NEW YORK LAW SCHOOL

NYLS Law Review

Volume 37 | Issue 1 Article 36

January 1992

A Psychologist and the Law

Jerome Bruner
New York University School of Law

A PSYCHOLOGIST AND THE LAW*

JEROME BRUNER**

Having worked with lawyers at the New York University Law School these past few years, I think it might be instructive to reflect on the sorts of issues that a psychologist is likely to encounter once he begins engaging with legal scholars. The very briefest summary of the matter is that when a psychologist is principally interested in what has come to be called "the social construction of reality"[1] (as I am), then the law provides an ideal arena for study. For the "world of law"—its *corpus juris*, its procedures, and its customary practices—is almost the quintessential example of such a socially constructed reality. But before launching into this complex subject, let me first situate this discussion in the field of psychology itself, for there are different "kinds" of psychology.

Roughly speaking, psychologists can be divided into two broad classes. The first and oldest of these looks to the "laws of nature" as its means of explicating human nature. True explanation for such psychologists reduces to specifying the interplay between a material organism and a material world, and the explanations are extensions of the principles in terms of which one accounts for other aspects of nature. Mind is, as it were, simply a mirror of nature. This is *positivism.*[2] According to this positivist view, the study of mind can be virtually reduced to a laboratory science, since all the complexities and subtleties of mental functioning are merely the interplay of nature's elementary processes that can be studied *in vitro*. Positivism is the way of purity and self-containedness whose ideal, of course, is physics. Its aim in psychology is to reduce the brute data of people's observable responses to general laws about man as a natural organism. It rejects explanations that rest upon how people construe the world or what they believe reality to be. Such "folk psychology"[3] is to be replaced by scientific psychology wedded to the ideal of causal explanation and prediction. Positivist psychology has brought off some stunning local successes in the study of perception, memory, and even in the tortuous domain of thought and the

---

* This article is based on the remarks the author delivered as a commentator at the New York Law School Lawyering Theory Symposium, Mar. 1992.

** Senior Research Fellow, New York University School of Law.

1. *See* PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY (1966).

2. *See* RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979).

3. *See* STEPHEN P. STICH, FROM FOLK PSYCHOLOGY TO COGNITIVE SCIENCE: THE CASE AGAINST BELIEF (1983).

so-called higher mental processes. At its worst, of course, it ignores altogether that human beings live in history and in a culture—that they act on the basis of the *meanings* they impose upon events or happenings or upon people's acts.

Some critics, like Clifford Geertz, characterize positivist psychology as a "perverse alchemy" that seeks to turn gold into lead.[4] That is surely too harsh. So-called scientific psychology, after all, is one way of imparting an air of stability and universality to our conception of man. It provides a useful metaphor and is rather like a promissory note that assures the lender eventual payment in the form of "laws of nature." And all science is metaphor, a kind of "paradigm," as Kuhn calls it, for helping us get things clearer for certain purposes.[5] But for many purposes, a natural-science explanation is insufficient, particularly when the issue under scrutiny has to do with the nature of meaning and how people construct their meanings. A good example is the transformation in our understanding of the meaning of a concept like "equal opportunity" as one moves through over a half-century from *Plessy v. Ferguson*[6] to *Brown v. Board of Education*.[7] Such problems bring into being a second kind of psychologist, the kind that takes meaning making as its central concern.[8]

Their argument is that the human mind and mental functioning cannot be studied as if they were in bottles or in some aboriginal reality outside of human culture. Our mental acts are always situated in the social world. Indeed, their very form as well as their expression depend upon prosthetic devices that are made available only through participation in a culture. These devices include such things as language, modes of reckoning, and notions of what is expectable. They also include a system and practice of laws and the long shadow that law casts. By this view, the idea of an original human nature to be found *in vitro* is not only a fiction, but a mischievous one most often created to support covert ideological ends. For convenience, this second outlook can be labelled "cultural psychology."[9] A typical axiom associated with this view is that it is impossible to understand the nature of thought without understanding the manner in which it is formed in and patterned by the context of a culture's dialogic

---

4. CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 182 (1983).

5. *See* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

6. 163 U.S. 537 (1896).

7. 347 U.S. 483 (1954).

8. *See* JEROME BRUNER, ACTS OF MEANING (1990).

9. *See id.* at 19; RICHARD A. SHWEDER, THINKING THROUGH CULTURES: EXPEDITIONS IN CULTURAL PSYCHOLOGY (1991).

styles. An analagous view from the realm of legal thinking is that you cannot know a concept of law just from an examination of statutes and principles, but must know as well how it is used in prevailing practice.

