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Articles

Narrative Transactions—Does the Law Need a Narratology?

Peter Brooks*

I.

I have for some time been puzzled about the status of narrative in the law, and more particularly the status of talk about narrative in the law. On the one hand, there has been plenty of legal scholarship—starting more or less from the “storytelling” issue of *Michigan Law Review* in 1989—on the uses (and the virtues) of “outsider” narratives in the law, and even before that there was Robert Cover’s foundational *Nomos and Narrative*.¹

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1. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); see also Richard Delgado, *Storytelling for Oppositionists and Others: A Plea*

It has become something of a commonplace—too much of one—that legal storytelling has the virtue of presenting the lived experience of marginalized groups or individuals in a way that traditional legal reasoning doesn't. This view has of course been criticized, and some of the more naïve assumptions about the moral benefits of storytelling have been questioned. On the other hand, I am not aware that all this story talk has made any difference to legal actors. Trial advocates tell stories—they have always told stories—and clinical training in advocacy includes some attention to construction of the story you will tell in the courtroom² (which of course echoes the training in rhetoric given to lawyers in antiquity, when rhetoric and the law were inextricably interwoven). In particular, it is assumed that juries often decide verdicts on the basis of the more persuasive story presented at trial.³

Yet you search in vain for any explicit recognition by legal decision-makers that how a story is told can make a difference in legal outcomes. That is not quite true: there are moments when the law notes that a story has been mis-told, or not told according to the rules (of evidence, for instance), or doesn't make sense as told. Appellate courts are to some degree the enforcers of rule-governed storytelling. Yet they don't talk narrative talk. They are conspicuously lacking in the analytic vocabulary and tools of literary "narratology," for instance. Narratology—which I shall discuss in more detail later on—distinguishes between events in the world and the ways in which they are presented in narratives. It pays attention to the parts of narrative and how they combine in a plot; to how we understand the initiation and completion of an action; to standard narrative sequences (stock stories, one might say); and to the movement of a narrative through a state of disequilibrium to a final outcome that re-establishes order. Narratology also studies perspectives of telling: who sees and who tells, the explicit or implicit relation of the teller to what is told, the varying temporal modalities between the told and its telling. I know of only one instance when the Supreme Court shows an explicit, quasi-narratological awareness of narrative as a category of thought and

for Narrative, 87 MICH. L. REV. 2411 (1989); Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989).

2. See, e.g., STEFAN H. KRIEGER ET AL., *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* 137-48 (2d ed. 2003) (presenting story model as one for organizing facts); STEVEN LUBET, *MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE* (3rd ed. 2004); THOMAS A. MAUET, *TRIAL TECHNIQUES* 508 (6th ed. 2002) (describing developing the theory of the case as an "ongoing process of developing logical, consistent positions on disputed facts and integrating them harmoniously with the undisputed facts to create a persuasive story of what really happened"); Philip N. Meyer, *"Desperate for Love III": Rethinking Closing Arguments as Stories*, 50 S.C. L. REV. 715 (1999); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994); Sunwolf, *Talking Story in Trial: the Power of Narrative Persuasion*, 24 THE CHAMPION 8, 26-31 (2000).

3. See Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991).

presentation of reality (I'll come back to it later), and it has not produced a sequel.

My question, then, is something like this: if the ways stories are told, and are judged to be told, makes a difference in the law, why doesn't the law pay more attention to narratives, to narrative analysis and even narrative theory? These would seem to be almost as relevant as economic or social theory to understanding how cases come to the law and are settled by the law. Whereas a number of disciplines that border on the law—history, sociology, philosophy, even economics—have within the past couple of decades recognized a “narrative turn” in their work,⁴ there does not seem to have been an analogous recognition in legal adjudication. The narrative turn (a synonym would be: trope) has been made applicable to the law by such scholars as Anthony Amsterdam and Jerome Bruner, who maintain that in the law as in other domains, “much of human reality and its ‘facts’ are not merely recounted by narrative but *constituted* by it.”⁵ Yes, but does the law *know* this? If it does, what kind of a knowing is it? Why can't it be more explicit about the knowledge?

I want to pursue this question by way of a few concrete examples before reaching a more general discussion of narratology and its possible place in the law, in the belief that the pertinence of the kind of questions addressed in narrative analysis will in this manner become more evident. Like many literary critics, I prefer working from problems posed by texts toward the more general issues these may implicate. Before coming to my cases, let me set the stage by way of two representative discussions of the place of narrative in legal process. In Robert P. Burns's *A Theory of the Trial*, for one instance, the term “narrative” appears to be the key to the author's understanding of how a trial works. For Burns, the trial is “the crucible of democracy” because jurors use their latent cognitive narrative abilities to arrive, most often, at the correct verdict.⁶ If you turn to his index, you will find a series of subheads under narrative, for instance: “cognitive significance of”; “competing narratives”; “constraints on”; “jury evaluation of”; “moral meaning of”; “public identity and”; “relation of to folk psychology”; “role of in trial”; “role of jury in constructing”; “structure of”; “use of in opening statements”; “use of in structuring direct examination.”⁷ This seems promising. But in practice—in the way Burns conducts his analysis—we rarely get beyond the identification of

4. See, e.g., JEFFREY C. ALEXANDER, *CULTURAL TRANSMISSION AND COLLECTIVE IDENTITY* (2004); CARLO GINZBURG, *CLUES, MYTHS, AND THE HISTORICAL METHOD* (1990); ALASDAIR MACINTYRE, *AFTER VIRTUE* (1981); DEIRDRE N. MCCLOSKEY, *IF YOU'RE SO SMART: THE NARRATIVE OF ECONOMIC EXPERTISE* (1990).

5. ANTHONY AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 111 (2000); see also GUYORA BINDER & ROBERT WEISBERG, *LITERARY CRITICISMS OF LAW* 201-91 (2000).

6. ROBERT P. BURNS, *A THEORY OF THE TRIAL* 201 (1999).

7. *Id.* at 246.

something as narrative. Then we make a leap to its moral import. It's as if Burns had accepted Hayden White's provocative but surely too simplistic argument that narrative is in essence a moralization of events as the last and only word on the subject.⁸ Burns apparently feels no need to ask himself what narrative is, how it works, what its parts might be, and how they might go together—in short, the kind of questions that narratology would ask.

At what I regard as a key moment in his argument, Burns notes that “[i]nvestigators in many fields . . . have concluded that narrative forms the deep structure of human action. In other words, the bedrock of human events is not a mere sequence upon which narrative is imposed but a configured sequence that has a narrative character all the way down.”⁹ And a few pages later: “Failure to understand how fundamental narrative is to the comprehension of human action and human selves has led to similar elevation of what we may call analytic-logical categories in the philosophy of history and in the understanding of the trial.”¹⁰ Sentiments to which I subscribe, of course. In the legal sphere, Burns appears to be making a critique similar to that urged by Jerome Bruner in his essay, *The Narrative Construction of Reality*, where he argues that cognitive psychologists have traditionally focused too much on the “little scientist” view of child development, not enough on the constructive narrative component of the cognitive toolkit.¹¹ But then comes a kind of swerve in Burns’ argument, into moral philosophy, eventuating in the claim that the “natural superiority of the true story would provide a condition of the possibility of the truth of verdicts.”¹² It’s not so much that I find this conclusion disturbingly complicit with the legal ideologies I thought Burns had set out to critique, but that it seems to negate all that we thought he was discovering about the power of and potential of narratives—including the power to mislead, even to mis-convict. What if instead of turning to the moral philosophers he had read a bit of narratology—by which I mean such critics and theorists as the Russian Formalists, or the French Structuralists, perhaps especially Roland Barthes, Tzvetan Todorov, and Gérard Genette?¹³ Narratology has provided some elements of an analytic that would enable one to go beyond arguing the inevitable goodness of the true narrative.

Richard A. Posner (in my second instance) grants that story is “an important element in law” and suggests that “literary theory” might be a

8. See Hayden White, *The Value of Narrativity in the Representation of Reality*, in *ON NARRATIVE 1* (W.J.T. Mitchell ed., 1981).

9. BURNS, *supra* note 6, at 222.

10. *Id.* at 225-26.

