 states still retain laws dictating that

This fits neatly within the framework of Fish's interpretive-community theory, which—at bottom—is as much an account of interpretive *disagreement* as of agreement.<sup>121</sup> For as Fish explains, if one believes in single determinate meanings, then “disagreement can only be a theological error. The truth lies plainly in view, available to anyone who has eyes to see; but some readers choose not to see it and perversely substitute their own meanings for the meanings that texts obviously bear.”<sup>122</sup> This belief is rooted in the more general belief that disagreements can be resolved by reference to “facts.” But this line of argument is circular: as Eagleton observes, “[a]n interpretation on which everyone is likely to agree is one way of defining a fact.”<sup>123</sup> Thus, within the context of the Simpson case, it does little good for one side or the other to point to the gloves as a dispositive “fact” because, reverting to Fish, “not everyone believes the same thing or, to be more precise, not everyone’s perceptions are a function of the same set of beliefs, and so there will not be one but many standard stories in which the world will be differently constituted, with different facts, values, ways of arguing, evidentiary procedures, and so on.”<sup>124</sup>

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a doctor’s performance be measured against standards existing in that physician’s community”).

<sup>121</sup> FISH, *supra* note 77, at 338.

<sup>122</sup> *Id.*

<sup>123</sup> EAGLETON, *supra* note 61, at 86.

<sup>124</sup> FISH, *supra* note 77, at 199. Put in the form of an aphorism, I think Fish’s theory boils down to this: “We don’t see things as they are, we see them as we are.” ANAIS NIN, *SEDUCTION OF THE MINOTAUR* 124 (1961).

So where one person may see a “cause” or a “motive,” another person may see a non sequitur.<sup>125</sup>

To extend this point a little, I think we can fairly conclude that belief in different public narratives can produce different facts. As we have seen in the King-beating case (and to a lesser extent in the Simpson case), different public narratives—when they come into contact with one another—can produce explosive results. Oddly enough, though, pro-democratic consequences can flow from volcanic social eruption. And I think that the jury system both facilitates the exchange and ameliorates possible consequences. What I mean is this: most institutional processes take place behind a veneer of relatively genteel discourse, in which representatives of “The People” rarely say (or even know) what their constituents are actually thinking. Institutional actors speak in what Yeats called “polite meaningless words” that conceal more than they reveal.<sup>126</sup> Juries and their verdicts, by contrast, often disclose how relatively insular groups see the world. The truth thereby unmasked can be ugly, but it can also facilitate institutional change more quickly than would otherwise be possible. The reaction to the King-beating verdict is a perfect example. Prior to the South Central riots and the Simpson acquittal, there was little public discourse about racism in the LAPD. All that changed after the disturbances. This came at a high price, of course, but perhaps not

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<sup>125</sup> Cf. MACCORMICK, *supra* note 5, at 222 (explaining principles of “universal causation” and “rational motivation” as tools for understanding and reconstructing past events).

<sup>126</sup> William Butler Yeats, *Easter 1916* (1916, 1920), ll. 6 & 8.

as high as it might have been had the grievances of the minority communities in Los Angeles continued to fester. After all, a riot is better than a revolution.

## 6. Is Jury Nullification Democratic and Within the Rule of Law?

Before leaving juries and turning in earnest to a theory of democratic legal interpretation, I want to consider one additional pro-democratic aspect of the jury system. Although both the King-beating case and the Simpson case have been labeled as instances of “jury nullification,” that label is not apt. Nullification occurs when a jury declines to follow the law as instructed.<sup>127</sup> In the Simpson case, for instance, the jury did not simply decide not to enforce the California law against murder; rather, it found that the State of California had not met its burden of proof for the reasons that we just examined.<sup>128</sup> To illustrate this contrast, a brief look at *United States v. Marion Barry* will be helpful.<sup>129</sup>

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<sup>127</sup> See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 700 (1995):

Jury nullification occurs when a jury acquits a defendant who it believes is guilty of the crime with which he is charged. In finding the defendant not guilty, the jury refuses to be bound by the facts of the case or the judge’s instructions regarding the law. Instead, the jury votes its conscience.

<sup>128</sup> It is, of course, difficult to tell with any degree of certainty exactly what motivates any given jury to acquit. Given the sacrosanct “black box” of the jury as it deliberates, the most that we can typically learn comes after-the-fact and is thereby subject to the taint of faulty recollections, rationalizations, and lies. See generally Note, *Second Circuit Holds that Juror’s Intent to Nullify Is Just Cause for Dismissal*, 111 HARV. L. REV. 1347, 1352 (1998).

<sup>129</sup> U.S. v. Barry, No. 90-0068, 1990 WL 174907 (D. D.C. Oct. 26, 1990), *aff’d*, 938 F.2d 1327 (D.C. Cir. 1991).



In 1990, Marion Barry, an African-American, was the mayor of the District of Columbia, the population of which was about two-thirds black.<sup>130</sup> He was enormously popular in the black community, but rumors of drug use and “chasing women” continuously swirled around him. One day in January of that year, Rasheeda Moore, an old friend of the mayor, contacted him and let him know that she was in town for a short visit. Later that day, Barry dropped by her hotel and invited her to meet him in the lobby for a drink. Moore suggested instead that he join her in her room, which he did. The two talked for a while, and at some point Moore produced crack cocaine and a pipe, which Barry eventually smoked (after first declining). FBI agents and DC police officers then burst into the room and arrested Barry, who learned that Moore was an informant and that their entire encounter had been videotaped. Barry was later charged with over a dozen criminal counts, including allegations of conspiracy to possess cocaine, possession of cocaine, and perjury for lying to the grand jury that had investigated him.

After his arrest and indictment, Barry publicly proclaimed that he was the victim of a racist prosecution. At trial, the jury apparently agreed, finding Barry guilty of only one misdemeanor charge of cocaine possession, while acquitting him on another and deadlocking on the remaining twelve. Among the charges on which the jury refused to convict was one based on the videotaped FBI sting operation. This result came about in a matter in which the trial judge (a white male) subsequently stated that he had “never seen a stronger Government case” and that the evidence of Barry’s guilt was “overwhelming” on nearly all of the thirteen

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<sup>130</sup> The following account is drawn from Butler, *supra* note 127, at 681-82, which is itself based on several accounts in the popular press.

counts on which the jury acquitted or deadlocked.<sup>131</sup> The judge singled out four jurors for particular blame, finding that each had lied during jury selection to gain a seat and use that seat to acquit. As a matter of policy, the judge concluded, “the jury is not a minidemocracy or a minilegislature. They are not to go back and do right as they see fit. That’s anarchy. They are supposed to follow the law.”<sup>132</sup>

But is this right? Must a jury always follow the law? To be clear, the Barry case was not one in which the jurors reached an interpretation of the evidence that seemed out of step with that of a dominant interpretive community. Rather, it was a straightforward case of jury nullification—i.e., there was no doubt that Barry was caught smoking crack, so the jury’s verdict can only be explained as a refusal to apply the law as instructed. Now of course the root cause of nullification and interpretive anomalies is the same—jury members under the sway of a public narrative different from that of the mainstream. The difference can be described as one of conscious intent. A Simpson-type juror votes to acquit because he or she privileges certain evidence and discounts other evidence as a matter of interpretive belief. A Barry-type juror willingly votes to acquit even though he or she believes that the defendant committed the acts charged; that juror is voting his or her conscience, making a political statement or showing mercy.<sup>133</sup> But the decision to

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<sup>131</sup> ABRAMSON, *supra* note 85, at 65-66. As an interesting and potentially revealing side-note, this judge, Thomas Penfield Jackson, is the jurist criticized by the Court of Appeals for making improper public statements in the notorious *Microsoft* case. *U.S. v. Microsoft*, 253 F.3d 34, 107-117 (D.C. Cir. 2001).

<sup>132</sup> *Id.* Others would no doubt disagree. Devlin, for example, explicitly states the opposite: “Each jury is a little parliament.” DEVLIN, *supra* note 91, at 164.

<sup>133</sup> In the *Barry* case, some have suggested that the jury was in fact making a political statement about race relations in the District of Columbia:

cut against the grain is intentional, purposeful, and knowing. Not surprisingly, it is this obvious, flagrant disregard for the law as instructed that gives some critics of nullification the most pause. That concern, though valid, is nonetheless often counterbalanced and is in some sense misplaced.

When a jury nullifies, many observers—like the Barry judge—decry the act as an affront to the Rule of Law, civil society and the judicial process. That is true enough in the sense that the jury disobeyed the instruction of a properly appointed judicial official. But the criticism is also too broad because our judicial system—our rules of law—grant juries that power, at least in certain circumstances. We find that tacitly in the Constitution’s Fifth Amendment, which—by virtue of the Double Jeopardy Clause—prohibits appellate reversal of or retrial after an acquittal verdict.<sup>134</sup> There is historical support as well, stretching from the seminal *Bushell’s Case*, in which the English Court of Common Pleas held that a juror in a criminal

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Columnist William Raspberry wrote in the *Washington Post* that “it would surprise me not at all to learn that all 12 jurors secretly believed the mayor guilty on virtually all counts.” . . . Raspberry speculated [that] the jury behaved as if Washington were a “federal colony” with a black population and a white power structure. The jury, Raspberry thought, bridled at the years-long vendetta of the U.S. Attorney’s Office and the FBI to bring down a popular black mayor. They refused to convict, beyond the one charge, out of a sense that “occupying forces” had pulled out all the stops to topple a powerful black man for merely personal sins. There may have been no legal basis for some juror’s refusal to convict on the most serious charges, but Raspberry congratulated them for using their nullifying powers to send a powerful message to federal authorities about the nature of life in Washington, D.C.

ABRAMSON, *supra* note 85, at 66.

<sup>134</sup> See, e.g., *Ball v. U.S.*, 163 U.S. 662, 672 (1896) (“A verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense.”).

trial could not be fined for acquitting against the will of a judge,<sup>135</sup> to early state constitutions, which specifically provided that “the jury shall be judges of law, as well as fact.”<sup>136</sup> And even today, two state constitutions allow criminal juries to decide matters of law and fact, thus rendering a court’s instructions merely advisory.<sup>137</sup> I don’t mean to suggest that jury nullification is favored—it plainly is not—but it is not, as the Barry judge would have it, anti-constitutional.

I also don’t mean to suggest that jury nullification is an ideal, or even a clear net positive.<sup>138</sup> To confirm that fact, we need only recall that many all-white juries acquitted clearly guilty whites of crimes against blacks and civil-rights workers in the 1950s and 1960s. But it does showcase narrative dissonance between communities in a way that can spark important reforms and give a democratic voice to socially hidden narratives. (After all, the Southern misadventures galvanized the movement to seek racial equality across the board.) To some extent, then, juries are of greater systemic importance as a source of information (concerning, for instance,

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<sup>135</sup> 124 Eng. Rep. 1006 (C.P. 1670). The case arose when Bushell, a juror in the trial of William Penn for unlawfully (and admittedly) assembling a crowd on London streets, refused to pay a fine levied on the jury for rendering a verdict contrary to the evidence and against the court’s instructions.

<sup>136</sup> See ABRAMSON, *supra* note 85, at 76 (noting the Georgia Constitution of 1777 and the Pennsylvania Constitution of 1790).

<sup>137</sup> *Id.* at 62.

<sup>138</sup> For instance, I think Paul Butler’s proposal that African-American jurors should harbor a “presumption in favor of nullification” whenever faced with an African-American defendant charged with a “victimless” crime is counterproductive and ultimately self-defeating. Butler, *supra* note 127, at 715. What Butler fails to consider is the inevitable backlash that would occur if black jurors were to begin to acquit black defendants wholesale. This could take a number of forms, ranging from more juror dismissals for cause to an overall weakening of the jury system.

the popular temper or particular community disaffection) than as a source of individual adjudication. Ultimately, with Abramson, I agree that nullification carries risks, but that these risks are part and parcel of the democratic enterprise:

[Q]uestions about the law’s justice or the wisdom of enforcing it against a particular defendant can and should not be avoided in any system designed to leave law’s final enforcement to the people. If jurors may never properly decide that the specifics of a case make it unwise or trivial to enforce the law, if jurors may never balk at enforcing laws they believe are fundamentally unjust, then juries become the rubber stamp of legislatures and judges, not independent sources of democratic judgment.<sup>139</sup>

As Abramson goes on to suggest, “[t]o permit juries to show mercy by not enforcing the law in a given case is hardly to destroy the fabric of a society under law.” In fact, the jury system, as I just observed, is in some sense a feedback loop built into the larger legal system, a way—to refer back to Bankowski’s remark—“to let the outside in.”<sup>140</sup> And in so doing, a jury—by showing mercy in an individual case—can ennoble the entire system, as Portia concludes in *The Merchant of Venice*:

The quality of mercy is not strain’d.  
It droppeth as the gentle rain from heaven  
Upon the place beneath. It is twice blest:  
It blesseth him that gives and him that takes.  
'Tis mightiest in the mightiest; it becomes  
The throned monarch better than his crown.  
His scepter shows the force of temporal power,  
The attribute to awe and majesty  
Wherein doth sit the dread and fear of kings;  
It is an attribute of God himself;

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<sup>139</sup> ABRAMSON, *supra* note 85, at xxi-xxii.

