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The Structure of Judicial Opinions

John Leubsdorf†

A judicial opinion tells many stories and speaks with many voices. It is less a single and anonymous utterance of the law than a condensed quarrel, less a line than a knot. It is precisely that complexity that enables it to absorb and seek to resolve a variety of conflicts: conflicts between parties, between social interests, between judges, between justice in the individual case and general rules of law. Its stories and voices also help it to lodge in a reader's mind, carrying the conflicts from which it springs, disseminating its effort to resolve them, while opening different directions for future growth.

These characteristics of judicial opinions are not happenstance. They are defining features of a special and unstudied literary genre. An opinion works in differing but related ways. Like a novel, it portrays a human conflict. Like a letter, it intervenes in the conflict it portrays. Like a treatise, it gives a systematic analysis meant to be applicable to many situations. Like a work of history or criticism, it compares disputes that have occurred over the years and analyzes what past authors have proposed. Like a dialogue, it embraces clashing approaches to the conflict before the court. Like a script or computer program, it gives instructions to those who act and decide. Like an oration, it seeks to persuade.

Only a complex structure can fulfill these various functions. Learning to be a lawyer requires one to develop at least an implicit understanding of this structure by learning to read an opinion as an opinion, rather than as some other kind of composition. Law students are not the only ones tempted to read a court's opinion as an essay on the law, detached from its facts and procedural context, or as a reliable description of the

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facts or law or history it recites, or as an argument for the result the author prefers. Of course, an opinion could contain any of these, but not always, and not always in the way uninformed reading might suggest. The way any of them operates is inevitably affected by its appearing as part of an opinion. Considering the structure of opinions in a more explicit and detailed way, we may understand them better.

This Essay seeks to show how opinions weave together different stories and voices. An opinion may tell the story of the dispute in question, of proceedings in court, of what did not actually happen but might have happened or could happen in the future, of comparable past cases, or of changes in law or society. Each story forms a background against which the reader may appraise the decision.

Many voices, heard more or less directly, may tell or discuss those stories: the author of the opinion, concurrenrs and dissenters, trial judges, judges who wrote in other cases, legislatures and legislators, lawyers, and sometimes even litigants and witnesses. It would be a wild overstatement to describe the typical judicial opinion, as Bakhtin describes Dostoevsky's novels, as a "plurality of independent and unmerged voices and consciousnesses, a genuine polyphony of fully valid voices."¹ Often, indeed, the opinion's author succeeds in swallowing other voices, which can be heard, if at all, only like the duck quacking from the wolf's stomach in another Russian work, *Peter and the Wolf*.² Still, a judicial opinion offers real opportunities for dialogue.

The interweaving of stories and voices constitutes the structure of a judicial opinion, or at least that part of it discussed here. By structure, I do not mean the order in which an opinion's components appear. Opinions do tend to follow a standard order—statement of the procedural posture, exposition of relevant facts, discussion of legal issues, and disposition of the case. This order is, of course, appropriate to the opinion's functions, just as the somewhat similar order of a classical forensic oration or modern brief serves its function of persuasion.³ Yet judges often change the usual order on grounds of

1. MIKHAIL BAKHTIN, PROBLEMS OF DOSTOEVSKY'S POETICS 6 (Caryl Emerson trans., Univ. of Minn. Press 1984) (1929).

2. SERGEI PROKOFIEV, PETER AND THE WOLF (Maria Carlson trans., Viking Press 1st ed. 1982) (1936).

3. See FED. R. APP. P. 28; QUINTILIAN, INSTITUTIO ORATORIA III, at ix (H.E. Butler trans., Harvard Univ. Press 1963) (written in the first century

convenience or style, for example, by postponing a statement of facts to the discussion of the legal issue to which those facts belong.

Some changes of order—such as disclosing at the outset the court's legal conclusions or disposition of the case—would have an enormous impact in another genre. A fictional narrative that discloses on its first page what will ultimately become of its characters is radically different from one reserving that information.⁴ This remains true, in some respects, even for a second reading by a reader who already knows the outcome. Because narratives depend so much on suspense and development, disclosing the plot's outcome tends to make both author and reader shift the focus of the work to some kind of suspense and development other than the plot, such as the effort to understand what we already know to have happened. Judicial opinions rarely rely much on suspense, so their order of presentation is not crucial in the same way.

What counts in opinions is trying to organize a variety of quarreling claims into a resolution satisfactory both for the dispute before the court and for the law. The structure of an opinion is therefore, for my purposes, composed of its stories and voices and their relationships.

The interweaving of different and sometimes conflicting stories and voices can make judicial opinions quite different from the model of impersonal, monologic, unquestioning declaration to which their authors, in the view of some, aspire.⁵ Perhaps legal scholars have been too willing to accept a literary view of law as mechanical and repressive without questioning literature's own claims to insight and perspective. Law and literature are competitors as well as partners.⁶ Even Robert

A.D.).

4. See, e.g., FORD MADDOX FORD, *THE GOOD SOLDIER* (Albert & Charles Boni, Inc. 1927) (1915) (utilizing a narrator who discloses much of the story immediately, although readers understand more as he proceeds); JOHN MILTON, *PARADISE LOST* (Northrop Frye ed., Holt, Rinehart & Winston 1960) (1667) (summarizing in the opening lines the plot, which the reader is assumed to know in any event); A.B. YEHOOSHUA, *MR. MANI* (Hillel Halkin trans., Doubleday 1992) (1989) (in which the story unfolds in reverse chronological order).

5. See Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 *YALE J.L. & HUMAN.* 201 (1990); Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 187, 188 (Peter Brooks & Paul Gewirtz eds., 1996); Gerald B. Wetlauffer, *Rhetoric and its Denial in Legal Discourse*, 76 *VA. L. REV.* 1545, 1561-63 (1990).

6. See, e.g., HARRIET MURAV, *RUSSIA'S LEGAL FICTIONS* 1-7 (1998); Tony

Cover and Shoshana Felman, both of whom portray law as a scene of conflict, may overstate the extent to which courts succeed in bridging or suppressing that conflict.⁷

Some opinions approach the supposed ideal more closely than others. Yet there are ways of opening up even those written in the terse, anonymous Continental style.⁸ Although judges may hope to issue unanswerable opinions, who today would espouse a stylistic ideal of impassive impersonality, when we all know that opinions are written by human judges about human problems?⁹ Better that an opinion should show the problems and contexts to which its author responds. The form of opinions—at least Anglo-American appellate opinions, with their tension between stories and voices—is more suited to doing that than to fostering an illusion that the disembodied voice of logic is speaking. Indeed, the form, by acknowledging that the court chooses among competing views, might be said to make opinions self-deconstructing in ways much like those alleged of literary fiction.¹⁰

By tracing the stories and voices of judicial opinions, I hope to be more specific than some of those who routinely describe law as some sort of narrative.¹¹ What is important is just what sort of narrative an opinion is—or rather, what sorts of narrative, for each opinion contains several interacting narratives—and what the nature of these narratives implies about what judges are doing and how readers are reacting. Likewise, I

Sharpe, *(Per)versions of Law in Literature*, in *LAW AND LITERATURE* 91 (Michael Freeman & Andrew D.E. Lewis eds., 1999).

7. See Robert M. Cover, *Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4, 44-60 (1983); Shoshana Felman, *Forms of Judicial Blindness: Traumatic Narratives and Legal Repetitions*, in *HISTORY, MEMORY, AND THE LAW* 25 (Austin Sarat & Thomas R. Kearns eds., 1999).

8. See, e.g., Mitchel de S.-O.-F.E. Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 *YALE L.J.* 1325, 1343-1402 (1995). That is true even of legislation, which would seem the epitome of monologic assertion. See John Leubsdorf, *Deconstructing the Constitution*, 40 *STAN. L. REV.* 181, 198-200 (1987).

9. James Boyd White develops a view similar to that in the text in works including *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* (1990).

10. See PAUL DE MAN, *BLINDNESS AND INSIGHT: ESSAYS IN THE RHETORIC OF CONTEMPORARY CRITICISM* 17-18, 135-40 (2d ed. rev. 1983). One could, however, argue that opinions need deconstruction to undermine their claims to be free of fiction. From that point of view, this Essay could be considered to attempt that deconstruction.

11. For perceptive criticism of this practice, see Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 *BUFF. L. REV.* 141 (1997).

hope to explore regions that rhetorical analyses of opinions have not reached. Because these analyses stress the style and imagery of opinions rather than their structure, they tend to show how the language of opinions can pull the wool over the eyes of their readers, and sometimes their writers as well¹²—a good thing to know, but one that may distract attention from more central effects. After all, most opinions are not sufficiently coherent to make their imagery or style very revealing. All opinions, however, even those written by average judges or average clerks on average days, must incorporate at least some of the stories and voices I will describe. And anyone writing a judicial opinion must somehow use or misuse the possibilities its structure evokes and the expectations that help structure its readers' responses.

Does exploring the structure of opinions have any use? Understanding the legal process is usually helpful, and this Essay will suggest some practical consequences of the structure of judicial opinions. I confess, however, that I am writing this Essay primarily because seeing opinions in a new light and exploring their complexity interests me, and in the hope that this will also prove interesting to others. The judicial opinion, despite its familiarity and the dullness of many of its exemplars, turns out to be an unexpectedly complicated and subtle genre, comparable in these respects to more traditional literary genres. Just as we understand classical music better if we know something about the possibilities of sonata form, considering the structure of judicial opinions can help us understand how a particular author has shaped a particular opinion.

12. *E.g.*, RICHARD A. POSNER, *LAW AND LITERATURE* 266-72 (rev. ed. 1998) (unmasking Justice Holmes' dissent in *Lochner v. New York*, 198 U.S. 45 (1905)); Sherry F. Colb, *Words That Deny, Devalue, and Punish: Judicial Responses to Fetus-Envy?*, 72 B.U. L. REV. 101, 107-39 (1992) (unmasking several opinions); Richard Delgado & Jean Stefancic, *Imposition*, 35 WM. & MARY L. REV. 1025, 1029-58 (1994) (unmasking conservative opinions' strategies for delegitimizing those who seek change); Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 389-413 (1989) (unmasking Justice Scalia's opinion in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), while praising Justice Marshall's); Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805, 1813-32 (1993) (unmasking Justice White's opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986)). For a discussion of metaphors and other figures of speech in First Amendment cases, see HAIG BOSMAJIAN, *METAPHOR AND REASON IN JUDICIAL OPINIONS* (1992).

I. STORIES

A single opinion can contain a number of stories. Each story imposes a requirement of narrative coherence: The result of the case should fit naturally into the story. The opinion's author can emphasize one story rather than another and can tell each kind of story in different ways. Like other constraints on judges, constraints of narrative are therefore flexible.

A. WHAT HAPPENED

1. The Significance of a Statement of Facts

A trier of fact need not set forth the facts out of which a dispute arises. Civil juries do not usually do so—much to the shock of some foreign courts¹³—and, in some states, neither do trial judges deciding civil cases.¹⁴ Criminal trials do not lead to written findings by either juries or judges. Even on the appellate level, Ohio attempted to reduce the operative portion of opinions to the syllabus,¹⁵ and many of the facts of a French Court of Cassation case often can be discovered only if someone has published a note on the court's decision.¹⁶ Indeed, recent

13. See *Solimene v. B. Grauel & Co.*, LG Berlin, *Recht der Internationalen Wirtschaft* [RIW], 35 (1989), 988, translated in ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND ARBITRATION* 440 (1993) (declining to enforce a Massachusetts judgment because of a lack of factual findings and other defects). *But see* FED. R. CIV. P. 49 (allowing but not requiring special verdicts and interrogatories to a jury).

14. John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 630 (1984) (criticizing the absence of a finding requirement).

15. See *State v. Hauser*, 131 N.E. 66, 67 (Ohio 1920) (criticizing—in the opinion but not the syllabus—reliance on opinions rather than syllabi); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 97-99 (1960) (discussing the collapse of this effort). Similarly, compare *Corbin v. Wilkinson*, 52 P.2d 45, 47 & syll. 4 (Okla. 1935), in which the court rejected dictum of a previous case because not included in the syllabus, with *Oklahoma Tax Comm'n v. McClinnis*, 409 P.2d 355, 359 & syll. 2 (Okla. 1965), in which the court used facts in a previous case's opinion to construe its syllabus. See *Union Underwear Co. v. Aide*, 159 S.E.2d 217, 221 (W. Va. 1967) (discussing the status of the syllabus).

16. See Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 67, 87-88 (2001). See generally James Boyd White, *What's an Opinion For?*, 62 U. CHI. L. REV. 1363 (1995) (discussing the uses of opinions).

scholarship suggests that even Hammurabi's Code, long taken for legislation, was intended as a collection of abstracts of the King's decisions, published as a sort of treatise on justice for the guidance of other judges.¹⁷

The incorporation of a full statement of facts into Anglo-American opinions is a relatively recent development that may well be related to the rise of the English novel in the eighteenth century—one more link between judicial opinions and literature. Reported opinions have not always contained a statement of facts. Even after judicial reporters started attempting to transcribe the actual words of judges, they often stated the facts on their own authority, before turning to the lawyers' arguments and the court's decision.¹⁸ Although sometimes noting that the judge had stated the facts while delivering his opinion, the reporter apparently felt no need to include that statement as part of the opinion.¹⁹ Full judicial statements of facts became common only with the arrival of the nineteenth century.²⁰ Meanwhile, the same sort of particularized narration of a series of events found in a statement of facts had also become a defining feature of the English novel, as well as of other new genres: news reporting, crime stories, travel literature, and the modern biography.²¹ These new forms, which may have influenced the development of the judicial statement of facts, themselves reflected a new cultural emphasis on facts and evidence to which

17. JEAN BOTTÉRO, *MESOPOTAMIA: WRITING, REASONING, AND THE GODS* 156-84 (Zainab Bahrani & Marc Van De Mieroop trans., Univ. of Chicago Press 1992) (1987).

18. *E.g.*, Gwynne v. Heaton, 28 Eng. Rep. 949 (Ch. 1778); Hamilton v. Mendez, 96 Eng. Rep. 154 (K.B. 1761); John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 576-78 (1993). On the development of judicial reporting, see *infra* Part III.A.

19. *E.g.*, Alexander v. Baltimore Ins. Co., 8 U.S. (4 Cranch) 370 (1808); King v. Corporation of Bath, 104 Eng. Rep. 736 (K.B. 1811); Muckleston v. Brown, 31 Eng. Rep. 934 (Ch. 1801).

20. *E.g.*, Peisch v. Ware, 8 U.S. (4 Cranch) 347 (1808); Oliver v. Oliver, 161 Eng. Rep. 581 (Consistory Ct. of London 1801) (possibly reflecting the court's civil law procedure); Dean of York v. Middleborough, 148 Eng. Rep. 888 (Ex. Ch. 1828). Fuller development of this theme would require differentiating the various ways in which factual findings or allegations could be brought before appellate courts under the old procedural systems.

