# STORYTELLING, NARRATIVE RATIONALITY, AND LEGAL PERSUASION

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*"Humans are essentially storytellers."*
—Walter Fisher[1]

*"[T]he law always begins in story: usually in the story the client tells, whether he or she comes in off the street for the first time or adds in a phone call another piece of information to a narrative with which the lawyer has been long, perhaps too long, familiar. It ends in story, too, with a decision by a court or jury, or an agreement between the parties, about what happened and what it means."*
—James Boyd White[2]

As James Boyd White pointed out over twenty years ago, storytelling lies at the heart of what lawyers do. Every legal case starts with a story—the client's story—and it ends with a legal decision that, in effect, offers another version of that story, one cast into a legal framework. In between, in the middle, lies the story told at trial—or, rather, the stories told at trial, since most trials contain competing narratives.[3] Much of the work on legal storytelling has concentrated on this middle—storytelling at the trial level. Storytelling there, everyone agrees, is persuasive. The question is, how?

For many, work on this question dates back to Lance Bennett and Martha Feldman's 1981 treatise *Reconstructing Reality in the*

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[1] Walter R. Fisher, *Human Communication as Narration: Toward a Philosophy of Reason, Value, and Action* 64 (U. S.C. 1989).

[2] James Boyd White, *Heracles' Bow: Essays on the Rhetoric and the Poetics of the Law* 168 ( U. Wis. Press 1985).

[3] *Id.* at 174; *see also* Robert Burns, *A Theory of the Trial* 164–166 (Princeton U. Press 1999).

*Courtroom: Justice and Judgment in American Culture*.[4] Note the subtitle. As Bennett and Feldman explain, in looking for something broader in American criminal trials, "justice and judgment," they reached "an interesting conclusion: the criminal trial is organized around storytelling."[5] Bennett and Feldman, both social science researchers, go on to explain how trial lawyers use storytelling strategies to construct their cases and, more importantly, how those story structures are not just descriptive but also analytic, forming an essential part of the basis for making judgments about the outcome of the trial and thus serving as an important part of the formal legal process.[6]

Ten years later, Nancy Pennington and Reid Hastie looked more closely at the process of legal decision-making, primarily studying juries, and reached essentially the same conclusion: the "central cognitive process in juror decision-making is story construction."[7] Although in the legal academy Pennington and Hastie's work shifted a large part of the discussion away from mathematical and probabilistic models of legal decision-making,[8] their research offered support for what many trial lawyers had already long known[9]—that lawyers persuade by telling stories. Since then, a long line of works has followed on the uses of storytelling for persuasion in law practice.[10]

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[4] *See generally* W. Lance Bennett & Martha S. Feldman, *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture* (Rutgers U. Press 1981).

[5] *Id.* at 3.

[6] *Id.* at 18.

[7] Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 Cardozo L. Rev. 519, 520 (1991).

[8] *Id.* at 519.

[9] *See e.g.* Gerry Spence, *Let Me Tell You a Story*, 31 Tr. 72 (Feb. 1995).

[10] *See* Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 Clin. L. Rev. 1 (2005); Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Argument to a Jury*, 37 N.Y. L. Rev. 64 (1992); Anthony G. Amsterdam, *Telling Stories and Stories about Them*, 1 Clin. L. Rev. 9 (1994); Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 Rutgers L.J. 459 (2001); Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 Cardozo L. Rev. 559 (1991); Steven Lubet, *Persuasion at Trial*, 21 Am. J. Tr. Advoc. 325 (1997) [hereinafter *Persuasion at Trial*]; Steven Lubet, *The Trial as a Persuasive Story*, 14 Am. J. Tr. Advoc. 77 (1990); Philip N. Meyer, *Making the Narrative Move: Observations Based upon Reading Gerry Spence's Closing Argument in the* Estate of Karen Silkwood v. Kerr-McGee, Inc., 9 Clin. L. Rev. 929 (2002); Philip N. Meyer, *Vignettes from a Narrative Primer*, 12 Leg. Writing 229 (2007) [hereinafter *Vignettes*]; Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 Seattle U. L. Rev. 767 (2006). A symposium in the mid-1990s was dedicated to storytelling in law practice. *See Lawyers as Storytellers and Storytellers as Lawyers: An Interdisciplinary Symposium Exploring the Uses of Storytelling in the Practice of Law*, 18 Vermont L. Rev. 567 (1994).

I have long been interested in persuasion, and for many years I have included theories of persuasion in an advanced legal writing seminar that I teach. I always ask my students the same question—"what persuades in the law?"—and after looking at different theories of persuasion, they then develop their own theory of legal persuasion. When I first taught the course, I had in mind rhetorical models of persuasion, starting with Aristotle and Cicero and moving toward more contemporary rhetorical work.[11] Very quickly, however, I had to add narrative models of persuasion, plus a second question—"what is it about narratives that makes them persuasive in the law?"

This second question has increasingly consumed the majority of our class time on theories of persuasion, reflecting the growing influence of theories of narrative on the ways that we think about legal persuasion. I would respond to my second question above as follows:[12]

(1) Narratives are "innate" ways of understanding and structuring human experience; this makes them inherently persuasive.

(2) Narrative models go beyond models of persuasion based on formal or informal logic, to encompass "narrative rationality."

(3) Narratives embody several properties that are psychologically persuasive:

  (a) Coherence (a formal property);

  (b) Correspondence (a formal property);

  (c) Fidelity (a substantive property).[13]

In this Article, I intend to discuss briefly each of these persuasive features of narratives, but I am particularly interested in the psy-

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[11] *See e.g.* Aristotle, *On Rhetoric (*transl. George A. Kennedy, Oxford U. Press 1991); George A. Kennedy, *A New History of Classical Rhetoric* (Princeton U. Press 1998); Chaim Perelman, *The Realm of Rhetoric* (William Klubach trans., U. Notre Dame Press 1982); Chaim Perelman & Lucie Olbrechts-Tytecha, *The New Rhetoric: A Treatise on Argumentation* (John Wilkinson & Purcell Weaver trans., U. Notre Dame Press 1969); Stephen Toulmin et al., *An Introduction to Reasoning* (2d ed., MacMillan 1984); Stephen Toulmin, *The Uses of Argument* (Cambridge U. Press 1958).

[12] In the seminar, I try to let the students pull these ideas out of the course readings, gently coaxing them toward these ideas.

[13] I see these three concepts as the major sub-categories for the psychologically persuasive properties of narrative, and I discuss them—and their sources—in more detail later in the Article: coherence, *infra* section I(C); correspondence, *infra* section I(D); and fidelity, *infra* section I(E).

chologically persuasive properties of narratives and their relationship to legal persuasion. Much has been written about the first two of those properties, coherence and correspondence—formal properties, as I would call them. But less has been written about the third, fidelity, which I would call a substantive property.

By "formal," I mean the structural properties of narratives—the internal characteristics of the structure of a given narrative and the way in which those structural parts interact to tell a story persuasively. My use of the term echoes the initial work on narrative done in the early twentieth century by the group known as the Russian Formalists, who began to establish a formal (i.e., structural) vocabulary for talking about narratives.[14] Much of the work on legal narratives, discussed below, focuses on the formal, or structural, features of those narratives. In contrast, narrative fidelity, the third psychological feature of narratives, is in my view best seen as a substantive feature of narratives. This property persuades, not as a matter of the structure of the narrative, but rather as a matter of its content and the particular substantive appeal that the content makes. This appeal, however, is not a simple matter of the narrative's accuracy or realism, but rather is mediated through the judgment of the audience, as will be discussed below.

In making this distinction, between formal and substantive properties, I am taking a cue from the speech communication theorist Walter Fisher and his work on "narrative rationality."[15] Fisher writes that "[n]o matter how strictly a case is argued—scientifically, philosophically, or legally—it will always be a story, an interpretation of some aspect of the world that is historically and culturally grounded and shaped by human personality."[16] Drawing upon Kenneth Burke, Chaim Perelman, and Stephen Toulmin,[17] Fisher then argues that any rhetorical model of persuasion, including legal persuasion, is incomplete without accounting for reason and argumentation as forms of symbolic action (as opposed to being only formal models for reasoning) and without accounting for the elements of argumentative discourse that lead to adherence on the part of the audience. That is, in Fisher's view,

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[14] *See generally* Mieke Bal, *Narratology: Introduction to the Theory of Narrative* (U. Neb. Press 1985); Mieke Bal, *Narratology: Introduction to the Theory of Narrative* (U. Toronto Press 1985); L.T. Lemon & L. J. Reis, *Russian Formalist Criticism: Four Essays* (U. Neb. Press 1965); Vladimir Propp, *Morphology of the Folktale* (Laurence Scott trans., 2d ed., U. Tex. Press 1990) (originally published in 1928).

