

2009

Narrative Construction of Legal Reality, The

Richard K. Sherwin
New York Law School

Follow this and additional works at: http://digitalcommons.nyls.edu/fac_articles_chapters

Recommended Citation

6 J. Ass'n Legal Writing Directors 88 (2009)

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

The Narrative Construction of Legal Reality*

Richard K. Sherwin**

Introduction

What makes a deductive-nomological explanation "explain," is . . . that it tells us why E [an individual event] had to be (occur), why E was necessary once the basis is there and the laws are accepted.

—Georg Henrik von Wright¹

What is truth? a mobile army of metaphors, metonyms, anthropomorphisms, in short, a sum of human relations which were poetically and rhetorically heightened, transferred, and adorned, and after long use seem solid, canonical, and binding to a nation.

—Friedrich Nietzsche²

The law of rhetoric . . . is that one must lie in order to speak the truth.

—Jean-Paul Sartre³

For a long time we have been taught to interpret the law's meaning and authority in the rhetoric of rhetoric's suppression. Objectivity,⁴

Richard K. Sherwin, *The Narrative Construction of Legal Reality*, was first published at 18 Vt. L. Rev. 681 (1994). © 1994 Vermont Law Review; Richard K. Sherwin. Reprinted with permission.

The article has been reprinted with only minor modifications in formatting, and the original footnote citation format has been retained.

* This essay is dedicated to Jerome Bruner, tireless trailblazer and teacher extraordinaire.

** Richard K. Sherwin. Professor of Law, New York Law School; J.S.D. 1989, L.L.M. 1985, Columbia; J.D. 1981, Boston College; B.A. 1975, Brandeis.

¹ GEORG HENRIK VON WRIGHT, EXPLANATION AND UNDERSTANDING 13 (1971).

² FRIEDRICH NIETZSCHE, *On Truth and Lying*, in FRIEDRICH NIETZSCHE ON RHETORIC AND LANGUAGE 250 (Sander L. Gilman et al. eds. & trans., 1989) (n.d.).

³ JEAN PAUL SARTRE, SAINT-GENET: ACTOR & MARTYR 518 n. * (Bernard Frechtman trans., 1963) (1952).

⁴ See generally H. Richard Uviller, *The Advocate, The Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. PA. L. REV. 1067, 1067 (1975) ("[I]t seems to me that properly directed and purged of obvious abuses, the juxtaposition of two contrary perspectives, the impact of challenge and counter-proof, often discloses to a neutral intelligence the most likely structure of Truth."); ALEXANDER WELSH, STRONG REPRESENTATIONS: NARRATIVE AND CIRCUMSTANTIAL EVIDENCE IN ENGLAND (1992).

For the past two hundred years, irrespective of their differences, Anglo-American and Continental courts of law have put primary emphasis on true representations of the facts. This state of affairs differs markedly from the frank

neutrality,⁵ and acontextual comprehensiveness⁶ have long served as academic standards by which to measure scholarly achievement and judicial excellence. In legal academia, impersonal abstractions rather than particular voices and dramas have ruled the day. We have been taught (and more often than not continue to teach others) to suppress the proper name, to play down who figures how in the stories that lawyers and judges tell.

There is nothing surprising in this. After all, it has long been a part of the Western philosophical tradition to prefer the abstract and the universal over the particular and the contextual. Recall Plato, who would have banished the poets and dramatic storytellers from his ideal state for fear of their undermining truth and law.⁷ (Plato's own political tale apparently would have escaped philosophical censure.⁸) Or consider Descartes, who derided the eloquence of rhetoric and narrative in favor of reason's supposedly unmediated clarity.⁹ (Yet Descartes also knew full well when "to put forward

emphasis upon superior rhetoric among ancient authorities; the customs of ordeal, combat, or compurgation known to early medieval Europeans; the finally self-defeating methods of arriving at truth by torture and confession introduced in the twelfth century; or the original uses of the English jury trial.

WELSH, *supra*, at 10.

⁵ See generally BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 309–10 (1980) ("[C]itizens of a liberal state have more than the right to complain in court when others frustrate their desires. They have a right to relief when their fellows prove incapable of justifying their power through Neutral dialogue."); *id.* at 10–12 (on the desirability of neutrality); see also Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

⁶ See generally JOHN RAWLS, A THEORY OF JUSTICE 13 (1971) ("Justice as fairness begins . . . with one of the most general of all choices which persons might make together, namely, with the choice of the first principles of a conception of justice which is to regulate all subsequent criticism and reform of institutions."); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 116–17 (1977) (describing Hercules as the ideal judge who "must construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well").

⁷ "[W]e can admit no poetry into our city save only hymns to the gods and the praises of good men. For if you grant admission to the honeyed Muse in lyric or epic, pleasure and pain will be lords of your city instead of law. . . ." PLATO, *The Republic*, Book X, line 607a, in PLATO, THE COLLECTED DIALOGUES (Edith Hamilton et al. eds., 1961) (n.d.) [hereinafter PLATO, *The Republic*]; see also PLATO, GORGIAS (W.C. Helmbold trans., The Liberal Arts Press, Inc. 1952) (n.d.) (equating rhetoric with beauty-culture and cookery, both of which pander harmfully to our depraved tastes rather than what is true or real).

⁸ This is Plato's "opportune falsehood" and "one noble lie" based on the caste of an individual's genetic metal. See PLATO, *The Republic*, *supra* note 7, at Book III, lines 414b–c. "God in fashioning those of you who are fitted to hold rule mingled gold in their generation, for which they are most precious—but in the helpers silver, and iron and brass in the farmers and other craftsmen." *Id.* at lines 415a–b.

⁹ RENE DESCARTES, *Discourse on Method*, in THE PHILOSOPHICAL WORKS OF RENE DESCARTES (Elizabeth S. Haldane et al. trans., Cambridge Univ. Press 1931) (n.d.) "Those who have the strongest power of reasoning, and who most skillfully arrange their thoughts in order

his ideas plainly and unemotionally and when to appeal to the irrational sides of human nature.”¹⁰)

And what of that other bright star in the Western philosophical firmament, Immanuel Kant? Did not Kant champion the modernist faith in dispassionate rationality. Was it not his belief that human reason could discern the intervention of justice in our world, as if it were some mighty transcendent force?¹¹ Did he not insist upon the value of “disinterested” as opposed to “interested” judgments?¹² More recently, one can hear the echoes of Kantian modernity in the words of John Rawls when Rawls speaks about justice and the concept of right: “Principles should be general. That is, it must be possible to formulate them without the use of what would be intuitively recognized as proper names, or rigged definite descriptions.”¹³ Justice as fairness, under the Rawlsian veil of ignorance, has no need of proper names or particular contexts. It has no need to hear personal stories or to look upon the storied face of the other.

On the other hand there has always been an other hand—the less dominant, less rule-bound, left-handed view.¹⁴ Today, in the natural sciences,¹⁵

to render them clear and intelligible, have the best power of persuasion even if they can but speak the language of Lower Brittany and have never learned Rhetoric.” *Id.* at 85.

¹⁰ PETER FRANCE, RHETORIC AND TRUTH IN FRANCE: DESCARTES TO DIDEROT 67 (1972); *see generally* JEAN D. MOSS, NOVELTIES IN THE HEAVENS: RHETORIC AND SCIENCE IN THE COPERNICAN CONTROVERSY (1993).

¹¹ *See* RICHARD KUHN, TRAGEDY: CONTRADICTION AND REPRESSION 98 (1991).

¹² *See* IMMANUEL KANT, CRITIQUE OF JUDGMENT 199 (J.H. Bernard trans., Hafner Press 1951) (n.d.) (“The beautiful pleases *immediately . . . apart from any interest. . .*”); *cf.* FRIEDRICH NIETZSCHE, THE BIRTH OF TRAGEDY AND THE GENEALOGY OF MORALS 238 (Francis Golffing trans., Doubleday & Co. 1956) (1887) (“Kant, like all philosophers, instead of viewing the esthetic issue from the side of the artist, envisaged art and beauty solely from the ‘spectator’s’ point of view, and so, without himself realizing it, smuggled the ‘spectator’ into the concept of beauty.”). In Nietzsche’s view, “All seeing is essentially perspective, and so is all knowing. The more emotions we allow to speak in a given matter, the more different eyes we can put on in order to view a given spectacle, the more complete will be our conception of it, the greater our ‘objectivity.’” NIETZSCHE, *supra*, at 255.

¹³ RAWLS, *supra* note 6, at 131.

¹⁴ *See* JEROME S. BRUNER, ON KNOWING: ESSAYS FOR THE LEFT HAND (expanded ed. 1979).

¹⁵ *See generally* PAUL FEYERABEND, SCIENCE IN A FREE SOCIETY (1978); THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

the social sciences,¹⁶ the humanities,¹⁷ and the law,¹⁸ the traditional repudiation of rhetoric and dramatic narrative is being questioned. Increasingly, scholars are realizing the inescapability of storytelling and the diverse ways in which narratives construct what we regard as truth and reality.¹⁹ But of course this too is not new. Even before Plato there was Isocrates, who advised young men “to spend some time on the exact sciences, like astronomy and geometry, but not to allow their minds to be dried up by these barren subtleties, nor to be stranded on the theoretical speculations of the ancient sophists. . . .”²⁰ And even after Descartes, there was Vico, who warned: “There is a danger that instruction in advanced philosophical

¹⁶ See generally JEROME BRUNER, *ACTS OF MEANING* (1990) (psychology); REID HASTIE ET AL., *INSIDE THE JURY* (1983) (same); SIMON SCHAMA, *DEAD CERTAINTIES* (1991) (history); HAYDEN WHITE, *METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH-CENTURY EUROPE* (1973) (same); RICHARD A. SHWEDER, *THINKING THROUGH CULTURES: EXPEDITIONS IN CULTURAL PSYCHOLOGY* (1991) (anthropology); SALLY E. MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* (1990) (same); Kim L. Scheppelle, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989) (sociology); Kim L. Scheppelle, *Just the Facts Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y. L. SCH. L. REV. 123 (1992) (same).

¹⁷ See generally RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* (1983) (philosophy); RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979) (same); JACQUES DERRIDA, *MARGINS OF PHILOSOPHY* (Alan Bass trans., University of Chicago Press 1982) (1972) (same); ON NARRATIVE (W.J.T. Mitchell ed., 1981) (literary criticism); WAYNE BOOTH, *MODERN DOGMA AND THE RHETORIC OF ASSENT* (1974) (same).

¹⁸ See generally W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* (1981); BERNARD S. JACKSON, *LAW, FACT AND NARRATIVE COHERENCE* (1988); *Lawyering Theory Symposium: Thinking Through the Legal Culture*, 37 N.Y. L. SCH. L. REV. 9 (1992).