The aim of this article is not to settle once and for all the battle between positivist and cultural psychologists. The great physicist, Niels Bohr, once commented on the difference between small truths and big truths. The opposite of a small truth, he said, is false, but the opposite of a big one is usually also true. The two views of psychology exist without contradicting each other. They are both true, but the choice between them makes an enormous difference in how you ply your trade as a psychologist and whom you regard as your kissing cousins.

I am a cultural psychologist, but with a history of positivist deviation. I usually know when I am being one rather than the other. In the legal domain, however, there is no choice. Law is the domain of cultural psychology.

II.

Many psychologists study the nature and development of the so-called cognitive processes in human beings. This includes the study of how people go about reaching decisions, making judgments, and coming to conclusions. Most of this work has been limited to how people solve what logicians call well-formed problems in deductive reasoning, or problems in induction based on empirical evidence, or neat puzzles like Missionaries and Cannibals or The Tower of Hanoi. Interest in such well-formed problems was fueled by the ideal of building computational models that treated human intelligence as an extension of machine intelligence (what we now call Artificial Intelligence). Computers can deal only with well-formed problems.[10] The emphasis on computationalism left virtually unexplored a vast range of culturally sensitive cognitive activities directed to making sense of ill-formed problems, such as recounting what happened in the office today or justifying why one said one thing to a friend rather than another. Efforts have been made to convert problem solving in such ill-formed domains into something classier and more formal. Rational Choice Theory is one example.[11] These efforts require such stilted assumptions about the utility values of alternative moves, that they turn ill-formed problems into thinly disguised versions of Missionaries and Cannibals. Worse still, when such rational approaches are applied, people are treated as if they were unsituated, without histories, passions, or cultural expectations. So that way has not worked very well.

---

10. Hubert Dreyfus & Stuart Dreyfus, *Why Computers May Never Think Like People*, TECH. REV., Jan. 1986, at 42, 47.

11. *See* BRUNER, *supra* note 8, at 28.

To understand how people interpret a task, a problem, an event, requires that you know one crucial point first. What did they think would ordinarily or canonically happen under the circumstances? One of the most basic forms of cognitive activity is figuring out the relation between what you are encountering now and what the world is *supposed* to be like under present circumstances: finding a mode of interpreting how things are in the light of how they are supposed to be.

The difference between how the world is and how it is supposed to be is almost invariably accounted for narratively, by telling a story about how it came about that the expectable failed to occur.[12] 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, of course, one of a culture's great treasures. It is used incessantly. Studies of white, working-class families in Baltimore[13] show, for example, that children who hang around adult conversations are exposed to real-life narratives at the rate of about six per hour, sixty per ten-hour day, 22,000 per year, or about 500,000 by the time they get to a law school. The estimate is conservative. Besides, all societies give special status to those who can tell compelling stories out of their imagination about possible, imaginable violations of canonical expectancy and how they were coped with.

It is no accident that narratives have two clearly distinguishable features: an account of what happened, and a slightly less explicit indication of why the account is worth telling and being heard. The latter tells or implies why the former is unusual or noncanonical.[14] Unless both are present and interpretable, a narrative has no point. The typical story begins with an enunciation of the expected ("I was walking down the street the other day, and . . ."), followed by a breach ("this tough guy comes up to me and starts X-ing . . ."), followed by an attempted redress ("So I said to him, 'watch where you're going . . .'"), followed by some sort of resolution ("So he said, 'Hey, I thought you were somebody else.'"), concluded by a coda to bring you back to the here and now ("Isn't that the damndest thing you ever heard?").

Note well that the world of stories is not the impersonal physical world of causes and effects but the world of human beliefs, desires,

---

12. *See id.*

13. *See* Peggy J. Miller & Barbara B. Moore, *Narrative Conjunction of Caregiver and Child*, 17 ETHOS 43-61 (1989).

14. The pioneering account of the formal structure of narrative is found in William Labov & Joshua Waletzky, *Narrative Analysis: Oral Versions of Personal Experience*, *in* ESSAYS ON THE VERBAL AND VISUAL ARTS—PROCEEDINGS OF THE 1966 ANNUAL MEETING OF THE AMERICAN ETHNOLOGICAL SOCIETY 12-44 (June Helm ed., 1967). For a fuller account, see BRUNER, *supra* note 8, at 33-65.

intentions, and dramatic necessities, however mundane. In trying to make sense of a story, even to figure out whether it is true or right—whether from the bench, in an armchair reading, or in conversation—we search for the golden thread of rights and responsibilities in the network of human circumstances recounted. In so doing, we use the story not only as a way of representing what happened, but to pass judgment on what happened. Without explicitly intending to, stories carry a moral in recounting what is taken for granted and what is taken as a breach. So, narrative is implicitly (if subtly) judgmental, which is probably why novelists are among the first victims of the new dictator.