[15] *See generally* Fisher, *supra* n. 1.

[16] *Id.* at 49.

[17] *See supra* n. 11.

any model of persuasion needs to account for the role of narratives.[18] For Fisher, the idea of narrative rationality—and within it, the elements provided by storytelling—opens up argumentation and persuasion to this more complete view.[19]

Fisher's narrative model ends with fidelity and, in so doing, brings in the idea of the audience's adherence.[20] Fisher largely relies on Perelman for his discussion of adherence and uses Perelman to add this third, "substantive" property of narrative. I find this property compelling and somewhat overlooked, and so I intend to explore it more at the end of this Article, with some very brief application to a recent United States Supreme Court opinion.[21] But first, an overview of the other features of narratives that, in my mind, can make them legally persuasive.

## I. NARRATIVE FEATURES AND LEGAL PERSUASION

### *A. Narratives Are "Innate" Ways of Understanding and Structuring Human Experience; This Makes Them Inherently Persuasive*

Legal trials involve the recounting of human events, which must be understood in a particular way before a judge or jury can arrive at a decision. One of the struggles of a trial lawyer is to provide a structure for that understanding that will lead to a favorable result. And narratives, as it turns out, offer a compelling structure, most probably because narratives are a natural mode for understanding human experience.[22] The psychologist Jerome Bruner speaks of a human "predisposition to organize experience into a narrative form."[23] For Bruner, this predisposition toward narrative is linguistically or psychologically "innate," as natural to human comprehension of the world as our visual rendering of what the eye sees into figure and ground.[24] Robert Burns points to narrative

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[18] Narratives are, of course, one of the most powerful forms for expressing symbolic action.

[19] *See* Fisher, *supra* n. 1, at 47–49, 62–69.

[20] *See id*. at 105–121, 124–138.

[21] *Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

[22] Burns, *supra* n. 3, at 159; *see also* Alper et al., *supra* n. 10.

[23] Jerome Bruner, *Acts of Meaning* 47 (Harv. U. Press 1990) (quoted in Burns, *supra* n. 3, at 159).

[24] *Id.* at 47.

structure as "an innate schema for the organization and interpretation of experience."[25]

Little disagreement exists about the fact that narratives are fundamental to our understanding of human experience, but some questions exist about how (which is why I put "innate" in quotation marks). That is, are narrative structures a feature of language, or are they psychologically fundamental in some prelinguistic way? And are narrative structures congruent with reality, or are they some type of Kantian category, a structure of the mind that pre-exists and shapes our understanding of experience? Several commentators have wrestled with these questions, digging deeper into why narratives are so fundamental.

Amsterdam and Bruner, for example, note that many theories treat narratives as being "endogenous"—that is, narrative structures are inherent either in the structure of the mind or in the structure of language.[26] In contrast, they suggest that narrative structures might lie outside linguistic or psychological structures, as ways of sharing culturally-shared human experiences.[27] If narrative structures are the latter, a type of social or cultural construction, they seem almost universal, perhaps as a consequence of the fact that humans experience social reality temporally[28] or of the fact that the human life cycle itself contains the elements of a narrative structure—a beginning, middle, and end, to which we assign meaning.[29]

Another theorist, Steven Winter, argues for an endogenous theory of narrative, favoring the view that narratives—or structures related to narratives—are fundamental mental models.[30] Winter notes that these models have been described in various forms—as scripts, for example, or as stock stories—each form infused with social meaning.[31] Borrowing from George Lakoff,[32] Winter sees narratives as built on more fundamental mental models,

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[25] Burns, *supra* n. 3, at 159.

[26] Anthony Amsterdam & Jerome Bruner, *Minding the Law* 115–119 (Harv. U. Press 2000).

[27] *Id.* at 117–118.

[28] Although the precise nature of the temporality can differ; no matter—narrative structures, of various sorts, can be seen as the human effort to assign meaning to temporality.

[29] *See* Frank Kermode, *The Sense of an Ending: Studies in the Theory of Fiction* (Oxford U. Press 1967).

[30] Steven L. Winter, *Making the Familiar Conventional Again*, 99 Mich. L. Rev. 1607, 1630–1632 (2001).

[31] More about stock stories later in this Article.

[32] In much of his work, Lakoff explores human cognition, viewing it in terms of the mental structures that underlie what we call "rationality." *See* George Lakoff, *Women, Fire, and Dangerous Things: What Categories Reveal about the Mind* (U. Chi. Press 1987).

ones that rely on category structures or "idealized cognitive models."[33] Whether their model could be called endogenous or exogenous, however, narrative theorists agree that narrative forms are not only immediately recognizable, but that they allow us to assign meaning to events through "pre-given understandings of common events and concepts, configured into the particular pattern of story-meaning."[34] Narratives strike us as natural ways of understanding experience.

Dodging the Kantian debate, Burns argues for a congruency between the structure of narrative and the structure of human experience.

> Investigators in many fields . . . have concluded that narrative forms the deep structure of human action. In other words, the bedrock of human events is not a mere sequence upon which narrative is imposed but a configured sequence that has a narrative character all the way down. To act at all is to hold an immediate past in memory, to anticipate a goal, and to organize means to achieve that goal—analogously, the "beginning, middle, and end" of a well-constructed story. Both action and storytelling are intrinsically chronological and logical.[35]

If actions are understood chronologically, then they will also be understood logically, but "logical" in a way that lies deeper than ordinary understandings of that term. And any effort to understand human actions outside the structure of narratives will yield only "the disjointed parts of some possible narrative."[36]

### *B. Narrative Models Go Beyond Models of Persuasion Based on Formal or Informal Logic to Encompass "Narrative Rationality"*

Traditional models of legal adjudication, which are based solely on informal or formal models of logic, are increasingly seen as incomplete, or inadequate, for fully describing the persuasiveness of legal arguments.[37] The "deeper" logic of narrative structures adds to more traditional models for legal argumentation. Burns,

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[33] Winter, *supra* n. 30, at 1629.

[34] *Id.* at 1628–1629.

[35] Burns, *supra* n. 3, at 222 (footnotes omitted); *see also* David Carr, *Time, Narrative, and History* 16–17 (Ind. U. Press 1986) (upon whom Burns relies).

[36] Alasdair MacIntyre, *After Virtue* 215 (U. Notre Dame Press 1984).

[37] *See e.g.* Bernard Jackson, *Law, Fact and Narrative Coherence* 37–60 (Deborah Charles Publg. 1988).

for example, sees narrative as co-equal with logic in the trial.[38] For Burns, persuasion at the level of the trial relies on two strands—one strand of narrative and one of logical argument—related to each other like a twisting double helix that forms a lawyer's theory of the case.[39] "One strand is dominated by narrative and the other by informal logical inference or argument. Narrative is the story of events, actors, backgrounds, actions, and motives . . . . Argument is a logical pattern of propositions . . . that must be proven or disproved."[40] Narrative is thus central to the lawyer's theory of the case—"a simple, plausible, coherent, legally sufficient narrative that can easily be integrated with a moral theme"[41]—and provides the judge or jury with concrete reasons for deciding one way or another. The other embedded strand, the logical one, primarily serves the formal function of rendering the argument "legally reasonable," but in Burns's view does less to move the decision maker.[42]

Walter Fisher goes further, offering what he calls "narrative rationality"[43]—a broader view of rationality, one that encompasses all human actions symbolically expressed and that imposes sequence and meaning on those actions.[44] In essence, he redefines rationality. Fisher sees narrative rationality as more comprehensive than traditional forms of rationality and as something that more fully enables us to interpret and understand human experience. He spends three chapters of his book outlining the differences between narrative rationality and what we ordinarily regard as "rationality."

