

Policing Stories

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I will be talking here about the law from the perspective of an outsider—a perilous enterprise, but one in which I take some comfort from recent arguments, especially by Austin Sarat and Paul W. Kahn, that legal culture and discourse need critique from without: that most legal scholarship, however critical of the law, situates itself within the law, in a reformist enterprise that cannot, by its very nature, stand outside law as a system. “There is remarkably little study of the culture of the rule of law itself as a distinct way of understanding and perceiving meaning in the events of our political and social life,” writes Kahn in *The Cultural Study of Law*.¹ My own effort here may be in the nature of what the Russian Formalists—that remarkable group of critics and theorists who flourished in the Soviet Union just after the revolution, before Stalinism put an end to their experimentalism—called *ostranenie*, “making strange,” the attempt to bathe the familiar in a new light, in order to ask questions of legal business-as-usual. In particular, I want to think about the place of narrative in the law, and the strange manner in which the law recognizes that place: by way of denial.

I begin with a Supreme Court case from 1997, *Johnny Lynn Old Chief v. United States* (117 S. Ct. 644). The question at issue is whether a defendant with a prior conviction on his record should be allowed to “stipulate” to the prior conviction, thus disallowing the prosecution from presenting the facts of the earlier felony in making the case against him for his new alleged crime. In other words, the defendant here knew he had to admit to a prior crime and conviction—on an assault charge—but didn’t want the prosecutor to be able to detail the prior crime, for fear that it would aggravate his sentence on the new crime (which in fact was quite similar to the prior one). The prosecutor refused to accept the

stipulation, and the district court judge ruled in his favor: the full record of the prior crime and conviction was offered as evidence. Old Chief was found guilty on all counts of the new charges of assault, possession, and violence with a firearm. He appealed. His conviction was upheld by the Ninth Circuit, which essentially restated the traditional position that the prosecution is free to make its case as it sees fit. This will be the position argued by Justice O'Connor when the case reaches the Supreme Court. O'Connor writes for the four dissenting justices (Rehnquist, Scalia, Thomas, and herself): "That a variety of crimes would have satisfied the prior conviction element of the . . . offense does not detract from the fact that petitioner committed a specific offense. The name and basic nature of petitioner's crime are inseparable from the fact of his earlier conviction and were therefore admissible to prove petitioner's guilt" (657).

But this claim is rejected by the majority (consisting of Justices Souter, Stevens, Kennedy, Ginsburg, and Breyer) in an opinion written by Souter that is full of interest. Souter argues that introduction of the full story of the past crime could be unfairly prejudicial; it could lead the jury to convict on grounds of the defendant's "bad character," rather than on the specific facts of the new crime. The story of the past crime might "lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged" (650). The story of the past crime must be excluded, not because it is irrelevant, but because it may appear overrelevant: "It is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge" (650-51, citing Justice Jackson in *Michelson v. United States*, 335 U.S. 469, 475-76). The story of Old Chief's past crime must be excluded because it risks creating too many narrative connections between past and present, and presenting the story of a bad actor deserving punishment whatever the specific facts of the new case.

Souter in this manner orders the exclusion of the past story, reverses Old Chief's conviction, and remands the case for further proceedings. But the most interesting moment of his opinion comes in his discussion of the dissenters' point of view, their argument that the prosecution needs to be able to present all the evidence, including the story of past crime and conviction, in its specificity. He concedes the need for "evidentiary richness and narrative integrity in presenting a case" (651). He

goes on to say that “making a case with testimony and tangible things . . . tells a colorful story with descriptive richness.” And he continues:

Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them. (653)

It is almost as if Souter had been reading literary “narratology” (which he may have been, since he appears to be the most erudite and curious of the current justices) and been persuaded by the argument that narrative is a different kind of organization and presentation of experience, a different kind of “language” for speaking the world. In conclusion to this section of his opinion, he writes:

A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. People who hear stories interrupted by gaps of abstraction may be puzzled at the missing chapters . . . A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best. (654)

Here Souter turns back to the case of *Old Chief*, to argue that the prosecution’s claim of the need to tell the story of the earlier crime is unwarranted because that is another story, it is “entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense.” *Old Chief*’s stipulation does not result in a “gap” in the story, it does not displace “a chapter from a continuous sequence” (655).

Souter hence rules out the prosecution’s longer, fuller narrative as the wrong story, something that should not be part of the present narrative sequence. It is interesting that in so doing he feels the need to discourse on the place and power of narrative in the presentation of legal evidence: its “richness,” its “momentum,” its “persuasive power.” “A

syllogism is not a story": in this phrase, Souter recognizes what some scholars concerned with "law and literature" have argued, that the law's general assumption that it solves cases on the basis of reasoning alone is inadequate, and indeed a falsification. Storytelling is present everywhere in the law, from the competing stories presented in the courtroom, to the reformulation of those stories from the written record at the appellate level, on up to the grand narratives of the Supreme Court, which must match the story of the case at hand to the continuing narrative of constitutional interpretation.

