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# Is Law Narrative?

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## INTRODUCTION

Is every statement in or about the law a story? Is every explanation of the law a narrative? Is all legal argumentation rhetorical? Maybe, but maybe not. Surely the answer depends on what is meant by the terms “story,” “narrative,” and “rhetorical.” In this article, we argue that terms such as these, and claims that rely on them, require definition and clarification. Questions such as “is law narrative?” or “is law rhetorical?” implicate the tricky business of how meaning is made in law. If that is the issue, we ought to face it directly. That is the aim of this essay.

Law is a communicative activity. Clients communicate to lawyers; witnesses communicate to courts; lawyers communicate to each other, to judges, and to juries; judges communicate to lawyers and parties; legal scholars communicate to each other and, sometimes, to the practicing bar. This list could easily be expanded.

Some of the communicative activity involved in law takes a form that most people would recognize as storytelling. Witnesses’ accounts of events, for example, or clients’ explanations of their legal problems are often perceived in this way. Thus, someone observing a trial might describe a witness’s testimony along the following lines: “He told his story about the accident, that he was going to the store and saw the defendant run the light and hit the plaintiff.” A lawyer might describe her first meeting with a client this way: “She told me her story of how her husband started to drink heavily, so the marriage failed and she wanted a divorce.” The statements of the witness and the client conform to ordinary, common sense notions of what a story is. To say that law involves storytelling in this sense is not

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terribly controversial.<sup>1</sup>

Many other communications within law can also be understood as stories. Judicial opinions select from among the many facts adduced at trial those "relevant" to what is deemed to be the case's issue to construct a statement of the case; the resulting rendition of "the facts" can thus be seen as a story crafted to support the court's holding.<sup>2</sup> Were the issue framed differently, or were the court to reach a different result, different facts might be selected, and another story told.<sup>3</sup>

Legal doctrine itself may be seen as a set of stories. The substantive law of contracts, for example, may be perceived as telling a story of free will and free choice.<sup>4</sup> Or the substantive law of rape may be understood as telling a story about how men and women communicate (dis)interest in sex.<sup>5</sup> The justifications

1. This is not to say that legal forms do not constrain in important ways precisely what can be communicated. Rules of evidence, the procedural structure of trials, and the expectations of legal actors such as judges and attorneys all may be at odds with the ordinary speech practices of litigants and witnesses, and thus might limit or alter what is or can be said in legal settings. For an overview of this phenomenon, see JOHN M. CONLEY & WILLIAM M. O'BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE* (1990).

2. For an analysis of the language of judicial opinions, see RICHARD POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATIONSHIP* 269 (1988); Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 187 (Peter Brooks & Paul Gewirtz eds., 1996) [hereinafter *LAW'S STORIES*]. See also Paul Gewirtz, *Narrative and Rhetoric in the Law*, in *LAW'S STORIES*, *supra*, at 11 ("judicial opinions always create 'the facts' in the sense that judges always select out from the profusion of details before them selected particulars that seem plausible and give an account coherence.").

3. On the importance of the framing of the issue, see Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 *YALE J.L. & HUMAN.* 201, 208 (1990) ("The real creativity in a judicial decision lies in the question that judges decide to accept as the basis of their deliberations. This question and its competitors are peculiar as well as central to the judicial opinion . . . Every court makes a fundamental decision about the question before it, and the wording in that first decision controls all others."); Kim Lane Scheppele, *Foreword: Telling Stories*, 87 *MICH. L. REV.* 2073, 2094 (1989) [hereinafter Scheppele, *Foreword*] ("[I]n legal stories, 'where one begins' has a substantial effect because it influences just how the story pulls in the direction of a legal outcome.").

We do not mean to suggest that facts are immaterial to the framing of the issue. Rather, the process is dynamic: an overview of the facts will suggest some legal categories and, possibly, rule out others; the legal categories then trigger a search for specific facts related to them; the final choice of category renders certain facts relevant and others irrelevant. See KIM LANE SCHEPPELE, *LEGAL SECRETS* 95 (1988) (describing this process).

4. Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *YALE L.J.* 997, 999-1000 (1985). In these and the examples that follow, we recount one story that doctrine might be said to tell. As we explain below, other stories might also be told of the same doctrines.

5. Susan Estrich, *Rape*, 95 *YALE L.J.* 1087 (1986). The "official story" of rape unfor-

for the formalities of wills law might be said to involve a story about the potential for carelessness and greed in the setting of donative transfers.<sup>6</sup> Any given set of doctrinal rules might be said to dictate what stories may emerge and how they may emerge in potential cases involving those rules; the substantive law determines which facts will and which will not be deemed to bear on the problem at hand.<sup>7</sup>

While the notion that a witness's or a client's account is a story—or even “just” a story—tends not to raise too many eyebrows, the notion that opinions are (just) stories, or that all law is (just) a story excites more controversy. Some of this controversy may be the result of the vehemence or lack of modulation of some of the claims legal scholars have made.<sup>8</sup> The stronger the argument that law is only or merely a story, the more frequent the reminder that law is not literature,<sup>9</sup> and that “legal interpretation takes place in a field of pain and death.”<sup>10</sup>

But some of the controversy is different. Consider, for example, the following statement written recently by Judge Leval of the United States Court of Appeals for the Second Circuit:

unately continues to focus more on sexuality and consent than on aggression.

6. Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155 (1989).

7. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1591 (1987) (“Legal categories—whether created by doctrine, statute, or constitution—will define legal discourse, will indicate what is ‘relevant’ and what is not.”); Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 495 (1987) (“[T]he purpose of legal doctrine is . . . to create a consensus about which issues are potentially relevant to [a dispute’s] resolution. Doctrine . . . describes the scope of the conversation . . .”).

8. See, e.g., Richard Delgado, *Rodrigo’s Final Chronicle: Cultural Power, The Law Reviews, and the Attack on Narrative Jurisprudence*, 68 S. CAL. L. REV. 545, 564 (1995) (“Legal storytelling is potentially the most revolutionary form of scholarship on the current scene . . .”). See also Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229, 1247 (1995) (arguing that “the scope and intensity of the political claims made on behalf of storytelling are themselves cause for wonder” and giving examples of such claims).

9. See, e.g., Alan M. Dershowitz, *Life is Not a Dramatic Narrative*, in LAW’S STORIES, *supra* note 2, at 99, 100-05 (arguing that the truth conventions of literature—in which, for example, a gun introduced in Act I must be discharged by Act III—distort reality and therefore are inappropriate for law); Robin L. West, *Adjudication is Not Interpretation: Some Reservations About the Law-as-Literature Movement*, 54 TENN. L. REV. 203, 207 (1986) (“Despite a superficial resemblance to literary interpretation, adjudication is not primarily an interpretive act . . .; adjudication . . . is an imperative act. If we lose sight of the difference between literary interpretation and adjudication, . . . then we have either misconceived the nature of interpretation, or the nature of law, or both.”).

10. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986). Of course, literature too is filled with pain and death. But the field to which Cover refers is that of the actual, not the imagined.

The objectives and duties of the judicial opinion are far different from those of polemics, poetry, and the narrative forms of literature; the employment of their rhetorical techniques of suggestion and evocation will more likely be at the expense of, than in the service of, the opinion's capacity to achieve its goals. Pursuit of literary techniques is more likely to undermine than to reinforce the success of the opinion in meeting its judicial obligations.<sup>11</sup>

Surely Judge Leval takes as part of the "judicial obligation" that a judicial opinion must persuade its audience, if not of the rightness of the decision it advocates, then of the reasoning processes by which that decision was reached.<sup>12</sup> Thus its deployment of "rhetorical techniques" is not "at the expense of," but actually "in the service of," its goals.<sup>13</sup> Judicial opinions may or may not employ lyrical images or poetic metaphors. Yet most contain several narrative sequences: at the very least, they contain stories of what happened among the parties and also of the procedural status of the lawsuit. And from the perspective of their persuasive intent, all judicial opinions might be characterized as polemics, if by that term is meant simply a learned disputation aimed at resolving a controversy.

Judge Leval's statement illustrates one of the stickiest problems in the debates concerning legal storytelling: the lack of agreed-upon definitions for the vocabulary legal scholars have

11. Pierre N. Leval, *Judicial Opinions as Literature*, in *LAW'S STORIES*, *supra* note 2, at 206, 207.

12. Judge Leval states:

What are the essential tasks of the opinion? (1) To analyze the problem and its solution clearly and logically and (2) to state the holding clearly, with clear explanation (including recitation of pertinent facts) of the reasons supporting it. The opinion is performative, and the performance of its task depends on clear analysis and clear transmission of its message.

*Id.*

13. For a detailed discussion of how judges use rhetoric to advance the aims of their opinions, see MARTHA NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 99-118 (1995). Nussbaum specifically praises the opinion of Judge Posner in *Carr v. General Motors (Allison Gas Turbine Division)*, 32 F.3d 1007 (7th Cir. 1994), in the following terms:

[I]magination and appropriate emotion are crucial in the reasoning of [Posner's] opinion. His indignation is not capricious: it is solidly grounded in the facts, and he can make his reader feel it in his narration of the facts. Indeed, his opinion does what good satire of the Juvenalian or Swiftian kind does: it inspires indignation through the mordant portrayal of human venality and cruelty. Here . . . the literary approach is closely connected with sympathetic attention to the special plight of people who are socially unequal and to a certain extent, therefore, helpless.

*Id.* at 110-11.

drawn from the field of literary criticism.<sup>14</sup> While some theoretical terms—for example, “deconstruction”<sup>15</sup>—have been examined with care, the basic literary critical vocabulary has been taken to be self-evident. In particular, the words “story”, “rhetoric”, and “narrative” are assumed to be of no lexical complexity and are often used interchangeably.<sup>16</sup>

This undisciplined use of terms fosters confusion and exaggeration in the claims—pro and con—made about the importance of storytelling in law. Storytelling is not an all-or-nothing proposition. To say, as we did in the examples with which we began, that law involves storytelling, or to say, as many legal scholars have recently argued, that law should do more to take account of the stories of outsiders,<sup>17</sup> is not to say that law is only or simply an ever-changing set of stories. Unfortunately, it has been easy for some to make that leap.<sup>18</sup> Similarly, efforts to explain how storytelling invokes and employs emotion in the service of argument contribute to an erroneous dichotomization of emotion from reason.<sup>19</sup> Reason as much as emotion controls

14. Ann Coughlin concurs:

A significant problem with much of the outsider narrative scholarship is that its key terms, including “narrative,” “story,” “storytelling,” “myth,” and “experience,” are not carefully defined, if they are defined at all, or the terms are used so expansively that it is difficult to know what particular meaning the author has in mind with any specific reference.

See Coughlin, *supra* note 8, at 1253 n.82. Unlike Coughlin, we do not believe this problem is confined to outsider narrative scholarship.

15. See generally J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987).

16. See, e.g., Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813 (1992); Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381 (1989). Both Delgado and Ross use more or less synonymously the words “story,” “narrative,” “myth” and “rhetoric.” Delgado, *supra*, at 818; Ross, *supra*, at 381-87. Sometimes the use of “narrative” and “storytelling” as synonyms represents an explicit choice. See Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 363 n.8 (1996) (“I use the terms ‘narrative’ and ‘storytelling’ interchangeably.”).

17. See, e.g., Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989).

18. See, e.g., Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647, 658 (1994) (suggesting that certain narrative scholarship embodying “a postmodern epistemology . . . has the potential to endanger the viability of the rule of law”).

19. See, e.g., Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453, 459 (1996) (arguing that when radical constructivists turn to the narrative and emotional functions of language “what people say becomes as important as what they can ‘prove,’ and the per-

the domain of stories, because interpretation itself is a rational process in which factors such as credibility, plausibility, coherence, consistency, and so on determine conclusions, just as such factors affect outcomes in the law.

Because vocabulary matters, it is important that we be clear in our use of words. We propose to use the term "rhetoric" to denote simply the art of persuasion.<sup>20</sup> In this use, we follow Aristotle:

Rhetoric is useful because things that are true and things that are just have a natural tendency to prevail over their opposites . . . . [W]e must be able to employ persuasion, just as deduction can be employed, on opposite sides of a question, not in order that we may in practice employ it both ways (for we must not make people believe what is wrong), but in order that we may see clearly what the facts are, and that, if another man argues unfairly, we on our part may be able to confute him. No other of the arts draws opposite conclusions: dialectic and rhetoric alone do this.<sup>21</sup>

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suasiveness of any given claim rests as much on its noncognitive or emotional appeal as on whether it accords with the dictates of reason and common knowledge."). See also Daniel A. Farber & Suzanna Sherry, *Legal Storytelling and Constitutional Law: The Medium and the Message*, in *LAW'S STORIES*, *supra* note 2, at 37, 50:

Whereas storytellers view language as operating most powerfully beyond the realm of reason, many of those who oppose either the methodology or the substance of the storytellers' proposals celebrate the use of language as a tool of rational argument.

Indeed, it should not be surprising that storytelling has been the object of resistance in the legal academy. Both law and the academic world have long been viewed as bastions of reasoned argument within a broader world that relies less on reason and more on power or rhetoric. . . .

This belief in the primacy of reason rather than rhetoric underlies much of the resistance to both the message and the medium of storytelling. The few direct critiques of storytelling that have been published so far have argued for the primacy of reasoned argument in scholarship.

(footnote omitted).

For an argument that the reason/emotion dichotomy is misguided, see Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 *COLUM. L. REV.* 269 (1996).

20. We specifically do not mean to use the term rhetoric in the popular sense of something "concerned primarily with style rather than substance, with persuasion rather than discovery of the better argument, with emotion rather than reason, with dazzling effect rather than rigorous analysis." J.M. Balkin, *A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason*, in *LAW'S STORIES*, *supra* note 2, at 211, 211.