Fisher starts with Aristotle, an identifiable historical beginning point both for what we regard as formal structures of logic ("technical logic," in Fisher's term) and for rhetorical structures for argumentation ("rhetorical logic").[45] He then traces the historical development of each logical form, noting their separation into two forms of rationality even in Aristotle's work. For Aristotle, both forms could be regarded as forms of argumentation, but in different ways. Technical logic, what we would commonly call formal or symbolic logic, found its full expression in the analytic syllogism and relies heavily on the form of the proof for the validity of its

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[38] Burns, *supra* n. 3, at 36–38.

[39] *Id.*

[40] *Id.* at 36 (footnote omitted).

[41] *Id.* at 37.

[42] *Id.*

[43] Fisher, *supra* n. 1, at 20.

[44] *Id.* at 27–28, 47–49. Modern law, of course, relies upon both.

[45] *See id.* at 24–49.

conclusions.[46] In its emphasis on the validity of the logical form, coupled with the truthfulness of its premises, technical logic can lead to truth claims about the world. Rhetorical logic, on the other hand, although it also relies on set, formal structures for argument, leads to conclusions with a different status. Because rhetorical logic builds upon premises that are probable, as opposed to true, it leads to conclusions that are situational, contextual, and bound to the beliefs of the audience.[47] The keys to rhetorical logic, then, are probability and audience.[48] Despite this different status, however, Aristotle regarded rhetorical logic as an essential part of civic life and deemed it "practical wisdom."[49]

Fisher traces these two traditions from Aristotle forward, noting the general privileging of technical logic over rhetorical logic and the transformation of technical logic into increasingly abstract forms following its shift toward the methods of empirical science.[50] Technical logic ultimately finds its purest expression in mathematical and symbolic notation.[51] Fisher's point, however, is that the two logics, taken together, form what are commonly regarded as "rational" or "logical" ways of understanding the world, and all valid forms of argumentation and persuasion, including those in the law, derive from them.[52] Fisher calls this the "rational-world paradigm."[53]

Fisher does not dismiss the rational-world paradigm, but views it as incomplete.[54] To it, he would add narrative rationality. Narrative rationality, derived from the "narrative paradigm,"[55] is broader and accounts more fully for human experience, and thus is an essential component of communication and persuasion.

> The narrative paradigm challenges the notions that human communication . . . must be argumentative in form, that reason is to be attributed only to discourse marked by clearly identifia-

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[46] *Id.* at 28.

[47] *Id.*

[48] Rather than truth claims.

[49] *Id.*

[50] *Id.* at 30–36.

[51] *Id.* at 31.

[52] *Id.* at 44–47; *see also* Steven J. Burton, *An Introduction to Law and Legal Reasoning* (Aspen Publishers 2007).

[53] Fisher, *supra* n. 1, at 47; *see also* Delia B. Conti, Student Author, *Narrative Theory and the Law: A Rhetorician's Invitation to the Legal Academy*, 39 Duquesne L. Rev. 457, 469 (2001).

[54] Richard K. Sherwin offers a similar challenge in law; see *What We Talk about When We Talk about Law*, 37 N.Y. L. Sch. L. Rev. 9, 13–16 (1992).

[55] Fisher, *supra* n. 1, at 63. Jackson's normative syllogism is central to what Fisher calls the "rational-world paradigm."

> ble modes of inference and implications, and that the norms for evaluation of rhetorical communication must be rational standards taken exclusively from informal or formal logic. The paradigm [Fisher] offer[s] does not disregard the roles of reason and rationality; it expands their meanings. . . .[56]

To the traditional modes and norms for argumentation, then Fisher adds two more—narrative probability and narrative fidelity[57]—to which this Article will return to below.

Others have also challenged the completeness of traditional argumentative forms, seeing narrative forms as supplying a component that is missing from formal models of logic and less evident in rhetorical models of logic. Bennett and Feldman, for example, point out the "normative connections" that narrative structures provide: "Categorizations and logical chains of inference can be supported by, or even based upon, normative understandings about excusable and inexcusable behavior in certain circumstances."[58] Bernard Jackson devotes an entire chapter of his treatise *Law, Fact and Narrative Coherence* to the question of what he calls the "normative syllogism," in his view the prevailing model for legal adjudication.[59] Jackson argues that this model, the traditional basis for the deductive view of the legal process and its application of law to fact, barely conceals the narratives upon which it is built.[60] Jackson argues that the traditional major premise of the normative syllogism, the legal rule, is informed by underlying narrative models that typify human action, although expressed in the abstract terminology of the law.[61] The minor premise, the evidence presented at trial, is built upon the story of the trial.[62] The relationship between these premises, commonly understood as the application of law to fact, is guided by rules of construal that rely in turn upon a narrative basis for the underlying premises.[63] In essence, Jackson rewrites the traditional model for legal adjudication—the application of law to fact—as a narrative model.

So if narratives are a primary form through which humans configure ideas and experience, an innate way of human understanding, then it follows that narratives can add something to the

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[56] *Id.* at 58.
[57] *Id.* at 47–49.
[58] Bennett & Feldman, *supra* n. 4, at 57.
[59] Jackson, *supra* n. 37, at 58–60.
[60] *Id.*
[61] *Id.* at 58–59.
[62] *Id.*
[63] *Id.*

more traditionally accepted ways of reasoning about the world, ways of reasoning through logical or rhetorical forms. The question becomes, then, what is it that narratives add? As mentioned above, Fisher responds with two specific principles—narrative probability and narrative fidelity: "These principles contrast with but do not contradict the traditional concepts or constituents of rationality. They are, in fact, subsumed within the narrative paradigm."[64] These principles take us more specifically into the persuasiveness of narrative structures and thus inform the remaining three persuasive features of narratives, all of which I would call psychological.

### *C. Narratives Embody Several Properties That Are Psychologically Persuasive: Narrative Coherence (a Formal Property)*

The first of Fisher's two features of narrative rationality, narrative probability, embodies what I am calling the formal properties of narratives.[65] In fact, almost all of the work on the persuasive properties of narratives has focused on their formal or structural features. From the beginning, Bennett and Feldman, for example, focused their work on the internal, structural relations within the stories told in the courtroom.[66] These internal relations were the key to understanding the persuasiveness of a given story. The fact that these stories are also symbolic representations of reality makes their internal, structural relations all the more important.

> [T]he way in which a story is told will have considerable bearing on its perceived credibility regardless of the actual truth status of the story. This means that the symbols chosen, the structural elements (scene, act, agent, agency, and purpose) that are defined and left undefined, and the amount of detail provided to facilitate connections between story symbols, will all have a significant bearing on audience judgments about stories. . . .[67]

In looking at the way that a story is told, most researchers look primarily to the story's coherence—how well its parts fit together. Fisher himself uses the term "coherence" almost as a synonym for

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[64] Fisher, *supra* n. 1, at 66.
[65] *Id.* at 47.
[66] Bennett & Feldman, *supra* n. 4.
[67] *Id.* at 89.

"narrative probability" in talking about the features of narratives.[68]

Coherence is indeed an essential feature of a persuasive narrative.[69] Faced with competing stories in a trial setting and the need to decide what "really happened," jurors are influenced by the story that seems most probable, and the story that is presented most coherently will also be the story that seems most probable.[70] In my view, narrative coherence can be best understood when it is further broken down into two parts: internal consistency, how well the parts of the story fit together, and completeness, how adequate the sum total of the parts of the story seems.

Internal consistency is important to legal storytelling because the full story, the "real" story, is seldom told at trial. Rather, judges and juries construct stories based on the evidence presented, the fragments of the potential story, perhaps attaching those fragments to a story framework suggested by a strong opening statement. The work of constructing the story, however, requires inferences, and adjudicators can only make those inferences in light of an underlying story structure that seems internally consistent.[71] The inferences supply a connection between potentially-related parts of the story, but only if those parts seem related. If so, the story seems more likely to be true.[72]

Researchers like Jackson confine their discussion of internal consistency to the emerging story framework that underlies the arguments at trial. "Internal narrative coherence can be conceived primarily in quasi-logical terms. Are the various parts of the story consistent with one another, or do they manifest contradiction?"[73] Pennington and Hastie extend the notion of internal consistency beyond the story framework itself; the framework must also be consistent with the credible evidence that is being presented and around which the juror is building the story.[74] In any case, consistency—whether among the parts of the story, or between the story framework and the surrounding evidence—is vital. Legal stories that lack internal consistency will seem ambiguous—

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[68] Fisher, *supra* n. 1, at 47.

