BOOK REVIEW

THE MANY PROMISES OF STORYTELLING IN LAW

AN ESSAY REVIEW OF *Narrative and the Legal Discourse: A Reader in Storytelling and the Law* (David R. Papke ed., Deborah Charles Pubs. 1991)*

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The notion that storytelling is ubiquitous in the law — and in human interactions generally — has recently attained something like the status of a truth universally acknowledged. Interest in storytelling and the law has been expressed from a dizzying variety of directions, including critical legal studies,[1] feminist jurisprudence,[2] law and economics,[3] the new pragmatism,[4] and critical race theory.[5] In light of the breadth and intensity of the legal academy's fascination with the telling of stories, one can only welcome the publication of David Ray Papke's *Narrative and the Legal Discourse: A Reader in Storytelling and the Law*.[6] The book, which collects fourteen previously-published essays by thirteen authors, captures the diversity of perspectives and interests characterizing the current "rush to storytelling."[7] Indeed, because Papke presents so well the very wide

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1. *See, e.g.*, Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985).

2. *See, e.g.*, Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

3. *See, e.g.*, Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37 (1990).

4. *See, e.g.*, Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763 (1990).

5. *See, e.g.*, Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

6. NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW (David R. Papke, ed. 1991) [hereinafter NARRATIVE AND THE LEGAL DISCOURSE].

7. Kim L. Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989). Legal storytelling has been the subject of two recent law review symposia: Symposium,

range of issues addressed and views expressed by those interested in storytelling and law, *Narrative and the Legal Discourse* offers an opportunity to assess the problems and promises of this nascent jurisprudential "movement."

The authors of the essays in *Narrative and the Legal Discourse*, like others who have written about the relationship between storytelling and law, have not styled themselves a "movement" nor sought to coordinate their positions. The concerns of these authors vary enormously, which may explain why, despite an apparent consensus that stories and storytelling have *something* to tell us about the law, there are large areas of confusion and disagreement. The focus of discussion shifts a great deal among the essays in *Narrative and the Legal Discourse*. Sometimes the subject is the personal stories of individuals —law students,[8] law professors,[9] or litigants.[10] The "counter-stories" of groups provide the subject of other essays.[11] Still other essays focus not on any person or group's story, but on narrative technique,[12] famous literary works,[13] and appellate opinions as works of literature in their own right.[14] The authors of these essays come to a wide variety of conclusions as to the implications of attention to stories, ranging from suggestions that such attention will enable us to become better day-to-day practitioners of law to arguments that through stories we can change the law itself.

In fact, what has been written about under the rubric of "storytelling" and "narrative" involves at least[15] three quite different subjects: the place

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Legal Storytelling, 87 MICH. L. REV. 2073 (1989), and *Pedagogy of Narrative: A Symposium*, 40 J. LEGAL EDUC. 1 (1990). Some of the essays in NARRATIVE AND THE LEGAL DISCOURSE are drawn from these symposia.

8. James R. Elkins, *The Quest for Meaning: Narrative Accounts of Legal Education*, *in* NARRATIVE AND THE LEGAL DISCOURSE *supra* note 6, at 10.

9. Andrew W. McThenia, *Telling a Story About Storytelling*, *in* NARRATIVE AND THE LEGAL DISCOURSE, *supra* note 6, at 30.

10. William M. O'Barr & John M. Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives*, *in* NARRATIVE AND THE LEGAL DISCOURSE, *supra* note 6, at 65.

11. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, *in* NARRATIVE AND THE LEGAL DISCOURSE, *supra* note 6, at 289.

12. Kathryn H. Snedaker, *Storytelling in Opening Statements: Framing the Argumentation of the Trial*, *in* NARRATIVE AND THE LEGAL DISCOURSE, *supra* note 6, at 132.

13. John Denvir, *William Shakespeare and the Jurisprudence of Comedy*, *in* NARRATIVE AND THE LEGAL DISCOURSE, *supra* note 6, at 183.

14. David R. Papke, *Discharge as Denouement: Appreciating the Storytelling of Appellate Opinions*, *in* NARRATIVE AND THE LEGAL DISCOURSE, *supra* note 6, at 206.

15. I say, "at least" because interest in storytelling also overlaps, to some degree, with interest in law and literature. *See, e.g.*, Martha L. Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1687-95 (1990). Many of the essays in NARRATIVE AND THE LEGAL DISCOURSE refer to or discuss the

in legal education and doctrine of the personal stories of actual people; the stories that legal doctrines tell about the world, its problems and its potential; and the way in which stories are or can be used strategically as a method to enhance the quality of communication between actors in legal settings such as law offices and courtrooms. Interest in each of these three subjects seems to have developed independently of interest in the others, and those writing in one area rarely address directly those writing in another. The important questions raised by *Narrative and the Legal Discourse* concern the interrelation of these diverse strands of interest in storytelling and law. Are too many different positions vying for shelter and authority under the umbrella of "narrative"? Are too many claims being made on behalf of "storytelling"?

In Part I, I suggest that the storytelling movement encompasses at least three independent and divergent approaches to the question of "objectivity" or "truth" within the law. For all their differences, however, these approaches share a concern about the law's ability to confront and take seriously the human reality of legal problems. As I explain in Part II, many have claimed that, through storytelling, we can change law and how it is practiced. While these claims are difficult to sustain, the aspiration underlying them — the rethinking of our understanding of justice — cannot be lightly dismissed.

I. WHICH STORY?

Narrative and the Legal Discourse begins with the proposition that "narrative is a crucial tool for comprehending human existence. . . . Narrative orders, deepens and enriches our lives, and narrative surfaces in all human products."[16] Law is no exception: narrative is "present at every turn" in the "things and activities that we consider 'legal.' "[17] This view, shared by others,[18] commits Papke to a wide inquiry. He organizes that inquiry into four parts: legal education, litigation, legal doctrine, and alternative legal narratives. Each part is itself a survey. The section on

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connection between law and literature. *See, e.g.*, Denvir, *supra* note 13; David O. Friedrichs, *Narrative Jurisprudence and Other Heresies: Legal Education at the Margin*, *in* NARRATIVE AND THE LEGAL DISCOURSE, *supra* note 6, at 43. Bernard S. Jackson, *Narrative Models in Legal Proof*, *in* NARRATIVE AND THE LEGAL DISCOURSE, *supra* note 6, at 158. However, the precise relationship between the storytelling and law and literature "movements" remains unclear.

16. *Preface* to NARRATIVE AND THE LEGAL DISCOURSE, *supra* note 6, at 1.

17. *Id.*

18. *See, e.g.*, JAMES B. WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 169 (1985) ("One fundamental characteristic of human life is that we all tell stories, all the time, about ourselves and others, both in the law and out of it.").

litigation, for example, includes essays on storytelling in small claims court, lawyers' offices, plea bargain negotiations, and trials.

Similarity of subject-matter may not provide a glue strong enough to hold Papke's groupings together. Within each section, there is a difference of views about *which* story to focus on: some essays emphasize the individual stories of clients and litigants, others the story "told" by legal doctrine, and still others the story of law's procedures. Although these divergent stories suggest quite distinct critiques of law, there is a relation among them. Each of these critiques responds to what is perceived as the sterility and abstraction of technical doctrinal analysis, and all reflect concern for the law's ability to respond to human voices.

A. Real People, Real Stories

Impartiality, independence, disengagement, lack of bias — the convention within the legal community is that these are all qualities to which judges should aspire.[19] Commitment to the rule of law (and not of "men") has been associated with suspicion of the personal and emotional;[20] wise decisionmaking is thought to require a clearer head. In pursuit of this goal, law students are taught to give "reasons," not "opinions." Lawyers are encouraged to represent clients' legal interests regardless of how they might "feel" about their clients' behavior. The adversary system permits exploration and correction of the self-serving inaccuracies of each litigant's account of events. In framing rules and policies, in negotiating and adjudicating disputes, and in reaching and interpreting appellate decisions, lawyers see themselves as seeking and working with facts, with real events in the real world. To see the facts clearly, we must see them objectively — as they really are — and not through the prism of self-interested subjectivity.[21]

The equation between impartiality, objectivity and distance, on the one hand, and "facts" or "truth" on the other, has come to be questioned in virtually every area of intellectual life.[22] The law has not been immune to such questioning. On one level, the issue is whether impartiality is

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19. Judith H. Resnick, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1882 (1988).