21. ARISTOTLE, RHETORIC I.1.1355a22-35 in *THE COMPLETE WORKS OF ARISTOTLE* (rev. Oxford trans. Jonathan Barnes ed., 1984) [hereinafter *COMPLETE WORKS*]. See also Stanley Fish, *Rhetoric*, in *CRITICAL TERMS FOR LITERARY STUDY* 203 (Frank Lentricchia & Thomas McLaughlin eds., 2d ed. 1995) [hereinafter *CRITICAL TERMS*].

In classical formulations, rhetoric was the discipline most intrinsic to the practice of law, and "the substantive aspects of rhetoric . . . remain central to the contemporary work of lawyers, judges, and students of the law."<sup>22</sup> Rhetoric and substance cannot be separated: "[W]hen we try to justify a particular rule of law to another person, we must find arguments that justify it, and to do this we ourselves must analyze the situation and determine the most plausible arguments for and against the position that we are taking. So the tasks of persuasion and analysis go hand in hand."<sup>23</sup>

We use the term "story" to mean an account of an event or set of events that unfolds over time and whose beginning, middle, and end are intended to resolve (or question the possibility of resolving) the problem set in motion at the start.<sup>24</sup> Not all stories can be classified as "literary," for we take "literary" stories to be only those which are deliberately both artful and fictive. Stories form one aspect of the larger category of "narrative": stories are, in Seymour Chatman's words, "the what of narrative,"<sup>25</sup> to which other elements such as character, setting, point of view, and so on, remain subservient.<sup>26</sup>

We use the term "narrative" to signify a broader enterprise that encompasses the recounting (production) and receiving (reception) of stories. This enterprise functions to organize certain kinds of problems into a form that renders culturally meaningful both the problems and their possible resolutions. For example, *Oedipus Rex*<sup>27</sup> is comprised of many individual stories: of the curse on Laius and Jocasta, of their binding Oedipus's feet and leaving him on a hillside to die, of the shepherd who rescues him and took him to Corinth, of Oedipus's killing several men at a crossroads (one of whom is, unbeknownst to him, his father), of Oedipus's solving the riddle of the sphinx, of Oedi-

22. Balkin, *supra* note 20, at 212.

23. *Id.* at 215.

24. Stories that end ambiguously are not inconsistent with this definition, for ambiguity is a form of resolution.

Note that in many languages, the Romance languages and German in particular, the same word denotes what English needs both "story" and "history" to signify.

25. SEYMOUR CHATMAN, *STORY AND DISCOURSE: NARRATIVE STRUCTURE IN FICTION AND FILM* 9 (1978).

26. See generally PETER BROOKS, *READING FOR THE PLOT: DESIGN AND INTENTION IN NARRATIVE* (1984).

27. There are many translations of Sophocles' best-known play. See, e.g., *Oedipus The King*, in 1 *GREEK TRAGEDIES* 107 (David Grene & Richmond Lattimore eds., 1960); *SOPHOCLES: THE OEDIPUS CYCLE* (Dudley Fitts & Robert Fitzgerald trans., 1949); *SOPHOCLES: THE THREE THEBAN PLAYS* (Robert Fagles trans., 1982). The trilogy includes *Oedipus the King*, *Oedipus at Colonus*, and *Antigone*.



pus's marriage to his own mother. These stories are embedded in a frame story in which Thebes is gripped by plague. Together, these interwoven stories, concluding with Jocasta's suicide, Oedipus's self-blinding and exile, and the end of the Theban plague, comprise a narrative of the relation between transgression and punishment.<sup>28</sup> The narrative consists of the cumulative effects of these separate stories as their aggregate meaning comes to light. By organizing discrete stories and constructing their "point," narrative is interactive and social; it represents one collective way of knowing things, one communal mechanism for grasping the world. As Peter Brooks has written, narrative is "one of our large, all-pervasive ways of organizing and speaking the world—the way we make sense of meanings that unfold in and through time."<sup>29</sup>

With these definitions in mind, we may be better able to see why the law, broadly speaking, may be said to employ rhetorical strategies, to use stories, and to be narrative. We may also see why these suggestions—that law contains stories and can be categorized as narrative—have aroused such controversy. Some of the controversy stems from the view that law cannot be reduced entirely either to storytelling or to the broader category of narrative. Of course not. Yet we need to understand the ways legal discourse uses and embeds narrative elements.

Certainly judicial opinions, especially those parts that discuss the law as opposed to the facts of the case, seem less story-like in form than the ordinary witness and client accounts described above. But critiques such as Judge Leval's implicitly concede that judicial opinions *could* be cast as narratives; if it were not possible to apply to opinions the techniques of "the narrative forms of literature," there would be no reason to be concerned about the appropriateness of doing so. So notwithstanding their apparent difference from witness and client accounts, opinions

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28. Cultural meaningfulness is contingent; it shifts from one historical moment to another, and from culture to culture. More than one culturally meaningful narrative may operate simultaneously. For example, fifth century B.C.E. Greeks understood illness to represent a punishment from the gods. If we were to list the variety of narratives that purport to explain the global AIDS epidemic, for example, in the late twentieth century, we would need to include, among others, beliefs in HIV (and retroviruses in general) as a causal factor (a scientific narrative); Western ideas concerning the sexual practices of central Africans (a racialized narrative); and judgments that hold homosexual practices to be unnatural and thus deserving of punishment (a moral narrative). Note that this last narrative returns us, anachronistically, to Thebes.

29. Peter Brooks, *The Law as Narrative and Rhetoric*, in *LAW'S STORIES*, *supra* note 2, at 14, 14. See also J. Hillis Miller, *Narrative*, in *CRITICAL TERMS*, *supra* note 21, at 66, 66.

can be understood as narratives. Similarly, scholarly articles in law reviews—even if they do not take the form of explicit narratives—can also be seen to tell stories about what the law is or could be.<sup>30</sup> The question is not whether opinions, articles, or other communicative acts within law can be seen as stories, but whether they are best understood in this way.

This is the question we address in this paper: Is it useful—and, if so, in what ways is it useful—to focus on the narrative qualities of various communications and interactions that occur within the law? Not surprisingly (why else would we write?), we believe that a focus on narrative in law can be helpful as a way of elucidating how meaning is made in legal contexts. This is not to say that all meaning, in or outside of law, is somehow ineluctably narrative in character.<sup>31</sup> Rather, we assert that examining when it seems problematic or unproblematic to describe legal communications as stories helps to illuminate how narrative conventions regulate the production of meaning in legal contexts. Moreover, as we will demonstrate, debates about narrative are connected to cultural anxieties about the status and role of “facts” in law.

30. See Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 276 (1994). See also Bandes, *supra* note 16, at 385 (“The legal discourse we observe, create, and participate in is already ordered into narratives. It is just that some are more visible than others.”).

31. One of us, it must be said, has asserted elsewhere: “It can be argued that all human understanding is finally organized by and achieved through narrativity, that narrative can be said to underpin all Western epistemologies.” JULIA EPSTEIN, *ALTERED CONDITIONS: DISEASE, MEDICINE, AND STORYTELLING* 25 (1995). For other arguments to this effect, see ARTHUR DANTO, *ANALYTICAL PHILOSOPHY OF HISTORY* (1965); W.B. GALLIE, *PHILOSOPHY AND HISTORICAL UNDERSTANDING* (1964); Louis O. Mink, *Narrative Form as a Cognitive Instrument*, in *THE WRITING OF HISTORY: LITERARY FORM AND HISTORICAL UNDERSTANDING* 129 (Robert Canary & Henry Kosicki eds., 1978); Paul Ricoeur, *The Narrative Function*, in *HERMENEUTICS AND THE HUMAN SCIENCES* 291 (John B. Thompson ed., 1981).

Alan Dershowitz argues to the contrary that:

Life is not a purposive narrative . . . . Events are often simply meaningless, irrelevant to what comes next; events can be out of sequence, random, purely accidental, without purpose. . . . Human beings always try to impose order and meaning on random chaos, both to understand and to control the forces that determine their destiny. This desperate attempt to derive purpose from purposelessness will often distort reality . . . .

Dershowitz, *supra* note 9, at 100. See also HAYDEN WHITE, *THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION* 24 (1987) (“[T]he value attached to narrativity in the representation of real events arises out of a desire to have real events display the coherence, integrity, fullness, and closure of an image of life that is and can only be imaginary.”).

In Part I we illustrate the narrative character of a traditional law review article. Our point is to show that it is relatively simple to see even the most conventional scholarly writing as containing and comprising a story. In Part II we examine whether our analysis in Part I is "fair" to the article, or whether it distorts in important ways what the article says. Our goal here is to demonstrate the epistemological positions at stake in the controversy over narrative. In Part III, we connect the debates about storytelling to contemporary debates over the possibility of neutrally or objectively discovering and representing facts. These debates have a peculiar valence and poignancy in law, where "finding the facts" has always seemed central to doing justice.

### I. ARTICLE AS STORY

Some communications seem more obviously to be stories than others. Many would agree that "Cinderella" and "Little Red Riding Hood" are stories. A friend's account of how she learned to ride a bicycle or how a bear got into her backpack on a camping trip would also fit comfortably into most people's notion of a story. We "recognize" these communications as stories without conscious consideration, without having a specific definition of "story" in mind, and without needing to classify these "stories" as fairy tales, personal anecdotes, mythic quests, Greek tragedies, and so on.

Some communications do not seem to be stories. Few of us would read a grocery shopping list to our children at bedtime. Asked to "tell a story" around the campfire, most of us would not read aloud the lead piece in the *New England Journal of Medicine* or the section of Williston's treatise on contracts dealing with, say, the definition of an "offer." However vague our concept of a story might be, these writings do not seem to fit.

To say that some communications seem like stories and some do not is not to posit a definitive type or genre. While theorists of history and of literature have worked to describe the essential elements of a story or narrative,<sup>32</sup> few people consult

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32. See, e.g., ERICH AUERBACH, *MIMESIS: THE REPRESENTATION OF REALITY IN WESTERN LITERATURE* (Willard R. Trask trans., 1953); MIKHAIL M. BAKHTIN, *THE DIALOGIC IMAGINATION: FOUR ESSAYS* (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., 1981); NORTHROP FRYE, *ANATOMY OF CRITICISM: FOUR ESSAYS* (1957); FREDRIC JAMESON, *THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT* (1981); WALLACE MARTIN, *RECENT THEORIES OF NARRATIVE* (1986); VLADIMIR PROPP, *MORPHOLOGY OF THE FOLKTALE* (Louis A. Wagner ed. & Laurence Scott trans., 2d ed. 1968); PAUL RICŒUR, *TIME AND NARRATIVE* (Kathleen McLaughlin & David Pellauer trans., 1984); ROBERT

such descriptions in characterizing what they hear or read as a "story." Most of us rely instead on intuition or experience to sort communications into categories such as "fairy tale," "anecdote," "list," "article," or "treatise."

Yet the lines that separate these categories are easily blurred. For example, the notion of a sharp and distinct divide between an "article" on the one hand and a "narrative" on the other is undermined by the fact that even the most traditional law review article may, and usually does, contain elements that are associated with narrative. The kind of writing that we have come to recognize as an article relies no less than any "story" on formal and rhetorical devices; it tells a "story" about the law under discussion; and it also tells a "story" about its author—if only, in many articles, a story of invisibility. These points can be illustrated by examining the famous law review article by Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*.<sup>33</sup> We choose this article not because we wish to join the chorus of those praising or castigating Wechsler's thesis, but because its status as legal scholarship has never to our knowledge been questioned.<sup>34</sup>

#### A. *The Ideology of Toward Neutral Principles*

Wechsler's main thesis in *Toward Neutral Principles* concerns the proper criteria of constitutional interpretation.<sup>35</sup> He states them as follows:

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SCHOLES & ROBERT KELLOGG, *THE NATURE OF NARRATIVE* (1966); TZVETAN TODOROV, *THE POETICS OF PROSE* (Richard Howard trans., 1977).

33. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

34. A 1985 survey listed *Toward Neutral Principles* as the second most heavily cited law review article. Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540, 1549 tbl.1 (1985). When that survey was updated in 1996, *Toward Neutral Principles* remained the second most frequently cited law review article. Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI-KENT L. REV. 751, 766 tbl. 1 (1996). For a collection of sources demonstrating "the extent to which [*Toward Neutral Principles*] continues to provoke controversy and attract citations," see Norman Silber & Geoffrey Miller, *Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 855 n.6 (1993). For a recent critique of *Toward Neutral Principles*, see NUSSBAUM, *supra* note 13, at 87-90.

35. A second thesis, comprising Part I of the article, concerns the scope of the Supreme Court's powers of review and, more specifically, the circumstances under which the Court should abstain from adjudicating constitutional questions. Wechsler's reading of the constitution's text led him to the conclusion that "the only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts." Wechsler, *supra* note 33, at 9.

I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved. To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply?<sup>36</sup>

This thesis may or may not be an interesting or adequate account of how to interpret the Constitution.<sup>37</sup> Yet in developing it, Wechsler relays a fascinating—though not entirely explicit—narrative about the nature of judge-made law. In this narrative, Wechsler's central concern is to underscore the legitimacy of judicial reasoning processes by proposing how judges can decide cases in a value-free and truly impartial manner.