11. Jerome Bruner, *The Narrative Construction of Reality*, 18 *CRITICAL INQUIRY* 1, 4 (1991).

12. BURNS, *supra* note 6, at 229.

13. For some representative samples of this work, see *infra* note 105.

place to seek elucidation of it, yet finds that “much of the best scholarship on the story element in law owes little to . . . fields outside of law itself.”¹⁴ While he (justifiably, I think) criticizes the volume *Law’s Stories* for not containing enough consideration of “the methodological issue—by what means is one to study the story element in law?”¹⁵ he glosses over the pieces that do argue essentially narratological points (Alan Dershowitz’s and my own introduction).¹⁶ I sense that he is reasonably content that work on narrative in the law not “derive from any arcane extradisciplinary source,” that it be rather “merely the application of logic and common sense to the work of the storytellers.”¹⁷ More disturbingly, though, when he comes to his own discussion of narrative in the law, it is all about the emotional impact of narrative, reiterating what seems to be a common view of narrative by legal thinkers, that it is a vehicle of emotion, opposed to logic and reasoning.¹⁸ He does not consider that narrative may be a form of explanation and argument deployed for kinds of meanings that are time dependent and sequential, that do not lend themselves to other kinds of statement. One should of course worry about the emotional impact of stories told at trial—and the law does—but one could learn more about the components and construction of that impact by way of narratology. Even more important, one needs to recognize—as Posner I think doesn’t—that narrative is inevitable and irreplaceable: it is not an ornament, it is not translatable into something else. The argument for study of narrative in the law must be that it is not reducible to other kinds of speech and argument, and since it is not, it demands analytic consideration in its own right.¹⁹

II.

I turn now from these general considerations to a specific instance in which I find a legal reader, from whatever instinct or training I can’t say, performing a precisely narratological reading of an element of

14. Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737, 740 (1997) (reviewing LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz eds., 1996)).

15. *Id.* at 741.

16. See Peter Brooks, *The Law as Narrative and Rhetoric*, in LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW 14 (Peter Brooks & Paul Gewirtz eds., 1996); Alan M. Dershowitz, *Life Is Not a Dramatic Narrative*, in LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW, *supra*, at 99. I discuss Dershowitz’s argument later in this essay, *see infra* pp. 25-26; my own introduction briefly lays out some of the principles of narrative analysis, *see Brooks, supra*.

17. Posner, *supra* note 14, at 741.

18. *Id.* at 744-45.

19. I could go on at greater length on the peculiarities of Posner’s review of *Law’s Stories* (while freely admitting the gaps and inadequacies of the book). His notion of narratologists whose work should have been included is Wayne Booth, Arthur Danto, and Martha Nussbaum, which excludes formalist work on narrative in the Russian and French traditions; his notion of “techniques special to narrative, such as the choice among types of narrator,” etc., *id.* at 741, seems to derive from WAYNE BOOTH, *THE RHETORIC OF FICTION* (1961), an important book but one published before contemporary narratology came into its own. Posner calls for narratology at the same time he wants to show it as relatively trivial.

narrative construction, and in doing so making all the difference. The reader is Justice Potter Stewart, in *Bumper v. North Carolina*—a Fourth Amendment search and seizure case from 1968.²⁰ The question to be decided was whether Hattie Leath consented to a search of her house in the course of which the police found the rifle putatively used by her grandson, Wayne Bumper, in a brutal rape and shooting. When the county sheriff, accompanied by two deputies and a state investigator—all white males—arrived at the isolated rural home of Hattie Leath—“a 66-year-old Negro widow”—they claimed to have a warrant to search the house, and Mrs. Leath reportedly told them, “Go ahead,” and opened the door.²¹ It was later ascertained—at a hearing on the motion to suppress the evidence as illegally obtained—that the sheriff in fact had no warrant.²² At least, no warrant was returned, and the State did not premise its case on a valid warrant. The sheriff claimed instead that he relied on Mrs. Leath’s consent to the search.²³ Was her consent, then, an act of free will, or was it coerced by the false claim of a warrant?

What we know of Mrs. Leath’s version of the events, as cited from the suppression hearing in the opinion of the Court written by Justice Stewart, reads in part:

Four of them came. I was busy about my work, and they walked into the house, and one of them walked up and said, “I have a search warrant to search your house,” and I walked out and told them to come on in. . . . He just come on in and said he had a warrant to search the house, and he didn’t read it to me or nothing. So, I just told him to come on in and go ahead and search, and I went on about my work. I wasn’t concerned what he was about. I was just satisfied. He just told me he had a search warrant, but he didn’t read it to me. He did tell me he had a search warrant.

. . .

. . . He said he was the law and had a search warrant to search the house, why I thought he could go ahead. I believed he had a search warrant. I took him at his word. . . . I just see them out there in the yard. They got through the door when I opened it. At that time, I did not know my grandson had been charged with crime. Nobody told me anything. They didn’t tell me anything, just picked it up like that. They didn’t tell me nothing about my grandson.²⁴

Now, the peculiarity of this narrative discourse concerns its source. As

20. 391 U.S. 543 (1968).

21. *Id.* at 546.

22. *Id.*

23. *Id.*

24. *Id.* at 546–47.

Justice Stewart remarks in an acutely perceptive footnote:

The transcript of the suppression hearing comes to us from North Carolina in the form of a narrative; i.e., the actual questions and answers have been rewritten in the form of continuous first person testimony. The effect is to put into the mouth of the witness some of the words of the attorneys. In the case of an obviously compliant witness like Mrs. Leath, the result is a narrative that has the tone of decisiveness but is shot through with contradictions.²⁵

That is, what appears to be a transcription of Mrs. Leath's narrative of the events from her point of view is in fact a construction—from the questions asked and the answers given at the hearing—which makes it appear as if she is telling the story from beginning to end, and telling it as a story of consent. But if the words are not in fact hers, but a composite of what was said to her and the responses elicited from her, then the narrative is an act of ventriloquism, an example of indirect rather than direct discourse. This is good fictional technique, as novelists have long understood, but an obfuscation of the issue of Mrs. Leath's understandings and motivations.

Stewart's assertion that the narrative is "shot through with contradictions" rests on a certain slippage or incoherence in the relation of the narrative discourse to the "consent narrative" that the North Carolina court inferred from it. At another point, for instance, the cited narrative reads: "Nobody threatened me with anything. Nobody told me they were going to hurt me if I didn't let them search my house. Nobody told me they would give me any money if I would let them search. I let them search, and it was all my own free will."²⁶

Underneath Mrs. Leath's supposed narrative one hears here the questions to which she was responding, and in fact many of her sentences begin with "Yes," or "No," indicating to an attentive reader the latent presence of a suppressed dialogue.²⁷ And we come to a realization that such a phrase as "I let them search, and it was all my own free will" does not sound like Mrs. Leath's language; it is rather that of the attorneys, who framed the narrative to be one of freely willed consent. Or at another moment of the hearing—this not cited by Stewart—she is quoted as saying: "I thought the search would be valid and there would be no reason to look at it [the warrant]; that is what I thought about it."²⁸ This, like the second citation above, is from the cross-examination of Mrs. Leath by the State, following her direct examination by the defense, so we can be certain a word like "valid" is that of the prosecuting attorney, though set into what is ostensibly her own speech pattern. Once one registers these

25. *Id.* at 547 n.8.

26. *Id.*

27. See Joint Appendix at 46-48, *Bumper*, 391 U.S. 543 (1968) (No. 1016).

28. *Id.* at 47.

dissonances in narrative speech, certain factual uncertainties also emerge. Did she in fact open the door to them, or did they walk in the door first? ("I was busy about my work, and they walked into the house and one of them walked up and said . . ." is one version²⁹; "No, they did not come into the house before I got to the door; they come to the door. No, they did not knock because I walked in the door"³⁰ is another, neither wholly lucid.) Was there any request for consent, or did the sheriff gain entry and undertake his search on the basis of the claim to authority: "he said he was the law"? Was there coercion before consent?