<sup>140</sup> Devlin suggests that jury nullification provides a vital check on legislation and (especially) executive overreaching. See DEVLIN, *supra* note 91, at 160-162 (“The . . . greater purpose that is served by trial by jury is that it gives protection against laws which the ordinary man may regard as harsh or oppressive. I do not mean by that no more than that it is a protection against tyranny. It is that: but it is also an insurance that the criminal law will conform to the ordinary man’s idea of what is fair and just. If it does not, the jury will not be a party to its enforcement.”).

And earthly power doth then show likest God's  
When mercy seasons justice.<sup>141</sup>

## 7. Some Thoughts on Democratic Interpretation

Thus far, we have looked principally at how juries evaluate and reconstruct narratives and how that process serves democratic ends. Now, I want to look at how judges perform a cognate process when interpreting and applying legal rules and to take some steps towards defining a theory of interpretation that is equally democratic (or at least less antidemocratic than some of the alternatives). What we find, as Bolt's Thomas More believed, is that legal interpretation *is* in some ways different from "ordinary" interpretation: "The world must construe according to its wits. This Court must construe according to the law."<sup>142</sup> But what we also find is that these differences are neither absolute nor even largely exclusive of one another.

As I have already shown, some statutes and common-law rules are particular narratives universally stated. These particular narratives take hold only when they accord with a higher-order narrative. Developments in the law can thus take place when (1) an especially compelling particular narrative is aired (2) in the presence of a higher-order narrative that makes the individual narrative both plausible and worthy of universalization and institutionalization. We saw this in the case of Betty Hundley: her personal story squared with a larger feminist narrative that had only recently displaced a sexist narrative. It was thus time to change the rules that were

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<sup>141</sup> WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1, ll. 182-195.

<sup>142</sup> BOLT, *supra* note 10, at 152.

an instantiation of that displaced narrative.<sup>143</sup> Sometimes this narrative provenance is facially apparent, sometimes not. But the narrative is always there, if only as a trace. Part of the task of judging is, I think, a duty to interpret and apply rules with an eye to the narratives—both large and small—that gave rise to those rules. This may require some digging—perhaps even imaginative reconstruction in some cases—but the exercise is necessary because it assures that public opinion (as embodied in public narratives) is *considered*, even if that opinion is ultimately rejected for good reasons on the facts of a particular case.<sup>144</sup>

Before going further, we need to return to the question of what the process of *judicial* interpretation means—i.e., whether that process is meaningfully different from that of a juror interpreting the competing narratives presented at a trial, a literary scholar interpreting a novel or poem to which she has devoted a lifetime of study, or me reading the morning newspaper with our dogs yapping in the background. The answer to this comes in two parts. First, judges are (what Karl Llewellyn dubbed) “law-conditioned officials,” which means that they are members of a specially trained professional community, one that is taught to make fine-grained distinctions, to revere precedent, to be attuned to issues of causation, and to

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<sup>143</sup> Holmes saw this as the way that law naturally develops. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897) (“We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.”).

<sup>144</sup> Judge Posner makes a similar point in discussing whether a judge can (or should) dodge precedent or clear legislative intent: “My answer is that only in the extreme case would the judge be justified in disregarding the legislative judgment. For judges to conduct guerrilla warfare against legislatures and higher courts is destabilizing, and in general a bad thing, but it is not *always* worse than the alternative.” POSNER, *supra* note 2, at 71.

consider consequences of various legal strategies (including interpretation).<sup>145</sup> Then, too, judges must make difficult decisions, decisions with (sometimes) enormous consequences. (As far as I know, no one suffered anything more than embarrassment for offering a discredited reading of *Moby Dick*.) But second, judges are members of other interpretive communities: each has a different basket of religious beliefs, political inclinations, moral standards, life experiences, and—as practitioners can readily confirm—abilities and temperaments. Thus, while a judge will by training know how to read a precedent more or less broadly or narrowly or to reason by way of a syllogism, how he or she chooses to do so in any given case may depend as much on extra-legal influences as on legal training.

If we follow this extra-legal trail to its source, what we find is a *desire* for law, or—perhaps more accurately—the desire for social conditions that are (perhaps) available only in the presence of law. To this point, Stanley Fish suggests that “[I]aw emerges because people desire predictability, stability, equal protection, the reign of justice, etc., and because they want to believe that it is possible to secure these things by instituting a set of impartial procedures.”<sup>146</sup> In arguing for a “pragmatic” theory of adjudication, Judge Posner emphasizes the need for these procedures to (at least appear to) preserve these values:

The significance of the slogan that judges are to find rather than make law is merely as a reminder that aggressive judicial lawmaking is likely to undermine important systemic values. It is difficult to plan one’s activities if the judges are at any moment to veer in a new direction; and judges who

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<sup>145</sup> See KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 19-20 (1960).

<sup>146</sup> Stanley Fish, *Almost Pragmatism: Richard Posner’s Jurisprudence*, 57 U. CHI. L. REV. 1447, 1462 (1990).



become too caught up in the essentially political role of making new policies are apt to lose their neutrality and become partisans. We might even note a tension between two of the components of the rule of law, impartiality and predictability. Partial judges may be all too predictable. Impartial judges are predictable only if their discretion is circumscribed, either by precise and detailed rules laid down by a legislature or by a commitment to deciding cases in accordance with precedent, which is how the common law is stabilized.<sup>147</sup>

This need to circumscribe judicial authority is typically justified by an appeal to objectivity, by which legal theorists mean a number of things. As I mentioned before, some commentators think legal objectivity is achievable; others think that the enterprise is doomed before it starts. The naysayers argue that objectivity is merely a cultural fiction or a manifestation of a reigning ideology or a blindness to the arbitrary nature of language or the mask of a powerful hierarchy or, most simply, a human delusion.<sup>148</sup> The yeasayers put their faith in the Enlightenment position that, as Peter Railton puts it, “objectivity follows automatically once we proceed rationally.”<sup>149</sup> Of course there is a looming contradiction here: viz., how can an internal, and thus inherently subjective, process always yield objective results?<sup>150</sup> This question calls us to further ask what legal actors mean by objectivity and whether this concept bears on the narrative theory that we have been developing.

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<sup>147</sup> POSNER, *supra* note 2, at 61-62.

<sup>148</sup> Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 87 (1996).

<sup>149</sup> Peter Railton, *Marx and the Objectivity of Science*, in THE PHILOSOPHY OF SCIENCE 763, 764 (Richard Boyd et al. eds., 1991).

<sup>150</sup> There is no way to carve objectivity and subjectivity at the joint. Nor would this be desirable. For as Neil MacCormick has observed, a “subjective” inquiry at a level of particularity can aid in the search for “objective” meaning at a level of generality. See MACCORMICK, *supra* note 5, at 136 (arguing that divining the subjective intention of individual legislators can facilitate the process of ascribing an objective intention to a legislative body).

Robert Nozick offers a contrast: “Something is objective when (or to the extent that) it is determined in its character by the features of an object; it is subjective when it is determined in its character by states such as consciousness, emotions, and desires that are intrinsic to being a subject.”<sup>151</sup> To help sort out this difference, most commentators suggest a tripartite touchstone for discerning the objectivity of a process:

- objective inquiry is value-free;
- objective inquiry is not biased by factual or theoretical preconceptions—e.g., it does not adopt a theory until the evidence is in, and it refuses to interpret evidence in light of the theory at issue; and
- objective inquiry uses procedures that are intersubjective and independent of particular individuals or circumstances—for example, its experiments are reproducible, its methods are determinate, its criteria are effective, and it makes no essential use of introspective or subjectively privileged evidence in theory assessment.<sup>152</sup>

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<sup>151</sup> ROBERT NOZICK, *INVARIANCES: THE STRUCTURE OF THE OBJECTIVE WORLD* 75 (2001).

<sup>152</sup> Railton, *supra* note 149, at 764. This sorting process also helps identify several core indicia of a legal system’s objectivity, which Brian Leiter neatly summarizes in four parts:

- We expect the content of our laws to be objective in the sense of treating people the same unless they are “relevantly” different;
- We expect judges to be objective in the sense of not being biased against one party or the other;
- We expect legal decisions to be objective in the sense of reaching the result that the law *really* requires without letting bias or prejudice intervene;
- In some areas of the law, we expect the law to employ “objective” standards of conduct (like the “reasonable person” standards) that do not permit actors to excuse their conduct based on their subjective perceptions at the time.

To these criteria (which can be summed up as accessibility from different angles, intersubjectivity, and independence) Nozick would add a fourth, “invariance,” by which he means that an objective fact is one that is invariant under various transformations (e.g., Einstein’s Special Theory, which holds that all physical laws are the same for all observers at rest).<sup>153</sup>

This is all well and good in the world of beakers, pipettes, and their high-tech successors, but how do these standards help us achieve objective answers to legal and ethical questions? The answer is, I’m afraid, far from clear. For as Posner and Fish have argued, scientific objectivity in law is only “sometimes attainable,” and the only way “to kick legal objectivity up a notch . . . is to make the courts and legislatures more homogeneous, culturally and politically.”<sup>154</sup> This sort of judicial and legislative caste system would hardly serve democratic ends, and even then, it seems to me, the procedures employed would be narrowly formalistic, which—as we saw in *Hynes*—can lead to results that are legally justified yet unjust in a popular sense. This is not to suggest, however, that I think that all legal decisionmaking is or should be ad hoc or that replicable results are not achievable in the vast majority

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Brian Leiter, *Introduction to OBJECTIVITY IN LAW AND MORALS* 1, 3 (Brian Leiter ed., 2001).

<sup>153</sup> NOZICK, *supra* note 151, at 76. In the realm of ethics, Nozick proposes that “[t]he ethical status of an action or policy is invariant under transformations that substitute one person for another. An ethical statement is (held to be) objective when it exhibits this kind of generality . . .” *Id.* at 289. Within the framework of the law, I think the question of what kind of rule- or reasoning-based invariance should be required is the most interesting. But in practice, the key component of objectivity is often deemed to be “invariance across judging subjects.” Gerald Postema, *Objectivity Fit for Law*, in *OBJECTIVITY IN LAW AND MORALS*, *supra* note 152, at 108.

<sup>154</sup> Fish, *supra* note 146, at 1448.

of cases. But I do think that we should guard against formalisms that do nothing more than glue a veneer of objectivity over essentially political decisions in difficult cases that turn on questions of interpretation.

Central to all textual interpretation is the question of language. What do these words *mean*? As I've already said, this question is of critical importance in law because the consequences of one interpretation over another can quite literally (though rarely) have life-or-death consequences or—less dramatically—because language is the medium through which the law works. Judge Posner observes with respect to this latter point that

A systemic value that requires particular emphasis is the importance of preserving language as an effective medium of communication. If judges did not generally interpret contracts and statutes in accordance with the ordinary meaning of the sentences appearing in those texts, certainty of legal obligation would be seriously undermined. For judges in run-of-the-mill contract and statutory cases to subordinate this consideration to weighing of case-specific consequences would therefore be unpragmatic, although it would be equally unpragmatic to refuse to consider case-specific consequences altogether just because the language of the contract or statute in issue seemed clear on its face . . . . The existence of [doctrines allowing departure from literal meaning] shows, by the way, that interpretation can be a good deal more complicated and uncertain than deduction, contrary to the view of those legal formalists who equate interpretation to deduction in an attempt to show that the language of a contract or a statute provides a sure guide to “objective” adjudication. . . . Despite these qualifications, most contract and statutory cases are decided quickly and easily on the basis of the “plain meaning” of the relevant texts.<sup>155</sup>

As Posner correctly indicates, many commentators equate the “plain meaning rule” with “objectivity,” thus identifying a fruitful line of investigation of the latter through the former. The plain meaning rule tends, at least in theory, to create uniformity in legal outcomes by constraining judges’ interpretations of

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<sup>155</sup> POSNER, *supra* note 2, at 62.

statutes and constitutional provisions to the literal meaning of the words used in the text at issue.<sup>156</sup> One of the earliest modern commentators on the rule speculated that “[t]he plain meaning rule seems to have been intended, originally, to rule out the traditional judicial doctrine of ‘the equity of the statute,’ a doctrine which justified alterations in the literal meaning of statutory language to avoid results which, in the opinion of an interpreting judge, were unfair or inequitable.”<sup>157</sup> In its contemporary application, however, the rule is most commonly invoked to bar extrinsic evidence of a text’s meaning (e.g., legislative materials like committee reports or social norms at the time of adoption).<sup>158</sup> There is nothing inherently suspicious in assigning presumptive validity to plain-meaning interpretations: to the contrary, as Neil MacCormick persuasively argues, judicial respect for literal textual meaning serves democratic ends by forcing legislators to draft with clarity.<sup>159</sup> The problem is thus not with the general rule; rather, it is with resort to the general rule in those specific cases that are ill-suited to a “quick look” mode of interpretation.

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<sup>156</sup> For an interesting article that shows, among other things, that “plain meaning” has no plain meaning, see Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561 (1994).

<sup>157</sup> Harry Jones, *The Plain Meaning Rule and Extrinsic Aids in Interpretation of Federal Statutes*, 25 WASH. L. Q. 2 (1939), reprinted in NORMAN SINGER, 2A SUTHERLAND STAT. CONST. 785, 788 (6th ed. 2002).