Souter here breaches the bar over what you might call an element of the repressed unconscious of the law, bringing to light a narrative content and form that traditionally go unrecognized. Yet curiously, or perhaps predictably, he does it by way of arguing that in the present case the lower courts failed to guard against the irrelevant and illegitimate power of narrative, admitting into evidence story elements—the story of Old Chief's prior crime—that should not be considered part of the "natural sequence" of the present crime. The past story would give too much credence to the present story that the prosecution must prove. It is in defending against the power of storytelling that Souter admits its force.

This defensiveness is typical of the law: its recognition of the claim of narrative in the law most often comes—though rarely in such open and perspicuous form as Souter gives it here—by way of its desire to limit the play of narrative, its desire to set narrow formal limits to storytelling. The law rarely recognizes overtly how much it in fact does implicitly, almost preconsciously, recognize the power of storytelling. We detect this implicit recognition in the ways that law has been intent, over the centuries, to formalize the conditions of telling, in order to assure that narratives reach those charged with judging them in controlled, rule-governed forms. In modern judicial procedure, stories rarely are told directly, uninterruptedly. They are elicited piecemeal by attorneys intent to shape them to the rules of evidence and procedure, then reformulated in persuasive rhetoric to the listening jurors. The fragmented, contradictory, murky unfolding of narrative in the trial courtroom is subject to formulas by which the law attempts to impose rule on stories, to limit their free play and extent. Should Nicole Simpson's 911 phone call be considered part of the story of her murder? Or is that part of another story which, brought within the sequence ending in homicide, takes on a misleading significance and force? All the

“rules of evidence”—including the famous “exclusionary rule,” barring illegally seized evidence—touch on the issue of rule-governed storytelling. The judge must know and enforce these rules. And when stories are culled from the trial record and retold on the appellate level, it is in order to evaluate their conformity to the rules. At this level, all narratives become exemplary: they illustrate a point of law, a crucial issue in justice, a symbolic moment in the relations of individual and state. So it is that the law has found certain kinds of narrative problematic and has worried about whether or not they should have been allowed a place at trial—or what place they should have been allowed. Rules governing confessions by criminal suspects—formulated in the well-known *Miranda* warnings—offer a perennially controversial example. There is also the hotly contested question of victim impact statements used in the sentencing phase of trials on capital offenses.²

In a famous paper on the concept of “negation”—or denial—Sigmund Freud writes: “Negation is a way of taking cognizance of what is repressed.”³ In other words, the patient’s denial of an explanation or association that arises in analysis does not erase its truth, but rather strikes a line through it, so it is visible under the act and the fact of its negation. In the restatement of Freud’s definition by the French analysts Laplanche and Pontalis, negation is “the procedure by which the subject, in the process of formulating one of his hitherto repressed desires, thoughts, feelings, continues to defend himself from it by denying that it is his own.”⁴ In negation, one could say, what is denied is visible under its erasure. The bar of repression keeps the narrative content and form of the law under erasure, subject to formal rule, visible but unarticulated. Souter in *Old Chief* does articulate the nature and force of narrative in the law, in a startling move that I have not found in other legal opinions.

Let me try to make this clearer—and to make the stakes of the issue clearer—by way of discussion of a classic torts case from 1928, one that every first-year law student knows by heart. This is *Palsgraf v. Long Island Railroad Company* (248 N.Y. 339), where the Court of Appeals of the State of New York, in a famous opinion by its chief judge, Benjamin Cardozo, reversed the tort finding against the railroad. I begin with the “facts of the case” as stated by Cardozo himself:

Plaintiff was standing on a platform of defendant’s railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station,

bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact, it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sues. (340–41)

Legal commentators for decades clucked admiringly over the laconic clarity of Cardozo's presentation here. More recently, Judge John Noonan has pointed to some of the relevant ancillary facts we don't get, such as the nature of Helen Palsgraf's injuries, her income and family status, the financial resources of the Long Island Railroad, the number of injuries annually resulting from railway accidents, and so forth: facts that would tend to go into a modern torts settlement.⁵ But what interests me here is less those other facts than how the admirable concision of Cardozo's narrative of the accident controls that very narrative, limiting its reach as a story, keeping it within well-policed boundaries.

Cardozo, like most judges, only appears to tell the story of the event under adjudication. He recasts the story events so that they make a legal point, rendering it a narrative recognizable in terms of legal principle. He wants to demonstrate that the defendant, in the person of the railway guard, could not reasonably have foreseen the harm to the plaintiff:

The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. (341)

The alliteration of this sentence gives it a kind of conclusive panache. After running through a brisk series of hypothetical narratives

intended to show that “prevision so extravagant” as to include the remote consequences of acts cannot be a basis for a ruling in favor of the plaintiff, Cardozo writes, “Negligence, like risk, is thus a term of relation” (345). It has to do with a relation of a legal duty of care and foreseeable harm, which Cardozo cannot find here. His concise narrative of the incident on the railway platform is an antinarrative in that it seeks precisely to destroy relation, to show that certain linkages of cause and effect are “extravagant.”

