

OKLAHOMA CITY UNIVERSITY LAW REVIEW

VOLUME 26

SUMMER 2001

NUMBER 2

ARTICLES

AS I READ, I WEEP*—IN PRAISE OF JUDICIAL NARRATIVE

In memory of Professor Stanley S. Herr, who knew how to alleviate sadness through law.

SHULAMIT ALMOG**

We live immersed in narrative, recounting and reassessing the meaning of our past actions, anticipating the outcome of our future projects, situating ourselves in the intersection of several stories not yet completed.

—Peter Brooks¹

* Judge William J. Fernandez. Judge Fernandez authored the opinion in *Guardianship of Phillip Becker*, No. 101981 (Cal. Super. Ct. Santa Clara County 1981) (unpublished opinion). For a full text of the judgment, see FAMILY MATTERS: READINGS ON FAMILY LIVES AND THE LAW 288 (Martha Minow ed., 1993) [hereinafter FAMILY MATTERS].

** Faculty of Law, Haifa University in Mount Carmel, Haifa, Israel. I would like to thank Ariel Bendor, Peter Brooks, Stanley Herr, Martha Minow, and Yonathan Yovel for their help concerning a number of important points in this Article, and for their illuminating comments and encouragement. I also want to thank Pnina Alon and Lotem Pery for their excellent research assistance.

1. PETER BROOKS, READING FOR THE PLOT: DESIGN AND INTENTION IN NARRATIVE 3 (1984).

*About Facts**Find your facts.**Select your facts. (What to include, what to omit.)**Arrange your facts.**Consider missing facts.**Explain your facts. How much, and what, will you explain, and why?**This leads to the vexed question of speculation. Does it have any place, and if it does, on what basis?*—A.S. Byatt²

1. INTRODUCTION

The place of the narrative and its various functions within legal contexts has been the subject of substantial research in recent years, and interest in them grows continuously.³ The use of narrative in law and its legal

2. A.S. BYATT, *THE BIOGRAPHER'S TALE* 31-32 (2001).

3. See generally SANDRA BERNS, *TO SPEAK AS A JUDGE: DIFFERENCE, VOICE AND POWER* (1999); ROBERT COVER, *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* (Martha Minow et al. eds., 1992); BERNARD S. JACKSON, *LAW, FACT AND NARRATIVE COHERENCE* (1991); L.H. LARUE, *CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY* (1995); *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* (Peter Brooks & Paul Gewirtz eds., 1996); GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 149-166 (1995); MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* (1995); DAVID RAY PAPKE, *NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW* (1991); THOMAS ROSS, *JUST STORIES: HOW THE LAW EMBODIES RACISM AND BIAS* (1996); BARRY R. SCHALLER, *A VISION OF AMERICAN LAW: JUDGING LAW, LITERATURE, AND THE STORIES WE TELL* (1997); MICHAEL THOMSON, *REPRODUCING NARRATIVE: GENDER, REPRODUCTION AND LAW* (1998); BERT VAN ROERMUND, *LAW, NARRATIVE AND REALITY: AN ESSAY IN INTERCEPTING POLITICS* (1997);

relevance has many diverse aspects. Stories of legal importance are generated and interpreted incessantly by plaintiffs and defendants, accused and witnesses, lawyers and jurors, and also by observers of legal machinery. Yet, the relationship between law and narrative is a complex one, and not easily defined or even admitted.

Law as a system of adjudication cannot allow an unconstrained narrative flow. A narrator that finds herself in a legal field is never permitted to roll a story, freely and fully, according to her taste, need, or talent. The law has numerous tools that assume story-spoiling or story-deconstructing functions. Among those tools are the rules of procedure and evidence, the rigid structures of legal doctrines and legal documentation, and conventions that form our expectations of the law as well as the law's limits. Formally, law is not interested in narratives as such, but in certain facts that ignite certain legal outcomes. Nevertheless, narrative is ever present within the legal field. It has a way of penetrating and manifesting itself clearly and forcibly, even after being minimized, disguised, or obscured by the legal course of action.

