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Foreword: Telling Stories

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FOREWORD: TELLING STORIES

*Kim Lane Scheppele**

Why is there such a rush to storytelling? Why has narrative become such an important and recurring theme in legal scholarship these days?¹

Perhaps it is the post-Kuhnian pragmatism about truth that has spread from the history of science throughout the academy.² If science has what appears to be fads and fashions, then can other knowledge be more certain? Or perhaps it is a response to "argument by anecdote"³ that Ronald Reagan made so popular, countering numbing statistics showing that all was not right with the happy stories of individuals who didn't fit the patterns. Or perhaps it's that law has always been concerned with narratives, with the individual plaintiff and the individual defendant in the individual case, so that *theoretical* attention to narrative was bound to emerge eventually.

The concern for narrative that the present issue reveals has a more easily identifiable origin, though the other forces probably matter too. The last twenty years or so have seen a great opening of the legal pro-

* Assistant Professor of Political Science, Adjunct Assistant Professor of Law, and Assistant Research Scientist in the Institute of Public Policy Studies, University of Michigan. A.B. 1975, Barnard College; M.A. (Sociology) 1977, Ph.D. (Sociology) 1985, University of Chicago. — Ed. I would like to thank Eric Rabkin for inspiring the format of the conference on legal narrative and Kevin Kennedy and the other *Review* editors for working so hard to make sure it happened. I would also like to thank Greg Heller, Don Herzog, Rick Pildes, and especially Peter Seidman for providing comments, criticisms, and common sense on short notice.

1. In addition to this special issue of the *Michigan Law Review*, there have been other symposia on the law-and-literature theme recently. See, e.g., *Symposium: Law and Literature*, 39 *MERCER L. REV.* 739 (1988); *Symposium: Law and Literature*, 60 *TEXAS L. REV.* 373 (1982); *INTERPRETING LAW AND LITERATURE* (S. Levinson & S. Mailloux eds. 1988). In addition, a rash of recent individual articles has appeared on law review pages. See, e.g., in a much larger literature, López, *Lay Lawyering*, 32 *UCLA L. REV.* 1 (1984); Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 *MICH. L. REV.* 543 (1988); West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 *N.Y.U. L. REV.* 145 (1985); see also D. BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); K. BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988). The work of the founders of the law-and-literature movement, in which the legal narrative theme sounds prominently, is an almost mandatory citation in articles with this perspective. See J.B. WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985); J.B. WHITE, *THE LEGAL IMAGINATION* (1973); J.B. WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984); Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 *CAP. U. L. REV.* 179 (1985); Cover, *The Supreme Court, 1982 Term — Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4 (1983) [hereinafter Cover, *Nomos and Narrative*]; Cover, *Violence and the Word*, 95 *YALE L.J.* 1601 (1986), for some of the inspiration that drives the movement.

2. T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

3. I owe the phrase to Don Herzog who has used it in conversation.

fession to those who were formerly outsiders. The legal community, once comprised almost entirely of white men, has, however partially, hesitantly and reluctantly, begun to admit women, people of color, and those with life experiences far different than those of the lawyers whose ranks they now join. As the world of law schools, legal practice, and legal teaching has become more diverse, it should not be surprising that legal scholarship is showing signs of diversity as well. The conference on legal narrative that gave rise to this volume is one product of that diversity. And though narrative is not uniquely the province of those who seek to challenge established ways of thinking in law, many of the authors in this volume use stories to highlight and celebrate diversity.

The hefty issue that you now have in your hands has, despite its bulk, a sort of urgency about it, an urgency that comes from the fact that so many of these Articles draw from deep experience. The Articles contained here speak with many voices and draw on many powers. Some are not like law review articles you have ever seen before; others may look more traditional, but they carry unconventional messages. Some experiment with format, with subject matter, with the boundaries of legal discourse. Some speak to the heart more than to the head. Some want to provoke, to unsettle, to challenge "the way we do things around here." Almost all want to challenge the "we."

These Articles break taboos. The Articles by Patricia Williams and Clark Cunningham speak with the power of "I." They will engage you in a conversation with this named author, this real person, whose struggles and thoughts are revealed in the words on the page. And they use this power of "I" to make larger points about social arrangements, about conventional wisdom and its unwise ness, about how things might be. Other Articles, those by Richard Delgado and Derrick Bell, tell stories that are not true, though readers will recognize the realness in them. They ask readers to imagine, and in imagining to experience, the worlds created in the words, to save the pain of having to live them. Still other Articles, those by Mari Matsuda, David Luban, and Milner Ball, report the official court-approved versions of stories, and then reveal the unofficial versions, available to but rejected by courts. They show in the telling of alternative stories how selective narratives come to have the power of truth, though there may be other versions that lead to other conclusions, other ways of seeing. The Article by Joseph Singer engages the practice of teaching, and shows how stories can be used to enlist empathy and understanding from students whose own experiences do not ordinarily lead them to challenge the official views. There are also Articles that challenge the

premises of the rest of the issue, reminding all that in the proliferation of stories, it matters how one chooses among them, and that one needs criteria other than narrative force to do that. Toni Massaro and Steven Winter argue that narrative alone, for all its power, is not enough.

This issue testifies to the attractiveness of, and limits to, storytelling as a force in law. But whose stories are told? Who listens? And who responds? This symposium explores these questions, challenging traditional practices and exploring new ones in the telling of stories in the law. One important lesson that can be learned from this issue is that narrative is a way of organizing, coping with, even acting on the world. Stories carry power because they have the ability to convey truths even if the stories themselves are not the only ways of seeing the world. Stories re-present experience, and can introduce imagination and new points of view.

To make sense of law and to organize experience, people often tell stories. And these stories are telling.

I. THE STORY OF THIS SYMPOSIUM

Once upon a time,⁴ Richard Delgado sent a letter to the major law reviews suggesting a symposium on legal narrative.

We believe that stories, parables, chronicles, and narratives are potent devices for analyzing mindset and ideology — the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal discourse takes place. . . . [T]he main cause of Black and brown subordination is not so much poorly crafted or enforced laws or judicial decisions. Rather, it is the prevailing mindset through which members of the majority race justify the world as it is, that is with whites on top and Blacks at the bottom. Ideology makes current social arrangements seem natural and fair.⁵

Along with this dire diagnosis, Delgado proposed a remedy. “The cure is storytelling,” he announced, “counterhegemonic” storytelling to “quicken and engage conscience.”⁶

Kevin Kennedy, the editor-in-chief of the *Michigan Law Review*, and Lee Bollinger, dean of the University of Michigan Law School, discussed the idea and agreed that the *Review* would devote a special issue to questions of legal narrative and its “counterhegemonic” power. Calls went out to potential storytellers; enthusiastic responses encouraged the *Review*’s editors to proceed. And with all the speed of

4. June 1, 1988, to be precise.

5. Letter from Richard Delgado to Kevin Kennedy (June 1, 1988).

6. *Id.* at 2.

a group that has only one year to make a difference, *Review* editors solicited manuscripts, selected a set, and invited the participants to come to Michigan's campus in April, only ten months after Delgado's original letter was sent.