The eloquent dissent in *Palsgraf*, by Judge William Andrews, gives a narrative of the incident even more laconic than Cardozo’s, which is strange since one would think it in Andrews’s interest to elaborate on *this* story. Instead, Andrews meditates philosophically on kinds of relation established in stories, and he presents us with a series of hypotheticals: a dam with faulty foundations breaks, injuring property far downstream; a boy throws a stone into a pond, and “the water level rises. The history of that pond is altered to all eternity”; “A murder at Sarajevo may be the necessary antecedent to an assassination in London twenty years hence. An overturned lantern may burn all Chicago”; and:

A chauffeur negligently collides with another car which is filled with dynamite, although he could not know it. An explosion follows. A, walking on the sidewalk nearby, is killed. B, sitting in a window of a building opposite, is cut by flying glass. C, likewise sitting in a window a block away, is similarly injured. And a further illustration. A nursemaid, ten blocks away, startled by the noise, involuntarily drops a baby from her arms to the walk. We are told that that C may not recover while A may. As to B, it is a question for court or jury. We will all agree that the baby might not. (353)

In fact, says Andrews, there are no fixed rules to guide us here. “It is all a question of expediency” (354). The best guide he can offer is: “The court must ask itself whether there was a natural and continuous sequence between cause and effect.”

What Andrews is getting at is something akin to Souter’s “narrative integrity,” and the question of what should be included in the story. How far do the Rube Goldberg–like consequences of the dynamite-laden car exploding extend? Where do you declare the story to be over? Without saying so—and again, without unpacking the incident on the

railway platform—Andrews seems to point to a problem in the doctrine of “foreseeability” of harm. We know what harm was caused only retrospectively, after it has occurred. Narrative itself is retrospective, its meanings become clear only at the end, and the telling of a story is always structured by anticipation of that end, the “point” of the story, the moment at which its sequences and their significance become clear. It is only in hindsight, retrospectively, that one can establish a “chain of events,” in the manner of Sherlock Holmes concluding one of his cases. “‘You reasoned it all out beautifully,’ I exclaimed in unfeigned admiration. ‘It is so long a chain, and yet every link rings true’”—as Dr. Watson admiringly declares at the end of one of Holmes’s stories.⁶ In this sense, there are no principles to guide you, there is only the causal and sequential linkage of events, the concrete particulars that narrative alone can convey.

Now, in the tellings and retellings of the *Palsgraf* story I can find nothing about the narrative particular that seems to me most deeply mysterious and important: those scales that, in Cardozo’s account, were “thrown down” by the shock of the explosion, injuring Helen Palsgraf. Where and what were these scales? What did they look like? Were they attached to the wall, or freestanding? How did they become dislodged from their customary position in such a way as to strike Helen Palsgraf?⁷ And how did they strike her, and what kind of injuries did they cause? You seek in vain, in both the majority and the dissenting opinions, for any attempt to render this vital moment—the moment of the injury—in the story. Any student in Creative Writing 101 would be sent to rewrite his or her draft for omitting this crucial information. The very clever student might, in detective story fashion, reserve it for the end. One can imagine Holmes and Watson in discussion: “So those scales, you see . . .”

Cardozo once eloquently declared in a speech that as “a system of case law develops, the sordid controversies of the litigants are the stuff out of which great and shining truths will ultimately be shaped.”⁸ The statement makes very clear the rationale for repressing the sordid story of Mrs. Palsgraf on the railway platform. But surely those great and shining truths in *Palsgraf* depend intimately on narrative constructions, on “sordid” story details, which the opinions in the case repress even as they recognize their importance. Cardozo and Andrews both recognize that there is a story to be told, and the dissent, in particular, notices that how it is constructed makes a difference. But they both then eviscerate

the particular story at hand, indeed they spend more time and give more particulars in their hypothetical narratives. Their recognition of the importance of the story is denied by their determination that the story exists only to reach the “great and shining truths” of legal precedent and rule. The gesture of the judges here could almost be analogized to classic scenarios of denial and repression in Freud, for instance the child’s simultaneous recognition and repression of sexual difference. Here, recognition of the need to narrate what happened is used to deny any real narrative of what happened.

I have dwelt at some length on *Palsgraf*, not because I have any thoughts to contribute to tort law, but because I think it offers a classic instance of how the law simultaneously recognizes and represses its narrative involvements and commitments. Let me offer another, very different kind of example. It comes from the troubling subject of rape, a subject that of course needs to be taken up only with the greatest care, but which is almost unavoidable to someone interested in the unavowed narrative content and form of the law since it so crucially poses the question, Whose story is it? How do you adjudicate two narratives of the same event that have utterly different meanings and legal consequences? Studying a well-known case from Baltimore, *Rusk v. State* (1979, in the Court of Special Appeals of Maryland), and then *State v. Rusk* (1981, in the Court of Appeals of Maryland), one becomes convinced that Edward Salvatore Rusk believes that his conduct was nothing more than Saturday night business as usual, while the woman the court identifies only by the pseudonym “Pat” believes she was raped. Rusk was convicted at trial; the conviction was reversed in the first appellate court, then reinstated in the higher court.