This kind of dialectic or attraction-repulsion relationship is enhanced when looking at judicial writing. A written legal opinion is a fascinating form of expression. On one hand, it has a clear public dimension. It is directed at translating a certain occurrence into the objective, impartial, and unimaginative language of law. On the other hand, judges are often overcome by the urge to construct a complete narrative, embellished by personal preferences, selections, and skills. In many cases, a judgment cannot completely conceal the narratives that influenced its creation.

IAN WARD, LAW AND LITERATURE: POSSIBILITIES AND PERSPECTIVES 4-15 (1995); ROBIN WEST, NARRATIVE, AUTHORITY, AND LAW (1993); Shulamit Almog, *Literature, Politics and the Law: On Blacksmiths, Tailors and the Demolition of Houses*, 1 INTERDISC. LITERARY STUD. 37 (1999); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

In this Article, I endeavor to look at some of the questions raised by the narrational aspects of judicial writing. The gap between the function of the judicial text as a public normative act and its private dimension, which is expressed in a catalogue of personal creative choices, creates continuous tension and poses a number of complex questions, some of which shall be considered below.

The next section will present the difference between "internal judicial narrative," which is not open to free choice, and "external narrative," which is constructed by personal choices judges make. The third section will focus on some manifestations of external narratives. Though narrative choices are present in almost every judgment, they are sharply evident in cases that offer different judicial narratives for the same set of facts. This section aims to look at such cases, and to demonstrate how constructing a judicial narrative involves creativity, imagination, and constant choice-making.

The fourth section deals with the idiosyncratic characteristics of the judicial narrative, compared to other types of narratives. It will be proposed that only the judicial narrative signifies a particular occurrence as reality. Only judicial stories are directed at entirely eliminating the disbelief of the audience and representing a claim of knowledge. In this section, I shall elaborate on an argument that fundamentally rejects the use of the narrative in law. Thereafter, I shall put forward the reasons why accepting such a position is highly problematic. Nevertheless, questions that may be termed the "ethics of judicial narrative," and relate to the quality of the narrative, i.e., to its being "good" or "bad" in value terms, should be dealt with. In order to advance this discussion, the fifth section will mention a number of possible models for creating judicial narratives. This discussion leads to a conclusion about the nature of a preferred model. Such a preferred model seems to be a personal one, relatively free of formal restrictions, and open to the individual choices of each judge. A free judicial narrative provides a window into the consciousness that created it. It makes the outcome and its reasoning clearer, more transparent and accessible to criticism. It links the story presented in the judgment to external, social, and cultural contexts. A free judicial narrative is therefore a desirable, essential, and ethical element of judicial activity.

2. INTERNAL AND EXTERNAL JUDICIAL NARRATIVE

In the most obvious, and perhaps most traditional way, the narrative is a story presented to the person required to reach a judicial determination. For the purpose of the discussion in this Article, it is sufficient to define the

narrative as a verbal representation of events and facts, with a temporal connection between them. This representation, which embodies an occurrence relevant to the case, is the story told in the judgment.⁴

Thus, the aim of the prosecutor in a criminal trial is to present a certain chronology of events, the finale of which is the offense committed by the accused, in a manner which will convince the judge or jurors that the accused indeed carried out the crime of which he is accused. The aim of the defense is to present a different chronology of events, which refutes the conclusion that the accused committed the crime. After coming to a decision, the judge creates her own narrative in her judgment. This narrative is intended not only to deliver the normative guideline (acquittal or conviction and sentence), but also to specify the factual grounds relevant to the normative guideline, and to persuade readers of its correctness and inevitability.

Now, every person acquires a reserve of internal narratives, formed by the structure of the person's personality, personal experiences, gender, national and religious affiliation, and so forth. When presented with any external narrative, we compare them to our own internal, personal narratives relevant to the circumstances in question. Judges do the same. The result of this comparison is the element on which they actually base their determination. From this material they construct a new external narrative, the one which is expressed in the judgment. This is the final judicial narrative, a few aspects of which I shall examine.

