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PHILOSOPHICAL CONSIDERATIONS AND THE USE OF NARRATIVE IN LAW

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I. INTRODUCTION

The use of narrative in law raises a number of philosophical/jurisprudential issues. Narrative has been used primarily by critical theorists, including critical race theorists,[1] Latino legal theorists,[2] Asian-American legal theorists,[3] feminist theorists,[4] and gay/lesbian legal theorists.[5] They offer narrative as a way to introduce a perspective that is not represented in mainstream legal discourse.

Drawing on philosophy, I explain the importance of narrative for outsiders and offer responses to some important philosophical or

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1. *See, e.g.*, Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); *see also, e.g.*, DERRICK BELL, FACES AT THE BOTTOM OF THE WELL (1992); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991).

2. *See, e.g.*, Kevin R. Johnson, *"Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259 (1997); Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984); Yxta Maya Murray, *Merit-Teaching*, 23 HASTINGS CONST. L.Q. 1073 (1996); Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425 (1990).

3. *See, e.g.*, Margaret H.R. Chon, *On the Need for Asian-American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences*, 3 ASIAN PAC. AM. L.J. 4 (1995).

4. *See, e.g.*, Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986).

5. *See, e.g.*, William N. Eskridge, *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994).

jurisprudential objections to the use of narrative in law. In particular, I respond to the following claims: (1) the use of narrative is an illegitimate externalist approach to law; (2) the use of narrative is misguided because it does not seek to ascertain truth, but instead seeks to change the law; and (3) the use of narrative is hostile to "reason." This philosophical discussion is especially timely and important because although some of the leading critics of narrative have recognized the relevance of philosophy to the debate over the use of narrative in law,[6] they have refused to squarely confront the philosophical issues implicated in the debate.[7]

II. THE PHILOSOPHICAL SIGNIFICANCE OF NARRATIVE FOR OUTSIDERS

The philosopher Jean-Francois Lyotard's notion of the "differend" helps show the importance of narrative for outsiders. Without narrative, minorities experience the differend. Lyotard says that the dominant idea of justice can silence subordinate persons.[8] The differend arises when there is a conflict between two conceptions of justice and there is an effort to judge an individual who does not hold the foundational views of the regime that stands in judgment of the individual.[9] In such a situation, the subordinate person lacks "a forum and a language" which would allow them to express how they have been injured.[10] African-Americans have experienced this difficulty. For hundreds of years, blacks had no standing to sue for the injuries they sustained at the hands of the white majority.[11] They sustained more than legal injuries.[12] They were harmed because they had "no forum in which they could speak."[13] In such circumstances, the prevailing conception

6. *See* DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 9, 96-99 (1997).

7. *See* Francis J. Mootz, III, *Between Truth and Provocation: Reclaiming Reason in American Legal Scholarship*, 10 YALE J. L. & HUMAN. 605, 614-15 (1998) (lamenting the lack of philosophical analysis in the controversy over the use of narrative in legal scholarship).

8. *See* DOUGLAS E. LITOWITZ, POSTMODERN PHILOSOPHY & LAW 119 (1997).

9. *Id.*

10. *Id.* at 119-20.

11. *Id.* at 120.

12. *Id.*

13. *Id.* Lyotard explains:

> In the differend, something "asks" to be put into phrases, and suffers from the wrong of not being able to be put into phrases right away . . . this state includes silence, which is a negative phrase, but it also calls upon phrases which are in principle possible. This state is signalled by what one ordinarily calls a feeling: "One cannot find the words, etc."

of justice deprives the person of a "voice that can be heard on terms which the system will understand."[14] Lyotard says:

> I would like to call a differend the case where the plaintiff is divested of the means to argue and becomes for that reason a victim.[15]

When one experiences an injury that cannot be established in a given system of justice, one is victimized and one's claim "constitutes a differend lying outside the system of justice."[16] The differend cannot be acknowledged or comprehended by those who brought it into existence.[17] In general, it seems minorities experience the differend: their harms sometimes cannot be recognized by the justice system—i.e., the traditional forms of legal argument.

Consider some examples. Mexican-Americans have faced the differend. They have sometimes found that our legal system has not recognized their harms. In *Hernandez v. State*,[18] a Mexican-American man had been convicted of murder. He sought to reverse his conviction on the ground that Mexican-Americans had been illegally excluded from serving on the jury. He relied on case law holding that it was a violation of the Equal Protection Clause of the Fourteenth Amendment to exclude blacks from serving on juries. The court, however, found that the Fourteenth Amendment protected only two races: blacks and whites.[19] In this regard, the court held that Mexican-Americans are "white."[20] Since the juries that indicted and convicted the defendant were composed of white persons—i.e., members of

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JEAN FRANCOIS LYOTARD, THE DIFFEREND: PHRASES IN DISPUTE 13 (Georges Van Den Abbeele trans., 1988).

14. *See* LITOWITZ, *supra* note 8, at 120.

15. *See* LYOTARD, *supra* note 13, at 9, xi. "[A] differend would be a case of conflict, between (at least) two parties, that cannot be equitably resolved for lack of a rule of judgment applicable to both arguments." *Id.*

16. *See* LITOWITZ, *supra* note 8, at 120.

17. *Id.*

18. 251 S.W.2d 531 (Tex. 1952). For more on the *Hernandez* case, see Ian F. Haney Lopez, *Race Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143 (1997).

19. *See Hernandez*, 251 S.W.2d at 535.

20. *Id.* For more on the legal construction of Mexican-Americans as white, see George A. Martínez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321 (1997). For additional scholarship on the analysis of "whiteness," see generally CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997).

his own race—there was no equal protection violation.[21] In *Hernandez*, Mexican-Americans were confronted with the differend. The system did not recognize the harm they suffered from having no Mexican-Americans on juries.

Consider another example. In *Mashpee Tribe v. Town of Mashpee*,[22] a Native American community sought to reclaim certain tribal lands. The Mashpee alleged that the lands had been acquired from them in contravention of the Indian Non-Intercourse Act of 1970.[23] That Act bars the sale of Indian land unless the federal government has approved the sale.[24] The Mashpee argued that its land had been sold without the approval of the United States. In response, the defendant Town of Mashpee contended that the Mashpee were not covered by the Act because they were not a tribe.