In Wechsler's narrative, the evil to be combatted is personified in those who "frankly or covertly make the test of virtue in interpretation whether its result in the immediate decision seems to hinder or advance the interests or the values they support."<sup>38</sup> This result-oriented instrumentalism is fine for the political arena,<sup>39</sup> as well as for the legislative and executive branches of government.<sup>40</sup> But, in contrast to these institutions, courts "are bound to function otherwise than as a naked power organ."<sup>41</sup> There is "a vital difference between legislative freedom to appraise the gains and losses in projected measures and the kind of principled appraisal, in respect of values that can reasonably be asserted to have constitutional dimension, that alone is in the province of the courts[.]"<sup>42</sup> In carrying out their "special duty"<sup>43</sup> to participate in public life "as courts of law,"<sup>44</sup> courts

36. *Id.* at 15.

37. For a strong critique, see generally Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

38. Wechsler, *supra* note 33, at 11.

39. *Id.* at 14 ("[N]o one will deny . . . that principles are largely instrumental as they are employed in politics, instrumental in relation to results that a controlling sentiment demands at any given time. Politicians recognize this fact of life and are obliged to trim and shape their speech and votes accordingly . . .").

40. *Id.* at 15-16 ("No legislature or executive is obligated by the nature of its function to support its choice of values by the type of reasoned explanation that I have suggested is intrinsic to judicial action . . .").

41. *Id.* at 19. See also *id.* at 12 (courts are not free "to function as a naked power organ").

42. *Id.* at 16.

43. *Id.*

44. *Id.* at 19.

must reach decisions having "legal quality."<sup>45</sup> Such decisions are "entirely principled," a criterion satisfied only if they "rest[] on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."<sup>46</sup>

The narrative Wechsler relays is familiar alike to traditional constitutional theorists and critics of traditional theory. It concerns the proper relation of politics and law. Wechsler constructs it by presenting various qualities as dichotomous and opposed: reason/will; law/naked power; the principled/the ad hoc. The first quality in each pairing must—and in his view, fortunately, does—subdue the second. Thus, the Court can involve itself in controversial political issues of the moment without becoming or even seeming to become "the partisan of a particular set of ethical or economical opinions."<sup>47</sup> In the end, Wechsler's narrative concerns the legitimacy of judicial decision-making.

Wechsler's argument may be convincing or unconvincing. Our point is that it *is* a narrative, one of many that could be told about the nature of the judicial process and its connection to the nation's political life. This observation is not itself a critique, for any account of the role of courts will constitute a narrative about the place of the judiciary in the public realm. But it is nonetheless important to make the observation, lest these narrative qualities of Wechsler's account be obscured by the traditionally "analytic" form in which he presents his argument.

## B. *Stories About the Author and the Lawyer's Role*

The *narrative* Wechsler relays about judge-made law is the larger framework that houses the various *stories* he tells about his own experience. These stories concern two kinds of problems he faced in his career. First, he found himself in professional situations in which he felt obliged to argue positions he thought morally repugnant.<sup>48</sup> Second, he confronted situations in which an outcome he believed to be morally correct was underpinned by flawed legal reasoning.<sup>49</sup> He offers the theory of neutral principles as a solution to these dilemmas.<sup>50</sup>

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45. *Id.*

46. *Id.*

47. *Id.* (quoting *Otis v. Parker*, 187 U.S. 606, 609 (1903)).

48. See *infra* text accompanying notes 54-56.

49. See *infra* text accompanying notes 57-71.

50. We develop the latter point at length *infra* in the text accompanying notes 88-101.

We learn quite a bit about Herbert Wechsler the man in *Toward Neutral Principles*. Because he delivered the paper as an invited lecturer, it is not surprising that he is far less invisible than the typical author of a scholarly article. Under the conventions that have until relatively recently governed traditional law review writing, the author adopts an impersonal style and tone, speaking the generic voice of authority, not (overtly) his or her own voice. Perhaps because Wechsler, in contrast, was asked to speak on *his* views, he does not employ the impersonality/authority conventions and instead explicitly identifies the positions he expresses as his own.<sup>51</sup>

We learn first that Wechsler was involved as an advocate—and not a disengaged law professor—in some of the cases of which he speaks. He refers four separate times to his involvement “as a lawyer”<sup>52</sup> in the decisions he discusses; in three of the four, it is clear that he represented the Government.<sup>53</sup> These references, offered in an apologetic, confessional tone, paradoxically establish Wechsler’s authority to speak: he is revealed to be an experienced professional who has done real lawyer’s work and also someone with direct, actual knowledge of some of the cases at issue.

We learn also that Wechsler did not always argue, in his capacity as attorney/representative, positions he personally favored. Indeed, in two instances, Wechsler accompanies his disclosures about his involvement with an explicit disavowal of the position he advocated.<sup>54</sup> From these disclaimers we can infer

51. Wechsler described his development of the neutral principles idea, and the invitation to lecture about those ideas, as follows:

[While at Harvard as a Visiting Professor in 1956], I found myself developing the neutral principles idea as a pedagogical instrument for pushing students into subjecting their own immediate reactions of approval or disapproval of the results of a particular decision to a more searching type of criterion of evaluation . . . .

[I] did enough talking along this line in my teaching at Harvard and also in chewing the rag with colleagues on the faculty, so . . . when there came a time when they were good enough to ask me to fill a vacancy in the annual Holmes Lectureship, it was perfectly clear that what they wanted me to do was to put up or shut up on this line that I had been following pedagogically and disputatiously . . . .

Silber & Miller, *supra* note 34, at 925-26.

52. Wechsler, *supra* note 33, at 18; *see also id.* at 21, 27, 28.

53. *Id.* at 18 (referring to Walker v. Johnston, 312 U.S. 275 (1941), which Wechsler argued as Special Assistant to the Attorney General); *id.* at 27 (referring to Korematsu v. United States, 323 U.S. 214 (1944), in which Wechsler appeared on the brief as Assistant Attorney General); *id.* at 28 (referring to United States v. Classic, 313 U.S. 299 (1941), which Wechsler argued as Special Assistant to the Attorney General).

54. *Id.* at 18, 27. Wechsler is especially vehement about the Government’s position

something of how Wechsler understood the lawyer's proper role. Wechsler may have been ashamed or embarrassed about the views he advanced in the court, but he is not ashamed or embarrassed that he advanced them. A lawyer, we infer, may (and possibly must) advocate the position favored by his client, regardless of the lawyer's own views of that position.<sup>55</sup> Wechsler thus reveals himself to have adopted the quite common view of the lawyer as "nonaccountable," i.e., not *personally* responsible for the views he expresses while acting in his professional role.<sup>56</sup>

The gap between the positions Wechsler advocated in his capacity as an attorney and those he personally adopts is recapitulated in Wechsler's examination of specific Supreme Court decisions, especially those concerning racial segregation. Wechsler repeatedly distinguishes between the Court's methods and reasoning, which he relentlessly criticizes, and its results, which he grudgingly endorses. Wechsler begins this pattern in his discussion of the cases extending *Brown v. Board of Education*,<sup>57</sup> in which the reasoning "accorded import to the nature of the *educational* process,"<sup>58</sup> to noneducational contexts "such as public transportation, parks, golf courses, bath houses, and beaches, which no one is obliged to use . . . ."<sup>59</sup> "That these situations present a weaker case against state segregation is not . . . what I am saying," Wechsler explains.<sup>60</sup> "I am saying that the question whether it is stronger, weaker, or of equal weight appears to me to call for principled decision."<sup>61</sup> The problem, Wechsler argues, is that the necessary assessment of principle cannot be made because of the Court's practice of issuing *per curiam* affir-

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in the *Korematsu* case. He explains that notwithstanding his participation "in the line of duty as a lawyer," he thought of the Japanese evacuation, which the Supreme Court upheld, as "an abomination when it happened." *Id.* at 27. For more on this point, see *infra* text accompanying notes 82-95.

55. In a separate speech, later published, Wechsler specifically outlined his views of the ethics of being a lawyer for the government. See Herbert Wechsler, *Some Issues for the Lawyer*, in INTEGRITY AND COMPROMISE: PROBLEMS OF PUBLIC AND PRIVATE CONSCIENCE 117 (R.M. MacIver ed., 1957), quoted in Silber & Miller, *supra* note 34, at 888-90. We describe in the text the views that emerge solely from reading *Toward Neutral Principles*. Our reading does not differ materially from Wechsler's statement of his views.

56. For overviews of the nonaccountability position and of alternatives that have been offered to that position, see DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 140-50, 177-200 (2d ed. 1995); Paul R. Tremblay, *Practiced Moral Activism*, 8 ST. THOMAS L. REV. 9, 12-28 (1995).

57. 347 U.S. 483 (1954).

58. Wechsler, *supra* note 33, at 22 (emphasis added).

59. *Id.*

60. *Id.*

61. *Id.*



mances in the post-*Brown* cases. It is not the extension of *Brown per se* that disturbs him, only its method.

The distinction between process and result—and the accompanying dissociation between disapproval of method and approval of outcome—is most plain in Wechsler's climactic and controversial discussion of the *Brown* decision itself. *Brown* "stirs the deepest conflict I experience in testing the thesis I propose."<sup>62</sup> The problem in the decision, Wechsler explains, "inheres strictly in the reasoning of the opinion."<sup>63</sup> Did the Court's finding that segregated schools are inherently unequal turn on evidence or judicial notice of actual harm?<sup>64</sup> If so, it was difficult to explain why apparently contrary evidence was ignored.<sup>65</sup> It was similarly difficult to explain how the decision could be automatically extended, without similar factual findings, to any other school districts.<sup>66</sup> If, in contrast, *Brown* turned not on its peculiar facts, but "on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed,"<sup>67</sup> that rationale only presents different problems. That position requires "an inquiry into the motive of the legislature, which is generally foreclosed to the courts. . . ." Equally untenably, it "make[s] the measure of validity of legislation the way it is interpreted by those who are affected by it."<sup>68</sup>

Wechsler concluded that the Court had erred in understanding the problem of *Brown* in terms of discrimination. The "human and . . . constitutional dimensions" of state-enforced segregation were better understood, Wechsler asserted, in terms of the "denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved."<sup>69</sup> But, unfortunately, "if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant."<sup>70</sup> Wechsler closes his lecture by lamenting the distance between the result he wishes for and the reasoning that might, but does not yet, sustain that result:

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62. *Id.* at 31.

63. *Id.* at 32.

64. *Id.*

65. *Id.* at 32-33.

66. *Id.* at 33.

67. *Id.*

68. *Id.*

69. *Id.* at 34.

70. *Id.*

Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail? I should like to think there is, but I confess that I have not yet written the opinion. To write it is for me the challenge of the school-segregation cases.<sup>71</sup>

Notice that the process/outcome dichotomy permits Wechsler to approve and disapprove of the result in *Brown* more or less simultaneously. On the one hand, he repeatedly tells us it is a result he prefers, and that extensions of it to other contexts are not necessarily wrong. At the same time, however, he tells us that a decision cannot properly be characterized as truly "legal" unless it can meet standards of neutrality and generality that *Brown* in fact does not meet. In this sense, *Brown* is plainly wrong. And this is so regardless of the good intentions of the Court and of those who support desegregation.

### C. *The Rhetoric of Toward Neutral Principles*

From a technical perspective, Wechsler is a master rhetorician. He follows Aristotle's dicta in Book 3, Chapter 9 of the *Rhetoric*, concerning the uses of periodic style. Aristotle defines the periodic style as "a portion of speech that has in itself a beginning and an end."<sup>72</sup> Language of this kind, Aristotle continues, "is satisfying, and easy to follow. It is satisfying because it is just the reverse of indefinite; and moreover, the hearer always feels that he is grasping something and has reached some definite conclusion."<sup>73</sup> Wechsler practices this style with flourish and aplomb. *Toward Neutral Principles* employs direct addresses to the reader again and again.<sup>74</sup> It also employs over and over sequences of escalating questions or negative assertions, draw-

71. *Id.*

72. ARISTOTLE, RHETORIC III.9.1409a35-36, in COMPLETE WORKS, *supra* note 21.

73. *Id.* at III.9.1409b1-3.

74. Look at the following phrases: "If you abide with me thus far, I doubt that you will hesitate upon the final step," Wechsler, *supra* note 33, at 4; "I submit" and "I need not say," *id.* at 9; "Think of . . ." and "You will not doubt," *id.* at 10; "Whatever you may think to be the answer, surely you agree with me that I am right to state . . .," *id.* at 11; "You will not charge me with exaggeration if I say . . .," *id.* at 12; "All I have said, you may reply, is . . .," *id.* at 14; "You will not understand . . ." and "I would certainly remind you," *id.* at 16; "Nor will you take me to deny. . ." and "Nor will you even think that I deem . . ." and "Would any of us have it otherwise . . . ?," *id.* at 17. This list of examples could be lengthened.

ing the reader into his reasoning processes.<sup>75</sup> Indeed, we call Wechsler a rhetorician in *Toward Neutral Principles* in admiration for the control of language and audience he achieves. This, too, is a story, the story of a man who has mastered forensic style and argumentation. But to what end?

A rhetorician needs an *agonist*, a voice to which his oratory responds, and Wechsler provides this agonistic voice in the redoubtable person of Judge Learned Hand, the previous year's Oliver Wendell Holmes Lecturer at Harvard Law School.<sup>76</sup> The embedded debate allows Wechsler to write a more conversational prose than that usually found in drier, more strictly composed law review articles. A conventional article, for example, is unlikely to appeal to its readers with expressions such as "Am I not right, however, in believing . . . ?," "I need not say . . . ," "You will not doubt . . . ," and "I put it to you that . . . ."<sup>77</sup> In other words, Wechsler uses the interactive conventions of oratory and the strategies they permit in addition to the conventions of written academic disputation.<sup>78</sup> In so doing, he simultaneously addresses his Harvard audience and Judge Hand.