4. The definition of a narrative, its substance, functioning, and the relationship between it and the plot are complex issues that have attracted extensive research. *See generally* MIEKE BAL, *NARRATOLOGY: INTRODUCTION TO THE THEORY OF NARRATIVE* (1985); PETER BROOKS, *READING FOR THE PLOT: DESIGN AND INTENTION IN NARRATIVE* (1984); JONATHAN CULLER, *LITERARY THEORY: A VERY SHORT INTRODUCTION* 83-94 (1997); ADAM Z. NEWTON, *NARRATIVE ETHICS* (1995); GERALD PRINCE, *NARRATOLOGY: THE FORM AND FUNCTIONING OF NARRATIVE* (1982); SHLOMITH RIMMON-KENAN, *NARRATIVE FICTION: CONTEMPORARY POETICS* (1983).

The internal narrative created by each case is not subject to control and discipline, as it is part of an individual consciousness, one that judges cannot change by their free choice. Usually, it remains concealed since judges tend to veil their internal narratives “behind presumptions, precedents, and conceptions of their professional role.”⁵

5. Martha Minow, *Guardianship of Phillip Becker*, 74 TEX. L. REV. 1257, 1259 (1996). In her article, Minow describes one of the rare cases in which a judge chooses to expose the internal narrative evoked by the facts. See *Guardianship of Phillip Becker*, No. 101981 (Cal. Sup. Ct. Santa Clara County 1981) (unpublished opinion), in *FAMILY MATTERS*, *supra* note *, at 288. The case involved the determination whether to allow Phillip Becker, who was born with Down’s syndrome, to have medical treatment. His parents refused when asked to consent, but another couple (the Heaths—voluntary caretakers) initiated their own legal proceeding on behalf of the child. Judge Fernandez, in a very emotional opinion, uses several unusual rhetorical methods, among them “platonic dialogue,” which aims to represent the conflicting relevant stories, as he alludes to his own internal narrative:

I have read all of Phillip’s admissible medical and nursing records. I note with mounting anguish the developing and growing course of his strangling cyanotic illness; and as I read, I weep uncontrollably at the struggles of this wee lad to survive. My soul reaches out to him and his laboring heart to try to give it ease, and in this time of grief, I think of Tiny Tim and what might have been but for old Marley’s ghost.

Id. at 296.

Judge Fernandez granted guardianship to the Heaths and gave them authorization to determine the feasibility of surgery. This decision was affirmed by the appellate court. See *Guardianship of Phillip B.*, 188 Cal. Rptr. 781 (Ct. App. 1983), *cited in* Minow, *supra* note 5, at 1258. See also MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 341-49 (1990); Stanley Herr, *The Phillip Becker Case Resolved: A Chance for Rehabilitation*, 22 MENTAL RETARDATION 30 (1994). For an illuminating discussion on the interfaces between “Law and Tears,” see MILNER S. BALL, *CALLED BY STORIES: BIBLICAL SAGAS AND THEIR CHALLENGE FOR LAW* 84-98 (2000).

In contrast, the external narrative, the story that the judges choose to tell in the judgment, is carefully controlled and constructed. It is created and designed in a conscious manner, and by means of selections made by the judges.

In the United States, the law provides a guideline regarding the factual details, which are supposed to be included in the judgment. Even though the findings of fact may be made orally, such a procedure is mandatory, at least in federal proceedings.⁶ According to the practice applied in countries with legal systems originating in the common law, judges will elaborate upon or

6. See CIVIL PROCEDURE (Jack H. Friedenthal et al. eds., 2d ed. 1993). "Whenever an action is tried without a jury, Federal Rule of Civil Procedure 52(a) and similar state rules require the trial judge to make *findings of fact* and conclusions of law when entering judgment." *Id.* § 12.2, at 539 (footnote omitted) (emphasis added). (This requirement is mandatory and may not be waived.) "In many states, however, the rules do not require the judge to make special findings unless a request for them is made by one of the parties. Further, the findings may be made orally. Federal Rule 52(a) was amended in 1983 to make clear that the judge may make findings of fact and conclusions of law orally in open court." *Id.* at 540 (footnote omitted). "The trial judge should state the factual findings separately from the conclusions of law . . . [F]indings of facts should be clear, complete, and specific." *Id.* at 540-41 (footnote omitted). "Findings . . . should be included to give the appellate court an understanding of logic used by the trial judge in reaching an ultimate conclusion on each factual issue." *Id.* at 541.