21. *E.g.*, LENNARD J. DAVIS, *FACTUAL FICTIONS: THE ORIGINS OF THE ENGLISH NOVEL* (1983); J. PAUL HUNTER, *BEFORE NOVELS: THE CULTURAL CONTEXTS OF EIGHTEENTH-CENTURY ENGLISH FICTION* (1990); MICHAEL MCKEON, *THE ORIGINS OF THE ENGLISH NOVEL 1600-1740*, at 1-128 (1987); IAN WATT, *THE RISE OF THE NOVEL* (1967).

English legal practice may have contributed.²²

Although, as we will see, a narrative of the facts has the same elements as other narratives,²³ it differs in many ways from literary fiction. This is because its functions differ from those of fiction. Recounting the facts provides some assurance to litigants and their lawyers that the judge delivering the opinion knows what the dispute is about. It allows readers to appraise the adequacy of the court's resolution of that dispute, and allows higher courts to consider challenges to the judge's factual assumptions. It permits later readers to consider what the court says in the light of the factual situation it confronted, so that court rulings may be understood, limited to their facts, or extended. It provides an illustrative fact pattern, not always a typical one, against which formulations of the law may be tested. This last function resembles the use of literature as a storehouse for models of human behavior.

The story form in either law or literature, useful though it may be, subtly affects the responses of both narrators and readers by invoking assumptions imbedded in story-telling. It is expected, for example, that the events of a story will be related to each other, not randomly thrown together. Their relationship will involve development through time, usually in a way in which earlier events cause later ones. The relationship is also ethical. Readers feel satisfied when the end of a story is a fitting resolution of what has gone before, but perceive an unfitting resolution as implausible (depending on the details), satirical, or absurdist (although even satiric and absurdist fictions tend to develop according to a logic of some kind²⁴). Likewise, a story almost always has living protagonists, whose acts have intentions and consequences, and who are subject to ethical judgment. A conventional story is also limited and self-sufficient: It has a beginning and an end,²⁵ and its contents

22. See, e.g., BARBARA J. SHAPIRO, *A CULTURE OF FACT: ENGLAND, 1550-1720* (2000); ALEXANDER WELSH, *STRONG REPRESENTATIONS: NARRATIVE AND CIRCUMSTANTIAL EVIDENCE IN ENGLAND* (1992).

23. For a survey of these elements, see MIEKE BAL, *NARRATOLOGY: INTRODUCTION TO THE THEORY OF NARRATIVE* (Christine van Boheemen trans., Univ. of Toronto Press 1985) (1978).

24. E.g., EUGÈNE IONESCO, *RHINOCEROS AND OTHER PLAYS* (Derek Proux trans., Grove Press, Inc. 1960) (1960); EVELYN WAUGH, *DECLINE AND FALL* (Little, Brown & Co. 1949) (1928).

25. See ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 152-53 (2000) (observing that lawyers may choose, to some extent, how far back to trace their stories). This book includes many illuminating insights

should suffice to explain what happens in it. Really believing that everything is related to everything else would make it hard to write any story other than a complete history of the universe.²⁶

These various assumptions are widespread in our society, and lawyers usually take them for granted. That is one reason we use stories so much in legal opinions as well as in many other kinds of writing.²⁷ Indeed, it may be impossible for humans to understand a human's behavior except as part of a story.

The law's use of stories not only helps keep the assumptions of story-telling alive²⁸ but is deeply related to legal thought. Lawyers and judges, for example, tend to resist imposing liability based on a mere statistical correlation between what the evidence describes and the defendant's characteristics, preferring even unreliable eyewitness evidence that a particular defendant was seen committing the crime or tort—in other words, a story.²⁹ It has been claimed that

in the development of the capacity to assimilate "stories" and to tell them, . . . the child also learns what it is to be that creature that . . . is capable of making promises . . . and of linking his end to his beginning in such a way as to attest to an "integrity" which every individual must be supposed to possess if he is to become a "subject" of (any) system of law, morality, or propriety.³⁰

In any event, it is almost impossible for members of our le-

into legal story-telling.

26. For a sketch of a legal system presupposing that causes and consequences extend beyond a party's present life, see REBECCA REDWOOD FRENCH, *THE GOLDEN YOKE: THE LEGAL COSMOLOGY OF BUDDHIST TIBET* (1995).

27. *E.g.*, HAYDEN WHITE, *METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH-CENTURY EUROPE* (1973) (explaining narrative techniques used in historical writing); STEVEN MARCUS, *REPRESENTATIONS: ESSAYS ON LITERATURE AND SOCIETY* 247-310 (1954) (explaining narrative techniques used in case history by Freud); *NARRATIVE IN CULTURE: THE USES OF STORYTELLING IN THE SCIENCES, PHILOSOPHY, AND LITERATURE* (Cristopher Nash ed., 1990).

28. AMSTERDAM & BRUNER, *supra* note 25, at 140-42.

29. *See, e.g.*, *Smith v. Rapid Transit, Inc.*, 58 N.E.2d 754 (Mass. 1945). For some of the noteworthy scholarly literature on this subject, see Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 48 (Daniel Kahneman et al. eds., 1982), and Jonathan J. Koehler & Daniel N. Shaviro, *Veridical Verdicts: Increasing Verdict Accuracy Through the Use of Overtly Probabilistic Evidence and Methods*, 75 *CORNELL L. REV.* 247 (1990).

30. HAYDEN WHITE, *THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION* 36 (1987) (ascribing this claim to Roland Barthes).

gal culture to discuss a legal issue without connecting it to some story, real or hypothetical, whether that story is an example of circumstances in which the issue arises or a legal history of how the issue came to exist or a description of an imagined debate. Even when one court certifies an issue of law for decision by another court, there is usually an accompanying factual narrative.³¹

2. The Nature of the Story

The story a statement of facts recites is usually of a special sort, a species of moral tale. The author of such a judicial tale may have two prime concerns: to explore who did what, and to attribute legal (but also moral) responsibility. These may also be concerns of literature, which indeed has long resorted to depictions of trials in order to portray the search for truth³² and moral judgment.³³ Unlike most literary moral tales, however, those that judges tell in opinions are almost entirely retrospective. The events in dispute have already happened, and are being reviewed to educe a final judgment about them, albeit one that may lead to prospective relief.

Literary narrators, by contrast, even when they position themselves after the events they describe, often try to keep readers in suspense.³⁴ The judgments that fictions suggest are usually meant for readers still facing similar problems and choices, for example, the young women that Jane Austen contemplated as readers. Judicial authors may also hope to influence future behavior—and sometimes with stronger warrant than novelists—but more through the sanctions they decree and the rules they lay down than through reflection by future actors on the misadventures of past Palsgrafs or Marburys.

To the extent that judges seek to grant relief shaping the future, they resemble less authors of fiction than participants in psychoanalysis, who similarly tell and retell the past in or-

31. *E.g.*, *Reilly v. Alcan Aluminum Corp.*, 181 F.3d 1206 (11th Cir. 1999).

32. *E.g.*, 1 *Kings* 3 (judgment of Solomon); *Daniel* 13 (apocrypha) (Susanna and the Elders). For the influence of such Biblical trial narratives on procedural law, see generally R.H. Helmholz, *The Bible in the Service of the Canon Law*, 70 *CHI.-KENT L. REV.* 1557 (1995).

33. AESCHYLUS, *THE EUMENIDES*, in *AESCHYLUS: THE ORESTEIA* 97 (Douglas Young trans., Univ. of Okla. Press 1974) (458 B.C.) (the trial of Orestes).

34. *E.g.*, *JOSEPH CONRAD, LORD JIM* (1921).

der to reconstruct and resolve it.³⁵ Both projects are subject to evidentiary restrictions: Judges follow the law of evidence, and analysis limits itself to the analysand's own memories and thoughts. Both appraise the evidentiary material carefully and critically, although analysands (and analysts as well) are encouraged to introspection and self-interrogation while judges are more likely to direct suspicion at witnesses than at their own prepossessions. (Hence Jerome Frank's proposal that all judges should be psychoanalyzed.³⁶) Psychoanalysis, ultimately, is more oriented to the future than law: It looks to the past mainly to improve the future, and often relies less on the analysand's memories than on his or her present interactions with the analyst and others.³⁷ Law is more concerned with redressing the past, and more openly uses moral and judgmental narratives.

The moral tale an opinion tells is likely to be nuanced and bittersweet. Normally, it will involve two characters in collision, which rules out the kind of story that shows how relationships and influences pervade a social milieu³⁸ as well as the rarer story of one person's inner development.³⁹ Rarely will either party be wholly in the right, if only because such simple cases are less likely to result in opinions. Often, good has not triumphed in the real world—the civil plaintiff has been victimized, the criminal defendant has accomplished his bad aim—and only the court, setting aside its role of narrator to assume that of *deus ex machina*, can begin to redress the balance. Unfortunately, all a court can do is hand out money and punishments, which do not really heal the harm.⁴⁰ Sometimes, it re-

35. See Roy Schafer, *Narration in the Psychoanalytic Dialogue*, in *ON NARRATIVE* 25 (W.J.T. Mitchell ed., 1981).

36. JEROME FRANK, *COURTS ON TRIAL: MYTH & REALITY IN AMERICAN JUSTICE* 247-50 (1949); see John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 *N.Y.U. L. REV.* 237, 247-52 (1987).

37. DONALD P. SPENCE, *NARRATIVE TRUTH AND HISTORICAL TRUTH: MEANING AND INTERPRETATION IN PSYCHOANALYSIS* (1982).

38. *E.g.*, ANTHONY POWELL, *A DANCE TO THE MUSIC OF TIME* (1975); MARCEL PROUST, *REMEMBRANCE OF THINGS PAST* (C.K. Scott Moncrieff & Terence Kilmartin trans., Chatto & Windus 1982) (originally published in eight parts, 1913-1927).

39. *E.g.*, HERMANN BROCH, *THE DEATH OF VIRGIL* (Jean Starr Untermeyer trans., Routledge & Kegan Paul 1977) (1965) (recounting an author's death in another German work); THOMAS MANN, *DEATH IN VENICE* (Kenneth Burke trans., Alfred A. Knopf, Inc. 1973) (1912) (illustrating the central character's relationship, which exists mainly in his own mind).

40. Courts also award injunctive relief, the limits of which need not be

fuses to do even that much.⁴¹ Likewise, when a civil or criminal defendant turns out to have been the good guy, she is vindicated only after suffering the ordeal of litigation.

3. The Narrator

The author of an opinion, although obliged to tell a moral tale, can often sway the reader's sympathies by choosing the point of view and even the genre of that tale. Criminal procedure cases provide the most familiar example. A judge deciding to uphold a conviction will tell a detective story, as seen from the point of view of the detective who ultimately succeeds in tracking down proof of guilt. A judge deciding to reverse will tell a tale more closely resembling Kafka's *The Trial*,⁴² seen from the point of view of the defendant who has been manipulated into confessing. Sometimes, both judges write in the same case.⁴³ One can even find an occasional opinion adopting the perspective of the main witness.⁴⁴

An opinion's author is a peculiar kind of narrator—on the one hand claiming to be an objective observer of a dispute that does not involve him, on the other becoming the decisive actor in that dispute by issuing an order to end it. Literature offers many examples of both involved narrators⁴⁵ and of relatively

discussed here.

41. *E.g.*, *Colegrove v. Green*, 328 U.S. 549, 552-53 (1946) (stating that courts cannot remedy vote dilution); *Giles v. Harris*, 189 U.S. 475, 486-88 (1903) (explaining the court's inability to remedy massive voting discrimination); *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506, 510-12 (7th Cir. 1996) (explaining the federal courts' inability to remedy abuse in a class action claim from a state court).

42. FRANZ KAFKA, *THE TRIAL* (Willa & Edwin Muir trans., Alfred A. Knopf, Inc. 1947) (1914).

43. *E.g.*, *Commonwealth v. Mahnke*, 335 N.E.2d 660 (Mass. 1975) (compare the opinion of the Court with Justice Kaplan's dissent); see ROBIN WEST, *NARRATIVE, AUTHORITY, AND LAW* 419-36 (1993) (contrasting narratives of the crime by judges upholding penalties with emphasis on rights by others). There are different ways of stating the facts. See AMSTERDAM & BRUNER, *supra* note 25, at 77-109 (analyzing Justice Scalia's approach to the facts in an individual case); David Ray Papke & Kathleen H. McManus, *Narrative and the Appellate Opinion*, in 23 *LEGAL STUDIES FORUM* 449 (1999).

44. See, *e.g.*, *People v. Rodriguez*, 971 P.2d 618 (Cal. 1999); see David Luban, *Difference Made Legal: The Court and Dr. King*, 87 *MICH. L. REV.* 2152 (1989) (discussing the Court's assumption of the viewpoint of governmental authorities in *Walker v. City of Birmingham*, 388 U.S. 307 (1967)).

45. *E.g.*, CHARLOTTE BRONTË, *JANE EYRE* (Oxford Univ. Press 1938) (1846); GIACOMO CASANOVA, *HISTORY OF MY LIFE* (Willard R. Trask trans., Harcourt, Brace & World, Inc. 1966) (first published in its entirety in 1960); FYODOR DOSTOEVSKY, *NOTES FROM UNDERGROUND* (Robert G. Durgy ed.,

uninvolved ones,⁴⁶ but I cannot recall an example of one who shifts from one to the other. In literature, such a dramatic change of role might impair the narrative's credibility—although some authors set out to do just that. In law, the narrator's two roles encapsulate a fundamental conflict of adjudication: Judges exercise power, but often claim that they make no choices but merely apply law to facts.

Although the judge delivering an opinion is its primary narrator, sometimes that judge introduces another narrator. The secondary narrator may be the trial judge who composed findings of fact: "the District Court found that . . ." Sometimes, when a court bases its judgment on the pleadings, a party or a party's lawyer becomes a narrator: "the plaintiff alleges that . . ." When the court considers a motion for summary judgment, the story is pieced together out of affidavits submitted by one or several parties. Occasionally, an opinion does not put the story together at all, but simply recites what each witness said.⁴⁷

Like the author of a novel, the opinion's author may let these additional narrators speak for themselves by quoting, paraphrasing, or summarizing their statements, or even temporarily assuming their points of view. When novelists do this, it is usually to help readers share the perceptions and the feelings of the story's characters. Judges are more likely to use secondary narrators to distance themselves and their readers, implying that what a party alleges is not necessarily what happened. Alternatively, the court may simply accept a secondary narrator's story as the set of facts on which the court must pass judgment in a procedural context such as a motion to dismiss a complaint. The unschooled reader may not then notice that the "facts" the court discusses emerge from a complex process of construction.

The most extraordinary way in which judges writing opinions use a secondary narrator to construct the factual narrative occurs when the case has been tried by a jury. A jury rarely says what facts it has found. (In a criminal case, a judge is forbidden to ask it to do so.⁴⁸) So the court simply assumes that

Serge Shishkoff trans., Thomas Y. Crowell Co. 1969) (1864). Almost all memoirs have involved narrators.