In the decisions on each appellate court, there was a majority opinion and a dissent, starkly opposed to one another. Thus we have four different retellings of what we know is the “same” story—the story of what happened between a man and a woman one night in Baltimore, the story then constructed at trial. The different retellings of course have dramatically different results: results that send Rusk to prison for seven years or else release him. How can these four stories, based on the same “facts”—and none of the principal events of what happened that night was in dispute—have different outcomes? The answer, I think, is that the narrative glue is different: the way incidents and events are made to combine in a meaningful story, one that can be called “consensual sex” on the one hand or “rape” on the other. In each

case, the blanks (what the literary theorist Wolfgang Iser would call the *Leerstellen*) of the story are filled in according to each judge's general understanding of human behavior and intent. It becomes virtually a problem of literary genre: How do we know whether this tale fits in the category of the "consensual sex story" or in that of the "rape story"?

What I have called the narrative glue—the way incidents combine into a meaningful whole that can then be labeled as a certain form of action—depends in large part on the judges' view of standard human behavior, on what words and gestures provoke fear, for instance. Any given narrative will be built to some extent on what Roland Barthes liked to call *doxa*, that set of unexamined cultural beliefs that structure our understanding of everyday happenings. In this case, the judges who rule against the rape conviction at the two appellate levels tend to construct their narratives on the basis of how they believe a woman ought to behave in certain circumstances. A key moment of the story comes when Rusk, in the passenger seat of Pat's car, asks her to come up to his apartment; when she refuses, he gets out of the car, walks to the driver's side window, reaches in and removes the keys from the ignition, and says: "Now will you come up?" Here Judge Thompson writes: "Possession of the keys by the accused may have deterred her vehicular escape but hardly a departure seeking help in the rooming house or in the street" (406 A.2d 624, 626). One could go on at some length in analysis of this sentence. "Deterred her vehicular escape"? A translation would be: Pat is totally stranded in a deserted street in an unknown and sinister section of downtown Baltimore in the middle of the night. A phrase such as "vehicular escape" in its very pompousness should alert us that we are faced with some avoidance maneuver. And "a departure seeking help" is similarly obscuring—it translates into something like: running though the deserted street screaming for help. The sentence is one of many that eschews narrative precision in favor of an arch rendering of the story from a normative narrative standpoint which is that of the judge. It is part and parcel of a narrative point of view in which Pat is always referred to as "the prosecutrix," described as "bar-hopping," and characterized as "a normal, intelligent, twenty-one year old vigorous female."

It is on the basis of such a retelling of the story that the first appeals court reverses Rusk's conviction. In the higher court, the conviction is reinstated, but over the strong dissent of Judge Cole, who writes, for instance:

She [the victim] may not simply say, "I was really scared," and thereby transform consent or mere unwillingness into submission by force. These words do not transform a seducer into a rapist. She must follow the natural instinct of every proud female to resist, by more than mere words, the violation of her person by a stranger or unwelcomed friend. She must make it clear that she regards such sexual acts as abhorrent and repugnant to her natural sense of pride. (Md., 424 A.2d 720, 733)

What he means is made more specific toward the end of his opinion:

I find it incredible for the majority to conclude that on these facts, without more, a woman was *forced* to commit oral sex upon the defendant and then to engage in vaginal intercourse. In the absence of any verbal threat to do her grievous bodily harm or the display of any weapon and threat to use it, I find it difficult to understand how a victim could participate in these sexual activities and not be willing. (734)

Again, the detail of the recounting would deserve much closer attention than I can give it here. The one word *participate*, for instance, speaks volumes about Judge Cole's views of sex (especially oral sex), of women, and of the world. *Participate* in itself conveys a whole conception of a narrative incident that needs to be unpacked and analyzed.

The differing outcomes in the retellings of the *Rusk* cases offer a dramatic instance of how narratives take on design, intention, and meaning. Narratives do not simply recount happenings; they give them shape, give them a point, argue their import, proclaim their results. And where the law is concerned, they shape the judgment. The lack of awareness of how they are telling the story on the part of Judges Thompson and Cole needs to be exposed for what it is: the telling of a stock story based on preconceptions about men, women, and sex that does not deal adequately with the story events that need to be connected and shaped. What is at issue here is not legal rule or reason but, in Souter's phrase, a question of "narrative integrity." Souter to the contrary, however, this is not a concept generally recognized by judges, who tend to repress narrative integrity in order to reach what they see as the "great and shining truths" of the case.