But how to run a conference on a topic and with a method designed to challenge ordinary ways of doing things? The business-as-usual format with serial speakers presenting prepackaged papers was not going to match the radical ambitions of the conference organizers or the writers. The emphasis on different points of view called for a format that encouraged interaction and dialogue among participants. Kevin Kennedy asked me to help, because I teach a course on legal narrative and the legal construction of facts at the University of Michigan Law School. I asked Eric Rabkin, a professor of English at Michigan and an extraordinary teacher of writing, literature, and literary theory, to suggest a format. Rabkin proposed having the writers, *Review* editors, and others who wanted to participate in the conference meet in small editing groups to read, discuss, and provide feedback on the papers.⁷ All the conveners would meet together at the beginning and the end, first to agree on some collective ambitions for the issue and later to discuss how each paper grew and dovetailed with the others after all the structured dialogue, in multiple editing groups with different casts of characters, over two days of meetings.

At first the *Review* editors, and later the participants, were skeptical. And the logistical problems raised by trying to match in small groups sets of people who had had a chance to read closely particular papers in advance were staggering. But in the end, with constant adjustments in the original plan being made as objections were being constantly raised, the conference proceeded in small group discussion sessions,⁸ punctuated by trips to local restaurants and breaks for bits

7. Eric Rabkin and his colleague Macklin Smith have been experimenting with different formats for helping people to meet together to discuss work in progress and to assist each other in the process of writing. The format we adopted for this conference is adapted from these methods, which are more fully discussed in E. RABKIN & M. SMITH, *TEACHING WRITING THAT WORKS* (forthcoming) (on file with author).

8. The small groups in which the discussions took place had a complicated structure. Each participant, whether author, *Review* staffer, or general participant (and a number of Michigan Law School faculty participated) was assigned to an editing group of three or four members, each of which had one author in it. First, each editing group met to discuss and write comments on the paper of an author who was not present in that group but who was present at the conference. This allowed each group to consider a paper the way readers of this issue actually would: as an interested audience who did not have the author immediately present to ask for clarifications or elaborations. Later, informal conversation between these editing groups and the authors whose papers were discussed in this way gave each writer oral feedback in addition to the written feedback. The original editing groups then met again, this time to discuss the paper of the author who was a member of that group. By this time, each group had had a chance to build solidarity and had had experience discussing a paper already. And this group also had as part of the

of sleep and exercise.

It would be a wild exaggeration to claim there was agreement at the end about just how to think about the role of narrative in legal discourse. If anything, differences among some of the conference participants were sharpened by the time everyone met in a large group at the end of the conference. Some worried about the coercive power of stories; others claimed that stories were noncoercive. Some insisted on the importance of theory; others wanted to undermine the prestige of theory. Some changed their minds, and their drafts, as a result of hearing others' stories and insights; others found their drafts weathering the discussion with no need for repair. And so on.

But what almost all the writers shared was a concern with the point of view of outsiders, those whose perspectives had been excluded in the law's construction of an official story for the particular case. Almost all agreed on the value of polyphony, and the conference generated a great deal of it.

II. THE "CONSTITUTIVE WE" AND THE VOICES OF OUTSIDERS

Much of legal scholarship these days is written in consensual terms to an audience it constitutes as "we." In the first sentences of the preface of *Law's Empire*, for example, Ronald Dworkin writes: "We live in and by the law. It makes us what we are We are subjects of law's empire, liegemen to its methods and ideals, bound in spirit while we debate what we must therefore do."⁹ And Robert Cover begins *Nomos and Narrative* with: "We inhabit a *nomos* — a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void."¹⁰

And lest you think this is just a rhetorical device used by those, like Dworkin and Cover, who are looking for a coherent set of values in the law in which "we" can believe, those who find that the law is fraught with contradiction are not free from "we" either. To take a couple of examples from the Critical Legal Studies literature, here is the first sentence of an article by Peter Gabel: "Legal reasoning is an

material they could consider the comments of the group that had discussed that author's paper first. Each author, now in a group whose participants he or she knew fairly well already, was then able to discuss his or her own paper and the comments it had generated from other participants. Because this format meant that the authors didn't have an opportunity to discuss their papers directly with each other (since each was in a different editing group), there was an additional session in which the authors met together to talk about the overlapping subject matter and the structure of individual papers. After nearly two days of focused discussion of these papers in small groups, everyone met to talk about the papers, the topic, and the issue.

9. R. DWORKIN, *LAW'S EMPIRE* vii (1986).

10. Cover, *Nomos and Narrative*, *supra* note 1, at 4.

inherently repressive form of interpretive thought which limits *our* comprehension of the social world and its possibilities."¹¹ And an excerpt from the opening paragraph of an article by Frances Olsen: "*Our* historical experience with censorship warns *us* to be wary of state protection; *our* experience with domestic violence warns *us* to be wary of privacy."¹²

Now these may be somewhat different "we"s and "our"s and "us"s in the different excerpts,¹³ but they reveal something quite striking about contemporary legal scholarship.¹⁴ Contests over the meaning, the reach, or the significance of law these days are often framed as debates between "we" and an invisible but ever-present "they." "They" are the outsiders, the ones who do not believe, who are not included, who do not understand, who are beyond the boundaries of community. Wherever there is a "constitutive we," there is also an excluded "they."

This is, of course, nothing new. The use of the "constitutive we" in the American legal tradition is prominent in the founding documents of American government, law and nationhood. "We hold these truths to be self-evident," begins the Declaration of Independence.¹⁵ "We the People," begins the Constitution.¹⁶ These were texts of revolutionary times, when the assertion of a "we" was first an act of defiance, and then an act of construction. Constituting a "we" was an essential part of separating "us" from a firmly excluded and rejected "them."

"We" talk does not just appear at founding moments, when the construction of a new community is urgent, however. "We" talk is a *persistent* feature of legal discourse, even once a legal system is up and

11. Gabel, *Reification in Legal Reasoning*, in MARXISM AND LAW 262 (P. Beirne & R. Quinney eds. 1982) (emphasis added).

12. Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEXAS L. REV. 387, 387-88 (1984) (footnote omitted; emphasis added).

13. I am not meaning to include here the uses of "we" to include the writer and readers in a common journey through a text. References like "we can see in this argument that . . ." and "in the next section of this article, we will find that . . ." seem to me to be doing something else. They are joining writer and reader in a temporary alliance in the joint project of getting through a text. They are not examples of the "constitutive we," creating an alliance of fate or of belief or of community that goes beyond the text, as the Dworkin, Cover, Gabel, and Olsen examples do. Nor does the use of "we" to indicate a collective author constitute a "constitutive we." The Supreme Court often uses "we" this way, but the reference is clearly to an institution of multiple individuals, not some group created by the use of "we."

14. Of course, some of those writing in jurisprudence *do* explicitly recognize the assumptions which are masked by the "constitutive we." See, e.g., M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 318 (1988) ("an ever-changing 'us'").

15. The Declaration of Independence para. 2 (U.S. 1776).

16. U.S. CONST. preamble.

running.¹⁷ There are several reasons why this may be so. One is that in some versions of a liberal political regime, the government relies for its legitimacy on the consent of those who are to be subject to its laws. And it matters, then, who is included among the consenters for it is only against consenters that the laws may be legitimately enforced. "We" are those who consent; "they" are outside the reach of "our" laws.¹⁸ Another reason for the persistence of "we" talk in law may have to do with the relative insularity of the legal profession. Those who are trained in law learn to speak a specialized language. When talking about the law with others who are similarly trained, lawyers become the "we" who know the laws, excluding the "they" who do not.¹⁹ And the adversarial nature of legal practice in common-law legal systems also encourages a "we-they" attitude to emerge. "We" are the forces of justice in the world who are on the right side of this case; "they" are the opponents who want to thwart "us" at every turn. Legal discourse is in an important way, then, dependent on a variety of "we-they" subdiscourses for its internal structure.