¹⁹ See, e.g., Jerome Bruner, *A Psychologist and the Law*, 37 N.Y. L. SCH. L. REV. 173 (1992).

Stories are so compelling and useful a way of representing deviations from expectancy in the world that cultures typically include a good stock of them in their tool kit of ready mades. This tool kit is . . . used incessantly. Studies of white, working-class families in Baltimore show, for example, that children who hang around adult conversations are exposed to real-life narratives at the rate of about six per hour. . . .

Id. at 176 (footnote omitted).

²⁰ ISOCRATES, *Antidosis*, in ISOCRATES II 334–35 (T.E. Page et al. eds., & George Norlin trans., Loeb Classical Library 1929) (n.d.).

For since it is not in the nature of man to attain science by the possession of which we can know positively what we should do or what we should say, in the next resort I hold that man to be wise who is able by his powers of conjecture to arrive generally at the best course, and I hold that man to be a philosopher who occupies himself with the studies from which he will most quickly gain that kind of insight.

Id. at 334–35.

criticism may lead to an abnormal growth of abstract intellectualism, and render young people unfit for the practice of eloquence.”²¹

And today, in the time of Rawls and Ackerman and Dworkin, increasingly, in the legal academy, we hear and read left-handed scholarly talk about the making and telling of stories. The new discourse comes from scholars who study particular legal contexts²² and who seek to give life to particular (often unheard) voices and dramas in the legal culture.²³ In these works we are being invited, as Professor Peggy Davis has aptly put it, to consider “how people get together, talk, and settle upon articulations—and therefore upon interpretations—of facts and of governing rules . . . and the characteristics of mind and culture that structure the weaving of stories. . . .”²⁴

Today the dominance of the rhetoric of rhetoric's suppression is easing. Amid the smoothing, depersonalized narratives of sweeping principle and decontextualized abstraction, other rhetorics can now be heard.²⁵ In the legal culture today one can discern the rhetoric of multi-vocality, empathy, and emotion playing out against a living backdrop of drama, myth, and metaphor.²⁶ These diverse rhetorical and narrative forms have always been

²¹ GIAMBATTISTA VICO, ON THE STUDY METHODS OF OUR TIME 13 (Donald Verene & Elio Gianturco trans., Cornell Univ. Press 1990) (1709). It was Vico who also said: “It often happens that people unmoved by forceful and compelling reasons can be jolted from their apathy, and made to change their minds by means of some trifling line of argument.” *Id.* at 15.

²² See, e.g., Susan H. Williams, *Legal Education, Feminist Epistemology, and the Socratic Method*, 45 STAN. L. REV. 1571, 1574 (1993) (“Knowledge can be understood as a social practice deeply embedded in a particular culture. . . . One's position in a social framework will have profound effects on what one knows and the path by which one comes to know it, and no social position can claim access to some undistorted truth.”); Peggy C. Davis, *Law and Lawyering: Legal Studies with an Interactive Focus*, 37 N.Y. L. SCH. L. REV. 185 (1992).

²³ See, e.g., DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864, 1865 (1990); see also Sandra D. O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217–20 (1992).

²⁴ Peggy C. Davis, *The Proverbial Woman*, 48 REC. ASS'N B. CITY N.Y. 7, 7 (1993); see WILLIAM TWINING, RETHINKING EVIDENCE 223 (1990) (“‘A story is a narrative of particular events arranged in a time sequence and forming a meaningful totality.’” (citing Paul Ricoeur)).

²⁵ See Donald P. Spence, *Narrative Smoothing and Clinical Wisdom*, in NARRATIVE PSYCHOLOGY: THE STORIED NATURE OF HUMAN CONDUCT 211 (Theodore R. Sarbin ed., 1986).

²⁶ See generally Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L. J. 1329 (1991); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Richard K. Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729 (1988); Richard K. Sherwin, *Lawyering Theory: An Overview—What We Talk About When We Talk About Law*, 37 N.Y. L. SCH. L. REV. 9, 17 nn. 17–20 (1992); Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y. L. SCH. L. REV. 55, 64–65, 65 n. 23, 95–96, 96 nn. 111–12, 112 n. 145 (1992) (on myth and drama and metaphor).

there, even if their authority has at times fallen into desuetude. Perhaps in the years to come the reemergence of storytelling in the field of legal scholarship will come to be seen as part of a much larger cultural development; for convenience, let us call it postmodernism. In light of this culture-wide shift away from the positivist model for knowledge, cognition and perception, legal scholars and teachers of law may more readily be inclined to give serious thought to the realities that practicing lawyers and judges face everyday. They too will see that from the scraps and fragments of lived experience stories are being told—told to communicate,²⁷ to persuade,²⁸ and at times simply to be heard.²⁹

As a result of such heightened sensitivity to the importance and pervasiveness of storytelling in the law, storytelling itself has come in for greater scholarly scrutiny.³⁰ This is not surprising given the number of unanswered questions in this area. For example, of what are legal stories made and how do they work? How does a story trigger our narrational expectations, leading us to the familiar site of a known genre? How does the story exploit our world knowledge—the numerous and varied cultural scripts, schemata, and stereotypes, that we carry around in our heads?³¹ How does the story make use of shapeshifting mood devices, such as Todorov's transformations, which alter the action of the verb from a *fait accompli* (the historical fact of the matter) to an action that is psychologically in process (what we might call the contingent or *subjunctive* mode)?³² Or consider: How do story structure and character-typing interact with narrative composition and genre selection in the creation of meaning?³³

This article only takes a small step along one of the paths that these inquiries project. Part I focuses on the narrative use of schemata in a series of redescrptions of a possible case of homicide. Part II examines the work of

²⁷ See generally JOHN M. CONLEY & WILLIAM M. O'BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE* (1990); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991) (analyzing how jurors make stories out of evidentiary fragments).

²⁸ Willem J. Witteveen, *Doctrinal Stories*, 6 INT'L J. SEMIOTICS L. 179 (1993).

²⁹ See generally Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

³⁰ See generally Symposium, *Lawyers as Storytellers & Storytellers as Lawyers: An Interdisciplinary Symposium Exploring the Use of Storytelling in the Practice of Law*, 18 VT. L. REV. 565 (1994); see also Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993); Jane B. Barron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994).

³¹ See *infra* notes 59–63 and accompanying text (describing typical schemata and scenarios as mental blueprints for how a particular kind of event plays out in life).

³² See, e.g., JEROME BRUNER, *ACTUAL MINDS, POSSIBLE WORLDS* 29 (1986) [hereinafter *ACTUAL MINDS*].

³³ See, e.g., Jerome Bruner, *The Narrative Construction of Reality*, 18 CRITICAL INQUIRY 1, 29 (1991) [hereinafter *The Narrative Construction of Reality*].

schemata and narrative genre together with the effects of plot and mood in the stories counsel told in briefs submitted to the United States Supreme Court in the landmark case of *Miranda v. Arizona*.³⁴ My goal throughout is to try to convey a better sense of how particular story elements can be used to shape and inform the meaning of a particular legal reality. My hope is that this kind of close textual analysis will stimulate increased self-reflectiveness about how legal narratives trigger or induce a particular belief or expectation concerning the explanatory value ("truthfulness") or verisimilitude ("lifelikeness") of the legal and factual realities that are being portrayed.³⁵

Before proceeding to the specific legal stories that this article will invite you to consider, one more point may warrant explicit noting. Much has been said over the years about the artificial reason of the law. From Lord Coke's day³⁶ down to our own,³⁷ jurists have referred to the law as a discipline unto itself. The interpretive or constructivist approach offered here does not deny that there may be practices which are unique to the legal culture. However, a significant aspect of the storytelling and, more generally, of the interpretive turn in legal studies involves the recognition of a complex interpenetration and cross-fertilization from the mainstream to the legal culture, and vice-versa. Upon closer scrutiny of the stories that lawyers and judges tell, it becomes apparent that popular culture offers a rich source of meaning schemata which daily inform and shape our expectations about what constitutes a good story and how that story ought to play out.

For example, in the legal culture, as in the mainstream culture, there is evidence of a strong popular affection for the detective story's ingenious, albeit straightforward, logic-driven marshalling of clues culminating in closure and finality.³⁸ The detective story typically takes us along a causally sequential

³⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966).

³⁵ For a fuller development of this theme, see Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessities in a Criminal Case*, 47 STAN. L. REV. (forthcoming 1994) [hereinafter *Law Frames*].

³⁶ *Prohibitions Del Roy*, 77 Eng. Rep. 1342, 1343 (K.B. 1608).

³⁷ Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35 (1981).

³⁸ All those litigators and jurors who at one time were beguiled viewers of that brilliant trial attorney, Perry Mason, know that in the final moment of artful cross-examination the confession will come and truth will dissolve any antecedent mystery. See generally Steven D. Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police as Television Heroes*, 42 U. MIAMI L. REV. 229 (1987). Jeremiah Donovan also mentioned this in his speech at the Symposium.

See also TZVETAN TODOROV, INTRODUCTION TO POETICS 41 (Richard Howard trans., University of Minn. Press 1981) (1968) ("Most works of fiction of the past are organized according to an order that we may qualify as both temporal and logical; let us add at once that the logical relation we habitually think of is implication, or as we ordinarily say, causality."); Herbert Morris, *The Decline of Guilt*, 99 ETHICS 62 (1988).

Among law's clearest lessons are that norms exist and that they are to be taken

path ending with certainty, for in the end we know “who done it,” who is to blame. Such knowledge is often accompanied by a sense of inevitability. As if to say, “If one were but to look at the matter closely enough, the truth shall emerge. It is but awaiting detection.”³⁹ In this respect, the detective story may be said to represent a popular version of the long-dominant “logico-scientific” genre.⁴⁰ The world according to this genre is one in which logic makes its demands and reality complies. Whether we desire it to be so or not is quite beside the point, for surely impersonal natural forces care not a wit for human wishes and feelings. We must accept things as they are. We must accept reality. At least that is the familiar posture in which one finds oneself when one is in the grip of this kind of explanatory narrative genre. In the logico-scientific story the audience is typically cast in the role of objective observer, with a view of reality that is both dispassionate and fixed. Faced with what has been shown to be the case, one accepts.

Prosecutors in criminal cases can be quite fond of the logico-scientific story form.⁴¹ It comports nicely with their burden of proof, namely to demonstrate guilt beyond a reasonable doubt. And it carries a solid psychological insight. Cast into a world of objective truth, where deductive and inductive logic dictates concrete results, jurors may more readily accept their fate: to confirm what has already occurred, and to apply the rules that govern legal outcomes in such situations. Passivity before truth and law, letting the judgment that must come come, is a classic (although by no means exclusive) formula for prosecutorial success.