[69] Pennington and Hastie tie the coherence of a story to its persuasiveness. Pennington & Hastie, *supra* n. 7, at 528.

[70] *See* Burns, *supra* n. 3, at 167.

[71] *See* Bennett & Feldman, *supra* n. 4, at 125–141.

[72] Lubet, *Persuasion at Trial*, *supra* n. 10, at 346–347.

[73] Jackson, *supra* n. 37, at 58.

[74] Pennington & Hastie, *supra* n. 7, at 528.

unable to allow for relationships and connections between their parts—and worse, will be deemed implausible.[75]

The other aspect of a story's coherence is its completeness, the extent to which the structure of the story contains all of its expected parts.[76] A story may be internally consistent and yet remain unconvincing if it is incomplete. According to Bennett and Feldman, this need for completeness extends to the inferences that a jury is willing to make.[77] They note that a jury, in making inferential steps in the construction of a story, will refer to other cognitive models—narrative scripts—for guidance.[78] If the story structure at hand is sufficiently incomplete, this process breaks down.[79] Fisher, who calls this "material coherence," makes a similar observation: "a story may be internally consistent, but important facts may be omitted, counterarguments ignored, and relevant issues overlooked."[80] The story must account for all of its parts, whether those parts are explicit or implicit.

The coherence of a legal story—its consistency and completeness—greatly influences its persuasiveness. Pennington and Hastie found that trial stories constructed with attention to features of coherence, for example completeness, resulted in more predictable judgments.[81] Looking at the social science research of both Bennett and Feldman and of Pennington and Hastie, Richard Lempert was willing to generalize:

> I think it is safe to say . . . that the more coherent the story a party presents at trial, the more likely it is that jurors will accept that party's story independent of the informational content of the evidence. A trier presented with a jumble of facts is, in other words, less likely to find for the party presenting those facts than a trier who receives the same factual information presented not as a jumble but as a coherent story.[82]

Lempert makes a very strong claim. The structure of the telling can prevail over the evidence in and of itself. But narrative coherence is only one of two formal or structural properties that render narratives persuasive, the second being narrative correspondence.

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[75] Burns, *supra* n. 3, at 168.
[76] Pennington & Hastie, *supra* n. 7, at 528.
[77] Bennett & Feldman, *supra* n. 4, at 44–45.
[78] *Id.*
[79] *Id.*
[80] Fisher, *supra* n. 1, at 47.
[81] *See e.g.* Pennington & Hastie, *supra* n. 7, at 546–549.
[82] Lempert, *supra* n. 10, at 562.

### *D. Narratives Embody Several Properties That Are Psychologically Persuasive: Narrative Correspondence (a Formal Property)*

Narrative correspondence is a matter of a story's corresponding to what a judge or jury knows about what typically happens in the world and not contradicting that knowledge.[83] This correspondence is an important part of the story's plausibility and hence of its persuasiveness. Burns calls it "external factual plausibility," a matter of the story's satisfying the decision maker's sense that it "could . . . have happened that way."[84] Bennett and Feldman add that the matching can be normative: the actions of a story model must correspond, not only to a sense of what happens in the world, but to socially normative versions of what happens in the world.[85] Jackson agrees:

> Each narrativised pattern of behavior is accompanied by some tacit social evaluation: that such behavior is good, bad, pleasing, unpleasing, etc. Social action is intelligible because we compare what we see with a stock of socially transmitted narrative models, each one of them accompanied by a particular social evaluation. The one which most resembles that which we observe renders our observation not only intelligible in a cognitive sense; it also provides an evaluation of it.[86]

Although narrative correspondence may sound like a kind of reality check on the story being constructed at trial, and thus like a substantive property, it is still a formal feature of narratives. The correspondence is structural, not referential or "truth-based." The story at trial must correspond to what "could" happen, or what "typically" happens, not to what actually happened. What "could" happen is determined, not by the decision makers' undertaking an empirical assessment of actual events, but rather by their looking to a store of background knowledge about these kinds of narratives—to a set of stock stories.[87] The narrative is plausible, and persuasive, to the extent that it bears a structural correspondence to one of these stock scripts or stories, not to the extent that it "really happened."[88]

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[83] Pennington & Hastie, *supra* n. 7, at 528.

[84] Burns, *supra* n. 3, at 168. Pennington and Hastie also use the term "plausibility." Pennington & Hastie, *supra* n. 7, at 528.

[85] Bennett & Feldman, *supra* n. 4, at 57.

[86] Jackson, *supra* n. 37, at 99 (footnote omitted).

[87] Bennett & Feldman, *supra* n. 4, at 50.

[88] Alper et al., *supra* n. 10, at 2–3.

Nevertheless, correspondence relies on relationships with something outside the trial story itself, which leads Jackson to call it external narrative coherence.

> External narrative coherence involves comparison of the content of the story told by the witness with other stories which form the stock of social knowledge of the jury. A story will appear plausible to the extent that it manifests similarity with some model of narrative which exists within the stock of social knowledge of the jury.[89]

Both Jackson and Bennett and Feldman raise the importance of stored social knowledge, or what this Article earlier referred to as "narrative scripts," or what are sometimes referred to as "stock stories."[90]

A story's reference to stock stories bears on its persuasiveness. To the extent that a story is congruent with them, stock stories not only lend plausibility to that story, but also offer a frame of reference for the story's significance. Stock stories not only contain standard models for human action[91] but also allow generalizations about the meaning of those actions. In a sense, they are cultural archetypes, often driven by plot. For example, one stock story, common to Western culture, is the Conquering Hero-Turned-Tyrant story.[92] A conqueror rescues the polis through valor and noble deeds and then assumes power. But the conqueror's valor takes a reversal, through deception and mistaken judgment, or through corruption, or through character flaw, etc. Now the conquering hero becomes a tyrant. The plot can end tragically, with the destruction of the hero, or it can end redemptively, with self-realization on the part of the hero, or with the hero's rescue by a defender, etc. This stock story, recognizable to all of us, can in turn be mapped onto other narratives, as Amsterdam and Bruner do with the Supreme Court opinion in *Freeman v. Pitts*.[93] We can understand the Court's judgment in this opinion, they argue, in terms of the stock story that lies behind it.

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[89] Jackson, *supra* n. 37, at 58–59.

[90] *See* Amsterdam & Bruner, *supra* n. 26, at 45–47, 117–118, 121–122.

[91] *See e.g. id.* at 45–48, 121–122, 186–187; Foley & Robbins, *supra* n. 10, at 468–469; Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. Rev. 1, 5–16 (1984); Robbins, *supra* n. 10, at 773–738.

[92] Amsterdam & Bruner, *supra* n. 26, at 143–164.

[93] Amsterdam and Bruner view the Court's opinions as versions of the stock story of catastrophe narrowly averted. In their retelling of *Freeman v. Pitts*, Justice Kennedy views the federal courts, formerly the hero in school desegregation efforts under *Brown*, as having turned into an overstepping tyrant that must be withdrawn from the process, which in turn should be handed back to local government. *Id.*

Because stock stories draw upon cultural archetypes, Amsterdam and Bruner lean toward an exogenous view of narratives—that the narrative forms we impose on events are culturally formed, in response to either the aspirations or the plights shared by human groups. Those narrative forms represent "both the culture's ordinary legitimacies and possible threats to them."[94] And given that the idea of plight, or threat, or disruption seems common to stock stories, Amsterdam and Bruner find that they lend themselves especially well to legal narratives.