20. *See, e.g.*, Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985); Joseph Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

21. Scheppele, *supra* note 7, at 2090 (in the "objectivist" view, "truth can be found by removing the self-serving accounts of those who stand to gain in the process of being partial").

22. *E.g.*, THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970) (natural science); MARTHA L. MINOW, MAKING ALL THE DIFFERENCE: INCLUSION,

possible.[23] No decisionmaker can be free of beliefs and interests.[24] Consequently, "facts" cannot be confidently distinguished from "judgments": "[w]hat we see and hear is filtered and interpreted within a cognitive framework that is constructed largely from our own individual temperament and prior experience."[25] Moreover, as Martha Minow has often noted, the commitment to impartiality is itself a partial stance, one all the more dangerous for suppressing "the inevitability of the existence of a perspective."[26] In this sense, "impartiality is the guise that partiality takes to seal bias against exposure."[27]

Even if objectivity and impartiality were achievable, there is reason to question whether and to what extent they are desirable. Impartiality and freedom from bias can cut decisionmakers off from "dangerous" self-interest.[28] Yet they can also cut decisionmakers off from knowledge of themselves and of their connection to those who are subject to their decisions.[29] In this sense, the commitment to impartiality and objectivity

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EXCLUSION AND AMERICAN LAW (1990) (social sciences); RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979) (philosophy).

23. Resnick, *supra* note 19, at 1943 ("Impartiality and disengagement can never be achieved,. . . . hence we are always living in a second best world in which we cover our tracks with doctrines of insulation.").

"Partiality" is itself an ambiguous concept. It can connote bias or favoritism (as in "I am partial to Italian opera") or it can connote unprejudiced, "objective" knowledge of only a part of a larger whole (as in "I had only a partial view of the stage.") The two distinct senses of the word suggest two divergent meanings of "impartiality": lack of any bias or a more complete view of the whole.

If all knowledge is partial in the sense of being biased, then there is no "objective" truth to be learned, only a potentially infinite number of perspectives. On the other hand, if individuals' knowledge is partial in the sense of being incomplete, then it might be possible to learn "the truth" by gathering and synthesizing multiple accounts.

Those writing about storytelling have not addressed directly the ambiguity of "partiality." For their purposes, it has been more important to demonstrate that law is not "impartial" in either of the two senses suggested above.

24. Kenneth L. Karst, *Judging and Belonging*, 61 S. CAL. L. REV. 1957, 1957-58 (1988); Martha L. Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 32 (1987); Resnick, *supra* note 19, at 1908.

25. Catherine Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1727, 1743 (1990) (footnote omitted). *See also*, Scheppele, *supra* note 7, at 2090 ("Observers . . . bring with them a conceptual scheme already formed, a set of presuppositions and expectations, that influences what they see and report.").

26. Minow, *Foreword: Justice Engendered*, *supra* note 24, at 45.

27. MINOW, MAKING ALL THE DIFFERENCE, *supra* note 22, at 376. *See also* Abrams, *supra* note 2, at 975-76 ("The ostensible 'neutrality' of the law disguises the extent to which it is premised on the perspectives of the powerful. . . .").

28. *See* Patricia Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945, 1946 (1988); *c.f.* Resnick, *supra* note 19, at 1922 (both distinguishing "good" from "bad" bias).

29. Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L.

operates as a masked rule of relevance, under which much human information is excluded from consideration.[30]

One possible corrective to the disguised partiality of impartiality can be found in the actual stories of actual people. The approach of soliciting and listening to these stories has an elegant simplicity (as in, "If you want to know what I think, why don't you just ask me"?). When asked for their stories, actors within the legal system — students, professors, litigants — will provide them.

The use made of the actors' stories will vary. Consider the personal accounts described in *Narrative and the Legal Discourse*. When James Elkins reads the individual stories told in his first year students' journals, he tries "to listen to them and retell what [he] . . . hear[s], reshaping the student voices into a collective story that constitutes an ongoing description and critique of legal education as a felt experience."[31] Marie Ashe uses "[t]he self-accounts of mothers and of all women,"[32] including her own powerfully described experiences of childbirth and miscarriage, to uncover "truths of female bodies suppressed in the dominant discourse."[33] William O'Barr and John Conley analyze the stories told by litigants in small claims courts to explore "the powerful effect of the evidentiary constraints found in ordinary litigation."[34] Richard Delgado points out that the stories of "outgroup" members can be used "to subvert . . . ingroup reality."[35] Whether these are worthwhile purposes or whether these purposes are actually served by the stories told are questions I will defer for now. What is important here is to point out that the authors of these essays are using their stories in a distinctive way.

REV. 37, 44 (1988) ("Modes of argument and justification that curb the self-knowledge of the human beings pursuing them cannot help but cut off the knowledge of human qualities of the persons who are the subjects of the arguments and decisions.").

30. *See* Walter D. Weyrauch, *Law as Mask — Legal Ritual and Relevance*, 66 CAL. L. REV. 699, 707 (1978) ("Both rules of evidence and conceptions of relevance act to exclude certain information, often of a human nature, that cannot be subsumed under a given rule, and therefore have elements of legal masks.").

31. Elkins, *supra* note 8, at 315-16 n.4. For another description of how students' personal stories can be used pedagogically, see Patricia A. Cain, *Teaching Feminist Legal Theory at Texas: Listening to Difference and Exploring Connections*. 38 J. LEGAL EDUC. 165 (1988).

32. Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, *in* NARRATIVE AND THE LEGAL DISCOURSE, *supra* note 6, at 286.

33. *Id.* at 280.

34. O'Barr & Conley, *supra* note 10, at 65.

35. Delgado, *supra* note 11, at 289. For other accounts of outsiders' stories challenging insiders' reality, see Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280 (1989); Matsuda, *supra* note 5; Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989).

Storytelling in the law is, on one level, nothing new. Real people are asked to tell true stories in legal settings all the time — just think of the witness on the stand at trial giving her account of the auto accident at issue. Those stories, however, are considered *sources* of facts, such as the location of the two cars with respect to each other. If we had an accurate videotape of the events, we could dispense with the eyewitness's account altogether.

Yet the real-life stories recounted in the essays in *Narrative and the Legal Discourse* — like the personal stories being told so much more frequently now in legal scholarship[36] —are not offered for the facts they contain, but *as* facts. If the objectivist thinks of truth as "what remains when all the bias, all the partiality, all the 'point-of-viewness' is taken out" of an account,[37] the increasing use of and interest in the real stories of real people suggest another theory of truth altogether. This "truth" is true precisely because it is partial, engaged, biased, and felt.

The truth of personal, real-life stories provides a basis from which to criticize law. Law purports to be interested in "facts," but defines the term too narrowly, thereby overlooking or ignoring the very information allegedly sought. Since all decisionmakers are inevitably situated somewhere, decisions reached without attention to the experiences of those subjected to them will reflect the unacknowledged partiality of those reaching them. The choice is not between "fact" and "fiction," or between "objectivity" and "subjectivity." *Someone's* story will emerge in legal decisions; the only question is whose.

B. Law As a Story

Overtly or covertly, consciously or unconsciously, people tell stories in legal proceedings. The law also tells stories of its own:[38] "Law, like religion and television images, is one of th[e] . . . clusters of belief . . . that convince people that all the many hierarchical relations in which they live and work are natural and necessary."[39] If legal rules seek to respond to real

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36. Susan Estrich's account of her own rape may have become something of a model in this regard. *See* Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986).