But there is another important "we-they" structure in legal discourse, one that this issue of the *Michigan Law Review* has as its theme. It is the implicit contrast between those whose self-believed²⁰ stories are officially approved, accepted, transformed into *fact*, and those whose self-believed stories are officially distrusted, rejected, found to be untrue, or perhaps not heard at all.²¹ Those whose stories are believed have the power to create fact; those whose stories are not believed live in a legally sanctioned "reality" that does not match their perceptions. "We," the insiders, are those whose versions count as facts; "they," the outsiders, are those whose versions are discredited

17. Karl Llewellyn was well aware of this tendency when he wrote:

Nowhere more than in law do you need armor against . . . ethnocentric and chronocentric snobbery — the smugness of your own tribe and your own time: *We* are the Greeks; *all* others are barbarians. . . . Law, as against other disciplines is like a tree. In its own soil it roots, and shades one spot alone.

K. LLEWELLYN, *THE BRAMBLE BUSH* 44 (1960).

18. A more complete discussion of the relation between consent, legitimacy of a regime of laws, and obligation to obey the laws can be found in K.L. Scheppele & J. Waldron, *Contractarian Methods in Political and Legal Evaluation* (unpublished manuscript on file with author).

19. For one example of what happens when these two discourses collide, see Sarat & Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 *LAW & SOC. REV.* 93 (1986).

20. The term is Erving Goffman's. Lies are "self-disbelieved" statements, since what makes a statement a lie is not only whether the statement *is* false, but also whether the teller *believes* it to be false. E. GOFFMAN, *STRATEGIC INTERACTION* 7 (1969). Similarly, then, a self-believed story is one that the teller takes to be true.

21. This "we-they" structure is not wholly independent of the other "we-they" structures described above. Those whose self-believed stories find their way into law may well be those who are more plausibly represented as having consented to a legal regime and who are able to express their stories in language more amenable to legal argument.

and disbelieved. This can happen on an individual level, where specific persons find their truths *not* to be inevitable, or on a collective level, where whole groups of persons find their truths to be dismissed. In either instance, fundamental issues of legitimacy are raised.

How are people to think about the law when their stories, the ones they have lived and believed, are rejected by courts, only to be replaced by other versions with different legal results? The legal theorist may be able to fall back on a consent story, to say that these people did or plausibly could have committed themselves to the *process* in which the facts were found and judgments given, even if they find themselves in disagreement over the particular findings of fact in a particular case. But there are few things more disempowering in law than having one's own self-believed story rejected, when rules of law (however fair in the abstract) are applied to facts that are not one's own, when legal judgments proceed from a description of one's own world that one does not recognize.

The resolution of any individual case in the law relies heavily on a court's adoption of a particular story,²² one that makes sense, is true to what the listeners know about the world, and hangs together.²³ But some liberal models of legal legitimacy rely solely on consent to abstract laws, or perhaps even consent to the basic structure of a legal system or a government, to justify the application of the laws in particular instances.²⁴ These models of legitimacy do not require that somehow people's *particular* points of view are taken into account at all, either because justice isn't thought to operate at a level that specific,²⁵ or because the situation in which consent is initially given does not generally include enough information for someone to have a point of view different from that of others²⁶ or because the specific points of

22. See K.L. SCHEPPELE, *LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW* 86-108 (1988), for an argument that interpretation of law and interpretation of fact are not separate processes, but instead accomplished together in the process of justifying a decision.

23. See L. BENNETT & M. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM* (1981) for a description of what makes stories persuasive at trial.

24. For Locke, for example, consent was given to the *form* of a government rather than to the specific application of laws. See J. LOCKE, *Second Treatise of Government*, in *TWO TREATISES OF GOVERNMENT* (P. Laslett rev. ed. 1963) (3d ed. 1698). And consent for John Rawls means agreement on the basic institutions of a society, and nothing nearly as specific as individual laws, let alone particular facts or particular points of view. See J. RAWLS, *A THEORY OF JUSTICE* (1971).

25. Most efforts at understanding legal legitimacy operate at the level of the whole system and are reluctant even to claim that something so specific as that an individual law should be just for consent to be inferred. See J. RAWLS, *supra* note 24, at 350-55.

26. One effect of Rawls' "veil of ignorance," *id.* at 136-42, is that people do not have enough information to be able to develop different points of view, not just about preferences and self-interest, but perhaps even more importantly, about how to see the social world around them in the first place. This is not a necessary feature of contractarian thought, however. It is possible

view people bring with them into concrete cases are too full of self-interest to provide a compelling *normative* account of how the case should be resolved.²⁷ A considerably abstracted consent is enough. But consent to basic structures or abstract legal rules is not enough to ensure the *experience* of justice on the ground in concrete cases.

The experience of justice is intimately connected with one's perceptions of "fact," just as it is connected with one's beliefs and values. Beliefs and values do not exist in a world of pure abstraction, but rather always operate with and on specific assumptions about and perceptions of the state of the world. A judgment that murder is wrong, for example, already comes with the presupposition that some sorts of very specific factual occurrences count as murder and others do not. (And it also comes with a view that some cases are problematic for the classification scheme, existing as they do at the blurry boundaries of the concept of murder.) People might agree in the abstract that there should be legal rules condemning and punishing murder, but if a woman killing her husband counts as a murderer while a man killing his wife in otherwise identical circumstances does not, then some, at least, are apt to feel their sense of justice has been violated. And it is not because those whose sense of justice has been violated and those who think the judgment is fair disagree about abstract rules or basic structures that provide for the condemnation of murder. They disagree, at a minimum, about what features of the world are to be considered relevant to a particular description and how observations and evidence, themselves already and inevitably conceptualized, are to be further mapped into specialized descriptive categories.²⁸ They may also disagree about what is to count as evidence, about the accuracy of particular bits of information or about the correctness of taking cer-

for a model of consent to have much more sociological fidelity and still be fully contractarian. For a case to this effect, see K.L. Scheppele & J. Waldron, *supra* note 18.

27. Contractarianism often captures the problem of conflicting accounts by asking people to see a situation from another person's point of view. As with the Golden Rule, we are asked to imagine what it would feel like to be in another person's position. But this is meant to capture an *impersonal* (or *interpersonal*) view of the situation, not a richly variegated sense of the ways in which different people may see things differently from different social vantage points. "From this interpersonal standpoint, a certain amount of how things look from another person's point of view, like a certain amount of how they look from my own, will be counted as bias." Scanlon, *Contractualism and Utilitarianism*, in *UTILITARIANISM AND BEYOND* 117 (A. Sen & B. Williams eds. 1982).

28. Judgments of relevance and problems of mapping are not usually idiosyncratic judgments, independent of rules. The injunction to "decide like cases alike" is itself a rule that may be represented as the product of prior consent. But just what counts as "alike" for the purposes of particular cases is often very much a local judgment that cannot be well captured in rules at the level of generality at which consent judgments are usually implied in liberal political thought. See C. GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective*, in *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 167 (1983).

tain points into account in the description. But the most troublesome problem for an account of the legitimacy of law involves the sometimes irreconcilable differences among people in their widely varying accounts of the same event.