> In litigation, the plaintiff's lawyer is required to tell a story in which there has been trouble in the world that has affected the plaintiff adversely and is attributable to the acts of the defendant. The defendant must counter with a story in which it is claimed that nothing wrong happened to the plaintiff (or that the plaintiff's conception of wrong does not fit the law's definition), or, if there has been a legally cognizable wrong, then it is not the defendant's fault. Those are the obligatory plots of the law's adversarial process.[95]

This kind of disruption lends itself to any number of stock stories. The advocate's task is to successfully match the trial story to the appropriate stock story.

### *E. Narratives Embody Several Properties That Are Psychologically Persuasive: Narrative Fidelity (a Substantive Property)*

So far, this Article has offered an overview of current thinking about legal narratives and what features of them lend persuasiveness to a legal argument. I have put the overview into a schema that makes sense to me, one that I offer to my students when we discuss narrative persuasion. In this next section, I want to go beyond that familiar schema, using Walter Fisher's concept of narrative rationality as a guide.

The schema so far has focused on formal, or structural, properties of narrative, as has much of the recent research on legal narratives and their persuasiveness. But do formal properties alone make a legal narrative sufficiently persuasive? That is, given that every trial contains competing narratives, what if those narratives were equally compelling formally—in terms of their internal consistency, completeness, and so on. Which, then, would offer

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[94] *Id.* at 117.
[95] *Id.*

the better argument? At the level of the narrative alone (and setting aside other considerations—the underlying law, the "rhetorical" structure of the legal argument, the quality of the evidence, etc.), is there something else that a legal audience would find additionally compelling? Fisher's model indicates that there is.

Alongside "narrative probability," his term for the formal features of narratives, Fisher places the second property of "narrative fidelity." As mentioned above, narrative probability has to do with whether an audience finds that a story is coherent. Fisher says that narrative fidelity, on the other hand, has to do with "whether or not the stories they experience ring true with the stories they know to be true in their lives."[96] In addition, Fisher contrasts narrative fidelity with the other properties of narrative by noting that it is a substantive property, not a formal one.[97] This intrigues me and has induced me to explore further narrative fidelity.

At first, it may sound like Fisher is describing narrative fidelity in terms of stock stories—"the stories they know to be true in their lives"—but I think he is not. The effectiveness of stock stories, as explained above, is a matter of their formal correspondence with mental or socially transmitted models. Narrative fidelity is not a matter of formal correspondence. Rather, narrative fidelity reaches beyond what is only formal—to, in Fisher's words, whether the components of a story "represent accurate assertions about social reality and thereby constitute good reasons for belief or action."[98] Narrative correspondence seems like a process of structural matching; narrative fidelity seems like a reaching for something substantive.

Here, Fisher seems to be responding to a question that initially haunted me: fidelity to what? His answer seems to be "social reality," although that term may be slippery, and Fisher seems to know that. He wants to go beyond the formal properties of narratives, properties that make them persuasive, to something more essential, but he also knows that he must stay away from problematic concepts like "truth," or even the simple one of "reality."[99] The term "social reality" will do for the moment, although he will tie it to the concept of audience later.

Fisher also seems deliberate in his choice of the word "good," as in "good reasons for belief or action." In addition to reaching out beyond the structural confines of narratives, he is also looking for

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[96] Fisher, *supra* n. 1, at 64.
[97] *Id.* at 75–76.
[98] *Id.* at 105.
[99] *Id.* at 85–101.

a way to add an evaluative or normative component to them. Narratives can be persuasive because they touch something substantive as well. But having suggested that more traditional forms of argumentation are incomplete, he has to be careful not to use terms that would place narrative fidelity back within those traditions. So the reasons for belief or action cannot be simply "logical"—that would place narrative fidelity back in the realm of technical logic—and they cannot be only "probable"—that would place them in the realm of rhetorical logic. "Good" must suffice, and it adds the additional connotative sense of normativity, by connecting values to reason.[100]

Fisher, then, in describing narrative fidelity as a substantive property of narratives, must avoid the foundationalist trap of appealing to something like the truth, and he must elaborate on his use of an overly vague term like "good." At the same time, he must try to avoid traditions that otherwise would offer a way of discussing these matters—for example, philosophy or logic—because he views those traditions as incomplete. He finds a resolution to all this in the new rhetoric of Chaim Perelman,[101] in whose work Fisher sees a parallel to his own, and in particular in Perelman's use of the concept of audience.[102]

Just as Fisher turned away from formal models for assessing reasoning, he notes, so did Perelman in developing his new model of persuasion.[103] Perelman, who adopted a juridical model for argumentation, replaced truth with justice as the goal for argument.[104] Perelman then made a second move, regarding the ways in which argument uses reason to move toward this goal of justice. Perelman rejected the efficacy of technical models for reasoning, what we would probably call formal logic, viewing their rules for validity as overly artificial.[105]

In his new rhetoric, Perelman modified these rules in a way that allowed for human judgment to enter: the validity of an argument would be determined, in part, by the judgment of the audience to whom the argument was addressed.[106] With this move, Perelman moved argumentation from the realm of philosophy and logic back into the realm of rhetoric. Perelman immediately saw the objection—that this move could render argumentation overly

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[100] *See* Conti, *supra* n. 53, at 473–474.
[101] *See supra* n. 11.
[102] Fisher, *supra* n. 1, at 124–126.
[103] *Id.* at 124.
[104] *See id.* at 126–130.
[105] *Id.* at 124.
[106] *Id.* at 132.

relativistic or even fallible. He responded by postulating the idea of the universal audience—"'the best body of critics you can imagine for your subject, given your situation.'"[107] For Perelman, the worth of an argument could be tested by its ability to appeal to this construct of the universal audience. "An argument is as worthy as the audience that will adhere to it."[108] Now argumentation, under Perelman's schema, has moved back into the realm of rhetoric, but also into a world not only of technical, logical reasoning, but of values.

Fisher examines Perelman's concept of the universal audience carefully and regards it as worth adopting for his own concept of narrative fidelity, with one interpretive modification. Fisher notes that the universal audience is implied by particular arguments and that those arguments can be evaluated in part on that basis.[109] That is, although Perelman intends the universal audience to be an abstract concept, useful for testing the worth of an argument, Fisher believes that the concept can be grounded in specific situations for specific arguments, as a construct implied by any given text.[110]

All of this is an elaboration on the idea of "good reasons," the driving force behind narrative fidelity. Narrative fidelity is a matter of assessing the substantive worth of a story, but not in terms of its appeal to abstract universals like the truth, and not in terms of its ability to translate into formal, logical propositions about social reality. Rather, whether a story constitutes good reasons for belief or action is a matter of how willing an audience is to adhere to the story. That audience is, in a sense, implied by the text of the story, but because the story itself is situated historically and socially, then in that respect the universal audience—universal in its willingness to appeal to the highest ideals for justice—is also an audience of the moment, also situated in an historical and social setting.

In assessing the concept of narrative fidelity, Fisher notes that he has introduced it as a way of going beyond logical ways of understanding argument to a normative understanding of argument. In his view, argument—"rhetorical communication"—is as laden with values as it is with reasons, and a fuller view of argument and persuasion must account for this.[111] Looking more specifically

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[107] *Id.* (quoting Perelman).
[108] *Id.* at 138.
[109] *Id.* at 136.
[110] *Id.* at 134–138 (footnote omitted).
[111] *Id.* at 105.

at the law, Amsterdam and Bruner seem to agree. Law is inherently normative—it "prescribe[s] general rules about what is permissible and impermissible"[112]—and narrative links this abstract normativity of the body of law to the circumstances of our individual lives.[113]

> [I]t is through narrative that we provide humanly, culturally comprehensible justifications for our principled decisions and opinions. It is through narrative, rather than through some impeccable, impersonal argument from first precepts, that we show how or why the plaintiff's or the defendant's case is to be judged as we judge it.[114]

And Burns, as well, thinks that part of the value of narrative in the law is normative or evaluative and that narratives locate the more abstract normativity of legal rules within the particulars of individual cases and their settings. "The norms around which stories are told are not derived from an abstract morality of principle; they are those actually embedded in the forms of life of the community in which storyteller and listener find themselves."[115]