37. Scheppele, *supra* note 7, at 2090.

38. On the concept of law as narrative in which "legal argument consists of, and takes the form of, narrative accounts (histories) of the practice advanced in support of arguments about how to 'go on' (forward) with the practice," see Dennis M. Patterson, *Law's Pragmatism: Law as Practice & Narrative*. 76 VA. L. REV. 937 (1990).

39. ROBERT W. GORDON, *New Developments in Legal Theory*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 413 (David Kairys ed. rev. ed. 1990). [hereinafter POLITICS]. 1990). *See also* Clare Dalton, *supra* note 1, at 997 ("Law, like every other cultural institution, is a place where we tell one another stories about our relationships with ourselves, one another, and authority.") (footnote omitted).

social problems, discussion of the rules and their application to particular facts necessarily involves either explicit or implicit consideration of the nature of the social world. This consideration occurs, among other places, in appellate opinions, which can be read as "extraordinarily rich and diverse texts."[40] These "texts" create what Papke calls "master narratives," which can "genuinely be treated as stories."[41] They "perform a didactic function; they articulate normative understandings of social life."[42]

Describing the "narrative" told by doctrine in various areas of the law has come to be a very popular form of legal scholarship.[43] Papke's own essay, *Discharge as Denouement: Appreciating the Storytelling of Appellate Opinions*, is a fine example of the genre. The essay describes the "most recognizable" narrative of consumer bankruptcy, the Chapter 7 bankruptcy:

> Essentially, the prototypical opinion tells a story of an individual whose debts and poor financial management dictate a bankruptcy filing. Assorted legal twists and turns slow the bankruptcy, and in some cases the courts even terminate the proceeding. More commonly, the debtor and his or her counsel maneuver through the maze. In the tale's denouement, bankruptcy discharge is achieved. Freed from the shackles of debt, the discharged bankrupt begins anew and has a veritable "fresh start" on life.[44]

To the extent that an appellate opinion constitutes just another text, it can be analyzed in terms of its literary style. Are its characterizations of the actors in the story oversimplified? Is its plot too linear? Is the narrative voice appropriate in tone?[45] The master narrative of a given area of law can also be analyzed in terms of its literary form or "grand narrative category."[46] In the case of bankruptcy, the master narrative is, in Papke's

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40. NARRATIVE AND THE LEGAL DISCOURSE, *supra* note 6, at 180.

41. Papke, *Discharge as Denouement*, *supra* note 14, at 208.

42. *Id.*

43. For a host of examples, see the essays included in Part II of POLITICS, *supra* note 39. *See also* Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985) (trusts); Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155 (1988) (wills); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (family law).

44. Papke, *Discharge as Denouement*, *supra* note 14, at 210.

45. *Id.* at 213.

46. *Id.* at 214-15. The categories — the tragic, comic, romantic and ironic — are drawn from Northrop Frye's ANATOMY OF CRITICISM (1957). The analysis of literary opinions in terms of these categories follows the lead of Robin West's *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985), applying Frye's categories to legal theory.

view, comedy,[47], and it must be analyzed by exploring how successfully the narrative follows the comedic path "from repression to liberation to regeneration."[48] Failure to realize fully this progression to regeneration may, in other areas of law whose master narratives involve comedy, suggest the need for doctrinal change.[49]

Whatever virtues may exist in the treatment of law as literature, Papke, like others who write about law as a story, is aware that "despite their literary features, appellate opinions, because they are commands backed by state power, have more in common with legislation and government decrees than with great poems or novels."[50] To the extent they are exercises of state power and politics, the master narratives of various areas of law are subject to what Papke calls an "ideology critique" — "a sociopolitical interpretation that relates the master narrative to the economy and the state."[51] In the realm of consumer bankruptcy, for example, the master narrative "casts a soothing light on the collapses that result" when individual consumers become victims of an American ethos which teaches that happiness lies in ever more purchases of ever more goods.[52]

In their ideological dimension, the law's narratives have a curious and uneasy relation to both the real stories of real people and the idea of "truth" or "facts." To some extent, the master narratives are ideologies because they are *not* true; they are instead idealized plot lines that do not conform to the actual experience of real people. As Papke points out, "contrary to the master narrative, bankruptcy in the contemporary economic system is

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47. Papke, *Discharge as Denouement. supra* note 14, at 215.

48. *Id.*

49. *See* Denvir, *supra* note 13, at 198.

50. Papke, *Discharge as Denouement, supra* note 14, at 208. *See also* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) ("Legal interpretive acts signal and occasion the imposition of violence upon others . . . [and] also constitute justifications for violence which has already occurred or which is about to occur."); Robin West, *Adjudication is not Interpretation: Some Reservations About the Law-As-Literature Movement*, 54 TENN. L. REV. 203 (1987).

51. Papke, *Discharge as Denouement, supra* note 14, at 213. *See also* Jay M. Feinman & Peter Gabel, *Contract Law as Ideology, in* POLITICS, *supra* note 39, at 382 ("The law justifies . . . practical norms and . . . contributes to constituting and reconstituting the norms and the social reality that they represent. . . .").

52. Papke, *Discharge as Denouement, supra* note 14, at 214. The notion that law attempts to cast reality in a "soothing light," or "mediate" social or political conflicts is quite common in scholarship focusing on law as a story. *See, e.g.*, Dalton, *supra* note 1, at 1113 ("My story reveals the world of contract doctrine to be one in which a comparatively few mediating devices are constantly deployed to displace and defer the otherwise inevitable revelation that public cannot be separated from private, or form from substance, or objective manifestation from subjective intent.").

hard and painful. . . . The much fabled discharge . . . includes exceptions and denials, . . . embarrassment and destruction of credit ratings make the bankrupt's situation more stale than fresh."[53] The stories told by law are not the real stories of real people. We are interested in the latter stories because they *are* facts, but we are interested in the narrative of law because it *hides* facts — indeed, the very facts that real stories reveal.

In actuality, however, the relationship between law's master narratives and real people's actual stories—between the law's stories and "true" stories—is more complicated than it might at first appear. Law's narratives, in the sense that they contradict lived and felt experiences, hide or suppress "truth." Yet at the same time, law's narratives may help to create truth. Many of those interested in the ideological function of law argue that the law's story, like other images, "limits and impoverishes the way we experience our affective and productive lives, the possibilities we can imagine for restructuring our shared existence, and the manner in which we attempt change."[54] Papke seems to agree, stating: "Stories . . . establish a complex normative environment. If we wander through shopping malls whenever time allows, we may too fully have accepted the promise of advertising stories that commodities lead to happiness."[55] There seems to be a paradox here: narratives that deny real experiences are helping to determine what real people experience in their real lives.[56]

The essays in Papke's volume tend not to address this paradox directly. Papke's own essay on bankruptcy suggests that the relationship between the law's idealized, ideological stories and the true stories of individuals might best be understood in dynamic terms:

> To tell one's own stories, one must confront other stories. Because modern society is rife with stories, no storyteller writes on a blank slate. . . . A

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53. Papke, *Discharge as Denouement*, *supra* note 14, at 214. *See also* Dalton, *supra* note 1, at 1113 (suggesting doctrine may "misrepresent" reality).

54. Olsen, *supra* note 42, at 1529. *See also* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 111 (1984) ("[T]he legal forms we use set limits on what we can imagine as practical options . . . [They] condition not just our power to get what we want but what we want (or think we can get) itself.").

55. Papke, *Discharge as Denouement*, *supra* note 14, at 220-21.

56. *See* Dalton, *supra* note 1, at 999 ("Since our stories influence how we imagine, as well as how we describe, our relationships, our stories also limit who we can be.").

Feminist legal theory faces similar problems. *See* Katharine Bartlett, *Feminist Legal Methods*. 103 HARV. L. REV. 829, 872 (1990) ("what women know has been determined — perhaps overdetermined — by male culture")(footnote omitted); *see also id.* at 879 ("the post modern critique of foundationalism . . . poses a threat . . . to feminist politics. . . . To the extent that feminist politics turns on a particular story of woman's oppression, a theory of knowledge that denies that an independent, determinate reality exists would seem to deny the basis of that politics.") (footnote omitted).