Of course, jurors may also be led to reject the passive role that the prosecutor may cast for them. Rather than being ruled by fixity and closure, jurors may instead enter a world of possibility and openness. At any rate, there is a good chance that this is the kind of world that the defense’s story will presuppose.⁴² This kind of story lacks logico-scientific precision. Instead, it

seriously. These in turn provide reassurance that our social world is orderly and not chaotic, that it is a structured space in which not everything is permitted, where there are limits to conduct, a role for rational argumentation over who has crossed these limits, and, equally important psychologically, that closure exists as a possibility once these limits have been breached.

Morris, *supra*, at 69; see also *Law Frames*, *supra* note 35.

³⁹ It may be that one of the great functions of the law is to propagate a continued belief in certitude and closure so that justice may be done. See Morris, *supra* note 38. This is, perhaps, our own “noble lie,” according to which the truth (of uncertainty) must be suppressed for the sake of a greater truth (the possibility of justice). See RENE GIRARD, *VIOLENCE AND THE SACRED* (Patrick Gregory trans., Johns Hopkins Univ. Press 1977) (1972) (on scapegoating).

⁴⁰ See ACTUAL MINDS, *supra* note 32, at 12; see also *The Narrative Construction of Reality*, *supra* note 33, at 19; CARLO GINZBURG, *CLUES, MYTHS, AND THE HISTORICAL METHOD* 106–17 (John & Anne Tedeschi trans., Johns Hopkins Univ. Press 1989) (1986) (referring to the Galilean method of proof); VON WRIGHT, *supra* note 1.

⁴¹ See generally Amsterdam & Hertz, *supra* note 26.

⁴² See generally *id.*

portrays a world filled with contingencies, uncertainties—the stuff of human drama. The world that it presupposes is psychologically in process. In such a world, jurors are likely to feel compelled to rely upon their own world knowledge in order to fill in the gaps that the defense's story presents. And the inherited cultural knowledge at the jurors' fingertips will be, at least so the defense hopes, shaped and informed by the images, scripts, and familiar scenarios that defense counsel evokes during the course of the trial. For unlike the prosecutor's passivity-inducing counter-narrative, the defense wants the jurors to know that this is their story too. They have the final say in the outcome of the drama. On this view, truth and justice need not be externally demanded: neither by objective reality nor by some impersonal ("logical") force.⁴³

From what has been said so far, one may begin to see how different narrative genres compete for a legal audience's attention and belief.⁴⁴ But there is more to be discerned here than competition among story genres, whether it is the genre of historical truth or that of narrative seduction. One may also note the influence of newly emerging story forms and storytelling techniques. Consider, in this regard, the impact of the quick-cut montage, the rapid juxtapositioning of sound and image in contemporary film and television, particularly in television advertising.⁴⁵ These same techniques can be seen again in the thirty second sound bite on the news, or the ninety

⁴³ Compare, for example, Justice Blackmun's empathic and emotional narrative in his dissent in *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989), with Justice Rehnquist's imperative, syllogistic interpretation of relevant case law in the same case. According to Justice Rehnquist: "[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* at 195. In contrast, Justice Blackmun states:

Poor Joshua Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes . . . "dutifully record[] these incidents in [their] files."

Id. at 213 (Blackmun, J., dissenting) (citation omitted).

⁴⁴ See, e.g., Richard J. Gerrig & Deborah A. Prentice, *The Representation of Fictional Information*, PSYCHOL. SCI., Sept. 1991, 336, 336–40; Daniel S. Bailis et al., *The Influence of Fictional Information on Beliefs About the Real World* (May 1, 1993) (paper on file with author); WAYNE C. BOOTH, *THE COMPANY WE KEEP: AN ETHICS OF FICTION* 16 (1988) ("[W]e never read a story without making a decision, mistaken or justified, about the implied author's answer to a simple question: Is this 'once-upon-a-time' or is it a claim about events in real time?").

⁴⁵ See, e.g., SERGEI M. EISENSTEIN, *THE FILM SENSE* (Jay Leyda ed. & trans., 1975) (1942). The task that confronts [the film director] is to transform [the director's inner] image into a few basic *partial representations* which, in their combination and juxtaposition, shall evoke in the consciousness and feelings of the spectator, reader, or auditor, that same initial general image which originally hovered before the creative artist.

Id. at 30–31.

second summation on *L.A. Law*, or in the glitzy channel-surfing emulations of MTV. Given the potency of these audio-visual techniques, the more staid images and plodding plot forms of a previous generation, along with the world-view that they presuppose (typically featuring the evidentiary smoking gun as part of the airtight Sherlock Holmesian causal-analytic/mystery-expose format) may be losing their grip upon popular belief.⁴⁶ Today the power of silent, rapid associations (as if unreeling scenes from some subliminal mythological tale) may more readily do the trick of truth-speak and persuasion.⁴⁷

Consider the Rodney King affair. The general public's interpretation of the beating of King was based primarily on the mass media's extensive broadcast of the George Holliday videotape that captured the Los Angeles police officers' blows. This contrasted sharply with the jury's interpretation which was based not only on a slightly longer version of the Holliday videotape, but one that the defense team had skillfully *contextualized* (against the backdrop of an eight-mile, high-speed chase during which King reached speeds approaching 100 miles per hour) and *reconstructed* (using such techniques as freeze-frame sequencing to emphasize the officers' responsiveness to King's resistant behavior, and sound-track alternations to emphasize, for example, the sound of a Taser stun-dart being fired rather than that of a police baton blow). A recent *New York Times* article captures the point well:

[P]hotographic images of all sorts remain essentially ambiguous, and must be anchored in a convincing narrative before they take on a specific meaning. And most images can be made to fit into a number of widely disparate narratives.

. . . In news photography, captions play a crucial role in defining not only what a photograph means, but even what it depicts. Photojournalists are fond of recounting incidents in which the same

⁴⁶ To the TV generation, starting perhaps with the post-J.F.K. assassination crowd, the aesthetic jolt coming off the crime left unsolved (as frequently is the case in contemporary television shows involving criminals, police, and lawyers) may surpass the one coming off the fact of resolution. In this way, we see that popular storytelling fashions mimic, in form and in substance, a mood of uncertainty and disillusionment in the popular culture. As novelist Don DeLillo recently stated in an interview about the assassination of J.F.K.:

We still haven't reached any consensus on the specifics of the crime: the number of gunmen, the number of shots . . . the list goes on and on. Beyond this confusion of data, people have developed a sense that history has been secretly manipulated. . . . I think we've developed a much more deeply unsettled feeling about our grip on reality.

Anthony DeCurtis, "*An Outsider in This Society*": *An Interview with Don DeLillo*, S. ATLANTIC Q., Spring 1990, at 281, 286.

⁴⁷ See, e.g., ACTUAL MINDS, *supra* note 32, at 28; Amsterdam & Hertz, *supra* note 26, at 104–10, 105 n. 129, 106–07 nn. 134–35.

picture, with different captions, has been used by different publications to illustrate exactly opposite points of view.

In television news, the raw information provided by the videotape of an event is heavily processed and filtered by a variety of mechanisms before it gets on the air.⁴⁸

In short, whether the matter in question is technical or popular, whether the medium in which it is being portrayed is textual, audio-visual, or image only, there is no non-interpretative way to frame its meaning. Because this is so, the world-view that is prefigured in or presupposed by any storytelling technique, cannot be idly ignored, not if its power is to be understood and harnessed—or countered.⁴⁹ This means that in order to perform effectively, many lawyers, particularly litigators, may be obliged to keep abreast of (in order to tap into) the popular storytelling forms and images that people commonly carry around in their heads.⁵⁰ Today the main source of these forms and images is the electronic mass media. Legal scholars who ignore the truth of this reality will increasingly be talking to themselves.

But if self-reflexive storytelling and the constructivist (fiction/fact blending) spirit of postmodernism represent an important part of the current cultural scene, that does not mean that their impact is monolithic. For example, one might suggest that the *hard-coreless postmodernism* of some critical scholars⁵¹ and avant-

⁴⁸ Charles Hagen, *The Power of a Video Image Depends on the Caption*, N.Y. TIMES, May 10, 1992, § 2, at 32.

⁴⁹ See, e.g., *The Narrative Construction of Reality*, *supra* note 33, at 16 (“The normativeness of narrative, in a word, is not historically or culturally terminal. Its form changes with the preoccupations of the age and the circumstances surrounding its production.”).

⁵⁰ Cf. AL RIES & JACK TROUT, POSITIONING: THE BATTLE FOR YOUR MIND 5 (rev’d ed. 1986) (“To be successful [in advertising] today, you must touch base with reality. And the only reality that counts is what’s already in the prospect’s mind.”); see also Symposium, *Power Advocacy: Achieving Maximum Jury Impact During Trial*, N.Y. ST. B. ASS’N, Oct. 15, 1993, at 3 (featuring a presentation entitled “Opening Statement: Lessons from L.A. Law”). Litigators have conceded (albeit off the record) that they have been influenced by the style and techniques of “L.A. lawyering.”

⁵¹ See, e.g., HAYDEN WHITE, THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION 75 (1987) (“One must face the fact that when it comes to apprehending the historical record, there are no grounds to be found in the historical record itself for preferring one way of construing its meaning over another.”); RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 20 (1989) (“[T]he world does not provide us with any criterion of choice between alternative metaphors, . . . we can only compare languages or metaphors with one another, not with something beyond language called ‘fact.’ ”); Martin Jay, *Of Plots, Witnesses, and Judgments*, in PROBING THE LIMITS OF REPRESENTATION: NAZISM AND THE “FINAL SOLUTION” 97, 101 (Saul Friedlander ed., 1992) [hereinafter PROBING THE LIMITS] (“If postmodernism means anything, it implies the abandonment of precisely the dream of submitting to the exigencies of pure language or pure vision.”).

garde film-makers⁵² is not the same as the *soft-core postmodernism* that we witness in most contemporary film and television—and in the most artful litigation.⁵³ While the hard-coreless postmodernist may deny the very possibility of knowing truth or reality, claiming that there is simply no “there” there to know, the soft-core postmodernist offers more. Unlike their hard-coreless cousins, soft-core postmodernists are believers. Indeed, it is by virtue of their (and our) belief in the substance of certain images, feelings, myths, and dramatic forms that soft-core postmodernists can hook us into particular ways of seeing, thinking, and feeling about ourselves and others and events around us. In this way, soft-core postmodernism is able to supply more than the hard-coreless postmodernist’s ironic laughter or nihilistic despair in the face of cosmic emptiness or the endless profusion of form. Soft-core postmodernists (like most of us) know that that kind of brittle laughter and despair have no place in the world most of us inhabit—the everyday world of judgment and accountability, the law’s proper domain.⁵⁴

What does it mean then, to speak of an end to the suppression of rhetorical and narratological analysis in legal education and scholarship? For one thing, I believe it has something to do with the emergence of the human voice, the proper name, the local drama. Witness in the legal culture today the claim of “thick” analysis countering the traditional claim of impersonal abstraction.⁵⁵ As part of this development we find a growing number of legal scholars inviting us to see and hear and feel with the particular voice, the

⁵² See, e.g., Anton Kaes, *Holocaust and the End of History: Postmodern Historiography in Cinema*, in *PROBING THE LIMITS*, *supra* note 51, at 206, 208–12 (“I believe that Hans-Jürgen Syberberg’s controversial seven-hour film of 1978, self-consciously entitled *Hitler—A Film from Germany*, represents one of the few attempts to come to terms with the Nazi phenomenon in a way that challenges Hollywood story-telling. . . .”) *Id.* at 208–09. “Syberberg is interested less in constructing history as a story with cause and effect (thereby implying a logical development that can be ‘understood’) than in presenting constellations and associations that surprise and shock the audience.” *Id.* at 210.