In order to prevail, the Mashpee had to establish that they were a "tribe" at the time the land was transferred. Relying on earlier case law, the court defined "tribe" as a "body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."[25] Applying this definition, the court held that the Mashpee were not a tribe.[26]

The Mashpee disagreed with the court's definition of a "tribe." They argued that their tribal identity could be established through an alternative conception of a tribe—i.e., one based on their long-term relationship with the land and their maintenance of unique cultural practices.[27] That notion of a "tribe," however, could not be recognized by the legal system. Thus, the system could not recognize their claim. The Mashpee experienced the differend.

Narrative provides a language for minorities to communicate harms. Without narrative, minorities have no voice to explain how they have been harmed. Their claims cannot, at times, be vindicated within the present system. Thus, minorities face the differend, deprived of a language to express claims that are located somewhere outside of the system.

Consider how narrative might have been useful in the *Hernandez* case. If the Mexican-American defendant had been able to use narrative,[28] he

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21. *See Hernandez*, 251 S.W.2d at 536.
22. 447 F. Supp. 940 (D. Mass. 1978).
23. *Id.* at 947; *see* 25 U.S.C. § 177 (1994).
24. 25 U.S.C. § 177.
25. Montoya v. United States, 180 U.S. 261, 266 (1901).
26. *Mashpee Tribe*, 447 F. Supp. at 950.
27. *See* Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1709, 1765 (1993).
28. In this case, such a narrative would be what has been termed a journalistic

could have shown that he was harmed by the absence of Mexican-Americans on the jury. Narrative would have shown that he was not protected by having whites on the jury because white Anglos constructed Mexican-Americans as non-white. Two examples of the descriptions that Anglos produced regarding Mexican-Americans will suffice. The historian David Weber writes:

> Anglo Americans found an additional element to despise in Mexicans: racial mixture. American visitors to the Mexican frontier were nearly unanimous in commenting on the dark skin of Mexican mestizos who, it was generally agreed, had inherited the worst qualities of Spaniards and Indians to produce a "race" still more despicable than that of either parent.[29]

Similarly, another commentator described how Anglo Americans drew a clear racial distinction between themselves and Mexican-Americans:

> Racial myths about Mexicans appeared as soon as Mexicans began to meet Anglo American settlers in the early nineteenth century. The differences in attitudes, temperament, and behavior were supposed to be genetic. It is hard now to imagine the normal Mexican mixture of Spanish and Indian's as constituting a distinct "race", but the Anglo Americans of the Southwest defined it as such.[30]

Through narrative, the defendant in *Hernandez* could have explained how he was injured by not having Mexican-Americans on the jury. Since the narrative would have established him as non-white, he could have shown that he was not protected by having whites instead of Mexican-Americans on the jury.

Thus, narrative can and has been used by outsiders to point out various injuries that they have sustained. For instance, in an effort to rebut those who argue that we should limit the number of Latinos that are allowed to immigrate into the United States on the ground that they refuse to assimilate into the American mainstream, Kevin Johnson has employed narrative to eloquently describe the psychological damage that is suffered by Latinos

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account—a legal narrative that "purports to describe things as they actually happened." Yxta Maya Murray, Legal Fictions 14 (unpublished manuscript on file with the author).

29. FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF THE MEXICAN-AMERICANS 59-60 (David J. Weber ed., 1973).

30. JOAN N. MOORE, MEXICAN-AMERICANS 1 (1970).

who attempt to fully assimilate by relinquishing their cultural traditions.[31] Similarly, Richard Delgado and Derrick Bell have used storytelling to show how minorities are injured by racism that affects the hiring process of law school faculties.[32] Likewise, Mari Matsuda has used narrative to show how minorities are harmed by hate speech.[33]

The philosopher Jacques Derrida's notion of justice is also instructive in explaining the importance of narrative as the voice of the outsiders. For Derrida, justice is a "relation or debt from one person to another."[34] Justice is an "incalculable demand to treat the other on the other's terms."[35] Derrida insists that "[t]o address oneself in the language of the other is, it seems, the condition of all possible justice."[36] Because narrative provides minorities with a way to communicate how they have been harmed, narrative is the language of the other. Since justice requires that we treat the other on the other's terms, outsiders should be permitted to use narrative. For Derrida, justice does not permit a dominant group to force its linguistic practices on a minority group.[37] Thus, it is wrong for a majority to impose its legal language, i.e., the traditional forms of legal argument, on outsider groups.

Narratives and conventional modes of legal argument seem to constitute incommensurable languages. There appears to be no reason to believe that narratives are necessarily translatable into traditional modalities of legal argument. Indeed, the fact that minorities experience the differend demonstrates this point. Lyotard contends that the differend arises precisely from the untranslatability or "the incommensurability of phrases and phrase systems."[38] He asserts: "There are a number of phrase regimens: reasoning,

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31. *See generally* Johnson, *supra* note 2.

32. *See* Delgado, *supra* note 1, at 2430-34. DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 140-61 (1987).

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

34. LITOWITZ, *supra* note 8, at 92.

35. *Id.*; *cf.* Drucilla Cornell, *From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation*, *in* LEGAL HERMENEUTICS: HISTORY, THEORY AND PRACTICE 161 (Gregory Leyh ed., 1992) ("The aspiration to a just and egalitarian state proceeds from the irreducible responsibility of the subject to the others. Each other has her claim, and her claim must be heeded.").

36. LITOWITZ, *supra* note 8, at 92.

37. *See id.* at 206 n.35.

38. *Id.* at 119. "When one genre or phrase system is wrapped over another, the incommensurability produces a differend, a remainder, an injustice, or a wrong that cannot be communicated or translated into the universe of the phrase regime or genre which is responsible for causing the differend." *Id.* at 121.

knowing, describing, recounting, questioning, showing, ordering, etc. Phrases from heterogeneous regimens cannot be translated into the other."[39]

This has important implications. First, it supports the idea that minorities have a different conceptual scheme than the dominant group. One philosopher, Donald Davidson, has argued that one conceptual scheme is different from another if it is not translatable.[40] Since outsider narrative is not necessarily translatable into the mainstream forms of legal argument, it represents an alternative conceptual framework. Outsiders, then, operate from a different conceptual scheme. This different conceptual scheme expressed through narratives explains why it is plausible to suppose that there is a distinctive "voice of color."