In their recent book *Minding the Law*, Anthony Amsterdam and

Jerome Bruner argue that the “traditional supposition of the law” that it can find answers to questions by way of “free-standing factual data” must be contested by a recognition that “both the questions and the answers in such matters of ‘fact’ depend largely upon one’s choice (considered or unconsidered) of some overall narrative as best describing *what happened* or *how the world works*. . . . much of human reality and its ‘facts’ are not merely recounted by narrative but *constituted* by it.”⁹ I agree with this, and Bruner, as author of a well-known essay entitled “The Narrative Construction of Reality,” is in a particularly good position to argue that the law doesn’t simply assemble facts into stories, that our sense of the way stories go together, how life is made meaningful, presides at our choice and organization of facts. Where I think Bruner and Amsterdam are in error is in their apparent assumption that the law *knows* this. Commentators on the law may recognize its inherent narrativity, but legal actors do not—cannot, in their understanding of what law is—allow that recognition into consciousness.

To the extent that it knows its own narrativity, I have suggested, the law represses and censors that knowledge. While it is true that courtroom advocates know they must tell an effective story—and textbooks on trial practice for law students make the point—one searches legal doctrine in vain for recognition of narrative as a category of thought and practice.¹⁰ In discussions of legal decision making, in arguments on rules of evidence, on causes and effects, there is no overt recognition—Souter’s statement on the subject is a rare exception—that how stories are told may be a major shaping force in selecting facts and reaching those shining truths. Absent this recognition, legal actors who are in fact often adjudicating on the basis of narrative constructions have no conceptual and analytic tools for understanding and unpacking these constructions.

My final example is especially stark and gruesome, a case from 1947 that bears revival in the context of a renewed American debate on capital punishment. *Francis v. Resweber* (329 U.S. 459) takes up the case of Willie Francis, whom Louisiana tried but failed to execute from a malfunction of the electric chair, to decide whether a second electrocution would violate the double jeopardy provision of the Fifth Amendment, and the cruel and unusual punishment provision of the Eighth Amendment. Austin Sarat and Thomas Kearns have forcefully shown how the rhetoric of “rules” in *Francis v. Resweber* keeps the extreme violence that the law is here exercising at arm’s length, indeed makes it very nearly

invisible.¹¹ The rhetorical form in which the exclusion of violence occurs is also a negation of the narrative of Willie Francis's experience.

"Accidents happen for which no man is to blame," writes Justice Reed in the opinion of the Court (462), which sends Francis back to a second encounter with the electric chair. And Frankfurter in his concurring opinion characterizes the failed execution as "an innocent misadventure" (470). Reed repeatedly speaks the language of foreseeability (like Cardozo in *Palsgraf*) and of intent: "The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain," he writes (464), and therefore one cannot allege any cruel or unusual results.

The dissent by Justice Burton (joined by Douglas, Murphy, and Rutledge) ineffectively attempts to combat the majority's decision in a rhetoric of generalized moral outrage. He calls the circumstances of the case "unique in judicial history" and urges that "taking human life by unnecessarily cruel means shocks the most fundamental instincts of civilized man. It should not be possible under the constitutional procedure of a self-governing people" (472, 473-74). In addition, "it is unthinkable that any state legislature in modern times would enact a statute expressly authorizing capital punishment by repeated applications of an electric current separated by intervals of days or hours until finally death shall result" (474). This rhetoric of high principles stands in refreshing contrast to Frankfurter's crabbed and narrow legal reasoning on the case, but it really achieves little more than a kind of noble moral stuttering.

Burton is reduced to arguing that the Louisiana Criminal Code provides for "the application and continuance of such current through the body of the person convicted until such person is dead" and therefore does not permit multiple applications of the current (475). This logic leads Burton to hypothetical narratives: "If the state officials deliberately and intentionally placed the relator in the electric chair five times . . . [a]lthough the failure of the first attempt, in the present case, was unintended, the reapplication of the electric current will be intentional. How many deliberate and intentional reapplications of electric current does it take to produce a cruel, unusual and unconstitutional punishment?" (476), and so on. Burton's hypotheticals in fact play into the hands of the majority, since they all turn on the question of intent, on the interpretation of the narrative from the point of view of the state's

agents—of the executioners—and thus displace what should be at issue: the lived experience of the man condemned to die twice, the retrospective narrative of what in fact happened.

What is so peculiar and striking to the nonlegal reader of *Francis v. Resweber* is that the relevant narrative does appear: but only at the very end, and only in a footnote, which Burton smuggles in because the material quoted indicates “the conflict of testimony that should be resolved”—that is, the amount of electric current that reached Francis’s body. The footnotes cite affidavits of the official witnesses to the attempted execution. To quote only the first of these, and part of the third:

Then the electrocutioner turned on the switch and when he did Willie Francis’ lips puffed out and he groaned and jumped so that the chair came off the floor. Apparently the switch was turned on twice and then the condemned man yelled: “Take it off. Let me breath.”