By the third year of life, children have the rudiments of the narrative art well in hand.[15] And almost as soon as they grasp its form, they seem able to use it deftly not only to tell what happened, but to plead their case by their management of the telling.[16] From the start, it would seem, narratives are used not only to construct or constitute reality, but also, with cunning rhetorical design, to plead a case. Stories are profoundly rhetorical: they provide the medium for making excuses, for justifying our acts, for framing mitigating circumstances.[17]

III.

Given what I have said thus far, it is no surprise that narrative plays such a central part in legal procedure.[18] Legal narratives are, of course, contending versions of a story offered up for adjudication. All adjudication is premised upon someone's presumed ability to decide which competing narrative version is truer, righter, or provides a better fit to some point of law. In the standard rendering of Anglo-Saxon law, what actually happened is supposed to be a "matter of fact" to be decided by a jury that hears a case pleaded in a fashion constrained by rules of evidence and the like. Matters of fact are supposed to be independent of and distinct from points of law. The latter are broad principles illustrated by precedents of their prior application. It is taken for granted, of course, that this sharp separation sometimes breaks down. But it has only been in recent years that legal scholars have begun to wonder whether the sharp separation is anything more than a useful fiction.[19] The malaise that such skepticism

---

15. *See* Jerome Bruner & Joan Lucariello, *Narrative Recreation of the World*, *in* NARRATIVES FROM THE CRIB 73, 80 (Katherine Nelson ed., 1989).

16. JUDY DUNN, THE BEGINNINGS OF SOCIAL UNDERSTANDING 145 (1989).

17. *See* John L. Austin, *A Plea for Excuses*, *in* PHILOSOPHICAL PAPERS 175-204 (2d ed. 1970).

18. *See* BERNARD S. JACKSON, LAW, FACT, AND NARRATIVE COHERENCE (1988).

19. *See id.*

creates often leads legal scholars to turn a deaf ear toward many of the major issues of epistemology that have set the tone of modern philosophical debate.[20] Yet, it is not that much of a practical disaster to accept that matters of fact, even when filtered through rules of evidence, oaths, and cross-examination, do not, after all, speak for themselves. In many ways, facts are constructed in response to value judgments that exist either in the broader society or in the law itself, as Kim Lane Scheppele makes clear in the present issue of this journal.[21] This has always been so, and it becomes unsettling only when it is ignored.

The tradition of legal positivism probably has had a good deal to do with the ignoring. Ronald Dworkin, though a critic of positivism, describes its position succinctly. How well does a particular story or collection of facts fit a certain point of law? "The law of a community is a set of special rules used by the community directly or indirectly for the purpose of determining which behavior will be punished or coerced by the public power."[22] If the accepted account of what happened is not clearly covered by such a rule, give or take some judicial discretion, then the case cannot be decided by applying the law.[23]

The fit between matters of fact and points of law illustrates an interesting feature of our legal process. The special rules that constitute the law of a community are not simply criterial subsumption rules as with such natural-kind categories, as say, animals or minerals. Again Dworkin trying to give a fair account of the traditional view: "[T]hese special rules [that constitute the law] can be . . . distinguished by specific criteria, by tests having to do not with their content but with their *pedigree* or the manner in which they were adopted or developed."[24] Precedents selected by tests of pedigree guide one toward valid application of a rule of law.

Now I must confess that psychologically (leave aside legally) this sounds a daunting, if not impossible task. One can always be sure, however, that when something that is widely practiced seems theoretically to be virtually impossible, it is invariably not the practice but the theory that is impossible. It is this odd disjunction between legal practice and legal theory that poses the challenge. This is not simply a cultural psychological question; part of the difficulty resides in the guarded way that lawyers themselves describe what the law is about. A reading of the great masters of jurisprudence provides some interesting hints.

---

20. *See* RORTY, *supra* note 2.

21. *See* 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).

22. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 17 (1977).

23. *See id.* at 17-21.

24. *Id.* at 17.