The narrative derived from the suppression hearing claims authenticity and integrity by its mimicry of Mrs. Leath's language, using her colloquialisms and ungrammaticalities. It pretends to capture her speech from the outset: "My name is Hattie Leath. I stay on Union Ridge, City Lake. I stay on Mount Vernon Road, almost a mile off the highway. . . . This place is just nowhere hardly from City Lake, about 200 yards right down on the lake."³¹ It is an example of what literary critics sometimes call "free indirect discourse" or "narrated monologue,"³² here given the status of direct discourse, quoted monologue, a transcription of what Mrs. Leath said. But since the narrated monologue is a construction, the attempt to attribute its narrative of events to Mrs. Leath is a treacherous device that risks masking her story rather than revealing it. In substituting the constructed narrative for the questions and answers of the hearing, the North Carolina transcript elides—and therefore makes us ask—who is speaking here? It is notable that the dissent in this case, by Justice Hugo Black, cites and italicizes the key sentence, "I let them search, and *it was all my own free will*," and then goes on to claim: "I do not believe the Court should substitute what it believes Mrs. Leath should have said for what she actually said—'it was all my own free will.'"³³ Black thus manages to ignore Stewart's footnote, and to take the rewritten narrative as what Mrs. Leath "actually said." He then goes on to recount what the majority opinion omits, the story of the rape and shooting, what he calls the "sordid facts"³⁴ of the case, leading to the conclusion that Bumper is "obviously guilty."³⁵ He piles this other horror story—that of the crime itself—atop the story of the legal/illegal search, in an attempt to trivialize the fine points of the consent/coercion narrative with the overwhelming force of the crime narrative. On this basis, Mrs. Leath's consent becomes a

29. *Id.* at 46.

30. *Id.* at 48.

31. *Id.* at 45-46.

32. For a good analysis of these terms, see DORRIT COHN, *TRANSPARENT MINDS: NARRATIVE MODES FOR PRESENTING CONSCIOUSNESS* (1978).

33. *Bumper*, 391 U.S. at 556-57 (Black, J., dissenting).

34. *Id.* at 558.

35. *Id.* at 561.

small technicality.

One may wonder why Stewart makes his crucial point about the discursive form of the narrative attributed to Mrs. Leath only at the end of a long footnote, rather than in the body of his argument. I would suggest that it indicates a certain discomfort with deciding a major constitutional case on a point of rhetoric, by way of a characterization of a form of narrative discourse. Judges know that they must often engage in interpretive work on language, as when they refer to the “canons” that constrain interpretation of statutes, but they may be uneasy with suggestions that analyzing the way stories are told makes any difference in the law. Such a recognition would risk undermining the authority of too many narratives that the law relies upon—such as the transcript from a court below. *Bumper v. North Carolina* leaves me with the very uneasy question: what if Stewart hadn’t noticed? What if something in his training or sensibility (he was after all the brother of a professor of Classics³⁶) hadn’t triggered some sense of rhetorical impropriety in the transcript of the suppression hearing supplied by North Carolina?

While justices can be sensitive readers of narrative accounts, there is virtually no recognition in Court opinions that there may be a *general* problem of narrative, that is, with the forms of telling in which issues are presented. I note that close to the moment Oliver Wendell Holmes was initiating the modern spirit in legal thinking, his boyhood friend Henry James was reflecting on his increasing understanding of the advantages of perspectivalism in narration, his preference for “a certain indirect and oblique view of my presented action,” especially the uses of someone’s impression of what happens.³⁷ Nearly any post of observation providing perspective on what happens is preferable, says James, to “the mere muffled majesty of irresponsible ‘authorship.’”³⁸ “Authorship” is in this sense irresponsible because no one takes responsibility for how things are seen and known—to James, of course, a prime preoccupation, especially in his later work.³⁹ Free indirect discourse or narrated monologue is often a way to avoid responsibility, as Gustave Flaubert most tellingly understood: the story appears to “tell itself,” more or less in the words and thoughts of the characters, while there are ironies and juxtapositions that

36. See Harvard Classics Department, Zeph Stewart, The Andrew W. Mellon Professor of the Humanities, Emeritus, <http://www.fas.harvard.edu/~classics/people/stewart.html> (last visited Nov. 30, 2005) (profiling Professor Zeph Stewart, Potter Stewart’s brother).

37. HENRY JAMES, *Preface to The Golden Bowl*, in LITERARY CRITICISM 1322, 1322 (Leon Edel & Mark Wilson eds., Library of Am. 1984) (1909).

38. *Id.* at 1323.

39. Best known of James’s work presenting radical issues in point of view may be *THE TURN OF THE SCREW* (1898). See also HENRY JAMES, *The Beast in the Jungle*, in *COMPLETE STORIES*, 1898-1910 (John Hollander et al. eds., Library of Am. 1996) (1903); HENRY JAMES, *THE SACRED FOUNT* (New York, Charles Scribner’s Sons 1901); HENRY JAMES, *WHAT MAISIE KNEW* (London, W. Heinemann 1897) [hereinafter JAMES, *WHAT MAISIE KNEW*].

suggest a hidden authorial hand.⁴⁰ What Stewart has done in *Bumper* is to unveil the authorial hand through his close reading. But his reading is an exceptional and idiosyncratic moment. The Supreme Court does not cite Henry James's sustained reflection on the means and meaning of different narrative presentational modes. It does not acknowledge any need for narrative analysis; it does not register the existence of "narratology."

III.

I offer here some narratological hits and misses in legal decision making: moments where courts see the importance of how a story has been told, or else are blind to it. In *Bumper*, Stewart showed himself a perceptive reader of a story already constructed in the law. In other cases, we witness judges constructing stories in ways that may show little awareness of their narrative premises and implications. Obvious instances can be found in adjudications of accusations of rape, which pre-eminently offer competing stories with dramatically different perspectives, interpretations, and outcomes. Take a well-known case from Baltimore, *State v. Rusk*.⁴¹ Edward Salvatore Rusk was convicted at trial; the conviction was reversed in the Maryland Court of Special Appeals, then reinstated in the state's highest court, the Maryland Court of Appeals. In the decisions on each level of appeal, there were majority and minority opinions starkly opposed to one another. Thus we have four different retellings of what we know is the "same" story—the story of what happened between a man and a woman one night in Baltimore, the story then constructed at trial—with wholly differing results, results that send Rusk to prison for seven years or else release him. How can these four stories, based on the same "facts"—none of the principal events of what happened that night was in dispute—have different outcomes? The answer, I think, is that the narrative "glue" is different: the way incidents and events are made to combine in a meaningful story, one that can be called "consensual sex" on the one hand or "rape" on the other. The "facts" take on their meaning only within and by way of a thoroughly perspectival narrative.⁴²

40. See Flaubert's famous comment: "An author in his book must be like God in the universe, present everywhere and visible nowhere." Letter from Gustave Flaubert to Louise Colet (Dec. 9, 1852), in *THE LETTERS OF GUSTAVE FLAUBERT, 1830-1857*, at 173, 173 (Francis Steegmuller trans. & ed., Harvard Univ. Press 1980).

41. *State v. Rusk* (*Rusk II*), 424 A.2d 720 (Md. 1981), *rev'g* 406 A.2d 624 (Md. Ct. Spec. App. 1979). I have found a brief discussion of some of the narrative elements of these cases in Lisa A. Binder, "With More Than Admiration He Admired": *Images of Beauty and Defilement in Judicial Narratives of Rape*, 18 *HARV. WOMEN'S L.J.* 265, 294-98 (1995); and Scheppele, *supra* note 1, at 2086.

42. Though Henry James never wrote a story of rape, he offers many analogies and metaphorical versions of violation of personal integrity, perhaps most tellingly, in our context, in *JAMES, WHAT MAISIE KNEW*, *supra* note 39. The classic "literary" treatment of the perspectival stories of rape is of

The substance of what I call narrative glue—it might be better to think of the electromagnetic charges given to narrative incidents, which determine how they will combine and line up—depends in large part on the judges' view of standard human behavior, on what words and gestures are held to provoke fear, for instance. Any given narrative will be built to some extent on what Roland Barthes liked to call *doxa*, that set of unexamined cultural beliefs that structure our understanding of everyday happenings.⁴³ Conversely, those *doxa* produce stock narratives, ways that things “are supposed to happen.” In *Rusk*, the judges who rule against the rape conviction at the two appellate levels tend to construct their narratives on the basis of how they believe a woman ought to behave in certain circumstances.