The debate between Wechsler and Judge Hand forms what we might call the frame story of *Toward Neutral Principles*. It operates as a frame story because it contains the more detailed stories that *Toward Neutral Principles* tells. Wechsler's article has the structure of a set of Russian dolls.<sup>79</sup> The largest doll is the *narrative* we have discussed concerning the legitimacy of judge-made law. Inside that doll is a slightly smaller one that is the *frame story*, which presents the rhetorical situation as a de-

75. The phrase "Nor is it" is repeated three times. *Id.* at 31-32. A sequence of "If" questions follows a passage from Hand on judicial power. *Id.* at 6. Questions beginning "Is it not clear . . . ?" or the equivalent organize a paragraph at *id.* at 11. At *id.* at 12, a sequence of questions goes as follows: "Did not New England challenge . . . ?," "Was not Jefferson . . . ?," "Can you square his [Jefferson's] disappointment about Burr's acquittal . . . ?," "Were the abolitionists . . . ?" At *id.* at 16, a sequence of questions takes this form: "Does not . . . ?," "Is there not . . . ?," "Does not . . . ?," "Is it not also . . . ?" This kind of repetitive stylistic tactic is a version of *anaphora*.

76. Hand's lectures, delivered in 1958, are reprinted in *LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES, 1958 (1958)*. Hand is also an impressive rhetorician. Interestingly, he like Wechsler criticized the *Brown* decision, albeit on the very different ground that the Court had inappropriately "assume[d] the role of a third legislative chamber." *Id.* at 55. For a description of Hand's lectures and the reaction to them, see *GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 652-64 (1994)*.

77. Wechsler, *supra* note 33, at 7, 9, 10, 15.

78. Note that we also use the conventions of direct address and questions in the first paragraph of this article.

79. For a recent history of this wooden toy, called a matreshka or matrioshka doll, see *ALISON HILTON, RUSSIAN FOLK ART 127 (1995)*.

bate between Judge Learned Hand and Herbert Wechsler. A doll that is smaller still represents the *stories* Wechsler tells about particular cases to convey how he has come to define the act of lawyering in the course of his career as a litigator. The nugget doll—the one that is not hollow—represents the theory of neutral principles itself. Only by unscrewing and removing each doll one by one can one arrive at this core theory.

One key story Wechsler tells within the debate frame reveals his advocacy role in some of the cases he discusses. We focus on one striking case, *Korematsu v. United States*,<sup>80</sup> involving the internment of Japanese Americans as an alleged security threat during World War II. In *Toward Neutral Principles*, Wechsler remarks of this case:

Only the other day I read that the Japanese evacuation, which I thought an abomination when it happened, though in the line of duty as a lawyer I participated in the effort to sustain it in the Court, is now believed by many to have been a blessing to its victims, breaking down forever the ghettos in which they had previously lived.<sup>81</sup>

In a 1993 interview, Wechsler reveals that he had doubts at the time about the constitutionality of relocating Japanese citizens.<sup>82</sup> In that interview, he remarks that *Korematsu* and its companion cases<sup>83</sup> “were nice cases for testing the role of the government lawyer.”<sup>84</sup> Wechsler reports that he and other Justice Department lawyers “declined to make arguments that the War Department in particular wanted to be made, which we considered to be specious, either in law or in fact.”<sup>85</sup> In particular, Wechsler explains, lawyers in the Justice Department sought to avoid reliance on the Final Report prepared for the War Department by Commanding General John L. DeWitt, which described the purported security threat posed by Japanese-Americans, “because we regarded it as spurious.”<sup>86</sup> Wechs-

80. 323 U.S. 214 (1944).

81. Wechsler, *supra* note 33, at 27. At the time *Korematsu* was argued, Wechsler was serving in the Justice Department as Assistant Attorney General in charge of the War Division. See Silber & Miller, *supra* note 34, at 882.

82. Silber & Miller, *supra* note 34, at 883.

83. In addition to *Korematsu*, other cases involving Japanese Americans included *Hirabayashi v. United States*, 320 U.S. 81 (1943) (in which Wechsler did not participate), and *Ex Parte Endo*, 323 U.S. 283 (1944) (in which Wechsler did).

84. Silber & Miller, *supra* note 34, at 883. Dissenting in *Korematsu*, Justice Murphy concluded that its ruling was a “legalization of racism.” 323 U.S. at 242.

85. Silber & Miller, *supra* note 34, at 883.

86. *Id.* As we describe *infra* in the text accompanying notes 90-92, by the time the Justice Department lawyers were preparing their presentation to the Supreme Court in

ler goes on to say:

[T]here was no possibility of anything being urged that wasn't true. And so the argument in support was made. It was made with recognition of the difficulty and importance of the case. That was also true of the companion case involving the effort of the War Relocation Authority to control the departure of Japanese-Americans from relocation centers, which we lost and were delighted to lose.<sup>87</sup>

At first blush, Wechsler appears to contradict himself. He espouses neutral principles, principles extending beyond the case at hand, as a legal ideal. Yet he admits to having participated as a lawyer in acts he found abhorrent in the terms of his own ideals—behavior he would hardly want to generalize beyond the individual cases in which he engaged. He justifies his participation with a military phrase, "in the line of duty," which is usually used to disclaim personal responsibility.

But Wechsler later reconstructed his involvement in a way that permitted him both to take and to escape responsibility. Echoing his vision of the nonaccountable lawyer, Wechsler conceptualized his involvement in these controversial cases in terms of *role*:

I did superintend the preparation of [the *Korematsu*] brief. . . . I did it because it seemed to me that the separation of function in society justified and, indeed, required the course that I pursued; that is to say that

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*Korematsu*, they had received information from the FBI, the FCC, and Naval Intelligence that contradicted the DeWitt Report. For a description of the debate within the Justice Department over the use of the DeWitt Report, in which Wechsler's role appears considerably less than passive or benign, see PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES 278-92* (1983) [hereinafter IRONS, *JUSTICE AT WAR*]. See also *supra* text accompanying notes 92-96.

In 1983, Fred Korematsu filed a petition for a writ of error *coram nobis*, and in 1984 his conviction was overturned. The record in the case is reprinted in *JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES 125-376* (Peter Irons ed., 1989). Judge Marilyn H. Patel's opinion granting the writ concluded that "the government deliberately omitted relevant information and provided misleading information in papers before the court. . . . The judicial process is seriously impaired when the government's law enforcement officers violate their ethical obligations to the court." *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

For an overview of the wartime experiences of Japanese Americans, told "through the voices of those who were young at the time," see ELLEN LEVINE, *A FENCE AWAY FROM FREEDOM: JAPANESE AMERICANS AND WORLD WAR II* ix (1995). For a collection of articles about the internment and the legal struggles relating to it, see *THE MASS INTERNMENT OF JAPANESE AMERICANS AND THE QUEST FOR LEGAL REDRESS* (Charles McClain ed., 1994).

87. Silber & Miller, *supra* note 34, at 885. Wechsler refers here to *Ex Parte Endo*, 323 U.S. 283 (1944), which involved a challenge to the lawfulness of detention under the internment orders. Regarding the *Endo* case, see IRONS, *JUSTICE AT WAR*, *supra* note 86, at 307-10.

it was not my responsibility to order or not to order the Japanese evacuation. . . . It was the responsibility of the President of the United States. . . . Neither was it . . . my responsibility to determine whether the evacuation was constitutional or not constitutional. That was the responsibility . . . of the Supreme Court of the United States. . . .

I suggest to you, in short, that one of the ways in which a rich society avoids what might otherwise prove to be insoluble dilemmas of choice is to recognize a separation of functions, a distribution of responsibilities, with respect to problems of this kind, and this is particularly recurrent in the legal profession.<sup>88</sup>

It does not take a special astuteness to see in this vision of role differentiation the skeleton of the process jurisprudence which, with *Toward Neutral Principles*, made Wechsler a household name in the law school world.<sup>89</sup> Combining Wechsler's responsible role argument with his theory of neutral principles yields a view of lawyering that at once exonerates him for participating in a case he did not personally believe in, and offers a model for the Supreme Court to follow. A process view of jurisprudence frees Wechsler from a dilemma, that there is no neutral principle that characterizes *Korematsu*. To see how this works, we can examine a detail of Wechsler's role in *Korematsu*.<sup>90</sup>

88. Wechsler, *supra* note 55, at 890.

89. See PAUL M. BATOR ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (3d ed. 1988). A "rough-and-ready description" of the legal process school is as follows:

The legal process school focuses primary attention on who is, or ought, to make a given legal decision, and how that decision is, or ought, to be made. Is, or ought, a particular legal question to be resolved by the federal or the state government? By courts, legislatures, or executive agencies? If by courts, at the trial level or by appellate tribunals? If at trial, by judges or juries? Subject to what standard of appellate review? And so on.

Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 691 (1989) (book review).

On the continuing influence of the legal process model, see Richard J. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953 (1994).

90. As noted above, see *supra* note 86, a controversial aspect of that case concerned the validity of General DeWitt's Final Report. U.S. Department of War, Final Report, Japanese Evacuation from the West Coast (1943). The first version of the Report "implied that Japanese Americans constituted such a 'tightly-knit racial group' that separation by loyalty could not have been accomplished by any means." IRONS, *JUSTICE AT WAR*, *supra* note 86, at 208. That would have contradicted the government's contention in earlier cases that since time did not allow individual determinations of loyalty to be made, all Japanese Americans should be restricted. See *id.* After some negotiation, DeWitt rewrote the Report to say that "no ready means existed for determining the loyal and the disloyal with any degree of safety." *Id.* at 210. The Justice Department did not see the full report until it was released to the public in January 1944. See *id.* at 211-12. Neither the FBI nor the FCC was able to verify the Report's allegations that Japanese Americans had committed acts of espionage with signal lights and radio transmissions, allega-

By the time the Justice Department wrote the *Korematsu* brief, the DeWitt Report, which purported to supply the facts demonstrating the dangers posed by Japanese Americans, had been substantially discredited. John Burling, the chief author of the Justice Department's brief, appended a footnote warning the Court that "the contrariety of the reports" with respect to allegations of espionage was such that "we do not ask the Court to take judicial notice of the recital of those facts contained in the Report."<sup>91</sup> This warning provoked outrage from the War Department; in the ensuing wrangling, printing of the brief was halted, and Assistant Attorney General Herbert Wechsler rewrote the warning footnote.<sup>92</sup> The new version said simply: "We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice; and we rely upon the Final Report only to the extent that it relates to such facts."<sup>93</sup> The Court's final *Korematsu* opinion referred in a general way to "military necessity,"<sup>94</sup> and one of the only doctrinal aspects of *Korematsu* that survives is that military necessity of sufficient urgency justifies racial discrimination.<sup>95</sup>

Let us examine Wechsler's rewritten footnote along with his remark in *Toward Neutral Principles* concerning his *Korematsu* role. Burling's footnote had explicitly called into question any relationship between the DeWitt Report and "facts"; in marked contrast, Wechsler's version repeats the word "facts" twice, first in an assertion of their presence in the brief, and then in an ambiguous reference to the relationship between the Final Report and "such facts." Wechsler's note might be taken to imply a problem with the factuality of the Final Report. But it might

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tions essential to the argument that the Japanese Americans posed a security threat. *Id.* at 279-84.

91. IRONS, *JUSTICE AT WAR*, *supra* note 86, at 286. "There is sharp controversy as to the credibility of the DeWitt report." *Korematsu v. United States*, 323 U.S. 214, 245 (1944) (Jackson, J., dissenting).

92. IRONS, *JUSTICE AT WAR*, *supra* note 86, at 286-92.

93. *Id.* at 290-91.

94. See *Korematsu*, 323 U.S. at 218 ("apprehension by the proper military authorities of the gravest imminent danger to the public safety"); *id.* at 219 ("a military imperative"); *id.* at 223 ("the military urgency of the situation").

95. See JACOBUS TENBROEK ET AL., *PREJUDICE, WAR AND THE CONSTITUTION* (1954); Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175 (1945).

Not all the Justices concurred in this view. Justice Murphy, for example, wrote: "I dissent . . . from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life." 323 U.S. at 242.

also be read as a simple assertion that the brief presents its "facts" to the Court independently, even if in corroboration, of the Report.<sup>96</sup> In other words, the note distances the *Korematsu* brief from the DeWitt Report with one hand, while with the other pointing to the identical conclusion arrived at in each document: that Japanese Americans should be relocated.

Now we can return to Wechsler's statement that although he thought the Japanese evacuation an "abomination," he helped to sustain it in the Court "in the line of duty as a lawyer."<sup>97</sup> His language in this sentence is startling. First, "abomination" is a powerful word with Biblical associations to the Levitician ideas of pollution and moral taint.<sup>98</sup> Second, "in the line of duty" is a military phrase. Using such an expression to justify the claim of "military necessity" situates the Justice Department in a position parallel to that of the War Department in pursuing military objectives.<sup>99</sup>

However, Wechsler undercuts these charged terms even as he uses them. The sentence begins with disarming casualness: "Only the other day I read . . ." The entire sentence highlights a *Newsweek* article that conveniently concludes the Japanese evacuations to have been a "blessing" in disguise, helping Japanese Americans to move out of ethnic ghettos.<sup>100</sup> So even though he thought the evacuation an "abomination" when it occurred, Wechsler serendipitously finds, fifteen years later, that it turns out inadvertently to have been justified on grounds utterly different from those on which it was argued. Finally, *Toward Neutral Principles* produces a theory that would erase the sort of moral quandary set in motion at the Justice Department by *Korematsu*.<sup>101</sup>

96. See Arval A. Morris, *Justice, War, and the Japanese-American Evacuation and Internment*, 59 WASH. L. REV. 843, 859-60 (1984) ("[I]t would take a very clever and discriminating reading between the lines to discern any substantive criticisms of General DeWitt's Final Report."). Morris goes on to call the footnote "misleading semantic ambiguity." *Id.* at 860.

