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Preface

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PREFACE

> [A]s I walk through the world, I bring into focus certain things which are meaningful, and others are by degrees less in focus, dependent upon their meaningfulness in terms of what I'm doing, to the point where there are certain things that are totally out of focus and invisible. We organize our minds in terms of this hierarchical value structure, based on certain ideas about meaning and purpose and function.[1]

For a long time, legal theory has been used to achieve generality. By rising above particulars, theoreticians have been able to focus upon comprehensive abstract ideas, like justice, equality, and the social good. Lawyering theory takes a different path.

In this collection of articles, scholars in law, anthropology, psychology, and sociology examine the ways in which legal meanings are made and distributed in everyday legal practices. Particular attention is given to what goes on at the local level. How do practicing attorneys, government officials, clients, witnesses, judges, and mediators think and talk about the law in particular contexts? What meanings does their discourse reflect and generate? And why does a particular legal meaning, or one kind of legal narrative, come to triumph over another at a particular time and place in a given set of circumstances?

In short, a lawyering-theory approach invites us to study concrete particularities. It does not join in (even if it does not reject) the effort to construct comprehensive abstract models as points of departure for analyzing what the law is or should be. If there are constructs to uncover, a lawyering theorist might say, let us look first to see how they are operating in practice. Let us examine the numerous acts of representation and interpretation that occur everyday in the life of lawyers and others with whom they interact. There is much to discern in those acts: implicit meanings lay embedded, and are often veiled, within them. Legal and factual interpretations come so quickly to hand that we often experience them as indistinguishable from reality or consciousness itself. It is as if no interpretation occurred at all, as if what we see, and the way we see it, what we understand and the way we understand it, were unmediated, direct, coming from "out there." But closer study suggests otherwise. Inevitably, acts of perception and conceptualization are acts of interpretation as well.

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1. LAWRENCE WECHSLER, SEEING IS FORGETTING THE NAME OF THE THING ONE SEES: A LIFE OF CONTEMPORARY ARTIST ROBERT IRWIN 108 (1982).

Taking this insight as a point of departure, the articles that follow set out to refresh our perception and understanding of law in everyday life. These articles examine the concepts, beliefs, and feelings that may be causally involved in the legal and lay actor's actions and reactions to one another and to the world around them. In this way, lawyering theory reflects a mode of inquiry that is currently emerging in fields such as cultural and cognitive anthropology and psychology.[2] One of the main objectives of this approach is to explore how legal meanings are brought "on and off line" or are kept more or less permanently repressed.[3] An effort is also being made to examine the social, political, and psychological processes that may account for how and why this meaning selection process occurs.

As cognitive psychologist Jerome Bruner notes in his article for this volume,[4] the narrative construction of reality is pervasive, and it is very much a part of the lawyering process. Whether it is a matter of drawing upon "the great theme[ ] of protecting hearth and home against intruders"[5] or setting one metaphor against another in an effort to contrast ships "in dry dock" with vessels "ready for sea,"[6] the challenge judges and lawyers face remains the same: how shall the legal story be told? According to Bruner, there is much to consider in responding to this question. For example, one's choice of narrative form or genre, the images one selects, and the "golden thread" of plot by which one makes

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2. *See* Richard K. Sherwin, *Lawyering Theory Symposium: An Overview*, What We Talk About When We Talk About Law, 37 N.Y.L. SCH. L. REV. 9, 15 n.11 (1992).

It should be noted here that the cognitive approach reflected in these pages deals with the way humans construct meaning in concrete interpretive practices and symbolic activities. This insistence upon meaning as the central concept of psychology first emerged in the late 1950s, in opposition to the once dominant behavioral ("stimulus/response") model of human psychology. There is similar resistance afoot today in reaction to recent efforts by cognitive scientists to reduce our acts of meaning to something quantifiable, a matter of "information processing." Attempts to create artificial intelligence by mechanically duplicating human "cognitive programs" are illustrative of this type of reductionistic, computative approach to cognition. *See generally* JEROME BRUNER, ACTS OF MEANING 1-32 (1990) (providing a general history and update of the "cognitive revolution" in psychology). For a recent philosophical critique of cognitive and linguistic reductionism, see HILARY PUTNAM, REPRESENTATION AND REALITY (1989).

3. Richard Shweder & Maria A. Sullivan, *Cultural Psychology: Who Needs It?*, 44 ANN. REV. PSYCHOL. 497 (1993).

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

5. *Id.* at 180.

6. *Id.*

one's story cohere—all of these considerations figure in the task of rendering a legal narrative believable.