Social theorists have long known that people differently situated in the social world come to see events in quite distinct and distinctive ways.²⁹ How people interpret what they see (or what people see in the first place) depends to a very large extent on prior experiences, on the ways in which people have organized their own sense-making and observation, on the patterns that have emerged in the past for them as meaningful in living daily life. And so it should not be surprising that people with systematically different sorts of experiences should come to see the world in systematically different ways. The varying descriptions composed by people with varied experiences reveal that "perceptual fault lines"³⁰ run through apparently stable communities that appear to have agreed on basic institutions and structures and on general governing rules. Consent comes apart in battles of description.³¹ Consent comes apart over whose stories to tell. And legal earthquakes are always just about to happen when there are serious perceptual fault lines that run through the legal construction of facts.

Stories may diverge, then, not because one is true and another false, but rather because they are both self-believed descriptions coming from different points of view informed by different background assumptions about how to make sense of events. In law, the adoption of some stories rather than others, the acceptance of some accounts as fact and others as falsehood, cannot *ever* be the result of matching evidence against the real world to figure out which story is true. Despite the popularity of correspondence theories of language,³² courts *cannot* do what would be necessary to determine whether words corresponded to things and hence were being used properly. In law, both at trial and on appeal, all courts have is stories. Judges and jurors are not witnesses to the events at issue; they are witnesses to stories about

29. See generally P. BERGER & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1966); K. MANNHEIM, *IDEOLOGY AND UTOPIA* (1936); A. SCHUTZ & T. LUCKMANN, *THE STRUCTURES OF THE LIFE-WORLD* (1973).

30. For a more complete discussion of "perceptual fault lines," see Scheppele, *The Re-vision of Rape Law*, 54 U. CHI. L. REV. 1095, 1108-13 (1987).

31. For one particularly striking example of this, notice the battle between pro-choice and pro-life forces on abortion over whether to use "fetus" or "the unborn child" to describe something that or someone who has no neutral name — nor even an uncontested pronoun.

32. For a first-rate introduction to problems and puzzles in the philosophy of language, see S. BLACKBURN, *SPREADING THE WORD: FOUNDINGS IN THE PHILOSOPHY OF LANGUAGE* (1984).

the events.³³ And when litigants come to court with different stories, some are accepted and become “the facts of the case” and others are rejected and cast aside. Some of what is cast aside may indeed be false (and some of what is accepted may be too). But some of the rejected stories may be accurate versions of events that grow from experiences different from the experiences of those who are doing the choosing.

This issue on legal narrative provides evidence of the presence and persistence of perceptual fault lines in contemporary American legal culture. Milner Ball traces the dominant story of origin of the American republic, and shows how the versions of American Indians present a very different picture. Patricia Williams reveals in a moving personal account what the experience of harm from racial discrimination *feels* like, although courts say no harm is done. Mari Matsuda presents compelling evidence that racist hate speech *does* have strong effects on those to whom it is directed, that it is patterned and organized, that it is not in experience what courts have said it is in theory. David Luban contrasts two quite different accounts of the demonstrations for racial equality held in Birmingham, Alabama, in 1963. Joseph Singer uses imaginative hypotheticals in teaching to get students who have never had the experience to imagine what it is like to be workers thrown out of jobs by a plant closing. Clark Cunningham wonders whether legal discourse is so different from ordinary discourse that a lawyer cannot really “represent” a client’s views in legal language at all. Derrick Bell and Richard Delgado create fictional events to provide vivid accounts of racial discrimination, to pierce the self-justification that those in the “we” engage in to explain their actions, and to construct visions that might supplant usual ways of thinking.

All of these Articles attest to the very real presence of perceptual fault lines, different descriptions of events that grow from different experiences and different resonances. And most of these perceptual fault lines described in these Articles occur at the boundaries between social groups, between whites and people of color, between the privileged and the poor, between men and women, between lawyers and nonlawyers. And the Articles also make clear that the “we” constructed in legal accounts has a distinctive selectivity, one that tends to

33. Jerome Frank noticed this, and realized that, in legal storytelling, “[s]ince the actual facts of a case do not walk into court, but happened outside the court-room, and always in the past, the task of the trial court is to reconstruct the past from what are at best second-hand reports of the facts.” J. FRANK, *Modern Legal Magic*, in *COURTS ON TRIAL* 37 (1949). Frank also noticed that since jurors and judges are witnesses to stories, they themselves introduce another layer of interpretation of the facts. The facts are, in this process, “twice refracted.” J. FRANK, *Facts Are Guesses*, in *COURTS ON TRIAL* 22 (1949).

adopt the stories of those who are white and privileged and male and lawyers, while casting aside the stories and experiences of people of color, of the poor, of women, of those who cannot describe their experiences in the language of the law. "They" are the outsiders, and this volume engages in what Mari Matsuda calls "outsider jurisprudence,"³⁴ telling the stories that are omitted from mainstream legal discourse.

The papers in this volume show *that* the stories of outsiders are systematically ignored. But *why* are certain perspectives excluded from legal narrative? In asking this question, I share some of the theoretical concerns expressed in the Articles by Steven Winter and Toni Massaro. Winter shows how narrative provides a compelling way to make sense of the world because it invariably draws on concepts and categories with which people have first-hand experience. Massaro asks how judges should choose among competing stories when the stories diverge and empathy gives us uncertain guidance. Both Winter and Massaro examine the mechanisms that lead some stories to seem more compelling and to be chosen over others.

In the next Part, I will explore some of the other mechanisms that tend to exclude "outsiders' stories." One obvious answer suggests itself. Given that the perceptual fault lines occur at the boundaries between groups where there is much social tension these days, excluding outsiders' stories may be a *direct* act of racism, of sexism, of intolerance of difference. It may be an overt act of power, a response by those in control to keep those without power in their place. But many of the practices that put people of color and other outsiders at a disadvantage are more subtle, harder to see, and harder still to correct.

The exclusions of outsiders' views happens not only in explicit acts of hostility and rejection, but also implicitly in the details of legal practice, at the places where abstract rules are applied to concrete cases and at the places where courts invoke apparently neutral procedures. And it is at places where the perceptual fault lines shift and buckle, revealing the multiplicity of voices that the law generally quiets, that legal institutions reveal the strain under which they operate and the ordinary legal habits that guide legal practice. As I will try to show in the next Part, outsiders' stories are often excluded by the daily operation of apparently harmless legal habits.

34. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323-26 (1989).

III. LEGAL HABITS

Storytelling can be seen as a deeply patterned activity. English speakers know when they hear "once upon a time" that a story is about to begin. "And they lived happily ever after" is clearly an ending. Vladímir Propp has demonstrated that a whole tradition of Russian folktales followed a relatively simple, predictable structure.³⁵ And literary structuralists of all sorts demonstrate over and over again how, despite the enormous superficial variation in the content, style, and tone of stories, deep structures reappear.³⁶

Legal storytelling is no less patterned than other sorts of storytelling; indeed, it may be even more structured because it is embedded in a larger institutional framework that routinizes solutions to unusual events and that values regularity and predictability. But unlike rules of law, which are explicitly taught and tested in law schools, the craft of legal storytelling is generally left to the practitioner to learn and develop without formal and systematic training. And though this craft is constrained by rules of evidence and the demands of legal relevance, there are few formal legal rules providing guidance on how the lawyer or judge should structure stories.³⁷

Yet, it matters a great deal how stories are framed. The same event can be described in multiple ways, each true in the sense that it genuinely describes the experience of the storyteller, but each version may be differently organized and give a very different impression of "what happened." And different legal consequences can follow from the choice of one story rather than another.