97. Wechsler, *supra* note 33, at 27; see *supra* text accompanying notes 54, 82-88.

98. MARY DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO* (1984).

99. In the 1993 interview, Wechsler disclaimed that the Justice Department was doing the War Department's bidding. See Silber & Miller, *supra* note 34, at 886.

100. *Disguised Blessing*, NEWSWEEK, Dec. 29, 1958, at 23, cited in Wechsler, *supra* note 33, at 27 n.91.

101. On the moral quandary, see Peter Irons, *Fancy Dancing at the Marble Palace*, 3 CONST. COMMENTARY 36 (1986).



#### D. *Can We Be Neutral About Toward Neutral Principles?*

We have analyzed the narrative structure of *Toward Neutral Principles* and used the metaphor of a Russian doll to illustrate the ways Wechsler presents his material. He opens by setting himself a large question, which he describes as "that most abiding problem of our public law: the role of courts in general and the Supreme Court in particular in our constitutional tradition; their special function in the maintenance, interpretation and development of the organic charter that provides the framework of our government, the charter that declares itself the 'supreme law.'"<sup>102</sup> We have called this "abiding problem" the overarching narrative of *Toward Neutral Principles*. Having situated that narrative, Wechsler goes on to frame his approach to it as a debate between himself and Judge Learned Hand. We have called this debate the frame story. The frame established, Wechsler proceeds to the theory of neutral principles, which he argues in large part by recounting several stories about particular cases and his role in them. This structure produces an effective argument, and is part of the reason *Toward Neutral Principles* became a much cited landmark article in constitutional legal scholarship. Wechsler is a skilled rhetorician and a good writer.

When we initially defined narrative, we used the example of Sophocles' *Oedipus Rex*. Indeed, *Toward Neutral Principles* may be said to employ a narrative structure of embedded stories very like the narrative structure of *Oedipus*.<sup>103</sup> Wechsler's grand narrative concerning judge-made law parallels the Sophoclean grand narrative of transgression and punishment. The Wechsler/Hand debate grid that sets off *Toward Neutral Principles* parallels the dilemma of the plague in Thebes that sets Oedipus' detective work in motion. The stories of Wechsler's advocacy roles parallel the multiple stories that make up the ill-fated Oedipus' family history. And each narrative closes with a culturally meaningful resolution acceptable to its particular audience: the theory of neutral principles for Wechsler; blindness and exile for Oedipus, who is accompanied to Colonus by his daughter Antigone.<sup>104</sup>

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102. Wechsler, *supra* note 33, at 1.

103. *Oedipus* is the key text in Aristotle's *Poetics*; as such, it holds a special, almost primal, place in the canon of Western literature. The *Poetics* can be found in II THE COMPLETE WORKS, *supra* note 21. The standard teaching edition is ARISTOTLE'S POETICS (James Hutton trans., 1982).

104. We are not suggesting either that *Toward Neutral Principles* is a tragedy or that Wechsler is a tragic hero. Although there may be fatal flaws in both protagonists,

We claim that any law review article could be shown to have a narrative structure. *Toward Neutral Principles's* structure works like a Russian doll, one possible narrative model, although not the only one. The same narrative model works to analyze our own writing practice in this Article. Our grand narrative also asks a large question which serves as our title: is law narrative? We establish a frame story by taking Wechsler's famous article as an agonist, a worthy text with which we wrestle in order to demonstrate our claims. And we embed several stories in our article: the story of *Oedipus Rex*, perhaps reminding readers that one of us is a literature professor; the story of Russian *matreshka* dolls<sup>105</sup>; the story of the abiding value of classical rhetoric; perhaps even the story of our own collaboration.<sup>106</sup>

We have also occluded some of our views. We argue that we are doing a strictly structural analysis of *Toward Neutral Principles* and that we abstain from taking a position on its account of how best to interpret the Constitution. Yet, of course, we cannot help but hold such a position. We disagree with Wechsler that a theory of neutral principles resolves the problems he puts forward, because we are anti-foundationalists (see below) who harbor radical doubts concerning the possibility of arriving at pure objectivity or neutrality, however laudable that goal. And we find Wechsler's advocacy practice at certain moments, in particular his participation in *Korematsu*, reprehensible because we do not believe his process jurisprudence and its role theory precludes his having to take responsibility for actively participating in something he thought, and we think, was an "abomination."

Like Wechsler, we have just made some confessions. *Is Law Narrative?* is susceptible to precisely the kind of critique to which we have just submitted *Toward Neutral Principles*. We can only hope that we would emerge from such a critique with the same verdict that we assign to Wechsler, that of being skilled writers of legal scholarship.

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our analogies are purely structural.

105. A psychoanalytic critic would no doubt make something of the history and maternal imagery of these "mother" dolls.

106. Since we met as neighbors and came to know each other over several years of standing with our children at the same school bus stop, is it perhaps not coincidental that we found the perfect metaphor in mother dolls?

## II. WHY NARRATIVIZE?

In what ways is it useful to see the stories in *Toward Neutral Principles* and to focus on its narrative structure? Does the exercise help us to read the article more insightfully, to understand better what Wechsler was trying to say? Or, to the contrary, does it distort our reading of the article and make it into something Wechsler would barely recognize? And would such distortion, if it occurred, be wrong or unfair?<sup>107</sup>

The answer to these questions depends on what it means to read insightfully and fairly. In fact, the process of reading, of understanding the meaning of a presentation such as Wechsler's, is quite complex. Part of that process may include trying to ascertain the ideas the speaker/author intended to communicate, but that is only a part.<sup>108</sup> Other parts of the process may include such things as knowing the immediate context in which the speaker/author is acting (a lecture at Harvard Law school; a dinner table conversation), putting the author's ideas in a context of others on the same topic (such as alternative views of constitutional interpretation), understanding the larger context to which the speaker/author wishes to contribute (ideas about law generally), or discovering the speaker/author's investments in the issues. This list is by no means exhaustive. Meaning is complicated. Focusing on the varying narrative elements of a traditional essay such as *Toward Neutral Principles* helps demonstrate how complex the process of making sense of things can be.

### A. *Stories as Conventions*

Wechsler could have tried to convey his points about the need for neutral principles and the flaws of the *Brown* decision by telling a story directly. Consider the following very rough example:

107. We have been careful about our definitions thus far. Since we employ a neologism, let us explain that the term "to narrativize" encompasses the questions asked in this paragraph.

108. Authorial intention is vexingly difficult to reconstruct from textual evidence alone. For the classic literary critical article on this subject, see William K. Wimsatt & Monroe C. Beardsley, *The Intentional Fallacy*, 54 SEWANEE REV. 468 (1946), reprinted in THE CRITICAL TRADITION: CLASSIC TEXTS AND CONTEMPORARY TRENDS 1383 (David Richter ed., 1989). THE CRITICAL TRADITION also reprints several responses to *The Intentional Fallacy*: E.D. Hirsch, Jr., *Objective Criticism*, *supra* at 1392; P.D. Juhl, *Does a Literary Work Have One and Only One Correct Interpretation?*, *supra*, at 1411; and Steven Knapp & Walter Benn Michaels, *Against Theory*, *supra*, at 1424).

I am a lawyer for the government. I have devoted my career to advancing the civil rights of blacks, specifically, to ending segregation and Jim Crow. And I was greatly relieved when the U.S. Supreme Court decided *Brown v. Board of Education*, for I believed that I now had an authoritative precedent that I could invoke in future cases.

Soon after the decision in *Brown*, I was assigned a new case involving a segregated swimming pool [bus system, park, golf course, etc.]. Initially, I was sure I would be able to obtain a judgment that barring blacks from the pool was unlawful. But when I tried to write the brief and argue the case, I discovered there were problems. *Brown* turned on some factual findings about the harm to children attending segregated schools. I could not see how similar findings could be reached in the case of a swimming pool. Moreover, the Court seemed to suggest in *Brown* that segregation is wrongful *per se* as a denial of equality to the minority against whom it is directed. But not all differences in treatment are unequal, so this finding seemed to require an investigation of legislative intent to discriminate—an investigation I was certain I could not get the court to make in my swimming pool case.

In the end, I won the case anyway. The court issued an order requiring nondiscriminatory access, but its opinion was very vague, merely reciting the facts of the immediate case and holding that 'under *Brown* such treatment cannot continue.' Although I was glad to get a good outcome for my clients, I felt curiously deflated. As a matter of law, *Brown* probably did not demand the desegregation of the pool. I felt that the court in my case, and perhaps even the Supreme Court in *Brown* itself, had merely acted expediently, in response to political pressures. I wondered whether such decisions in time would lose their legitimacy as law, just as I felt in making my arguments I had to some extent compromised my own legitimacy as a lawyer.

Is the point of this story the same as that of *Toward Neutral Principles*? In some ways, yes: the absence of a truly defensible (i.e., neutral, general) rationale for *Brown* renders that decision less helpful to the lawyer who narrates the story, and ultimately makes him uncomfortable with himself as a professional and with his profession. What would we, the story's audience, learn? That courts should decide cases using neutral and general principles.

But maybe this story fails to convey the point of *Toward Neutral Principles*. Wechsler speaks there of judicial legitimacy, of judge-made law. Perhaps only a story about a judge's experience, rather than a lawyer's, could effectively make this point.

Notice that we have to "know" the point of *Toward Neutral Principles* to evaluate these assertions, but we come to *Toward Neutral Principles* after the fact, as readers; our problem is interpretive. Before the fact, Wechsler, knowing his own point, could easily have chosen to present it in a form his listeners

would have recognized intuitively as a story. Or perhaps he could have prefaced his article with this "story"—as, for example, Susan Estrich prefaced her article on rape law with a personal account of her own rape.<sup>109</sup> Had he situated himself so overtly with respect to the principles he espouses, and has felt the lack of in cases that have caused him personal moral anguish, that shift in his engagement with the argument might have produced a concomitant shift in the reader's response. All this is to say that Wechsler's primary decision before the fact involved determining the best, most effective way to deliver the message (the "point") he had in mind, and *that* determination required a choice whether to use the overt story format or some other. As readers after the fact, we know he opted for the quite different format of what can be called the academic disputation.<sup>110</sup>

We do not pretend to know anything about Wechsler's actual thought process as he prepared his remarks. We focus on (some of) the available alternatives to the format in which *Toward Neutral Principles* appears in order to highlight the fact that, in deciding how to deliver his message, Wechsler, like all persons seeking to communicate, had to choose among various available forms for presenting his ideas. A story is one such form, an academic speech another.

The choice of forms is important because different expectations tend to accompany different forms. Assume along the lines of our earlier speculation that Wechsler *had* chosen to present his ideas by telling "war stories" from his own experiences. The audience might have heard *Toward Neutral Principles* very differently. Many lawyers who are not academics tell war stories, so perhaps listeners would have heard the message as less scholarly than it looked in its speech form. War stories are derived from an individual's own unique experiences, so perhaps the audience would have interpreted Wechsler to be describing only one person's idiosyncratic troubles with *Brown*. And there would be an added irony here, since *Korematsu*, for example, is, quite literally, a war story in itself, a story in which Wechsler acted "in the line of duty."<sup>111</sup>

These possible expectations or reactions to the war story form are not in any sense "natural." To the contrary, they are

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109. Estrich, *supra* note 5, at 1087-88.

110. An academic disputation, like an article, a treatise, or any other text, can have narrative elements without taking the overt form of a story. That is one of the main arguments we wish to make.

111. See *supra* text accompanying notes 89-101.

artificial and contingent, dependent on any number of factors that could have been otherwise: who has told such stories in the past, what those persons have said, the audience members' prior encounters with war stories, and so on.<sup>112</sup> Yet however artificial or contingent the connection between a particular form and the expectations that accompany it, once the connection is made, the decision to adopt the form is in effect a decision to invoke the expectations. In this sense, the choice of one communicative form—a story, a speech—is strategic. One employs the form one believes will be most persuasive, given the expectations and associations one perceives to be connected to that form.

And yet the choice can never be only strategic. For if different expectations accompany different forms, then the choice of form will affect meaning as well. The choice to “tell” *Toward Neutral Principles* as an overt story would of necessity have changed the “point” that got made.

### B. *Stories as Constructs*

Earlier, we stated that “Wechsler’s narrative [in *Toward Neutral Principles*] concerns the legitimacy of judicial decision making.”<sup>113</sup> It is here that many modern legal theorists would argue that since the vision of legitimacy in *Toward Neutral Principles* can be contested, Wechsler’s argument is “only a story.”<sup>114</sup> But although *Toward Neutral Principles* can be presented as a narrative of legitimacy, there is nothing in the form or the tone of the article to suggest that Wechsler actually thought of himself as employing a narrative structure or telling stories. To the contrary, there is every indication that Wechsler regarded *Toward Neutral Principles* as offering true (albeit potentially controversial) observations about constitutional law

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112. On the contingency of conventions and responses to conventional genres, see Stanley Fish, *Literature in the Reader: Affective Stylistics, in IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 21 (1980). On how conventions trigger responses, see UMBERTO ECO, *THE ROLE OF THE READER: EXPLORATIONS IN THE SEMIOTICS OF TEXTS* (1979); WOLFGANG ISER, *THE ACT OF READING: A THEORY OF AESTHETIC RESPONSE* (1978); HANS ROBERT JAUSS, *TOWARD AN AESTHETIC OF RECEPTION* (1982); *THE READER IN THE TEXT: ESSAYS ON AUDIENCE AND INTERPRETATION* (Susan R. Suleiman & Inge Crosman eds., 1980); *READER-RESPONSE CRITICISM: FROM FORMALISM TO POST-STRUCTURALISM* (Jane P. Tompkins ed., 1980).