Then the hood was placed before his eyes. Then the officials in charge of the electrocution were adjusting the mechanisms and when the needle of the meter registered to a certain point on the dial, the electrocutioner pulled down the switch and at the same time said: “Goodby Willie.” At that very moment, Willie Francis’ lips puffed out and his body squirmed and tensed and he jumped so that the chair rocked on the floor. Then the condemned man said: “Take it off. Let me breath.” Then the switch was turned off. Then some of the men left and a few minutes after the Sheriff of St. Martin’s Parish, Mr. E. L. Resweber, came in and announced that the governor had granted the condemned man a reprieve. (480–81, n. 2)

One might have thought that this was precisely the material that Burton needed for his dissenting argument—the story that should have stood at the head of his opinion, as an irrefutable claim that the reexecution of Francis would be a violation of the Eighth Amendment. It, rather than Burton’s hypotheticals, is a full narrative, with macabre beginning, middle, and end.

But the narrative of Willie Francis’s ordeal is largely repressed and denied, in the dissent as in the majority opinion, since the weight of legal tradition claims that the case must be decided on principle—not story—

including the claim that the hypothetical narrative of what might constitute cruel and unusual punishment (recall the hypotheticals of *Palsgraf*) is relevant whereas the narrative of what really happened is not. Yet in a case that needs to decide whether a given punishment is “cruel and unusual,” one might think that the experience of punishment—as undergone by a particular body and mind—was precisely relevant. The legal cover-up of what seems the inescapable narrative in *Francis v. Resweber* offers a particularly egregious example of law’s suspicion of narrative, its implicit awareness that in certain cases letting narrative breach the bar of repression would risk a veritable deconstruction of all the legal argumentation—a massive housewrecking of judicial rhetoric-as-usual. To the extent that the law does allow narrative a place—as, for instance, in the victim impact statement—it is as a calculatedly daring gesture, mostly of a political or ideological import.¹² The intense debates concerning VIS suggest, once again, that unleashing the power of stories—albeit not overtly recognized as stories—provokes unease, outrage, and exclusionary gestures within the law.

I have been arguing the importance of narrative in the law and suggesting that the law generally recognizes this importance only by way of negating it and by policing the introduction of narrative into its domain. But one might at this point legitimately ask: Why my insistence on narrative? What insight may be gained trying to breach this legal repression, and to open legal argument to narrative analysis? I have tried to suggest that narratives can be analyzed in their form, in how the narrative discourse shapes and presents the story elements. On the model of structural linguistics, the analytic study of narrative sometimes called narratology has held that narrative is systematic, that it can be studied in its formal properties—its units and their combinations, the internal relations that shape meaning. An attention to narrative form, as well as content, might indeed benefit those legal actors who, more than they are willing or able to recognize, are adjudicating on the basis of narrative constructions.

Law may need a narratology. A legal narratology might be especially interested in questions of narrative transmission and transaction: that is, stories in the situation of their telling and listening, asking not only how these stories are constructed and told, but also how they are listened to, received, reacted to, how they ask to be acted upon and how they in fact become operative. What matters most, in the law, is how the “narratees” or listeners—juries, judges—hear and construct the story. If

the law may fascinate a literary narratologist, it is in part because people go to jail, even to execution, because of the well-formedness and force of the winning story. "Conviction"—in the legal sense—results from the conviction created in those who judge the story. So it is that a greater attention to the narrative forms given to the law might serve to greater clarity about what it is that achieves conviction.

Yet this plea for formal, analytic attention to narrative in the law meets an objection that has been flamboyantly presented by Alan Dershowitz.¹³ Dershowitz contends that the whole notion of a well-formed narrative—as exemplified in Chekov's "rule" that a gun introduced in act one of the drama must by act three be used to shoot someone—is misleading in the court of law, since it leads jurors to believe that real-life stories must obey the same rules of coherence. If we allow into evidence the narrative of spousal abuse, then the eventual murder of former wife by former husband becomes a logical narrative conclusion to the story; whereas, Dershowitz wants to argue, who is to say that life really provides such a narrative logic? Dershowitz offers here his version of a theory of narrative advanced by, among others, Jean-Paul Sartre, in his contention that telling—as opposed to living—really starts at the end of the story, which is there from the beginning, transforming events into indicia of their finality, their making sense in terms of their outcome. This, incidentally, is why Sartre turned against the novel: it seemed a violation of the indeterminacy of existential freedom.