Syberberg’s translation of historical reality into a self-sufficient cosmos of signs, intertexts, quotations, allusions, memories, and associations gives him the freedom to encode German history in a variety of specular forms: as circus spectacle and horror cabinet; as puppet theater, cabaret, and side show; as tribunal; and as allegorical, baroque *theatrum mundi*. The central project of the film is not the representation of Hitler himself but the representation of the various ways in which Hitler has been represented.

Id. at 211–12.

⁵³ See, e.g., Philip N. Meyer, “Desperate for Love”: *Cinematic Influences upon a Defendant’s Closing Argument to a Jury*, 18 VT. L. REV. 721; Jeremiah Donovan, *Some Off-the-Cuff Remarks About Lawyers as Storytellers*, 18 VT. L. REV. 751.

⁵⁴ See *Law Frames*, *supra* note 35.

⁵⁵ See CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, in *THE INTERPRETATION OF CULTURES* 3, 9 (1973) (describing “thick” descriptions in anthropology as “sorting out the structures of signification . . . and determining their social ground and import.”).

proper name struggling to emerge from beneath the scholar's veil of ignorance. In addition to the emergence of diverse story forms we are also witnessing changes in the medium of storytelling itself. Consider the shift from textual linearity to audio-visual non-linearity.⁵⁶ By virtue of this cultural development, the presentation of cumulative causal sequences may be viewed as but one among other methods of persuasion. For example, we also encounter the use of powerful, isolated images, and the non-verbal associations that they trigger in the viewer's mind. This too, is a highly effective method of mobilizing desire and affecting belief.⁵⁷

As a result of these cultural and cognitive developments, or perhaps as part of their occurrence, scholars in a variety of fields, including law, are being led to ask wide-ranging questions about how meaning occurs, or more aptly

⁵⁶ See, e.g., Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509, 510 (1992) ("We live in an era of 'paratexts,' in which words and images, as captured by electronic recording, compete with print to represent legally significant events."); JAMES B. TWITCHELL, CARNIVAL CULTURE: THE TRASHING OF TASTE IN AMERICA 51 (1992) ("What characterizes the condition of culture since World War II is . . . that now we have more signs than referents, more images than meanings that can be attached to them. The machinery of communication often communicates little except itself—signs just refer to each other, creating a 'simulacra' of reality."); JEAN BAUDRILLARD, FATAL STRATEGIES (Jim Fleming ed., Philip Beitchman & W.G.J. Niesluchowski trans., Semiotext(e) 1990) (1983).

What fascinates everyone is the debauchery of signs, that reality, everywhere and always, is debauched by signs. This is the interesting game, and this is what happens in the media, in fashion, in publicity and more generally, in the spectacle of politics, technology, science . . . because the perversion of reality, the spectacular distortion of facts and representations, the triumph of simulation is as fascinating as catastrophe—and it is one, in effect. . . .

BAUDRILLARD, *supra*, at 74.

⁵⁷ See, e.g., DORIS-LOUISE HAINEAULT & JEAN-YVES ROY, UNCONSCIOUS FOR SALE: ADVERTISING, PSYCHOANALYSIS, AND THE PUBLIC 55 (Kimball Lockhart & Barbara Kerslake trans., University of Minn. Press 1993) (1984).

It is abundantly clear that the acquisition of certain goods above all does not depend on intellectual arguments; it is motivated instead by power or by narcissistic or phallic libido. In some cases the advertising message offers a range of intellectual arguments that can be used as camouflage or rationalizations.

Id. at 55–56.

In contrast to more conventional, straightforward, rational, causally-sequenced forms of persuasion, the use of isolated images appeals to a distinctly non-linear, acausal cognitive process (such as the subconscious mobilization of desire). See Law Frames, *supra* note 35.

Recent developments in chaos theory may also provide some useful insights here. According to this theory, small differences can, after a number of repetitions, contribute to disproportionate effects down the road. Applying chaos theory's non-linear approach to law, one might say that just as a butterfly's wing flutter in China may produce a hurricane in Florida, so, too, a defendant's inappropriate smile in the course of a criminal trial might create the cognitive armature around which jurors weave a story of guilt. See generally JAMES GLEICK, CHAOS: MAKING A NEW SCIENCE (1987); DRAGAN MILOVANOVIC, POSTMODERN LAW AND DISORDER: PSYCHOANALYTIC SEMIOTICS, CHAOS AND JURIDIC EXEGESES (1992).

put, how meaning is *constructed*.⁵⁸ Surprisingly, we still know comparatively little about what makes a good story work, or how it manages to enlist our passion and belief. Thus we ask: What are the constituent elements of a good story, and what function do they perform?

To begin to address these concerns in a particular legal context, consider the following illustrative story. It involves a possible case of homicide.

I. [Re-]Constructing a Homicide

Tony Kreskin was driving down a country road one day when he spotted a figure staggering along the roadside. The person looked hurt, so Kreskin stopped his car to investigate. When he saw that the person was indeed injured, Kreskin helped him into the car. The other's name, Kreskin soon learned, was Nicholas Faccio. Faccio told Kreskin he had been robbed and beaten by two unknown assailants.

After driving together for a while, Kreskin and Faccio struck up a friendship of sorts. Faccio said that he was on his way to play cards with an acquaintance of his, a wealthy man by the name of James Smite. When Faccio invited Kreskin to come along, Kreskin said okay.

While at Smite's house, following several hours of high stakes poker, Smite and Faccio had an argument. Despite this, Faccio and Kreskin spent the night at Smite's as planned. The next morning Kreskin awakened to find Faccio sprawled on the front lawn of the house. He'd been badly beaten and seemed close to death. Learning of the situation, Smite arranged to have Faccio taken to a local hospital. Kreskin was convinced that Smite had ordered one of his employees, a man by the name of Jake Crosby, to undertake the beating in order to teach Faccio a lesson. Kreskin subsequently arranged to have Crosby as a passenger in Kreskin's car. Kreskin then smashed up the car and Crosby was killed.

The legal question that this incident immediately raised is this: What are we to make of Jake Crosby's death? Was it simply an accident? Or is Kreskin a criminal, the perpetrator of a homicide?

Clearly, more facts are needed before a judgment can be made. Fortunately, more details are at hand.

⁵⁸ See generally JAMES W. STIGLER ET AL., CULTURAL PSYCHOLOGY: ESSAYS ON COMPARATIVE HUMAN DEVELOPMENT (1990).

Installment One

The incident described here is based on a real case, although the names have been changed. It was tried in state criminal court and Kreskin was ultimately convicted of manslaughter. Through witnesses and various exhibits at trial, the prosecutor established that around the time the incident took place, the defendant, Kreskin, was a middle-aged, unemployed drifter. After inheriting some money following his father's death, he'd been aimlessly driving around from one place to another.

Nicholas Faccio, the man Kreskin spotted on the roadside, was a young professional card player. Apparently he had been playing a high stakes game at the time he claimed to have been robbed, beaten, and left on the roadside where Kreskin found him. It was never made clear exactly who had attacked Faccio, or why.

James Smite was shown to have been a wealthy businessman. He claimed to have started his business ventures with money that he won in a lottery. Smite, like Faccio, liked to play cards. The two had played together before in Atlantic City and it was there that they arranged to play again at Smite's home.

On direct examination in court, Smite testified that in the course of their playing together, he had become convinced that Faccio and Kreskin were card sharks and that they had cheated him out of a significant amount of money. They argued over this at Smite's house the day before Faccio was beaten. While he claimed no responsibility for those injuries and could not explain how or why the beating of Faccio had occurred, Smite conceded that he was angry at Faccio and "was not unduly put out" by the fate Faccio had suffered. In his trial testimony Smite said, "Hey look, this guy's the type that makes enemies, know what I mean?"

While on the witness stand, Tony Kreskin, the defendant, expressed his belief that Smite had ordered Crosby to give Faccio a beating for revenge. Smite denied this. Concerning Crosby's death, Kreskin testified, "It was one of those things. It was an accident. What else can I say?"

In her summation, the prosecutor argued to the jury in part as follows:

Look, we all know what these characters Kreskin and Faccio were up to. They're sharks. They follow their noses, they live day-to-day. They play by their own rules. And the rules of the game are clear: "You get my guy, I get yours." And, ladies and gentlemen, that's precisely what Kreskin did. That's how he played it. Crosby crossed him, so he evened the score.

Apparently, the jury believed her; they convicted Kreskin of manslaughter. As it turned out, however, the jury may not have had all the facts before them.

Installment Two

Shortly after the trial, a young film-maker by the name of Earl Orris happened to read about the Kreskin case in the newspapers. It piqued his interest, so he decided to learn more about the matter. Through his own investigative efforts, Orris came up with some interesting facts, some of which had not come out at the trial. For instance, there was the nurse who cared for Crosby at the hospital before Crosby died. In the course of an interview that Orris conducted and filmed, the nurse said that Crosby kept saying the same thing, over and over, before he died: "If only I'd kept the music on, it'd be all right."

When Orris went to visit Kreskin in prison he asked Kreskin about what the nurse had said. In his own filmed interview, Kreskin gave this response:

Oh yeah, right. Just before the accident see I had the car stereo on, you know? I always drive to music. And at one point, Crosby just reached out and snapped the thing off. I mean, I couldn't believe it. So I turned to him, I was pissed, and I said, "Why'd you do that for?" I was staring at him, kinda hard like. Then all of a sudden I see, there was this truck . . . I spotted this truck real close by. And I guess . . . well, I didn't see it soon enough, so, anyway, you know, I had to jerk the car away fast. And there wasn't time, so, I just lost it, lost control. . . . So, yeah. Sure. If Crosby had just left the goddamn music on everything might've been all right.