A judge, for example, is bound by judicial tradition to treat a case as similar to specific past cases that he singles out as precedents. But some forms of similarity are deep and more established than others. Our judge is enjoined, therefore, to choose precedents in a principled way. The question is how univocally can principle operate in guiding the choice of precedents? Do the principles in *Brown v. Board of Education*[25] also fit *Green v. County School Board*?[26] Or *Metro Broadcasting, Inc. v. Federal Communications Commission*?[27] The multiple principles for achieving racial balance are not so much to be found in statutes or in the precedent cases as they are to be drawn from them by acts of interpretation. To carry out such interpretation is much less like scientific induction or logical deduction than it is like applying a moral principle or a cultural maxim. Given the nature of interpretation, particularly since it is the interpretation of stories that is at issue, it could not be otherwise.

But legal positivists, such as H.L.A. Hart[28] (if indeed he is one), believe that moral principles and legal rules should be held totally distinct from each other, and that only the latter have relevance in deciding a case. They then admit (often rather cheerfully) that rarely will particular cases under adjudication uniquely or formally fit abstract rules of law, even with the guidance of precedents. For example, Hart states:

> Any honest description of the use of precedent in English law must allow a place for the following pairs of contrasting facts. *First*, there is no single method of determining the rule for which a given authoritative precedent is an authority. Notwithstanding this, in the vast majority of decided cases there is very little doubt. The head-note is usually correct enough. *Secondly*, there is no authoritative or uniquely correct formulation of any rule to be extracted from cases. On the other hand, there is often very general agreement, when the bearing of a precedent on a later case is in issue, that a given formulation is adequate.[29]

A relevant story is told about Garret Fitzgerald who, while first minister of the Irish Republic, was offered a plan for the economic development of the country by a very bright and experienced businessman. It was fantastic, practical, and smashing, and seemed surefire. "I see how it works in practice," he was alleged to have said, "but there's only one

---

25. 347 U.S. 483 (1954).

26. 391 U.S. 430 (1968).

27. 497 U.S. 547 (1990).

28. *See* H.L.A. HART, THE CONCEPT OF LAW 181 (1961).

29. *Id.* at 131.

problem. How does it work in theory?" The same can be said about jurisprudence. The law works moderately well, although there is some worry whether it will go on doing so. A version of Fitzgerald's question is still worth asking: How well do theories of law capture what law does in practice?

Such questions can be approached both top down and bottom up. The top-down questions are about how the Supreme Court actually decides specific cases. We can narrow this down by asking how decisions are affected by the narrative forms used in characterizing a case. A review of Supreme Court holdings quickly suggests that it is more than fit that determines which precedent cases are cited. As much to the point is the narrative genre in which a case has been framed by the judge. Genre has a potent effect. *Village of Euclid, Ohio v. Ambler Realty Co.*[30] provides a good example. Justice Sutherland structured his interpretation of the facts of the case into a classic narrative that justified zoning in terms of the great themes of protecting hearth and home against intruders, against smoking factory chimneys, even against high-rise apartment buildings. Given that choice of narrative, it was not difficult for him to conceive of zoning power as an extension of police power for enforcement of the general welfare. He could as readily have centered his narrative on the issue of the exclusion of the less well-off by the imposition of zoning and introduced an obligation for a community to provide affordable housing for those excluded by zoning. The enabling legislation related to zoning during that period, one could argue, compelled his decision.[31] Or he might have been constrained by the reality of the flight to the suburbs that was under way.[32] We look somewhat askance at *Euclid* today because only now, in an age of homeless people and locked-up urban ghettoes, are we able to see its broader implications.

But the power of narrative structuring is by no means limited to cases as politically, economically, and ideologically fraught as *Euclid*. One even finds narrative dominance in the most seemingly apolitical Admiralty cases—as in, for example, what constitutes a vessel being ready for sea. You can hear the sea chanties echoing through the minds of the learned justices deciding that a vessel in dry dock undergoing repairs could not be accounted as one causing wrongful death since in principle it was not ready for sea.[33] The repair task that killed the worker in question, not a

30. 272 U.S. 365 (1926).

31. For the background of this case, see ROBERT FISHMAN, BOURGEOIS UTOPIAS (1987), as well as LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 133-34, 593-94 (2d ed. 1988).

32. *See* FISHMAN, *supra* note 31.

33. *See* United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki, 358 U.S. 613 (1959).

crew member, was one formerly performed at sea by members of the crew. Justice Brennan wrote a dissent along quite different narrative lines, arguing that the majority's holding had the effect of passing on the benefits of advancing marine technology to shipowners while ignoring the welfare of those who manned the ships.[34] The power of narrative seemed to have prevailed even on so austerely technical a legal issue as this one. Yet, in the very same year, another technically similar case—involving the alleged wrongful death of a non-seaman called in to repair a faulty pump delivering oil from the ship's hold to a dock to which the ship was secured—was decided in favor of the decedent.[35] In close calls, narrative genre may make a large difference.