113. See *supra* text accompanying note 36.

114. See, e.g., Delgado, *supra* note 16, at 814 (describing the notions of freedom and consent in tort law as “narratives”); Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systematic Social Ills?*, 77 CORNELL L. REV. 1258, 1280 (1992) (portraying as a narrative the First Amendment notion of a marketplace of ideas).

and judicial decision-making. The contrast between viewing *Toward Neutral Principles* as (just) a story—or, to be more precise, a narrative containing various stories—and viewing it as (a version of) the “truth” is useful because it highlights how persuasion occurs against, and depends upon, a series of ordinarily invisible background assumptions about how the world really is and what questions are worth asking. Putting the conflict bluntly: what is truth to one can be (just a) story to another.

What does it mean to say that Wechsler’s article is “just a story”? We are not proposing that the narrative elements in *Toward Neutral Principles* diminish its argument. Rather, we claim that its argument can be read as a narrative, and that its narrativity contextualizes this argument both personally and historically. *Toward Neutral Principles*, inescapably, is of its time and place and culture. It was written in a period in which the United States was developing exponentially as a world power, growing economically, and beginning a long road toward equal rights for its African-American citizens. To read the article as narrating the place of judicial decision-making within this context is to enrich our understanding of Wechsler’s theme. Whether we agree with Wechsler or not, the investments he had in making his case for neutrality come into clearer relief if we are able to read the narrative of *Toward Neutral Principles*.

We could imagine someone in Wechsler’s shoes raising objections along the following lines:

You may differ with me over the nature of judicial decision making. You may think I’m wrong about *Brown* in particular and neutral principles in general. If that is all you mean by calling my article a story, then why don’t you just say so? That is, why is it better to “tell the story” of *Toward Neutral Principles* than to say “*Toward Neutral Principles* presents an erroneous (or idealized, or dangerous, or whatever) view of constitutional law? If, on the other hand, you mean to say only that *Toward Neutral Principles* presents one vision (= “story”) of constitutional law and that other visions (= “stories”) vie with mine within constitutional theory, then fine, but so what? You’ve just renamed what traditional legal theorists customarily call “positions” or “arguments” as “stories.” Why is your new label better?

These objections arise out of a view of law that holds there is an ultimate “truth” of constitutional decision-making. Thus, there are better and worse, right or wrong ideas about things such as judicial review. Concepts such as better and worse, correct or incorrect require comparison to a fixed point of reference. Only from a foundational place or ground of ultimate “truth” can we judge who is “right” or “wrong” about constitutional law.

And the spatial metaphor of "positions" only reinforces this idea of an essential truth that we can be closer to or farther from. It may be that neither law professors nor judges—even those on the United States Supreme Court—have unmediated access to this foundational truth. Nonetheless, getting as close to it as possible remains the goal.

Sometimes the contention that a particular legal argument—in an article, say, or a judicial opinion—is (just) a story can appropriately be translated: that argument is not in fact a correct interpretation/understanding of the law in question. Sometimes, in other words, the word "story" is used, as in the paragraph above, more or less as a synonym for "position," or—more accurately—"your position." When someone labels an opponent's argument a "story" in this sense, he or she is disagreeing with the opponent on the merits of the particular point in question and, possibly, attempting to disparage the opponent's position. But he or she is not disputing the concept of "the merits." The opponent has just gotten things wrong ("told a story") and not right ("gotten at the truth of the matter"). We will call this the foundationalist challenge.

But other characterizations of an argument as (just) a story attempt to go in a different direction. They are meant to highlight the absence of any neutral position from which one could gauge the relative merits of contending positions and to question whether there is any way to recognize an essential "truth" to which one can be close or far. To question whether there is a neutral, objective method for discovering or determining truth is not necessarily to question whether there is truth at all, although some theorists might go that far.<sup>115</sup> The claims we ex-

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115. Some recent critiques of science have been accused of arguing that there is no such thing as reality. Such an accusation was the premise of a recent hoax in which a professor of physics submitted to a scholarly journal called *Social Text* a parody of the cultural studies of science, inspired by NORMAN LEVITT & PAUL R. GROSS, *HIGHER SUPERSTITION: THE ACADEMIC LEFT AND ITS QUARREL WITH SCIENCE* (1994). Alan D. Sokal, *Transgressing the Boundaries: Toward a Transformative Hermeneutics of Quantum Gravity*, 46/47 *SOCIAL TEXT* 217 (Spring/Summer 1996). The physicist revealed the hoax only after the issue was in print. Alan D. Sokal, *A Physicist Experiments with Cultural Studies*, 6 *LINGUA FRANCA* no. 4 at 62 (May/June 1996). For an account of the flap, see Janny Scott, *Postmodern Gravity Deconstructed*, *Slyly*, N.Y. TIMES, May 18, 1996, at A1.

As was pointed out in an Op-Ed piece written in response to the reports about the hoax, see Stanley Fish, *Professor Sokol's Bad Joke*, N.Y. TIMES, May 21, 1996, at A23, anti-foundationalists do not claim that the world is not real. Rather, they try to demonstrate that scientific empiricism and objectivity cannot ever be fully divorced from the conditions under which science is practiced. The practice of science occurs within non-objective parameters such as public and private funding trends, employment practices in scientific institutes and universities, consumer demand, corporate profits, and state and



amine here tend to be epistemological rather than ontological; they focus less on whether facts or reality exist than on how we come to "know" what we consider factual and real. If one takes as one's premise the notion that truth always comes to us mediated in some way—by language, culture, or other social constructions—then it becomes important to understand the mediating processes, especially their politics or ideologies. When used this way, the contention that a particular legal writing is (just) a story should be translated: that argument reflects and derives from assumptions about the world which your presentation has rendered invisible, but which it is important to expose and to question. When someone labels an opponent's argument a "story" in *this* sense, he or she refuses to join issue on the merits of the particular point in question because he or she wishes to dispute the concept of "the merits." What he or she is trying to do by labeling the opponent's argument a "story" is to problematize the framework from which the opponent has argued.<sup>116</sup>

This problematization does not require that there be some "better" framework from which argumentation could proceed; indeed, this use of the "story" characterization often proceeds from the position that frameworks cannot be ranked abstractly as better or worse, because there is not and cannot be any neutral correct point from which to engage in comparative assessment.<sup>117</sup> Relatedly, this problematization views frameworks as

military sponsorship. All of these things affect the kinds of questions whose answers are sought, and the approaches to finding answers. In the U.S., mercantile capitalism largely controls the conditions under which scientific work may take place. Science studies investigate these conditions rather than the premises of scientific research itself. A forthcoming collection of essays reviews the current state of debates about science, see *SCIENCE WARS* (Andrew Ross ed., 1996).

116. See, e.g., Delgado, *supra* note 8, at 549:

[Some] Critical Race scholars do write chronicles, parables, and narratives. We use them to explore ideology and mind-set. Stories are a great device for probing the dominant narrative. We use them to examine presupposition, the body of received wisdoms that pass as truth but actually are contingent, power-serving, and drastically disadvantage our people.

117. Again, we are not asserting that people—anti-foundationalists and foundationalists alike—do not actually engage in the practice of ranking frameworks. In ordinary day to day life, some ideas seem more useful or helpful—indeed, more true—than others. For example, I might make an assessment that there is a chair beneath me before I sit down because in the context of the decision I have to make ("should I sit or stand?") it is rational and helpful to adopt the standpoint of empiricism ("I can sit because I see there is a chair there"). In another context, such as examining my belief in God, I might reject the empirical framework, arguing from faith that God exists even if that existence is not subject to empirical verification.

But this practice of relying on frameworks in day to day life does not mean that we

inherently and unavoidably value-laden. The point of narrativizing is to expose and thereby subject to debate the values hidden by the apparently nonnarrative format of pieces written in traditional "academic" styles. We will call this the anti-foundationalist challenge.

Antifoundationalists hold that arguments, legal or other, are not made in a vacuum, but are constructed within a context of many factors: political beliefs, moral values, philosophical principles. A legal argument, in the antifoundationalist view, always arises at a particular historical moment or within a specific set of jurisprudential debates. In addition, arguments, like perceptions of events and objects in the world, are always mediated through language, and language is open to interpretation. As noted above, this does not mean that there is no such thing as truth or facts, or even that objectivity cannot be seen as an ideal. It does mean, however, that our knowledge of facts or truth is always in some way filtered. Thus, to recognize that a narrative underpins an argument helps us to negotiate the mediated nature of all attempts to get at "truth".

### C. *Stories as Critiques*

The contention that a communication that does not look like a story—an article, a statement of legal rules or policies—is nonetheless (just) a story is usually offered as a criticism. But the foundationalist and anti-foundationalist challenges actually involve quite distinguishable critiques directed to quite different ends. The foundationalist challenge seeks to get things right in an absolute sense, so when a foundationalist argues that an opponent's position is just a story, she tends to mean that her opponent is telling the wrong story, and her objective is to correct it. But the antifoundationalist challenge denies the possibility of a single right story, so when she argues that her opponent's position is just a story, her goal is not to correct it, but to demonstrate its character as a social or cultural artifact that could be constructed differently. Some examples can help demonstrate these points.

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cannot and should not question those frameworks. The question is not whether we do rely on frameworks, categories, and the like, but whether we treat those frameworks and categories as "natural" or, in contrast, are willing to examine the beliefs and assumptions that underlie them. See Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 51-53 (1988) (feminists must rely on and yet challenge simplifying categories and stereotypes).

Imagine two scholars debating whether the basis of contract obligation lies in free choice (simplistically: the state in enforcing contracts implements the intention of private citizens to be bound) or in reliance (the state in enforcing contracts imposes obligations on private citizens to prevent unfairness and protect reliance, regardless of the citizens' intention to be bound).<sup>118</sup> These two positions about contract law can be cast as stories: the intention story (in which people go around making free and unfettered trades) and the reliance story (in which people first induce, and then betray, trust). What is accomplished by recasting the positions as stories?

The label "story" in this context is meant to be belittling, dismissive: the intent argument, sneers the believer in reliance, is just a story (translate: a fantasy, a fiction), whereas the reliance argument is not (translate: is correct, accurate, true). And when the intent proponent rejoins that it is the reliance rather than the intention argument that is the story (i.e., fantasy, fiction), he is making the legal analogue of the statement, "Is not!" Substantively, the assertion that the intent argument is just a story implies that it does not "fit the facts"; such assertions tend to be followed by analyses of the case law demonstrating that holdings cannot be explained by reference to intent, but can be better (or only) explained with reference to reliance. The argument, in other words, is basically over how best to understand contract law in light of the facts of human behavior and prior case law. In this argument, it is assumed that the proper measure of "best" is fit with facts or law. Foundationalist challenges in this sense take for granted and rely on traditional criteria for evaluating legal arguments.

The relatively traditional nature of the foundationalist challenge is at times obscured by the form in which that challenge is offered. Rather than employing the traditional "article" format, some legal scholars have published stories to supplement or even to supplant conventional analysis.<sup>119</sup> Instead of arguing

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118. These theories are but two of many that have been offered to explain the basis of contract. For overviews of the theories, see RANDY E. BARNETT, *CONTRACTS: CASES AND DOCTRINE* 631-54 (1995); A *CONTRACTS ANTHOLOGY* 54-128 (Peter Linzer ed., 2d ed. 1995). For one recent argument that none of the accepted theories adequately explains contract law, see James Gordley, *Enforcing Promises*, 83 CAL. L. REV. 547, 548 (1995) ("The[] decisions [of American courts] do not turn on whether the parties made a bargain or the promisee relied or the offeree assented. They turn on the effect of the transaction on the distribution of wealth between the parties.")

119. See, e.g., Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. REV. 355 (1989) (using the author's own experiences of childbirth and miscarriage as a basis for criticizing the law's treatment of is-

about what the cases “really” show about the relative importance of intention or reliance in contract law, scholars in this vein describe their own or others’ actual experiences in entering into or enforcing contracts.<sup>120</sup> The stories are often quite dramatic and surprising, but their apparently radical departure from the formal conventions of legal scholarship can cloud a relatively accepted substantive goal: to demonstrate some aspect of lived reality that existing legal doctrine fails to take into account. In other words, stories presented as part of a foundationalist challenge are offered for their “informational value.”<sup>121</sup> Underlying these presentations is the very ordinary, not earthshaking, presumption that legal doctrine should be based on and responsive to facts; under this presumption, if there are facts that doctrine leaves out of account, reality to which doctrine does not respond, then there is a problem with the law. The critique implicit in foundationalist storytelling is reformist in orientation.

But imagine a slightly different version of the debate between the two contracts scholars. One argues that contract law is primarily based on the intent of the parties. The other responds that this view is “(just) a story.” If the first professor were then to ask, “Oh. Do you think that reliance better explains the cases?,” the second might reply, “No. Reliance is (just) a story, too. The relational theory<sup>122</sup> is yet another story, and I’d say the same for any other theories offered to ‘explain’ contract law.” What does the label “story” mean here?

In this context, to call an account a story is not to contrast it with some other real or ideal account that is *not* a story, i.e., that is “true”. Rather, the critic calls an account a story to emphasize its nature as an explanatory construction. This is what we attempted to do by narrativizing *Toward Neutral Principles*, and the same could be done for a traditional essay on contract

issues surrounding reproduction); Eskridge, *supra* note 17 (using the author’s and others stories as the basis for a critique of homophobia in the law); Estrich, *supra* note 5 (using the story of the author’s own rape to introduce an evaluation of rape doctrine); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991) (using stories of the experiences of battered women to explore problems in the legal treatment of battering).