46. *E.g.*, WILLA CATHER, *MY ANTONIA* (1988); THOMAS MANN, *DOCTOR FAUSTUS* (H.T. Lowe-Porter trans., Alfred A. Knopf, Inc. 1948) (1947).

47. *See, e.g.*, *People v. Rodriguez*, 684 N.E.2d 128 (Ill. App. Ct. 1997).

48. *See United States v. Spock*, 416 F.2d 165, 181 (1st Cir. 1969).

the jury found the set of facts most favorable to the prevailing party that is consistent with the evidence and with the judge's instructions. This mechanical system for writing a story recalls experimental fiction in which the course of the plot is decided by the reader's choice or by random selection.⁴⁹

Judicial authors rarely explore some of the other narrative options that literary theorists have analyzed. The narrator does not claim omniscience—unlike some novelists and trial lawyers, judges do not profess to know the undisclosed thoughts of their characters—and never admits that he is making up the story and could change it, except by deciding what remedy to award after the story ends. Rarely will the judge mention anything seen outside the courtroom.⁵⁰ No judge will set out to be what students of literature call an “unreliable narrator,” one whose readers will doubt his words.⁵¹ On the contrary, making oneself credible is a prime goal of judicial rhetoric.⁵² Sometimes, however, a judge unintentionally becomes an unreliable narrator because his language reveals bias or neglect.⁵³

49. FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 769-70 (5th ed. 2001); see, e.g., JULIO CORTÁZAR, HOPSCOTCH (Gregory Rabassa trans., Pantheon Books 1966) (1963) (two alternative sequences of chapters); JOHN FOWLES, THE FRENCH LIEUTENANT'S WOMAN (1969) (two alternative endings). François Rabelais of course described a judge's use of dice to decide cases in *Gargantua and Pantagruel*. FRANCOIS RABELAIS, GARGANTUA AND PANTAGRUEL, bk. III, chs. 39-44 (J.M. Cohen trans., Penguin Books 1955) (1534, 1532).

50. See MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(a) (1999) (requiring a judge with personal knowledge of disputed evidentiary facts to withdraw). But see *In re State Bar*, 485 N.W.2d 225, 227-29 (Wis. 1992) (per curiam) (Bablitch, J., concurring) (describing his own experiences); JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 216, at 26 (5th ed. 1999) (discussing the evidentiary status of a “view” taken by a jury or judge).

51. WAYNE C. BOOTH, THE RHETORIC OF FICTION 211 (1961). For clear examples, see CHARLOTTE PERKINS GILMAN, THE YELLOW WALLPAPER (1973); KAZUO ISHIGURO, THE REMAINS OF THE DAY (1989); WILLIAM MAKEPEACE THACKERAY, THE MEMOIRS OF BARRY LYNDON, ESQ. (Univ. of Neb. Press 1962) (1844).

52. E.g., Levinson, *supra* note 5; see *infra* Part III.A. But see *Republic of Bolivia v. Philip Morris Cos.*, 39 F. Supp. 2d 1008, 1009 (S.D. Tex. 1999) (judge professing ignorance to be humorous).

53. E.g., *Stell v. Savannah-Chatham County Bd. of Educ.*, 220 F. Supp. 667 (S.D. Ga. 1963) (upholding school segregation), *rev'd*, 333 F.2d 55 (5th Cir. 1964), *cert. denied*, 379 U.S. 933 (1964), *remanded to* 255 F. Supp. 83, 88 (S.D. Ga. 1965); *Davis v. Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641, at *30-31 (Tenn. Cir. Ct. Sept. 21, 1989) (resolving a frozen embryo dispute on the basis of findings about when life originates), *rev'd*, 1990 Tenn. App. LEXIS 642, at *7-8 (Tenn. Ct. App. Sept. 13, 1990). For more discussion of the frozen embryo dispute, see Colb, *supra* note 12, at 117-25.

Perhaps to bolster an air of straightforward reliability, judicial story-tellers omit some tricks of the narrative art (which, of course, can itself be considered a trick). They usually tell their story from beginning to end, with few flashbacks or later revelations about previous incidents, although a complicated tale may be broken into separate narratives.⁵⁴ Often, they tell it several times, with varying detail and emphasis, somewhat like Wagner's *Ring of the Nibelungen*, but at lesser length. There is little dialogue, except when the content of a discussion is crucial, and not much background material, unless the matter in dispute prompts the judge to wax expansive.⁵⁵ The style often aspires to the plain mode of Defoe and Hemingway, albeit in a clumsier and more polysyllabic version. But any genre has its conventions and, as Gerald Wetlaufer has explained, a central feature of judicial rhetoric and other legal rhetoric is the denial that it is rhetorical.⁵⁶ Despite these conventions, however, a judge occasionally succeeds in writing a factual narrative that might entertain even a non-lawyer, for example the tales of eighteenth-century England told by Sir William Scott (later Lord Stowell).⁵⁷

4. The Characters

The characters who appear in judicial opinions are more

54. *E.g.*, *Morgan v. Hennigan*, 379 F. Supp. 410 (D. Mass. 1974) (describing separately segregative acts in different parts of a school system), *aff'd*, 509 F.2d 580 (1st Cir. 1974). For examples of flashbacks, see *United States v. Peed*, 714 F.2d 7, 8 (4th Cir. 1983), and *Eight Hundred Corp. v. 217 State Street Realty Corp.*, 565 N.Y.S.2d 179, 180 (App. Div. 1991) (mem.). For some of the possible narrative techniques rarely found in judicial opinions, see GÉRARD GENETTE, *NARRATIVE DISCOURSE: AN ESSAY IN METHOD* (Jane E. Lewin trans., Cornell Univ. Press 1980) (1972).

55. *E.g.*, *Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2454-55 (2001) (describing the history of a town in which a Takings Clause case arose); *Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993) (detailing the history of a plaintiff's trans-sexuality, when the issue was whether the trial court should have appointed counsel).

56. Wetlaufer, *supra* note 5, at 1555. *But cf.* *Texas v. Johnson*, 491 U.S. 397, 421-29 (1989) (Rehnquist, C.J., dissenting) (giving flowery description of history and significance of the flag).

57. *E.g.*, *Evans v. Evans*, 161 Eng. Rep. 466, 468 (Consistory Ct. London 1790). This is a tale, told by a sexist narrator, of a couple who married in India and quarreled in England, and featuring a French governess who testified "in the style . . . of a French novel." *Id.* at 482. Case narratives became popular reading in eighteenth-century France, but they were briefs rather than judicial decisions. See SARAH MAZA, *PRIVATE LIVES AND PUBLIC AFFAIRS: THE CAUSES CÉLÈBRES OF PREREVOLUTIONARY FRANCE* (1993).

like those in fables, epics and newspaper articles than they are like the characters of Henry James or Dostoevsky. The limited information available about them, the tendency of lawyers and judges to think about litigants in familiar and therefore plausible stereotypes, the drive to justify the decision by justifying or condemning a party's acts, and the hope that decisions will establish models for future behavior lead to the prevalence of two-dimensional figures.⁵⁸ That would scarcely surprise novelists who, for both artistic and competitive reasons, delight to show how the judicial process fails to perceive the complex truth about individuals.⁵⁹

Even when an issue calls for psychological subtlety, the court is more likely to respond by elucidating the law than by analyzing an individual.⁶⁰ Criminal trials often raise issues about a defendant's state of mind, but those issues are usually resolved by a jury and do not get into opinions. Things might be different in countries where judges hear criminal cases and are expected to write findings of fact.⁶¹

Yet we should not be too quick to dismiss legal characters as mere John or Jane Does, feeble copies of their literary counterparts. Amélie Oksenberg Rorty even suggests that law and drama share the credit for the invention of personhood. "The idea of a person is the idea of a unified center of choice and action, the unit of legal and theological responsibility."⁶² The per-

58. See E.M. FORSTER, ASPECTS OF THE NOVEL 103-18 (1927) (discussing two and three dimensional characters).

59. See, e.g., ALBERT CAMUS, THE STRANGER (Matthew Ward trans., Alfred A. Knopf, Inc. 1988) (1942); FYODOR DOSTOEVSKY, THE BROTHERS KARAMAZOV (Ralph E. Matlaw ed., Constance Garnett trans., W.W. Norton & Co. 1976) (1880); ANTHONY TROLLOPE, ORLEY FARM (Oxford Univ. Press 1935) (1862); RICHARD WRIGHT, NATIVE SON (1940); see also Jan-Melissa Schramm, *Is Literature More Ethical than Law? Fitzjames Stephen and Literary Responses to the Advent of Full Legal Representation for Felons*, in LAW AND LITERATURE, *supra* note 6, at 417, 418 (arguing that Dickens and others sought to establish their own reputability by criticizing lawyers).

60. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (discussing mixed motives in an employment discrimination case); United States v. Allen J., 127 F.3d 1292 (10th Cir. 1997) (discussing the competence of a thirteen year old with a learning disability to testify); State v. Alley, 776 S.W.2d 506, 518-19 (Tenn. 1989) (discussing a multiple personality disorder claim in a criminal defense); Peter Brooks, *Law, Therapy, Culture*, 13 YALE J.L. & HUMAN. 227 (2001).

61. E.g., Sari Bashi, *Netanyahu Ally Guilty of Bribery*, BOSTON GLOBE, Mar. 18, 1999, at A2 (mentioning a 917 page opinion in an Israeli criminal case tried by three judges).

62. AMÉLIE OKSENBERG RORTY, *Character, Persons, Selves, Individuals*,

sonages in legal opinions lack the subtlety and color of those in many novels, but they have the essentials of individual personhood. They intend, act, suffer, and must answer for their behavior. Here again, it may be more than a coincidence that the English novel arose during the same period as English judicial opinions with developed statements of facts.

5. Texts Within Texts

The use of texts within texts is a traditional technique of fiction⁶³ that often appears in judicial opinions. Sometimes, it involves no more than including in the statement of facts excerpts from a document, part of the examination of a witness, or findings of a trial court. Sometimes, the dispute itself concerns stories, as when a plaintiff claims that the defendant has published a work that libels him or infringes his copyright. The judge's narrative must then include or describe the offending text.⁶⁴ In a suit for legal malpractice committed in a previous action, or a suit for wrongful use of civil proceedings, the court's narrative may include findings made in the previous action, creating a statement of facts within a statement of facts.⁶⁵

Although not all statements of facts contain embedded texts, they are themselves embedded in a larger text: the judi-

in MIND IN ACTION: ESSAYS IN THE PHILOSOPHY OF MIND 78, 85 (1988) (distinguishing, however, characters from persons).

63. *E.g.*, THE ARABIAN NIGHTS OR THE BOOK OF A THOUSAND AND ONE NIGHTS (Richard F. Burton trans., Blue Ribbon Books, Inc. 1932) (Shahrazad tells stories to the King); CHODERLOS DE LACLOS, LES LIAISONS DANGEREUSES (P.W.K. Stone trans., Penguin Books 1961) (1782) (epistolary novel composed of letters among characters); WILLIAM SHAKESPEARE, A MIDSUMMER NIGHT'S DREAM (play within play). Sometimes, legal texts are imbedded in fictions. *E.g.*, WILLIAM GADDIS, A FROLIC OF HIS OWN (1994) (parodies of legal documents); HERMAN MELVILLE, BENITO CERENO (1856) (deposition).

64. *E.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325-26 (1974) (describing the events that precipitated a defamation suit); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 49-53 (2d Cir. 1936) (L. Hand, J.) (comparing several different works in a copyright case); see Anthony Bradney, *Reading Blasphemy: The Necessity for Literary Analysis in Legal Scholarship*, in LAW AND LITERATURE, *supra* note 6, at 533.

65. *E.g.*, *In re Hayes*, 183 F.3d 162, 164-66 (2d Cir. 1999) (considering whether a lawyer's duty to return an excessive fee, as adjudicated in previous case, is dischargeable in bankruptcy); *Armstrong v. Adams*, 283 P. 871 (Cal. Dist. Ct. App. 1929) (considering alleged legal malpractice in a previous case in which the judge made findings); see *Transcroft, Inc. v. Galvin, Stalmack, Kirschner & Clark*, 39 F.3d 812 (7th Cir. 1994) (considering the admissibility of a transcript of a previous case in a legal malpractice suit). On the significance of the statement of facts in a judicial opinion, see *supra* Part I.A.1. For more on texts within texts, see *infra* Part I.C.

cial opinion itself. When a story is thus inserted in a discussion of law, the juxtaposition modifies each of them. Some literary fictions likewise include essay-like material.⁶⁶ The closest parallel to this feature of opinions comes from the Old Testament, which likewise contains both stories and legal rulings, each of which can be considered a commentary on the other.⁶⁷ The Book of Ruth, for example, alludes to laws laid down elsewhere about the conversion of Moabites and the duty to marry a deceased brother's wife, and itself became a source for the Jewish laws of conversion.⁶⁸

As this example shows, influence can run both ways: Laws can inspire stories, and stories can lead to laws.⁶⁹ Within a legal opinion, only the second process is supposed to operate: Judges have some leeway in shaping the law to provide the best response to the history before them, but should not rewrite the facts so as to match the law. Yet the law does affect the way in which judges and readers perceive disputes; and a decision in one case can influence behavior in the world outside that becomes the occasion of another case.

B. WHAT MIGHT HAVE BEEN

Judges tell some stories that are frankly fictional. Sometimes they imagine what a civil defendant might have done other than what she did. How, for example, can one show that a defendant was negligent except by describing a safer course that she failed to follow and that would have avoided the injury?⁷⁰ Once negligence has been shown, the plaintiff may re-

66. *E.g.*, HERMANN BROCH, *THE SLEEPWALKERS* (Willa & Edwin Muir trans., Vintage Books 1st ed. 1996) (1945); LEO TOLSTOY, *WAR AND PEACE*, Epilogue, pt. II (Rosemary Edmonds trans., Greenwich House 1982) (1868).

67. *See* NORTHROP FRYE, *THE GREAT CODE: THE BIBLE AND LITERATURE* (1982); *see also* works cited *infra* note 69.

68. *See* D.R.G. BEATTIE, *THE JEWISH EXEGESIS OF THE BOOK OF RUTH* (1977). *Compare* *Ruth* 1:11-17, 4:9-11, *with Deuteronomy* 23:3-8, 25:5-10, and *The Babylonian Talmud*, *Yevamot* 47b. This connection between law and stories continues in later Jewish writing. *See, e.g.*, JACOB NEUSNER, *JUDAISM AND STORY: THE EVIDENCE OF THE FATHERS ACCORDING TO RABBI NATHAN* (1992); ADIN STEINSALTZ, *THE ESSENTIAL TALMUD* 251-58 (Chaya Galai trans., Basic Books, Inc. 1976) (1976).