Narratives may differ because they take a different cut through events, beginning and ending at a different place or taking a different point of view throughout. But they may also be different because the elements which go to make up the narrative are framed differently in the first place. While some important legal consequences flow from how the narrative is structured overall, other important legal consequences are attendant upon the choice among alternative descriptions

35. V. PROPP, *MORPHOLOGY OF THE FOLKTALE* (1968).

36. See, e.g., S. CHATMAN, *STORY AND DISCOURSE* (1978); E. RABKIN, *NARRATIVE SUSPENSE* (1970); R. SCHOLES, *STRUCTURALISM IN LITERATURE* (1974); Winter, *The Cognitive Dimension of the Agon Between Legal Power and Legal Meaning*, 87 MICH. L. REV. 2225 (1989).

37. One such formal standard is the "clearly erroneous" rule, which provides a way for appellate courts to overturn the judgments of lower courts when lower courts have reached a clearly erroneous conclusion about specific facts. But a thoughtful and detailed study of the uses of the clearly erroneous rule shows that it is not one standard but many, giving appellate courts substantial flexibility in reviewing lower courts' findings of fact and not providing explicit guidance in a rigorous way. See Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645 (1988).

for discrete elements of the story. I will examine discrete descriptions first and whole narratives in the sections to follow.

Let's start by taking one example where two different terms are applied to the same event: A 1977 Maryland rape attack involved a woman, identified only as Pat, who gave a ride home to Eddie Rusk, a man she met at a singles bar. Pat claimed that Rusk "lightly choked" her. This action, however, could have also been a "heavy caress."³⁸ Both descriptions might be given to the same physical movements of the defendant in placing his hands at the woman's neck, but the description of "choking" leads far more easily to the conclusion that the woman was raped than does the description that she was being "caressed." Neither version is evidently false, and yet the two competing descriptions lead judgment in different directions. In the Maryland Court of Appeals, Chief Justice Murphy's opinion upholding the conviction quoted the woman's words that the defendant "started lightly to choke me"³⁹ and found that the jury could reasonably have believed her version "with particular focus upon the actual force applied by Rusk to Pat's neck."⁴⁰ In the dissent in that court, Justice Cole wrote, "there is no suggestion by her that he bruised or hurt her in any manner, or that the 'choking' was intended to be disabling."⁴¹ But heavy caressing, light choking, actual force applied, or "choking" (which put in quotes like this is probably meant to be read as "so-called choking") could describe the same event, seen from different points of view.

Or take another situation where the witnesses produced different accounts: In 1958 in North Carolina, a black man confessed to raping and murdering a white woman. The defendant, Elmer Davis, said that he had been interrogated "most all the time during the day and most all the time during the night" during the sixteen days he was held by the police before he confessed.⁴² The detective captain denied that there was around-the-clock interrogation because there were no detec-

38. Judge Thompson's intermediate appellate opinion in *Rusk v. State*, 43 Md. App. 476, 406 A.2d 624, 628 (1979) stated, "At oral argument it was brought out that the 'lightly choking' could have been a heavy caress." See also the discussion of this case in S. ESTRICH, *REAL RAPE* 63-66 (1987), and Scheppele, *supra* note 30, at 1105.

39. *State v. Rusk*, 289 Md. 230, 235, 242 A.2d 720, 722 (1981).

40. 289 Md. at 246, 424 A.2d at 728.

41. 289 Md. at 258, 424 A.2d at 734 (Cole, J., dissenting).

42. This case appeared in the Supreme Court as *Davis v. North Carolina*, 384 U.S. 737 (1966). The record in the case included a transcript of an evidentiary hearing held by the federal district court to determine the voluntariness of Davis' confession on a habeas petition. Davis' testimony about the extent of his questioning appeared in the record as Transcript of Hearing upon Writ of Habeas Corpus, at 238, *Davis v. North Carolina*, 384 U.S. 737 (1966) (No. 65-815) [hereinafter *Habeas Transcript*].

tives working on the 11:00 P.M. to 7:00 A.M. shift and so Davis couldn't possibly have been questioned all night.⁴³ All three of the detectives assigned to the Davis case during the 3 p.m. to 11 p.m. shift, however, testified that they might have asked Davis questions after dark.⁴⁴ These conflicting descriptions about the extent of the questioning might lead one to believe that someone was lying. Perhaps the detectives were coming back after the evening shift to interrogate Davis all night and were lying about it at trial. Perhaps Davis was exaggerating the extent of the questioning to make it seem that the police were unduly pressuring him. But perhaps both descriptions referred to the same physical occurrences. Davis, who was sitting in jail for sixteen days and who, in all probability, was not wearing a watch,⁴⁵ could have easily thought that he was being interrogated around the clock because the detectives asked him questions when it was light and when it was dark. Davis could have had a difficult time telling exactly when he was being questioned and, with nothing other than the alternation of light and dark and the twice-daily appearance of food to mark out his days, Davis could understandably have felt that the interrogation went on at all hours of the day and night. The detectives, being quite aware of the actual clock time when Davis was interrogated during each twenty-four hour period, could have understandably concluded that Davis was not questioned all day and all night. And the two descriptions might lead to very different legal consequences. If Davis were interrogated day and night, the court might conclude that his original confession was coerced. But if Davis were found to have been questioned only at regular hours, the case for a coercive effect would be less compelling. Just such differences in descriptions of "what happened" were central to the Court's judgments in the case. Chief Justice Warren's opinion overturning Davis' conviction describes Davis as having been "interrogated repeatedly," which was taken as evidence that the police were overbearing.⁴⁶ Justice Clark's dissent, arguing that the conviction and death sentence should

43. Testimony of Detective Captain W.W. McCall, Habeas Transcript, *supra* note 42, at 354.

44. Testimony of Detective Gardner, *id.* at 329; Testimony of Detective Holmberg, *id.* at 343; Testimony of Detective Porter, *id.* at 346.

45. Davis had escaped from prison just before he allegedly raped and murdered Mrs. Foy Bell Cooper. The statement of facts in the North Carolina Supreme Court provides much detail about Davis' attire at the time of his arrest, commenting on his "reddish brown shoes and dark clothing," on the shoe box he was carrying and on the billfold found in his possession which belonged to someone else. There is no mention of a watch, which he would have had to have acquired following his escape from prison, and which would undoubtedly have been noticed by the police. See *State v. Davis*, 253 N.C. 86, 90, 116 S.E.2d 365, 367 (1960).

46. *Davis v. North Carolina*, 384 U.S. 737, 739 (1966).

be upheld, referred to "sporadic interrogation,"⁴⁷ which was not thought to be that coercive. Repeated and sporadic interrogation may have described the same events, seen from different points of view, but they had quite different legal force.

Given how closely the legal results follow on the adoption of one description rather than another when both are arguably accounts of the same physical event, it matters a great deal how descriptions are framed in legal arguments in the first place, and how single descriptions are selected as "what happened." But despite the enormous literature on how judges and lawyers interpret the law, much less attention has been paid in the jurisprudential literature to how judges and lawyers interpret facts. And the construction and selection of descriptions of events in the social world is not just the process of gathering up facts the way one might gather up stones on a beach. The process of making a bit of information, an insight, or a description of experience into a "fact" is itself an important part of what it means to engage in the practice of lawyering or judging and, while it is governed by legal rules in some limited ways, this activity is largely the product of legal habit. Gifted practitioners know without reflection how to make accounts into legal narratives the way native speakers of a language know how to express thoughts in grammatical sentences. But that does not mean that those who can do it know how to describe systematically what they have done. Those trained in the law learn to see the world in particular ways, and the particular ways come to be seen unproblematically as the only truth there is. There seems to be no question or choice about it. It just is.