This conclusion is highly significant. Daniel Farber and Suzanna Sherry, for example, have questioned the existence of the voice of color.[41] They ask, for example, why a white person could not write in the voice of color.[42] The fact that minorities have a different conceptual scheme from whites makes it plausible to suppose that there is a distinctive voice of color which is based on that distinctive conceptual scheme. It also explains why whites cannot write in the voice of color. They cannot speak in the voice of the outsider because they have a different conceptual framework.

The differences in conceptual schemes or world views can be clearly seen in the different ways that whites and outsiders view the world. For example, Richard Delgado has described the white majority's view on race in America as follows:

> Early in our history there was slavery, which was a terrible thing. Blacks were brought to this country from Africa in chains and made to work in the fields. Some were viciously mistreated, which was, of course, an unforgivable wrong; others were treated kindly. Slavery ended with the Civil War, although many blacks remained poor, uneducated and outside the cultural mainstream. As the country's racial sensitivity to black's plight increased, the vestiges of slavery were gradually eliminated by federal statutes and case law. Today, blacks have many civil rights and are protected from discrimination in such areas as housing, public education, employment,

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39. LYOTARD, *supra* note 13, at 128.

40. DONALD DAVIDSON, INQUIRIES INTO TRUTH & INTERPRETATION 184-85 (1984) ("[S]peakers of different languages may share a conceptual scheme provided there is a way of translating one language into the other.").

41. *See* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 809-19 (1993).

42. *See id.* at 815-18.

> and voting. The gap between blacks and whites is steadily closing, although it may take some time for it to close completely . . . . Most Americans are fair-minded individuals who harbor little racial prejudice. The few who do can be punished when they act on those beliefs.[43]

Thus, whites see the world as a place where racism has been overcome.[44] In stark contrast to that world view is the outsider perspective. It holds that the history of

> black subordination in America [is] a history "gory, brutal, filled with more murder, mutilation, rape and brutality than most of us can imagine or easily comprehend." This . . . history continues into the present, implicating individuals still alive. It includes infant death rates among blacks nearly double those of whites, unemployment rates among black males nearly triple those of whites, and a gap between the races in income, wealth, and life expectancy that is the same as it was fifteen years ago, if not greater. It includes despair, crime, and drug addiction in black neighborhoods, and college and university enrollment figures for blacks that are dropping for the first time in decades. It dares to call our most prized legal doctrines and protections shams—devices enacted with great fanfare, only to be ignored, obstructed, or cut back as soon as the celebrations die down.[45]

Minorities, then, view the world as still very much infected with racism. For instance, minority scholars describe a world where racial minorities experience numerous "microaggressions."[46] "Microaggressions" are "subtle, stunning, often automatic, and non-verbal exchanges which are 'put downs' [of minorities]."[47] Members of the dominant group, however, seem to view racism as largely a thing of the past. Consistent with a conceptual framework that does not see race as presenting a significant problem, critical

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43. Delgado, *supra* note 1, at 2417.

44. *See* Sylvia R. Lazos Vargas, *Deconstructing Homo[genous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493, 1523, 1525 (1998) ("The White ethnic immigrant narrative has helped construct and reinforce a version of racism under which . . . Whites claim racial innocence . . . . [This narrative] reinforces the myth that racism . . . is not a serious injury or harm that can persist through history; and that racism and racist attitudes are not entrenched in current economic structures and social norms.").

45. Delgado, *supra* note 1, at 2417-18.

46. *See* Peggy C. Davis, *Law as Microaggression*, 98 YALE L. J. 1559, 1565 (1988).

47. *Id.* at 1565.

scholars have pointed out that whites see themselves as raceless.[48] Thus, whiteness is said to be "transparent."[49] "[T]o be white is not to think about it."[50] In my view, outsiders have written a number of narratives, in part, to show the omnipresence of racism. For example, Patricia Williams describes the racism that she experienced in the ordinary act of shopping where a store employee told her that the shop was closed even though it was early afternoon and there were whites shopping in the store.[51] Similarly, Charles Lawrence has described how whites have sought to "praise" him by stating "I don't think of you as a Negro."[52] Likewise, Margaret Chon has observed that Asian-Americans experience as racist the often received compliment that they "speak such good English."[53]

These differences in conceptual schemes help explain related phenomena. Minorities have observed that whites tend to criticize outsiders for raising issues of race.[1] This criticism is understandable once one perceives the different conceptual schemes at work. According to the conceptual scheme of the dominant group, racism is no longer a significant problem in America. Given this, it makes sense that whites are troubled by the outsider's insistence that racism continues to be a problem.

This difference in conceptual schemes may also help explain the appeal that "color-blind constitutionalism" has for many members of the dominant group. According to this view of the constitution, it is improper to take race into account in making a decision, even if the failure to consider race would operate to the disadvantage of minorities.[55] Minority legal scholars have

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48. *See, e.g.*, IAN F. HANEY-LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 158 (1996) (stating that "the tendency not to see oneself in racial terms is widespread among whites").

49. Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969 (1993).

50. *Id.* at 969.

51. *See* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 44-45 (1991).

52. Charles R. Lawrence, III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318 (1987).

53. Chon, *supra* note 3, at 6.

54. *See, e.g., id.*; Robert S. Chang & Jerome McCristal Culp, Jr., *Nothing and Everything: Race, Romer and (Gay/Lesbian/Bisexual) Rights*, 6 WM. & MARY BILL OF RIGHTS J. 229, 244-245 (1997) ("It is clear that, for many, to document racism is to improperly raise the issue of race.").

55. *See generally* Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991). The classic statement of color-blind constitutionalism is found in Justice Harlan's famous dissenting opinion in *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding segregation on passenger trains). There, Justice Harlan stated:

criticized color-blind constitutionalism on the ground that it perpetuates the subordination of minority groups.[56] Although there may be no "legitimate rationale"[57] for the failure to recognize race, the difference in conceptual schemes between minorities and the dominant group makes it possible to understand why a color-blind constitutionalism is plausible to whites. If racism is confined to the distant past and is no longer a significant problem, it makes little sense to take race into account in decision-making.