120. See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 146-65 (1991).

121. Eskridge, *supra* note 17, at 614.

122. On the relational theory, see, for example, Ian R. Macneil, *Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 N.W. U. L. REV. 854 (1978); Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981).

doctrine because the point of almost any presentation can be re-written as the "moral" of a story.<sup>123</sup> Other strategies are also available for emphasizing the constructed nature of any individual account. One could, for example, illustrate how the courts in each case carefully selected which "facts" about the transaction to describe. Dealings between the parties prior to the legally-effective offer where a particular opinion begins, for example, might provide a context in which the transaction described by a court could be perceived very differently.<sup>124</sup> Or perhaps all the cases in a given category involve plaintiffs in similar positions—women, say, or children. Focusing on this aspect of these cases, rather than on their formal holdings, might show that the application of legal doctrine depends importantly on courts' perceptions not just about the parties but also about the groups or categories to which those individuals belong.<sup>125</sup> Yet a third strategy is to tell one—or better yet—several stories that interrogate the original account, showing how the same event/transaction might be very differently perceived by different actors, so that no single version of either "what happened" or "the meaning of events" can be arrived at.<sup>126</sup>

The object of these efforts is not to establish some alternative, authoritative account of the law in question. Rather, it is to emphasize the impossibility of establishing an authoritative account. To say that the original account, be it Wechsler's view of constitutional decision-making or the reliance theory of contract, is (just a) story is thus not in itself a critique, for the multiplicity of ways in which a single event might be perceived and described suggests that *all* alternative accounts will equally be (just) stories. The critique lies in the demonstration of how the original account seeks falsely to establish itself as authoritative,

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123. See, e.g., Wayne Eastman, *How Coasean Bargaining Entails a Prisoners' Dilemma*, 72 NOTRE DAME L. REV. 89, 89 (1996) (describing as "stories" both the Coase Theorem and the Prisoners' Dilemma); Marc R. Poirier, *Environmental Justice and the Beach Access Movements of the 1970's in Connecticut and New Jersey: Stories of Property and Civil Rights*, 28 CONN. L. REV. 719 (1996) (describing the "stories" organizing competing theories of beach access law).

124. See Scheppele, *Foreword*, *supra* note 3, at 2094-97 (describing how starting a story at a different point in time changes perceptions of the events "in question"). See also Martha Minow, *Stories in Law*, in *LAW'S STORIES*, *supra* note 2, at 24, 31 (describing problems of selectivity in storytelling; important parts of a story may be omitted in order to present the actors in a more sympathetic or unsympathetic light).

125. See, e.g., Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065, 1129-34 (1985); Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195, 216-17 (1987).

126. This technique is used in a different context in Delgado, *supra* note 17, at 2418-35.

to privilege itself as the only "true" account. This privileging requires the suppression or subordination of other perspectives.<sup>127</sup> What passes for "analysis" can thus be understood as the exercise of domination and power. Wechsler recounts the history of *Brown* as a narrative about the legitimacy of judicial decision-making, but this is "only a story" in the sense that there are many other enlightening narratives that could frame *Brown*.

The author in Wechsler's position (generically, the "original author") might well complain that he did not mean to tell a story but rather to make a case or tell the truth, and that the story presented in the narrativized version of the article therefore is not his. The complaint is well-founded: the re-writing of the article (or speech or rule) into a story is meant to expose and, usually, to challenge the original author's epistemological assumptions. The fact that a different article/story can be written out of the same materials the original author used to construct the article/story he wrote only demonstrates the extent to which meaning is a function of perspective and of language. From inside the foundationalist premises of conventional legal analysis, reading *Toward Neutral Principles* as a narrative misrepresents it because it presents the article's thesis as but one of many possible visions of how constitutional decision-making can be justified, whereas the article proceeds from the view that some understandings of constitutional decision-making are better than others (even if we can't agree which are better).<sup>128</sup> But from the antifoundationalist perspective, in which the notion of "better" makes only relative sense, the charge of misrepresentation has no critical bite; that charge proves only that people who believe truth is univocal and objective will perceive as mistaken those who suggest that truth is multiple and perspectival.

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127. See Delgado, *supra* note 8, at 553:

There is the "majoritarian" story or tale. White folks tell stories, too. But they don't seem like stories at all, just the truth. So when one of them tells a story, such as the pool is so small or affirmative action ends up stigmatizing and disadvantaging able blacks, few consider whether it is authentic, typical, or true. No one asks whether it is adequately tied to legal doctrine, because it and others like it are the very bases by which we evaluate legal doctrine. White tales like these seem unimpeachable.

(footnote omitted).

128. For a discussion of analogous misreadings and misrepresentations of judicial opinions, see Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191, 248-60 (1991).

#### D. *Stories as Scholarship*

We have been sketching a general theory concerning the place of narrative in legal scholarship, and thus we are now in a position to understand better the debate about storytelling in legal scholarship.<sup>129</sup> A great deal of that debate turns on the choice between the vantage of foundationalism as opposed to that of antifoundationalism. From the former, it is reasonable to ask questions on the order of: Is this story true? Is it typical? Is it relevant? From the vantage of antifoundationalism, more important questions would be: Where does this story start? What does it take for granted? How does it seek to establish itself as authoritative? How does it seek to defuse alternative interpretations? What are its political and historical contexts? The difference between these sets of questions to some extent problematizes the notion of “standards” for (good) scholarship. Assessments of whether scholarship is “better” or “worse” must be made at least in part in terms of success in achieving objectives, but foundationalist and antifoundationalist objectives are, to state the obvious, quite divergent.

Scholarship in the overt form of a story (“narrative scholarship”) does not look like scholarship in the form that articles have usually taken. But (some) foundationalist narrative scholarship shares objectives with articles more typical in form (“classical scholarship”): to show readers something new and important about the relationship of facts and law in the world. If one believes, for example, that antidiscrimination law should reach all conduct that minorities experience as hurtful, then it would be a reasonable aim of scholarship about antidiscrimination law to adduce evidence of such hurtful conduct not reached by existing law. That evidence is offered in traditional scholarship in a variety of ways. There may be a bald assertion of actual fact—“much conduct not currently reached by the law actually hurts minorities”—with accompanying citation of

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129. See, e.g., Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (criticizing narrative scholarship); Baron, *supra* note 30; Eskridge, *supra* note 17; Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845 (1994) (all responding to the Farber and Sherry critique); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992) (criticizing narrative scholarship); Gary Peller, *The Discourse of Constitutional Degradation*, 81 GEO. L.J. 313 (1992) (responding to the Tushnet critique). See also Coughlin, *supra* note 8 (criticizing autobiographical narrative scholarship) and sources cited *infra* note 133 (responding to the Coughlin critique).

authority.<sup>130</sup> Or there may be a more tentative assertion of hypothetical fact—"one can imagine minorities being hurt by much conduct that the law does not currently reach"—with accompanying illustration of a particular kind of conduct that some individuals might find hurtful. Some narrative scholarship simply offers evidence of how the law fails to reach hurtful conduct in the form of a story about someone's experience of that particular conduct.<sup>131</sup> The objective of the story is the same as the objective of the assertions in classical scholarship: to provide evidence of an important fact.

To the extent that a story's purpose is evidentiary in the sense we just described, it can be interrogated like any other item of evidence. Not all evidence is equally good, thus it is fair to ask of these "evidentiary" stories whether they are actually good evidence of whatever they purport to show.

Notice, however, that this inquiry does not *necessarily* require that a story be true (as opposed to fictional) or typical (as opposed to unusual). William Faulkner's depictions of the workings of racism in novels such as *Absalom, Absalom* or *Go Down Moses* are unquestionably fictional and involve most peculiar events, yet they provide excellent evidence of the harms of slavery in the antebellum South. Martha Nussbaum has recently illustrated that the fictional Mr. Gradgrind of Charles Dickens' *Hard Times* provides evidence of the moral perils of certain

130. An interesting question here is what counts as authority. Survey evidence? Accounts in books or the press of minorities' experiences? The conventions of classical scholarship virtually demand that assertions of empirical facts be "backed up" by something; however many quibbles there might be over the strength of cited authorities, the quoted words appearing without a supporting citation would invite a full-scale attack. Accusations about the inappropriateness of stories often arise because, it is alleged, the "anecdotal" is neither verifiable nor generalizable. Stories cannot be independently repeated in the lab in order to reproduce their findings. For an elaboration of this point, see Farber & Sherry, *supra* note 129, at 835-40.

131. See, e.g., WILLIAMS, *supra* note 120, *passim*; Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365. See also Kimberle Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990) (describing how judicial stories of the experience of discrimination may be at odds with litigants' actual experiences).

For an article in story form that describes how a plaintiff who has suffered a civil rights injury can find "that it is very hard to tell [his or her] story in court," see Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 81 (1996). Delgado reaches the depressing conclusion that "there is something fundamentally wrong with the legal narrative: one simply cannot tell stories of many kinds of injustice through the law." *Id.* at 88-89.



forms of utilitarian thinking.<sup>132</sup> Fiction can show much that is true about the world, so if we are in search of the "fact of the matter" there is no reason to dismiss a story solely because we know that the events it describes did not actually occur. In formulating a legal approach it may be desirable to supplement a fictional or hypothetical account with other forms of evidence, such as retellings of actual events, the results of scientific experiments, or the like. But this is no different from the need to supplement what can be dry statistical compilations with other forms of evidence, such as humanizing stories—actual or imagined—that bring the numbers to life. We do not dismiss statistics as evidence because they are sometimes unreliable or inaccessible, and we need not dismiss stories on these grounds either. Reliability, accessibility, relevance, persuasiveness all go to the quality of the evidence, not to whether something can be evidence.

Still, nothing guarantees that a story—fictional or real—will be the best or even good evidence of whatever it purports to show. Where narrative scholarship is offered for evidentiary purposes, it will be evaluated for its quality, for no evidence is received without scrutiny. To the extent that stories are offered to demonstrate something true about the world, it is reasonable to ask whether the demonstration works. This question will seem harsh and *ad hominem* in the case of first-person accounts that present themselves as true, as exemplified by the critiques of Patricia Williams' Benetton story.<sup>133</sup> But the question makes sense in terms of these stories' objectives.

However, not all stories are offered for evidentiary purposes. Narrative scholarship can be written from the vantage of antifoundationalism. Such scholarship questions whether there can be a single "fact of the matter." That question does not have to be raised in story form; plenty of articles that look nothing like stories have raised it.<sup>134</sup> But one way to explore the problems and possibilities of the notion of a single fact of the matter is to tell a story illustrating that what seemed to be an objective,

132. NUSSBAUM, *supra* note 13, at 13-52.

133. See RICHARD POSNER, *OVERCOMING LAW* (1995); Farber & Sherry, *supra* note 124, at 835 n.146; Tushnet, *supra* note 129, at 266-71. See also Jerome McCristal Culp, Jr., *Telling a Black Story: Privilege, Authenticity, "Blunders," and Transformation in Outsider Narratives*, 82 VA. L. REV. 69 (1996); Richard Delgado, *Coughlin's Complaint: How to Disparage Outsider Writing, One Year Later*, 82 VA. L. REV. 95 (1996) (responding to apparently *ad hominem* attacks in Coughlin, *supra* note 8).

134. See, e.g., Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254 (1992); Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195 (1989).

neutral and correct account looked or could have looked, from an alternative perspective, biased, partial or nonsensical. The objective of such narrative scholarship, like the objective of nonnarrative antifoundationalist scholarship, is not to prove any particular version of the facts to be false. Rather it is to problematize the idea of "knowing" the facts.<sup>135</sup>

Note that here again the distinction between true and fictional stories is not itself helpful for evaluating narrative scholarship written from an antifoundationalist vantage point. A fictional tale, or a series of fictional stories "telling" the same event from multiple perspectives, as in Faulkner's *As I Lay Dying* or Akira Kurasawa's film *Rashomon*,<sup>136</sup> may be quite successful in calling into question the notion of a single univocal "truth." The appropriate question is not whether these stories recount events that actually happened, but whether, singly or alone, they create doubts about what is or can be known.

*Rashomon's* manipulation of points of view and of audience trust exemplifies the way in which multiple perspectives complicate the idea of truth. Each participant in or observer of the film's core event holds a different stake in the way that event is read. The film raises questions about who gets to narrate the story, who gets to hear it, and who gets to interpret it. One of the several internal frames in the film aligns the viewer with the royal magistrate in the interrogation yard where the central narrations take place. The viewer never sees the final arbiter of the "truth"; the judgmental voice is strategically occluded, indeed never heard. The film ends as it begins, at the liminal space of the city gates, neither inside nor outside. The horror it bespeaks is the possibility that the "truth" will never out at all, precisely because it can never be known.

Again, nothing guarantees that any particular story or set of stories will create doubts about what can be known. As Patrick Ewick and Susan Silbey have explained:

[Narratives] are cultural productions. Narratives are generated interactively through normatively structured performances and interactions[.] Because of the conventionalized character of narrative, . . . our stories

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135. As we noted earlier, the antifoundationalist does not deny the existence of facts in the world. See *supra* text accompanying notes 115-17. The question is whether there is any transparent, unmediated means by which we can perceive or know those facts.