> willingness to tell stories about these other stories helps one to tell the kinds of personal stories that create a greater contentment and wholeness. Stories of the dominant ideology . . . can be containing and repressing if unchallenged. When confronted and challenged, they can become stories against which one crafts more personal and genuine tales.[57]

Papke here suggests that attention to the law's master narratives will enhance the authenticity of personal stories, which in turn can be used to challenge the master narratives. The suggestion is soothing, but is it more than a bromide?[58] The notion is that consciousness of the *possibility* of inauthenticity can be a means toward attaining authenticity. Yet, if consciousness is itself a product of ideology, can we be confident that we can use it to overcome ideology?

C. *Stories as Communication Strategies*

Whether or not the narratives of legal rules create the reality to which they purport to respond, whether or not that reality can be "known" in some unmeditated way, law is "done" every day — people untrained in the law seek help with problems they think of as legal and people trained in the law seek to provide the help requested. The language, customs and procedures used in the day-to-day practice of law are different from those of "ordinary" life; they are specialized and often mysterious to the nonlawyer. That difference has prompted some to ask how the law "really" works.

In some of the essays in *Narrative and the Legal Discourse*, the question of legal mechanics is approached empirically, as in William O'Barr and John Conley's study of "how the informality of small claims court procedures affects the ways in which litigants tell their stories"[59] or Douglas Maynard's investigation of the "speech practices . . . through which practitioners settle the bulk of cases" in the nonpublic, negotiational arena of plea bargaining.[60] In other essays, the approach is more specula-

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57. Papke, *Discharge as Denouement*, *supra* note 14, at 220.

58. Katharine Bartlett has suggested that the answer to the analogous dilemmas faced by feminist theory, *see supra* note 56, may lie in "positionality," which seems to share some of the features of Papke's approach:

> Because knowledge arises within social contexts and in multiple forms, the key to increasing knowledge lies in the effort to extend one's limited perspective. . . . My perspective gives me a source of special knowledge, but a limited knowledge that I can improve by the effort to step beyond it, to understand other perspectives, and to expand my sources of identity.

Bartlett, *supra* note 56, at 881-82 (footnotes omitted).

59. O'Barr & Conley, *supra* note 10, at 65.

60. Douglas W. Maynard, *Narratives and Narrative Structure in Plea Bargaining, in*

tive, as in Thomas Shaffer and James Elkins' exploration of whether the traditional image of lawyers as solvers of technical problems tells us "enough" about "the way lawyers work."[61] Kathryn Holmes Snedaker employs detailed textual analysis to describe "how the opening statement serves as an important phase of the trial persuasion process."[62] What unites these otherwise disparate inquiries and methodologies is a common concern with the very practical question of how interactions in legal settings really work.

All these essays assert that storytelling is an essential part of the "doing" of law in each of these diverse settings. Litigants in small-claims court, free from the evidentiary constraints applicable in formal trials, employ "the same narrative strategies that they use in ordinary social interaction."[63] A typical client approaches his or her attorney not only because he or she has a legal problem, but also because he or she "has a story to tell."[64] Lawyers negotiating plea bargains "bring facts, biography, law, and other matters to bear on the decision-making process. . . . by using narrative structure."[65] Similarly, in formal trials, "the story form" is the "communication strategy underlying successful opening statements."[66]

The focus in these essays is not on the particular story told (or suppressed) in any of the described settings. Instead, the focus is on storytelling as a way of communicating within the legal system. The essays draw on a tradition of interest in the relationship between the specialized conventions of the law and the routine practices of ordinary life.[67] This

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NARRATIVE AND THE LEGAL DISCOURSE, *supra* note 6, at 102. *See also* Jim Thomas, *Prisoner Cases as Narrative*, *in* NARRATIVE AND THE LEGAL DISCOURSE, *supra* note 6, at 237 (based in part on empirical research).

61. Thomas L. Shaffer & James R. Elkins, *Solving Problems and Telling Stories*, *in* NARRATIVE AND THE LEGAL DISCOURSE, *supra* note 6, at 92.

62. Snedaker, *supra* note 12, at 133.

63. O'Barr & Conley, *supra* note 10, at 87.

64. Shaffer & Elkins, *supra* note 61, at 96.

This assertion clearly needs more qualification than Shaffer and Elkins offer. Their statement seems uncontroversial enough as a description of *some* cases — the residential tenant, say, who might be seeking not only to terminate his lease but also to ventilate his personal grievances against the landlord who has been unresponsive to his complaints. But as is further developed *infra* in the text accompanying notes 111-112, many clients are far more concerned with the legal outcomes of their cases than with the quality of their interaction with their attorney. For example, I doubt whether an indigent criminal defendant, whose attorney is a court-appointed defender whom the client never "approached," would care significantly about telling her story if she could obtain dismissed charges or a favorable plea bargain through a hurried, impersonal consultation with her lawyer.

65. Maynard, *supra* note 60, at 126.

66. Snedaker, *supra* note 12, at 133.

67. *See, e.g.*, W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING

tradition begins with the proposition that lawyers, clients and judges are, after all, human. To solve legal problems, they will draw not only on specialized, technical legal skills, but also on their general competence as human beings. A significant component of that competence involves using stories as devices through which they can understand and explain the world.[68] Because legal problems are fundamentally human problems, solving legal problems, like solving other human problems, requires the telling and hearing of stories.[69] The good lawyer, the lawyer who truly wishes to be effective on behalf of his or her clients, must act on this knowledge, honing his or her skills as a listener and raconteur.[70]

On this level, the subject of this set of essays about storytelling is not "law" but "lawyering." Indeed, some of the essays in the vein have a sort of "how-to" quality.[71] Yet as most of these essays recognize, the distinction between what law is or says, on the one hand, and *how* law is done, on the other hand, is questionable. Not all stories are of equal legal force and persuasiveness.[72] Unfortunately, "narrative power, or the ability to convincingly and compellingly select and manipulate symbols for sharing with others, provides a resource unequally distributed among narrators."[73] The conventions of legal storytelling have the potential to systematically silence or marginalize some voices. To the extent that that potential is realized, the "fairness" of law will be very much in doubt.[74]

Even if all voices were heard, emphasis on the strategic aspect of

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REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE (1981); Gerald P. Lopez, *Lay lawyering*, 32 UCLA L. REV. 1 (1984); WHITE, *supra* note 18.

68. *See, e.g.*, Lopez, *supra* note 67, at 3; Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning* 87 MICH. L. REV. 2225, 2230 (1989).

69. *See, e.g.*, Lopez, *supra* note 67, at 1.

70. *See, e.g.*, Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989); Shaffer & Elkins, *supra* note 61.

71. *See, e.g.*, Snedaker, *supra* note 12, at 138 ("In a criminal trial, the story should provide persons and actions that are consistent with the facts of the case. . . . Accommodate the story to the images and metaphors likely to represent the experiences of jurors."). *See also* Steven Lubet, *The Trial as a Persuasive Story*, 14 AM. J. OF TR. ADV. 77 (1990) (describing the characteristics of a persuasive trial story).

72. *See* O'Barr & Conley, *supra* note 10, at 87 ("In presenting accounts in court, witnesses rely on the conventions of every day narratives about trouble and their informal cultural assumptions about justice. From the law's perspective, such accounts often have disabling shortcomings.").