69. *E.g.*, CALUM CARMICHAEL, *THE SPIRIT OF BIBLICAL LAW* (1996) (arguing that interpretation of Old Testament laws requires an understanding of the historical narratives that inspired biblical lawgivers); DAVID DAUBE, *THE EXODUS PATTERN IN THE BIBLE* (1963) (agnostic as to whether the exodus narrative inspired laws about liberating slaves or was influenced by them).

70. *See* ELAINE SCARRY, *THE BODY IN PAIN* 297-304 (1985); James A.

sort to fiction once more in proving damages, conjuring up the life he would have led but for the injury,⁷¹ and prognosticating what psychiatric care he will need ten years after the trial.⁷² The defendant may rejoin that different behavior by the plaintiff would have avoided the injury or mitigated the damages or, alternatively, that the plaintiff would have suffered the same injury even had the defendant acted otherwise.⁷³

When judges tell tales of this sort, at least three kinds of story may result. The first is a fantasy, based on someone's imagination of how a party would have behaved in other circumstances, filtered through a judge or jury's sense of plausibility and narrative coherence.⁷⁴ (Perhaps lawyers contesting these cases should call novelists as expert witnesses.) The second is a tale of human averages—something like a fiction

Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867 (1998); see also *Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322, 1326 (Ore. 1978).

71. *E.g.*, *Feldman v. Alleghany Airlines, Inc.*, 382 F. Supp. 1271, 1281-87 (D. Conn. 1974) (describing in detail what would have been the plaintiff's legal career), *aff'd in part and rev'd in part*, 524 F.2d 384 (2d Cir. 1975); see, *e.g.*, *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977) (holding that courts should bring about the racial composition schools would have had but for unconstitutional segregation); John Leubsdorf, *Remedies for Uncertainty*, 61 B.U. L. REV. 132 (1981) (discussing the problems of putting plaintiffs where they would have been but for the violation); Robert N. Strassfeld, *If... : Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339 (1992).

72. *E.g.*, *Drayton v. Jiffee Chem. Corp.*, 591 F.2d 352, 368-69 (6th Cir. 1978).

73. *E.g.*, *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995) (limiting relief for employee who defendant discriminated against when the defendant showed that it would have legally discharged him if the defendant had known of employee wrongdoing); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (holding that when the discharge of a teacher was influenced by the teacher's exercise of free speech, the court should deny reinstatement if the defendant shows the teacher would have been discharged in any event); *Young v. Heekin Canning Co.*, 681 S.W.2d 419 (Ark. Ct. App. 1985) (denying workers' compensation for a heart attack on the job that would have occurred the same day in any event); *Hamil v. Bashline*, 392 A.2d 1280, 1283 (Pa. 1978) (discussing proof that a patient might have survived had there been no medical malpractice); *cf. Nix v. Williams*, 467 U.S. 431 (1983) (admitting evidence that the police would have discovered even had there been no constitutional violation); *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490 (1980) (requiring personal injury damages for lost earnings be reduced by the taxes worker would have paid had he continued to earn).

74. See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 367-71 (1977) (discussing how the court should decide who would have been hired but for the employer's hiring discrimination); *Frankel v. United States*, 321 F. Supp. 1331, 1337-38 (E.D. Pa. 1970) (hypothesizing a victim's potential artistic career and likelihood of marriage).

whose characters are portrayed as identical, machinelike, or at least fungible—in which the court relies on statistics and expert testimony to describe the usual fate of those in a party's situation.⁷⁵ The third is a kind of utopian fiction, conjuring up a world in which people behave according to law. (Perhaps it should be called Restatementland.) In legal malpractice cases, for example, juries are invited to decide how a reasonable judge would have decided had the allegedly delinquent lawyer presented a client's claims properly. Introducing evidence of the idiosyncrasies of the particular judge before whom the case was pending is too upsetting to contemplate.⁷⁶ The reasonable person whose imagined behavior constitutes the standard of care in negligence cases reflects a similar idealization.

One can easily see as hypothetical fictions statements of fact that purport to narrate what actually happened to real persons. When witnesses disagree, or when their testimony supports more than one inference about what happened, what the judge recounts is a story about how the people in question would most probably have behaved, given what is known about them and the circumstances. This story can be based on direct evidence of their acts and character—although evidence law discourages character evidence⁷⁷—and on knowledge of how people do or should behave. Much of that knowledge is itself based on fictions—spoken, written, or seen in movies or on television—that shape our expectations of human behavior and provide scenarios to which lawyers appeal in shaping and presenting their claims.⁷⁸ Often, of course, opposing lawyers in-

75. *E.g.*, *Oldham v. Korean Air Lines Co.*, 127 F.3d 43, 51-54 (D.C. Cir. 1997) (predicting what a stockbroker would have earned and left to his children had he survived); see Edwin B. Wainscott, Note, *Computation of Lost Future Earnings in Personal Injury and Wrongful Death Actions*, 11 IND. L. REV. 647 (1978).

76. *E.g.*, *Justice v. Carter*, 972 F.2d 951, 956-57 (8th Cir. 1992) (asserting that juries may not consider the behavior and thought of a particular judge in an earlier related case but only what the judge would have decided); *Phillips v. Clancy*, 733 P.2d 300, 303-06 (Ariz. Ct. App. 1986) (rejecting an administrative judge's affidavit about how he would have decided the matter); see Michael C. Dorf, *Prediction and the Rule of Law*, 42 U.C.L.A. L. REV. 651 (1995) (discussing problems of predicting state court rulings under *Erie* doctrine).

77. FED. R. EVID. 404-05, 412-15, 608-09.

78. See, *e.g.*, LAURA HANFT KOROBKIN, *CRIMINAL CONVERSATIONS: SENTIMENTALITY AND NINETEENTH-CENTURY LEGAL STORIES OF ADULTERY* (1998); Philip N. Meyer, "Desperate for Love": *Cinematic Influences Upon a Defendant's Closing Argument to a Jury*, 18 VT. L. REV. 721 (1994).

voke competing scenarios.⁷⁹ The reader (or the spectator, for these invocations often occur during trials) must then compare the evidence to two stories of what might have been, somewhat like the author of a novel that holds the reader in suspense by presenting differing versions of what is happening.⁸⁰

The stories lawyers invoke often derive from previous judicial opinions: They are paradigms of such legal notions as forming a contract or causing an injury. Such paradigms are stories of how people behave, but they are also stories of what the law will accept as falling within its categories. They lurk behind the facts of the present case as templates that the facts may or may not fit. Does the correspondence between the parties sufficiently resemble the paradigmatic exchange of offer and acceptance to be treated as forming a contract, for example, or is it more like inconclusive bargaining?⁸¹ When a court relies on such paradigms, it compares what it assumes actually happened to a story of what might have been, and to what has occurred in other cases. Of course, the law uses such stories because (among other reasons) people believe they reflect what actually happens.⁸² The stories then influence the perceptions of judges and lawyers of what happened in the cases they confront.

C. PROCEDURAL HISTORIES

1. Separating Facts and Proceedings

In real life, disputes merge into the litigation to which they lead. Such activities as stating and contesting claims, hunting for evidence, and discussing settlements occur both before and after court proceedings start. Students of dispute resolution see no clear boundary between life and litigation.⁸³ Novelists

79. See, e.g., W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* (1981); ROBERT P. BURNS, *A THEORY OF THE TRIAL* (1999); REID HASTIE ET AL., *INSIDE THE JURY* (1983); JANET MALCOLM, *THE CRIME OF SHEILA MCGOUGH* (1999); Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992).

80. Compare HENRY JAMES, *THE TURN OF THE SCREW* (LeRoy Phillips 1915) (1898) (in which the ambivalence is not resolved), with HENRY JAMES, *THE AMBASSADORS* (1903) (in which it is).

81. E.g., *Roth v. Malson*, 79 Cal. Rptr. 2d 226, 229 (Cal. Ct. App. 1998).

82. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 44, 122-26, 268-77 (1960).

83. E.g., *THE DISPUTING PROCESS: LAW IN TEN SOCIETIES* (Laura Nader &

as well portray characters and their relationships as continuing to evolve during their litigation⁸⁴ or criminal prosecution.⁸⁵

Judicial opinions, however, usually state separately the procedural course of the litigation and the facts out of which it arises. Often, they reverse chronological order by describing the proceedings first. Occasionally, when only a procedural issue is before the court, or when an opinion writer wants to emphasize such an issue, the opinion describes its development but says virtually nothing of the underlying dispute.⁸⁶ In one recent opinion, Justice Breyer replaced the actual facts of the case with an elaborate hypothetical, either because he is a former law teacher or because he thought the hypothetical posed the issue before the Court more clearly than mere reality.⁸⁷ The opposite approach of stating the facts but omitting the procedural history is scarcely possible: Some sort of procedural frame is needed to identify what the court has been asked to do.

Separate treatment of facts and proceedings carries a complex, contradictory message about their connection. On the one hand, it displays the legal system's ideal that, once a dispute comes to court, its resolution should be based entirely on the facts and the law, with lawyers, judges, and procedures serving only to present facts and law for decision. What happened in the court system should therefore not contaminate the result. On the other hand, stating the proceedings separately emphasizes their importance and makes it clear that issues for decision do not simply appear in court but must be shaped and presented through proceedings that are often long and contentious.

The more practical reason for stating a case's procedural

Harry F. Todd, Jr. eds., 1978).

84. *E.g.*, GADDIS, *supra* note 63; BEAUMARCHAIS, FIGARO'S MARRIAGE, in THE MISANTHROPE AND OTHER FRENCH CLASSICS: FOUR PLAYS 187 (Eric Bentley ed., 1989).

85. *See, e.g.*, works cited *supra* note 59. Of course, there are exceptions. In Kafka's *The Trial* there is a prosecution but no crime, and in many detective stories court proceedings are at most an epilogue. *See* KAFKA, *supra* note 42.

86. *E.g.*, Dickerson v. United States, 530 U.S. 428, 432-38 (2000); McNeil v. Wisconsin, 501 U.S. 171, 174-82 (1991); *see* Neder v. United States, 527 U.S. 1, 4-6 (1999) (describing a defendant's misdeeds at length on the way to upholding his conviction, while Justice Scalia's dissent says nothing about the facts); *see also* RICHARD POSNER, CARDOZO: A STUDY IN REPUTATION 33-55 (1990) (comparing Cardozo's emphasis on human victim in *Hynes v. New York Central Railway*, 131 N.E. 898 (N.Y. 1921), with his depersonalization of *Palsgraf v. Long Island Railroad*, 162 N.E. 99 (N.Y. 1928)).

87. Hunt-Wesson, Inc. v. Franchise Tax Bd., 528 U.S. 458, 461-63 (2000).

history separately also reflects some of this ambivalence. The court must sometimes decide a procedural issue that purports to be distinct from the merits—but how can a court appraise the adequacy of the procedures without considering what issues were to be resolved, and how likely it was that any procedural shortcut would affect the result? Courts look more closely for procedural error when the result seems wrong; and their receptiveness to substantive claims may shrink if the appellant has already enjoyed ample review, or may grow if the trial judge was careless.⁸⁸

Judges often use the separation of proceedings and facts to emphasize one or the other. One example is the familiar technique of starting an opinion in a criminal appeal with a graphic description of the crime. This practice tends to reduce the significance of a later description of the proceedings and their alleged flaws.⁸⁹ A criminal investigation can be treated either together with the crime (because it occurs before charges are filed) or as part of the proceedings. This may affect whether the reader sees Fourth and Fifth Amendment issues as entangled with real life or as technical procedural matters.⁹⁰

An opinion's statement of proceedings may function as a vouching preamble, which validates the ensuing statement of facts by ascribing responsibility for it to a reliable process that the author of the opinion could not manipulate. This is like the prefaces to some novels, in which a narrator establishes the credibility of the following text by describing how the "actual author" of that text wrote it and how the narrator found it.⁹¹

Alternatively, describing the proceedings may undermine

88. *E.g.*, *Delo v. Stokes*, 495 U.S. 320, 320-22 (1990) (vacating a stay of execution because the defendant had filed three previous habeas petitions); *Luhr Bros. v. Shepp*, 157 F.3d 333, 338 (5th Cir. 1998) (employing closer scrutiny when the trial court adopted without change a party's proposed findings).

89. *See, e.g.*, *Darden v. Wainwright*, 477 U.S. 168, 171-74 (1986); ROBIN WEST, *NARRATIVE, AUTHORITY, AND LAW* 419-39 (1993) (discussing the use of this method in *Sawyer v. Smith*, 497 U.S. 227 (1990)). *But see* *Chambers v. Florida*, 309 U.S. 227, 229-30 (1940) (in which a description of the crime leads into and strengthens a description of police investigatory excesses).

90. *Compare, e.g.*, *Oregon v. Elstad*, 470 U.S. 298, 300-03 (1985) (including investigation in statement of facts), *with* *Ashcraft v. Tennessee*, 322 U.S. 143, 144-45, 153-54 (1944) (describing the crime at the outset, the investigatory procedures much later).

91. *E.g.*, VLADIMIR NABOKOV, *LOLITA* (1955) (in which the preface is part of the game); JONATHAN SWIFT, *GULLIVER'S TRAVELS*, *in* *GULLIVER'S TRAVELS AND OTHER WRITINGS* (1958).

what follows.⁹² Statements of the proceedings in fictional works with legal settings have often portrayed the ludicrous,⁹³ grim,⁹⁴ and combative⁹⁵ aspects of legal proceedings, as well as their ability to explore character, morality, and the nature of law.⁹⁶ One can imagine similar procedural narratives in legal documents, such as the briefs Beaumarchais wrote to defend himself against charges of bribery in an earlier suit; the briefs describe with much humor the course of that suit.⁹⁷ Most judicial opinions, however, treat the statement of proceedings perfunctorily.

2. Characters

The trial judge is a central character in an appellate opinion's statement of proceedings, and is also an important member of its audience and sometimes a secondary narrator whose findings of fact are accepted or rejected. Usually, she comes across as worthy but bland, her name and character concealed behind her designation as "the trial court" or "the District Court." Occasionally, however, an opinion will go to some trouble to portray her patience and wisdom⁹⁸—or to make the reader dubious of her assertions and outraged at her arbitrariness.⁹⁹ (The latter approach recalls works in which a judge try-

92. *E.g.*, *Riner v. Allstate Life Ins. Co.*, 131 F.3d 530, 532-33 (5th Cir. 1997) (reversing on the merits a judge who acted *sua sponte*).

93. *E.g.*, JOHN BARTH, *THE FLOATING OPERA* (1967); CHARLES DICKENS, *THE POSTHUMOUS PAPERS OF THE PICKWICK CLUB* (Oxford Univ. Press 1969) (1837).

94. *E.g.*, CHARLES DICKENS, *BLEAK HOUSE* (Oxford Univ. Press 1975) (1853); WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*.

95. *E.g.*, *NJAL'S SAGA* (Magnus Magnusson & Hermann Palsson trans., Penguin Books 1960). Scores of contemporary movies and television shows also focus on the combative aspect of legal proceedings.