Beyond all of this, the use of narrative is philosophically important for outsiders because it provides a way for minorities to achieve authenticity. John Calmore has observed that minority intellectuals must "battle to avoid being rendered inauthentic by the pressures of adapting to the white world."[58] Martin Heidegger is one of the leading philosophers of this century who has done important work on the notion of authenticity that is not yet well-known in the legal academy. His discussion of inauthentic human beings helps explain the philosophical significance of narrative for outsiders. It provides a way for minorities to escape from standard practices of the mainstream world and thereby become authentic.

In his major philosophical work, Heidegger sought to ascertain "the meaning of being."[59] People can comprehend the notion of being in two distinct ways, "authentically and inauthentically."[60] The authentic route

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> [I]n view of the Constitution, in the eye of the law, there is in this country no superior dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

Id. at 559.

56. *See, e.g.*, Gotanda, *supra* note 55, at 2-3; *see also* HANEY-LÓPEZ, *supra* note 48, at 178 ("Race-blindness is perverse: although it purports to combat racial stereotypes, it actually leaves racist beliefs intact and attacks instead the efforts to challenge and remake those beliefs.").

57. Gotanda, *supra* note 55, at 637.

58. John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2170 (1992).

59. Harrison Hall, *Intentionality and World: Division I of Being and Time*, *in* THE CAMBRIDGE COMPANION TO HEIDEGGER 135 (Charles Guignon ed., 1993); *see also* Charles Guignon, *Introduction* to THE CAMBRIDGE COMPANION TO HEIDEGGER 2 (Charles Guignon ed., 1993) ("Heidegger's lofty ambition was to rejuvenate philosophy [and at the same time, Western culture] by clearing away the conceptual rubbish that has collected over our history in order to recover a clearer, richer understanding of what things are all about.").

60. Hall, *supra* note 59, at 135.

provides us with the most accurate understanding of what it is to be.[61] Heidegger provides an important analysis of inauthentic human beings. In engaging in specific activities and tasks, we express our societal understanding of what it is to be.[62] In Heidegger's view, we generally do so in an inauthentic way.[63] Part and parcel of this societal understanding of what it is to be is an idea of the appropriateness of our goals and tasks and of the ways in which we carry them out.[64] In general, this sense is expressed in social norms of behavior.[65] These norms reveal themselves in such statements as "One just doesn't do that," "One doesn't do that here, in that manner," or "One always . . ." and so on.[66] For Heidegger, these norms are omnipresent as the possible expressions of the societal notion of what it is proper or fitting to do.[67]

According to Heidegger, we are always and everywhere selecting from among the culturally determined alternatives for acting.[68] In so doing, we often choose to do "what one does."[69] "[W]hen we *choose* to interpret our being in the public way—living in the world of the one, . . . doing what one does, we 'fall' into the inauthentic way of being."[70]

When we fall into an inauthentic way of being, we act as one acts. We engage in activities and interpret the world in the manner that is normal in our society.[71] This limits the possibilities for action to what lies within the

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61. *Id.*; *see also* Charles B. Guignon, *Authenticity, Moral Values, and Psychotherapy*, *in* THE CAMBRIDGE COMPANION TO HEIDEGGER 228 (Charles Guignon ed., 1993) ("[For Heidegger, authenticity] points to a way of life that is higher than that of average everydayness.").

62. *See* Hall, *supra* note 59, at 136.

63. *Id.*; *see also* Guignon, *supra* note 61, at 227 ("Inauthenticity is characterized by 'falling' and 'forgetting.'").

64. *See* Hall, *supra* note 59, at 136.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* Heidegger observes: "Primarily and usually the self is lost in the one. It understands itself in terms of the possibilities of existence which 'circulate' in the 'average' public way of interpreting Dasein today." MARTIN HEIDEGGER, BEING AND TIME 35 (1977).

70. *See* Hall, *supra* note 59, at 137. Heidegger writes: "The one as that which forms everyday being-with-one-another . . . constitutes what we call *the public* in the strict sense of the word. It implies that the world is already primarily given as the common world." MARTIN HEIDEGGER, HISTORY OF THE CONCEPT OF TIME: PROLEGOMENA 246 (1985).

71. *See* HUBERT L. DREYFUS, BEING-IN THE-WORLD: A COMMENTARY ON HEIDEGGER'S BEING AND TIME, DIVISION I 328 (1991). Heidegger explains: "The 'one' has its own ways in which to be. That tendency of being-with which we have called 'distantiality' is grounded in

realm of a standard world— i.e., the typical, the usual or that which is appropriate.[72] The inauthentic person does precisely what anyone would do in that kind of circumstance.[73] Inauthenticity means that we fall into the "anonymity and dispersion of the one."[74]

With Heidegger's analysis in hand, it is possible to see clearly why narrative is important for outsiders. When outsiders produce narrative as scholarship they are not following the traditional norms of scholarship.[75] They are doing something that does not conform to mainstream practices. Thus, narrative provides a way for minorities to be authentic in their intellectual life because it provides a way to move away from standard practices in scholarship. Producing narrative as scholarship provides a way for minorities to become authentic in Heidegger's sense and escape the banality of the one and the "nullity of inauthentic everydayness."[76]

III. INTERNAL VERSUS EXTERNAL APPROACHES IN LEGAL PHILOSOPHY

Some legal philosophers would contend that such theorists, in using narrative, take an externalist approach to law and judicial decision-making. The distinction between internal and external approaches in jurisprudence has become a central focus of legal philosophy.[77] Externalist approaches to legal decision-making seek to appraise legal practice on the basis of criteria or theory external to that practice.[78] In contrast to this approach are

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the fact that being with-one-another concerns itself as such with averageness, which is an existential characteristic of the 'one.'" HEIDEGGER, supra note 69, at 164-65.

72. *See* DREYFUS, *supra* note 71, at 234; *see also* Guignon, *supra* note 61, at 226 ("[I]nvolvement in public forms of life can have a pernicious effect. It threatens to level all decisions to the lowest common denominator of what is acceptable and well adjusted.").

73. *See* DREYFUS, *supra* note 71, at 235; *see also* Guignon, *supra* note 61, at 226 ("Inauthentic Dasein is dispersed into a multiplicity of humdrum routines, drifting with the latest fads.").

74. *See* DREYFUS, *supra* note 71, at 313.