A key moment of the story comes when Rusk, in the passenger seat of Pat's car, asks her to come up to his apartment; when she refuses, he gets out of the car, walks to the driver's side window, reaches in and removes the keys from the ignition, and says: “Now, will you come up?”⁴⁴ Here Judge Thompson writes for the mid-level appellate court: “Possession of the keys by the accused may have deterred her vehicular escape but hardly a departure seeking help in the rooming house or in the street.”⁴⁵ One could go on at some length in analysis of this sentence. “Deterred her vehicular escape”? A translation would be: Pat is totally stranded in a deserted street in an unknown and sinister section of downtown Baltimore in the middle of the night (a translation that is itself of course another version of events). A phrase such as “vehicular escape” in its very pompousness should alert us that we are faced with some avoidance maneuver. And “a departure seeking help” is similarly obscuring: it translates into something like: running through a deserted street screaming for help. The sentence is one of many that eschews narrative precision in favor of an arch rendering of the story from a normative narrative standpoint which is that of the judge. It is part and parcel of a narrative point of view in which Pat is always referred to as “the prosecutrix,” is described as “bar hopping,”⁴⁶ and characterized as “a normal, intelligent, twenty-one year old, vigorous female.”⁴⁷ It's a narrative with little apparent self-awareness on the part of the narrator. He's a bit like Emma Bovary's husband Charles, in Flaubert's novel: sexually stimulated by the woman in the story, but not fully capable of understanding her. But his position of authority makes him less ridiculous than Charles, and more

course the film by Akira Kurosawa, *RASHOMON* (Daiei Motion Picture Co. 1950).

43. See, e.g., Roland Barthes, *From Work to Text*, in *THE RUSTLE OF LANGUAGE* 56, 58 (Richard Howard trans., Hill & Wang 1986) (1984).

44. *Rusk II*, 424 A.2d at 721 (internal quotation marks omitted).

45. *Rusk v. State (Rusk I)*, 406 A.2d 624, 626 (Md. Ct. Spec. App. 1979).

46. *Id.* at 625.

47. *Id.* at 627.

frightening.

It is on the basis of such a retelling of the story that the first appeals court reverses Rusk's conviction. In the higher court, the conviction is reinstated—there are sensitive readers in this case as well—but over the strong dissent of Judge Cole, who writes, for instance:

She [the victim] may not simply say, "I was really scared," and thereby transform consent or mere unwillingness into submission by force. These words do not transform a seducer into a rapist. She must follow the natural instinct of every proud female to resist, by more than mere words, the violation of her person by a stranger or unwelcomed friend. She must make it clear that she regards such sexual acts as abhorrent and repugnant to her natural sense of pride.⁴⁸

What he means is made more specific toward the end of his opinion:

I find it incredible for the majority to conclude that on these facts, without more, a woman was *forced* to commit oral sex upon the defendant and then to engage in vaginal intercourse. In the absence of any verbal threat to do her grievous bodily harm or the display of any weapon and threat to use it, I find it difficult to understand how a victim could participate in these sexual activities and not be willing.⁴⁹

The details of this plot summary would deserve much closer attention than I can give here. The one word "participate," for instance, speaks volumes about Judge Cole's views of sex, especially oral sex, of women, and of the world. "Participate" in itself conveys a whole conception of a narrative incident that needs to be unpacked and analyzed.⁵⁰

On the central issue of fear, Judge Thompson, writing for the majority of the intermediate appellate court, states that doctrine derived from an earlier case, *Hazel v. State*,⁵¹ dictates that "the victim's fear that overcomes her will to resist must be a reasonable fear."⁵² This interpretation may give us pause, since "fear" is rarely an emotion that behaves reasonably. While Judge Wilner in dissent indicates there is something wrong with this "rule of reason,"⁵³ it is Chief Judge Murphy, writing for the higher appellate court, who better articulates the problem:

Hazel did not expressly determine whether the victim's fear must be "reasonable." Its reference to reasonableness related to whether "the acts and threats of the defendant were reasonably calculated to

48. *Rusk II*, 424 A.2d at 733 (Cole, J., dissenting).

49. *Id.* at 734.

50. To participate is "to take or have a part or share, as with others." RANDOM HOUSE UNABRIDGED DICTIONARY 1414 (2d ed. 1993). That is, use of the word "participate" already implies the conclusion that one has been a part of the action rather than a victim of it.

51. 157 A.2d 922 (Md. 1960).

52. *Rusk I*, 406 A.2d at 627.

53. *Id.* at 630 (Wilner, J., dissenting).

create in the mind of the victim . . . a real apprehension, due to fear, of imminent bodily harm” Manifestly, the Court was there referring to the calculations of the accused, not to the fear of the victim. While *Hazel* made it clear that the victim’s fear had to be genuine, it did not pass upon whether a real but unreasonable fear of imminent death or serious bodily injury would suffice.⁵⁴

This strikes me as a fair and useful gloss on the question. It of course eschews any objective test of whether the victim’s fear is reasonably grounded or not. One may be able to judge whether or not the accused’s words and gestures ought to have caused fear, but whether they did or not is a matter of the victim’s perspective. It seems to me that (in some version of a rule in tort law⁵⁵) the putative rapist has to take his victim as he finds her: her mechanisms of anxiety, fear, panic belong to what Rousseau long ago called “inner dispositions,” and as such tend to evade external evaluation.⁵⁶ Rousseau indeed is something of a theorist of fear as precisely the emotion that produces unreasonable readings of the world.⁵⁷

The differing outcomes in the retellings of the *Rusk* cases offer a dramatic instance of how narratives take on design, intention, and meaning. Narratives do not simply recount happenings; they give them shape, give them a point, argue their import, proclaim their results. And to do so they necessarily espouse some sort of “point of view” or perspective, however hidden it may be, even from narrators themselves.⁵⁸ The competing stories of *Rusk* offer an exemplary instance of legal “narrativity” in that narrative form—while never of course named as such—is the very bone of contention. The judges in *Rusk* curiously seem both to know and not to know this. It is perhaps more useful to say that the mode in which they know it remains largely untheorized, unarticulated, and therefore in some large measure unrecognized.

Let me turn to a possibly less obvious instance of judicial narrative construction, in a case that every first-year American law student knows by heart, a classic torts case from 1928, *Palsgraf v. Long Island Railroad Co.*,⁵⁹ where the Court of Appeals of New York, in a famous opinion by its Chief Judge, Benjamin Cardozo, reversed the lower court’s finding that

54. *Rusk II*, 424 A.2d at 726-27 (majority opinion) (citation omitted).

55. See, e.g., *Steinhauser v. Hertz Corp.*, 421 F.2d 1169 (2d Cir. 1970) (Friendly, J.); *Vosburg v. Putney*, 50 N.W. 403 (1891).

56. On the “inner dispositions,” or “innermost feelings” as the most recent translator of the *Confessions* puts it, see JEAN-JACQUES ROUSSEAU, *CONFESSIONS* 84 (Patrick Coleman ed., Angela Scholar trans., Oxford Univ. Press 2000) (1782).

57. On fear, perception, and language, see 7 JEAN-JACQUES ROUSSEAU, *Essay on the Origins of Language*, in *THE COLLECTED WRITINGS OF ROUSSEAU* 289 (John T. Scott trans. & ed., Univ. Press of New England 1998) (1781).

58. On “point of view,” see COHN, *supra* note 32; and GÉRARD GENETTE, *NARRATIVE DISCOURSE* (Jane E. Lewin trans., Cornell Univ. Press 1980).

59. 162 N.E. 99 (N.Y. 1928).

the railroad was liable for Helen Palsgraf's injuries. I begin with the "facts of the case" as stated by Cardozo:

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sues.⁶⁰

Legal commentators for decades clucked admiringly over the laconic clarity of Cardozo's presentation here. More recently, Judge John T. Noonan has pointed to some of the relevant ancillary facts we don't get from Cardozo, such as the nature of Helen Palsgraf's injuries, her income and family status, the financial resources of the Long Island Railroad, the number of injuries annually resulting from railway accidents, etc.—facts that would tend to go into a modern torts settlement.⁶¹ But what interests me here is less those other facts than how the admirable concision of Cardozo's narrative of the accident controls that very narrative, limiting its reach as a story, keeping it within well-policed boundaries.

Cardozo, like many judges, only appears to tell the story of the event under adjudication. He recasts the story events so that they make a legal point, rendering it a narrative recognizable in terms of legal principle. He wants to demonstrate that the defendant, in the person of the railway guard, could not reasonably have foreseen the harm to the plaintiff:

The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed.⁶²

The alliteration of this sentence gives it a kind of conclusive panache. After running through a brisk series of hypothetical narratives intended to

60. *Id.* at 99.