It is indeed in the logic of narrative to show, by way of the sequence and enchainment of events, how we got to where we are. As I suggested in discussing *Palsgraf*, narrative understanding is retrospective. Dershowitz may be right to protest that life is blinder and more formless than that. And yet, his protest may be in vain. For our literary sense of how stories go together—their beginnings, middles, and ends—may govern life as well as literature more than he is willing to allow. Our very definition as human beings is very much bound up with the stories we tell, about our own lives and the world in which we live. The imposition of narrative form on life is a necessary human activity; we could not make sense of the world without it. We seek to understand actions as intelligible units that combine into goal-oriented plots. Hence, if Dershowitz utters a significant caveat about putting too much trust in a preformed sense of how stories "turn out," it's not clear that we could even put together a story, or construe a story as meaningful, without this competence—acquired very early in life—in narrative con-

struction. If narrative form were to be entirely banished from the jury's consideration, there could be no more verdicts.

Legal narratology might be precisely the forum in which to debate the relevance of our narrative desire: our desire to see the world as ordered in story, and the kind of suspicion that needs to be directed to this desire. To the extent that we can understand the formal consequences of our narrative desire, we may be better able to see the cultural work it does in ordering our perceptions of the world, and make more enlightened judgments about the role of narrative as a kind of Kantian "category" in our thinking. Once again, the law seems obscurely to recognize some form of the need for such understanding. Note that the jury trial is supposed, in criminal cases, to resolve competing stories "beyond a reasonable doubt." But these cases nonetheless can go on to appeals courts, which are not supposed to second-guess the jury on the story it accepted but to make sure that the rules of storytelling—including what is permitted to be told—have been properly followed. Stories at the appellate level become exemplary, they involve an elucidation of the rules. This is of course especially true at the level of the Supreme Court, where the individual case must be fitted into the controlling narratives of constitutional interpretation, made illustrative of the basic principles of the rule of law and the social order. "It is so ordered," the Supreme Court opinion typically concludes, by which we may understand that the Court has delivered a final narrative of order and, more generally, that its narrative orders, gives events their definitive shape and meaning. "It is so ordered" sounds like the wrap-up to a Dickens novel, where we learn about the final punishments and rewards, the marriages and the babies to come. It's not the kind of ending that modernist and postmodernist narratives (and indeed, many premodern narratives as well) tend to furnish us. "It is so ordered" is definitive, but its closure invites suspicion as well. Does legal conviction thus defined really derive from a story imposed by legal actors who claim that story has no place in the "great and shining truths" they have discovered?

The Supreme Court opinion offers another kind of narrative construction as well: the narrative of constitutional interpretation, where the Court argues that its present ruling fits seamlessly into a continuing web of interpretation that reaches back to the text of the Constitution itself, that it is part of a motivated, well-ordered consecutive plot. As the authors of the "joint opinion" in *Planned Parenthood v. Casey* (112 S.

Ct. 2791 [1992] state): "Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession" (2833). The "covenant" is a master narrative, into which each new narrative episode must be fitted. How does this work? In the joint opinion's words, "the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation" (2814). The narrative of the covenant relies on precedent and *stare decisis* in order that change and innovation appear to be principled, so that sequences appear not random but as instances of consecution. The most apt words in this sentence may be "sufficiently plausible." What does suffice here? Only that which is rhetorically effective, that which persuades, that which assures "conviction." "Sufficiently plausible" invites assent, but also a degree of awareness of how one is being worked on by a narrative rhetoric that claims the Court has no choice but to rule as it does, that outcomes are determined by origins and prior rulings. The logic of narrative itself may suggest that the process in fact works in the opposite direction: that the outcome proclaimed by a court constructs its sufficiently plausible precedential narrative. If narrative is always retrospective, it will always postulate its beginnings and middles in relation to its ends.

In conclusion, I want to suggest that attention to the role of narrative in the law can begin to open to thought the unthought assumptions, procedures, and language of the law. If, as Souter puts it in *Old Chief*, a syllogism is not a story, the law needs to become more conscious of its storytelling practices, their functions, their shaping force. And here I believe a critique from outside the law may be not only warranted but necessary. The law is hermetic; it assumes its terms of legal art and its reasoning procedures may be refined and improved but not fundamentally altered. Only from another tradition of critique and reading can we summon the law to recognize what it represses. From an engagement with the law from outside legal business-as-usual, we can attempt to provoke an awareness that the law's concepts, language, and procedures have their place in other domains of culture as well and thus cannot be wholly insulated and protected purely as legal terms of art. What has become a loosely defined movement called "law and literature" represents a conscious breaching of barriers between disciplines, maintaining that those barriers are artificial dikes erected against the inrush of forms of critical thinking the law considers irrele-

vant, an attempt to disturb certain complacencies of legal thinking. Certainly an attention to narrativity in the law would be part of that attempt. What is wholly unclear to me at present is whether the law, as a system, will pay any attention to what is so far merely a skirmish on its confines. For much of the law's efficacy and power derive from its self-enclosure, its capacity to impose an exclusionary rule on attempts to open up its hermeticism. The law polices its frontiers indefatigably.