What are some of the assumptions involved in the construction of facts in legal stories? What legal habits lead some versions and some accounts to be favored over others? A complete answer to these questions cannot be given without a great deal more investigation and a great deal more evidence than I can present in a foreword, but, from what I have seen in my work on this subject thus far,⁴⁸ I can suggest some candidates.

A. *Law and the Objectivist Theory of Truth*

Most people, when pressed, subscribe to what might be called the objectivist theory of truth. The objectivist theory of truth holds that there is a single neutral description of each event which has a privi-

47. 384 U.S. at 754 (Clark, J., dissenting).

48. Scheppelle, *Facing Facts in Legal Interpretation*, REPRESENTATIONS, Spring 1990 (forthcoming); see also K.L. SCHEPPELE, *supra* note 22; Scheppelle, *supra* note 30.

leged position over all other accounts. This single, neutral description is privileged because it is objective, and it is objective because it is not skewed by any particular point of view. Its very "point-of-viewlessness"⁴⁹ gives it its power.

For example, in the *Rusk* case, the point-of-viewless answer to the question of whether Pat was choked or caressed might involve an account of the degree of force actually applied to Pat's neck as it might be seen by a neutral observer. Choking as an activity is associated with force;⁵⁰ caressing as an activity is not.⁵¹ So the presence of force would allow the neutral observer to determine which description is most appropriate. If there is no actual observer to the event in question, other trace evidence can substitute. Were there bruises? Did Pat's neck show the marks that Rusk would have made if he had *really* choked her? To tell caressing from choking, an objectivist account would focus on those observable differences that would allow someone not involved in the event to tell whether force has been applied. What Rusk thought he was doing or what Pat felt he was doing would be details outside the point-of-viewless account.

Or, on the other example, the point-of-viewless answer to the question of whether Davis had been questioned "most all the time during the day and most all the time during the night" would involve investigating the clock times that Davis was asked questions by the detectives. If Davis were never interrogated after 11:00 P.M. or before 7:00 A.M., then "most all the time during the night" would not be a good description of his meetings with the detectives. And if he were only interrogated twice per day for an hour each time by the detectives, then "most all the time during the day" would not be such a good description either. What the experience felt like to Davis or to the detectives would be irrelevant to the point-of-viewless account.

If one task of the law is to find truth⁵² then, on the objectivist account, the task of the law is to locate this privileged description, the one that enables the audience to tell what *really* happened as opposed

49. The term is Catharine MacKinnon's. See MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 638-39 (1983).

50. The *Oxford English Dictionary* defines "choke" as "[t]o suffocate by external compression of the throat; to throttle, strangle." 3 OXFORD ENGLISH DICTIONARY 154 (2d ed. 1989).

51. The *Oxford English Dictionary* defines "caress" as "to treat affectionately or blandishingly; to touch, stroke or pat endearingly." 2 *Id.* at 897.

52. Though finding truth is not the only goal of legal procedures, it certainly is one important consideration in assessing the adequacy of legal practice. If truth were the only goal, it would be quite difficult to make sense of the privilege against self-incrimination and many rules of evidence that exclude from a courtroom information that those outside the courtroom would take to be important and relevant in determining what happened. See Nessen, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985).

to what those involved *thought* happened. Truth can be found by removing the self-serving accounts of those who stand to gain in the process of being partial. Truth, in this view, is what remains when all the bias, all the partiality, all the "point-of-viewness" is taken out and one is left with an objective account free of the special claims of those who stand to gain. And though legal advocates may emphasize partial versions,⁵³ judges or juries are thought to be able to sort through those partial accounts to find the bits that are "really true."⁵⁴

But how does one know truth when one finds it? Truth isn't a property of an event itself; truth is a property of an *account* of the event. As such, it has to be perceived and processed by someone, or else it couldn't be framed in language to count as an account at all. On the objectivist view, the potential "someones" who might observe and report are interchangeable; as long as they approach the task of description in the proper spirit, the description does not depend on who the observers are. But, as Nelson Goodman remarks, the case against "perception without conceptualization, the pure given, absolute immediacy, the innocent eye, substance as substratum, has been so fully and frequently set forth . . . as to need no restatement here."⁵⁵ Observers, even those not directly involved in a dispute, bring with them a conceptual scheme already formed, a set of presuppositions and expectations, that influences what they see and report. Getting a group of observers to come up with the same description simply shows that one has found a group that shared the same conceptual scheme at the start and followed the same instructions for observation. The "neutral observer's" point of view is no less a point of view than any other. It may be more widely shared in a social setting than other perceptions, and it may be systematically different from the percep-

53. The job of a lawyer is to re-present her client's views in such a way that the client's "story" comes across as compelling to a judge or to a jury. See Clark Cunningham's article in this issue for a perceptive discussion of the limits of re-presentation. An advocate knows that her job isn't to present "the truth," but rather to present her client's *version* in the best possible light without actually lying. Jerome Frank saw this process as evidence that courts were really interested not in finding truth, but rather in judging competing stories. See J. FRANK, *The "Fight" Theory Versus the "Truth" Theory*, in *COURTS ON TRIAL* 80 (1949). Still, when asked about truth, I suspect that most advocates would say that there *is* one truth to the matter at issue and that it can be found by removing "bias."

54. Each side's presentation of the most helpful version of a story is not the only thing that makes it difficult for courts to get at a point-of-viewless description. Many bits of information that may be helpful in determining the truth may be excluded from legal description because they are not legally relevant or because they are not allowed to be considered for other reasons. We can see examples of the exclusion of informative but legally irrelevant information in this issue in the Articles by Milner Ball, David Luban, Mari Matsuda, and Patricia Williams.

55. N. GOODMAN, *WAYS OF WORLDMAKING* 6 (1978) (footnotes omitted).

tions of those immediately involved, but it is not point-of-viewless.⁵⁶

If the objectivist view is not point-of-viewless, then is the account it privileges still worth the reverence the law accords it? A great deal depends on just what the observer's point of view includes and excludes and what consequences such a view has. If the objectivist account is one point of view among many (and not point-of-viewless as against other point-of-viewful accounts), then one needs some other account explaining why it should be privileged, if indeed it is to be. One might begin such an account by saying that the objectivist view includes those things that should be included and excludes those things that should have no bearing on the legal outcome. And here is where the fate of the stories of outsiders might be considered relevant to a discussion of the point of view the law should take. If objectivist accounts systematically leave out the stories of outsiders and those stories should be considered, then perhaps objectivist accounts should not be privileged.

What do our two objectivist accounts leave out in *Rusk* and in *Davis*? In *Rusk*, looking for the degree of physical force already makes important and controversial assumptions. For one thing, it assumes that intentional accounts are irrelevant. Looking at objective force in this situation drops out both Pat's understanding of what it felt like to her *and* Rusk's account of what he might have intended. Doctrinally, this is a very curious thing to do in a criminal case. And then there is the question: Force, as seen by whom? Rusk may have *intended* to caress Pat; Pat may have *felt* choked. He may not have seen force in what happened between them, while she did. Men and women with systematically different experiences of force perceive where force begins very differently. Women see force as starting much earlier than men do, before it turns to physical and observable violence.⁵⁷ And any apparently objective standard of force cannot be neutral as between these two very different accounts.⁵⁸

In *Davis*, watching the clock also misses some crucial information.