Drawing from her various field studies, anthropologist Sally Engle Merry observes in her article that "law and society are mutually defining and inseparable."[7] According to Merry, the way in which one learns to think and talk about a problem helps to determine what that problem is about and how it should be treated. Whether the controversy involves, say, a legal right or entitlement warranting legal intervention, or is deemed a personal dispute, a "mere" failure of communication that should be worked out between the contending parties, depends upon the legal consciousness of the person describing the "relevant" events and the way in which the legal system names and discusses the matters at issue. Merry's mediation example in the article that appears in this volume illustrates this observation by showing how a particular court, by altering its discourse, secures a particular legal outcome. More specifically, here we see how a shift from rights talk to moral or therapeutic discourse simultaneously establishes the limits of the law and the mistaken expectations of a particular party.

Sociologist Kim Lane Scheppele makes a similar point in her examination of some hidden common-sense assumptions about "truthfulness" that operate in sexual-harassment cases. In her article,[8] Scheppele shows that a common-sense repudiation of "delayed" or "revised" stories, as told by victims of sexual harassment, reflects deeply ingrained socially constructed habits of belief about what truth is supposed to look like. In this common-sense view, because truth is simple, seeable, and "out there," there is no reason why we cannot get it at once. Accordingly, any delay or subsequent change in one's initial account of an event often comes to be seen as a way of distancing oneself from truth in its "purest," most immediate form. From this perspective, the act of self-reflection is more akin to an interference with, than a clarification of truth. Like other meddlesome "afterthoughts," it is suspect. The possibility that the initial shock of an event or the initial condition of the perceiver may have distorted the initially proffered account thus becomes highly counter-intuitive.

Yet, studies have shown that there are occasions when an assumption in favor of an initial version of events may not be reliable. For example, it is not uncommon for victims of post-traumatic-stress syndrome to distort their initial accounts of spousal violence against them. Moreover, women who experience rape or other forms of abuse frequently are reluctant to

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7. Sally E. Merry, *Culture, Power, and the Discourse of Law*, 37 N.Y.L. SCH. L. REV. 209, 209 (1992).

8. Kim L. Scheppele, *Just the Facts Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123 (1992).

discuss these experiences. Self-blame and self-deception, fear of the consequences of disclosure, and a deep sense of shame are common obstacles to such disclosure. In situations like these, subsequent reflection upon the triggering events, sometimes with the aid of psychotherapy, may be precisely what is needed for the victim to overcome the social, cultural, and psychological barriers that may initially silence her or produce an initially unreliable account.

Professor Martha Fineman shows us something similar in her article by bringing to our attention how contemporary legal stories about the family are being created and deployed as society casts about for a revised understanding of what the family is and what it is we expect of the "good" mother or father.[9] These stories, Fineman points out, tell us a good deal about ourselves and the society we live in. For example, she states that while "the dominant spousal story for the past decade has been one of *equality* . . . , there continues to be great gender *inequality* in the allocation of the burdens and costs associated with reproduction."[10] One begins to suspect that the stories that lawyers and judges sometimes like to tell about these matters might well be fabulations reproduced by a dominant form of discourse. These are myths we live by—regardless (or perhaps because) of the empirical observations that they may occlude.

Professors Anthony Amsterdam and Randy Hertz show in their contribution how popular myths, metaphors, and story forms, among other rhetorical and linguistic devices, can be used in the closing arguments of a criminal case to construct two strikingly different versions of reality.[11] Here we see how disparate legal stories not only present radically different accounts of the same events, but also how they play upon different belief systems in shaping their audience's response. For example, the prosecutor's closing argument constructs a straightforward account of a premeditated murder in which the "obvious" facts of a past event, the actual shooting, combine with applicable rules of law to require the guilty verdict. By contrast, the defense attorney's account tells a story that enfolds the jury in the open-ended real time of trial. It is a tale plotted around the story of the hero sworn to uphold an oath. The juror-hero is thus covertly invited to work through at trial his or her sworn duty to keep the government to its burden of establishing proof beyond a reasonable doubt. Faced with such a dire crime, a homicide, the jurors will be sorely tested. But the fractured facts regarding premeditation invite the jurors to opt for no conviction except that about which they can feel certain. In

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9. Martha A. Fineman, *Legal Stories, Change, and Incentive—Reinforcing the Law of the Father*, 37 N.Y.L. SCH. L. REV. 227 (1992).

10. *Id.* at 228.

11. Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992).

short, manslaughter, not murder, is the appropriate verdict. Unlike the prosecutor's clean and orderly narrative world, the defense has constructed a reality in which the jurors, facing severe and perhaps even disorienting factual ambiguity, can safely and honorably arrive at a point of closure—if, in heroic fashion, they close around the sacred oath that they have sworn to uphold.

In the course of their analysis, Amsterdam and Hertz show us that significant differences in grammar, stock scripts, metaphor, and mythic thematization directly inform and shape the two attorneys' efforts to accomplish their respective objectives. The disparate narratives that the attorneys use in their closing arguments before the jury make vivid the multiple and complex ways in which human cognition operates and how thoughts and beliefs can be influenced.