96. *E.g.*, BERTOLT BRECHT, *THE CAUCASIAN CHALK CIRCLE* (Eric & Maja Bentley trans., Oxford Univ. Press 1956) (1945); HERMANN MELVILLE, *BILLY BUDD, SAILOR*, in *BILLY BUDD, BENITO CERENO AND THE ENCHANTED ISLES* (1942).

97. BEAUMARCHAIS, *Mémoires contre Goëzman*, in *ŒUVRES* 673 (Pierre Larthomas ed., 1988).

98. *E.g.*, *Govas v. Chalmers*, 965 F.2d 298, 300 (7th Cir. 1992) (upholding sanctions ordered by a judge who had shown patience); *Carr v. Montgomery County Bd. of Educ.*, 429 F.2d 382, 387 (5th Cir. 1970) (praising Judge Frank Johnson and declining to reverse his decision).

99. *E.g.*, *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865-70 (1988) (chastising a judge who sought to avoid disqualification by claiming not to have read a document, and by failing to disclose facts to the parties); *Wallace v. Jaffree*, 472 U.S. 38, 48 (1985) (noting a judge who defied precedent);

ing a case turns out to be himself the guilty party.¹⁰⁰) More subtly, the opinion may pave the way for reversal by masking the judge's role in the decision below and stressing the behavior of the parties. The opinion will then describe what a party argues, while gliding as quickly as possible over the trial judge's acceptance of the argument.¹⁰¹

The court's stories may not only treat the parties as mere argument-bearers but may also, at the option of the opinion writer, depersonalize parties by referring to them only with such terms as "the respondent." The role of their lawyers is still stranger. Often the opinion does not mention them. The court describes the lawyers' acts as though their clients had acted, which a rhetorician would classify as a metonymy, and a lawyer would call treating as a reality the legal fiction *qui facit per alium facit per se*. This mode of description, of course, tends to conceal the fact that courts punish clients for what are actually the sins of their lawyers.¹⁰² When one adds the tendency of opinions to describe points advanced by lawyers as though the trial judge had thought of them herself, the result is that the only lawyers an opinion is likely to mention are those whose conduct or arguments it criticizes.¹⁰³

A procedural story that does not mention the lawyers, although virtually all readers know them to play an important role in the events described, is a most unusual kind of narrative. Perhaps the closest non-legal parallel would be a story in which divine intervention is not mentioned, but in which any religious reader sees it at work behind the scenes. The Book of Esther is a good example: The author never names God, but surely considers His invisible hand responsible for the lucky circumstances that enable Esther and Mordecai to foil Haman's

Walberg v. Israel, 766 F.2d 1071, 1072-75 (7th Cir. 1985) (criticizing a judge whose interventions deprived the defendant of the right to counsel).

100. See, e.g., ITALO CALVINO, *A Judgment*, in ADAM, ONE AFTERNOON AND OTHER STORIES 133 (Archibald Colquhoun & Peggy Wright trans., Secker & Warburg 1983); SHAKESPEARE, *supra* note 94; HEINRICH VON KLEIST, *THE BROKEN JUG* (John T. Krumpelmann trans., Frederick Unger Publ'g Co. 1962) (1808).

101. E.g., Linkous v. United States, 142 F.3d 271, 274 (9th Cir. 1998).

102. See, e.g., Link v. Wabash R.R., 370 U.S. 626, 628-29 (1962) (upholding the dismissal of a case when a lawyer failed to appear at a conference); Lester J. Mazor, *Power and Responsibility in the Attorney-Client Relation*, 20 STAN. L. REV. 1120 (1968).

103. E.g., Beeson v. Smith, 893 F.2d 930, 931 (7th Cir. 1990); Pool v. Superior Court, 677 P.2d 261, 263-65 (Ariz. 1984).

plan to annihilate the Jews.¹⁰⁴ For those who resist any comparison between lawyers and the divinity, another analogy might be what has been called the unconscious of fiction—matter lurking below the surface of a literary work, and inferable only by analysis of slips and hints in the text.¹⁰⁵ That good or bad lawyering influences the result might thus be considered a repressed secret of many judicial opinions.

3. Endings

Another unusual feature of procedural histories—and indeed of statements of facts as well—is that they are often stories without real endings. Often the case is remanded for retrial or reconsideration, or for the shaping or implementation of a remedy. The reader remains uncertain who, if anyone, will live happily ever after. That can rarely be said of fictional narratives: Even when, like *The Iliad*, they end in the midst of things, we usually know how the tale will end. If the author does hint of future problems without predicting their resolution, those problems are either themselves a conclusion—what the characters have let themselves in for—or perhaps another story.¹⁰⁶ Judicial opinions, by contrast, often tell stories with sequels.

Because judicial opinions may not end cases, a statement of proceedings has a strange relationship with the opinion in which it appears: Although the statement is part of the opinion, the opinion itself is part of the statement—or rather, part of the proceedings that the statement describes. The statement's story ends with the opinion, which prescribes what proceedings will follow. The opinion is not just a text emerging from the judicial system, but a program controlling the system's future operation.¹⁰⁷ Often, indeed, the court marginalizes its orders by

104. SANDRA BETH BERG, *THE BOOK OF ESTHER: MOTIFS, THEMES AND STRUCTURE* 11-13, 45-46, 104-05, 173-84 (1979). On the absence of God as a character in the later books of the Old Testament, and the possible suggestion to the reader that the Jews can now get on without Him, see JACK MILES, *GOD: A BIOGRAPHY* (1995).

105. MICHAEL RIFFATERRE, *FICTIONAL TRUTH* 84-111 (1990).

106. *E.g.*, 2 HENRY JAMES, *THE PORTRAIT OF A LADY*, ch. 55 (1909) (one of several James novels with relatively open conclusions).

107. *E.g.*, *Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464, 471-72 (1969) (requiring the lower court to follow a Supreme Court mandate); *Epstein v. MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1997), *withdrawn and superseded on reh'g by* 179 F.3d 641 (9th Cir. 1999) (considering what issues the prior Supreme Court decision left open).

placing them in formulaic language such as “reversed and remanded” or “stay of execution vacated” at the end of the opinion, or even in a separate document,¹⁰⁸ but no sophisticated reader will ignore what the court has done while considering what it has said. Auden wrote that “poetry makes nothing happen.”¹⁰⁹ A court’s opinion, however, intervenes in the history it describes and is therefore inescapably subject to ethical and political judgment.¹¹⁰

D. LAW STORIES¹¹¹

Opinions tell stories about how law has changed over time. Sometimes, for example, an opinion portrays the passage of legislation: the problems that gave rise to it, proposals for resolving those problems, and the legislature’s decision.¹¹² Disputes rage about the narrative conventions for such a tale, especially the permissibility or wisdom of resorting to legislative history. Often, courts tell stories about the evolution of precedent.¹¹³ Sometimes, they look beyond the law to changes in society.¹¹⁴

*Screws v. United States*¹¹⁵ may serve as an example of

108. See *United States v. Indrelunas*, 411 U.S. 216 (1973) (per curiam) (clarifying the requirement that district court judgments must be on a separate document).

109. W.H. AUDEN, *In Memory of W.B. Yeats*, in THE ENGLISH AUDEN 241, 242 (Edward Mendelsohn ed., 1977).

110. See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

111. This title is stolen from LAW STORIES (Gary Bellow & Martha Minow eds., 1996).

112. *E.g.*, *Amoco Prod. Co. v. Southern Ute Indian Tribe*, 526 U.S. 865 (1999); *Shah v. Reno*, 184 F.3d 719 (8th Cir. 1999).

113. *E.g.*, *Keene Lumber Co. v. Leventhal*, 165 F.2d 815, 821-22 (1st Cir. 1948) (analyzing eighteenth-century precedent); *Kline v. Ansell*, 414 A.2d 929 (Md. 1980) (explaining the growth of women’s rights); *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) (Cardozo, J.) (discussing the growth of products liability); see James Boyd White, *Reading Texts, Reading Traditions: African Masks and American Law*, 12 YALE J.L. & HUMAN. 117 (2000) (urging that an opinion can be understood only against the background of its precursors). On the possibility of exploring the history of a single precedent, see *infra* Part III.B.

114. *E.g.*, *Trammel v. United States*, 445 U.S. 40 (1980) (changing the spousal testimonial privilege because of developing views of women and marriage) (referred to by one of my colleagues as “Burger’s feminist opus”). On judges’ use of historical fictions, see generally J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 987-91 (1998) (describing stories about United States history as canonical components of constitutional law); Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871 (1986) (discussing the use of legal fiction in American law).

115. 325 U.S. 91 (1945). For background, see PAMELA BRANDWEIN,

some possible law stories, in this instance, stories about the Civil Rights Act of 1866. The case arose as part of a New Deal effort to invoke the criminal provisions of the Act in order to provide a federal remedy for lynching. A majority of the Court upheld the Act against a constitutional vagueness challenge but construed it narrowly. Some of the Justices, however, sought to place the Act in its historical context, in very different ways. For three Justices, writing in dissent, the relevant story was one of the Act's longtime neglect as part of history's rejection of "feverish Reconstruction days," leading to the conclusion that the Supreme Court should not try to revive what they considered a long abandoned statute.¹¹⁶ Justice Rutledge, concurring in the result, told a different story about how the Act responded to white supremacist lynchings, and thus should apply to the case before the Court and the lynching problem generally.¹¹⁷ For each of these Justices, a story about law and history shaped, or at least supported, a reading of the Act.

1. Directions of Change

The law story an opinion tells is usually one of progress. The path of the law is assumed to lead in the right direction, so that the court will not go astray if it continues in that direction. The literary analogue would perhaps be religious or socialist fiction—or Hegelian fiction, if there is such a thing—in which God or history brings an individual or society closer to perfection.¹¹⁸ Although many in other disciplines have rejected the nineteenth-century assumptions of inevitable evolution that such stories seem to imply,¹¹⁹ some legal scholars continue to defend them¹²⁰ and many judges apparently take them for

RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH (1999) (describing evolving Supreme Court characterizations of the Reconstruction era), and David Dante Troutt, *Screws, Koon, and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18 (1999) (including a story based on the *Screws* record).

116. 325 U.S. at 142 (Roberts, Frankfurter, & Jackson, JJ., dissenting).

117. *See id.* at 113-34 (Rutledge, J., concurring).

118. *E.g.*, JOHN BUNYAN, *THE PILGRIM'S PROGRESS FROM THIS WORLD TO THAT WHICH IS TO COME* (L.B. Seeley 1801) (1641); WILLIAM MORRIS, *News From Nowhere*, in *THREE WORKS BY WILLIAM MORRIS* 179 (1968).

119. *E.g.*, HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* (1959); STEPHEN JAY GOULD, *WONDERFUL LIFE* (1989); JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (Geoff Bennington & Brian Massumi trans., Univ. of Minn. Press 1984) (1979).

120. *See* George L. Priest, *The Common Law Process and the Selection of*

granted, at least when writing opinions. Of course, the belief behind such a story need not be one of inevitable evolution. The judge may assume that, because society changes, more recent decisions will come closer to reflecting social reality. Or the judge simply may accept the greater weight of more recent precedents as a rule of law. Likewise, a judge can rely on a statute's history out of deference to the legislature without necessarily believing that the statute improves the law.

Occasionally, however, an opinion tells a story of decline, in which a mistaken decision has involved the law in increasing confusion or folly. Sometimes it is not too late to undo the mistake, so that the story has a happy ending after all, at least in the view of its author.¹²¹ But sometimes the wrong is not righted, either because the judge telling the story of decline does not speak for the majority or because he does not consider himself free to overrule established precedent.¹²² The result is a tone of bitter satire not uncommon in literary portrayals of the law¹²³ but rare in judicial opinions, whose authors do not like to admit in public that the law suffers from imperfections they cannot or will not cure. The bitterness is likely to be even greater when a dissenting opinion tells a story that is a prediction of the dire results the majority's decision will produce, for then the judge's imagination need not be constrained by reality.¹²⁴

One can imagine, but will not find in real opinions, a story

Efficient Rules, 6 J. LEGAL STUD. 65 (1977); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 53-56 (1977).

121. *E.g.*, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (overruling bad precedent). Justice Brandeis was less successful in *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548-62 (1933) (dissenting opinion) (describing the development of large corporations and the law's failure to control their dangers).

122. *See* *Walton v. Arizona*, 497 U.S. 639, 656 (1990) (Scalia, J., concurring) (criticizing death penalty cases); *Michelson v. United States*, 335 U.S. 469, 487 (1948) (declining to overrule an evidentiary rule because law is too irrational for a court to disentangle); *McFaul v. Ramsey*, 61 U.S. 523, 524 (1857) (denouncing Field Code of civil procedure).

123. *E.g.*, DICKENS, *supra* note 94; HEINRICH VON KLEIST, *Michael Kohlaas: From an Old Chronicle*, in *THE MARQUISE OF O— AND OTHER STORIES* (Martin Greenberg trans., Criterion Books 1960).

124. "Loss of reputation for honorable dealing will bring us unending humiliation; the impending legal and moral chaos is appalling . . ." *Perry v. United States*, 294 U.S. 330, 381 (1935) (McReynolds, J., dissenting). Justice McReynolds, delivering this dissent in court, also predicted that "anarchy and despotism are at the door," but that does not appear in the published opinion. 3 *THE JUSTICES OF THE UNITED STATES SUPREME COURT 2031* (Leon Friedman & Fred L. Israel eds., 1969).

of more general decline, in which the law as a whole degenerates and the older precedents or statutes are usually the best. Novelists and historians have written such stories, but even the most conservative judges do not go that far.¹²⁵ To do so would risk collision with the law of precedent, which, even while requiring judges to look to the past for authority, usually makes the most recent past decision more authoritative than its precursors.¹²⁶ That law is indeed ambivalent, allowing a judge some choice between revering an old precedent as embodying basic principles of the law and rejecting it as quaint and outmoded.¹²⁷ Nevertheless, a judge bound by the law of precedent, but embracing a history of general decline, would find himself obliged to render frequent decisions that, according to his own belief, diverged from superior ancient views.

Principles of judicial propriety, like the principles of traditional fiction, likewise discourage stories of random legal change that lack overall direction. Ronald Dworkin's comparison of the judge's task to a novelist's adding a new chapter to a novel commenced by others suggests that law and literature share a concern with continuity with the past.¹²⁸ Judges should try to keep the law on a coherent path just as novelists seek narrative coherence, although a novelist is freer than a judge to flout tradition. A judge may portray a past decision as a misstep not to be repeated,¹²⁹ but must still try to maintain a distinction between law and chaos. At most, he may describe a "tension" in the course of decision, usually by way of argument for a solution meant to recognize and reconcile competing poli-

125. Compare, e.g., GUSTAVE FLAUBERT, *SENTIMENTAL EDUCATION* (Robert Baldick trans., Penguin Books 1964) (1869), and CHINUA ACHEBE, *THINGS FALL APART* (1969) and EDWARD GIBBON, *THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE* (J.B. Bury ed., Methven & Co. 1900) (1776), with *Burnham v. Superior Court*, 495 U.S. 604 (1990) (opinion of Scalia, J.) (maintaining that procedural due process protections do not grow, but admitting that they can shrink). But see J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* (1957) (describing sixteenth- through eighteenth-century appeals to the virtues of the supposed Anglo-Saxon Constitution).