<sup>158</sup> In many cases, “plain meaning” issues become entangled with issues of “originalism,” “textualism,” “organicism,” and other interpretive approaches to legal (especially constitutional) texts. Scholarly materials in this area are legion and well beyond the scope of my argument. A good place to enter this literature is, I think, with the historical perspectives presented in H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) and Mark Tushnet, *Constitutional Interpretation and Judicial Selection: A View from The Federalist Papers*, 61 S. CAL. L. REV. 1669 (1988).

<sup>159</sup> MACCORMICK, *supra* note 5, at 204.

A couple of examples are perhaps the best way of demonstrating how strict textualism can lead to results that are—if not absurd—undesirable. In *Caminetti v. United States*, the Supreme Court was called upon to decide whether the Mann Act, which criminalized the interstate transportation of women “for the purpose of prostitution or debauchery or for any other immoral purpose” applied to the exploits of a young college man who drove a young woman across a state line on the way to a tavern at which they were to spend the night.<sup>160</sup> There was no dispute as to whether the two had sexual relations (no question of what “is” is), but it was equally undisputed that there was no commercial transaction. It is clear from the legislative history of the Mann Act that it was not intended to apply to the scenario that I just outlined. Indeed the Act is entitled “The White Slave Traffic Act” and Representative Mann, the bill’s author, had assured members of the House—in response to this very line of questioning—that the Act was aimed solely as “vice as a business.”<sup>161</sup> Nonetheless, a majority of the Supreme Court found that the statute was “plain and unambiguous” and that the conduct at issue fit within the statute’s “other immoral purpose” proviso, no matter the actual intent of the Legislature. What the Court missed was the misalignment between the higher order narrative that gave rise to and is embedded in the Mann Act (“white slavery”/interstate prostitution) and the particular facts of the case (a college lark/extramarital but non-commercial sex). In other words, this case is another example of what we earlier discussed as narrative misclassification: liability should only attach when the

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<sup>160</sup> 242 U.S. 470 (1917).

<sup>161</sup> Jones, *supra* note 157, at 791.

particular narrative on trial is like the many particulars (the tales of abuse and exploitation of individual women) that conjoined to form the public narrative (against the white slave trade) that in turn gave rise to the universal rule against participating in the business of interstate prostitution.

At times, courts are so concerned with appearing objective that they shoehorn fairly obvious political or moral decisions into the plain meaning framework, often with destabilizing consequence. *Bowers v. Hardwick* is a good example.<sup>162</sup> Hardwick “was charged with violating the Georgia statute criminalizing sodomy by committing that act with another adult male in the bedroom of respondent’s home.”<sup>163</sup> Hardwick challenged the statute on several constitutional grounds; the United States Supreme Court granted a petition for certiorari to consider whether the Georgia statute violated the fundamental rights of homosexuals. Justice White, writing for the majority, reframed this issue in a way that permitted an ultimate “plain meaning” determination: “The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . .”<sup>164</sup> With the issue so constructed, Justice White was able to take a literalist approach, one loath to “announcing rights not readily identifiable in the Constitution’s text” or to making new “constitutional law having little or no cognizable roots in the language or design of the Constitution.”<sup>165</sup> The holding of

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<sup>162</sup> 478 U.S. 186 (1986).

<sup>163</sup> *Id.* at 188.

<sup>164</sup> *Id.* at 190.

<sup>165</sup> *Id.* at 186, 194.

the case was thus not surprising, given the narrowness of the task that Justice White set for himself—namely, to thumb through the Constitution and a few cases construing it looking for the words “right to homosexual sodomy” and, finding none, to consider the matter at an end. But as Drucilla Cornell ably shows in a deconstructive reading of the opinion, Justice White misreads the historical narrative at issue:

[T]he result for White is that “fundamental liberties” should be limited to those that are “deeply rooted in the Nation’s history and tradition.” For Justice White, as we have also seen, the evidence that the right to engage in “homosexual sodomy” is not a fundamental liberty is the “fact” that at the time the fourteenth amendment was passed, all but five of the thirty-seven states in the union had criminal sodomy laws and that most states continue to have such laws. In his dissent, Blackmun vehemently rejects the appeal to the *fact* of the existence of anti-sodomy criminal statutes as a basis for continuing the prohibition, and the denial of a right, characterized by Blackmun not as the right to engage in homosexual sodomy but as “the right to be let alone.”

Quoting Justice Holmes, Blackmun reminds us that:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>166</sup>

Cornell of course recognizes that “a legal system if it is *to be* just must also promise universality, the fair application of the rules.”<sup>167</sup> And this calls up yet again the twin faces of justice, one looking to the particular, the other to the universal. As a result, Cornell notes, “we have what for Derrida is the first aporia of justice, the

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<sup>166</sup> Drucilla Cornell, *The Violence of the Masquerade: Law Dressed Up as Justice*, 11 CARDOZO L. REV. 1047, 1056 (1990) (partially quoting Holmes, *supra* note 143, at 469).

<sup>167</sup> *Id.* at 1060.



*epokhe* [suspension] of the rule.” At this impasse a judge has not only an obligation to state the law but to *judge* it:

In short, for a decision to be just and responsible, it must, in its proper moment if there is one, be both regulated and without regulation: it must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case, rejustify it, at least reinvent it in the reaffirmation and the new and free confirmation of its principle.<sup>168</sup>

In Cornell’s view, then, “Justice White failed to meet his responsibility precisely because he replaced description with judgment, and indeed, a description of state laws a hundred years past, and in very different social and political circumstances.”<sup>169</sup>

What Cornell is getting at here is that public narratives concerning both homosexuals in specific and privacy rights in general had changed (recall that high-order narratives are always already in the process of revision, subsumption, or replacement) over the course of several generations. Therefore, judging Hardwick’s conduct under a statute animated by an outmoded narrative would be unjust. Justice White was (willfully?) blind to these new narratives, and this blindness had negative consequences for the democratic rule of law, if one assumes that predictability and stability are virtues. For within two decades, the Court admitted its mistake in *Bowers*, and overruled it.<sup>170</sup>

Cases like *Caminetti* and *Bowers* teach us that the very instruments of objectivity can be turned against it. It is a laudable aim of the law to establish

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<sup>168</sup> *Id.* at 1060 (partially quoting Jacques Derrida, *Force of Law: “The Mystical Foundation of Authority,”* 11 CARDOZO L. REV. 919, 961 (1990)).

<sup>169</sup> *Id.*

<sup>170</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

procedures that insulate litigants from bias or whimsy. But we must remain mindful that formalisms are of limited utility in hard cases. We must arm ourselves not just for quotidian cases (i.e., the type of cases in which the facts and law are not credibly in dispute and in which, therefore, a mechanical jurisprudence can be expected to work fairly well), but for the more subtle, marginal ones as well. When setting out to divine the “plain meaning” of a complicated text, an interpreter would be well advised to heed Hotspur’s admonitory rejoinder to Glendower in *Henry IV*:

GLENDOWER: I can call spirits from the vasty deep.

HOTSPUR: Why so can I, or so can any man,  
But will they come when you do call for them?<sup>171</sup>

By way of conclusion, I want to return to the image of law presented in Kafka’s “Before the Law.” Law both produces and receives narratives; thus, narrative failures of the sort that we have examined in the course of our various discussions can happen just as easily from the institutional side of the equation as from the human side. In his well-known reading of Kafka’s story, Jacques Derrida suggests that the man from the country is trapped in what might be called a literary dilemma, which means that his failure to enter the law may have been a failure of his own making—a readerly failure, if you will:

[T]here is no literature without a work, without an absolutely singular performance, and this necessary irreplaceability again recalls what the man from the country asks when the singular crosses the universal, when the categorical engages the idiomatic, as a literature always must. The man from the country had difficulty in grasping that an entrance was singular or unique

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<sup>171</sup> WILLIAM SHAKESPEARE, *THE FIRST PART OF KING HENRY THE FOURTH* act 3, sc. 1, ll. 51-53.

when it should have been universal, as in truth it was. He had difficulty with literature.<sup>172</sup>

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<sup>172</sup> JACQUES DERRIDA, *ACTS OF LITERATURE* 213 (Derek Attridge ed., 1992).

## IV. Narrative and Legal Pedagogy

### Introduction

Commentators from Dewey to Dworkin have argued that education is key to the development of a truly democratic society.<sup>1</sup> But the emphasis of this commentary typically focuses somewhat narrowly on the *content* of secondary education or the general need for *access* to higher education. Dworkin, for instance, believes that many of the most important social issues of the day are so complicated that they are beyond the judgment of many ordinary voters, thus causing them to vote (if at all) for candidates based on religious affiliation or personal attractiveness. As an antidote, he suggests that the secondary curriculum be overhauled to include “courses that take up issues that are among the most contentious political controversies of the day . . .”<sup>2</sup> This aim—though laudable—is one likely difficult to achieve (as Dworkin readily concedes), and so I want to set my sights somewhat lower and consider whether the narrative theory of law that we have been developing offers opportunities to introduce reforms in *legal* education that could facilitate democratic ends without creating the political difficulties inherent in Dworkin’s proposal.

It sometimes seems as if there are as many accounts of law as there are theorists to sponsor them: formalistic/scientific, realistic, autopoietic, positivist, pragmatic, feminist, CLS, institutional, post-colonial, and on and on. As I hope that

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<sup>1</sup> See, e.g., JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* (Free Press 1997) (1916); RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE* (2006).

<sup>2</sup> *Id.* at 148-49.

I have already sufficiently shown, narrative offers a partial (yet nonetheless significant) account of some aspects of legal systems and related democratic institutions. It is not a comprehensive normative theory of how judges, legislators and other legal actors should conduct the business of the law. In this respect, I think the narrative theory as I have stated it bears some resemblance to the most current version of law and economic theory. When I say “current,” I’m thinking foremost of Judge Posner’s latest reflections on the subject; his thoughts are of special importance because he was an early and certainly the most visible proponent of economic legal analysis.<sup>3</sup> Plainly, Posner once hoped that economics held the interdisciplinary key that would unlock the secret to a perfectly functioning legal system (and explain the breakdowns in less than perfectly functioning legal systems). Thus, in 1975, he was able to opine that an

important finding emerging from the recent law and economics research is that the legal system itself—its doctrines, procedures and institutions—has been strongly influenced by a concern (more often implicit than explicit) with promoting economic efficiency. . . . The idea that the logic of the law is really economics is, of course, repulsive to many academic lawyers, who see in it an attempt by practitioners of an alien discipline to wrest their field from them. Yet the positive economic analysis of legal institutions is one of the most promising as well as most controversial branches of the new law and economics. It seeks to define and illuminate the basic character of the legal system, and it has made at least some progress toward that ambitious goal.<sup>4</sup>

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<sup>3</sup> Posner’s most influential work in the law and economics vein began to appear in the early 1970s. *See, e.g.*, Richard A. Posner, *Killing or Wounding to Protect a Property Interest*, 14 J. L. & ECON. 201 (1971); *The Economic Approach to Law*, 53 TEX. L. REV. 757 (1975). The seminal work in what we now think of as law-and-economics analysis traces to a decade earlier, especially with the work of (now Judge) Guido Calabresi and Ronald Coase. *See* Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

<sup>4</sup> Posner, *supra* note 3, TEX. L. REV. at 763-64.

More recently, however, Posner has retreated from the notion of an all-embracing theory of law formed by yoking the precepts of a unified normative system (like utilitarianism) to the teachings of economics: “It has been many years since I flirted with such an approach.”<sup>5</sup>

But that does not mean that economics does not inform legal analysis in deep and interesting ways. For good or ill, economic concepts have swamped all others in my primary practice area (antitrust). In most federal courts, an antitrust plaintiff cannot get out of the gate in most types of cases brought under the Sherman Act unless he can plead—in his initial complaint—that competition has been injured in a market defined in precise *economic* terms.<sup>6</sup> And this is so no matter how ruthlessly anticompetitive the conduct at issue is alleged to be. As a consequence, it is impossible to practice or *to teach* antitrust law without having a solid working knowledge of economic concepts. Antitrust law thus illustrates one (of many) doctrinal corners of the law that has become inherently interdisciplinary both as a matter of practice and pedagogy. As Posner aptly observes, “[o]ne by-product of [law and economics] research that has considerable pedagogical importance has been the assignment of precise economic explanations to a number of fundamental legal concepts that had previously puzzled students and their professors, such as

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<sup>5</sup> RICHARD A. POSNER, *PRAGMATISM AND DEMOCRACY* 78 (2003).

<sup>6</sup> *See, e.g.*, *Apani Southwest, Inc. v. Coca-Cola Enters.*, 300 F.3d 620, 628 (5th Cir. 2002) (“Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff’s favor, the relevant market is legally insufficient, and a motion to dismiss may be granted.”).

‘assumption of risk,’ ‘pain and suffering’ as a category of tort damages, contract damages for loss of expectation, plea bargaining, and the choice between damages and injunctive relief.”<sup>7</sup>

What is important here is the way that economics has been seamlessly integrated into a wide range of doctrinal law-school courses, rather than being cabined solely in a “Law and Economics” seminar, as are so many supposed “interdisciplinary” offerings. It is this aspect that is worth exploring at length in the context of our narrative theory. But first we must pause to consider broader issues in legal education.