136. Kurasawa's film is based on two short stories by Ryunosuko Akutagawa (1892-1927) called *Rashomon* and *In a Grove*. See RYUNOSUKO AKUTAGAWA, *RASHOMON AND OTHER STORIES* (Takashi Kojima trans., 1952). We should note that the original stories do not employ multiple perspectives. Discussions of the film, the screenplay, and the original stories can be found in *FOCUS ON RASHOMON* (Donald Ritchie ed., 1972).

are likely to express ideological effects and hegemonic assumptions. We are as likely to be shackled by the stories we tell (or that are culturally available for our telling) as we are by the form of oppression they might seek to reveal.<sup>137</sup>

Notwithstanding some of the more exaggerated claims that have been made on behalf of storytelling, it is not the case that a story will cause a rethinking of assumptions or a recognition of perspectivism merely because it is a story.<sup>138</sup> Some stories may be "subversive" and "liberatory"<sup>139</sup>; others may—advertently or inadvertently—reinforce the status quo.<sup>140</sup> To the extent that

137. Patrick Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 L. & Soc'y REV. 197, 211-12 (1995). See also Coughlin, *supra* note 8, at 1257:

Just as legal doctrine determines the facts that judges will find, so the conventions, practices, and concerns of the law and the academy furnish the space for debate and perhaps even produce the truth that outsider stories report by determining which events are significant (or real) enough to be represented. This is one of a variety of ways . . . in which the narrative form distinctly mitigates the subversive intention of outsider storytelling.

138. See Bandes, *supra* note 16, at 385 ("When we tell law stories, . . . we may be merely reproducing the conventional narrative, with its implicit, existing norms. . . . Narrative . . . is a tool that can be used either to perpetuate the status quo, or to challenge it to move the law forward.") See also *id.* at 393 (arguing that victim impact statements, in particular, "illustrate that storytelling can be used for distinctly unprogressive ends.").

139. Ewick & Silbey, *supra* note 137, at 222-23.

140. There is no consensus on what makes a story subversive. Ewick & Silbey's view is as follows:

[T]o the degree that stories depict understandings about particular persons and events while simultaneously effacing the connections between the particular persons and the social organization of their experience, they hide the grounds of their own plausibility and thus help reproduce the taken-for-granted hegemony. However, narratives can also be subversive. To the degree that stories make visible and explicit the connections between particular lives and social organization, they may be liberatory.

*Id.* at 222-23.

Richard Sherwin offers a different view:

Lawyers and legal scholars can learn to assess more candidly their own and others' meaningmaking habits. This includes evaluating omissions, inconsistencies, and plotlines that flow from deep (usually hidden) beliefs and assumptions about what truth and justice are and how they operate in the world. These beliefs in turn often stem from subconsciously assimilated story forms, myths, and popular images. If this is so, we need to recognize and assess the effect of these ingrained preferences on how we tell stories as well as on how we hear them, being particularly alert to the exploitation of instinctive preferences for narrative techniques like causal linearity, story closure, and tantalizing scripts and stereotypes.

Richard Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal*

narrative scholarship aims to raise questions about what is usually taken for granted, or to create insight about the inevitably partial (incomplete, biased) nature of any particular point of view, stories of the latter sort may reasonably be deemed unsuccessful.

All of this is to say that antifoundationalist narrative scholarship and foundationalist narrative scholarship must alike be evaluated in terms of their objectives.<sup>141</sup> Foundationalists want to demonstrate the potential fixedness of facts; anti-foundationalists attempt to show that the very notion of unmediated factuality is itself problematic. Since the objectives are divergent, so must the evaluative criteria diverge. Success at illustrating something hitherto unseen about the world differs from success at illustrating that all seeing is partial: seeing some things prevents seeing others.

Two factors have obscured this relatively obvious point. First, storytellers sometimes try to have it both the foundationalist and antifoundationalist ways, offering stories of experiences that, they say, "truly" occurred while simultaneously questioning the notion of truth.<sup>142</sup> While there are ways to explain and possibly dissolve this apparent paradox,<sup>143</sup> the surface ambiguity renders it easy to misunderstand the storytellers' epistemological claims. In some cases, then, it has not been clear what evaluative criteria are appropriate.

The second factor that has led to confusion over standards is controversy about antifoundationalism itself. Many have found both narrative and nonnarrative challenges to the notion of a single, objectively knowable truth about events in the world

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Case, 47 STAN. L. REV. 39, 81-82 (1994).

141. For suggestions to this effect made in the context of narrative scholarship particularly, see Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683 (1992). See also Philip C. Kissam, *The Evaluation of Legal Scholarship*, 63 WASH. L. REV. 221 (1988) (suggesting that all scholarship must be evaluated in terms of its purposes); Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 902 (1992) ("To judge a particular work, then, we need to know what scholars in the field are attempting to achieve.").

To argue that scholarship should be evaluated in terms of its objectives is not to argue that scholarship should not be evaluated at all. For arguments that evaluation of narrative scholarship might best be postponed, see Richard Delgado, *The Inward Turn in Outsider Jurisprudence*, 34 WM. & MARY L. REV. 741, 766 (1993); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665, 676 (1993).

142. See Baron, *supra* note 30, at 282-85; Angela Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 757 (1995).

143. See Baron, *supra* note 30, at 283-84.

to be unpersuasive, incoherent, or even dangerous.<sup>144</sup> To these (it is not clear whether to deem them doubters or believers), the premises of stories written from the antifoundationalist vantage point are simply wrong. Having rejected the stories' objectives, it is not surprising that they judge the stories to be failures. But this judgment involves a dispute not about standards but about objectives.<sup>145</sup>

### III. LAW, NARRATIVES, AND FACTS

Finding the facts has a cherished place in law. Legislative policy is based in part on facts gathered by staff and adduced at hearings, although "politics" may also play a role. Lawyers negotiate deals and settlements based on facts their clients have communicated. At trials, juries or judges must find the facts in order to render a verdict in a lawsuit.

These images may seem too simple, but it would be troubling if they were only idealizations. As skeptics about the law and literature movement have been quick to recognize, legal decisions have consequences different from those of debates over, say, the best interpretation of *Hamlet*.<sup>146</sup> The image usually proffered to evoke these consequences is the convicted defendant in chains, being led to prison or execution,<sup>147</sup> but plenty of less dramatic instances could be offered to make the same point: property settlements on divorce have enormous impact on the relative well-being of family members once they come to live apart;<sup>148</sup> evictions from public housing projects for involvement

144. See Sherry, *supra* note 19, at 484:

The Enlightenment was indeed aptly named. From the darkness that hid anti-Semitism and other forms of religious persecution, the denial of human freedom for the sake of protecting orthodoxy, the inadvertent cruelty of a nature that man could neither comprehend nor tame, and the deliberate unspeakable tortures committed by one religious regime after another, the Enlightenment burst forth and pointed us toward freedom and equality. We have not yet attained either, but we should be careful before jettisoning the world view that has brought us this far. The dangers that the epistemology of the Enlightenment gradually defeated remain very real . . . .

145. For a general approach to the problem of assessing the quality of scholarship proceeding from premises that the evaluator does not share, see Rubin, *supra* note 141, at 947-53.

146. See Paul Gewirtz, *Narrative and Rhetoric in Law*, in *LAW'S STORIES*, *supra* note 2, at 2, 4 ("Of course, there are fundamental differences between law and literature; most obviously, law coerces people.")

147. See Cover, *supra* note 10, at 1618-28.

148. KATHERINE NEWMAN, *FALLING FROM GRACE: THE EXPERIENCE OF DOWNWARD MOBILITY IN THE AMERICAN MIDDLE CLASS* (1988); LENORE WEITZMAN, *THE DIVORCE REVOLUTION* (1985).

in drug trade can lead to homelessness;<sup>149</sup> rules barring adoption by a second parent who is the same sex as the first may deprive some children of care or inheritance rights.<sup>150</sup> Legal decisions, in other words, have consequences for the people affected by them. These consequences, especially when they are negative or painful, cry out for justification.

Facts have traditionally been part of the processes that justify and legitimate legal decisions. The prisoner in chains is in that position because the judge or the jury found as a fact that he was guilty of the crime charged. If he did not in fact commit the crime, his punishment is unjust. So is the homelessness of the wrongly evicted tenant, the disinheritance of the child who could not be adopted.

What if there were biases or distortions that systematically prevented legal decision-makers from correctly finding the facts? What if the phenomena that had been thought of as facts were just projections of a decision-maker's own individual values and prejudices? What if the empirical and scientific conventions that have been used in the past to generate and assess facts were themselves shown to lack objectivity and to be animated by a particular and non-neutral point of view? What if there is no agreement on the criteria that should be used to decide whether something is a "fact"? These questions substantially complicate the basic idea of justice as based on, or responsive to, facts.

Questions such as these are precisely the questions that legal storytellers have tried to raise. Stories that point out some important fact about an experience that has been wrongly ignored or left out of account suggest that the factual universe on which legal decisions are based can be too narrow. Stories that point out feelings, events or experiences at odds with those on which a particular doctrine is predicated suggest that sometimes the law is based on an incomplete or even wrong understanding of the facts. Stories that illustrate some of the many things that could not be shown at a trial suggest that evidentiary rules may impede, not facilitate, discovery of the facts.<sup>151</sup> Stories that

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149. See *U.S. v. Leasehold Interest in 121 Nostrand Ave.*, 760 F. Supp. 1015 (E.D.N.Y. 1991).

150. See Maxwell S. Peltz, *Second-Parent Adoptions: Overcoming Barriers to Lesbian Family Rights*, 2 MICH. J. GENDER & L. 175 (1995); Nancy D. Polikoff, *This Child Does Have Two Mothers*, 78 GEO. L.J. 459 (1990).

151. See Robert A. Ferguson, *Untold Stories in the Law*, in *LAW'S STORIES*, *supra* note 2, at 84, 96:

What . . . happens when a relevant story is actively repressed in a republic of laws? The simple answer would seem to be that it always returns, but on what terms? Whose terms? . . . [W]hen such a story is actively repressed in a forum

demonstrate how a single event could be perceived differently by the various actors involved suggest that there is no single description that will be universally recognized as the facts.<sup>152</sup>

Factual errors or omissions can be corrected; evidentiary rules, like other legal doctrines, can be reformed. But the storytellers' questions are not easy to dismiss. Foundationalist stories suggest that the law gets "the facts" wrong as often as it gets them right. If these errors tend to pertain to particular kinds of facts—facts about outsiders, facts about power—it is difficult to believe they will be "reformed" away. And antifoundationalist questions are meant to challenge the very idea of pure factuality—a challenge that, if taken seriously, would require a rethinking of basic notions of just decision-making.<sup>153</sup> Courts, after all, still have to decide cases;<sup>154</sup> if (to recur to our earlier example) all contract theories are (just) stories, how should a court adjudicate a dispute between two parties to a sales agreement?

Just as the notion of finding the facts has a cherished place in law, the notion of getting at the truth has a cherished place in legal scholarship. This is obviously not the place to debate what legal scholarship should try to accomplish, or whether anyone—especially anyone in the judiciary—is actually listening to what legal scholars say.<sup>155</sup> But for many scholars, as for Herbert Wechsler, the general purpose of scholarship is simple: to tell

that prides itself on its thoroughness and fairness, it belongs to the agent of the repressed.

152. To return to *Rashomon*, one interpretation is that all the characters' stories are true. Each character simply narrates his or her particular experience of what happened. These accounts will all be "partial" in one of two possible senses: (1) each account might be biased by the character's personality, disposition, attitudes and assumptions, or (2) each account may be incomplete, based on the fragmentary knowledge available to each person. On the ambiguity of the notion of partiality, see Jane B. Baron, *The Many Promises of Storytelling in Law*, 23 *RUTGERS L.J.* 79, 83 & n.23 (1991) (book review).

153. For a thoughtful essay on the problematic quality even of the most apparently factual of all narratives, the voluntary confession, see Peter Brooks, *Storytelling Without Fear? Confession in Law and Literature*, in *LAW'S STORIES*, *supra* note 2, at 114.

154. It is this situation that has led some to question the utility of antifoundationalism.

Lies are the ultimate risk of storytelling as method. This may be embarrassingly non-postmodern, but reality exists. Of this the law, at least, has no doubt. Something happened or will be found to have happened. You can still be tried for perjury even though there supposedly is no truth. You can still be sued for libel, so somewhere reality exists to be falsified.

Catharine A. MacKinnon, *Law's Stories as Reality and Politics*, in *LAW'S STORIES*, *supra* note 2, at 232, 235.

155. In addition to the sources cited *supra* note 141, see generally *A Symposium on Legal Scholarship*, 63 *U. COLO. L. REV.* 521 (1992); Harry T. Edwards, *The Growing Disjunction Between Legal Education and Legal Scholarship*, 91 *MICH. L. REV.* 34 (1992).

the truth about what the law is and should be. To the extent that legal storytellers complicate the notion of "truth," they raise questions about just what it is that scholars can and should do.

#### CONCLUSION

This essay is, of course, its own Russian doll. After analyzing the narrative structure of *Toward Neutral Principles*, we go on to produce an antifoundationalist way of looking at stories that, if accepted, makes a theory of neutral principles an impossible paradigm. One cannot analyze the structure of something without taking a position on that something. It would be completely specious to compliment Wechsler's rhetoric without commenting on his thesis, because form and content are not, in fact, separable.

We claim that an antifoundationalist practice precludes the possibility of absolute neutrality, even though neutrality might still serve as an ideal. In addition, we make several other claims in this article, each of which might be narrativized. We believe that legal thinking and literary criticism can learn from one another in mutually beneficial ways. We believe that the legal storytelling movement has pointed jurisprudence in a good direction, but that the theoretical underpinnings of legal storytelling have not yet been adequately formulated. We hope *Is Law Narrative?* moves the relationship between storytelling and the law in this direction by making a stronger case for the importance of such a relationship than has heretofore been made. And finally, we suggest that lawyers, judges, and legal scholars would do well to learn the techniques of close reading and literary analysis.