56. Perhaps the best defense of this general position is W. JAMES, *Pragmatism's Conception of Truth*, in *PRAGMATISM AND THE MEANING OF TRUTH* 95 (1978).

57. See S. ESTRICH, *supra* note 38, at 58-71.

58. There is a further important question here, which has to do with the reliability of the perceptions of those involved. Suppose the rapist were a man who didn't know his own strength. He may not have realized just how much force he was applying in the course of what he saw as ordinary lovemaking when he almost killed his partner. Or suppose the victim were a woman who was particularly frightened of physical contact. Any touching would then be perceived as threatening. My suspicion is that the recurring drive toward objective standards comes from the worry that the disputants' perceptions cannot be trusted or that they may very well be seriously unrealistic. But I am trying to show here that there is also danger in objective standards, for they drop out important experiential information which cannot be observed.

If Davis *felt* that the detectives were frequently interrogating him in the day and at night (and he was supported in this because the questioning occurred when it was light and when it was dark), then considering only clock times would miss this crucial aspect of Davis' experience. Davis, after all, was not likely to see his situation the same way that the detectives saw it. For one thing, Davis was black and living in a state with a history and practice of severe and overt racism. Being questioned by the hostile white police⁵⁹ was a serious business and knowing he was being held in connection with the rape and murder of a white woman, when the likely result of being found guilty was execution, made his situation all the more dire.⁶⁰ He didn't know how long he was going to be held and questioned, questioned, questioned. He was frightened and didn't see any way out.⁶¹

Rusk and *Davis*, however, are unusual cases. In each, the outsiders (a woman in an acquaintance-rape case,⁶² a black defendant in a racist climate) *did* in fact find that their views won out in the end. Rusk's conviction was upheld on appeal. Davis' confession was found to be coerced. This is not what one would expect if the objectivist accounts held sway, where actual force and clock time worked to undermine the outsiders' stories; nor is it what one would expect from the discussion above about the general exclusion of outsiders' perspectives from the law. What is going on here?

In each of these cases, the outsiders' stories were persuasive because other forces managed to overcome the general legal habit of using objectivist accounts. And what were these other forces? For one thing, doctrine worked to the advantage of both outsiders here. In the rape case, one part of the relevant legal standard was whether the wo-

59. In the brief submitted by North Carolina to the Supreme Court, the state did not even try to deny the language the police used in dealing with Davis. "Surely, Davis was not such a sensitive person, after all his years in prison, that 'cussing' and being called 'Nigger' constituted any degree of fear or coercion." Brief for Respondent, at 8, *Davis v. North Carolina*, 384 U.S. 737 (1966) (No. 65-815).

60. The execution rate in North Carolina for those indicted on first-degree murder charges around the time of Davis' case was 43% for black defendants charged with killing white victims and 15% for white defendants charged with killing white victims, with the differences being even greater in comparison on crimes different from the one Davis was charged with. S. GROSS & R. MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* 28 n.8 (1989). In addition, nearly 90% of those executed for rape between 1930 and 1979 were black. *Id.* at 27 n.4. See *Furman v. Georgia*, 408 U.S. 238, 364 (1972) for the evidence that the Supreme Court found persuasive on the racism implicit in the administration of existing death penalty statutes.

61. In his testimony at the evidentiary hearing, Davis said, "I signed that paper [the confession] to get away from [those] people over there because I was scared of them." Habeas Transcript, *supra* note 42, at 252.

62. For a picture of the difficulty women have in getting rapes successfully prosecuted, see Scheppele, *supra* note 30, at 1096-99.

man was "so terrified by threats as to overpower her will to resist."⁶³ This put the focus on the woman's feeling of terror, and made her account relevant to judging whether the legal standard was met. In the confessions case, the issue was whether the confession was made voluntarily. This, also, involved considering the situation from the defendant's point of view.⁶⁴ Both fear and voluntariness pose challenges for an objectivist account; both raise questions of whether what might *look* like consent was what was *felt* as consent. Though one can tell a great deal about people's feelings from observing their actions, not all feelings show themselves clearly. And so, when the doctrinal requirements direct the attention of judges and juries to the point of view of the outsiders in these cases, it matters when outsiders say that the feelings do not match the observations.

But that was not all that was going on here. Doctrine might have allowed the results, but it did not compel them. A black man whose case arrived at the Supreme Court in 1966 and a woman whose case arrived in the Maryland Court of Appeals in 1981 had social forces working for them also. The Civil Rights Movement had by 1966 achieved substantial success in calling attention to the racially discriminatory practices of southern police departments.⁶⁵ Federal judges were clearly on notice that the treatment of blacks in southern criminal cases was appalling, and that federal constitutional remedies were needed to keep state courts in check. This certainly did not mean that federal courts always supported the cause of the Civil Rights Movement.⁶⁶ But it may have made it easier for the Supreme Court, in some circumstances at least, to hear and respond to the voices of blacks. Similarly, the Women's Movement had by 1981 succeeded in putting rape reform on the agendas of most state legislatures and had achieved reform of the laws in many states.⁶⁷ And though this certainly did not by any means signal automatic victory for the forces of feminism, it may have once again allowed courts to hear and respond to the voices of women.⁶⁸

But two individual cases like this do not a general practice make.

63. *Hazel v. State*, 221 Md. 464, 469-70, 157 A.2d 922, 925 (1959).

64. *Davis v. North Carolina*, 384 U.S. 737, 741 (1966).

65. A. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT* 2 (1984).

66. See generally Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152 (1989).

67. S. ESTRICH, *supra* note 38, at 80.

68. The reform of rape laws did not automatically lead to women's points of view being adopted, even when the states shifted from focusing on *her* consent to focusing on *his* force. In fact, the evidence shows many courts went on seeing their cases the same way. See Scheppele, *supra* note 30, at 1102-04 (diagnosing the problem), 1108-13 (discussing the cause).

It is hard for institutions to change old habits. And the vigorous dissents that both of these cases produced (as well as the fact that each high court overturned at least one other court below) testify to the controversial, transient nature of the solutions found and the perspectives adopted.

I raise these two cases to show that the objectivist theory of truth, however powerful a hold it may have on legal reasoning, is not all the law recognizes, even now. There are places where the stories of outsiders can break through the objectivist barricades. But these two cases show, too, just how much it takes to get an outsider's view to provide the winning account. In each case, doctrine directing courts to pay attention to particular points of view combined with massive social movements making more real those points of view at a social level produced some small victories, over vigorous, angry, and nearly successful dissents.

B. *The Boundaries of Legal Narrative*

When does a story begin? At the beginning, one might plausibly answer. But one of the important characteristics of stories is that they have no *natural* beginning, in the sense of having only one particular place and time at which the story can begin.⁶⁹ Stories can always be constructed differently, though many are told in situations where there are such powerful background assumptions that a particular version seems to be the only version. This is just as true of legal stories as it is of any other sort of story. But in legal stories, "where one begins" has a substantial effect because it influences just how the story pulls in the direction of a legal outcome. "Where one begins" also has a great deal to do with the sympathy given the stories of outsiders. Where one ends the story also makes a similar difference. The boundaries of legal narrative are not fixed, but in many cases they might as well be. Those who are experienced legal storytellers often do not perceive themselves as having a choice; they just work with what is "obviously" the way to tell this particular story. The boundaries of legal narratives are shaped powerfully by legal habit, a habit that has worked to the disadvantage of outsiders.