### 1. The “Discipline” of Law Schools



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<sup>7</sup> Posner, *supra* note 3, TEX. L. REV. at 764.

Outside the west entrance to Columbia Law School stands Jacques Lipchitz's massive "Bellerophon Taming Pegasus." The sculpture towers over Revson Plaza, into which it is seemingly spiked, and—with its furious circularity—contrasts neatly with the strong vertical lines of the main Law School building (not so affectionately known to its current and former students as "The Toaster"). I mention its context because this is a case in which context is of extraordinary interpretive importance, as Lipchitz himself suggested: "Don't expect a blinded lady with scales and all those things from me," when Columbia Law School approached him in 1964 with the proposed commission. "I will try to think of something else."<sup>8</sup> What he thought of was a particular Greek myth, the story of how Bellerophon—armed with a golden bridle that Athena provided—tamed Pegasus and used him to complete a series of tests that Zeus had devised. To Lipchitz, the story of Bellerophon represented the dominance of man over nature: "You observe nature, make conclusions, and from these you make rules . . . and law is born from that."<sup>9</sup>

Against this backdrop, there are, I think, two (overlapping) ways of looking at the sculpture that are relevant to our discussion, each of which is suggested by a different word in the sculpture's literal context. First, we can emphasize the word "law" in Columbia Law School. From that vantage point, the bridle represents law, one of the instruments with which man gains dominion over nature. Second, we can emphasize "school." From that perspective, the bridle represents legal pedagogy,

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<sup>8</sup> I've drawn the basic factual background on the sculpture from Columbia's own account. That information and more can be found at [http://www.law.columbia.edu/media\\_inquiries/news\\_events/2007/august07/sculptures](http://www.law.columbia.edu/media_inquiries/news_events/2007/august07/sculptures).

<sup>9</sup> *Id.*



the way that students are taught “to think like a lawyer.” I think one wag of a law professor opened this second line of inquiry—though facetiously, of course—when he told the *New York Times* at the installation ceremony, “That looks like me trying to teach criminal law.”<sup>10</sup>

If we think about the word *education*, and look at the fossilized metaphor within it, “to lead,” we instantly see the link to Bellerophon and his bridle and the further problematic associations of that image: *break* to lead, *break* to ride.<sup>11</sup> The *Carnegie Report* (tacitly) examines the disturbing implications of this image by—ironically enough—picking through some of the talks that Karl Llewellyn gave to his first-year law students at Columbia (decades before the Bellerophon-Pegasus sculpture was installed on the campus).<sup>12</sup> In these talks, which he later expanded and collected in *The Bramble Bush*, Llewellyn explained the process of legal education in terms that frankly admit (and seemingly revel in) its dehumanizing aspects:

It is not easy thus to turn human beings into lawyers. Neither is it safe. For a mere legal machine is a social danger. Indeed, a mere legal machine is not even a good lawyer. It lacks insight and judgment. It lacks the power to draw into hunching that body of intangibles that lie in the social experience. None the less, it is an almost impossible process to achieve the technique without sacrificing some humanity first. Hence, as rapidly as we may, we shall first cut under all the attributes of *homo*, though the *sapiens* we shall then duly endeavor to develop will, we hope, regain the *homo*.<sup>13</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> I believe that Dean David Schizer speaks from time to time about the ambiguous meaning of the sculpture and its placement.

<sup>12</sup> WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 77-78 (2007) (quoting KARL LLEWELLYN, THE BRAMBLE BUSH (1930)) [hereinafter CARNEGIE REPORT].

<sup>13</sup> *Id.* (quoting LLEWELLYN at 101).

If there's any doubt that this "cutting under" that Llewellyn identifies is anything other than Bellerophon violence, that doubt is erased as Llewellyn "warms to his theme":

The first year . . . lays a foundation simultaneously for law school and law practice. It aims, in the old phrase, to get you "thinking like a lawyer." The hardest job of the first year is to lop off your common sense, to knock your ethics into temporary anesthesia. Your view of social policy, your sense of justice—to knock these out of you along with woozy thinking, along with ideas all fuzzed along their edges. You are to acquire ability to think precisely, to analyze coldly, to work within a body of materials that is given, to see, and see only, and manipulate the machinery of the law.<sup>14</sup>

Times have not changed all that much, as the *Carnegie Report* confirms in its observation that the "temporary moral lobotomy" is still a prominent feature of contemporary law-school pedagogy. I mentioned before Philip Kissam's likening of legal education to a Foucaultian discipline. In his *The Discipline of Law Schools: The Making of Modern Lawyers*, Kissam is concerned to test many of the cherished assumptions upon which American legal education has rested since Llewellyn's time and decades before.<sup>15</sup> His critique is comprehensive (and we must cut it short here), so I want to focus on just a couple of his points—viz., how law schools teach students to read, write, and therefore think about the law in ways that are ultimately constraining (and needlessly so):

The discipline teaches *instrumentalist habits of reading and writing* that both empower and limit future lawyers. These habits consist of quick, productive but often superficial ways of reading legal texts and writing about law, and they are linked to law school's distinctive oral culture, which celebrates oral heroism and tacitly devalues complex reading and writing. The law school's distinctive oral culture in turn rests upon the discipline's case method, its

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<sup>14</sup> *Id.* (quoting LLEWELLYN at 116).

<sup>15</sup> PHILIP KISSAM, *THE DISCIPLINE OF LAW SCHOOLS: THE MAKING OF MODERN LAWYERS* (2003).

large amphitheater classrooms, its Moot Court exercises and the speech-like forms of effective final examination writing. But this oral culture and the instrumentalist reading and writing habits of law schools tend to subordinate more complicated, more reflective, more critical and more imaginative ways of reading, writing and thinking about the law.<sup>16</sup>

For me, one aspect of this stands out above all others: the reliance on the case law method and the specialized narrative form upon which it is based.

Many observers of legal pedagogy hold that the case method is linked with the popular self-belief that the law school's highest mission is to teach how to—as Llewellyn stated in the quotation above—“think like a lawyer.”<sup>17</sup> When the case method arced into ascendancy in the late Nineteenth Century, there were few options for learning law other than through apprenticeships or “reading” law, the latter of which amounted to reasoning out legal propositions by seeing what courts had done when faced with different fact patterns.<sup>18</sup> The notion of learning law by reading about it was formalized in the system devised by Christopher Columbus Langdell, the then-Dean of Harvard, which promoted the use of casebooks and the study of appellate court opinions as the primary means of learning to apply reason to legal materials.<sup>19</sup> The Langdellian system has without doubt been modified over the course of more than a century, but I think that most law professors in the United States would probably agree that the casebook/case method of instruction still rules

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<sup>16</sup> *Id.* at 7.

<sup>17</sup> See, e.g., CARNEGIE REPORT at 47; Nancy B. Rapoport, *Is “Thinking Like a Lawyer” Really What We Want to Teach?*, 1 J. OF THE ASS’N OF LEGAL WRITING DIRECTORS 91, 95 (2002).

<sup>18</sup> See *id.*

<sup>19</sup> Philip C. Kissam, *Lurching Towards the Millennium: The Law School, the Research University, and the Professional Reforms of Legal Education*, 60 OHIO ST. L.J. 1965, 1970 (1999).

the schools, especially in first-year core classes. It thus behooves us to consider exactly what this “method” entails.

Casebooks are, as Kissam aptly and ironically describes them, “large heavy books that are bound in serious, somber colors, blue, black or deep red, and carry serious, somber titles such as ‘Contracts Law: Cases and Materials’ or ‘Federal Income Taxation.’”<sup>20</sup> These books consist largely of excerpts of appellate court opinions (in some subjects mostly from the United States Supreme Court), together with summaries of related cases, blurbs from scholarly writing, and a few discussion questions and hypotheticals. Some casebooks—especially those prepared by editors with cross-disciplinary leanings (e.g., economics)—may also include materials designed to provide an analytical framework within which to evaluate particular decisions. But, as Michael Hoeflich has observed, even in doctrinally expansive casebooks, “the editors rarely consider the broader context of the case as published nor do they suggest that reported decisions may not, in fact, give full accounts of ‘what really happened.’”<sup>21</sup> By “broader context” Hoeflich is thinking principally of things social and historical—i.e., the sort of materials that would make it possible for a reader “to understand and evaluate the origin, historic rationale, or legitimacy of the decision.”<sup>22</sup> As a consequence of all this, Kissam concludes, “[t]he structure of casebooks makes it difficult to understand opinions as comprehensible narratives,

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<sup>20</sup> KISSAM, *supra* note 15, at 31.

<sup>21</sup> M. H. Hoeflich, *On Reading Cases: The Law Student in Wonderland*, 42 SYRACUSE L. REV. 1163, 1180 (1991).

<sup>22</sup> *Id.*; see also Alan Watson, *Legal Education Reform: Modest Suggestions*, 51 J. LEGAL EDUC. 91, 93 (2001) (“What is going on in the case is very largely incomprehensible.”).

as comprehensible parts of larger coherent doctrinal or social contexts, or as useful subjects for the development of legal arguments, counter-arguments and criticism.”<sup>23</sup>

How is it that nearly the entire profession of law teaching came to rely on teaching materials that are so open to criticism? The answer is found in the pedagogical system that the casebooks are intended to serve: the case method. This method

rests upon the belief of Langdell that law was a science and that law had underlying and universally applicable laws just as did the physical sciences. He further believed that these rules could best be learned by students through a process of exploration of what he considered to be the raw material of the Common Law: appellate decisions. Thus, the purpose of introducing students to cases in the law school curriculum was not to teach them how to read cases critically nor to teach them how the law works in action, nor to teach the relationship between law and society. Rather, the purpose of teaching through cases was to teach students how to read cases for doctrinal rules and teach students how to distinguish between various fact patterns so as to determine which doctrinal rules would apply in new circumstances. This is what has come to be called “black letter law.” The casebook as a teaching device derives directly from the need of the case method teacher to have a series of cases which clearly and concisely lay out the doctrinal rules that the law professor wants to teach.<sup>24</sup>

This emphasis on rule-identification has of course moderated over time (as witnessed by, for instance, the inclusion of social-policy and interpretive-theory discussions in casebooks and classrooms), but its primacy—especially in first-year classes—remains assured for a variety of reasons, ranging from the perceived need to conduct large classes in an orderly fashion; to base grading on end-of-the-

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<sup>23</sup> KISSAM, *supra* note 15, at 32.

<sup>24</sup> Hoeflich, *supra* note 21, at 1178-79.

semester, issue-spotting examinations; and ultimately to prepare students for rule-driven bar examinations.<sup>25</sup>

The case method no doubt effectively serves these needs. This service comes, however, at a significant associated cost, as the *Carnegie Report* makes clear. There is a basic polarity in how lawyers think and thereby perform their greater social functions. In one mode, the analytical, “things and events are detached from the situations of everyday life and represented in more abstract and systematic ways.”<sup>26</sup> This way of thinking promotes stability and consistency. In the other mode, the narrative, “things and events are given significance through being placed in a story, an ongoing context of meaningful interaction.”<sup>27</sup> Things *human* (e.g., meaning and values) reside here. Both modes are vital and significant, but the case method privileges the former over the latter, as the *Carnegie Report* finds:

[The analytical mode] holds out the prestige of academic recognition, likely career success, and the apparent satisfactions of remaining too tough to fall into Llewellyn’s “woozy thinking.” [The narrative mode] continues to make appeals to conscience and the ideals of the profession. However, by now it should be obvious that this is by no means an even contest for the hearts and minds of law students. The first-year experience as a whole, without conscious and systematic efforts at counterbalance, tips the scales, as Llewellyn put it, away from cultivating the humanity of the student and towards the student’s re-engineering into a “legal machine.”<sup>28</sup>

With this backcloth stitched into place, we can begin to foreground the central feature of the case method—viz., the edited appellate opinion—and what that implies. An appellate opinion almost always takes a narrative shape, but that

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<sup>25</sup> See KISSAM, *supra* note 15, at 37-50.

<sup>26</sup> CARNEGIE REPORT, *supra* note 12, at 83.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 84.

narrative is highly concentrated and formalized. The last opinion in any given case stands at the head of a series of narrative regressions, those resulting from opinions below, testimony of parties and witnesses, statements and briefs of counsel, and no doubt others. The opinion that we find in a reporter is thus just the last—not the only—narrative in the record of a case, even though over time it may be the only generally available trace of a matter that is left to posterity.<sup>29</sup> But by no means can the opinion be taken as a complete statement of “what really happened” as a matter of history (at most, the facts as stated are conclusive only in the sense that they may bind the parties and perhaps those in privity with them). In sum, narrative coherence comes at the expense of narrative completeness. And this has undesirable pedagogical consequences, as the *Carnegie Report* warns:

[Casebook] opinions . . . are highly redacted accounts of legal proceedings that render fact-patterns in condensed formulas. As a first encounter with legal facts, this can give the misleading impression that facts are typically easy to “discover,” rather than resulting from complex processes of interpretation that are shaped by pressures of litigation.<sup>30</sup>

The version of an opinion that we find in a casebook (because of editing, topical organization and surrounding commentary) is in some sense a revision and recontextualization of a case’s final narrative—extrajudicial, yet of great importance because many bedrock cases are never read by lawyers outside of law school. As such, it suffers from two inherent deficiencies. First, as with the full version

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<sup>29</sup> In a masterful examination of law’s untold stories, Robert Ferguson shows how particular narrative pieces of a proceeding can be repressed and contained outside an official trial record. See Robert A. Ferguson, *Untold Stories in the Law*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 84 (Peter Brooks & Paul Gewirtz eds., 1996).