75. *See, e.g.*, FARBER & SHERRY, *supra* note 6, at 38-39 (describing how storytelling or narrative is a non-traditional form of scholarship); Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 684 (1992) ("Outsider scholarship is created and defined, in part, by contrast to traditional legal scholarship.").

76. *See* DREYFUS, *supra* note 71, at 315.

77. *See generally* DENNIS PATTERSON, LAW & TRUTH (1996); Pierre Schlag, *Clerks in the Maze*, 91 MICH L. REV. 2053, 2059 (1993) ("[The internal/external distinction] is typically used to patrol the borders of *Law's Empire*. It is used to rule out of bounds any perspective on law that is not consonant with what the judicial persona already takes to be 'law.'").

78. Douglas Lind, *Constitutional Adjudication as a Craft-Bound Excellence*, 6 YALE

internalist theorists. They take the position that judicial decision-making is autonomous from external standards or disciplines.[79] According to this internal point of view, there is no way to evaluate legal decision-making except by considering the internal conditions for excellence in legal practice.[80] One who takes the internalist position examines the practice of a craft to ascertain and describe the "interpretive methods and linguistic conventions" employed by those who engage in such craft.[81] Given this, the internalist approach to adjudication seeks to ascertain and describe the conventions actually employed by the practitioners of adjudication—i.e., lawyers and judges.

For example, one internalist, Philip Bobbitt, has described the six ways that lawyers argue for propositions in constitutional law.[82] He calls these forms of argument "modalities": (1) the "historical"—"relying on intentions of framers"; (2) the "textual"—"looking to the meaning of the words of the Constitution alone"; (3) the "structural,"—"inferring rules from the relationships that the Constitution mandates"; (4) the "doctrinal,"—"applying rules generated by precedent"; (5) the "ethical"—"deriving rules from those moral commitments of the American ethos that are reflected in the Constitution"; and (6) the "prudential"—"seeking to balance the costs and benefits of a particular rule."[83]

A judicial decision is then evaluated in terms of these internal modalities. A judicial decision is justified if one of these six internal modalities is used to render the decision. Thus, a legal decision is legitimate to the extent that it follows the forms of argument, i.e., one of the six modalities, recognized within our legal practice by attorneys and judges.[84]

J.L. & HUMAN 353, 356-57 (1994); *see also* Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 955 (1988) (discussing how most scholars take an externalist approach to law.).

79. *See* Lind, *supra* note 78, at 357. Stanley Fish describes the internalist perspective as follows: "the law does not wish to be absorbed by, or declared subordinate to, some other—nonlegal—structure of concern; the law wishes, in a word, to be distinct, not something else." Stanley Fish, *The Law Wishes to Have a Formal Existence*, *in* ANALYTIC JURISPRUDENCE ANTHOLOGY 133 (Anthony D'mato ed., 1996).

80. *See* Lind, *supra* note 78, at 357; *see also* Stephen R. Perry, *Professor Weinrib's Formalism: The Not-So-Empty Sepulchre*, 16 HARV. J.L. & PUB. POL'Y 597, 598 (1993) (describing internalist approaches as holding that "law can be understood and justified only in terms of itself, and not by reference to some external goal or ideal").

81. *See* Lind, *supra* note 78, at 359.

82. *See generally* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991).

83. *Id.* at 12-13.

84. *See* PATTERSON, *supra* note 77, at 137.

Thus, the forms of argument, or the internal modalities, are the ways in which legal propositions are shown to be true or false.[85] Contrary to externalist approaches, legal statements are not true by virtue of something separate and apart from the modalities and external to law as it is normally conceived.[86]

In contrast, external legal theorists seek to discover principles for legal decision-making that are external to the craft of adjudication.[87] Thus, they have sought to use techniques and theory from such external disciplines as philosophy or literature to evaluate the results of judicial decision-making.[88]

A. An Internalist Critique of Narrative or Storytelling

It seems that internalists would view narrative or storytelling as an externalist approach to law. Narrative, for example, does not seem to be one of the internal modalities—i.e., one of the forms of legal argument—that would be recognized by the practitioners of adjudication. Narrative, they would argue, lies outside of the practice of adjudication. Any judicial decision based on narrative would therefore be illegitimate on an internalist view. Indeed, the internalist contends that externalist standards are irrelevant.[89] Why? Because externalist theories permit the meaning of legal propositions to be determined separate and apart from actual legal practice.[90] According to internalists, however, actual legal practice gives us the only legitimate way to ascertain legal meaning.[91] Therefore, since external theorists base legal meaning on criteria which are external to legal practice, those theories generate legal conclusions that are necessarily irrelevant.[92]

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85. *Id.*

86. *See id.*; Michael C. Dorf, *Truth, Justice, and the American Constitution*, 97 COLUM. L. REV. 133, 147 (1997) ("Bobbitt does not identify the truth [or legitimacy] of statements of constitutional law with conditions external to the practice of constitutional law."). According to the internalist approach, "were it necessary for the law to have recourse to a supplementary discourse at crucial points, that discourse would be in the business of specifying what the law is and consequently, [the law's] autonomy would have been compromised indirectly." Fish, *supra* note 79, at 133.

87. *See* Lind, *supra* note 78, at 370.

88. *Id.*

89. *See* PATTERSON, *supra* note 77, at 137; Lind, *supra* note 78, at 396.

90. *See* Lind, *supra* note 78, at 390.

91. *Id.*

92. *Id.*; *see also* PATTERSON, *supra* note 77, at 137 ("Theory is banished not because it is wrong, but because it is irrelevant.").

Given this distinction between internal and external approaches, one can better understand a well-known criticism of the landmark case *Brown v. Board of Education*.[93] In *Brown*, the Supreme Court held that it was impermissible to segregate children in public schools on the basis of race.[94] *Brown* is often criticized because the Supreme Court relied on psychological studies to reach its decision—i.e., it relied on something external to law.[95] Therefore, the decision is sometimes said to be illegitimate. Theory is external to law, and, therefore, decisions based on external theory are illegitimate.