73. Thomas, *supra* note 60, at 252.

74. *See, e.g.*, O'Barr & Conley, *supra* note 10, at 88:

> It may be the case that certain categories of litigants are less prone to present legally adequate narratives and accounts. If such differences exist and follow ethnic, racial, or gender lines, new and important questions would arise about the fairness of present small claims court procedures and about possible reforms. . . .

storytelling raises serious questions about the relationship between law and truth. The craft of effective storytelling, assuming it is equally available to all who seek it, may be enlisted in the aid of the real stories of real people. But then again it may not; some clients lie to their lawyers. When clients do not lie, the telling of their real stories in legally-recognizable form may permit those stories to emerge as facts.[75] But then again, it may not. Sometimes the telling of the story in legally-recognizable form can change the "facts" of a tale.[76] For a variety of reasons, stories can be effectively told, persuasive, and yet completely false. Those who emphasize the strategic use of storytelling seem curiously indifferent to the truth of the stories told in and by the law.

D. Identifying the Problem for which Storytelling Is the Cure

Stories are sometimes personal and true, sometimes ideological and false, and sometimes simply a means of understanding and communicating. The range and disparity of the concerns underlying the essays in Papke's book suggest that the label "storytelling" or "narrative" can be sewn over a great number of apparently dissimilar subjects. The fault — if it is a fault — is not in Papke's selection of essays.[77] To the contrary, his selections capture the breadth of interest in "storytelling" and exemplify the major themes of this emerging "movement." The question is how these themes interrelate. The weakness of the "movement" lies in its failure to address this question.

The one point on which the essays in *Narrative and the Legal Discourse* seem to agree, the one point at which they converge, is that something is missing from the law — missing alike from law school classrooms, law offices, antechambers and courtrooms. That missing element bears an uncanny resemblance to what Julius Getman has called the "human voice" in legal discourse: "language that uses ordinary concepts and familiar situations without professional ornamentation in order to analyze legal issues."[78] The distance between law and human emotion is a constant theme of Papke's book. We are told, for example, that

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75. *See supra* text accompanying notes 36-38.

76. For a description of how the "facts" can be changed in the encounter between the attorney and client, see KIM L. SCHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW 97-98 (1988). *See also* Maynard, *supra* note 60.

77. The recent symposia in Michigan Law Review and the Journal of Legal Education have as wide a range and diversity as NARRATIVE AND THE LEGAL DISCOURSE. I must confess that I wondered why Lopez's *Lay Lawyering*, *supra* note 67, was not included.

78. Julius G. Getman, *Voices*, 66 TEX. L. REV. 577, 582 (1988).

law school is characterized by "prosaic, technical legalism."[79] "Scholarly . . . discourse in law . . . is characterized by a subversion or denial of self, of biography."[80] "The law of evidence is in frequent conflict with many of the conventions of everyday speech."[81] As a study of human relations, law "divorces itself from our emotional responses."[82]

What unites the seemingly-divergent strands of recent interest in storytelling is a concern to recover the human voice. What is valuable about the real stories of real people is that they speak with this voice. What is problematic about the ideological stories told by the law is that they often deny or simply ignore the human voice. What is dangerous about law's conventions and procedures is that they may suppress this voice. The solution, we are told, is storytelling. As Richard Delgado puts it, "Stories humanize us. . . . Telling stories invests text with feeling. . . ."[83] But can storytelling live up to this very large claim?

II. WHAT DO STORIES DO?

Perhaps the solution is simple. If something is missing, let's put it back, like we add salt to a bland stew or mount pictures on a blank wall. Some of the claims made for storytelling in *Narrative and the Legal Discourse* read like this sort of prescription. David Friedrichs argues that a "narrative jurisprudence" will promote "the legitimacy of the 'I'— the personal, reflexive account — as utterly appropriate in legal discourse."[84] Thomas Shaffer and James Elkins argue that "when we see our own stories, and hear the account of the client as a story" it will become possible for lawyers to "see the objects of our service as persons."[85] John Denvir asserts that, among other things, "literature provides a good antidote to the rule-centered emphasis of positivist jurisprudence that is so influential in modern legal education."[86] Exactly *how* stories and storytelling will accomplish these worthy goals is not explained.

The problem is not only that proposals such as those just described are often vague and difficult to implement, but that existing visions of law and lawyering may be so deeply entrenched as to render the offered reforms

79. Elkins, *supra* note 8, at 27.
80. Friedrichs, *supra* note 15, at 54.
81. O'Barr & Conley, *supra* note 10, at 87.
82. Denvir, *supra* note 13, at 195.
83. Delgado, *supra* note 11, at 312.
84. Friedrichs, *supra* note 15, at 59.
85. Shaffer & Elkins, *supra* note 61, at 100. *See also id.* at 101 ("The daily doing that otherwise dries us out is given new meaning and purpose in the plots of our stories.").
86. Denvir, *supra* note 13, at 195.

ineffectual. If modern jurisprudence is deeply rule-centered and positivistic, literature will be deemed irrelevant to it and not an antidote for it. If lawyers truly fail to see the objects of their service as persons, then they will be unable to hear their clients' accounts as stories. If the "I" is judged to be wholly inappropriate in legal discourse, then "narrative jurisprudence" will be thought of as illegitimate. Prescriptive claims about storytelling are easy to make, but they are equally easy to refute.

For the most part, however, those writing about storytelling — including, to be fair, those I have quoted above — are not primarily interested in prescriptions for reform. Rather, they see storytelling as a means for the achievement of broader, more radical goals: reconceptualizing the idea of lawyering and challenging existing patterns of power and dominance. I describe these goals in Parts A and B below. In Part C, I show that claims as lofty as these are also easy targets in their own way. Yet, for reasons I develop in Part D, I do not think these claims should be lightly dismissed. Whether or not the claims made for storytelling can be sustained, there lies beneath them an aspiration to reconsider our criteria for "judgment." This aspiration merits great respect.

A. Storytelling and Lawyering

Lawyers can be thought of as technicians "who can examine a situation, name the problem, and take whatever corrective means are necessary to get things going again."[87] There is *some* truth to this vision.[88] With varying degrees of cynicism and from varying perspectives,[89] law professors teach the skills of doctrinal analysis (or, if you prefer, manipulation),[90] students learn them,[91] and attorneys use them.[92]

Few, however, believe that doctrinal analysis is *all* that lawyers do. Much of law school, after all, seems devoted to demonstrating how, given a single set of facts and applicable rules, multiple inconsistent arguments and outcomes are possible. And everyone understands, in a vague way, that people are involved somewhere in these arguments and outcomes — that

87. Shaffer & Elkins, *supra* note 61, at 93-94.

88. *Id.* at 91 ("This view of what lawyers do is descriptive, accurate, and incomplete.")

89. *Compare* Richard K. Greenstein, *Teaching Case Synthesis*, 2 GA. ST. U.L. REV. 1 (1985) *with* Jeremy Paul, *A Bedtime Story*, 74 VA. L. REV. 915 (1988).

90. For an account of one professor's attempt, told in story form, see James Boyle, *Anatomy of a Torts Class*, 34 AM. U.L. REV. 1003 (1985).

91. For the story of one student's experience of the process, see SCOTT TUROW, ONE L (1977).

92. For an excellent story of the mixed experience of using doctrine in practice, see Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives on the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986).

humans, not rules, call attorneys, that individuals, not doctrines, get arrested, that men and women, not abstracted "judges" and "juries," decide cases. If our vision of lawyering is to be accurate and complete, it must take more explicit notice of both the limitations of doctrine and the human dimension of legal practice.

In this task of redefinition, storytelling can help in several interconnected ways. First, as described earlier,[93] stories are sometimes facts in themselves, providing necessary information about real people's actual experiences of legal practices. These experiences can demonstrate aspects of real situations that lawyers and legal rules fail to take sufficiently into account.[94]

But stories are not just facts in themselves. They are ways of learning and talking about facts, a way of communicating.[95] "In narrative, we take experience and configure it in a conventional and comprehensible form. This is what gives narrative its communicative power."[96] Since "[h]uman beings think about social interaction in story form,"[97] persuasion — a critical task for a lawyer[98] — requires the ability "to tell a plausible and compelling story — one that moves . . . [the decisionmaker] to grant the remedy we want."[99] Indeed, taking seriously the notion that stories are integral to human understanding of and communication about the world leads to a reconceptualization of the lawyer's role. Lawyers should no longer think of themselves or want to be thought of as technical problem-

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93. *See supra* Part I.A.