<sup>30</sup> *CARNEGIE REPORT*, *supra* note 12, at 53.

published in a reporter, the casebook version is cut off from the underlying narrative record upon which it is based. We must thus take it on faith that the judge who wrote a particular opinion did so in good faith and fairly and accurately described the facts, but this cannot always be the case: “we must also, in this post-Realist world, accept the possibility that judges edit the facts and analysis which they include in their published opinions.”<sup>31</sup> The reasons for this editing can range from the benign (trying to keep an opinion to a manageable length), to the problematic (tailoring the facts, perhaps subconsciously, to fit a personal or political agenda), to the corrupt (reaching a decision based on bribery). And we must remain largely ignorant of these reasons (or even a judge-author’s basic editorial choices) because we have no way to test the final, published narrative against its building blocks in the overall record—all we see is what the judge wants us to see. In short, the decision to conceal or foreground a narrative is a rhetorical decision that was made long before the printed page passes before our eyes. But we can sometimes catch that decision’s shadow in a case in which multiple judges write opinions.

Let’s take an example. *Ake v. Oklahoma* grew out of an especially horrid multiple homicide that took place outside Oklahoma City in the late 1970s.<sup>32</sup> The crime had a deep public impact, so much so that I recall people still talking about it in private conversations when I practiced law in Oklahoma City some 15 years later. One of the murderers, Glen Burton Ake, was convicted of the crime, but he appealed to the United States Supreme Court, arguing that the State of Oklahoma had violated

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<sup>31</sup> Hoeflich, *supra* note 21, at 1165.

<sup>32</sup> 470 U.S. 68 (1985).



his due process rights by failing to provide him with a psychiatrist to testify in his defense. Of the crime itself, here's what Justice Marshall, writing for the majority, had to say: "Late in 1979, Glen Burton Ake was arrested and charged with murdering a couple and wounding their two children."<sup>33</sup> The remainder of his factual recitation deals with Ake's mental instability, pretrial psychiatric treatment, and competence to stand trial. Justice Rehnquist, in dissent, had a much different story to tell:

Petitioner Ake and his codefendant Hatch quit their jobs on an oil field rig in October 1979, borrowed a car, and went looking for a location to burglarize. They drove to the rural home of Reverend and Mrs. Richard Douglass, and gained entrance to the home by a ruse. Holding Reverend and Mrs. Douglass and their children, Brooks and Leslie, at gunpoint, they ransacked the home; they then bound and gagged the mother, father, and son, and forced them to lie on the living room floor. Ake and Hatch then took turns attempting to rape 12-year-old Leslie Douglass in a nearby bedroom. Having failed in these efforts, they forced her to lie on the living room floor with the other members of her family.

Ake then shot Reverend Douglass and Leslie each twice, and Mrs. Douglass and Brooks once, with a .357 magnum pistol, and fled. Mrs. Douglass died almost immediately as a result of the gunshot wound; Reverend Douglass' death was caused by a combination of the gunshots he received, and strangulation from the manner in which he was bound. Leslie and Brooks managed to untie themselves and to drive to the home of a nearby doctor. Ake and his accomplice were apprehended in Colorado following a month-long crime spree that took them through Arkansas, Louisiana, Texas, and other States in the western half of the United States.<sup>34</sup>

Why such a contrast between the two opinions? Justice Marshall has concluded that Ake's rights were violated and that his conviction should be reversed. Straying into the facts of the crime itself could only detract from the rhetorical

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<sup>33</sup> *Id.* at 70.

<sup>34</sup> *Id.* at 88.

inevitability of that holding.<sup>35</sup> Justice Rehnquist, on the other hand, thinks that Ake is a faker (he later points to evidence in the record in which Ake told a cellmate that he was going to “play crazy”), and so he wants to paint Ake as acting with conscious deliberation (look back at the verbs he selects) as he went about his heinous acts— i.e., he may have been Satanic, but he was sane. We can’t go further here (we don’t have enough evidence before us), but we can see that Justice Marshall must shunt the multiple-murder-attempted-rape-of-a-twelve-year-old story to the side to stake his claim to authority and that Justice Rehnquist must do just the opposite.

Getting now to the second of our two points, a casebook editor further eliminates content, generally to draw attention to a particular doctrinal aspect of a case. And because an editor selects cases because he or she believes that each of them well illustrates a rule, the development of a rule, or the application of a rule, each case is edited and slotted in a casebook according to the editor’s overall organizational rubric. If context adds meaning—and I think it indisputably does— then where an opinion is placed in a casebook adds an important dimension to the opinion. Here’s an illustration: I just pulled four antitrust casebooks from my bookshelf, one that I use in the course I teach at Southern Methodist University from time to time,<sup>36</sup> one from a practitioners’ seminar I took about ten years ago,<sup>37</sup> and a

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<sup>35</sup> For a thorough rhetorical analysis of *Ake*, see Shulamit Almog, *As I Read, I Weep—In Praise of Judicial Narrative*, 26 OKLA. CITY U. L. REV. 471, 479-84 (2001).

<sup>36</sup> WILLIAM R. ANDERSEN & C. PAUL ROGERS, *ANTITRUST LAW: POLICY AND PRACTICE* (3d ed. 1999).

<sup>37</sup> PHILLIP AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES* (4th ed. 1988).

couple of others that publishers have sent me for review.<sup>38</sup> I searched through each to see what the editors had done with one of the most-cited cases in all of private antitrust litigation, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*<sup>39</sup> The case is important because it limits the category of private plaintiffs entitled to sue under the federal antitrust laws to those who can show “*antitrust injury*,” a concept that has proven slippery in subsequent attempts at application.<sup>40</sup> Andersen and Rogers edit the case down to a bit more than five pages (including eight of the opinion’s original footnotes) and place it as the first case in a section entitled “Private Enforcement.” That placement makes sense, given—as I already mentioned—that the case is more important in the civil litigation context than in others (like criminal enforcement). Morgan slims the case down by another page (largely by eliminating all but two footnotes) and lodges it at the end of the first subsection (called “The Transition Cases”) in a chapter focusing on developments since 1975. Morgan emphasizes history over practical application in his casebook, so he has selected *Brunswick* as one of several examples of the modern Supreme Court’s application of economic analysis to antitrust problems and to show how the Court began to change (most often by limiting) the field of operation of the federal antitrust laws, a process that

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<sup>38</sup> THOMAS D. MORGAN, *CASES AND MATERIALS ON MODERN ANTITRUST LAW AND ITS ORIGINS* (3d ed. 2005); CHARLES J. GOETZ & FRED S. MCCHESENEY, *ANTITRUST LAW: INTERPRETATION AND IMPLEMENTATION* (3d ed. 2006).

<sup>39</sup> 429 U.S. 477 (1977).

<sup>40</sup> *Id.* at 489 (“Plaintiffs must prove *antitrust injury*, which is to say injury of the type that the antitrust laws were intended to prevent and flow from that which makes the defendants’ acts unlawful.”).

continues to this day.<sup>41</sup> In short, he locates the case within a historical narrative and uses it as an element of his retelling of that narrative. The other two casebooks, Areeda/Kaplow and Goetz/McChesney, do not reprint *Brunswick* at all, although Areeda and Kaplow include a summary of the case (including a quotation of the sentence for which *Brunswick* is most often cited) in a subsection entitled “Antitrust Injury,” and Goetz and McChesney reprint cases that cite to *Brunswick*.

What do these various approaches tell us? At the one extreme, Goetz and McChesney imply that *Brunswick* itself is less important than more recent cases that cite it. In some ways, though, this is like reading the last chapter in Dworkin’s chain novel without reading the first chapter. Granted, a casebook cannot include all—or even many—cases in a series, but it seems to me that foundational cases that have led to splintered or confused subsequent authority are worth direct analysis. One step up the ladder is Areeda and Kaplow’s one-paragraph summary of *Brunswick*, which reduces the case to a rule, supported by a few sentences of factual recitation and commentary. If there is a teleology to the case method, the Areeda and Kaplow approach to *Brunswick* neatly illustrates it: important cases can be boiled to an essence. This may often be true, but it guides students towards a very narrow way of reading. And, as Kissam suggests, it also tacitly teaches students that if that’s all there is to the lawyerly enterprise, then there are surely more efficient ways of getting to and mastering rules than rooting them out of musty casebooks like truffles

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<sup>41</sup> For instance, the United States Supreme Court recently held that vertical price fixing (resale price maintenance) should no longer be considered per se illegal and should be viewed under the rule of reason. In taking this step, the Court overruled one of its most venerable precedents, *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911). *Leegin Creative Leather Products v. PSKS Inc.*, 127 S. Ct. 2705 (2007).

from the forest floor: one common method is to turn to commercial outlines, in which the truffles come pre-rooted.<sup>42</sup> But no matter what option the beginning student takes, all this

is likely to encourage an analytical, instrumentalist way of reading to obtain “the rules” of at least “the major” cases, for it is these rules that will seem most available and desirable to a bewildered, disoriented law student or to one who is simply pressed for time. Understanding “the rules” will appear to be a rational means of preparing for class discussions and especially for examinations, where students need a grasp of many legal rules and case holdings in order to identify issues and apply such law quickly to novel situations. This *instrumentalist reading* as a routine will focus students on certain *analysis* of texts to discover rules, but it ignores and tacitly discounts other ways of reading that seek to ascertain the contexts of judicial decisions, solve underlying legal problems, interpret or synthesize complicated legal authorities, or use judicial texts to construct complex arguments.<sup>43</sup>

The other two antitrust casebooks that we have been discussing attempt to avoid the rule-based trap by placing *Brunswick* in a larger context. I must admit that the practitioner in me favors the Andersen and Rogers approach because it underscores the foundational importance of the case to civil litigation. But, ultimately, this is to locate Brunswick and the rule it enunciates within a larger set of rules (the rules—principally Section 4 of the Clayton Act—conferring a private right of action on certain persons injured by reason of a violation of the antitrust laws). Morgan, on the other hand, places the case within a historical context, one that reveals an underlying shift in one of the United States’ most central public narratives: the story of Big Business. In our discussion of *The Jungle*, we saw how that public narrative had tipped in a decidedly populist direction. The Sherman Antitrust Act is a product of that narrative (and the era that gave it birth) no less than

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<sup>42</sup> KISSAM, *supra* note 15, at 33.

<sup>43</sup> *Id.* at 33-34.

the Meat Inspection Act. And its enforcement for the next several decades reflected those origins: many common business practices were considered per se illegal, no matter their actual impact on consumer welfare.

In the post-World War II period, the populist, anti-business narrative waned, and by the 1970s—as Morgan points out—the United States Supreme Court increasingly directed lower courts and enforcement agencies to consider the “reasonableness” of practices that had theretofore been deemed unworthy of analysis beyond proof that the alleged conduct had in fact occurred. The reasons for this are complicated and subject to ongoing dispute, but there is no doubt that the Court changed direction and that that change could be marked over the course of the 1960s and 70s.<sup>44</sup> For our purposes, it is enough to note that this narrative revision happened and that Morgan identifies it, thus signaling a possible way of reinvigorating some pedagogical practices. What I’m thinking of here are the dimensions that a narrative approach to legal materials might offer. What if—in addition to the public-narrative framework that Morgan employs—students were encouraged to examine the personal narratives that gave rise to particular disputes in the first place? Such an approach, it seems to me, would give students a greater sense of how many rules are formed and provide a corrective to the greatest

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<sup>44</sup> What Morgan correctly suggests is that change was inevitable by the early 1970s. The economy had become so complex that per se rules could no longer be trusted to produce desired results, and many older decisions either made little sense in the revised context or could not be logically extended to new situations or technologies. At the same time, influential critics like Robert Bork and Richard Posner made powerful thrusts against the received wisdom; these critics found sympathetic ears amongst the judiciary, including the Supreme Court, the composition of which radically changed with the turnover of four seats between 1970 and 1975. MORGAN, *supra* note 38, at 467.

shortcoming of appellate opinions: viz., their inherent narrowness of scope, a subject that calls for greater scrutiny.<sup>45</sup>

## **2. The Problem with Appellate Practice and Appellate Opinions**

Lawyers become so accustomed to reading appellate opinions for rules that it's easy for them to forget how narrowly those opinions are cast: e.g., they have a limited purpose, are subject to powerful generic constraints, and are built on a rhetoric of justification, not description. First, and in some ways most important, appeals are based on particularized points of asserted error in the proceedings below. At the level of the United States Supreme Court, then, it is most unusual for the Court to consider more than one or two narrowly framed issues, and those are selected because of their general importance, not because of their impact on the actual litigants before the Court. These limitations are not a matter of speculation or practitioners' folklore; they are institutionalized in the Court's rules. For example, Rule 10, which sets forth the considerations governing review on a writ of certiorari, specifically states that only extraordinary cases are subject to review, typically cases that involve conflicting decisions among United States courts of appeals or between those courts and state courts of last resort on an "important matter." This means that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists

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<sup>45</sup> It's also worth mentioning that classroom practices exacerbate the impetus of the appellate opinion to narrow: "instructors encourage students to construct a particular form of knowledge—a legal understanding of events that filters out some aspects of the narrative under analysis while selecting and extracting the legally relevant 'fact pattern' for attention." CARNEGIE REPORT, *supra* note 12, at 63.

of erroneous factual findings or the misapplication of a properly stated rule of law.”<sup>46</sup>

This rule assures that only a certain type of case is heard; another rule assures that the case is narrowly presented in a way that suppresses the matter’s narrative aspects. Rule 14, which mandates the content (and thereby the non-content) of a petition for a writ of certiorari, reveals a decidedly anti-narrative bias, one focused on narrowly cast legal questions. It essentially directs that all appellants use a one-size-fits-all formula under which:

- The questions presented for review [must be] expressed concisely in relation to the circumstances of the case, without unnecessary detail. The questions should be short and should not be argumentative or repetitive. The questions shall be set out on the first page following the cover, and no other information may appear on that page.
- A concise statement of the case set[s] out the facts material to consideration of the questions presented.
- A direct and concise argument amplif[ies] the reasons relied on for allowance of the writ.
- A petition for a writ of certiorari should be stated briefly and in plain terms.
- The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition.<sup>47</sup>

This emphasis on concision, directness, and brevity has certain consequences, the most important being that from the very outset, a Supreme Court appeal will have a tightly circumscribed, rule-focused ambit. It should come as no surprise, then, that most appellate opinions mirror the petitions of which they are mere culminations.