61. See JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW 111-51 (1976).

62. *Palsgraf*, 162 N.E. at 99.

show that “prevision so extravagant”⁶³ as to include the remote consequences of acts cannot be a basis for a ruling in favor of the plaintiff, Cardozo writes, “Negligence, like risk, is thus a term of relation.”⁶⁴ It has to do with a relation of a legal duty of care and foreseeable harm, which Cardozo cannot find here. His concise narrative of the incident on the railway platform is an anti-narrative in that it seeks precisely to destroy relation, to show that certain linkages of cause and effect are “extravagant.” It works against the kind of connections we usually seek in narratives.

The eloquent dissent in *Palsgraf*, by Judge William Andrews, gives a narrative of the incident even more laconic than Cardozo’s,⁶⁵ which is strange since one would think it in Andrews’ interest to *elaborate* on this story. Instead, Andrews meditates philosophically on kinds of relation established in stories, and presents us with a series of hypotheticals: a dam with faulty foundations breaks, injuring property far down stream; a boy throws a stone into a pond, and “[t]he water level rises. The history of that pond is altered to all eternity;” “[a] murder at Sarajevo may be the necessary antecedent to an assassination in London twenty years hence. An overturned lantern may burn all Chicago.”⁶⁶ And:

A chauffeur negligently collides with another car which is filled with dynamite, although he could not know it. An explosion follows. *A*, walking on the sidewalk nearby, is killed. *B*, sitting in a window of a building opposite, is cut by flying glass. *C*, likewise sitting in a window a block away, is similarly injured. And a further illustration: A nursemaid, ten blocks away, startled by the noise, involuntarily drops a baby from her arms to the walk. We are told that that *C* may not recover while *A* may. As to *B*, it is a question for court or jury. We will all agree that the baby might not.⁶⁷

In fact, says Andrews, there are no fixed rules to guide us here. “It is all a question of expediency.”⁶⁸ The best guide he can offer is: “The court must ask itself whether there was a natural and continuous sequence between cause and effect.”⁶⁹

How far do the Rube-Goldberg-like consequences of the dynamite-laden car’s explosion extend? Where do you declare the story to be over? By the term “expediency,” Andrews appears to point to the concrete, particularized, possibly ungeneralizable issues of a single narrative. Without saying so—and again, without unpacking this particular incident

63. *Id.* at 100.

64. *Id.* at 101.

65. *Id.* at 101-02 (Andrews, J., dissenting).

66. *Id.* at 103.

67. *Id.* at 104.

68. *Id.*

69. *Id.*

on the railway platform—he seems to detect a problem in the doctrine of “foreseeability” of harm. We recognize harm only after it has occurred, retrospectively. Narrative itself is retrospective, its meanings become clear only at the end, and the telling of a story is always structured by anticipation of that end, the “point” of the story, the moment at which its sequences and their significance become clear. It is only in hindsight, retrospectively, that one can establish a “chain of events,” in the manner of Sherlock Holmes concluding one of his cases. “‘You reasoned it all out beautifully,’ I exclaimed in unfeigned admiration. ‘It is so long a chain, and yet every link rings true’”—as Dr. Watson admiringly exclaims at the end of *The Red-Headed League*.⁷⁰ In this sense, there are no principles to guide you; there is only the causal and sequential linkage of events, the concrete particulars which narrative alone can convey.

Now, in neither Cardozo’s nor Andrews’ narrative of the *Palsgraf* story can I find anything about the narrative detail that seems to me most deeply mysterious and important: those scales which, in Cardozo’s account, were “thrown down” by the shock of the explosion, injuring Helen Palsgraf. Where and what were these scales? What did they look like? Were they attached to the wall or freestanding? How did they become dislodged from their customary position in such a way as to strike Helen Palsgraf? And how did they strike her, and what kind of injuries did they cause? You seek in vain, in both the majority and the dissenting opinions, for any attempt to render this vital moment—the moment of the injury—in the story. (Torts scholar William Prosser years later decided the scales could not have been dislodged by the explosion, as claimed by Cardozo, but were likely knocked down by a panicked crowd—invisible in the two opinions—on the platform.⁷¹) Any student in Creative Writing 101 would be sent to rewrite his or her draft for omitting this crucial information. The very clever student might, of course, in detective story fashion, reserve it for the end. One can imagine Holmes and Watson in their final wrap-up: “So those scales, you see . . .”

Cardozo once declared in a lecture that “as a system of case law develops, the sordid controversies of the litigants are the stuff out of which great and shining truths will ultimately be shaped.”⁷² The statement makes very clear the rationale for repressing the sordid story of Mrs. Palsgraf on the railway platform, in order to transform its dross into something precious, the narrative of the law itself. But surely those great and shining

70. ARTHUR CONAN DOYLE, *The Red-Headed League*, in *THE ADVENTURES OF SHERLOCK HOLMES* 49, 73 (Richard Lancelyn Green ed., Oxford Univ. Press 1993) (1892). On the retrospective nature of narrative, see PETER BROOKS, *READING FOR THE PLOT* (Harvard Univ. Press reprint ed. 1992) (1984).

71. See WILLIAM L. PROSSER & YOUNG B. SMITH, *CASES AND MATERIALS ON THE LAW OF TORTS* 364 (3d ed. 1962), quoted in NOONAN, *supra* note 61, at 119.

72. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 35 (1921).

truths in *Palsgraf* depend intimately on narrative constructions, on “sordid” story details, which the opinions in the case repress even as they recognize their importance. Cardozo and Andrews both recognize that there is a story to be told, and the dissent, in particular, notices that how it is constructed makes a difference. But they both then eviscerate the particular story at hand—indeed they spend more time and give more particulars in their hypothetical narratives. Their recognition of the importance of the story is denied by their determination that the story exists only to reach the “great and shining truths” of legal precedent and rule. The gesture of the judges here could almost be analogized to classic scenarios of denial and repression in Freud, such as the child’s simultaneous recognition and repression of sexual difference.⁷³ Here, recognition of the need to narrate what happened is used to deny any real narrative—concretely particularized, finely detailed—of what happened.

One could adduce many further examples, of differing kinds, to argue that an analytic attention to the construction of stories would be a useful part of the tool kit of legal actors and commentators. Recognition that narrative is at issue—and that narrative raises issues—would seem to me essential. “Searches and seizures,” for instance, almost inevitably involve narratives: even the application for a search warrant entails a predictive narrative of what the search will have uncovered when it has been carried out. Difficult issues often arise in distinguishing the permissible from the illegal search. Some recognition on the part of police, judges, and juries of the distinction between actions and their recounting—their reformulation as narrative discourse—could be helpful.⁷⁴ The “facts of the case,” once again, never are neutral or innocent; their telling has a certain narrative design and intention.

In a different kind of instance, a troubling problematic of narrative has arisen in the “Victim Impact Statement” (VIS), a relative newcomer to American law that intends to restore a place to victims of crime who, it has been argued, are often excluded in our modern adversary process (since victims no longer bring their own cases, as they did in the medieval world).⁷⁵ The VIS gives a detailed account of the harms suffered by the

73. See 19 SIGMUND FREUD, *Negation*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 233 (James Strachey ed., Hogarth Press 1961) (1925); 19 SIGMUND FREUD, *Some Psychical Consequences of the Anatomical Distinction Between the Sexes*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD, *supra*, at 241 (1925).

74. On some narrative questions raised by searches, see Peter Brooks, “Inevitable Discovery”—*Law, Narrative, Retrospectivity*, 15 YALE J.L. & HUMAN. 71 (2003).

75. On VIS, see Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1990); Lynne N. Henderson, *The Wrongs of Victim’s Rights*, 37 STAN. L. REV. 937 (1985); Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411 (1993); and Michael Ira Oberlander, *The Payne of Allowing Victim Impact Statements at Capital Sentencing Hearings*, 45 VAND. L. REV. 1621 (1992).

victim. Is it legitimate to introduce this kind of narrative at the sentencing phase of a capital case, where its effect is bound to be (and is intended to be) a harsher penalty, likely death, for the defendant? The U.S. Supreme Court said no in *Booth v. Maryland*,⁷⁶ then four years later reversed itself (having undergone a significant change in its membership) in *Payne v. Tennessee*.⁷⁷ The opinions in these cases implicitly argue the question of whether certain kinds of story—by their nature, tragic, inflammatory, and irrebuttable—can be told in certain crucial contexts: notably, when a jury is debating the question of life or death. They raise questions about narrative relevance (is the trauma of the surviving family members of a murder victim relevant to the guilt of the defendant?) and narrative closure (are the sequels to murder, in the sufferings of the survivors, part of the murder story?). Are VIS the wrong story, meaning: an effective story in the wrong place?