126. See HENRY CAMPBELL BLACK, *HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS, OR THE SCIENCE OF CASE LAW* 90-97 (1912).

127. E.g., *College Savings Bank v. Florida Prepaid Postsecondary Expense Bd.*, 527 U.S. 666, 689 (1999) (Justice Scalia criticizing the dissent for relying on an "anomalous and severely undermined decision" from the 1960s, rather than "a venerable precedent . . . embedded within our legal system for over a century").

128. RONALD DWORKIN, *LAW'S EMPIRE* 228-38 (1986).

129. See, e.g., Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998).

cies.¹³⁰

An opinion need not tell a story in which law evolves through time. It can also disregard the dates of precedents or statutes, using what fashionable theory calls a synchronic rather than a diachronic approach. Judges who write such opinions know that the law changes, but more or less consciously reject use of that knowledge to resolve the dispute before them, limiting themselves to other tools such as logic and policy to organize the relevant authorities.¹³¹ A rough literary equivalent might be a fantastic or postmodern tale bringing together real and fictional people and events from different eras, although these stories are likely to maintain chronological sequence within their own time frames.¹³² The author of such a tale is likely to play on the reader's awareness of the anachronism, however, unlike a synchronic judge who hopes that readers will not notice the dates of the relevant authorities.

2. Voices From the Past

When an opinion does tell a law story, the main character is likely to be the law itself, working itself pure or failing to do so. A slightly more human personification, the legislature, may also make an appearance. And then there are the judges of times past, returning in a variety of cameo roles. The opinion may validate a precedent by stressing that Friendly decided it, or summon up the ghost of Holmes to warn against repeating the errors of his own day.¹³³ These are stock characters that

130. *E.g.*, *Albright v. Oliver*, 510 U.S. 266, 288 n.2 (1994) (Souter, J., concurring). For stories of oscillation in the law told by scholars, see Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988), and Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849 (1998).

131. *See* WHITE, *supra* note 9, at 160-75 (criticizing this approach in the course of a discussion of *United States v. White*, 401 U.S. 745 (1971)). For an example involving statutes, compare Justice Breyer's diachronic opinion for the court with Justice Kennedy's synchronic dissent in *West v. Gibson*, 527 U.S. 212 (1999).

132. *See, e.g.*, JAMES JOYCE, *ULYSSES* 429-609 (Random House 1961) (1922) (Nighttown sequence); VIRGINIA WOOLF, *ORLANDO: A BIOGRAPHY* (1928); *cf.* E.L. DOCTOROW, *RAGTIME* (1975) (bringing together famous individuals of the same epoch who never met).

133. *E.g.*, *Deems v. W. Maryland Ry.*, 231 A.2d 514, 519, 522 (Md. 1967) (relying on Friendly); *State v. Goddard*, 649 S.W.2d 882, 892 (Mo. 1983) (Weliver, J., dissenting) (relying on Holmes); *cf.* *Int'l Bhd. of Teamsters v. Hanke*, 339 U.S. 470, 476 n.2 (1950) (explaining that because Brandeis wrote the previous opinion, it means what it says).

the audience knows and loves from previous encounters. Occasionally, a notoriously bad judge may be brought on stage to frighten readers away from the course he pursued.¹³⁴

Law stories often contain texts within texts, retelling the facts or contexts of the precedents whose courses they trace. Often the goal is to distinguish or limit the precedent, but it may also be to emphasize its similarity to the case at bar or to find in it the root of a broader principle.¹³⁵ A past decision may look very different as part of a fuller narrative than it did to the judges who handed it down. Sometimes, of course, an opinion abbreviates its discussion of a precedent, or reduces it to a simple citation. Readers can always retrieve the precedent's full text, however, so that the citing opinion is a kind of hypertext, below which other texts are accessible. This form of intertextuality resembles a literary allusion that summons up a myth or previous work with a word or two.

An opinion can do more than reread and retell the story of a previous case: It can also add to it, rewrite it, or erase it. A judge can reinterpret a precedent so that other lawyers and judges will be required to follow the reinterpretation, or can sometimes overrule it entirely. Authors of literature claim no such power. Yet an author may succeed in replacing a previous work or in causing future readers to see it through her eyes.¹³⁶ Richardson's *Pamela* will never be the same after Fielding's *Shamela*, Homer's Odysseus after those of Dante and Joyce, nor the *Declaration of Independence* after the *Gettysburg Address*.¹³⁷ On the judicial side, rejection does not wipe an offend-

134. *E.g.*, *Donnell v. Swenson*, 258 F. Supp. 317, 326 (W.D. Mo. 1966) (mem.) (referring to Lord Jeffreys).

135. *E.g.*, *Bd. of Educ. v. Farmingdale Classroom Teachers Ass'n*, Local 1889, 343 N.E.2d 278 (N.Y. 1975); *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1052-53 (N.Y. 1916).

136. See HAROLD BLOOM, *THE ANXIETY OF INFLUENCE: A THEORY OF POETRY* (1973); T.S. ELIOT, *Tradition and the Individual Talent*, in *THE SACRED WOOD: ESSAYS ON POETRY AND CRITICISM* 42 (1920).

137. *THE DECLARATION OF INDEPENDENCE* (U.S. 1776); CLARK E. CARR, *LINCOLN AT GETTYSBURG: AN ADDRESS* 1-4 (1909). Compare SAMUEL RICHARDSON, *PAMELA OR, VIRTUE REWARDED* (Peter Sabor ed., Penguin Books 1980) (1740), with HENRY FIELDING, *AN APOLOGY FOR THE LIFE OF MRS. SHAMELA ANDREWS* (Sheridan W. Baker, Jr. ed., Univ. of Cal. Press 1953) (1741), and HENRY FIELDING, *THE HISTORY OF JOSEPH ANDREWS AND HIS FRIEND MR. ABRAHAM ADAMS* (1742); compare also HOMER, *THE ODYSSEY* (Butcher & Lang trans., Macmillan Co. 1930), with DANTE ALIGHIERI, *INFERNO* 229-33 (Elio Zappulla trans., Pantheon Books 1998), and JOYCE, *supra* note 132.

ing decision from the books, except sometimes in California.¹³⁸ Readers can still read it, and another court may revive it.¹³⁹

II. INTERWEAVING THE STORIES: AN EXAMPLE

Part of the judicial craft is deploying different kinds of stories in different ways. Not every opinion tells all the stories I have discussed, and each has its own way to recount and to blend those stories it does tell. Often, the opinion tells its stories simply and separately; but a skillful judge considering an appropriate case can write more complex narratives. Rather than try to list different ways of mingling stories, I will give an example—an unusually important and well crafted one.

Lawyers remember *New York Times Co. v. Sullivan*¹⁴⁰ as the case that constitutionalized libel law. It held that the First and Fourteenth Amendments allow a public official to recover damages for a defamatory falsehood concerning his official conduct only by proving that the publisher knew the statement was false or recklessly disregarded whether it was false or not. Many remember it also as a decision preventing Southern defenders of segregation from using state court libel suits to harass Northern newspapers covering the desegregation struggle, in this instance by publishing an advertisement seeking contributions for Martin Luther King's campaign in Montgomery, Alabama and for voting rights activities. Justice Brennan's opinion for the Court unites these two contexts for the decision both rhetorically and intellectually through its interlocking stories.¹⁴¹

The opinion's statement of the case tells three stories. After stating in general terms the issue before the Court, Justice Brennan plunges into what, in form, appears to be a narrative of the proceedings below.¹⁴² This narrative, however, is also a

138. On the California Supreme Court's power to depublish lower court opinions, see Stephen R. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 LOY. L.A. L. REV. 1033, 1033-34 (1993).

139. See, e.g., *Maryland v. Wirtz*, 392 U.S. 183 (1968), *overruled by Nat'l League of Cities v. Usery*, 426 U.S. 833, 840 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985), *limited sub silentio by Alden v. Maine*, 527 U.S. 706, 758-60 (1999); *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1239-40 (10th Cir. 1999) (suggesting that precedent should be rejected as inconsistent with earlier precedents).

140. 376 U.S. 254 (1964).

141. See *id.*

142. *Id.* at 256-64.

frame for a second narrative. The procedural statement incorporates the facts of the case: the publication of the assertedly defamatory advertisement and its consequences. This second narrative in turn makes it possible for the opinion to quote much of the advertisement, thus describing the intimidation of peaceful civil rights protesters, and mentioning the advertisement's distinguished signers. The advertisement, a text within a text, hence evokes yet a third narrative, the dramatic history of the Montgomery boycott and its sequels. In 1964, when the case was decided, this context must have been fresh in many readers' minds.¹⁴³

This interweaving of the proceedings below, the facts concerning the alleged libel, and Montgomery realities continues as the statement proceeds. Describing Commissioner Sullivan's contention that the advertisement referred to him allows the Court to point out that it does not mention him by name, and to repeat the advertisement's own allegations.¹⁴⁴ Recounting the advertisement's minor inaccuracies brings forward what had actually happened. Students were not expelled for demonstrating at the Capitol, but they were expelled for demanding service at a courthouse lunch counter; Dr. King was not arrested seven times, but he was arrested four times; and so forth.¹⁴⁵ Mentioning the plaintiff's claims of damages raises the fact that he introduced no evidence supporting them, and that his witnesses did not testify to believing what he claimed the advertisement said about him.¹⁴⁶ The Court's implication—or should one say innuendo?—is clear: None of Commissioner Sullivan's Montgomery acquaintances thought worse of him because of what they read in a civil rights movement advertisement. Similarly, stating the facts relating to the *New York Times'* alleged malice establishes that the advertisement had been certified by A. Philip Randolph, described with some understatement as "known to the Times' Advertising Acceptability Department as a responsible person."¹⁴⁷

143. See TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63, at 143-205, 444-77 (1988); Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1016-28 (1989).

144. 376 U.S. at 258.

145. *Id.* at 259.

146. *Id.* at 260.

147. *Id.* For Randolph's role in the civil rights movement, see PAULA F. PFEFFER, A. PHILIP RANDOLPH, PIONEER OF THE CIVIL RIGHTS MOVEMENT (1990).

These interweavings have functions far more significant than showing that the placers of the advertisement were the good guys and the plaintiff was not—although establishing the context of racial injustice surely does make the opinion more persuasive. More importantly, however, the context shows that the libel judgment really did menace free speech about vital public issues, so that the issue the case posed could not be reduced to the state courts' technicalities about whether jurors could presume malice.¹⁴⁸ Readers cannot help recognizing that the case arose from a major public controversy.

The Court's narrative also establishes the relationship between the civil rights struggle and libel law. Publishing an advertisement in the *Times* was an appeal to the public just as deserving of constitutional protection as other protest activities like demonstrating on the steps of the state Capitol or demanding service at the courthouse cafeteria. By the same token, recovering a damage verdict from the *Times* was just as much an effort to suppress critical speech as arresting or intimidating demonstrators, expelling student protesters, and denying African Americans the right to vote. The statement shows, moreover, how an unreformed libel law could be used for suppression by permitting a large verdict on flimsy facts. The conclusion is clear: Free speech about controversial matters can be protected only by building into the law of libel some leeway for those protesting governmental actions.

Justice Black's concurring opinion emphasizes the context of the case even more explicitly than Justice Brennan's opinion for the Court, and it is interesting to ask why. Justice Black, himself an Alabama native, writes that "Montgomery is one of the localities in which widespread hostility to desegregation has been manifested."¹⁴⁹ He goes on to mention hostility to "so-called 'outside agitators'"¹⁵⁰ and to mention a number of similar defamation suits pending against the *Times* and CBS.¹⁵¹ I doubt that this divergence arises from Justice Black's willingness to go beyond the majority by forbidding altogether libel suits against state officials arising out of their official conduct: The logic of Justice Black's proposed rule in no way depends on these particular facts. To some extent, the difference in narra-

148. See 376 U.S. at 262-64, 267.

149. *Id.* at 294 (Black, J., concurring).

150. *Id.* (Black, J., concurring).

151. *Id.* at 294-95 (Black, J., concurring). Justice Brennan also mentions these suits, but only some of them and only in a footnote. *Id.* at 278 n.18.

tives may reflect a difference in style between the two Justices, as well as the greater freedom enjoyed by the author of a concurring or dissenting opinion.

I suspect, however, that Justice Brennan deliberately refrains from tying the decision explicitly to the situation in *Montgomery* in order to give it greater generality as a fundamental reorientation of First Amendment law.¹⁵² The context illustrates why that reorientation is needed but does not limit it. Justice Black, by contrast, while supporting an even more sweeping ruling, leaves himself more open to the criticism that he is over-reacting to a specific abuse.

As Justice Brennan proceeds to discuss the legal issues, he introduces yet another narrative, a law story about the First Amendment. A long quotation from Justice Brandeis's concurring opinion in *Whitney v. California* describes the Framers' intent to protect public discussion of grievances as a "political duty."¹⁵³ Soon afterward, Justice Brennan explains how the "great controversy over the Sedition Act of 1798 . . . first crystallized a national awareness of the central meaning of the First Amendment" as a guaranty of "free public discussion of the stewardship of public officials."¹⁵⁴ Although the opinion's analysis contains a lot more than history, its four page discussion of the Sedition Act is clearly central.¹⁵⁵ And the story of deepening national recognition of the importance of public criticism of public servants is carried forward through a detailed description of a 1908 Kansas case, clearly more important as a historical marker than as a precedent binding the Supreme Court.¹⁵⁶

Justice Brennan's law story functions as an inspirational narrative of how "[f]reedom slowly broadens down from prece-

152. See Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 193-94.

153. 376 U.S. at 270 (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam)).

154. *Id.* at 275.

155. See *id.* at 273-76. For a discussion of the Act's relevance, see HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 17-20 (1965).

156. See 376 U.S. at 280-82 (discussing *Coleman v. MacLennan*, 98 P. 281 (Kan. 1908)). Another emphasized lower court decision, this one arising from a charge of anti-Semitism against a Congressman, implies that the need for the principle that the Court recognizes extends beyond the civil rights struggle in the South. See *id.* at 272 (discussing *Sweeney v. Patterson*, 128 F.2d 457 (D.C. Cir. 1942)).

dent to precedent,"¹⁵⁷ but it also has more direct bearings on the case. The Sedition Act made truth a defense to the crime it defined, so that the nation's rejection of the Act supported the Court's requirement that libel plaintiffs who are governmental officials must prove the falsity of an allegedly defamatory statement. The Act's critics proclaimed that "the censorial power is in the people over the Government, and not in the Government over the people,"¹⁵⁸ which the Court made a premise of its decision. The history of misuse of libel law by public officials made Supreme Court reform appropriate. More broadly, the campaign of Jefferson and Madison against the Act was itself an example of free speech's operation to reform governmental abuses. Implicitly, then, the story of Jefferson and Madison parallels the story of Martin Luther King and the Montgomery protesters.