94. *See, e.g.*, Ashe, *supra* note 31 (women's personal experiences of reproduction); Austin Sarat & William L.F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 L. & SOC'Y REV. 737 (1988) (lawyer/client interactions concerning divorce proceedings.)

This type of storytelling evaluates legal practices by examining people's (usually nonlawyers') personal experiences of those practices. This evaluation differs from the technique of asking whether legal education, rules and practices live up to their own claims about themselves. The latter technique, often associated with critical legal studies, is sometimes called "trashing." *See* Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984). For examples of the technique applied to legal education, legal rules, and legal practices respectively, see Duncan Kennedy, *Legal Education as Training for Hierarchy*, *in* POLITICS, *supra* note 39, at 38; Singer, *supra* note 20; William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

95. *See* Lopez, *supra* note 67, at 10 (stories represent "the most comprehensible and persuasive form of human communication.").

96. Winter, *supra* note 68, at 2228.

97. Lopez, *supra* note 67, at 3. *See also* Winter, *supra* note 68, at 2228 ("The attraction of narrative is that it corresponds more closely to the manner in which the human mind makes sense of experience than does the conventional, abstracted rhetoric of law.").

98. Lopez, *supra* note 97, at 2.

99. *Id.* at 3. *See also* Winter, *supra* note 68, at 2228 (narrative is "a powerful tool of persuasion").

solvers. If they understand their role properly, lawyers will see that they are actually translators:

> A representative translates and, if necessary, transforms the story that a person . . . is living (her needs and concerns) into a story that an audience can identify, believe and find compelling. The translation or transformation typically is necessary because the rest of the world can know only from the outside the story any individual is living.[100]

The task of translation invites a reconsideration of the idea of "lawyering skills." Because stories are told at every turn in legal interactions — by clients to their attorneys,[101] by attorneys to each other[102] and to legal decision-makers,[103] and by decisionmakers to litigants and lawyers[104] — effective lawyers must understand the elements of persuasive storytelling.[105] "[T]he major features of a case are not prior to or independent of narratives; instead they come to life through narrative practices by which a teller makes them manifest and a listener makes inferences and responds accordingly."[106] As a result, the lawyer conscious of his or her role as a translator must constantly seek to learn more about how storytelling works.

Just as an attorney must first grasp the "self-understandings of the parties" in order to understand their legal situation,[107] so an attorney must convey the client's human situation to the judge in order to be persuasive.[108] To do so, the lawyer can use storytelling as a form of "phenomenological argument" to create "affective understanding" by including

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100. Lopez, *supra* note 67, at 11. *See also* Cunningham, *supra* note 70, at 2483 ("If law is seen as a language, then the lawyer becomes a translator."); WHITE, *supra* note 18, at 36 ("the heart of the law is the process of translation which it must work, from ordinary language to legal language and back again.").

101. *See, e.g.*, Sarat & Felstiner, *supra* note 94; Shaffer & Elkins, *supra* note 61.

102. *See, e.g.*, Maynard, *supra* note 60.

103. *See, e.g.*, BENNETT & FELDMAN, *supra* note 67; Lubet, *supra* note 71.

104. *See, e.g.*, Cunningham, *supra* note 70, at 2492; SCHEPPELE, *supra* note 76, at 103-04; WHITE, *supra* note 18, at 168.

105. *See, e.g.*, Lopez, *supra* note 67, at 15 (a representative's effectiveness as a storyteller will depend critically on his understanding of the process through which his audience ascribes meaning to the story told). *See also* Winter, *supra* note 68, at 2270-74.

106. Maynard, *supra* note 60, at 128 (footnote omitted). *See also* SCHEPPELE, *supra* note 76, at 95:

> The mutual construction of facts and rules is an iterative process in which the facts of the case determine the legal categories that will be invoked, which in turn determine how the facts will be sorted into those that are relevant and those that are irrelevant, which in turn determines which rules are to be invoked.

107. Minow & Spelman, *supra* note 28, at 52.

108. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1592 (1987).

"descriptions of concrete human situations and their meanings to the persons affected in the context of their lives."[109] Such arguments call upon human emotions and utilize them in a way reflecting "the complexity of human motivation which law's abstract categories both oversimplify and distort."[110]

One can question whether these visions of lawyering are new in any meaningful sense. Litigators have long known that trying cases involves telling stories, and there is a well-developed literature on trial advocacy that emphasizes storytelling skills.[111] Similarly, one can question whether the vision of lawyers as translators is overbroad. Surely some clients are more interested in obtaining legal outcomes than in expressing or explaining anything about their lived experiences.[112]

Still, the question of what it is that lawyers and judges actually *do* in the day-to-day practice of law has by no means been conclusively answered. While almost no one believes these days that lawyers and judges *just* apply rules to facts, there remains a strong tendency to treat the facts of a case as just *there*, independent of and prior to the attorney's presentation of them. Authors who write about storytelling encourage lawyers to question this tendency and to examine carefully their role in creating the reality of legal cases. If self-consciousness has any bearing on what lawyers actually do, then these efforts could help change how law is practiced.

B. Storytelling and Power

The strongest claim made for storytelling is that stories can be a powerful means of effecting social change. The argument supporting this claim begins with the assertion that "we construct social reality by devising and passing on stories —interpretive structures by which we impose order on experience and it on us."[113] The process by which stories construct social

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109. *Id. See also* Winter, *supra* note 68, at 2272 (describing the "affective way in which narrative persuades").

110. Denvir, *supra* note 13, at 195.

111. *See, e.g.*, DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977); Lubet, *supra* note 71.

112. *See supra* note 64. Questions about whether storytelling will actually lead to a reconceptualization of lawyering, assuming such reconceptualization is needed or desired, are addressed *infra* in Part C.

113. Delgado, *supra* note 11, at 291. This assertion can reflect theories of human cognition. *See, e.g.*, BENNETT & FELDMAN, *supra* note 67, at 62 ("stories . . . engage some general cognitive models of social action against which particular networks of story connections can be judged for completeness."); Lopez, *supra* note 67, at 3 ("Human beings think about social interaction in story form.").

reality has an affirmative, "community-building" aspect: "stories build consensus, a common culture of shared understandings, and deeper, more vital ethics."[114] Yet the process of creating reality through stories can also be used subversively or destructively. Stories, especially the "counter stories" told by outgroups,[115] can "challenge the received wisdom, . . . showing us that there are possibilities for life other than the ones we live."[116] Stories "can show that what we believe is ridiculous, self-serving, or cruel. They can show us the way out of the trap of unjustified exclusion. They can help us understand when it is time to reallocate power."[117]

Understanding how stories effect social change requires understanding how power works. If, despite pretenses to or aspirations toward impartiality, no one has access to "a view beyond human experience, a 'God's eye' point of view," then anyone who claims to be impartial is "trying to exercise power to cut off conversation and debate."[118] Power is most effectively exercised when invisible, and it is nowhere more invisible than when the perspective of the person doing the seeing or the judging is treated as objective, rather than as subjective.[119] But stories can bring the background to the foreground and thereby help us to see assumptions and preconceptions that had previously been invisible.[120] Stories are thus a "powerful means for destroying mindset — the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place."[121] In effect, the claim is that stories can make us re-think and thereby push us to question what has seemed obvious.

This assertion is strong, but it is not unsupported. Richard Delgado, for example, backs up his claims about the way stories can attack complacency by telling stories that do just that.[122] His essay illustrates

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114. Delgado, *supra* note 11, at 290.

115. *See supra* note 35.

116. Delgado, *supra* note 11, at 290.

117. *Id. See also* Friedrichs, *supra* note 15, at 45 (stories "challenge taken-for-granted hierarchies both by exposing so fully the cruel consequences of such hierarchies, and by imaginatively promoting alternative accounts of how humans might live together")(footnote omitted).