When asked why he did not tell this to the prosecutor, Kreskin said:

Why didn't I bring it up? I'll tell you why. How could it've helped? By showing I was really pissed at Crosby in the car? Sure. Great. Don't you see that'd only help the jury believe I wanted to get him? Nah, it couldn't but've hurt me anyway. The DA would've seen to that, that's for sure.

The release of Orris's film, which included these and other interview fragments, created a stir. Faced with growing public pressure, and given the new evidence that the film interviews seemed to provide, officials eventually felt compelled to reopen Kreskin's case. A new judge reviewed the matter and after finding serious prosecutorial errors decided to throw out Kreskin's conviction. A second trial was then conducted. This time Kreskin wound up with an acquittal.

After the verdict everyone said that the film had been a key factor in getting Kreskin off. When the media reported how the defense had played Orris's film for the second jury, the notoriety sparked even more interest in the film and the person who made it. A number of interviews with Earl Orris followed. And in the course of one of those interviews some information came to light that the second jury had not known.

Installment Three

According to the film-maker's public account, he'd never intended to make a documentary film about the Kreskin case. Orris's interest was more "metaphysical," he said, than historical. The driving idea, as Orris put it in one interview, had to do with how "things seem to just happen in life, without reasons." The film, he said, was meant to be about fate, about how people's lives are manipulated by events beyond their control. It was meant to portray how people "deny their helplessness by making up stories about reality after the fact." According to Orris, "stories provide rationales, explanations. Like the rationale the film gives. It's a device to make sense of things. It gives people a sense of control. But it's all self-deception. At any rate, that's what I wanted the film to convey."

As it turned out, the people Orris interviewed for the film had been told about his interest in fate and coincidence. And the interview fragments that the film used were in fact selected because they dealt with Orris's theme. One film critic, who was particularly interested in the increasingly popular docudrama genre, personally approached some of the people who appeared in the film, including the nurse who cared for Crosby before he died. According to the critic, the nurse said that it was Earl Orris who had raised the possibility that Crosby might have done something to cause Kreskin to lose control of the car. The article that the film critic wrote includes this alleged quote by the nurse:

We were talking about chance, and like how someone could have his whole life changed by fate or something. I said, "Yeah, there are things you never know." Maybe Kreskin was out to even the score. Or maybe it was just one of those things, fortuitous like. Crosby happens to get killed and there's Kreskin a victim of circumstance, framed for something he had no control over. I can imagine that. Like if Kreskin was suddenly distracted. Crosby reaches out and snaps off the radio. Just enough time is lost to break Kreskin's concentration, and Kreskin cracks the car up. Then in the hospital, there's Crosby repeating the same thing, his dying words: "If only I'd kept the music on, it'd be all right."

If what this interview suggests is right, perhaps those who viewed the film were misled. Perhaps the first jury had it right after all. But the difficulties do not stop there.

Installment Four

Here begins the explanatory meta-text. It is a parasitic text, taking its substance from the installments that precede it. In return, it converts them, through its own explanatory system, into discrete forms of understanding.

One part of the meta-text's explanatory system consists of categories of narrative analysis. For example, consider the schema or script. These are the

mental blueprints that we carry around in our head for quick assessments of what we may or should be seeing or feeling in a given situation. Such blueprints are simplified models of experiences we have had before. They represent a kind of shorthand that transcribes our stored knowledge of the world, describing kinds of situations, problems, and personalities. These models allow us to economize on mental energy: we need not interpret things afresh when there are pre-existing categories that cover the experience or condition in question.⁵⁹

Consider, for example, the schema that applies to the following situation: *John went to a party. The next morning he woke up with a headache.* Now it is common knowledge that people drink too much at parties and wake up the next day feeling hungover. The situation described leaves out the explanation. But we have no trouble supplying it. There is a schema in our head that quickly comes to mind to provide that explanation.⁶⁰ The point is that the explanation that we come up with goes beyond the information given. We fill in the gap. It is like solving a riddle. For example, what activity is being described in the following passage:

First you arrange things into different groups. Of course, one pile may be sufficient depending on how much there is to do. If you have to go somewhere else due to lack of facilities that is the next step, otherwise you are pretty well set. . . . After the procedure is completed, one arranges the materials into different groups again. Then they can be put into their appropriate places. Eventually they will be used once more and the whole cycle will then have to be repeated.⁶¹

Doing the laundry, of course. But it is the application of the appropriate schema that allows this otherwise gibberish-filled paragraph to make sense.

So far, the first part of this installment's explanatory system has dealt with mental schemata and scripts. The second part addresses how solving the riddle of a situation's or a text's meaning requires that we go beyond the

⁵⁹ See ACTUAL MINDS, *supra* note 32, at 48 (referring to these models as the constituents of folk wisdom); see also Ronald J. Allen, *The Nature of Juridical Proof*, 13 CARDOZO L. REV. 373, 403 (1991).

⁶⁰ Consider, for example, how director Lawrence Kasdan, in his film *Grand Canyon*, makes use of the latent stereotypes that people absorb from the popular culture. In one of the opening scenes of his film we see a white male chatting on his car phone while driving a late model Lexus sedan through a poor neighborhood of Los Angeles. A BMW occupied by several young black males passes in the other direction. They exchange glances. Minutes later the white driver's car begins to lose power. The BMW passes by again, its occupants staring at the Lexus and its driver. The Lexus driver nervously glances back at the BMW. Without having presented a single explicit image of violence in this scene, Kasdan successfully mobilizes a sense of foreboding. See GRAND CANYON (Twentieth Century Fox 1991).

⁶¹ See Allen, *supra* note 59, at 404–05.

information that the situation or text offers. In the matter of narrative, one might say that there is a surface (“manifest”) story and an underlying (“latent”) story. The surface story may tell us about a particular person or event. Beneath that description, however, lies another tale. The underlying tale is the one that we fill in by bringing meaning schemata up to the surface. As a result, the surface tale turns into something more complex, perhaps a symbol of something else. That is why we can say something like, “He’s been drinking and dressing that way since she left him for his friend Carl,” and understand by it a recognizable emotional state: despondency, or something like it.

This talk about the latent story beneath the surface tale evokes talk about an old rhetorical device: the enthymeme. Aristotle spoke about the enthymeme as a bit of incomplete reasoning.⁶² The argument being offered makes sense only when the audience fills in what is missing from it. Having induced the audience to participate in this way, the arguer has brought them closer to his side. For they now find themselves actively supplying, out of their own world knowledge, the very thing that makes the argument make sense. And since the premise comes from them, not the arguer, shouldn’t they believe it to be so?⁶³

Now let’s apply this installment’s explanatory system to the stories from which it takes its substance. Consider *Installment One*. How does one make sense of a situation involving professional card players who get into a fight over a high stakes poker game with a wealthy businessman who claims to have built up his wealth from the lottery? By filling in the gaps, of course. And the surface story readily complies by conjuring up a latent schema, such as: *Everyone knows these are no ordinary card players*. At which point a typical scenario unfurls: card sharks, the rackets, shady business deals, a life of scams and violence. It is a familiar story, which suggests that the prosecutor got it right. These are people who play by their own rules, and in their game it’s “you get my guy, I get yours.” Kreskin’s conviction makes sense.

By a similar process of filling in the gaps, *Installment Two* also makes sense. What happens when you put together the following surface story elements: a prosecutor who couldn’t care less about facts (when what she’s after is the conviction), a system of justice that is capable of going astray, and a victim of circumstances—someone who happens to be at the wrong place at the wrong time. Someone who also happens to be an outsider whom many people would be only too happy to condemn at the first opportunity. From

⁶² See Witteveen, *supra* note 28, at 189.

⁶³ See VICO, *supra* note 21.

The skillful orator . . . omits things that are well known, and while impressing on his hearers secondary truth, he tacitly reminds them of the primal points he has left out and while he carries through his argument, his listeners are made to feel they are completing it themselves. This is the way in which the orator stirs their minds before he sets about arousing their emotions.

Id. at 25.

this perspective what the film shows makes sense, for a suitable interpretive schema is now at hand: Kreskin became a scapegoat. He was convicted for who he was, not for something that he had done.

There is a meaning-making schema for *Installment Three* as well: *the docudrama*. Everyone these days knows that TV and film people are willing to play fast and loose with the facts. Think of Oliver Stone's interspersing of real and simulated "documentary" *JFK*,⁶⁴ or NBC's use of incendiary devices to rig a truck explosion on its "newsmagazine" show, *Dateline NBC*,⁶⁵ or the profusion of television crime shows with their reenactments or live recordings (to the extent one can still tell the difference) of everyday police activities.⁶⁶ Considering the mass media's apparent willingness to blend reality and simulation, it comes as no surprise that Orris's film manipulated people into believing something that probably was not true. Indeed, once we see that it is the docudrama schema that explains Orris's film, a clear conclusion follows: Orris duped people with that nurse's dying words scenario and his simulated nothing-but-fate tale. And here perhaps another schema may also come to mind: *postmodernism*. For isn't this what postmodernists do? They play with the thin line that separates fiction and truth, fantasy and reality, myth and law.

So much then for *Installment Three*, but what about the meta-text itself, *Installment Four*. Is there a schema for this too? Would proposing a schema for a system of schemata be going too far? Yes, and no.

The answer may be no, if the schema to be applied tracks what I previously referred to as *soft-core postmodernism*. Most of us can accept being told that there are schemata or other categories of meaning making that we carry in our heads and commonly use in a variety of everyday contexts in order to make sense of events and people around us.⁶⁷ True, this way of understanding human understanding suggests that meaning is being actively constructed, that it is not just out there waiting to be discovered. But this is an acceptable view in the sense that uncovering the various meaning schemata that typically assist us in our interpretation of events and texts is by no means synonymous with the erosion of belief. For example, to talk about the mythic subtext of films like *Star Wars*,⁶⁸ or *Red River*,⁶⁹ or of a text like Shakespeare's

⁶⁴ *JFK* (Warner Brothers 1991).

⁶⁵ *Dateline NBC* (NBC television broadcast, Nov. 17, 1993).

⁶⁶ See, e.g., *Stories of Highway Patrol* (Fox television broadcast); *Cops* (Fox television broadcast); *A Current Affair* (ABC television broadcast); *Rescue 911* (ABC television broadcast).