In her examination of a simulated episode of informal advocacy between a government official and an attorney in a salary garnishment case, Professor Peggy Davis weaves together several of the themes mentioned above.[12] For one thing, Davis reveals the semiotic complexity of legal narrative and how the reality it constructs, and the way in which it does this, reflects both the narrator's and the intended listener's social roles and objectives. For example, Davis describes an advocate's narrative that is careful not only to present his client's trouble, but also to integrate that story into another story about a government official working hard in a beleaguered agency that has been charged with a worthy mission. Here we see the attorney's description of the consequences for her client of "financial distress and garnishment with its sequelae of firing, irremediable unemployment, and deepening debt"[13] being deftly interwoven with a standing invitation for the official to take on the sympathetic character that the advocate's script has cast for her. Will she become the hero who will rescue the client from his awful plight?

The questions that these articles raise and the insights they may provide concerning how meaning is constructed in the everyday practices of law are made possible, I believe, by a significant shift in mainstream and legal culture. Some commentators have called this shift the "interpretive turn" or the advent of "postmodernism." Regardless of the label one chooses, however, it has become increasingly clear that we live in an age in which, to quote Jerome Bruner, there is "a quickened [sense] of the importance of explicit awareness, of consciousness, of the dangers of hidden agendas[.] We would do better, we now think, to replace id with ego, ritual with choice, to go 'meta' in general."[14] This view

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12. Peggy C. Davis, *Law and Lawyering: Legal Studies with an Interactive Focus*, 37 N.Y.L. SCH. L. REV. 185 (1992).

13. *Id.* at 192.

14. Jerome Bruner, *On Making It Strange Again*, Opening Lecture of the

suggests that we no longer enjoy the illusion of choicelessness, at least not to the extent we once did, as more and more putatively "self-evident" truths, the products of engrained habits of perception, thought, feeling, and belief yield up their constructed nature to critical reflection. In his article for this volume, cultural and cognitive anthropologist Richard Shweder situates this new perspective in a broader context.[15] Shweder's discussion explicitly takes note of the multicultural world that technological advances in communication and the mass media have set before us.

Professor Shweder uses wit and irony to highlight the strange confusions—consider the Japanese image of Christmas as "Santa Claus nailed to the cross"[16]—begotten by cultural familiarity that may be wider than it is deep. Shweder is amusing here, but he is making some profound points. One question his article raises concerns the broader implications of "going meta." As paradigms for meaning proliferate, as we begin to see more and more possibilities for making meaning, with some meanings and acts of meaning appearing rather starkly unfamiliar, the question of authority inevitably arises. Simply put, whose paradigm for constructing meaning do we (should we) authorize, under what circumstances? Proposed answers to this question in fields such as sociology or anthropology may tell us something significant about a specific culture or sub-culture. But in law we know that an authoritative response can be enforced by the police. Clearly, when it comes to preferred legal meanings the stakes are more than academic.

To conclude these prefatory remarks, I submit that the articles in this volume provide a fresh approach to what law is and where it can be found. They suggest that law's domain includes, but also reaches beyond, the realms of judicial discourse, legislative or regulatory enactment, and academic debate. Law's force can be felt wherever lawyers, officials, and lay people confront or anticipate legal issues and conflicts. As I will set out in further detail in the introductory article that follows, it may well be that we are now coming to see that law and society, psyche and culture, legal consciousness and social consciousness, are inter-penetrating and co-constitutive. To find out how and to what extent this is so, to explore how legal meanings shift or remain stable from one local context to another, we need to take a closer look at what makes up the law. Thus, the authors of the articles in this volume invite us to ask: What social scripts, stock stories, stereotypes, myths, metaphors, and other cognitive or linguistic representations, have been or are being used in legal narratives and

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Lawyering Theory Colloquium at New York University School of Law 3 (Spring 1991) (transcript on file with author).

15. Richard Shweder, *The Authority of Voice*, 37 N.Y.L. SCH. L. REV. 251 (1992).

16. *Id.* at 254.

discourse to stimulate and justify belief in, or rejection of, particular facts and judgments in particular contexts? Lawyering theory, at least at this initial stage in its development, may be viewed as an effort to surface the linguistic and cognitive tools and assumptions that legal and lay actors use in their everyday practices within, or in contemplation of entering, the legal system. Hopefully, these microanalytic local studies of everyday legal practices will increase our awareness of the relationship between what we focus on and think about when it comes to law and the legal system, and what we focus and think *with*.

Before closing, I want to take this opportunity to express my warm thanks to Tony Amsterdam, Jerry Bruner, Peggy Davis, Martha Fineman, Sally Merry, Gus Newman, Kellis Parker, Kim Scheppele, and Richard Shweder for their participation in the Lawyering Theory Symposium that was held at The New York Law School on March 6, 1992. I also wish to express my deep gratitude to the authors who contributed to this volume. Finally, I gratefully acknowledge the help of the editors of the *New York Law School Law Review* in putting together this symposium issue.

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