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<sup>46</sup> SUP. CT. R. 10 (2005).

<sup>47</sup> SUP. CT. R. 14 (2005).



Robert Ferguson has identified a number of generic characteristics in appellate opinions: a monologic voice, an interrogative mode, a declarative tone, all of which cohere in what he calls a “rhetoric of inevitability.”<sup>48</sup> As Ferguson correctly notes, the question that a court chooses to answer—and the way that it chooses to frame that question—is so fundamental as to make that process “the methodological anchor of judicial rhetoric.”<sup>49</sup> Not surprisingly, therefore, appellate counsel devote much energy to hitting just the right notes in the version of the question presented that they will sponsor because “[t]hey understand what an earlier member of the profession, Francis Bacon, observed four centuries ago: the questions we ask shape our knowledge far more than do the theories we propose.”<sup>50</sup> In practice, this means that every stroke of the oar—from start to finish in the appellate process—will be aimed at guiding the court to a “correct” statement of a question (or a few questions).

By emphasizing the generic importance of questions presented in appellate opinions, I do not mean to deny that those opinions have a narrative dimension. They do. But it is a type of narrative quite different from the complex of narratives that makes up the case prior to its arrival at the appellate court. The appellate narrative is, as Ferguson explains it, driven by a declarative tone, one designed at once to simplify and to convey certitude:

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<sup>48</sup> Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201 (1990).

<sup>49</sup> *Id.* at 208.

<sup>50</sup> *Id.*

The courtroom, as forum, takes the complexity of event—the original disruption that provokes legal action in the first place—and transfers aspects of that complexity into a narrative, the written form of which is a literal transcript of what has been said in court. The judicial opinion then appropriates, molds and condenses that transcript in a far more cohesive narrative of judgment, one that gives the possibility of final judgment by turning original event into a legal incident for judgment. Judgment, in turn, guides a general cultural understanding of the original event for consumption beyond the courtroom. . . . Every step of the process requires an unavoidable series of simplifications. Judgment must reduce event to an incident and further reduce incident to a narrative about acceptable behavior. This is its mission. Everything about the enterprise, including the listener-reader of the judicial opinion, welcomes the declarative tones that make it possible.<sup>51</sup>

This is, I think, just another aspect of what we have earlier discussed as the process by which particulars can become universals and of how ontological narratives can become strands in a higher-order narrative fabric. We have seen that this process of narrative distillation is effective at *making* rules, but it impedes the process of *understanding* rules because it necessarily obscures their narrative roots. And the editing of opinions for inclusion in casebooks thickens the cloak that is always already wrapped about an appellate opinion. Is there a classroom solvent that will help strip away this cloak?

### 3. (Re)Introducing Narratives in the Classroom

I think there is: more exposure to the narratives large and small that underlie case opinions. I am not suggesting an abandonment of all rule-based teaching;

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<sup>51</sup> *Id.* at 211. Sanford Levinson has noted how the tone of confidence present in most appellate opinions often obscures an underlying ambivalence. “How often,” he asks, “does one find a judicial opinion that frankly says that the question is an exceedingly close one . . .?” Not often. The reason, he suggests, is that a turn to judicial modesty in the face of a close call might be taken as a sign of the “terrifying arbitrariness that underlies much of the legal system” and as proof that any decision results from something other than the operation of the Rule of Law. Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in *LAW’S STORIES*, *supra* note 29, at 189.

rather, I am advocating the greater use of narrative material across the curriculum so that students will have another set of tools with which to evaluate and criticize legal propositions. If, as we have previously seen, the original justification for common-law rules usually follows the rubric of the normative/narrative syllogism, then in any given case, it would be helpful to know what narrative elements figured (or did not figure) in the formulation of the premises that led to the conclusion. Armed with that information, a reader has an important critical tool with which to evaluate the original legitimacy or the continuing vitality of precedent. As the *Carnegie Report* puts it, “[a]wareness of narrative and context bring[s] . . . principles alive while also giving conceptual nuance to their meaning.”<sup>52</sup> A couple of examples may help us here. First, there are the relatively easy situations in which certain lines of cases are tainted because of corruption. We earlier looked at the Oklahoma Supreme Court scandal and how opinions authored by Justice Corn are generally no longer cited by Oklahoma practitioners. But relatively few readers outside Oklahoma know that, and the opinions still appear right there in the *Pacific Reporter*, waiting for the unwitting to read and rely on them.<sup>53</sup> They bear no facially evident mark of the

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<sup>52</sup> CARNEGIE REPORT, *supra* note 12, at 124 (discussing interaction of narratives and legal principles in the context of clinical education).

<sup>53</sup> A similar—and more widely known—example is that of Judge Martin Manton, a former Chief Judge of the United States Court of Appeals for the Second Circuit. Judge Manton was widely admired for his skill in handling bankruptcy cases. But, alas, Judge Manton fell upon hard times himself (he had built a considerable real estate empire in New York that suffered after the Crash of 1929), and he began to entertain bribes. Thereafter, “[h]e continued to write model decisions in bankruptcy cases complete with factual and analytic narratives appropriate to the results. What he did not include in these published decisions was the fact that really decided the cases: who paid him the highest bribe.” Hoeflich, *supra* note 21, at 1167.

bribes that may have influenced any one of them. In fact, most of them seem reasonable, and an impartial, uncorrupted judge may very well have decided them the same way. But they are nonetheless illegitimate, and we can only know that through narratives existing outside the opinions themselves.

More troublesome are opinions that are driven by bias, yet manage to mask the fact with an admixture of authoritative tone and high-sounding rhetorical devices.<sup>54</sup> This is to say that not all biased decisions proudly announce themselves as such in the transparent manner of *Plessy*, *Muller*, or *Bowers*. Hoeflich neatly illustrates this in a discussion of a case, *Taft v. Hyatt*,<sup>55</sup> that is often cited for a basic contract principle and sometimes anthologized or summarized in casebooks.<sup>56</sup> I first offer my own summary of the case, followed by Hoeflich's conclusions based on his reading of it, followed in turn by some of my own observations that will leave us suspended in a state of indeterminacy that is nonetheless instructive. The case was essentially an interpleader action in which members of a group that had offered a reward for apprehension of a criminal pled (i.e., paid) money into a court so that

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<sup>54</sup> I am not offering these observations as a sponsorship of a Realist or CLS claim that all legal decisions are arbitrary, political or elitist. That argument is for another day. Here, I intend for us to test the notion that, for instance, there are prosaic cases that may have been covertly influenced by the type of racial animus that is overtly stated in *Dred Scott* or *Plessy*. We can do this, I think, without deciding how far one should push Llewellyn's famous fillip that "our government is not a government of laws, but one of laws through men." Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1243 (1931). For a summary of CLS positions on judicial discretion and indeterminacy, see Stephen B. Presser's mimetically titled *Some Realism about Orphism or The Critical Legal Studies Movement and the New Great Chain of Being*, 79 NORTHWESTERN L. REV. 869 (1984-85).

<sup>55</sup> 180 P. 213 (Kan. 1919).

<sup>56</sup> Hoeflich, *supra* note 21, at 1168-79.

rival claimants could set up their respective claims to the reward. One of the three claimants had prevailed in the trial court, as we will soon see.<sup>57</sup> The background facts are these: on May 16, 1917, residents of a small southeastern Kansas town, Parsons, learned that Agnes Smith—the wife of a local physician, Dr. Asa Smith—had been assaulted (she later died). Another physician, Dr. Robert Smith, was suspected of the crime; he soon went into hiding. All three of the Smiths were African-Americans. At some point before the afternoon of May 17, a local group that Hoeflich identifies as the Anti-Horse Thief Association (referred to as A.H.T.A. in the opinion) offered and publicized a \$750 reward for the arrest or information leading to the arrest of Robert Smith. Dr. Asa Smith was a member of this group.

During the afternoon of May 17, William Hyatt, a Parsons attorney, learned that Robert Smith wanted to meet with him. Hyatt went to Smith’s hideout, where “[t]he two talked together for an hour or more, but were unable to reach an agreement as to the employment of Hyatt to defend Smith.”<sup>58</sup> Before this meeting, Hyatt knew of the reward. In what may be a recurring lawyer fantasy (unacted upon, one would hope) in the face of a potential client unwilling to put up a retainer, Hyatt returned from the meeting and immediately told the county attorney where Smith was hiding. He even accompanied the deputy sheriff on the mission to arrest Smith. But in the meantime, Smith had been spirited away to nearby Oswego, Kansas by a group of five members of the Lodge of Colored Masons and Thomas Murry, the chief of police of Parsons, all of whom considered Smith’s fears of mob violence

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<sup>57</sup> 180 P. at 213-14.

<sup>58</sup> *Id.* at 214.

well-founded. Before the party left for Oswego, where Smith was ultimately placed in the custody of the Labette County Sheriff, Murry placed Smith under arrest. At the time of that arrest, Murry knew of the reward; the rest of the group did not. Hyatt, Murry, and the five members of the Colored Masons all claimed that the reward was theirs.

At trial, Hyatt prevailed. The other claimants appealed that judgment. The Kansas Supreme Court took each of the rivaling claims in turn and found them all wanting. Hyatt, the Court held, was not eligible to receive the reward because his actions (even setting aside his unconscionable use of prospective client information for his own pecuniary gain) did not lead to the arrest of Smith. It surely could have—had Smith remained at their meeting place—but it did not:

The court finds that the information Hyatt gave would lead to the arrest of the guilty person if it had been acted upon promptly, and the fact that it did not bring about this result was through no fault of Hyatt's. But this finding does not help Hyatt's case. It may have been that the officers to whom he confided his information were too slow. Whatever the reason, before any action was taken by them which resulted in apprehending the accused, the latter was on his way to the county jail in the custody of another officer, having, with the aid of his friends, surrendered himself. So far as the apprehension of the guilty person was concerned, Hyatt might as well have kept his information to himself.<sup>59</sup>

Murry's actions, on the contrary, actually did lead to Smith's arrest—he in fact arrested him. But the Court acknowledged and relied on well-settled law that a police officer may not “claim a reward for merely doing his duty”:

Murry cannot recover, because, as chief of police of the city of Parsons, it was his duty to make an arrest of fugitives from justice or persons charged with or suspected of crimes. The fact that he was not armed with a warrant or other process for the arrest of the accused is immaterial, because there was reasonable ground for believing that Smith had committed the particular

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<sup>59</sup> *Id.* at 215.

offense charged against him, and his subsequent conviction established his actual guilt.<sup>60</sup>

That leaves the collective claim of the members of the Colored Masons. It is this claim that led to the establishment of the rule for which the case is most often cited.<sup>61</sup> The critical facts for the Court were that this group of claimants “had not heard of the offer of the reward until after the accused had been surrendered to the sheriff” and acted out of a desire to protect Smith from mob violence, not to bring him to justice.<sup>62</sup> These facts, coupled with the legal holding that the private (as opposed to a statutory) offer of a reward should be analyzed under contract principles, stymied the group’s attempt to secure the reward:

A private offer of reward for the apprehension of a fugitive from justice or of a person suspected or charged with an offense stands, as a general rule, upon a different footing from a statutory offer, or one made by virtue of a statute. The offer of a private individual is a mere proposal, which, when accepted, becomes a contract. Until it is accepted by some person who upon the strength of the offer takes some steps to earn the reward, there is no contract. *Van Vlissingen v. Manning*, 105 Ill. App. 255. There must be a meeting of the minds of the parties—on the one side, of the person who makes the offer; on the other, of the person who performs the service. Where a claimant for the reward was not aware that it had been offered until after he had performed his services, there has been no meeting of minds which would constitute a contract. Besides, the undisputed facts with respect to those

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<sup>60</sup> *Id.*

<sup>61</sup> *See, e.g., Alexander v. Russo*, 571 P.2d 350 (Kan. App. 1977):

As stated in *Taft v. Hyatt*, 105 Kans. 35, 180 P. 213:

“A private offer of reward for the apprehension of an accused person stands, as a general rule, upon a different footing from an offer made by virtue of a statute. When accepted, the offer becomes a contract; until it is accepted by some person, who upon the strength of the offer takes some steps to earn the reward, there is no contract; and where a claimant of the reward was not aware that it had been offered until after he had acted, he is not entitled to claim the reward.” (Syl. 3.)