In *Booth*, the VIS presents problems similar to those detected by Justice Stewart in Hattie Leath's testimony in *Bumper*. The VIS in this instance was a written statement, prepared by the Maryland Division of Parole and Probation and read to the jury.⁷⁸ The Appendix to the Supreme Court's decision gives us the text, detailing the reactions of son, daughter, and granddaughter to the discovery of the bodies of Irvin and Rose Bronstein, stabbed to death in the course of a robbery for money to buy drugs.⁷⁹ The VIS is mainly concerned with the mental states induced in the survivors by the murder, the consequent depression, fear, sleeplessness, the feeling that their lives have been permanently changed by this tragedy. Much of the VIS unfolds in free indirect discourse, in a narrated summary of emotional affect. For instance, concerning the Bronsteins' daughter:

They didn't have to kill because there was no one to stop them from looting. Her father would have given them anything. The murders show the viciousness of the killers' anger. She doesn't feel that the people who did this could ever be rehabilitated and she doesn't want them to be able to do this again or put another family through this. She feels that the lives of her family members will never be the same again.⁸⁰

The effectiveness of such a passage—as novelists since Flaubert, at least, have understood—results from its effacement of any mediating narrator, its claim to render impersonally, without mediation, the thoughts and feelings of the individual subject. The anonymous author of the VIS steps forward only at the end, in a peroration all the more telling in that she has

76. 482 U.S. 496 (1987).

77. 501 U.S. 808 (1991).

78. *Booth*, 482 U.S. at 499.

79. *Id.* at 509-15.

80. *Id.* at 513.

let the story “tell itself” up to that point:

It became increasingly apparent to the writer as she talked to the family members that the murder of Mr. and Mrs. Bronstein is still such a shocking, painful, and devastating memory to them that it permeates every aspect of their daily lives. It is doubtful that they will ever be able to fully recover from this tragedy and not be haunted by the memory of the brutal manner in which their loved ones were murdered and taken from them.⁸¹

“It is doubtful that . . .”: this phrase makes one want to ask—as Roland Barthes does of some narrative statements in Balzac—“who is speaking?”⁸² Who is responsible for this narrative discourse and the judgments it conveys? In the absence of an author, the phrase tends to become the reader’s, a judgment internalized.⁸³ The conclusion reached by this anonymous employee of the Department of Parole and Probation appeals to an impersonal, and therefore irrefutable, construction, one devoid of specific human agency, endowed with all the power of the *doxa*, the truth invested with general societal authority.

Justice Powell, author of the majority opinion in *Booth*, does not perform the act of narrative analysis offered by Stewart in *Bumper*. But he cites the VIS in its entirety in his appendix, noting that “the family members were articulate and persuasive in expressing their grief and the extent of their loss.”⁸⁴ We can take this as a kind of indirect and perhaps troubled accolade to the author of the VIS, whose hidden presence is not explicitly remarked upon by Powell. When the Court reverses in *Payne*, Chief Justice Rehnquist seems to delectate in his narrative authority, telling the story of Tyrone Pervis Payne’s mayhem with a kitchen knife in all its gory detail.⁸⁵ He opens his opinion with the “horrifying scene” inside the apartment, where Charisse Christopher has received eighty-four separate knife wounds.⁸⁶ She and her daughter are both dead; her son survives only after seven hours of surgery.⁸⁷ No part of Rehnquist’s horror story is strictly relevant to the issue of VIS, since it is information the jury would have received during the guilt phase of the trial, not in a statement at the sentencing phase. But his attitude seems to be one of: now we are free to tell our stories of the impact of crimes without restraint. It is an odd performance, but one that seems to demonstrate some semi-conscious

81. *Booth*, 482 U.S. at 515.

82. See ROLAND BARTHES, *S/Z* 139-40, 151-52 (Richard Miller trans., Hill & Wang 1974) (1970).

83. According to Barthes, certain “equivocations” of the narrative text stand for the reader’s interest in its interpretation, his or her participation as decoder of the text. See *id.* at 151-52.

84. *Booth*, 482 U.S. at 504.

85. *Payne v. Tennessee*, 501 U.S. 808, 812-13 (1991).

86. *Id.* at 812.

87. *Id.*

awareness of the potency of narrative unleashed.

IV.

Trial lawyers, as Burns knows, as indeed we all know, are aware that they need to tell stories, that the evidence they present in court must be bound together and unfolded in narrative form.⁸⁸ Presumably legal advocates have known this for millennia, since the discipline of rhetoric, including argumentation through narrative, was in antiquity primarily training for making one's case in a court of law. Rhetoric was an encompassing system for making and interpreting arguments.⁸⁹ Narratology properly belongs to the analytic branch of rhetoric, to the operations by which one takes apart and studies an utterance or text. But the professionalization of law and legal education has over time tended to obscure the rhetorical roots of legal practice. In fact, the close ties law once entertained with rhetoric might now be viewed as something of a scandal in a field that wants to believe that it is rooted in irrefutable principles and that it proceeds by its own special methodology: modes of legal interpretation that do not necessarily produce unanimous results but nonetheless—excepting a few dissenting law professors—form a generally accepted discourse. It is part and parcel of its professionalization that legal discourse wishes to see itself as complete, autonomous, and hermetic.⁹⁰ To the extent that it may call upon kinds of expertise and analysis foreign to itself, it will make them pass through the narrow gate watched over by the judge—at trial, and then at the appellate level—who is supposed to know the judicial from the extra-judicial.

This gate-keeping function may in fact characterize law's way of acknowledging its narrative entanglements: it recognizes them through its attempts to police narrative form and content. The law tends to limit and formalize conditions of telling and listening, as if from a suspicion of the force of narratives. In modern judicial procedure, stories rarely are told directly, uninterruptedly. At trial, they are elicited piecemeal by attorneys intent to shape them to the rules of evidence and procedure, then reformulated in persuasive rhetoric to the listening jurors. The fragmented, contradictory, murky unfolding of narrative in the courtroom is subject to formulae by which the law attempts to impose rule on story, to limit its free play and extent. Should Nicole Simpson's 911 phone call be

88. See, e.g., LUBET, *supra* note 2, at 1-4, 8-14.

89. By "rhetoric," I understand the art of persuasion—all that is deployed in discourse to make an argument and produce assent in a listener or reader—and, by extension, the whole communicative system of discourse. For an engaging discussion of rhetoric in this sense, see Roland Barthes, *The Old Rhetoric: An Aide-Mémoire*, in *THE SEMIOTIC CHALLENGE* 11 (Richard Howard trans., 1988).

90. Similar points about the professional autonomy desired by the law have been made by Stanley Fish. See, e.g., STANLEY FISH, *Don't Know Much About the Middle Ages: Posner on Law and Literature*, in *DOING WHAT COMES NATURALLY* 294 (1989).

considered part of the story of her murder?⁹¹ Or is that part of another story, which, brought within the sequence ending in homicide, takes on a misleading significance and force? All the rules of evidence—including the notorious “exclusionary rule”—touch on the issue of rule-governed storytelling. The judge must know and enforce these rules. And when stories are culled from the trial record and retold on the appellate level, it is in order to evaluate their conformity to the rules. Appellate courts are not supposed to second-guess the “triers of fact” in the case, but to judge the frameworks in which the verdict was reached. At this level, all narratives become exemplary: they illustrate a point of law, a crucial issue in justice, a symbolic moment in the relations of individual and state. So it is that the law has found certain kinds of narrative problematic, and has worried about whether or not they should have been allowed a place at trial—or what place they should have been allowed. Yet the law’s recognition of its repressed narrative content and form generally comes in a negative manner, as denial. The bar of repression keeps the narrativity of the law under erasure.