⁶⁷ Of course not everyone is inclined to accept such postmodern, constructivist insights. See, e.g., Aaron Wildavsky, *Jerome S. Bruner: Acts of Meaning*, RESPONSIVE COMMUNITY, Summer 1991, at 78; cf. Richard K. Sherwin, *In Bruner's Defense*, RESPONSIVE COMMUNITY, Winter 1991/92, at 93.

⁶⁸ *STAR WARS* (Twentieth Century Fox 1977).

⁶⁹ *RED RIVER* (Metro-Goldwyn-Mayer/United Artists 1948).

The Tempest,⁷⁰ or even of a defense attorney's closing argument, need hardly impair our continued enjoyment of the effect that the story has upon us. We are still moved.

So in this respect, no: finding a schema for a system of meaning schemata, what I've called here soft-core postmodernism, probably would not be going too far. Knowledge about the different ways in which meaning can be and is being constructed is something we can live with. Specific beliefs may be affected by such knowledge, but belief itself is not at issue. At the same time, however, there is another schema that one might apply to *Installment Four*, and by extension to all the installments that I have been discussing, that would go too far. It is a schema that a number of contemporary scholars, including scholars of law, have found attractive.⁷¹ I call it the schema of *hard-*

⁷⁰ WILLIAM SHAKESPEARE, *THE TEMPEST* (Stephen Orgel ed., Oxford Univ. Press 1987) (n.d.)

⁷¹ See, e.g., Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987). Fish contends:

(1) that in whatever form it appears the argument for theory fails, (2) that theory is not and could not be used to do what Moore, Dworkin, and the Critical Legal Studies movement want it to do, generate and/or guide practice, (3) that when theory is in fact 'used' it is in the way Unger so dislikes, in order 'retrospectively' to justify a decision reached on other grounds, (4) that theory is essentially a rhetorical and political phenomenon whose effects are purely contingent.

Id. at 1781.

In short, according to Fish, since we are already constituted by a particular practice or interpretive community (be it "judging" or "theorizing about judging") there is nothing we can say, or that another can say to us, that is not already predetermined by who we and the utterer already are and what it is that we or s/he already do. See STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 171-73 (1980) (suggesting that it is "interpretive communities," rather than either the text or the reader, that produce meanings); Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984) [hereinafter Fish, *Fish v. Fiss*].

The person who looks about and sees, without reflection, a field already organized by problems, impending decisions, possible courses of action, goals, consequences, desiderata, etc. is not free to choose or originate his own meanings, because a set of meanings has, in a sense, already chosen him and is working itself out in the actions of perception, interpretation, judgment, etc. he is even now performing.

Fish, *Fish v. Fiss*, *supra*, at 1333. Or as Pierre Schlag puts it (aptly noting the ultimate irresponsibility of Fish's position): "You can't choose your interpretive construct because you are always already *within* them." Pierre Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37, 55 (1987).

Schlag takes Fish's deconstructive efforts a step further by deconstructing, in turn, Fish's notion of "interpretive communities" and of the "autonomous self" who supposedly belongs to such a community. *Id.* at 51 ("There is no reason to believe in interpretive communities or in the relatively autonomous self.").

Perhaps Duncan Kennedy caught the drift of what's left after such thorough deconstruction when he declared: "I want paradox and unconsciousness. Paradox and unconsciousness allow one experientially, existentially, to exist outside of the contradiction-space of separateness and unity." Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 23 (1984).

coreless postmodernism. Unlike the soft-core kind, this brand of postmodernism derides belief itself. According to this schema, it is schemata all the way down: there is no substance to feed on, only form.

Consider in this regard Jean Baudrillard's vision of the current Western cultural scene: "Communication is too slow. . . . In the to-and-fro of communication, the instantaneity of looking, light and seduction is already lost."⁷² In this view, our culture appears to be rapidly slipping from communication with content, into simulation, what Baudrillard calls "the ecstasy of the real."⁷³ According to Baudrillard, this state of ecstasy is a state of empty form.⁷⁴ Here images are stripped of meaning. Their naked force is akin to the force of seduction, or pornography. This is hard-coreless postmodernism: a condition in which meanings flatten out, and impersonal forces, like coincidence and fate, displace human intentionality.⁷⁵ It is a condition in which we may find millions of contemporary tele-viewers as they zap around the dial, prospecting for images, making shows out of chance associations⁷⁶—or as they let MTV do the surface image-surfing for them amid a profusion of quick-cuts, multiple montage, slow dissolves, animation, computer graphics, magnified close-ups, wild angles, and product sell mixed indiscernibly with world events, rock stars, politicians, starving children, catastrophes of war, Nike, Adidas, Coke, Pepsi, Porsche.⁷⁷

In short, according to the hard-coreless view, overcommunication, the massive influx and surplusage of images, has become the mass media's hallmark. The result is a popular cultural reality in which there are "more signs than referents, more images than meanings that can be attached to them."⁷⁸

⁷² BAUDRILLARD, *supra* note 56, at 8.

⁷³ *Id.* at 9.

⁷⁴ *Id.* at 14.

⁷⁵ For a fuller discussion of this cultural development, see *Law Frames*, *supra* note 35.

⁷⁶ See ODO MARQUARD, IN DEFENSE OF THE ACCIDENTAL 80 (Robert M. Wallace trans., 1991).

A central fact about the present seems to me to be that . . . the perception of reality, and fiction [] increasingly take on a semifictive character, and thus tend to converge with each other. That is why it is so easy, nowadays, to ignore really terrible things and to be convinced by imagined positive things, and almost easier, even, to believe in imagined terrible things and to be blind to really positive ones—in other words, to accept what suits one and to suppress what does not.

Id.

⁷⁷ See *Law Frames*, *supra* note 35, at 47 n. 68.

⁷⁸ TWITCHELL, *supra* note 56, at 51; see also BAUDRILLARD, *supra* note 56, at 52 ("Illusion is not false, for it doesn't use false signs; it uses senseless signs, signs that point nowhere. This is why it deceives and disappoints our demand for meaning, but it does so enchantingly.").

What fascinates everyone is the debauchery of signs, that reality, everywhere and always, is debauched by signs. This is the interesting game, and this is what happens in the media, in fashion, in publicity and more generally, in the spectacle of politics, technology, science . . . because perversion of reality, the spectacular distortion of

In this hard-coreless reality, it grows increasingly difficult to tell what is real after all: the event, the 'infotainment' news of it, the full length feature, or the almost instant television docudrama or mini-series version?⁷⁹

But what would such a hard-coreless postmodern schema look like in the context of a possible case of homicide, and how might one go about applying it here? There is a way. For example, assume that everything that I have said so far about Tony Kreskin and company is made up. Imagine, if you will, that the stories that have been told were actually based on a Paul Auster novel, *The Music of Chance*,⁸⁰ and on the filmmaker Erroll Morris, whose so-called documentary film, *The Thin Blue Line*, triggered a review of a capital murder case that eventually led to a dismissal of charges against a man a jury convicted and sentenced to death.⁸¹

To indulge such an assumption here (which, by the way, is an accurate one) invites a number of reactions. For one thing, it seems to invite disbelief in my credibility.⁸² After all, wasn't I supposed to be discussing a *real* homicide

facts and representations, the triumph of simulation is as fascinating as catastrophe—and it is one, in effect. . . .

BAUDRILLARD, *supra* note 56, at 74.

⁷⁹ See John J. O'Connor, *On TV, Truth is More Instant than Fiction*, N.Y. TIMES, June 3, 1993, at C17. ("[T]he time lapse between factual event and television dramatization gets shorter and shorter. In recent weeks, NBC broadcast three 'instant docudramas' within four days: 'Ambush in Waco,' 'Hurricane Andrew: Triumph over Disaster,' and 'Without Warning: Terror in the Towers.' "); John J. O'Connor, *Critic's Notebook: The Line Between Drama and Lies*, N.Y. TIMES, Dec. 31, 1992, at C11 ("Television's current Amy Fisher Film Festival can be evaluated on several levels, not least the one that raises questions about liars and lies. The three slapdash docudramas, one each for ABC, CBS and NBC, are indeed instantly disposable programs."). According to Judd Parkin, ABC's senior vice-president for movies and mini-series, "We're in the era of 'Hard Copy.' There are so many reality-based shows that it's difficult for us not to pay attention to them. . . . Once a story has made the rounds, it has a presold awareness that's impossible to create even with a best-selling book." Jeff Silverman, *Murder, Mayhem Stalk TV*, N.Y. TIMES, Nov. 22, 1992, § 2, at 1, 28; see also Stark, *supra* note 38, at 232 ("A recent poll revealed that seventy-three percent of those children surveyed could not cite any differences between judges depicted on television shows and those in real life.").

⁸⁰ PAUL AUSTER, *THE MUSIC OF CHANCE* (1990).

⁸¹ See *Law Frames*, *supra* note 35. In the film, Morris exposed the Dallas DA's frame-up of Randall Dale Adams who was sentenced to life in prison for a murder he (apparently) did not commit. See *THE THIN BLUE LINE* (Third Floor Productions 1988). As a result of the questions about the Adams case that Morris helped raise, the authorities re-opened the case and ultimately threw out the conviction. Motion for New Trial Hearing, Judge's Rulings, *Texas v. Randall Dale Adams*, No. w-77-1286-I (Dallas Co., Texas, Nov. 30, 1988).

⁸² This is a cardinal sin in just about any rhetorical handbook. See ARISTOTLE, *RHETORIC* 24 (W. Rhys Roberts trans., Modern Library, 1954) (n.d.) ("Of the modes of persuasion furnished by the spoken word there are three kinds. The first kind depends on the personal character of the speaker. . . ."); MICHAEL E. TIGAR, *EXAMINING WITNESSES* (1993).

When you think about stereotypes, you are dealing with a form of prejudice.

You must be brutally candid. If you are a woman, does your manner play into

case? To learn otherwise is surely a disenchanting experience. Second, it seems to deliberately collide with the narrative expectations that readers generally bring along when they encounter a law review article. Surely the reader should not expect literary criticism when he or she is seeking an analysis of law.⁸³

Perhaps then the schema of hard-coreless postmodernism is an apt candidate for capturing the meaning of what I have been up to. Indeed, if it turned out to be the case that meaning schemata were all I cared about, without regard to the substance of reality, if I thought there was no reality, only meaning schemata, would I not be inviting you to enter a hard-coreless postmodern world in which belief cannot be sustained?