One of the last pieces written by my late colleague Paul Freund relates to the Constitutional issue of "state action."[36] In it, he raises the question whether the State can be deemed responsible for what it *permits*, i.e., does not forbid. If so, can private action thus permitted be regarded under certain circumstances as delegated state action?[37] It is a complicated legal issue that brings to mind what might be called prototype legal narratives. Is there a preference for legal narratives about violations of prohibitions? And are there other hidden narrative preferences as well? What of the balance in the law of torts between legal criteria of moral fault, strict responsibility, and objective negligence? Thomas Grey's study of Justice Holmes's balancing of the three in American tort law suggests that, perhaps, the three genres of tort story are in some pragmatic symbiosis with each other, rather like a family of stories.[38] It is difficult to believe such issues as these are entirely legal in nature, with no overlay from a narrative tradition. In a word, certain broad issues of legal interpretation may be akin to issues of literary or mythological interpretation, involving the narrative predilections of an interpretive community beyond the community of legal practitioners. This is not a new view, of course, but it is one that is still badly in need of deeper study.[39]

---

34. *See id.* at 619-24 (Brennan, J., dissenting).

35. *See* The Tungus v. Skovgaard, 358 U.S. 588 (1959).

36. *See* Paul Freund, *The 'State Action' Problem*, 135 PROC. AM. PHIL. SOC'Y 3-12 (1991).

37. *See* Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). Justice Brandeis wrote in dissent, "Our Government is the potent, omnipresent teacher. For good or ill, it teaches the whole people by its example." *Id.* This of course raises the deeper question whether and under what circumstances the teacher is responsible for what the students learn.

38. *See* THOMAS GREY, JUSTICE HOLMES ON THE LAW OF TORTS (forthcoming) (presented to the Faculty Workshop at the New York University School of Law on Mar. 10 1993).

39. *See* JACKSON, *supra* note 18.

IV.

How do lawyers and the courts get the world to go along with them in the use of the specialized forms of legal narrative? Is it simply a matter of being compelled to do so? My colleagues[40] and I have been studying how people's ordinary, everyday trouble narratives get transformed into law narratives that suit the requirements of both legal procedure and legal rules. We start with the ordinary person's first encounter with a lawyer, using simulations of attorney and client played out by law students. Within a few minutes of the start of a client-attorney interview, even intending young lawyers are subtly at work transforming their clients' common-sense trouble stories into ones conforming to legal requirements. The clients' narratives quickly and easily take on a required legal shape. They soon accept that the initial canonical state, the breach, and the redress of a legal story, while still the required constituents of a story, must take on a different form in litigation than they take in life. But from the start they are well versed in what it takes to make a narrative believable and compelling. What an attorney teaches a client to do in order to "behave law" is not storytelling per se. Clients already know how to do that. Nor do they have to be taught how to tell a story with rhetorical intent. They have known that since childhood. Learning to "behave law" seems, rather, to be a matter, first, of adapting to certain procedural rules, and then replacing old narrative constituents with new ones—refining old construals of thoughtlessness with new ones about objective negligence, transforming old notions about a "nice little swimming pool in the backyard" into the concept of attractive nuisance, and the rest. The ordinary client has little trouble with this, and lawyers have little trouble getting them to pour new legal wine into old narrative bottles.

It is not surprising that, on the whole, the law works in spite of its logical impenetrability and its seeming formal contradictions. For it is organized much as ordinary experience is organized: in familiar narrative terms. It easily takes the form we speak of so comfortably as *reality*. The law, in that sense, seems to be rather prototypical of the way in which a culture structures the world of its participants.

This article, hopefully, provides some idea of how a cultural psychologist engages with the law. I have not said a single word about justice; nor do my colleagues do so very often. I had hoped that by ferreting out some of the procedural and psychological underpinnings of law, a concept of justice would emerge as an outcome. That may yet happen. But it seems more likely that law begins with an intuitive sense

---

40. Professors Anthony Amsterdam and Peggy Davis at the New York University School of Law.

of justice, some primitive normative principle such as Kelsen proposed.[41] As it develops, it devises procedures and principles that aim, never with full success, to instantiate that intuition where contested particulars are concerned. In doing so, it taps the full range of human interpretive activity. That is what makes the interface between law and the human sciences so rich. For whatever the theory of law turns out to be, it will surely not be about law alone.

41. *See* HANS KELSEN, GENERAL THEORY OF LAW AND STATE (Anders Wedberg trans. 1961) (1949); *see also* H.L.A. HART, *supra* note 28, for a discussion of this general point.