There is one instance—to the best of my knowledge, the only one—in which the Supreme Court overtly recognizes what one might call the legal stakes of narrative in adjudication. In *Old Chief v. United States*, decided in 1997, the question at issue was whether a defendant with a prior conviction on his record should be allowed to “stipulate” to the prior conviction, thus disallowing the prosecution from presenting the facts of the earlier felony in making the case against him for his new alleged crime.⁹² Defendant Johnny Lynn Old Chief knew he had to admit to a prior crime and conviction—on an assault charge—but didn’t want the prosecutor to be able to detail the prior crime, for fear that it would aggravate his sentence on the new crime (which in fact was quite similar to the prior one). The prosecutor refused to accept the stipulation, and the district court judge ruled in his favor: the full story of the prior crime and conviction was offered as evidence.⁹³ Old Chief was found guilty on all counts of the new charges of assault, possession, and violence with a firearm. He appealed. His conviction was upheld by the Ninth Circuit, which essentially restated the traditional position that the prosecution is free to make its case as it sees fit.⁹⁴ When the case reached the Supreme

91. Including Nicole Simpson’s 911 phone call implies that it constitutes a significant part of a narrative whose shape and significance is largely determined by how it ended: in her murder. Excluding it argues that the spousal abuse that resulted in the 911 call has nothing to do with the later homicide. Whether or not to allow the 911 call thus depends to some degree on where you take up your stand as interpreter of the narrative: at the end of a story known to be one of homicide, or at the beginning of a story yet to be determined.

92. 519 U.S. 172 (1997).

93. *Id.* at 176.

94. *United States v. Old Chief*, 56 F.3d 75 (9th Cir. 1995).

Court, Justice O'Connor, in a dissenting opinion joined by Chief Justice Rehnquist and Justices Scalia and Thomas, endorsed that traditional position.⁹⁵

But this claim was rejected by the majority (consisting of Justices Souter, Stevens, Kennedy, Ginsburg, and Breyer) in an opinion written by Souter that argues that introduction of the full story of the past crime could be unfairly prejudicial; it could lead the jury to convict on grounds of the defendant's "bad character," rather than on the specific facts of the new crime.⁹⁶ The story of the past crime might "lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."⁹⁷ The story of the past crime must be excluded, not because it is irrelevant, but because it may appear over-relevant: "it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."⁹⁸ The story of Old Chief's past crime must be excluded because it risks creating too many narrative connections between past and present. It risks establishing a powerful perspective that ends up creating that inference—one we regularly derive from narratives—that goes under the name "character," hence authorizing the jury to convict on the basis of "bad character" rather than the specifics of the present story.

Justice Souter in this manner orders the exclusion of the past story, reverses Old Chief's conviction, and remands the case for further proceedings.⁹⁹ But the most interesting moment of his opinion comes in his discussion of the dissenters' point of view, their argument that the prosecution needs to be able to present all the evidence, including the story of past crime and conviction, in its specificity. He concedes the need for "evidentiary richness and narrative integrity in presenting a case."¹⁰⁰ He goes on to say that "making a case with testimony and tangible things . . . tells a colorful story with descriptive richness."¹⁰¹ And he continues:

Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them.¹⁰²

95. *Old Chief*, 519 U.S. at 192-201 (O'Connor, J., dissenting).

96. *Id.* at 180, 185.

97. *Id.* at 180.

98. *Id.* at 181.

99. *Id.* at 173.

100. *Id.* at 183.

101. *Id.* at 187.

102. *Id.*

It is almost as if Souter had been reading literary narratology, and been persuaded by the argument that narrative is a different kind of organization and presentation of experience, a different kind of “language” for speaking the world.¹⁰³ In the conclusion to this section of his opinion, he writes:

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 stories interrupted by gaps of abstraction may be puzzled at the missing chapters 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.¹⁰⁴

Here, Souter turns back to the case of Old Chief, to argue that the prosecution’s claim of the need to tell the story of the earlier crime is unwarranted because it is *another* story; it is “entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense.”¹⁰⁵ Old Chief’s stipulation does not result in a “gap” in the story, it does not displace “a chapter from a continuous sequence.”¹⁰⁶

Souter hence rules out the prosecution’s longer, fuller narrative as the wrong story, something that should not be part of the present narrative sequence. It is interesting that in so doing he feels the need to speak at some length of the place and power of narrative in the presentation of legal evidence: its “richness,” its “momentum,” its “persuasive power.”¹⁰⁷ “A syllogism is not a story”: in this phrase, Souter appears to recognize what a few scholars within and without the legal academy have argued, that the law’s general assumption that it solves cases with legal tools of reason and analysis that have no need for a narrative analysis could be mistaken. Souter thus breeches the bar over what you might call an element of the repressed unconscious of the law, bringing to light a narrative content and form that traditionally go unrecognized. Yet curiously, or perhaps predictably, he does it by way of an argument that in

103. See Bruner, *supra* note 11.

104. 519 U.S. at 189. Filmmaker Errol Morris has recently made a similar argument about the fatal flaw of John Kerry’s presidential campaign: that he excised his opposition to the Vietnam War from his biography.

That was a mistake. People think in narratives—in beginnings, middles and ends. The danger when you edit something too severely is that it no longer makes sense; worse still, it leaves people with the disquieting impression that something is being hidden.

...

... [H]e left a blank space in his personal story

Errol Morris, Op-Ed., *Where’s the Rest of Him?*, N.Y. TIMES, Jan. 18, 2005, at A21.

105. 519 U.S. at 191.

106. *Id.*

107. *Id.* at 187, 183.

the present case the lower courts failed to guard against the irrelevant and illegitimate power of narrative, admitting into evidence story elements—the story of Old Chief’s prior crime—that should not be considered part of the “natural sequence” of the present crime. The past story would give too much credence to the present story that the prosecution must prove. It is in defending *against* the power of storytelling that Souter admits its force. And his riff on narrative has not been cited in any subsequent Supreme Court opinions.¹⁰⁸

Could one say that law needs a narratology? What would be its elements? All the most helpful narrative analysis since Aristotle has addressed the shape of narrative—beginnings, middles, and ends—in relation to the meanings it creates.¹⁰⁹ Narrative plots appear to be a certain formal organization of temporality, and need to be seen in their structuring cognitive role: a way of making sense of time-bound experience. Narratology, I noted earlier, includes attention to minimal units of narrative and how they combine in a plot; to how we understand the initiation and completion of an action; to standard narrative sequences (stock stories); to the movement of a narrative though a state of disequilibrium to a final outcome that re-establishes order.¹¹⁰ Narratology also considers perspectives of telling: who sees and who tells; the explicit or implicit relation of the teller to what is told; the varying temporal modalities between the told and its telling.¹¹¹

Most important, perhaps, narratology postulates a fundamental distinction between events in the world and the ways in which they are presented in a narrative discourse, demonstrating that storytelling always attempts to give some shape and significance to life. Russian Formalists made a basic distinction between *fabula* (the order of events as they took place in the world referred to by the narrative discourse) and *sjuzhet* (the order and manner in which the events are represented in the narrative discourse).¹¹² This distinction allows us to reflect on the many ways in which our tellings reorganize events to give them a certain inflection and

108. It has, however, received some attention in other federal and in some state courts. See, e.g., *United States v. Bowie*, 232 F.3d 923 (D.C. Cir. 2000); *United States v. Merino-Balderamma*, 146 F.3d 758, 762 (9th Cir. 1998); *United States v. Requaz*, 134 F.3d 1121 (D.C. Cir. 1998); *State v. Alexander*, 571 N.W.2d 662 (Wis. 1997). Also see the “rule of narrative completeness” derived from *Old Chief* in *State v. Monceaux*, 885 So. 2d 670, 676 (La. Ct. App. 2004).

109. The briefest list of sources here would include ARISTOTLE, *Poetics*, in *INTRODUCTION TO ARISTOTLE* 661 (Richard McKeon ed., Univ. of Chi. Press 1973); ROLAND BARTHES, *Introduction to the Structural Analysis of Narratives*, in *A BARTHES READER* (Susan Sontag ed., Richard Howard trans., Hill & Wang 1982) (1966); BARTHES, *supra* note 82; BROOKS, *supra* note 70; GENETTE, *supra* note 58; GERALD PRINCE, *NARRATOLOGY* (Mouton 1982) (1972); *RUSSIAN FORMALIST CRITICISM* (Lee T. Lemon & Marion Reis eds. & trans., Univ. of Neb. Press 1965); and TZVETAN TODOROV, *THE POETICS OF PROSE* (Richard Howard trans., Cornell Univ. Press 1977) (1971).