NOTES

1. Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: University of Chicago Press, 1999), 1. See also Austin Sarat, "Traditions and Trajectories in Law and Humanities Scholarship," *Yale Journal of Law and Humanities* 10, no. 2 (1998): 401–7. My own disagreements with some of Sarat's recommendations are recorded in the same issue of *YJLH*, but I now feel more sympathetic to his project of separating the cultural study of law from legal education, since I am now convinced that legal education is largely imperious to a study of the law from outside.

2. In victim impact statements used in capital sentencing, material that is inevitably tragic and inflammatory when developed as a story of irrefutable pain, suffering, wrong, cannot but persuade the jury to harsher punishment. Hence opponents of VIS have argued that it gives the wrong story, in the wrong place, but they have so far lost out to advocates of VIS who fully intend to see these narratives of irreparable harm produce more death sentences—though their explicit arguments in favor of VIS avoid making this point and do not explicitly recognize the unprecedented introduction of an irrebuttable narrative at this sensitive moment of legal proceedings. On VIS, see among many discussions: Peter Brooks, "Illicit Stories," *diacritics* 25, no. 3 (1995): 41–51; Martha Minow, "Surviving Victim Talk," *UCLA Law Review* 40 (1993): 1411–45; Paul Gewirtz, "Victims and Voyeurs: Two Narrative Problems at the Criminal Trial," in *Law's Stories*, ed. Peter Brooks and Paul Gewirtz (New Haven: Yale University Press, 1996), 135–61; Jennifer L. Culbert, "The Sacred Name of Pain: The Role of Victim Impact Evidence in Death Penalty Sentencing Decisions," in *Pain, Death, and the Law*, ed. Austin Sarat (Ann Arbor: University of Michigan Press, 2001), 103–35; Austin Sarat, "The Return of Revenge: Hearing the Voice of the Victim in Capital Trials," in *When the State Kills: Capital Punishment and the American Condition* (Princeton: Princeton University Press, 2001), 33–59.

3. Sigmund Freud, "Negation" [*Die Verneinung*] in *Standard Edition of the Complete Psychological Writings* (London: Hogarth Press, 1961), vol. 19, 235.

4. See Jean Laplanche and J.-B. Pontalis, *Le Vocabulaire de la psychanalyse* (Paris: Presses Universitaires de France, 1967), s.v. "(Dé)négation."

5. John T. Noonan, "The Passengers of *Palsgraf*," in *Persons and Masks of the Law* (New York: Farrar, Straus and Giroux, 1976), 111–51.

6. Arthur Conan Doyle, "The Red-Headed League," in *The Adventure of the Speckled Band and Other Stories of Sherlock Holmes* (New York: Signet, 1965), 83.

7. William L. Prosser, reconstructing the case, claims that it was "an ordinary penny scale of the railroad platform type," which was either knocked over by the explosion—as Cardozo believed—or else knocked over by people rushing to escape the explosion. William L. Prosser, "Palsgraf Revisited," *Michigan Law Review* 52, no. 1 (1953); cited in Noonan, 118. Prosser later concluded that the event could not have unfolded as Cardozo reported it: the scales must have been overturned by the crowd, not by the explosion. See Noonan, 119.

8. Cited by Noonan, 150. Noonan's essay on *Palsgraf* is concerned with the excessive abstraction of legal rules from facts, which parallels my concern with its excessive policing of the story of what happened.

9. Anthony Amsterdam and Jerome Bruner, *Minding the Law* (Cambridge: Harvard University Press, 2000), 111; see also Bruner, "The Narrative Construction of Reality," *Critical Inquiry* 18, no. 1 (1991): 1–21.

10. On trial advocacy and narrative, see, e.g., Steven Lubet, *Modern Trial Advocacy* (Notre Dame, Ind.: National Institute for Trial Advocacy, 1997), chap. 1, "Case Analysis and Storytelling."

11. See Austin Sarat and Thomas R. Kearns, "A Journey Through Forgetting: Toward a Jurisprudence of Violence," in Sarat and Kearns, *The Fate of Law* (Ann Arbor: University of Michigan Press, 1991), 209–73, esp. 213–18.

12. See, for example, *Payne v. Tennessee* (501 U.S. 808 [1991]), in which the Supreme Court reversed its holding in *Booth v. Maryland* (482 U.S. 496 [1987]) barring VIS during the sentencing phase of a capital case: arguing that VIS should be permitted, Rehnquist, writing for the Court, introduces his opinion with a detailed and gory account of the mayhem wreaked by Payne—an account quite irrelevant to the question at issue, but rhetorically effective in suggesting that Payne deserved any and all evidence that could be brought to bear against him. See my discussion of *Payne* and *Booth* in "Illicit Stories," *diacritics* 25, no. 3 (1995): 41–51.

13. Alan Dershowitz, "Life Is Not a Dramatic Narrative," in *Law's Stories*, ed. Peter Brooks and Paul Gewirtz (New Haven: Yale University Press, 1994), 99–105. On the end orientation of narrative, see Peter Brooks, *Reading for the Plot* (1984; rpt. Cambridge: Harvard University Press, 1992), 3–36.