Burns notes that this morality inherent within narrative is intensified in trial contexts, because each of the competing stories is built around a "theme," forcing the jury to make "comparative judgment[s] about the relative importance of the norms that the two positions represent."[116] And like Fisher, Burns sees legal narratives as having this evaluative, or moral, component because they are tied to action. But in an important step, Burns sees this connection between the morality of narratives and action as a link that makes any act of listening to and evaluating narratives an act of self-definition. "On the other hand, the trial is not simply a forum for judgments about the morality of individuals and actions. It is a public forum in which the jury engages in important public action. Such action reflects and redefines public identity . . . ."[117] In choosing between competing stories, we not only pass judgment on the competing narratives, but in that act, define ourselves. "Indeed, the coherence of the self is maintained by our being the storytellers of our own lives . . . ."[118] This act of self-definition locates

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[112] Amsterdam & Bruner, *supra* n. 26, at 140.
[113] *Id.* at 141.
[114] *Id.*
[115] Burns, *supra* n. 3, at 171.
[116] *Id.* at 172.
[117] *Id.*
[118] *Id.* at 173.

us in the public world and fosters the conversation that we call doing justice.[119]

I turn to Burns now because I believe that, in looking at this evaluative and self-defining function of narratives, he offers an elaboration on the role of audience in Fisher's concept of narrative fidelity. For Burns, a trial jury makes its judgment about the competing narratives presented to it based on something more than an objective, empirical weighing of the presentation of events, or something that goes beyond the merely inferential:

> The juror's judgment is, finally, a practical judgment . . . . The jury grasps not the accurate objective characterization of a situation in theoretical terms but something far more difficult to describe. . . . What the juror grasps is a literally indescribable structure of norms, events, and possibilities for action.[120]

Burns later calls this practical judgment "nonformal intelligence,"[121] and he cites Justice Holmes in support of it: "'[M]any honest and sensible judgments . . . express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions—impressions which may lie beneath consciousness without losing their worth.'"[122]

Burns finds cognates for this practical judgment, or "intuition of experience," in philosophy, cognates that, in his view, fairly describe the judgments made regarding legal narratives in trials. In each of these cognates—from Kant, Aristotle, and Gadamer—Burns finds a philosophical account of a mode of human understanding that "is not reducible to formal inference."[123] Rather, as in Fisher's concept of narrative fidelity, these cognates go beyond formal models of understanding, rely upon a "communal validity,"[124] and in doing so rely upon shared norms of the community.[125]

In Kant, Burns finds the philosophical cognate of reflective judgment, a judgment that focuses on particulars rather than on making inferences from Platonic or abstract universals.[126] Burns views it as a commonsense kind of judgment that relies on public

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[119] *Id.* at 162–166, 172–175. Burns sees this conversation as taking place within tensions created by competing narratives.

[120] *Id.* at 199.

[121] *Id.* at 209.

[122] *Id.* at 209–210 (quoting Justice Holmes in *Chicago, Burlington, & Quincy Railway. v. Babcock*, 204 U.S. 585, 598 (1907)).

[123] *Id.* at 211.

[124] *Id.* at 217.

[125] *Id.* at 218.

[126] *Id.* at 212–213.

perception of what kind of world the community desires. It resembles Fisher's model for a modified universal audience in that it is situated within particulars and relies on a "community of judgment," rather than generalized, abstract categories of right and wrong.[127]

In Aristotle, Burns finds practical wisdom, *phronesis*, an ethical insight that is almost immediate, that works as a kind of ethical perception, and that relies on tacit knowledge.[128] For Aristotle, this practical wisdom lies at the heart of moral judgment and responds to nuance and a sense of the concrete, outstripping abstract or general theories of what is right.[129] In this way, practical wisdom relies on a kind of immediate insight, rather than more formal inferential processes.[130]

Finally, Burns finds a cognate for practical judgment in Gadamer's notion of interpretive insight, an "interpretive understanding" in which the interpreter moves between hermeneutic circles—that is, moves between particular detail and more global structures for understanding, to a "mutual codetermination" between those particulars and universals that results in a considered judgment that is separate from technical, or formal, forms of decision-making.[131] "Interpretive understanding is dependent on our prejudgments: the web of belief that constitutes our common sense and defines who we are."[132] As with Fisher's universal audience, these prejudgments are normative and emerge from how we define ourselves.

So all three of these cognates for practical judgment rely upon "communal validity," "a validity within the public horizon of the community with which the judging subject identifies."[133] That is, all three depend on shared norms, and in that dependence are rooted in the kind of ideals that characterize Fisher's sense of the universal audience—ideals that are grounded in historical and social particulars, rather than in abstract universals. And thus the judgment available at trial relies upon "the perspectives, norms,

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[127] *Id.* Burns also looks to Hannah Arendt, who extended Kant's notion of reflective judgment, originally seen as a kind of artistic judgment, into her own scheme for judgments about political issues. *See* Hannah Arendt, *Lectures on Kant's Political Philosophy* 44 (Ronald Beiner ed., U. Chi. Press 1989); *The Crisis in Culture: Its Social and Its Political Significance*, in *Between Past and Future: Eight Exercises in Political Thought* 218 (Penguin Group 1977); *Truth and Politics*, in *Between Past and Future*, *supra* n. 127, at 241.

[128] Burns, *supra* n. 3, at 213–214.

[129] *Id.* at 213.

[130] *Id.* at 214.

[131] *Id.* at 215–216.

[132] *Id.* at 216.

[133] *Id.* at 217.

and practices of the community from which judge and jury are drawn"—but, for Burns, in the best way:

> My contention is, of course, that the trial's consciously structured hybrid of languages is designed precisely to actualize our reflective judgment, practical wisdom, and interpretive understanding in ways that can at least sometimes lift the common sense of a given community above the least common denominator of the institutions and practices of that community.[134]

This statement helps to locate Fisher's use of the universal audience within the setting of legal narratives. The language of the trial is interwoven with narrative structures, structures that, by their very nature, put the legal audience—at trial, the judge or jury—in a position of exercising practical judgment as well as technical, logical, inferential judgment. Furthermore, the very act of exercising that practical judgment is an act of self-definition, an act that can elevate that audience "above the least common denominator," in the direction of Perelman's best available audience—assuming that that audience will adhere to the narrative presented.

Admittedly, the dynamic of narrative fidelity is complicated and somewhat abstract. Its interest, for me, however, lies in the following:

- it is substantive;
- it offers a compelling account of how narrative persuasion can go beyond formal features alone;
- it reaches beyond "logical," inferential models for argumentation—something that many of us intuit about narrative persuasion, but have difficulty accounting for;
- it helps to account for normativity in legal arguments and, in doing so, goes beyond logic alone, to values;[135] and

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[134] *Id.* at 218.

[135] Narrative fidelity may answer part of Richard Lempert's concern, at the end of his article "Telling Tales in Court," that lawyers may be more persuasive if they pay attention to how they construct stories, but that in focusing on the structural elements of story construction, they may not necessarily be promoting justice or the "right" result. *See* Lempert, *supra* n. 10, at 573.

- it involves an act of self-definition, not only by the immediate audience, but for the community within which that audience—and those narratives—are situated.

My remaining task would be, in the brief time left for this paper, to look at narrative fidelity within the context of a specific legal narrative. For that, I turn back to the beginning of this Article, and to James Boyd White's comment that the law not only begins with a story but ends with a story, the decision of the judge or jury—itself a narrative.[136] Quickly, then, I want to look at the ending story, in a Supreme Court decision.

For Supreme Court decisions, the narratives are stories not only about the case at hand, but also about who we are or wish to be as a community. In addition, Supreme Court decisions themselves offer arguments for their own validity—including an implicit argument based on the underlying narratives.[137] That is, any Supreme Court decision serves not only as a legal prescription—the law of the land—but also as part of a larger story about who we are as a community and what kind of world we want to live in.[138] It not only offers a legal argument to support its holding, but also locates that argument within an implicit narrative framework about what kind of people we are and what kind of world we might inhabit. That implicit narrative framework—about what kind of people we are—strikes me as a framework that conjures a version of Fisher's modified universal audience.[139] Whether we would embrace the world offered by that implicit narrative framework is a matter, in part, of its appeal to something like our practical wisdom about it, or our "intuition of experience"—that is, a matter of its narrative fidelity.

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[136] *See* White, *supra* n. 2.