In this regard, one critic of critical race theory has raised an argument against narrative or storytelling that seems to be based on an internalist view of law. He criticizes storytelling, or the use of narrative, on the grounds that lawyers are supposed to deal with legal doctrine, not stories.[96] He asserts that "lawyers must look beyond stories to questions of doctrine."[97] Thus, storytelling or narrative poses a danger because "it can convince people to adopt a position without giving them a doctrinal basis for it."[98] The concern seems to be that storytelling is not a recognized mode of legal argument whereas doctrine is a recognized mode. Therefore, legal decision-making that is based on storytelling is illegitimate.

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93. 347 U.S. 483 (1954). As Derrick Bell has explained, "The Supreme Court's 1954 decision in *Brown v. Board of Education* has taken on a life of its own, with meaning and significance beyond its facts," DERRICK BELL, RACE, RACISM AND AMERICAN LAW 544 (3d ed. 1992), and "triggered a revolution in civil rights law." Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

94. 347 U.S. at 494-95.

95. *See, e.g.*, GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 501 (2d ed. 1991) ("Brown's reliance on empirical social science data has been the subject of continuing controversy."). *Id.*

96. *See* Douglas E. Litowitz, *Some Critical Thoughts on Critical Race Theory*, 72 NOTRE DAME L. REV. 503, 521 (1997).

97. *Id.*

98. *Id.* at 522. Judge Pierre Leval seems to have had a similar concern in mind when he recently stated that narrative techniques pose a threat to judicial decision-making. He writes

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

Pierre N. Leval, *Judicial Opinions As Literature*, *in* LAW'S STORIES 207 (Peter Brooks & Paul Gewirtz eds., (1996).

The internalist approach may appear to be a common sense approach. We typically teach first year students to use the forms of legal argument. Thus, we tend to teach them to take an internalist approach to law. It is possible to notice the change in students as they shift to an internalist perspective. At the outset, they may be concerned about the justice or morality of a legal decision, i.e., external matters. However, they are indoctrinated in the first year to "think like a lawyer." They learn to narrow their focus and to consider only internal matters. They learn to stay within the accepted forms of legal argument.

B. A Response to the Internalist Critique of Narrative

The consequences of an internalist approach may be negative for minorities. This result should not be too surprising. Outsiders—women and minorities—did not formulate our legal practices or modes of argument. Their perspective is not reflected in the practices. Thus, it would be surprising if their interests were protected by the internal forms of argument. I believe that this internalist approach is mistaken and that it is possible to defend, on philosophical grounds, an externalist approach that incorporates narrative.

1. Narrative and External Approaches to Law

As for the critics complaint that narrative that introduces something external to conventional legal doctrine into legal decision-making, the following may be said. The critics' position is not persuasive because the idea that legal decision-making is a function of something other than internal doctrine is well-established. The legal realists, for example, spent much time analyzing the nature of adjudication. They concluded that "traditional legal rules and concepts have limited value."[99] Indeed, leading realists took the position that "doctrine plays no role whatever in court's decision-making."[100] Instead, considerations external to law determined the

99. WILLIAM W. FISHER, III ET AL., AMERICAN LEGAL REALISM 164 (1993); *see also* ROBERT L. HAYMAN, JR. & NANCY LEVIT, JURISPRUDENCE: CONTEMPORARY READINGS, PROBLEMS, AND NARRATIVES 13 (1994) ("[R]ealists believed that legal rules were of limited use in deciding most controversies.").

100. FISHER ET AL., *supra* note 99, at 164; *see also* RAYMOND A. BELLIOTTI, JUSTIFYING LAW: THE DEBATE OVER FOUNDATIONS, GOALS AND METHODS 7 (1992) (stating that according to the legal realists, judges "cannot use past legal doctrine . . . [to] discover the antecedent right answer to the instant case").

results of adjudication.[101] The realists produced powerful arguments in favor of the position that internal doctrine could not constrain judicial decision-making. Most significantly, they argued that since legal doctrine is "internally inconsistent," doctrine could not generate clear answers to legal questions.[102]

The realists offered a number of suggestions regarding what external forces might be at work in legal decision-making. For example, one famous realist judge stated that judges decided cases on the basis of intuition or flashes of insight. Joseph Hutcheson wrote:

> I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch—the intuitive flash of understanding which makes the jump—spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.[103]

In this regard, some advocates of narrative have suggested that stories operate on mind sets through "flashes of recognition" or intuition.[104] In relying on intuition, then, narrative operates well within established external approaches to adjudication, such as legal realism.

Beyond this, there is no reason why legal philosophers or lawyers should be satisfied with an internalist approach that restricts itself to the modalities of ordinary legal argument. Other legal practices or conceptual schemes may be better able to resolve the problems of our society. Thus, arguably, legal philosophers/theorists should seek to reconstruct our legal

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101. *See* FISHER ET AL., *supra* note 99, at 164.

102. *Id.* at 165; *see also* Andrew Altman, *Legal Realism, Critical Legal Studies and Dworkin*, *in* JOEL FEINBERG & HYMAN GROSS, PHILOSOPHY OF LAW 189 (4th ed. 1991) ("In other words, while the realists claimed that all cases implicated a cluster of rules, they also contended there were competing rules leading to opposing outcomes."). Subsequently, scholars associated with the critical legal studies movement refined and developed the idea that legal doctrine is inherently contradictory and indeterminate. *See generally* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (describing how law is infused with irreconciably opposed principles); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

103. Joseph C. Hutcheson, Jr., *Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 278 (1929).

104. *See* Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1023 (arguing that narratives "[a]chieve credibility . . . through the ignition in the reader of a flash of recognition").

practices, our modes of legal argumentation, in order to create a conceptual scheme that will better solve the types of legal problems presented in social life.[105] As for the argument that externalist approaches are irrelevant, it seems the following may be said. If externalist forms of legal justification including narrative would be a more helpful instrument than our current forms of legal argument, then we should attempt to construct such schemes to help resolve practical problems.[106] We should not simply ban externalist approaches in legal philosophy. In selecting a conceptual scheme for resolving jurisprudential problems, for example, in deciding whether to adopt an internal versus an external approach such as narrative, we should be motivated by practical concerns.