<sup>62</sup> 180 P. at 215.

defendants who called the chief of police to assist them in taking the accused to Oswego are that these claimants were simply assisting the accused in surrendering himself. Their testimony is that what they did was for the purpose of protecting him from mob violence. They had never heard of the reward, and, of course, are not entitled to any part of it.<sup>63</sup>

This holding, as Hoeflich notes, was not compelled in any legal sense.<sup>64</sup> The issue presented was one of first impression in Kansas, as the Court's citation to a single out-of-state opinion reveals. From this, Hoeflich begins to wonder whether there was something else afoot, so he digs deeper. The opinion itself tells us that Hyatt and Smith were "unable to reach an agreement as to the employment of Hyatt to defend Smith" and at least part of the reason was because "they did not agree upon the fee to be paid for the defense."<sup>65</sup> Hoeflich's investigation of the appellate record shows that at trial only the members of the Colored Masons were asked *why* they wanted the reward. One claimant's response (as abstracted in the record) is

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<sup>63</sup> 180 P. 215.

<sup>64</sup> Cf. Richard Posner, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 326, 327 (1987-88). In a discussion of how formalists sometimes "smuggl[e] policy choices into the premises for logical reasoning without analysis or even acknowledgement," Judge Posner suggests that there may or may not be good reason to recognize a claim for a reward only if the claimant knows of the reward:

Consider this question of perennial fascination to students of contract law: should a person be allowed to claim, as a matter of contractual entitlement, a reward for returning a lost article, if he did not actually know that a reward had been offered? Langdell said no. And he said it on logical grounds: a contract requires—is defined to require—conscious acceptance; if the person who returned the lost property did not know about the reward he could not have accepted that unilateral offer, and therefore there is no duty to reward this person. Langdell's mistake was to impose a definition on the word "contract" without considering why one might want to make some promises and not others enforceable and what the effect of making this promise enforceable would be. Would it lead to more returns or fewer? Actually this is a difficult question but it is one that Langdell thought he did not even have to consider.

<sup>65</sup> *Id.* at 214-15.



particularly telling: “Witness testified that he was a friend of Dr. Smith; that he was interested in seeing that mob violence was not resorted to; *that he did not obligate himself or pay anything towards the defense of Smith.*”<sup>66</sup> In other words, the group wanted the reward to pay for Smith’s defense.

Because these questions have no relevance to the issue of knowledge of the reward, Hoeflich is compelled to ask *why* they were asked. Could it have something to do with the setting and circumstances—i.e., a black man accused of murder in small Kansas town that was already on the verge of forming a lynch mob? Did the townsfolk want to prevent Smith from mounting an adequate defense through the use of the reward money? Could this have influenced the outcome at trial and, perhaps, even on appeal? It is of course impossible to answer these questions with certainty. I am inclined to think that the appellate court would not have been directly swayed by a desire to withhold the reward money to keep Smith from using it for his defense for the simple reason that Smith had by that time been convicted and that conviction had already been affirmed.<sup>67</sup> On the other hand, there are good reasons to think that the Supreme Court may have been indirectly influenced, if only because of the institutional tendency to show deference to trial court decisions. And—based on my further investigation of the underlying murder case—there are even better reasons to think that the trial court may have been swept along by the racial undercurrents that Hoeflich senses in *Taft v. Hyatt*.

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<sup>66</sup> Hoeflich, *supra* note 21, at 1174 (quoting Abstract of Appellants at 14).

<sup>67</sup> *State v. Smith*, 174 P. 551 (Kan. 1918).

In *Taft*, the murder of Agnes Smith was reduced to the passing reference that she had been “assaulted” and then, in a parenthetical aside, to the fact that she had died and that Robert Smith had been charged and convicted of her murder.<sup>68</sup> But this was no ordinary murder. The narrative has plot elements straight out of Greek tragedy and is reminiscent of modern Greek-influenced dramas like Eugene O’Neill’s *Desire Under the Elms*. The list of major dramatis personae might read something like this:

Dr. Asa Smith—A black physician; once widowed; now over 60.

Robert Smith—Also a black physician; now 33; employed by Asa Smith since he was 13.

Agnes Smith—Wife of Asa Smith for one year; lived with the first Mrs. Smith prior to her death; partially educated by Asa; now 24.<sup>69</sup>

The respective ages of the players suggest a couple of familiar plotlines, one of which is borne out by the facts of the case. At trial, Smith was convicted largely on the strength of Mrs. Smith’s “dying statement,” a large portion of which was read to the jury as an exception to the general rule against hearsay:

I know that I am about to die and this is my statement in fear of death. Bob Smith came in at about 11 o’clock A. M., May 16th and says, “Why don’t you treat me better—why have you got it in for me?” I picked up some scissors, off the table, and he started for me and he took them away from me and seized me by the throat and choked me and threw me on the floor. He choked me and poured something in my mouth and face and ran out, and I got up and got to Mrs. Neighbors’ and lost consciousness.”<sup>70</sup>

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<sup>68</sup> 180 P. at 214.

<sup>69</sup> 174 P. 551 (Kan. 1918).

<sup>70</sup> *Id.* at 552.

From the testimony of one of the attending physicians, we learn what the “something” was that led to her particularly gruesome and drawn out death (she survived for about a week):

Agnes Smith was found to be burned with carbolic acid. Dr. Boardman testified that: “The odor was very strong. The acid was up in her hair, over her face, and down on her upper chest. The acid was upon her cheeks, around the back of her neck, and around her ears. Her eyes were entirely burned. One had turned entirely white. \*\*\* She was unconscious.”<sup>71</sup>

On appeal, Smith’s most significant claim of error was that Agnes Smith’s dying declaration should not have been received into evidence. For reasons that are unimportant to our discussion, the Court concluded that the statement was proper evidence. More telling, perhaps, was the Court’s quotation of the portion of the statement that was **not** read to the jury: “I told him to get out of the house, and \*\*\* *I feared he would rape me.*”<sup>72</sup> Since this excised portion of Agnes Smith’s statement was not directly at issue in the appeal, it seems to me that it may signal the crux of the matter for the Supreme Court. If we recall that the dominant racial narrative in predominantly white interpretive communities in the *late* Twentieth Century portrayed young black males as feral and threatening to civil society (think of the King-beating case), then so much the more so would this have been the case in the *early* Twentieth Century. In other words, the Supreme Court may well have concluded that Smith was just another out-of-control black man unable to control his appetites, despite overwhelming evidence of his good character and at least something more than a mere suggestion that Agnes Smith was suicidal. In other

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<sup>71</sup> *Id.* at 552.

<sup>72</sup> *Id.* at 555 (emphasis supplied).

words, a murder-attempted rape could have seemed the only coherent narrative available to the all-white, all-male Kansas Supreme Court of a hundred years ago. I may be overreading a bit, but I hear an echo of that in the Court's last substantive paragraph: "The record leads to the inevitable conviction that the cruel and atrocious crime charged was committed, and whatever influences actuated him, or whatever their source, the defendant was legally found guilty."<sup>73</sup>

At a minimum, all this buttresses Hoeflich's suspicion that race may have played some part in *Taft v. Hyatt*. It does not mean that that the Supreme Court strained to deprive the Colored Masons of the reward for racist reasons. Perhaps nothing was amiss at all. But perhaps there was a desire to keep solidarity with the decisions of the trial court below and with the Court's own holdings only a year before in *State v. Smith*. The point is, though, that one cannot even have this type of discussion—cannot engage in critical reading—without going outside the four corners of an appellate opinion. A fortiori, one cannot have this type of discussion when salient facts have been bobbed from a casebook version or, even more to the point, when the facts have been sanitized so as to present an intentionally unparticularized statement of the case, presumably to minimize distraction from the statement of universalized doctrine. Take, for example, the version of *Taft v. Hyatt* that appeared in Lon Fuller and Melvin Eisenberg's contracts casebook:

Smith, a member of a masonic lodge, was suspected of a murder which had aroused the indignation of the community. Smith conveyed his fears of mob violence to certain of his masonic brothers and asked their protection. They accompanied a police officer to his hiding place and in the company of the officer took Smith to the sheriff, who placed him in the county jail. Just before the party got into the cab to go to the sheriff's office, Smith was told

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<sup>73</sup> *Id.* at 556.

by the officers that he was under arrest. The masons now claim a reward of \$750 which had been offered by the husband of the murdered woman “for the arrest or information which will lead to the arrest” of Smith. Held, they were not entitled because (1) they did not know of the offer until after Smith was arrested, and (2) they merely assisted Smith in surrendering himself and therefore did not arrest him or give information leading to his arrest within the meaning of the offer.<sup>74</sup>

Every hint of race is erased from this summary, making it impossible to ask the questions about the case that we just asked.<sup>75</sup> In fairness, casebook editors have to make choices and not every case can be presented in an extensive form. And learning to extract legal rules from cases and manipulate them is a valuable lawyerly skill. I nonetheless think that law students should learn to dig in to cases from time to time (maybe three or four cases per semester) as a way of sharpening their critical reading skills and, thereby, their analytical writing skills.<sup>76</sup> Now is a perfect time to

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<sup>74</sup> Hoeflich, *supra* note 21, at 1178 (quoting LON FULLER & MELVIN EISENBERG, BASIC CONTRACT LAW 414-15 (3d ed. 1972)).

<sup>75</sup> I don’t mean to suggest that the technique that I am sponsoring is simply a way to reveal bias in a Realist sort of way. For example, I think one could take a case like *Brunswick* and show how it represents the waning of a public narrative that had romanticized (and legally protected) Mom-and-Pop businesses and vilified big business from at least the time of Teddy Roosevelt.

<sup>76</sup> See KISSAM, *supra* note 19, at 2006-09 (1999) (discussing, among other things, the link between reading critically and writing well). The *Carnegie Report* (*supra* note 12, at 53) puts it this way: “It is important . . . that instructors also give students experience with fuller accounts of cases in which students can grasp the different meaning of ‘facts’ from opposing points of view.” And I am inclined to go beyond actual case materials. Robert Ferguson has spoken of the “continuum of publication” that marks a trial, from things like pleadings to things like fictional projections. Ferguson, *Untold Stories*, *supra* note 29, at 84. I thus think it makes sense to compare various narrative approaches. To take one example, one could juxtapose opinions of the various courts involved in *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984), with the movie *Silkwood*. In the court opinions, Karen Silkwood’s personal narrative is reduced to a few lines and then silted over with page upon page of the history of and intent behind the Atomic Energy Act of 1954 and its subsequent amendments. In the film, she emerges as far more than a “decedent,” and we are left to wonder whether anything approaching justice was done in her

implement this type of curricular change because it has never been easier to accomplish. As most courts have migrated to electronic filing, all manner of case materials have become readily available for downloading. It has therefore become a much simpler matter to build a case file that includes pleadings, briefs, documentary evidence and testimony. The value of the reading-for-narratives approach that I am advocating can be expressed in a number of ways, but none is more important, I think, than the possibility of revealing the narratives that competed for victory, universalization, and institutionalization in any particular case. In that way, young lawyers can more fully understand that litigation is often no more than a competition to convince *this* judge, *this* jury, and a majority of *this* appellate panel that one story or another deserves favorable judgment. But it may be that in another time and place, that story is no longer convincing. In short, as Robert Ferguson suggests (following Thoreau), we must carefully attend to what we read:

“Books,” writes Henry Thoreau, “must be read as deliberately and reservedly as they were written.” The judicial opinion deserves the same injunction. Judges use words to secure shared explanations and identifications; they also use them as weapons of control. Deliberation with reservation explores that distinction, and the result is more than understanding. Here and elsewhere, a practiced appreciation or resourcefulness in language is the first safeguard in a republic of laws.<sup>77</sup>

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case. I am, by the way, untroubled by the use of “fiction” in the classroom setting—after all, teaching by way of hypotheticals is a law-school stock-in-trade. Wouldn’t most law professors (at least grudgingly) concede that Nora Ehpron (the author of the screenplay) is better at constructing a nuanced, full-blown hypothetical than they are, if only because she was able to devote countless hours to the construction of her narrative? The same could be said of Melville, Camus, Browning, Glaspell or any of the other authors that I have discussed in this work.

<sup>77</sup> Ferguson, *Judicial Opinion*, *supra* note 48, at 219.