In the final section, Justice Brennan's opinion turns from the recognition of a rule of Constitutional law to its application, holding that the record cannot support a verdict for the plaintiff.¹⁵⁹ That application requires the Court to recount in greater detail the story about the advertisement and its publication that it told at the outset of the opinion, this time without describing the proceedings below. The opinion thus relates how the *Times* acted in good faith in publishing the advertisement, and how not even the plaintiffs' own witnesses—whose testimony is set forth in some detail—read the advertisement as referring specifically to the plaintiff Commissioner Sullivan, as opposed to the city's government and police department in general.

That these circumstances appear twice in the opinion shows clearly enough that their first appearance was not simply part of a compulsory statement of the facts. One can easily imagine an opinion opening with a short statement of the proceedings below focusing on the rules of law that the Alabama courts applied, with the story of the advertisement postponed to the opinion's final section. Such a statement, however,

157. ALFRED LORD TENNYSON, *You Ask Me Why*, in TENNYSON 45 (1985).

158. 376 U.S. at 275 (quoting James Madison).

159. See *id.* at 283-92. In addition to clarifying the operation of the Court's main ruling, this discussion has also become a primary support for searching appellate review of factual findings where First Amendment rights are at stake. See *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 241-44 (1985).

would not play the multiple roles I have described. What Justice Brennan actually wrote not only plays those roles but also sounds at the opinion's close the same theme heard at its outset: An official used flimsy libel claims to suppress criticism. The Court drives its point home by holding, in its parting shot, that the decision of the Alabama courts is tantamount to banning criticism of the government itself by groundlessly construing it as criticism of an individual official.¹⁶⁰

Could the *New York Times* opinion have been written without telling its stories as it does? Of course it could have been, just as it could have been written without referring to the people's censorial function or the lower court precedents it quotes. The *Pentagon Papers* case (another case involving the *New York Times*) shows that a ruling can be important without an elaborate opinion.¹⁶¹

Would a storyless version of the opinion in *New York Times Co. v. Sullivan* have been substantially the same opinion? No: It would have been different in both content and effect. Ultimately, what a Supreme Court opinion winds up deciding depends to a considerable extent on how it inserts itself in the history of the law and the nation. That is precisely what Justice Brennan's use of stories addressed and accomplished. We can use analysis to separate from each other the stories he tells about the Sedition Act, the Civil Rights movement, and the First Amendment, but it will be hard for anyone who has read his opinion to conceive of those stories as unrelated to each other.

III. VOICES

According to one ideal, only one voice should be heard in judicial opinions: the voice of the law. That ideal, whatever its merit, does not correspond to reality. Even the voice of an opinion's author is more complex than one might think. And an attentive reader can usually hear other voices as well.

A. THE AUTHOR OF THE OPINION

1. Puzzles of Authorship

The legal voice is usually insincere. Its speaker may ex-

160. 376 U.S. at 291-92.

161. See *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

press views not his own, or may utter words written by another as his own. The advocate is the paradigm of the first possibility: He does his best to speak with every appearance of sincerity, occasionally even pretending to take on a client's or victim's identity,¹⁶² but in our legal system those in the know understand that he vouches for neither his client nor his arguments.¹⁶³

The second possibility likewise has roots in advocacy: Athenian orators, for example, wrote speeches that litigants delivered as their own.¹⁶⁴ That practice is not extinct in some forums, such as congressional hearings, in which parties are expected to speak in person rather than through counsel. Similar ventriloquism occurs, moreover, in other legal discourse. "We, the people" did not write the Constitution;¹⁶⁵ testators do not write the wills, nor contracting parties the contracts that speak in their names; legislatures, and even legislators, do not write statutes.

What counts in most legal writing is not authorship but authorization. Whoever wrote the words, whoever speaks them, and whoever believes what they say, the crucial question is whether the person for whom the words are spoken has licensed their use in her behalf. The traditional view of literary authorship is different: We often care whether the words we read were written by Shakespeare, Bacon, an unknown Elizabethan actor, or a later editor. In recent years, it has become popular to emphasize that the concept of individual artistic creation is a social convention, dating in important respects to the eighteenth century, inconsistent with the facts of much literary production, and productive of mystification in an era in

162. *E.g.*, *Drayden v. White*, 232 F.3d 704, 711-13 (9th Cir. 2000) (finding misconduct when a prosecutor gave purported a narrative of the dead victim's experience).

163. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (1984) (explaining that a lawyer's representation is not an endorsement of the client's views or activities); DAVID J.A. CAIRNS, *ADVOCACY AND THE MAKING OF THE ADVERSARIAL CRIMINAL TRIAL 1800-1865*, at 141-42, 154-62 (1998) (tracing the origin of the Anglo-American rule that an advocate may not purport to express his own opinion). Of course, there are limits to what a lawyer may argue on behalf of a client. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.3, 3.4 (1984).

164. MATTHEW R. CHRIST, *THE LITIGIOUS ATHENIAN* 37-38, 202-05 (1998); *see also* CAIRNS, *supra* note 163, at 49-51 (describing a similar practice in early nineteenth-century English felony trials).

165. U.S. Const. pmb1.

which corporate teams put together many works.¹⁶⁶ Judges in copyright cases must reckon with this problem, for example, when they seek to identify the author or authors of a movie to which many contributed.¹⁶⁷ Nevertheless, even sophisticated readers continue to presume that a novel or poem is the expression of an individual author.¹⁶⁸

A judicial opinion looks more like a novel than a contract in these respects. In Anglo-American legal systems, it is usually uttered by a single, named judge who is presumed to be its author. It is probably not a coincidence that the eighteenth century, when modern notions of literary authorship were developing, was also when reporters began trying to record judges' actual words, including rhetorical flourishes, rather than providing a summary of their reasons and conclusions.¹⁶⁹

A judge is free to write an opinion in her own style, and thus to express to some extent her own personality.¹⁷⁰ Indeed, some such self-expression is essential if the opinion is to establish its author's reliability.¹⁷¹ The ways of doing that vary from judge to judge if not from opinion to opinion. Justice Holmes's candor in avowing the choice he is making persuades us to believe his *Olmstead* dissent, while Chief Judge Cardozo portrays himself in *Ultramares* as the slave of the law, and Justice Brandeis's accumulation of studies and reports gives him the authority of science and objectivity.¹⁷² Lord Denning and Judge

166. See, e.g., JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS (1996); MARK ROSE, AUTHORS AND OWNERS (1993); MARTHA WOODMANSEE, THE AUTHOR, ART, AND THE MARKET (1994); Michel Foucault, *What Is an Author?*, in LANGUAGE, COUNTER-MEMORY, PRACTICE (Donald F. Bouchard & Sherry Simon trans., 1977).

167. E.g., *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000) (considering whether an advisor was co-author of the movie *Malcolm X*).

168. See SUSAN LETZLER COLE, PLAYWRIGHTS IN REHEARSAL: THE SEDUCTION OF COMPANY (2001) (describing the authority actors attribute to authors).

169. See authorities cited *infra* notes 176-77. For the earlier practice, see, for example, *The Queen v. Marquis of Winchester*, 76 Eng. Rep. 621 (K.B. 1583) (reported by Coke), and *Earl of Inchiquin v. Fitzmaurice*, 2 Eng. Rep. 603 (H.L. 1785) (reporting a House of Lords decision, at that time still rendered by vote and often without opinion).

170. Scholarship is another legal genre of which this may be said.

171. See POSNER, *supra* note 12, at 255-302; WHITE, *supra* note 9, at 102-12 (discussing Justice Frankfurter's self-presentation in *Rochin v. California*, 342 U.S. 165 (1952)).

172. Compare *Olmstead v. United States*, 277 U.S. 438, 469 (1928) (Holmes, J., dissenting), with *Ultramares Corp. v. Touche*, 174 N.E. 441, 442 (N.Y. 1931) (Cardozo, C.J.), and *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504,

Posner use a direct, informal style, while Chief Justice Marshall gives the impression of neutral objectivity.¹⁷³ None of these self-portraits, of course, necessarily coincides with its author's real character.

Although judges thus appear as authors in the traditional literary sense, they do not always write their own opinions. Nowadays, law clerks do much of the writing, or at least boast of doing so.¹⁷⁴ Judges have been known to risk appellate disapproval by adopting, more or less verbatim, findings of fact that one party has submitted.¹⁷⁵ English law reporters sometimes suppressed opinions they found incorrect, garbled opinions in transcription, or rewrote the opinions they claimed to report, as Coke notoriously did.¹⁷⁶ One distinguished reporter simply omitted decisions he considered "inconsistent with former decisions or recognised principles."¹⁷⁷ Supreme Court Justices negotiate the text of opinions, insisting on additions and deletions as the price of joining in an opinion.¹⁷⁸ Justice Holmes described this treatment of his opinions as castration.¹⁷⁹

2. The Judge and the Court

Negotiation of appellate opinions makes clear that an opin-

517 (1924) (Brandeis, J., dissenting). On the other judicial voices in *Olmstead*, see James Boyd White, *Judicial Criticism*, 20 GA. L. REV. 835 (1986).

173. Compare, e.g., *Seshadri v. Kasraian*, 130 F.3d 798, 799 (7th Cir. 1997) (Posner, C.J.), and *Candler v. Crane Christmas*, 1951 K.B. 164, 174 (Eng. C.A. 1951) (Denning, L.J., dissenting), with *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 375 (1821) (Marshall, C.J.).

174. WILLIAM DOMNARSKI, IN THE OPINION OF THE COURT 30-31, 39-44 (1996); see JOSEPH VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN 52-58 (1986) (discussing the implications of this practice).

175. E.g., *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 (1964).

176. See JOHN P. DAWSON, THE ORACLES OF THE LAW 65-80 (1968); James Oldham, *Detecting Non-Fiction: Sleuthing among Manuscript Case Reports for What was Really Said*, in LAW REPORTING IN BRITAIN 133 (Chantal Stebbings ed., 1995). For similar accounts in the United States, see Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1303-12 (1985).

177. Peter Luther, *Campbell, Espinasse and the sailors: text and context in the common law*, 19 LEGAL STUD. 526, 533 (1999) (quoting John Campbell, a judicial reporter and later Lord Chancellor).

178. BERNARD SCHWARTZ & STEPHEN LESHER, INSIDE THE WARREN COURT (1983); see also BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHERN (1979).

179. G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 314 (1993); cf. *Buck v. Bell*, 274 U.S. 200 (1927) (Holmes, J.) (upholding the constitutionality of sterilizing woman with asserted inherited feeble-mindedness).

ion is not simply the utterance of the judge who delivers it: It is also the utterance of the court, at least when it is a majority opinion of a multi-judge panel. As a result, it necessarily speaks with more than one voice. Alternatively, one could say that it speaks with a voice that is not necessarily the voice of any single judge, even the one who wrote it.¹⁸⁰ Perhaps this is a legal equivalent of the "free indirect style" of a novel, in which the narrator's voice sometimes merges with the thoughts of a character without actually quoting them.¹⁸¹

To the extent that an opinion speaks for a number of judges with differing views, one could say that to consider its purported author's sincerity becomes pointless. That author, like a courtroom advocate, speaks on behalf of others, or rather on behalf of a consensus that goes beyond her own views. The impression an opinion gives of honesty and conviction may attest only to the writer's rhetorical ability. In the world of literary theory, of course, some would question the whole notion of sincerity, maintaining that any writing is a social act, often penned by an individual but bearing the traces of many people and many utterances, and that in any event it is misleading to speak of congruence between a work and a detailed authorial intent distinct from and lurking behind it.¹⁸²

On the other hand, because the author of an opinion is thought to believe in the views she accepts, readers are free to discuss her sincerity. If, for example, she uses in one opinion views contrary to those she has stated elsewhere, we can tax her with insincerity as well as inconsistency. We expect that, even when a judge negotiates deletions and additions to her opinion, there must be some limit to her willingness to sign claims she is not prepared to honor in future cases. After all, she remains free to concur separately or to state the majority's views while noting her own dissent from them.¹⁸³

180. For an extreme example, see *Kansas v. Colorado*, 121 S. Ct. 2023, 2032 n.5 (2001) (four Justices endorsing a position with which they disagree in order to produce a majority for a judgment).

181. *E.g.*, GUSTAVE FLAUBERT, *SENTIMENTAL EDUCATION* (Robert Baldick trans., 1964); *see, e.g.*, BAL, *supra* note 23, at 46-52; PETER BROOKS, *READING FOR THE PLOT* 193-207 (1984).

182. *See* Roland Barthes, *The Death of the Author*, in *THE RUSTLE OF LANGUAGE* 49 (Richard Howard trans., 1986).

183. *E.g.*, *United States v. Bellomo*, 176 F.3d 580, 590 (2d Cir. 1999) (Judge Noonan noting his own dissent in his own opinion). During the era in which the Massachusetts Supreme Judicial Court shunned dissenting opinions, an opinion would sometimes state that "a majority of the court" had reached a

That a judicial opinion speaks both for its deliverer and for the court may also affect its interpretation. Should it be read in the light of other opinions delivered by the same judge, or in the light of other opinions delivered for the same court? Biographers have little hesitation in treating an opinion as a personal utterance;¹⁸⁴ lawyers and judges are less likely to do so. Does the author's explanation of what she said deserve special weight? Judges usually do not say that it does in a previous opinion, but one can find a few exceptions.¹⁸⁵ One can avoid such questions by insisting that an opinion "speaks for itself." Still, it is hard to avoid what everyone knows: that opinions also speak for their authors and for courts.

The double voice of judicial opinions arises in part from the practice, introduced by Chief Justice Marshall, of entrusting to a single judge the delivery of an opinion that, if all goes well, is also that of the court.¹⁸⁶ In Europe, opinions are anonymous and taken to speak for the court as a body, although when the court consists of a single judge a more individual reading is at least possible. England still follows in principle the opposite approach: Each judge delivers an opinion separately, sometimes extempore, so that one can determine the views of the court only by adding up these individual statements.¹⁸⁷ Today, however, English opinions are often written, and some of the judges may state only that they agree with another judge's opinion. Negotiation of the lead opinion may therefore occur, although the secrecy of court proceedings makes it impossible to say for sure.

certain result, tipping off readers that there were dissenters, and dissociating the unnamed dissenters from any appearance of asserting views they in fact repudiated. *E.g.*, *Duggan v. Rennick*, 77 N.E.2d 639, 640 (Mass. 1948).

184. *E.g.*, FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* 63-138 (1999) (tracing a consistent political philosophy in Brennan's opinions); RICHARD POLENBERG, *THE WORLD OF BENJAMIN CARDOZO* (1997) (relating Cardozo's opinions to his personality).