110. See BARTHES, *supra* note 109; TODOROV, *supra* note 109.

111. See GENETTE, *supra* note 58.

112. See *READINGS IN RUSSIAN POETICS* (Ladislav Matejka & Krystyna Pomorska eds., 1971); *RUSSIAN FORMALIST CRITICISM*, *supra* note 109.

intention, a point, and a particular effect on their hearers. The distinction leads to a further insight: often we as listeners or readers know “what happened” in the world only through its tellings. We are always summoned to consider the possible omissions, distortions, rearrangements, moralizations, rationalizations that belong to any recounting. The more we study modalities of narrative presentation, the more we may be made aware of how narrative discourse is never innocent but always presentational and perspectival, a way of working on story events that is also a way of working on the listener or reader. In sum, narratology helps us to understand the reach of narrativity in human consciousness, but also to “denaturalize” narratives, to show their constructedness, how they are put together and what we can learn from taking them apart.¹¹³

This sketch of elements is much too brief, of course; fleshing it out would demand a separate paper (or book) but would be entirely feasible. A legal narratology might be especially interested in narrative transactions, in questions of narrative transmission and decoding: that is, stories in the situation of their telling and listening, asking not only how these stories are constructed and told, but also how they are listened to, received, reacted to, how they ask to be acted upon and how they in fact become operative. What matters most, in the law, is how the “narratees” or listeners—juries, judges—hear and construct the story. As I noted earlier, people go to prison, even to execution, because of the well-formedness and force of the winning story. “Conviction”—in the legal sense—results from the conviction created in those who judge the story. So it is that a greater attention to the narrative forms given to the law might promote greater clarity about what it is that achieves conviction. Legal actors may well claim that they are already commonsensically aware of narrative forms at work in the law. Nonetheless, they might benefit from a recognized perceptual and analytic grid for identifying, and exchanging understandings about, the uses and effects of narrative constructions in the law. The ability to analyze narrative as narrative—to take it apart and put it back together in the manner of the narratologist—could be of clear benefit to those who have to make legal sense of “what happened.”

Yet this plea for a formal, analytic attention to narrative in the law meets an objection that has been flamboyantly presented by Alan Dershowitz. Dershowitz contends that the whole notion of a well-formed narrative—as exemplified in Chekhov’s “rule” that a gun introduced in act one of the drama must by act three be used to shoot someone—is misleading in the court of law, since it leads jurors to believe that real-life stories must obey the same rules of coherence.¹¹⁴ If we allow into evidence

113. See BROOKS, *supra* note 70; Bruner, *supra* note 11.

114. See Dershowitz, *supra* note 16, at 100-01, 104-05.

the narrative of spousal abuse, then the eventual murder of former wife by former husband becomes a logical narrative conclusion to the story. Whereas, Dershowitz wants to argue, who's to say that life really provides such a narrative logic? Dershowitz offers here his version of a theory of narrative advanced by, among others, Jean-Paul Sartre, in his contention that telling—as opposed to living—really starts at the end of the story, which is there from the beginning, transforming events into indicia of their finality, their making sense in terms of their outcome.¹¹⁵

It is indeed in the logic of narrative to show, by way of the sequence and enchainment of events, how we got to where we are. As I suggested in discussing *Palsgraf*, narrative understanding is retrospective. Dershowitz may be right to protest that life is blinder and more formless than that. His dissent from the narrative ordering of reality usefully alerts us to how stories may manipulate us. And yet, his protest may be largely in vain, since the narrative construction of reality is inescapable. Our literary sense of how stories go together—their beginnings, middles, and ends—may in fact govern life as well as literature more than he is willing to allow. Our very definition as human beings is very much bound up with the stories we tell, about our own lives and the world in which we live. The imposition of narrative form on life is a necessary human activity; we could not make sense of the world without it. We seek to understand actions as intelligible units that combine into goal-oriented plots. Hence, if Dershowitz utters a significant caveat about putting too much trust in a preformed sense of how stories “turn out,” it's not clear that we could even put together a story, or construe a story as meaningful, without this competence—acquired very early in life—in narrative construction. If narrative form were to be entirely banished from the jury's consideration, there could be no more verdicts. The best we can hope for is a more critical awareness of the storied nature of our thinking, as well as of the material presented to our thought.

Thinking about the place of narrative in American law must also and perhaps finally pay attention to the fact that issues of telling and listening—like all other issues—find their ultimate commentary in the judicial opinion, especially the Supreme Court opinion. “It is so ordered,” the opinion of the Court typically concludes, letting us understand that the Court has delivered a narrative of order, one that itself imposes order, and, more generally, that narrative orders, gives events a definitive shape and meaning. “It is so ordered”: this rhetorical *topos* inevitably fascinates the literary analyst, who normally deals with texts that cannot call on such authority. (Much literature, one suspects, would like to be able to conclude

115. See *id.* at 101; see also BROOKS, *supra* note 70; FRANK KERMODE, *THE SENSE OF AN ENDING* (1967); JEAN-PAUL SARTRE, *NAUSEA* 39-40 (Lloyd Alexander trans., New Directions 1964) (1938).

with such a line—to order an attention to its message, to institute a new order or a new point of view on the basis of the imaginative vision it has elaborated.) The court, in so ordering, must activate conviction that its narrative is the true and the right one. Recall the forceful statement on this point in the joint opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood v. Casey*,¹¹⁶ the case that reaffirmed, in broad outline, the right to abortion first secured in *Roe v. Wade*.¹¹⁷ The joint opinion, arguing the importance of *stare decisis* and the respect for precedent, notes: “Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession.”¹¹⁸ The “covenant,” we might say, is a master narrative, into which each new narrative episode must be fitted. How does this work? In the words of the joint opinion, “the Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.”¹¹⁹ The narrative of the covenant relies on precedent and *stare decisis* in order that change or innovation appear to be principled, so that sequence appear not random but an instance of consecution. The most apt words in the sentence quoted may be “sufficiently plausible.” What does suffice here? Only that which is rhetorically effective, that which persuades, that which assures “conviction.” “Sufficiently plausible” invites assent, but also a degree of awareness of how one is being worked on by rhetoric. “Sufficiently plausible” is a tautology that points to the inevitable hermeneutic circle of narrative interpretation.

The rhetoric of the *Casey* joint opinion (which has become a kind of dartboard for Justice Scalia’s poisoned barbs¹²⁰) could also be seen as a form of apologia for that “mere muffled majesty of irresponsible ‘authorship’” rejected by Henry James.¹²¹ “Authorship” of Supreme Court opinions is by tradition invested with muffled majesty, indeed their very authority depends on a rhetoric of continuity and steadfastness through the ages, so that the Court may claim an institutional immortality transcending its present membership. When dissenting opinions take issue with the rhetoric of authority, attempt to show it as illegitimate, overreaching, a misreading of the Court’s own past statements, a fissure in the covenantal discourse may be opened. Whether this will make any real difference in the ongoing narrative of Constitutional interpretation can only be known through subsequent decisions that rewrite the story. When the Court

116. 505 U.S. 833 (1992).

117. 410 U.S. 113 (1973).

118. *Casey*, 505 U.S. at 901.

119. *Id.* at 866.

120. See in particular his dissent in *Lawrence v. Texas*, 539 U.S. 558, 588 (2004) (Scalia, J., dissenting).

121. JAMES, *supra* note 37, at 1323.

reverses itself, there is of course a moment of narrative *peripeteia*, a reversal that forces a re-reading, an *anagnorisis* or recognition that makes the past bathe in a different light—or else makes the new-found ending seem illegitimate.

No one, I suspect, wants to abolish the muffled majesty of Supreme Court rhetoric. It makes us sleep better at night, and when it is seriously violated—as in *Bush v. Gore*—we suffer.¹²² But I do want to urge that some attention to the “narrativity” of the law—the narrative transactions performed within the law—could begin to open to thought some of the unthought assumptions, procedures, and language of the law. If, as Souter puts it in *Old Chief*, a syllogism is not a story, the law needs to become more conscious of its storytelling functions and procedures. If stories are generally told from a point of view, for a purpose, and create a perspective on happenings—even create happenings through perspective—then it would seem that some borrowings from literary analysis and theory could be useful. The “law and literature” movement has been less effective than it might be, I think, because it has, with excessive arrogance or excessive humility (or often some combination of both), proposed a relation to the law ranging from the deconstructive (possible certainly, but largely useless) to the feel good (literature as a cozy humanizing teddy bear for law to curl up with). What it might better do, I believe, is demonstrate to legal studies that it has analytic instruments in its toolkit that might actually be of some use with the legal plumbing.

122. 531 U.S. 98 (2000). The acrimonious and overtly political split of this case tended to cast discredit on the notion of the Court as elevated above politics, making decisions on purely legal grounds, as Justice Breyer most openly stated in his dissent. *See id.* at 158 (Breyer, J., dissenting).