Yet that is not my belief, nor does it reflect my intent here. To the contrary, my purpose in distinguishing hard-coreless from soft-core postmodernism is to preserve a place in legal studies for the latter but to dispel the notion that a place exists for the former. Put simply, I can think of no useful role for hard-coreless postmodernism in legal scholarship. I believe that the ineradicable need for judgment, the need to reach particular outcomes in particular cases, and the need for belief to sustain the meanings that legal stories and arguments call to mind for the sake of judgment, will ensure that hard-coreless postmodernism finds no fruitful foothold in the legal field. Baldly stated, the life of hard-coreless postmodernism is a life that cannot be lived. The same cannot be said, however, about soft-core postmodernism. Unlike its schizy, hyper-real, surface-gleaming, hard-coreless cousin, soft-core postmodernism either closes around a coherent meaning or at least points to one.⁸⁴ Of course it makes use of images, but it does so not for their own

conservative ideas about 'shrill, hag-like' conduct or 'tearful whining'? Defending a corporation, do you play to type by harrumphing your way through the case in a superior manner?

TIGAR, *supra*, at 293–94.

⁸³ See, e.g., Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992) (regarding the best manner of evaluating the use of stories in legal scholarship).

Readers connect particular invented stories to the world's reality differently from the way they connect particular factual reports to that reality. . . . An author must somehow either signal that she is using the genre of reportage or that of imaginative literature, or make it clear that she wishes to force her readers to confront the implications of blurring the genres.

Id. at 273; but see Gary Peller, *The Discourse of Constitutional Degradation*, 81 GEO. L.J. 313 (1992).

Within the evaluative frame employed by Tushnet, texts can be parsed according to the dichotomous boxes of fact and fiction, which themselves correspond to objectivity and subjectivity, the objective fact contrasted to the subjective story The formalism of Tushnet's approach consists in believing that simply the form of presentation—a labeling as a novel—would change its meaning. The objectivism consists in believing that there is a distinction between an accurate description and a filtered re-presentation.

Id. at 329.

⁸⁴ See *Law Frames*, *supra* note 35.

(insular or self-referential) sake alone. Soft-core postmodern storytelling hooks its images into coherent forms that derive from known storytelling genres, familiar stereotypes, and deeply rooted cultural myths. Thus, unlike the hard-coreless postmodern montage with its endless shifting surfaces and highly disjunctive, impersonal contiguities and free associations, here human motivation and intentionality continue to operate. In the soft-core world, internal forces (like the drive for meaning in ritual, drama, and myth) rather than wholly external forces (like chance and fate) can still account for events in the social world.⁸⁵ In sum, according to the view I am affirming here, capturing belief both in straightforward, causally-sequenced tales (of detection, for instance) and in acausal, non-linear stories (of isolated imagery or latent mythic archetypes) is an inescapable part of the workaday world in which we live and in which law and lawyers operate.

In the next part of this article, I conclude with a brief illustration of the immediately preceding observation as it applies to the appellate briefs that were submitted to the Supreme Court in the landmark case of *Miranda v. Arizona*.⁸⁶ Here we will see two sharply contrasting narratives. In one, the brief-writer, after having supplied the specific meaning schemata by which to interpret the argument being presented, expressly invites the reader to participate in a familiar deductive-syllogistic method of legal analysis, applying applicable law to a discrete set of facts. By contrast, the second brief-writer tells a surface story that presents the reader with a riddle, or perhaps one could say that it creates an enthymeme.⁸⁷ For rather than explicitly providing the means of solving the riddle, or of supplying the enthymeme's missing premise thus converting it into a proper syllogism, this brief invites the reader to complete the surface story's meaning by drawing upon his or her own implicit world knowledge and basic beliefs.

If I am successful in this final part of the analysis, it will become apparent that to a significant extent effective lawyering requires sound narrative analysis. Examples include choice of imagery, and the associations that one's images conjure; choice of genre, and the narrative expectations that the genre produces; choice of role for one's audience, and the passive deference to externally posited meaning schemata or the active participation in the construction of meaning from interior sources that the role invites—these and other strategic narrative considerations are hardly self-evident. Indeed, in order to be effective they must be deliberately cultivated, consciously assessed,

⁸⁵ See, e.g., FRANK MCCONNELL, STORYTELLING AND MYTHMAKING: IMAGES FROM FILM AND LITERATURE (1979); VICTOR TURNER, DRAMAS, FIELDS AND METAPHORS: SYMBOLIC ACTION IN HUMAN SOCIETY (1974); MAN AND HIS SYMBOLS (Carl G. Jung ed., Doubleday & Co., Inc. 1968).

⁸⁶ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁸⁷ See *supra* notes 62–63 and accompanying text.

and reflexively practiced. Consider in this regard the stories that the Supreme Court heard in the case of *Miranda v. Arizona*.⁸⁸

II. Strategic Storytelling in *Miranda v. Arizona*

Ernesto Miranda was charged with having kidnapped and raped an eighteen-year-old girl in the vicinity of Phoenix, Arizona, on March 3, 1963. He was also a suspect in an unrelated robbery that took place several months prior to the incident involving the rape and kidnapping. On March 13, 1963, Miranda was arrested at his home and taken into custody to the police station. At the precinct he was placed in a line-up and identified by two complaining witnesses, the one for robbery and the other for rape. Miranda was then interrogated at the police station regarding both matters.⁸⁹

Miranda was convicted at separate trials of both the robbery and the kidnapping-rape offenses.⁹⁰ Only the latter, however, became the subject of an appeal. The focus of that appeal was on Miranda's confession while in police custody. Specifically, the legal question raised concerned the failure of the interrogating officers to inform Miranda that anything he said while in custody would be used against him at trial and that he had the right to consult an attorney.⁹¹

A short time before the Supreme Court heard Miranda's appeal, the Court had held that a person accused of a crime must be permitted to consult with his attorney when the criminal process has shifted from an "investigatory" to an "accusatory" phase.⁹² The Court offered the following case-specific scenario for when such a shift may be said to have occurred: If the State's focus is

on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied [counsel], and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment."⁹³

When such a violation occurs, any statement elicited by police during the interrogation must be excluded from trial.

⁸⁸ *Miranda*, 384 U.S. at 436.

⁸⁹ Brief for Petitioner at 3–5, *Miranda* (No. 759) [hereinafter Brief for Petitioner].

⁹⁰ See *id.* at 4.

⁹¹ See *id.* at 2–3.

⁹² *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964).

⁹³ *Id.* at 490–91 (quoting *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963)).

Following the *Escobedo* decision, there was a great deal of controversy over the scope of the Court's ruling. How fact specific was it meant to be? Were all the elements that were present in the *Escobedo* case necessary to the Court's ruling?

Given this legal posture, the respective tasks of appellate counsel were clear. Miranda's task was to persuade the Court that its concern about fair process, as expressed in *Escobedo*, should extend to cover the situation in Miranda's case—even though Miranda, unlike Escobedo, never specifically asked to consult with an attorney, nor had one been retained and present in the police precinct as was the case at the time of Escobedo's interrogation. The Arizona Attorney General's (respondent's) task was to make clear that there was no reason to expand existing case law beyond what *Escobedo* had established simply to cover Miranda's situation.

Not surprisingly, these are precisely the two positions that opposing counsel staked out in their respective briefs. The question I want to pursue here is: what stories did they tell, and how? This inquiry leads to some not so obvious findings.

For one thing, we find that Miranda's brief takes the form of a strikingly dramatic narrative, replete with biographical details about its central character. In contrast, the State's brief pursues a straightforward argument in the form of a completed syllogism. By virtue of these genre choices, the reader of Miranda's brief finds herself cast in the active (one might say heroic) role of advancing a progressive movement within the law in the direction of basic beliefs. Notably, the story that Miranda tells does not explicitly articulate what those beliefs are. Rather, it invites the reader to fill in the normative content of those beliefs based on his or her own response to the surface tale about who Ernesto Miranda is and what happened to him while he was in police custody. In short, it is deemed sufficient for the surface tale to activate the brief-reader's implicit values of fairness and equality. By contrast, the reader of the Government's brief is cast in a more passive, conservative role as upholder of existing (externally posited) rules. Moreover, respondent's brief reader is expressly provided with all that is needed for judgment: the facts of the case, the relevant law, and the law's application to the facts. Let's take a closer look at each of these texts.

The theme of Miranda's brief has three suggestive and overlapping components. They are: fate, chance, and secrecy. From the associations that flow from this triad of images there emerges an implicit normative framework for a proper outcome to the case. All three elements are at work in the following initial overview of Miranda's argument:

When Miranda walked out of Interrogation Room 2 on March 13, 1963, his life for all practical purposes was over. Whatever happened later was inevitable; the die had been cast in that room at that time. There was no duress, no brutality. Yet when Miranda

finished his conversation with Officers Cooley and Young, only the ceremonies of the law remained; in any realistic sense, his case was done. We have here the clearest possible example of Justice Douglas' [sic] observation, "what takes place in the secret confines of the police station may be more critical than what takes place at the trial."⁹⁴

First, the element of fate. Whatever happened after the interrogation, says Miranda, was "inevitable." In other words, with Miranda's confession in hand, the trial process was an empty formality; its outcome was predetermined from the start. But of course (and here speaks the implicit schema) everyone knows that this should not be. The trial should be an open search for truth, not a farcical gesture in which the parties simply go through the motions of doing justice.

Second, the element of chance. Miranda says that "the die had been cast in that room at that time."⁹⁵ In other words, whatever endowments Ernesto Miranda happens to bring with him into Interrogation Room 2—whether it be psychological endowment, or the social and financial means of obtaining a good education, or the kind of life experience that can serve as a basis for practical knowledge about the ways of the world—these chance endowments are what determine how the die will be cast within. But surely (and here speaks the implicit schema) everyone knows that justice should not be a matter of chance, and that getting a fair shake within the legal system is something that the rich and the poor, the mentally ill and the psychologically healthy, the socially advantaged and the socially deprived are entitled to in equal measure.

Third, the element of secrecy. In his brief, Miranda cites Justice Douglas's observation that "what takes place in the secret confines of the police station may be more critical than what takes place at the trial."⁹⁶ Here the operative image suggests a schematic synthesis that weaves together all three elements: everyone knows that secrecy is an attribute of power and control. The person who is in a position to keep things secret is also in a position to control the flow of information. Only that person has the power to determine what shall be known and what shall remain under wraps. And it is the police who enjoy that position of power, that control, in the context of Interrogation Room 2 and all other rooms like it across the country.

The synthesis that emerges is this: we are faced here with a situation where the accused in police custody is helpless, friendless, at the mercy of forces beyond his control. He faces the force of fate (once his confession is

⁹⁴ Brief for Petitioner, *supra* note 89, at 10 (quoting *Crooker v. California*, 357 U.S. 433, 444–45 (1958) (Douglas, J., dissenting)).

⁹⁵ *Id.*

⁹⁶ *Id.*

obtained) and the force of chance (in light of the endowments he happens to bring with him into the interrogation room). And it is the police who create and exploit these forces by virtue of the unchecked and unbalanced power and control that they wield over the accused who has entered their secret confines.