118. Minow, *Justice Engendered*, *supra* note 24, at 75 (footnote omitted).

119. *Id.* at 33.

120. Delgado, *supra* note 11, at 290. *See also* Abrams, *supra* note 2, at 1031 (experiential narratives can provide "a vantage point outside the legal system, from which one can glimpse its partiality or subordinating effects").

121. Delgado, *supra* note 11, at 290.

122. In using stories in this fashion, Delgado is the acknowledged heir of Derrick Bell, who has consistently used "fictionalized" stories to get at the "truth" of racial reform. *See, e.g.*, Derrick Bell, *The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985); Derrick Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382 (1989).

how, in connection with the claim that storytelling can effect social change, all three forms of storytelling described in Part I can and do come together.[123] Delgado's stories concern a minority applicant for a faculty position at a more or less typical law school. The first story is the school's own "stock story—the one the institution collectively forms and tells about itself."[124] The tale is one of benevolent motivation, meritocratic selection criteria, and procedural fairness.[125] This story, the "master narrative,"[126] "justifies the world as it is."[127] Delgado then tells stories about the hiring events in question from the divergent perspectives of various actors involved in the process. These stories, differing sharply from the stock story (and among themselves) in both tone and emphasis, all call into question the "neutrality" of the stock story. For instance, the felt reality of the minority candidate's rejection calls into question the objectivity and fairness of the criteria and processes to which he was subjected. The applicant's personal story, like real stories of real people, presents an alternative vision of the disputed events in order to "attack and subvert the very 'logic' of the system."[128]

Not all the alternative stories are equally effective, persuasive, or plausible. Delgado describes how an alternative story directly challenging the law school's stock story and mocking "the school's meritocratic self-concept" is dismissed as marginal and extreme,[129] while a story attacking the faculty less frontally and using storytelling strategies more carefully to build credibility is more successful in raising suspicion about the law school's selection criteria.[130] The storyteller's ability to understand and manipulate the conventions of effective storytelling affects his or her success in persuading others to re-think their positions. Storytelling is not

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123. I use Delgado's essay illustratively, as an example. Others, such as Gerald Lopez, *see supra* note 66, and Steven Winter, *see supra* note 67, have also described how an understanding of the way stories work structurally and cognitively can enable them to be used as a form of "transformative communication." Winter, *supra* note 68, at 2277. As much as the essay described in the text, these essays are sensitive to how the different meanings and dimensions of storytelling come together when people seek to use stories to effect social change.

124. Delgado, *supra* note 11, at 295.

125. *Id.* at 296.

126. *See supra* text at note 41.

127. Delgado, *supra* note 11, at 295-96.

128. *Id.* at 303.

129. *Id.* at 304-05.

130. *Id.* at 308-09. With respect to the more successful alternative, Delgado explains: "The reader . . . moves back and forth between two worlds, the storyteller's, which the reader occupies vicariously to the extent the story is well-told and rings true, and his or her own, which he or she returns to and reevaluates in light of the story's message." *Id.* at 309.

only an approach to effecting change, it is a set of specific techniques — a craft --that can and must be learned.

If we construct our world out of stories — if what we think of as real is a function of the stories we tell about ourselves, others and the social world — then the ability to tell new stories, stories at odds with the accepted stories, can make a difference. Power is strongest and most insidious when it hides itself as objectivity or as truth. Stories fight power by showing how "the same event can be described in multiple ways, each true in the sense that it genuinely describes the experience of the storyteller."[131] Stories can then help effect change by demonstrating that there is no neutral, impartial starting point for description and characterization of events and by teaching us the reality lived by others.[132]

C. *Some Caveats about Storytelling and Transformation*

Stories can be agents of change, "but there are no guarantees."[133] Though some of the essays in Papke's volume are almost rhapsodic about the potential of storytelling and narrative for correcting the evils of contemporary jurisprudence,[134] caution is in order. Evidence in other essays suggests that stories have the potential to reinforce the status quo as well as to change it, that it may be impossible for the legal system to take seriously or assimilate stories which are, in tone or substance, at odds with reigning paradigms, and that the ability to tell convincing stories may be a limited resource.

1. Will Storytelling Change or Reinforce the Status Quo?

One way in which storytelling could change the law is by correcting the false or oversimplified assumptions within legal doctrine. The actual experiences of those subject to legal rules could be brought forward to demonstrate aspects of the problem to which existing rules are insensitive.[135] However, as suggested earlier,[136] the relation between the ideological narratives of legal doctrine and the actual stories of real people can be a

131. Scheppele, *supra* note 7, at 2085.

132. Minow, *Justice Engendered*, *supra* note 24, at 72, 76.

133. Winter, *supra* note 68, at 2277.

134. *See, e.g.*, Denvir, *supra* note 13, at 195 (literature provides an "antidote" to rule-centered positivism); Friedrichs, *supra* note 15, at 58 (narrative jurisprudence "suggests the inherent limitations of formal doctrinal and empirical analysis"); Papke, *supra* note 14, at 221 (stories give us "a critical awareness of the human condition in modern society.")

135. *See, e.g.*, Ashe, *supra* note 32.

136. *See supra* text accompanying notes 50-58.

complicated one. Law is part of what structures individuals' experiences, and law may affect individuals' reactions to experiences.

Papke's description of the memoirs of nineteenth-century professional criminals illustrates this problem.[137] Papke found the lawbreakers did not tell "stories of resistance," nor did they criticize the norms that made them criminals. "Rather than speaking as critical outsiders, the criminal memoirists of the period proffer autobiographical narratives which champion the institutions, norms and values most valorized by legitimate Americans. The criminal memoirs, grounded in a strong sense of professionalism, illustrate the power of the societal hegemony."[138] If law has this sort of power — the power to structure the stories told — can stories really be an agent of change?

A similar problem arises when storytelling is used strategically, as a communicative or lawyering technique. The technique can be used in the service of change, but presumably it can be used with equal effectiveness in the service of the status quo. For example, most analyses of effective storytelling techniques agree that, in framing the narrative, the storyteller must take into account the presuppositions and beliefs of his or her audience.[139] While the well-told story may challenge the audience to reconsider those presuppositions,[140] it is also possible for the storyteller to use the audience's presuppositions in a profoundly conservative way. Consider Kathryn Holmes Snedaker's advice concerning the construction of the opening statement in a criminal trial: "Accommodate the story to the images and metaphors likely to represent the experiences of jurors. The story should confirm the interests, values, and attitudes of jurors, as well as tailor the shape of the story to converge with the prevailing public mores and perceptions of justice."[141] The line between taking notice of audience predispositions and pandering to those predispositions seems here to be rather thin. Indeed, Snedaker's evaluation of the opening statements in the Chicago Anarchists Trial of 1886 suggests that the prosecution's effectiveness may have turned on its ability to play on jurors' tendencies to choose "scapegoats . . . to act as redeemers to purge a society of its evils."[142] This is hardly the stuff of which social change is made.

It would be comforting to believe that decisionmakers' existing

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137. David R. Papke, *Legitimate Illegitimacy: The Memoirs of Nineteenth-Century Professional Criminals*, *in* NARRATIVE AND THE LEGAL DISCOURSE, *supra* note 6, at 226.

138. *Id.*

139. *See. e.g.*, Lopez, *supra* note 67, at 15, 28; Winter, *supra* note 68, at 2272.

140. Winter, *supra* note 68, at 2277.

141. Snedaker, *supra* note 12, at 138.

142. *Id.* at 153.

attitudes, if understood and taken into account, could be changed if only new stories were presented. Yet the process may well work the other way around; consideration and incorporation of existing attitudes may change the stories being told. This observation does not suggest that stories cannot be used to effect social change. It suggests only that the process is more complicated than is often assumed.