[137] *See* Robert Cover, *Nomos and Narrative*, 97 Harv. L. Rev. 4 (1983).

[138] Cover states that "[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live. In this normative world, law and narrative are inseparably related." *Id.* at 4–5.

[139] Modified, that is, as Fisher indicates, by grounding that audience in specific situations for specific arguments. Fisher, *supra* n. 1, at 134–138.

## II. JUDICIAL OPINIONS AND NARRATIVE FIDELITY: *PARENTS INVOLVED IN COMMUNITY SCHOOLS v. SEATTLE SCHOOL DISTRICT NO. 1*[140]

On June 28, 2007, the U.S. Supreme Court issued its opinion in *Parents Involved in Community Schools v. Seattle School District No. 1.*, a case regarding the racial composition of the student body in public schools. *Parents v. Seattle School District* is the latest in a series of cases to follow *Brown v. Board of Education*,[141] the landmark case in which the Court ruled that a system of segregated schools could never offer equal educational opportunities and thus violated the Equal Protection Clause of the Fourteenth Amendment. The question following *Brown* was: what form could school desegregation take?—something that a long line of cases since *Brown* has addressed.[142] In response to *Brown* and its successors, school districts across the country have implemented various desegregation or voluntary integration policies.[143]

The plaintiffs in this most recent case, *Parents v. Seattle School District*, challenged the voluntary integration policies in two school districts, one in Seattle, Washington, and the other in Louisville, Kentucky. In Seattle, students could apply to attend any school in the district, but in deciding to which school the student was ultimately assigned, the school district used a system of tiebreakers that included race as a factor. In Louisville, the system was somewhat different: there, the school district assigned students to different schools depending upon the percentages of different races at any given school.

In its plurality opinion, authored by Chief Justice Roberts, the Court found both school plans unconstitutional. The Court ruled that the plans were not narrowly tailored and failed to meet the test of addressing a compelling state interest. The opinion of the Court was divided, however, with one notable concurrence (Justice Kennedy) that did not join fully with the reasoning of the plurality, and with two sharply-worded dissenting opinions (Justices Stevens and Breyer) that questioned whether the current opinion was

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[140] 127 S. Ct. 2738 (2007).

[141] 347 U.S. 483 (1954).

[142] *See e.g. Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Milliken v. Bradley*, 418 U.S. 717 (1974); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

[143] On the difference between segregation and voluntary integration, *see* James T. Patterson, Brown v. Board of Education: *A Civil Rights Milestone and Its Troubled Legacy* 205 (Oxford U. Press 2001).

beginning to reverse the trend that the Court had begun with *Brown*.

The opinion in *Parents v. Seattle School District* promises to be the topic of a long, heated, and perhaps polarizing debate.[144] How to assess it? In the commentaries to come, many approaches will no doubt emerge. I would like to look at the opinion from the perspective of two of its underlying narratives and briefly evaluate them in terms of their narrative fidelity. Do they offer assertions about social reality that comprise "good" reasons, or that appeal to our "intuition of experience"? What is the quality of the audience that would adhere to, or identify with,[145] these narratives—or, put another way, would these narratives appeal to some version of a universal audience? And, to the extent that an audience would adhere to them, in what ways do they define us, as individuals and as a community?

The opinion is written in many parts. The plurality opinion is authored by Chief Justice Roberts, various parts of which are joined by Justices Scalia, Kennedy, Thomas, and Alito. Justice Thomas filed a concurring opinion, and Justice Kennedy filed an opinion concurring in part and concurring in the judgment. Justice Stevens filed a dissenting opinion. And Justice Breyer filed a dissenting opinion, in which he was joined by Justices Stevens, Souter, and Ginsburg. With so many opinions, there are bound to be a number of underlying narratives. Here, out of a very long written opinion, are two fragments.

First, from the plurality opinion, written by Chief Justice Roberts:

> In *Brown v. Board of Education*, we held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority. It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954. ("The impact [of segregation] is greater when it has the sanction of the law"). The next Term, we accordingly stated that "full compliance" with *Brown I* required school districts "to achieve a system of determining admission to the public schools *on a nonracial basis*."

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[144] *See e.g.* Linda Greenhouse, *Justices, 5–4, Limit Use of Race for School Integration Plans: A Bitter Division*, 156 N.Y. Times A1 (June 29, 2007) (specifically the headline). As of the initial presentation of this Article, the opinion was only a few weeks old.

[145] On his use of Kenneth Burke's concept of identification, *see* Fisher, *supra* n. 1, at 66; *see also* Conti, *supra* n. 53, at 469.

> The parties and their *amici* debate which side is more faithful to the heritage of *Brown*, but the position of the plaintiffs in *Brown* was spelled out in their brief and could not have been clearer: "[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race." What do the racial classifications at issue here do, if not accord differential treatment on the basis of race?[146]
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> . . .
>
> Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way "to achieve a system of determining admission to the public schools on a nonracial basis" is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.[147]

And then an excerpt from the dissent written by Justice Breyer:

> Finally, what of the hope and promise of *Brown*? For much of this Nation's history, the races remained divided. It was not long ago that people of different races drank from separate fountains, rode on separate buses, and studied in separate schools. In this Court's finest hour, *Brown v. Board of Education* challenged this history and helped to change it. For *Brown* held out a promise. It was a promise embodied in three Amendments designed to make citizens of slaves. It was the promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools. It was about the nature of a democracy that must work for all Americans. It sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.
>
> Not everyone welcomed this Court's decision in *Brown*. Three years after that decision was handed down, the Governor of Arkansas ordered state militia to block the doors of a white schoolhouse so that black children could not enter. The President of the United States dispatched the 101st Airborne Divi-

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[146] *Parents*, 127 S. Ct. at 2767 (plurality) (brackets and emphasis in original; citations omitted).

[147] *Id.* at 2768 (citations omitted).

> sion to Little Rock, Arkansas, and federal troops were needed to enforce a desegregation decree. Today, almost 50 years later, attitudes toward race in this Nation have changed dramatically. Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it. The long history of their efforts reveals the complexities and difficulties they have faced. And in light of those challenges, they have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation, instruments that they believe are needed to overcome the problems of cities divided by race and poverty. The plurality would decline their modest request.
>
> The plurality is wrong to do so. The last half-century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*. The plurality's position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret.[148]

These are excerpts from two different opinions, offering two different stories about *Brown* and the events that have followed. I chose these excerpts because of their contrast with each other and the position in which that contrast puts the reader. It is difficult to read them without being moved toward a substantive position—they compel a reading that is, in part, a moral reading.[149]

The opinion of Justice Roberts raises a question—what is the true legacy of *Brown*?—and then answers that same question by referring to the opinion of the plaintiffs themselves in that earlier case: states should not offer differential treatment to schoolchildren on the basis of their race. While affirming this earlier principle, the opinion then reverses the application of this principle in the present case: the school districts in both Seattle and Louisville, by enforcing voluntary integration policies, are now *de facto* enforcing differential treatment on the basis of race. When viewed on purely logical grounds, the move seems reasonable.[150] If the Court has earlier affirmed a policy of non-differential treatment on the basis of race, and if it wants to adhere to that policy, then it should strike the desegregation plans in both Seattle and Louisville because they, in turn, enforce differential treatment on the basis of

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[148] *Id.* at 2836–2837 (Breyer, Stevens, Souter & Ginsburg, JJ., dissenting) (citations omitted).

[149] Burns, *supra* n. 3, at 170.

[150] Or a "cruel irony," as Justice Stevens notes. *Parents*, 127 S. Ct. at 2797 (Stevens, J., dissenting).

race. The plurality opinion appears to uphold a legal principle that was established in *Brown* and that is grounded in the Fourteenth Amendment. *Brown* and its legacy tell an important story, and this opinion attaches itself to that underlying story, as the latest chapter in its telling.

The underlying story, of course, is more complex. *Brown* struck down policies aimed at deliberately and systematically segregating schoolchildren on the basis of race. It was directed squarely at policies that discriminated against children of color and that afforded them inferior educational opportunities. The policies of the school districts in Seattle and Louisville, on the other hand, were not intended to discriminate, but rather to integrate—to achieve equal educational opportunities for all schoolchildren in their districts. Justice Breyer, in his dissent, tells a different version of the story.