#### 4. Democratic Education and the Law

What I have been arguing for here is, I suppose, a more thorough melding of black-letter law and theory in legal education.<sup>78</sup> But I don't think that the advantages of this type of approach would be limited to placing yet another argumentative arrow in the future litigator's quiver. I think, rather, that Ferguson is exactly right to suggest that a "readerly" approach to the law can help shore up the democratic values that the easy rhetoric of formalism and the rules that drive it so often obscure. Over twenty years ago, Neil MacCormick suggested that

[T]here are six questions to which any serious approach to higher education ought to allow of some answer, preferably one reached after substantial reflection. In quick and summary form, the questions are: (1) What is there? (2) What is the structure of the things there are, and how do different kinds of existence interrelate? (3) How do we know what there is, and how do we have acquaintance with the things that exist[]? (4) By what method should we explain and expound the various matters open to our knowledge? What is the place of human beings as rational agents in relation to whatever else there is? and (6) In light of all this, how are we to live and conduct ourselves?<sup>79</sup>

None of these questions is peculiar to law, but that is MacCormick's point. For if one is truly to understand law, one must learn more than the substance of a set of legal rules, rules that are always subject to defeasance at the whim of a legislature or high court. This "more than" is not a single identifiable technique but rather a range of skills that permit one to evaluate laws critically in their social context.

MacCormick's six questions mark a path along which to gather these skills and,

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<sup>78</sup> I think the *Carnegie Report* is correct in positing (after Amsterdam and Bruner) "that the narrative structure of legal reasoning provides a natural deep structure capable of uniting theory and practice." CARNEGIE REPORT, *supra* note 12, at 42.

<sup>79</sup> Neil MacCormick, *Democratic Intellect and the Law*, 5 LEGAL STUD. 172, 177 (1985).

also, to build the quality of intellect necessary to maintain the cornerstone role that law-as-profession holds within a thriving democracy:

The questions are ones which ought to remain open and alive for every law teacher, law student and indeed legal practitioner of whatever rank and eminence. That they are fundamental for lawyering and for legal education is one reason why a jurisprudence course is of structural and vital importance to any law degree within the tradition of the Democratic Intellect . . .<sup>80</sup>

But this is not all. Legal education must be infused with matters of theory and philosophy across the curriculum, not just through the pro forma addition of an offering or two in jurisprudence or critical theory to the upper-level run of law-school courses. To underscore this position, MacCormick invokes Zenon Bankowski and Geoff Mungham's *Images of Law*, which warns of the temptation to lodge—and thereby emasculate and marginalize—all matters critical and theoretical in separate courses.<sup>81</sup> As I hope my earlier discussion of *Taft v. Hyatt* shows, a critical approach may be of most value in core, traditionally doctrinal subjects:

If theory courses and substantive law courses run on quite different tracks, the theory part can become a purely decorative fifth wheel. Moreover, theorists risk the criticism (which is in some cases more than amply justified) that they lack any real interest in real law. So theory and law are driven apart.<sup>82</sup>

In the end, the programmatic and structural issues that I have just sketched with respect to legal education are a specific application of a larger cultural critique. When Edward Said called for a “democratic criticism” rooted in humanism, he was

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<sup>80</sup> *Id.* at 180.

<sup>81</sup> *Id.* at 181 (citing ZENON BANKOWSKI & GEOFF MUNGHAM, *IMAGES OF LAW* 1-6, 49-72 (1976)); see also CARNEGIE REPORT, *supra* note 12, at 84 (“It is noteworthy . . . that jurisprudence is rarely given an important place in the North American law school curriculum.”).

<sup>82</sup> *Id.*



urging us to find ways of overcoming the burden of too much (yet too facilely packaged) information, on the one hand, and too much balkanized (and jargon-laden) expertise, on the other:

We are bombarded by prepackaged and reified representations of the world that usurp consciousness and preempt democratic critique, and it is to the overturning and dismantling of these alien objects that, as C. Wright Mills put so correctly, the intellectual humanist's work ought to be devoted. . . . Expertise as a distancing device has gotten out of control, especially in some academic forms of expression, to the extent that they have become antidemocratic and even anti-intellectual.<sup>83</sup>

The remedy lies, Said suggests, in forms of discourse that mandate reflection and are built on what he calls “detail,” a word that he uses in much the same sense that I have used “narrative” throughout this work. For lawyers, this means that each of us must work to read legal texts in ways that allow us to penetrate the omnipresent fog of rules and see the stories for which those rules are often more or less accurate shorthand and to write our own legal texts in ways that are both revealing and intelligible to non-specialists. All this is to say that we should teach and practice law democratically.

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<sup>83</sup> EDWARD W. SAID, *HUMANISM AND DEMOCRATIC CRITICISM* 71, 73 (2003).

## A Conclusion of Sorts

The narrative dimensions of law are manifold. Disputes or crimes that are tried in court take the form of a story (or many). The ultimate disposition of a case quite often results in a written opinion that takes a narrative shape. And as we've seen, stories told to legal actors (be they legislators or judges) can actually become laws. That's not all, though, because the law exists and changes across time, which means that its history can be narrated, as in fact it is every time someone sets out to state what the law *is* on a particular subject. It's these recurring (and most often prosaic) narrative reconstructions—each executed in an ever-moving present and amidst a swirl of ephemeral public and personal narratives—that allow us a glimpse of the law's narrative genetic structure and, thereby, insight into how the law develops across cultures and over time.

In "Tradition and the Individual Talent," T. S. Eliot describes a relationship between the poet and the past that is a useful analogue to the relationships that I just noted.<sup>1</sup> He begins this essay by lamenting that "[i]n English we seldom speak of *tradition* . . .," a word that—when used at all—tends to appear only in a "phrase of censure."<sup>2</sup> The crux of his argument is that we all too readily embrace novelty (i.e., difference from predecessors, especially immediate predecessors) and are thereby blinded by prejudice. But "if we approach a poet without this prejudice we shall

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<sup>1</sup> T. S. Eliot, *Tradition and the Individual Talent*, reprinted in 2 THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 2293 (4th ed., M. H. Abrams gen. ed. 1979) (1919). For an interesting take on law-as-tradition-as-narrative, see Dennis Patterson, *Law's Pragmatism: Law as Practice & Narrative*, 76 VA. L. REV. 937, 987-89 (1990).

<sup>2</sup> *Id.* (italics added).

often find that not only the best, but the most individual parts of his work may be those in which the dead poets, his ancestors, assert their immortality.”<sup>3</sup>

Eliot immediately cautions, though, that “tradition” is much more than “timid adherence” to the immediately preceding generation and its most obvious successes, which are often “currents soon lost in the sand.” He has something else in mind:

Tradition is a matter of much wider significance. It cannot be inherited, and if you want it you must obtain it by great labor. It involves, in the first place, the historical sense . . . ; and the historical sense involves a perception, not only of the pastness of the past, but of its presence . . . . This historical sense, which is a sense of the timeless as well as the temporal and of the timeless and the temporal together, is what makes a writer traditional. And it is at the same time what makes a writer most acutely conscious of his place in time, of his own contemporaneity.<sup>4</sup>

Thus conceived, Eliot’s ideal writer is suspended in a ceaseless temporal oscillation between “now” and “then.” As a consequence, “[n]o poet, no artist of any art, has his complete meaning alone.” He becomes part of a fabric that he at once alters and is altered by: “The necessity that he shall conform, that he shall cohere, is not one-sided; what happens when a new work of art is created is something that happens simultaneously to all the works of art which preceded it.” The properly attuned writer “will not find it preposterous that the past should be altered by the present as much as the present is directed by the past” and, moreover, “will be aware of great difficulties and responsibilities.”<sup>5</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 2294.

<sup>5</sup> *Id.*

What Eliot ultimately develops here is a general theory of the relationship between past and present narratives, one suggesting that the narrative cosmos is neither an undifferentiated lump (“an indiscriminate bolus”), nor “one or two private admirations,” nor “one preferred period.” Instead, it is all these things, and more: viz., a main road that may change course from time to time but that does not superannuate the principal milestones along the route.<sup>6</sup> Pitched at this level, Eliot’s critical theory may be seen as a general humanistic statement of what we have observed more particularly in aspects of Dworkin’s concept of “integrity” or MacCormick’s suggestion of an ultimate convergence of narrative and normative coherence. For example, Dworkin argues that integrity “insists that the law—the rights and duties that flow from past collective decisions and for that reason license or require coercion—contains not only the narrow explicit content of these decisions [read: the specific narratives embodied in those decisions] but also, more broadly, the scheme of principles necessary to justify them.” And “scheme of principles” is but another name for a high-order narrative, what Dworkin calls “an overall story worth telling now.”<sup>7</sup>

Deciding what story to tell now is as much an act of judgment as of creation, and this fact holds as much for the literary writer as for the lawyer/judge. In

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<sup>6</sup> *Id.* at 2295.

<sup>7</sup> RONALD DWORKIN, *LAW’S EMPIRE* 227 (1986). Dworkin is not unaware of Eliot’s essay, although he cites it only for a position on authorial intention that he appears to eschew in favor of Gadamer. *Id.* at 61 n.11. *See also* NEIL MACCORMICK, *RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING* 233-36 (2005) (discussing possibility of normative coherence as narrative coherence).

considering the position of the poet, Eliot posits simultaneous cross-judgments between the past and present:

In a peculiar sense [the poet] will be aware . . . that he must inevitably be judged by the standards of the past. I say judged, not amputated, by them; not judged to be as good as, or worse or better than, the dead; and certainly not judged by the canons of dead critics. It is a judgment, a comparison, in which two things are measured by each other. To conform merely would be for the new work not really to conform at all; it would not be new, and would therefore not be a work of art. And we do not quite say that the new is more valuable because it fits in; but its fitting in is a test of its value—a test, it is true, which can only be slowly and cautiously applied, for we are none of us infallible judges of conformity.<sup>8</sup>

In urging this bilateral judgment based on “fit,” Eliot sets forth a critical theory that subsumes quite well the theory of narrative and normative coherence that I have described and elaborated on throughout this work.<sup>9</sup> Indeed, the interpretive work of the poet and of Dworkin’s common-law judge largely coincide:

Law as integrity asks a judge deciding a common-law case . . . to think of himself as an author in the chain of common law. He knows that other

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<sup>8</sup> *Id.* at 2294-95. Derrida makes a similar point when he asserts that

To be just, the decision of a judge, for example, must not only follow a rule of law or a general law but also must assume it, approve it, confirm its value, by a reinstating act of interpretation, as if ultimately nothing previously existed of the law, as if the judge himself invented the law in every case. No exercise of justice as law can be just unless there is a “fresh judgment” (I borrow this English expression from Stanley Fish . . .). This “fresh judgment” can very well—must very well—conform to a preexisting law, but the reinstating, reinventive and freely decisive interpretation, the responsible interpretation of the judge requires that his “justice” not just consist in conformity, in the conservative and reproductive activity of judgment.

Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority,”* 11 *CARDOZO L. REV.* 919, 961 (1989-90).

<sup>9</sup> I think this is also what Llewellyn is up to when he posits “the law of Fitness and Flavor”: *The work of the job in hand, and even more the work of the job at large, must fit and fit into the body and the flavor of The Law.* KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 222 (1960).

judges have decided cases that, although not exactly like his case, deal with related problems; he must think of their decisions as part of a long story he must interpret and then continue, according to his own judgment of how to make the developing story as good as it can be. . . . The judge's decision—his postinterpretive conclusions—must be drawn from an interpretation that both fits and justifies what has gone before, so far as that is possible. But in law as in literature the interplay between fit and justification is complex.<sup>10</sup>

Both Dworkin and Eliot understand that any narrative—be it legal or literary—exists in more than one plane: as part of a horizontal patchwork of all present narratives (some more generically related than others) and as part of a vertical column of generically related narratives stretching back through time. The trick for the present author, then, is to craft a narrative that fits in both dimensions. For example, a judge faced with an abortion case must craft a justificatory narrative that fits with *Roe*, *Casey*, and *Carhart* **and** with the current state of “privacy” and other relevant laws. This process preserves continuity with the past, while allowing for development in light of changing circumstances. The law is thus enslaved neither by its own past nor by fads of the day. As Eliot explains, “the difference between the present and the past is that the conscious present is an awareness of the past in a way and to an extent which the past's awareness of itself cannot show.”<sup>11</sup> In sum, although the past cannot be relived, its history can be (and indeed must be continually) reworked.

Taking all this into account, we can say that a proper narrative theory of the law is one that balances past and present. This entails acceptance of authoritative standards of practice articulated and adhered to in the past, but “[t]hat initial

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<sup>10</sup> DWORKIN, *supra* note 7, at 238-39.

<sup>11</sup> Eliot, *supra* note 1, at 2295.

acceptance . . . does not preclude subsequent critique of the practice.”<sup>12</sup> As a mode of argument, then, narrative “suggests that the way law changes is through the advancement of stories or accounts of the practice that have an internal unity that captures the significant elements of the practice while pointing in a direction different from the current understanding of the enterprise.”<sup>13</sup> In this way, law—like literature—“develops” (Eliot is careful to observe that change may be a “refinement, perhaps, complication certainly” but not necessarily an “improvement”). At the end of the day, development is, I suppose, an inevitable adjunct of the accumulation of institutional knowledge. But, as Eliot posits, our newest knowledge merely teeters at the always-already displaced mouth of a narrative stream stretching back to the time when humans first began to “know” at all:

Someone said: “The dead writers are remote from us because we know so much more than they did.” Precisely, and they are that which we know.<sup>14</sup>

The same may be said of lawyers.

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<sup>12</sup> Patterson, *supra* note 1, at 988.

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

<sup>14</sup> Eliot, *supra* note 1, at 2295.

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