2. Will "Different" Stories Be Assimilated or Dismissed?

Whether or not advocates self-consciously pander to decisionmakers' presuppositions, certain pre-existing beliefs may render some stories unbelievable.

> People who have different understandings about society and its norms may disagree about the plausibility of a story. . . . If legal facts are reconstructed as stories whose plausibility depends on understandings drawn from experience, then jurors who come from different social worlds may disagree about the meaning and the plausibility of the same stories.[143]

Those who advocate the telling of *more* stories and *different* stories implicitly suggest that the problem is that too few stories — and therefore too few perspectives — come to light in the law. This diagnosis is questionable. The telling of more stories — competing stories — requires choices among them, for "all stories cannot dominate."[144] The problem can be understood as one of power: "law often privileges the stories of the powerful and drowns out the voices of the weak and marginal."[145] Since "[t]hose whose stories are believed have the power to create fact,"[146] the alternative descriptions offered in counterstories, rather than being agents of change, can be dismissed as unreal.[147]

It would be comforting to believe that if only more stories were told, decisionmakers would be forced to reconsider their background assumptions about the "real" world. Yet stories cannot change our perceptions unless we listen to them.[148] Without a reciprocal commitment to listen and

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143. BENNETT & FELDMAN, *supra* note 67, at 171. *See also* Scheppele, *supra* note 7, at 2082 (" '[P]erceptual fault lines' run through apparently stable communities that appear to have agreed on basic institutions and structures and on general governing rules.").

144. Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2116 (1989).

145. *Id.* at 2116.

146. Scheppele, *supra* note 7, at 2079.

147. *Id.* at 2079 ("those whose stories are not believed live in a legally sanctioned 'reality' that does not match their perceptions."). Challenges to the truth of feminist narratives are treated thoughtfully in Abrams, *supra* note 2, at 1020-30.

148. Listening is not easy. *See* Cain, *Teaching Feminist Legal Theory*, *supra* note 31,

attend to the alternative stories offered, the telling of more stories may only increase the sense of outsiders that the law is indifferent to them.

3. Will Everyone Be Able to Tell Stories?

Finally, even assuming that alternative stories are not dismissed or trivialized, there is a question whether everyone is equally capable of telling stories within the law. "[T]he law imposes highly specific requirements on narratives."[149] Legal categories, rules of evidence, and the customary ways of dealing with issues of fault or blame form a powerful web of conventions regarding the type of stories the law will find acceptable. The "truths" of those who cannot master the conventions may be rejected.[150]

Jim Thomas's analysis of prisoners' stories illustrates this phenomenon. Inexperienced prisoner litigants "tend to emphasize the incident, and the narrative speaks to the grievance rather than to the relationship between that grievance and its deviation from prison policy."[151] Because the prisoners' descriptions are "impressionistic" and "neglect . . . the crucial analytic discourse that provides the reasons that the story relates to law," they are regarded as "bad cases."[152] Those who most need to have their stories heard in the law may be least able to tell them in a way the law will find persuasive.[153]

The problem is not necessarily solved by providing more lawyers to more potential litigants. First, if potential clients are unaware of the conventions of "strong" legal stories, then their lawyers themselves will be unable to hear what these clients tell them as a plausible legal "case."[154] Second, litigants are not the only people with relevant and important stories to tell. Witnesses at trials, clients of social service agencies,

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at 171 ("Often when we listen to others, we pick out the bits of their stories that are like our stories and discard the rest.").

149. O'Barr & Conley, *supra* note 10, at 87.

150. BENNETT & FELDMAN, *supra* note 67, at 171. *See also* Abrams, *supra* note 2, at 1032 ("mainstream readers may find it difficult to recognize the prescriptions presented in narrative scholarship because these prescriptions often take unfamiliar forms.").

151. Thomas, *supra* note 60, at 251.

152. *Id.*

153. *See, e.g.*, BENNETT & FELDMAN, *supra* note 67, at 172 (significant differences in patterns of language use may place users of a minority language at a disadvantage); O'Barr & Conley, *supra* note 10, at 88 (differences in ability to present legally adequate narratives may follow ethnic, racial or gender lines); Thomas, *supra* note 60, at 252 (power in prisons inheres even in access to symbolic resources).

154. For a detailed analysis of the difficulties of hearing and speaking clients' stories in the poverty law context, see Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991).

storekeepers who seek to persuade the police to "come quick"—all these and others tell stories in legal settings, but may be unable to tell them in a way that is recognizable by or persuasive to the relevant audience. Surely the problem is not that we fail to provide an attorney/translator for everyone who interacts with the legal system. The problem is that "translation" is so frequently required.

D. Aspirations

Broad claims about social change are easy to attack. The telling and appreciating of stories will not alone change the legal system or the world. Yet I do not think interest in storytelling should be dismissed. Beneath the specific claims offered on behalf of storytelling lie aspirations to redefine both the process of reaching legal decisions and the criteria for evaluating those decisions. These aspirations converge with those of other recent jurisprudential movements — feminist jurisprudence, critical race theory, and the new pragmatism — and must be taken seriously.

The storytelling "movement" offers a different vision of what is involved in legal decisionmaking. In this vision, the goal is not "objectivity." Rather, it is consciousness of the multiplicity of accounts — all in their way true, all inevitably partial[155] — that compete for attention and belief.

> 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.[156]

Judgment is not, then, a search for "the" truth, but involves choices among competing truths. To understand the legal situation of the parties, a decisionmaker must learn to grasp their "self-understandings."[157] Stories are important because they can heighten decisionmakers' sensitivity to the real people involved in legal decisions and the human consequences of those choices. "These are not merely procedural concerns, compared with the 'substance' of the result; the quality of the human response is itself a dimension of substantive justice, and heightening attention to human consequences may push the judge more in one direction than another."[158]

The response sought is not necessarily particularized and contextual,

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155. On the ambiguity of the concept of "partiality," see *supra* note 23.
156. Scheppele, *supra* note 7, at 2097 (emphasis in original).
157. Minow & Spelman, *Passion for Justice*, *supra* note 29, at 52-53.
158. *Id.* at 70.

as opposed to abstract and universal. The multiplicity of divergent, partial, true stories, all based on different perceptions of the same event, suggests that "[w]hether you prefer to be called a contextualist or a devotee of principled reason, you make choices about what features of context to address."[159] Justice is not a question of *which* context is chosen, but of how openly, explicitly, and caringly the choice among contexts is acknowledged.[160]

Nothing guarantees that an open acknowledgment of choice will actually change anything. Homelessness, poverty, and discrimination may indeed result, in part, from the law's failure to hear the stories outsiders tell. I fear, however, that even if those stories were told and heard we would still have homelessness, poverty, and discrimination. The question is not, after all, what decisionmakers know or can be made to learn about misery and powerlessness. The question is what they are prepared to do about it. Storytelling may demand, or at least encourage, honesty and openness about the choices being made, and that is a start. But it is only a start.

III. CONCLUSION

It is too early to assess the impact of the recent interest in storytelling. *Narrative and the Legal Discourse* is clearly intended to enhance the movement's effect by introducing storytelling and the law into law school classrooms.[161] There is no doubt that it belongs there. Collectively, the essays in *Narrative and the Legal Discourse* make the case that stories and storytelling are integral parts of *every* legal setting and that anyone interested in understanding the law must take that fact seriously.

The case for storytelling's transformative potential is another matter altogether. That case cannot be made by assertion alone. As some of the essays acknowledge, the law is, at least some of the time, highly resistant to stories which challenge its own conventions and ideological narratives. That resistance cannot be ignored or wished away. It must be analyzed and overcome. Until those steps are taken, the storytelling movement risks becoming mired in utopianism. First let us understand the story of law's resistance to some of the dimensions of human life. Only then will we be able to tell a new tale.

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159. Martha L. Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1629 (1990).

160. *See* Wells, *supra* note 25, at 1746.

161. Each of the book's selections is followed by student-oriented "Questions for Discussion."