Breyer notes both the history that lies behind *Brown* and the continuing need to enforce its promise. He cites the change in the attitudes toward race in the country, fifty years after *Brown*, and the role that *Brown* played in those changes. "Today, almost 50 years later, attitudes toward race in this Nation have changed dramatically. Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it."[151] But, as he notes, the promise of *Brown* has not yet been fully realized.

In describing the promise of *Brown*, Justice Breyer notes the concreteness of that promise:

> It was the promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools. It was about the nature of a democracy that must work for all Americans. It sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.[152]

I am struck by how he frames this promise—"not as a matter of fine words on paper," not as a "matter of legal principle," but as a matter of "how we actually live." In making this statement, he seems to be making a strong appeal in terms of an underlying story about American democracy—and its history, not only of embracing equality for its citizens, but also of correcting its own mistakes from the past. It is a story about the country—almost a statement

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[151] *Id.* at 2836–2837 (Breyer, Stevens, Souter & Ginsburg, JJ., dissenting).

[152] *Id.* at 2836.

of *mythos*, really—laden with the values of fairness, promise, and hope. For those whose lives span all or a large portion of American history since *Brown* and who have seen the change, that story, for all of its struggles and its incompleteness, seems right; it appeals to our "intuition of experience" about that segment of American history and the effort to make its democratic promise as inclusive as possible. It also seems to be a story that has defined us, as a country, and that the vast majority of us are willing to embrace. We are willing to adhere to it and the values that underlie it.

The excerpt from Justice Roberts,[153] viewed at this level of "narrative rationality," strikes me as weaker. While it seems more logical, it does not tell the story with what strike me as "good reasons" or in a way that seems to best define who we are at this moment. It seems (to borrow Justice Breyer's characterization) more like "words on paper," or more a matter of abstract legal principle than of lived experience. It lacks some element that would make the story compelling. To me, the underlying story of Justice Roberts's opinion is weak on narrative fidelity, weak on its appeal to my own "intuition of experience" and the way in which that appeal defines us as a community. I do not think this is where the legacy of *Brown* leads, in terms of its story and how that story fits in with the larger story of American democracy.

On the other hand, my view may not represent a majority view. It clearly does not represent the majority of the Court. And it may appeal to the "intuition of experience" held by others, if not to mine. I need to find a way to move away from personal preference at this point, because Fisher's concept of narrative fidelity relies upon something larger—his modified sense of the universal audience. In that vein, it may be helpful to put the appeal (or lack of appeal) of the plurality opinion in *Parents v. Seattle School District* into a larger context. In a work that reexamines *Brown* and its legacy, Jack Balkin observes that the underlying principle of constitutional equality affirmed in *Brown* has subsequently been interpreted in one of two ways: as anticlassification or antisubordination.[154]

Anticlassification theorists argue that it is unconstitutional to classify citizens based on race. When the state does so, it "risks returning to the racial division of society that characterized Jim Crow."[155] Martin Luther King's famous comment in his "I Have a

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[153] Admittedly an excerpt, but one that purports to offer a story about *Brown*.

[154] *What* Brown v. Board of Education *Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision* 11–14, 55–56 (Jack M. Balkin ed., N.Y. U. Press 2001) [hereinafter *What* Brown *Should Have Said*].

[155] Jack M. Balkin, Brown v. Board of Education*: A Critical Introduction*, in *What*

Dream" speech, that he dreamed of the day when his "four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character," can be seen as an anticlassification stance.[156] Contemporary anticlassification theorists argue that even when intended benignly, racial classifications can be harmful—either by promoting unfairness to other racial groups, or by stigmatizing the group that is classified.

Seen in this light, Roberts's plurality opinion is more than merely a logical enunciation of "words on paper" when it indicates that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[157] It echoes the words of Justice Harlan, in his dissent in *Plessy v. Ferguson*, when he notes that the "Constitution is color-blind, and neither knows nor tolerates classes among citizens."[158] For Justice Roberts, and for a majority of the current Court, the legacy of *Brown* should be a legacy that extends the anticlassification principle first enunciated in the dissent in *Plessy*. And for them, anticlassification—to draw on the language of constitutional theory—relies upon some underlying narrative that carries with it a sense of "good reasons," ones that are faithful to their own sense of the story to be told about American democracy.

Those who subscribe to the other theory, antisubordination, regard constitutional equality as a matter of whether the law is working to remedy subordination by race—regardless of the form that the law takes.[159] In their view, the courts, in focusing on racial classifications alone, might divert attention away from forms of subordination that result from practices other than racial classification—or even subtly sanction them. In this theoretical debate, I am drawn to the antisubordination view, and that may help to explain my own preference for Breyer's dissenting opinion in *Parents v. Seattle Schools*. It rests on an underlying narrative that seems more faithful to my own experience of who we are as a community.

Balkin places *Brown* into a grand national narrative that we tell about ourselves.

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Brown *Should Have Said*, *supra* n. 154, at 12.

[156] Martin Luther King, Jr., *I Have a Dream*, in *A Testament of Hope: The Essential Writings of Martin Luther King, Jr.* 219 (James Melvin Washington ed., Harper & Row 1986). King, however, also made comments in the speech that could be seen as antisubordination comments, and he should not be seen as taking a position one way or the other in a theoretical debate that postdates him.

[157] *Parents*, 127 S. Ct. at 2768 (plurality).

[158] 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

[159] Jack M. Balkin, Brown v. Board of *Education: A Critical Introduction*, in *What* Brown *Should Have Said*, *supra* n. 154, at 13.

> *Brown* fits nicely into a widely held and often repeated story about America and its Constitution. This story has such deep resonance in American culture that we may justly regard it as the country's national narrative. I call this story the Great Progressive Narrative. The Great Progressive Narrative sees America as continually striving for democratic ideals from its founding and eventually realizing democracy through its historical development. . . . The basic ideals of Americans and their Constitution are promises for the future, promises that the country eventually will live up to, and, in so doing, confirm the country's deep commitments to liberty and equality.[160]

But we do not always adhere to the same narrative version of the particulars, to the same version of how we can best arrive at our ideals. Hence the sharp division in the opinions of the Court in *Parents v. Seattle Schools*, reflecting differences in how the story is best told.[161] Those differences, under Fisher's narrative paradigm, are differences in what best reflects our intuition of experience and in who we want to be as a people. They are differences about the story, felt at the deepest levels of what makes us human. We are still looking for the telling that seems like the right one.

## III. CONCLUSION

On the one hand, narrative fidelity seems simple. Does a story, legal or otherwise, have a tug to it—does it appeal to our sense of lived experience, and the values that emerge from that experience? Is that part of what makes it persuasive? On the other hand, that appeal has to be more than personal preference, and it has to go beyond mere solipsism. Fisher carefully outlines a scheme for narrative rationality, as an extension of earlier philosophical and rhetorical traditions, and offers narrative fidelity as the most complex term of that narrative rationality, because of its appeal to something more substantive and because it incorporates values. This appeal intrigues me because versions of it, in one sense, have been around for a long time—in Aristotle's practical wisdom, for example, or in Kant's reflective judgment—and yet theories of argumentation have struggled to place it. Perelman, in Fisher's view, incorporates it partly into his new rhetoric and the notion of the universal audience. Fisher places it in narratives.

I mentioned much earlier that one of the primary features of narratives, for me, is that they are inherently persuasive. The

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[160] *Id.* at 5.

[161] *See* Greenhouse, *supra* n. 144, at A1.

question for those of us who teach narrative persuasion is, how? The answer, most commonly, lies in the formal features of narratives, which can be understood, taught, and used.[162] Fisher insists that, as important as these formal features are, there is something else that reaches beyond the formal features of the story, and beyond simple plausibility, to the center of how we allow narratives to define who we are. I agree. To the extent that our students think a winning story is one that contains only well-constructed parts, I believe we should find a way to show them that persuasive stories should win hearts as well as minds. Narrative fidelity strikes me as a part of that way.

[162] See e.g., the project that is partly described in Meyer, *Vignettes*, *supra* n. 10.