How might narrative have practical value in terms of the resolution of social problems? What practical considerations favor the use of narrative? One major way that narrative may be useful is that it can advance reform—especially racial reform. According to proponents of narrative, judicial decision making is a function of mind set—"the bundle of presuppositions, received wisdom, and shared understandings against a background of which legal [decision-making] takes place."[107] Mind set operates at an unconscious level.[108] As a result, mind set may be transformed through narrative.[109] Legal narrative, then, is a tool to change mind set. This is especially true for counter narratives which provide alternative perspectives through narrative—i.e., perspectives that run counter to the dominant perspective. This can break down narrow habits of perceiving that stand in the way of racial reform. Although some may question whether counter narratives can transform the consciousness of dominant groups, there is philosophical support for the proposition that generating alternative visions of reality can advance racial reform.

The idea that generating alternative visions of reality through narrative, especially counter-narratives or counter-stories, can advance racial reform finds important support in the philosophy of science and contemporary philosophy of law. In this regard, it is helpful to consider Thomas Kuhn's

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105. *Cf.* CHALLENGES TO EMPIRICISM 19 (Harold Morick ed., 1980) (stating one should select a conceptual scheme on the basis of practical considerations).

106. *Cf.* Rudolf Carnap, *P.F. Strawson on Linguistic Naturalism*, *in* THE PHILOSOPHY OF RUDOLF CARNAP 938-39 (Paul A. Schilpp ed., 1963) (stating linguistic or conceptual frameworks may be changed or constructed to suit our practical needs).

107. Richard Delgado, *supra* note 1, at 2413.

108. *See* FARBER & SHERRY, *supra* note 6, at 35.

109. *Id.*

classic account of scientific change.[110] Kuhn argued that during periods of "normal science," perception is dependent on mainstream, shared "paradigms."[111] According to Kuhn, a scientific revolution occurs when one paradigm is replaced by another.[112] Paradigm shifts cause scientists to view the world in new and different ways.[113] During scientific revolutions, then, scientists experience perceptual shifts.[114] According to Kuhn, the transition from one paradigm to another is a conversion experience that cannot be compelled by logical argument.[115]

Applying these notions to judicial decision-making, one leading philosopher of law, Judge Richard Posner, recently has argued that major reforms in law often are produced by a similar conversion process.[116] Such conversion involves a perceptual shift where one comes to see the world differently.[117] According to Judge Posner, this process explains the major transformations that have happened in law, including the expansion and recognition of civil rights.[118] Thus, the key turning points and watershed

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110. *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

111. *See* KUHN, *supra* note 110, at 10-17, 113. Kuhn defines paradigms as "accepted examples of actual scientific practice—examples which include law, theory, application, and instrumentation together—[which] provide models from which spring particular coherent traditions of scientific research." *Id.* at 10. Subsequently, Kuhn identified two primary meanings of paradigms "exemplars, which are concrete problem solutions accepted by the scientific community" and "disciplinary matrixes, which are the shared elements which account for the relatively unproblematic character of professional communication and the relative unanimity of professional judgment in a scientific community, and have as components symbolic generalizations, shared commitments to beliefs in particular models, shared values and shared exemplars." FREDERICK SUPPE, THE STRUCTURE OF SCIENTIFIC THEORIES 138 (1977).

112. *See* KUHN, *supra* note 110, at 12; *see also* SUPPE, *supra* note 111, at 146-47 (stating that scientific revolution "requires rejecting the old disciplinary matrix in favor of another which contains the new theory").

113. *See* KUHN, *supra* note 110, at 111; *see also* SUPPE, *supra* note 111, at 149 ("The conceptual changes which come from accepting a new disciplinary matrix are like a gestalt switch; two observers looking at the same things from within different disciplinary matrixes see different things."). *Id.*

114. *See* KUHN, *supra* note 110, at 112-13 (describing experiments on reeducation process of scientists).

115. *See id.* at 150.

116. *See* RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 459 (1990).

117. *See* KUHN, *supra* note 110, at 149 (citing LUDWIG WITTGENSTEIN, ON CERTAINTY, 14(e), 1D 92 (G.E.M. Anscombe & G.H. Von Wright eds., 1969)).

118. *See* POSNER, *supra* note 116, at 151 (stating that conversion process explains "many of the seismic shifts that have occurred in our law, such as the great expansion of

moments in American law are the result of "changing outlooks."[119] Attorneys and judges began to view legal doctrine in a new light.[120] Accordingly, there is reason to believe that providing alternative perspectives through narrative may help stimulate a paradigm shift in the area of race, causing lawyers and judges to look at legal issues implicating race differently.[121]

IV. NARRATIVE, SOCIAL CHANGE AND TRUTH

The notion that storytelling may help bring about social change generates another objection. For example, Farber and Sherry argue that the main goal of scholarship should be to ascertain the truth, not bring about change.[122] This criticism seems to be based on a familiar dualism: the alleged dualism between theory (scholarship) and practice (change).[123] There is a long tradition in philosophy which holds that there are various dualisms. These dualisms include the alleged distinction between mind and body[124] and word and object.[125] There have been efforts to bridge those dualisms.[126] In this regard, the alleged dualism between theory and practice has been denied. For instance, one philosopher famously argued that the point of theory/scholarship was precisely to bring about change: "The philosophers have only interpreted the world, in various ways; the point is to change it."[127]

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liability on virtually all fronts since the 1950s, the expansion of the rights of criminal defendants and of prisoners, the increased recognition of women's rights and the explosive growth of constitutional law").

119. *Id.* at 152.

120. *See id.* at 151-52.

121. *Cf.* Margaret Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1722 (1990) (arguing that paradigm shifts in law are necessary in order to change the status quo for oppressed people.)

122. *See* Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647, 650 (1994).

123. *See* Anthony V. Alfieri, *Black and White*, 85 CAL. L. REV. 1647, 1682 (1997) ("The liberal canon divides theory and practice into rigid categories.").

124. *See generally* Rene Descartes, *Meditations*, *in* PHILOSOPHICAL WORKS OF DESCARTES (E.S. Haldane & G.R.T. Ross trans., 1967).

125. *See generally* LUDWIG WITTGENSTEIN, THE TRACTATUS LOGICO PJILOSOPHICUS (D.F. Pears & B.F. McGuinness trans., 1974).

126. *See generally* RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979).