The traditional legal strategy of story-beginning looks to when "the trouble" began, and fans out in the direction of legally relevant

69. This case is made very effectively in A. DANTO, *NARRATION AND KNOWLEDGE* (1985). For an excellent analysis in the legal literature, see Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

facts.⁷⁰ "The trouble" is that the set of events giving rise to the lawsuit and the legal statement of facts usually focuses narrowly on what made those events happen. So, for example, in *Rusk*, the standard legal storytelling strategy would direct attention to the events on the night Pat claimed she was raped. The beginning would be set at the time and place that she and Rusk first met. And details of the events occurring between them from that beginning point until they parted company later that evening would provide the boundaries of the legal story. Similarly, in *Davis*, judging the voluntariness of the confession would require beginning the story at the time of Davis' arrest and detention by the Charlotte police and would end when he confessed. The beginning seems obvious. As does the end.

But of course, these are not the only possible boundaries. In *Rusk*, the account given in the intermediate appeals court majority opinion started predictably with the setting in which Pat met Rusk.⁷¹ But Judge Wilner, dissenting in that court and voting to uphold the rape conviction, began his narrative somewhere else, with the judicial equivalent of a wide-angle opening shot of the larger terrain on which this individual rape occurred. He noted that rape attacks were on the rise, that most victims responded with verbal rather than physical resistance, and that law enforcement agencies throughout the country warned women not to fight back against their attackers.⁷² Against this background, Pat's actions in not physically struggling looked very different than they did in an account starting with when "the trouble" began that night.

In *Davis*, too, the story in the lower courts upholding Davis' conviction fixed the narrative boundaries with the rape/murder at the beginning and the confession at the end, some with flashbacks to the point where he had escaped from prison right before the crime in question occurred.⁷³ But the story did not have to begin this way. Working from the same record, Chief Justice Earl Warren began his account of the *Davis* case like this:

Elmer Davis is an impoverished Negro with a third or fourth grade education. His level of intelligence is such that it prompted the comment by the court below, even while deciding against him on his claim of involun-

70. This "reactive lawyering" paradigm is well described in B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 46-71 (1984).

71. *Rusk v. State*, 43 Md. App. 476, 406 A.2d 624, 625 (1979).

72. 406 A.2d at 635 (Wilner, dissenting).

73. *Davis v. North Carolina*, 339 F.2d 770, 773-78 (4th Cir. 1964); *Davis v. North Carolina*, 310 F.2d 904, 905-06 (4th Cir. 1962); *Davis v. North Carolina*, 221 F. Supp. 494, 495-98 (E.D.N.C. 1963); *Davis v. North Carolina*, 196 F. Supp. 488, 491-93 (E.D.N.C. 1961); *State v. Davis*, 253 N.C. 86, 116 S.E.2d 365, 366-69 (1960).

tariness, that there is a moral question whether a person of Davis' mentality should be executed. Police first came in contact with Davis while he was a child when his mother murdered his father, and thereafter knew him through his long criminal record, beginning with a prison term he served at the age of 15 or 16.⁷⁴

In each of these cases, the wide-angle beginning puts the event before the court in a broader context than legal narratives usually invoke. And it is not surprising that in each of these "wide-angle" versions, the stories of outsiders are given more sympathy than they are given in versions beginning with an account of "the trouble."

Why is this? Outsiders often have a different history, a different set of background experiences and a different set of understandings than insiders. (And just as all insiders' experiences are not all alike, neither are outsiders' experiences all of a piece.) So, when taken out of their context, outsiders' actions often look bizarre, strange, and not what the insider listening to the story would do under similar circumstances. And without knowing more about how the situation fits into a context other than the "obvious," insider's one, courts may find it hard to rule for outsiders. In the rape case, Pat didn't struggle to get away. It is probably hard for most men (who, after all, tend to be the judges) to imagine not fighting back when attacked unless their passivity results from a weakness of will or a failure of nerve, neither of which are remediable in law. But the beginning of Judge Wilner's narrative showing that most women do not physically struggle when attacked, and that women are advised *not* to struggle by police, provides a context within which Pat's actions may be understood by those who have not shared her background and experiences. Similarly, Chief Justice Warren's account succeeds in showing that Davis was at a great disadvantage in dealing with the police, allowing Warren to break through the usual assumptions that the relevant standard to apply was what the judge or juror (or the "reasonable man") would have done under the circumstances. Davis became a real person with a distinctive past, and not some person on average or the law's vision of the typical rational actor. Warren might have been able to be even more effective in providing a wide-angle view helpful to outsiders had he documented the racism that existed in the North Carolina legal system at the time and the well-founded fear Davis had. Warren's perspective may not have provided a wide-enough angle since it only involved this particular case and not the structural conditions giving rise to the differential treatment of blacks and whites in many similar cases.

Now wide-angle descriptions may not always, or even frequently,

74. *Davis v. North Carolina*, 384 U.S. 737, 742 (1966).

work to the advantage of outsiders.⁷⁵ But these examples show us how they might work in some circumstances. The claims of outsiders are often not heard in law because the experiences and reactions and beliefs and values that outsiders bring to the law are not easily processed in the traditional structures of legal narratives. Drawing the boundaries of legal stories closely around the particular event at issue may exclude much of the evidence that outsiders may find necessary to explain their points of view. But standards of legal relevance, appearing to limit the gathering of evidence neutrally to just "what happened" at the time of "the trouble," may have the effect of excluding the key materials of outsiders' stories. And this apparently harmless legal habit has effects that are not at all harmless.

IV. RETHINKING LEGAL NARRATIVES

I have tried to show in this foreword how the "we/they" structures of legal discourse have led to the exclusion of outsiders' stories. And I have further argued that some apparently neutral legal habits, such as preferring objectivist accounts to other point-of-viewful accounts of events and framing stories narrowly around "the trouble" at issue, work to silence the accounts of outsiders (though sometimes doctrine may aid them). But what can be done from here?

In rethinking legal narratives, the first step is to realize that the presence of different versions of a story does not automatically mean that someone is lying and that a deviant version needs to be discredited. Stories can be told many ways, and even stories that lead to very different legal conclusions can be different plausible and accurate versions of the same event. It may make sense, then, to think that the presence of these different, competing versions of a story is *itself* an important feature of the dispute at hand that courts are being called upon to resolve.

In some cases, different participants come to see "what happened" differently. Rather than choosing one point of view over another, courts might recognize that the existence of multiple, self-believed, plausible accounts is an important fact of the case that deserves some attention. If a dispute occurs across a perceptual fault line where people with different backgrounds, understandings and expectations have a disagreement, then the presence of different versions is a clue that there is more at stake here than the violation of a particular legal rule.

75. One of the chief effects of the law-and-economics movement has been to expand the scope of legal description. See B. ACKERMAN, *supra* note 70, at 53, for a discussion of these effects. The law-and-economics movement has not generally been associated with the claims of people of color, of women, or of other outsiders.

Whole world views may have come into collision and it does not serve courts well to simply suppress one of them.⁷⁶

Courts can exacerbate and reinforce the differences and disagreements that invariably exist in a pluralistic society by clinging to the views that there is only one true version of a story and that there is only one right way to tell it. Listening to the stories of outsiders does even more than provide a necessary corrective to monolithic and domineering majority stories; it also provides a way for courts to build into the structure of legal reasoning the pluralism that it is the business of the courts to protect and the respect for persons that it is the business of the courts to enforce.

76. For a similar argument, see G. CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW* 87-114 (1985).