“What can counter such intolerable inequality and unfairness?” Miranda’s brief implicitly asks. The answer it provides is suggestive: “This case is not to be decided by the color-matching technique of determining whether one case looks just like another case. We deal here with fundamentals of liberty, and so, in consequence, with basic belief.”⁹⁷ What exactly are the basic beliefs that Miranda has in mind? He does not specify. It is enough perhaps to demonstrate that the law is moving in a progressive direction in this area (“there is a tide in the affairs of men”⁹⁸ and that the Court is in a position to seize the moment and join in that heroic spirit. Why heroic? Because the Justices are poised to transcend the petty formalism of legal analogy for the more exalted action of befriending the helpless, coming to the aid of the most vulnerable in society. Heroic because the Court can now restore balance to a situation that is awash in inequality and unfairness. They need only extend the protections embodied in the Bill of Rights.

In short, Miranda’s narrative need not specify the facts of the case. Indeed, given the situation as it is, those facts cannot be known. (Who knows what goes on behind closed police doors?) But who needs facts when the uncertainties involved implicate such vulnerability and potential for police abuse? Let the Court find the words that will justify what justice demands. And let it suffice for Miranda to say: the Justices of the Court know what needs to be done; they have the authority to do it; let it then be done. The subjunctive mood of Miranda’s story, fueled by factual uncertainty and emotional outrage, casts the decisionmaker in the active role of savior on behalf of the disadvantaged and the helpless.

Unlike Miranda’s dramatic narrative, the Attorney General of Arizona composed a brief that was premised upon objective facts and clear law knitted together by the power of syllogistic reasoning. The brief’s central plot line works this way: (1) the fact is that Ernesto Miranda is not nearly as disadvantaged as appellant’s brief makes him out to be, and in fact he does not deserve the Court’s solicitude; (2) there was no police abuse or overreaching in this case, and if Miranda gave himself away that is his, not the authorities’ doing; (3) in any event, a basic syllogism takes care of the matter: (i) *Escobedo* is the applicable law; (ii) Ernesto Miranda, unlike Danny Escobedo, never requested the advice of counsel while in police custody; (iii) therefore, since the police did nothing to refuse such a request, Miranda’s right to counsel, unlike Escobedo’s, was never blocked by the authorities. In

⁹⁷ *Id.* at 35.

⁹⁸ *Id.* at 34.

short, according to the Attorney General of Arizona, Miranda's brief asked the Court to ignore "not only the plain wording of the opinion in *Escobedo*, but to completely disregard the factual and legal bases for the opinions cited in [Escobedo's] historical analysis."⁹⁹

Of course, what the Attorney General failed to go on to address in his brief is why the factual distinction that he made between the *Escobedo* and *Miranda* cases is as significant as he apparently believed it to be. In the respondent's view, apparently it was sufficient to say that there is no constitutional reason for the Court to equate Miranda and Escobedo. Simply stated, his claim is this: if Danny Escobedo was clever enough to think of hiring and seeking advice from an attorney during an important phase of the police investigation, while Ernesto Miranda was not so clever, that is an inequality of no constitutional consequence.¹⁰⁰

With the aid of hindsight, we know that respondent's argument failed to take seriously enough the Court's concern about establishing appropriate procedural safeguards to counter potential police abuses.¹⁰¹ But, putting aside what respondent might have said in light of how the Supreme Court ultimately ruled, important questions arise based on a closer consideration of respondent's narrative strategy. For example, it is apparent simply from reading the two appellate briefs together that in at least three significant respects the Attorney General needlessly reinforced Miranda's story line. First, respondent explicitly discussed, without ever defusing, the reality of police mistakes and errors which require judicial exposure and correction.¹⁰² Second, respondent acknowledged the existence of broad popular support (in professional journals, national magazines, and political speeches) for the more vulnerable members of our society—thus needlessly bolstering Miranda's image of a new birth¹⁰³ and a "tide in the affairs of men."¹⁰⁴ Third, by conceding the impossibility of proving the existence of police coercion,

⁹⁹ Brief for Respondent at 20, *Miranda v. Arizona*, 384 U.S. 436 (1966) (No. 759) [hereinafter Brief for Respondent].

¹⁰⁰ *Id.* at 24–25.

¹⁰¹ *Miranda*, 384 U.S. at 457–58.

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

Id. (footnote omitted).

¹⁰² Brief for Respondent, *supra* note 99, at 9.

¹⁰³ *See id.* at 10.

¹⁰⁴ Brief for Petitioner, *supra* note 89, at 34.

respondent not only undermined his own claim that Miranda's description of police abuse in this case was inaccurate, but he also reinforced Miranda's assertion that it was precisely the unknowability of what goes on behind closed police doors that required corrective judicial action.

In addition to unwittingly bolstering Miranda's narrative strategy, respondent also seriously neglected his own. The hallmark of the case law upon which respondent relied was that a totality of circumstances approach was better suited to dealing with specific claims of possible police abuse than a universal ("bright line") rule. With this as respondent's main line of argument, it is only natural for the reader to expect respondent's narrative to feature both persuasive evocations of the strengths of the existing case by case ("totality of circumstances") method of analysis and demonstrations of the weaknesses of alternative approaches. But respondent's text raised these expectations only to disappoint them in the end. And the residual schema with which one is left is the one that crudely asserts: criminals get what they deserve.¹⁰⁵ That is hardly the sort of claim that uplifts the spirit, or that ennobles, or even serves to legitimate inherited judicial wisdom.

It is far from certain that a different respondent's brief would have led to a different outcome in *Miranda*, though the fact that the Court divided five-to-four in favor of Miranda suggests that such a possibility might have existed. In any event, such a possibility is not the essential thing as far as I am concerned here. For I hope that it has been enough to show that heightened sensitivity to the strategic advantages and disadvantages of choosing to tell a particular legal story in a particular way—for example, by using specific images set within a particular genre that consistently fulfills its own set of narrative expectations and that accords with the role in which one's audience has been cast—is not only of great practical value to practicing lawyers and judges, but also a subject that richly rewards close scholarly analysis. Indeed, legal storytelling is such a pervasive part of the legal culture that it is hard to believe that this kind of scrutiny has been so long in coming. That tide, however, may at last be turning.

Conclusion

The three movements of thought contained in this article may be summed up as follows. First, I have observed that there is now under way a broad cultural development (for convenience, call it postmodernism) that is deeply affecting the legal as well as popular (or mainstream) culture. As part of this development, we see a shift away from positivism, neutrality, and objectivism as the dominant standards for legal scholarship and

¹⁰⁵ See Brief for Respondent, *supra* note 99, at 24–25 ("Miranda and Escobedo are not equal and there is no Constitutional reason for this Court to equate them in the manner sought by petitioner, any more than there would be for this Court to balance their skill in committing and concealing their crime.").

decisionmaking. Interpretivism and constructivism are now providing alternative standards. According to this competing view, what we believe about an individual or an event is inextricably tied to the way in which our belief is called into play (e.g., whether it is narratively seduced, or made the captive of logic's necessity). The underlying point here is this: human perception and cognition are never without some interpretive framework within which reality and meaning come into view.

This thought implicates a second one. If reality and meaning depend, to a significant extent, on perceptual and cognitive constructions, it becomes of no small interest to learn what interpretive frameworks are at work in specific legal contexts. One way to express this inquiry is to ask: what kinds of stories, and what modes of storytelling, are being used by lawyers, judges, and others within the legal system to construct and convey meaning? This path of inquiry leads to a heightened awareness of competing rhetorics and strategies of narration. Such awareness may operate on the plane of broad principle and decontextualized abstraction or on the level of local voices, proper names, and particularized dramas. From this perspective, recent developments in legal scholarship, such as critical race studies, feminist studies, and lawyering theory, can be seen as offshoots of a cultural climate in which the positivist paradigm for meaning-making no longer stands alone.

The preceding leads to a third and final movement of thought. If it is, as I have suggested, a matter of some scholarly interest and practical worth for lawyers and law scholars to study how legal storytelling can be (and is being) used to make sense of individuals and events in a given set of circumstances, it is appropriate to ask: what kinds of insights can we expect such an analysis to provide? In response to this query, I have sought to demonstrate the impact of several different narrative strategies through redescriptions of a possible case of homicide and a critical assessment of the briefs submitted to the Supreme Court in the landmark case of *Miranda v. Arizona*.¹⁰⁶ These narrative strategies include: one's choice of meaning schemes, which will serve to fill in a given narrative gap; one's choice of narrative genre, which will determine the expectations or norms by which a particular story shall be read or experienced; and one's choice of role for one's audience, which will determine whether they shall be cast as passive affirmer of explicitly posited (imperative) norms and historical facts, or as active cocreator based on a subjunctive triggering of internalized norms and implicit scripts or scenarios.

Finally, there is this additional offshoot of my analysis. In discussing the cultural impact of postmodernism, I have suggested that it is important to distinguish two different kinds of postmodernism. One kind, *soft-core postmodernism*, points to a narrative form (i.e., a perceptual and cognitive paradigm) that now actively competes with the objectivist, linear, causal-sequential story form with which we have long been familiar.

¹⁰⁶ *Miranda v. Arizona*, 384 U.S. 436 (1966).

Soft-core postmodern storytelling allows us to take account of significant shifts in the medium of communication and, consequently, in the way we tend to make sense of ourselves, others, and events around us. For example, we see from contemporary film and television that it is possible to place great emphasis upon an isolated image, or a rapid juxtaposition of image and sound, or of image and image, in the making of a meaning. This is something that we tend not to find in earlier generations' text-based narrative techniques, which commonly relied upon the cumulative effect of linear, causal sequences. The issue here is not whether meaning is possible, but rather how it is constituted. By contrast, there is a second form of postmodernism, the *hard-coreless* kind, that exploits the phenomenon of constructivism (which is to say, the human act of making meaning) as a way of collapsing substantive meaning into the forms of its construction. According to this hard-coreless view, it is as if there were no "there" there, as if it were form all the way down.

But the hard-coreless postmodern view is one that cannot be lived. For example, without belief to sustain the law's meanings, the law's unshakable demand for judgment could not be met. Thus, contrary to some contemporary scholars, I have concluded that hard-coreless postmodernism has no useful role to play in the legal field. Baldly stated, it is a game that none of us can afford to play—not on the field of human conflict, pain, and death that is the law's common ground. On the other hand, it is precisely these stakes that require as complete an assessment as we can manage of how the law's stories, whether in linear-causal or non-linear/acausal fashion, do captivate belief. There lies the calling of the legal storytelling scholar.