127. Karl Marx, *Theses on Feuerbach*, *in* KARL MARX: SELECTED WRITINGS 158 (David McLellan ed., 1977).

Similarly, the American pragmatists also viewed the alleged distinction between thought and action as an artificial construction.[128] Given this, the Farber and Sherry view regarding the point of scholarship is one that has been rejected by some thinkers. Thus, it is not a persuasive criticism of the use of narrative in law.

Beyond this, the critics of narrative are also mistaken to disconnect truth from practice or to seek change in the world. The notion of truth may be closely tied to practice or social impact or social reform. According to the pragmatists, for example, truth is a function of "social need."[129] Thus, William James defined the truth as "whatever proves itself to be good in the way of belief."[130] Accordingly, the critics of narrative are wrong to assert a sharp divide between seeking truth and seeking change or social reform.

Significantly, the possibility that narratives can stimulate racial reform also has implications for Derrick Bell's notion that racism is permanent. [131] Bell contends that minorities will always be subordinated and that minorities will be unable to truly establish their civil rights.[132] What might explain this phenomenon?

One possible explanation is that minorities and members of the dominant group operate from different conceptual schemes.[133] They see the world and the issue of race through different conceptual frameworks.[134] In my view, this may help explain the persistence of racism. So long as these

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128. *See* Radin, *supra* note 121, at 1707; *see also* JOHN DEWEY, EXPERIENCE AND NATURE at xvii (2d ed. 1929) ("The chief obstacle to a more effective criticism of current values lies in the traditional separation of nature and experience, which it is the purpose of this volume to replace by the idea of continuity.").

129. POSNER, *supra* note 116, at 464.

130. WILLIAM JAMES, PRAGMATISM 76 (1947). William James offers additional explanation:

> Truth for us is simply a collective name for verification processes, just as health, wealth, strength, etc., are names for other processes connected with life, and also pursued because it pays to pursue them. Truth is made, just as health, wealth and strength are made, in the course of experience.

Id. at 104.

131. *See generally* BELL, *supra* note 1.

132. Bell states:

> Minorities "will never gain full equality in this country. Even those Herculean efforts we hail as successful will produce no more than temporary 'peaks of progress,' short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies."

Id. at 12.

133. *See supra* notes 37-50 and accompanying text.

134. *See supra* notes 42-50 and accompanying text.

world views are not bridged, then racism may be, as Derrick Bell contends, permanent. Narratives provide a way to bridge the parallel worlds. They can help generate new ways of seeing things—i.e., the paradigm shift. Thus, narratives may provide the only way to undermine racism.

V. NARRATIVE AND REASON

Some have criticized the use of narrative on the ground that it is hostile to the Enlightenment's ideal of "reason": that our institutions, including legal institutions, should be based on reason.[135] They argue that narrative seeks to change perspectives of the dominant group through stories instead of reason.[136] Thus, the use of narrative is anti-reason. This argument is not persuasive. The storyteller's reliance on something other than rational argument to change points of view is consistent with scientific practice. As discussed above, Kuhn has argued that scientific revolutions occur when there is a paradigm shift.[137] During such a shift, scientists begin to look at the world in different ways. Such a paradigm shift is a conversion experience which Kuhn contends cannot be produced by rational argument or reason. Thus, the position of the advocates of narrative is at least as strong as actual scientific practice.

Beyond this, the present-day critics of narrative have distorted the role of reason in law, overemphasizing its importance. Significantly, they are not the first to do so. The realists criticized the legal formalists on the ground that formalists gave too much importance to the role of logic or reason in law and failed to acknowledge the importance of intuition in adjudication.[138] Thus, Oliver Wendell Holmes wrote that the "felt necessities . . . and . . . intuitions of public policy . . . have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[139] Similarly, Roscoe Pound criticized formalism and its elevation of reason as follows:

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135. *See* FARBER & SHERRY, *supra* note 6, at 47-51.

136. *See id.* at 35; *cf.* Larry Alexander, *What We Do and Why We Do It*, 45 STAN. L. REV. 1885, 1890-96 (1993) (stating that outsider scholarship "fails the test for rational discourse").

137. *See supra* notes 110-15 and accompanying text.

138. *See* Douglas Lind, *Logic, Intuition and the Positivist Legacy of H.L.A. Hart*, SMU L. REV. (forthcoming 1999).

139. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

> It is an every day experience of those who study decisions that the results are usually sound, whether the reasoning from which the results purport to flow is sound or not. The trained intuition of the judge continually leads him to right results for which he is puzzled to give unimpeachable legal reasons.[140]

The critics of narrative are making the same mistake made by the formalists. They seek to overemphasize the importance of reason in law. Realist legal philosophy has shown that law is not about reason but is instead about intuition or flashes of insight. In relying on intuition and flashes of insight, then, narrative is firmly supported by the realist tradition in legal philosophy.

Moreover, in the area of race, reliance on something other than reason to generate reform may be especially appropriate. The issue of race may not be resolvable by appealing to the Enlightenment's ideal of reason.[141] Long ago, Thomas Jefferson pointed out that racial divisions were based not on reason but on powerful feelings and biases. He wrote: "Deep rooted prejudices entertained by the whites; ten thousand recollections, by the blacks, of the injuries they have sustained . . . will divide us into parties, and produce convulsions that will probably never end but in the extermination of one or the other race."[142]

Similarly, Charles Lawrence has observed that "[r]acism is irrational in the sense that we are not fully aware of the meanings we attach to race or why we have made race significant."[143] Since racial divisions are founded in something other than reason—i.e., deeply held prejudices and sentiments—perhaps it can only be undone by techniques, such as narrative, that do not depend on reason.

VI. CONCLUSION

The use of narrative in law poses a number of philosophical/jurisprudential issues. Although the critics of narrative have recognized the relevance of philosophy to the debate over the use of

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140. Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 951 (1923).

141. *See* K. ANTHONY APPIAH & AMY GUTMANN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 179 (1996) ("Race has been a great challenge to the hope of reason and the spirit of democracy from the beginning of the American republic.").

142. Thomas Jefferson, *Notes on the State of Virginia (1781-1782)*, *in* THOMAS JEFFERSON, WRITINGS 264 (1984).

143. Lawrence, *supra* note 52, at 330.

narrative in law, they have not fully considered the philosophical issues at stake. In this essay, I have sought to use philosophy to explain the importance of narrative to outsiders and to respond to some key philosophical objections to the use of narrative in law.