185. *See, e.g.*, *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 522 (1990) (Stevens, J., concurring in part); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 562 n.10 (1972); *Sprott v. United States*, 87 U.S. (20 Wall.) 459, 467 (1874) (Field, J., dissenting). For an illuminating discussion of the implications and development of the quest for a single opinion, see Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267 (2001).

186. John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH. U. L.Q. 137, 138 (1999).

187. *See* SANDRA BERNIS, *TO SPEAK AS A JUDGE: DIFFERENCE, VOICE AND POWER* 63-76, 111-24, 176-83 (1999) (comparing the opinions of different judges in the same case).

Yet even a one-judge court may speak with a double voice. When, for example, a trial judge writes an opinion, the authors of past appellate opinions can often be heard, not just in direct quotation, but by shaping what the trial judge feels authorized to write. The judge may occasionally criticize precedent but will often adopt its approach and even its phraseology, whether out of duty, decorum, fear of reversal, suggestibility, or inertia. Even when there is no binding precedent, the voice of the law (or the judge's perception of it) mingles with what might otherwise have been the judge's own voice. A judge confronting an unfamiliar problem and trying to work out what the law is and what his own views are may find it hard to distinguish the former from the latter.¹⁸⁸

So one could easily view judges, like other legal authors, as paragons of inauthenticity.¹⁸⁹ What could be less authentic (for those who believe in the possibility of authenticity) than systematically referring to oneself as "the court"? Indeed, the novelist Ivan Klíma, portraying a judge who struggles to distinguish his own voice from that of the law, shows how that struggle leads to the end of his judicial career in Communist Czechoslovakia.¹⁹⁰

An opinion's double voice often addresses itself to double or multiple hearers. An opinion speaks immediately to those interested in the resolution of the case at bar: parties, their lawyers, and lower court judges who may be called on to preside over further proceedings. At the same time, the judge speaks to those who will use the opinion to ascertain and understand the law: lawyers whose clients face legal problems arguably governed by precedent, and more broadly students, expounders and critics of the law. Usually, judicial opinions make no explicit reference to these audiences, adopting somewhat the tone of a voice from the heavens, as opposed to a human speaking to humans. Occasionally, however, a judge will address more directly the bar, the scholarly community, or the general public.¹⁹¹

188. Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).

189. Cf. RICHARD H. WEISBERG, *THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION* (1984) (describing as lawyers fictional characters who use verbal complexities to avoid realities).

190. IVAN KLÍMA, *JUDGE ON TRIAL* (A.G. Brain trans., Chatto & Windus 1991) (1986).

191. See *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 149-50 (1997) (Breyer, J., concurring) (reading an *amicus* brief as an offer of cooperation from the scien-

B. OTHER VOICES

1. Defining the Opinion's Boundaries

The judges of an appellate court, of course, may speak for themselves, and not merely by negotiating the language of a single opinion. They may concur or dissent separately. Doing so at once gives the resulting multiplicity of opinions an adversary character, recalling novels with several narrators.¹⁹² Quotations from opinions of the trial judge or the judges of appellate courts that have previously heard the case may add the voices and differing views of those judges, at least to the extent that an opinion quotes them or that a reader can look up their opinions. Occasionally, a lower court judge even gets a chance to respond to his superiors.¹⁹³

These possibilities give an appellate opinion indeterminate boundaries. Dissents and lower court opinions are not, strictly speaking, part of the opinion; but it is entirely legitimate for a reader to use them to improve his understanding of the facts, issues, or arguments. This in turn affects his reading of the main opinions. Sometimes, for example, other opinions show that an appellate opinion has swept under the rug problems it should have faced.¹⁹⁴

In literature, comparably indeterminate texts can be found when a novelist such as Balzac or Trollope writes a series of

tific community and urging trial judges to respond by appointing independent expert witnesses); *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958) (asserting that state officials and legislators must follow Supreme Court desegregation precedent); *Agee v. Paramount Communications Inc.*, 114 F.3d 395, 400 (2d Cir. 1997) (notifying the bar of the importance of complying with the rule); *Lippard v. Houdaille Indus.*, 715 S.W.2d 491, 505 (Mo. 1986) (en banc) (Welliver, J., dissenting) (urging the legislature to enact specified legislation overruling the majority opinion), *superseded by* MO. REV. STAT. § 537.765 (1987).

192. *E.g.*, VIRGINIA WOOLF, *THE WAVES* (1931); WILLIAM FAULKNER, *AS I LAY DYING* (Noel Polk ed., Vintage Int'l 1990) (1931); LAWRENCE DURRELL, *THE ALEXANDRIA QUARTET* (1961); see Orit Kamir, *Judgment by Film: Socio-Legal Functions of Rashomon*, 12 YALE J.L. & HUMAN. 39, 45-56, 66-73 (2000).

193. *E.g.*, *Daubert v. Merrell Dow Pharm., Inc.*, 43 F. 3d 1311, 1315-17 (9th Cir. 1995), *on remand from* 509 U.S. 579 (1993) (opinion on remand implicitly criticizing Supreme Court decision); *Marshall v. Mulrenin*, 508 F.2d 39, 41-45 (1st Cir. 1974) (Aldrich, J.) (defending his decision in *Hanna v. Plumer*, 331 F.2d 157 (1st Cir. 1964)), *rev'd*, 380 U.S. 460 (1965); Stephen Reinhardt, *The Supreme Court, The Death Penalty, and The Harris Case*, 102 YALE L.J. 205, 205-07 (1992) (criticizing the Supreme Court treatment of death penalty appeals).

194. *E.g.*, *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 392-97 (1998) (Breyer, J., dissenting in part).

novels that involve the same characters but are not simply parts of one longer work, so that readers may choose between treating one of them as entirely independent and reading it in the context of the others. In law as in literature, one can argue that the more inclusive alternative is more informative and therefore better. Yet the very fact that an appellate court chooses not to mention matters discussed below implies that it considers them irrelevant to its decision. Arguably, its constricting view should prevail over those of lower courts and dissenters, at least until a later court rereads the decision in its broader context.

How far should one go in extending the potential bounds of an opinion? The arguments of counsel in important cases used to be reported as fully as the court's opinion,¹⁹⁵ and now may be available electronically or in law libraries. Later courts have been known to rely on them to show what issues were before the court, and were therefore embraced by its opinion.¹⁹⁶

The syllabus of every Supreme Court opinion now carries a footnote asserting that it "constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader" but the Reporter protests too much: Syllabi surely influence some readers' understanding of some opinions. Overburdened researchers, for example, may never read an opinion whose syllabus makes it seem irrelevant, and in some jurisdictions the court does write the syllabus—at least, the rules say so.¹⁹⁷ One might also include in the opinion extrajudicial comments by judges on their own or other judges' opinions,¹⁹⁸ discussions in later opinions, and the occasional

195. *E.g.*, *Edwards v. California*, 314 U.S. 160, 161-70 (1941); *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 427-535 (1837); *Omychund v. Barker*, 26 Eng. Rep. 15, 15-32 (Ch. 1744).

196. *E.g.*, *United States v. Storer Broad. Co.*, 351 U.S. 192, 204 & n.14 (1956); *Wabash, St. Louis & Pac. Ry. v. Illinois*, 118 U.S. 557, 568-69 (1886). *But see* *Ramdass v. Angelone*, 530 U.S. 156, 168 (2000) (rejecting the petitioner's argument that the state court should be required to consult the briefs and record in construing Supreme Court precedent). On the exploration of a precedent's creation, see Adrian Vermeule, *Judicial History*, 108 *YALE L.J.* 1311 (1999).

197. *E.g.*, W. VA. CONST. art. VIII, § 4; KAN. STAT. ANN. §§ 20-111, 20-203 (1995), 60-2106(b) (1994); OHIO SUP. CT. RULES 1(B); *see also supra* note 15. Although it has been clear since *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337 (1906), that the Supreme Court is not responsible for syllabi, previously that was not always the case. *E.g.*, *Burgess v. Seligman*, 107 U.S. 20, 20 (1882) (syllabus).

198. *E.g.*, WILLIAM DOMNARSKI, *IN THE OPINION OF THE COURT* 7-8 (1996)

scholar's commentary that shapes the reading of an opinion.¹⁹⁹ Historians sometimes review the record or research beyond it in order to revive a suppressed voice.²⁰⁰

Ultimately, one could argue that no opinion stands by itself, and that the relevant text is our law (or even our history) read as a whole.²⁰¹ Even when an opinion silences voices, we can sometimes find them elsewhere, as when the Court's opinion in *Romer v. Evans*²⁰² pointedly refrained from mentioning *Bowers v. Hardwick*.²⁰³ After all, the law has long recognized that silence can speak.²⁰⁴ Of characters in a novel, in contrast, we can know only what the author chooses to include.²⁰⁵

(asserting that Justice Story wrote some of the notes that the Reporter appended to opinions); JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* (Gerald Gunther ed., 1969) (discussing anonymous newspaper essays defending the decision); William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1986).

199. Thus Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69 (1967), interpreted *Reitman v. Mulkey*, 387 U.S. 369 (1967), in a way that influenced *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982).

200. *E.g.*, DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978); JOHN NOONAN, *PERSONS AND MASKS OF THE LAW* ch. 4 (1976) (on *Palsgraf*); Kendall Thomas, *Rouge et Noir Reread: A Popular Constitutional History of the Angelo Herndon Case*, 65 S. CAL. L. REV. 2599 (1992).

201. See DWORKIN, *supra* note 128, at 225-75. This may also be said of Jewish law, in which students from the compilers of the Talmud until today have struggled to understand and if possible reconcile disputing voices. Cf. DAVID S. COLE, *THE RESPONSES* (1980) (unpublished play, on file with the author) (evoking a similar vision of Jewish law).

202. 517 U.S. 620 (1996).

203. 478 U.S. 186 (1986).

204. *E.g.*, *Fletcher v. Weir*, 455 U.S. 603 (1982) (per curiam) (inference from the defendant's silence); *Raffel v. United States*, 271 U.S. 494 (1926) (inference from the testifying defendant's failure to testify in a previous trial); *United States v. Williams*, 990 F.2d 507 (9th Cir. 1993) (argument from failure to call a witness); see Shoshana Felman, *A Ghost in the House of Justice: Death and the Language of the Law*, 13 YALE J.L. & HUMAN. 241 (2001); Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 33 U. MICH. J.L. REFORM 263 (2000).

205. There are instances in which characters in one fiction reappear in another; for example, in medieval stories about the courts of King Arthur or Charlemagne, or in TOM STOPPARD, *ROSENCRANTZ AND GUILDENSTERN ARE DEAD* (1968). See also Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429, 430-37. But the reader is not obliged to accept that all these reincarnations are "really the same person."

2. Within the Boundaries

One can find other voices in a judicial opinion without thus stretching its boundaries. An opinion may quote parties and other witnesses, as well as authors of written or oral statements admitted into evidence. Even the jury may speak, although usually the court reconstructs its supposed findings in the peculiar way already described.²⁰⁶ So may judges who wrote in previous cases but are quoted in this one, as well as other authors. Even imaginary speakers and speeches may appear: "one might contend that . . ."; "an objective observer would conclude that . . ."; "the defendant would naturally have contradicted the statements if he did not assent to their truth."²⁰⁷

Incorporating other voices in a judicial opinion may permit a real dialogue, but may also be merely an accumulation of quotations. "Using rhetoric, even a representation of a speaker and his discourse of the sort one finds in prose art is possible—but the rhetorical double-voicedness of such images is usually not very deep . . ."²⁰⁸ This reflects the ambivalence of litigation, which always arises out of clashing views and concerns, but culminates, when cases are tried, in a judicial attempt to resolve or suppress the clash.²⁰⁹ An opinion's author may invoke the conflict in its fullness, but may also present opposing voices in a partial and tendentious way. The latter approach may backfire, however, if readers detect and reject the author's partiality.

CONCLUSION

Judicial opinions tell more than one story because judicial decisions can and should pursue more than one goal. A decision should reach a result appropriate to the facts before the court; it should emerge from procedures adequate to develop those facts; and it should maintain consistency with past decisions while promising proper results in the future. Each of

206. See *supra* notes 48-49 and accompanying text.

207. The quoted words are similar to those found respectively in *Ferens v. John Deere Co.*, 494 U.S. 516, 531-32 (1990), *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 861, 865 (1988), and *Sparf & Hansen v. United States*, 156 U.S. 51, 56 (1895).

208. M. M. BAKHTIN, *THE DIALOGIC IMAGINATION: FOUR ESSAYS* 354 (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., Univ. of Tex. Press 1992) (1975) (discussing the rhetoric of courts).

209. See *supra* note 5 and accompanying text.

these goals implies its own context, which the opinion should set forth.

An opinion that tells accurate and persuasive stories about its facts, procedures, and law is more likely than other opinions to reach all three goals because telling and hearing stories is a good way to grasp and appraise how a series of events fit together. Narrative coherence of several kinds is thus an important judicial method.²¹⁰ It is not, of course, infallible. The stories an opinion can tell may point toward different endings, just as the ideals that decisions should be adequate to their facts, should emerge from fair procedures, and should apply sound general rules, may conflict with each other. As we have seen, a story may be told in many ways, each of which may support a more or less different ending. Yet the fact that judges use story-telling methods also found in literature does not merely reflect chance, judicial manipulation, or stylistic ambition. The different ways of telling stories embody different ways in which people, whether they are novelists or judges, perceive and understand human events.

That many voices may infiltrate a judicial opinion likewise promotes at least one ideal of adjudication, at least in a highly adversarial system such as ours. Hearing all those involved in a case is a procedural safeguard for good results as well as good in itself.²¹¹ Incorporating their voices in an opinion helps both the opinion's author and its reader to hear them. But there are also countervailing pressures. Letting opposing viewpoints have their say may discomfit the judge or, some think, undermine the law. Among our judges, Aesop has more followers than Dostoevsky. Often, indeed, the most distinguished judges are the most successful in filling their opinions with their own voices. Nevertheless, good readers often hear other voices as well.²¹²

210. For analyses of other judicial methods, see PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982), BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921), and LEWELLYN, *supra* note 82.

211. *E.g.*, Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 886 (1981); Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1, 20-21 (1974); see MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 79-121 (1995) (proposing the reader of fiction as a model for judges).

212. *See, e.g.*, Walker v. City of Birmingham, 388 U.S. 307 (1967); see Luban, *supra* note 44; Robert Rubinson, *The Polyphonic Courtroom: Expanding the Possibilities of Judicial Discourse*, 101 DICK. L. REV. 3, 12-18, 21-26

The structure of judicial opinions, lastly, helps them lodge in the reader's mind. We remember the stories of many opinions, and continue to hear some of their voices. Opinions are easier to retain than statutes and formulas. Not only do they stay with us, but they continue to be living influences on our thoughts and our dialogues. We test proposed rules of law against their stories, and continue the debates they embody. They constitute much of the experience that is the life of the law.