In criminal cases tried without a jury Federal Rule of Criminal Procedure 23(c) requires the court to "make a general finding" and in addition, "on request made before the general finding, [to] find the facts specially." FED. R. CRIM. P. 23(c). According to FED. R. CRIM. P. 32(d)(1), "[a] judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered accordingly." *Id.*

According to English legal practice, the law provides a guideline regarding the duty to give reasons for a decision. For example, it is the duty of a statutory tribunal to furnish an oral or written statement of the reasons for the decision on or before the rendering the decision. See Tribunals and Inquiries Act, 1992, § 10(1) (Eng.). The reasons must be proper, adequate, intelligible, and must deal with the substantial points raised. See *Re Proyser and Mills' Arbitration* [1964] 2 QB 467 (1963).

cut short the survey of relevant facts, depending upon the basis of all the circumstances of the case, their personal style, and personal choices.⁷

Every narrative, irrespective of type, is compiled from a series of choices. The purpose of the choice is to decide upon the relevancy of the events, that is—to make a selection between facts that will be included in the narrative, and those that shall be eliminated. A choice is also made as to the order in which the chosen facts will be mentioned, the emphasis to be given to each of them, and the choice of wording, style, and tone in which the events will be described.⁸ The set of choices made by each judge fashions the narrative presented in the judgment, dictates its character, and leads directly to the judicial determination. I will now consider these matters by examining two judgments.

7. For details of the manner of writing in the common law legal system, see Esin Orucu, *Mixed and Mixing Systems: A Conceptual Search*, in *STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING* 335-52 (Esin Orucu et al. eds., 1996). For a description of a number of cases which illustrate the connections between the content and materials of the narrative and the legal outcome in English case law, see Barnard S. Jackson, *Narrative Theories and Legal Discourse*, in *NARRATIVE IN CULTURE: THE USES OF STORYTELLING IN THE SCIENCES, PHILOSOPHY, AND LITERATURE* 23-50 (Christopher Nash ed., 1990). In contrast, in the continental legal system, the narrative descriptions are very limited and concise. This distinction ensues, apparently, from a basic difference between the continental and Anglo-American systems of law. Whereas the former is primarily based on doctrine, the Anglo-American law has developed from "case law" based on precedents and judicial decisions. In a legal system with such an orientation, great importance is placed on the details of the narrative which underlie every precedent. In the continental legal system, however, such details are superfluous. For a description of this distinction between the systems, see Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *HASTINGS L.J.* 805, 822-23 (1987).

8. The manner in which the narrative choices influence the responses of those exposed to the narrative is a subject for narratological research. Narratology deals with the theory and systematic research of narratives. See WAYNE C. BOOTH, *THE RHETORIC OF FICTION* (1961); STEVEN COHAN & LINDA M. SHIRES, *TELLING STORIES: A THEORETICAL ANALYSIS OF NARRATIVE FICTION* (1988).

3. NARRATIVE AS ARGUMENTUM AD HOMINEM

3.1. "Playing Crazy" or Psychotic?

Glen Burton Ake was convicted of murdering a minister and his wife in 1979.⁹ Ake, with his accomplice Steven Hatch, also injured the couple's two children. Despite the fact that the prosecution was permitted to bring in the testimony of a psychiatrist stating that Ake was sane, Ake's right to a court-appointed psychiatrist, who could testify in his defense, was denied.¹⁰ Ake appealed to the U.S. Supreme Court, claiming that the right to fair process obligates the State to provide the accused with a psychiatrist if he is unable to engage one himself. Justice Marshall gave the majority opinion and Justice Rehnquist gave the dissenting opinion. Here are their respective factual accounts:

Justice Marshall	Justice Rehnquist
<p>Late in 1979, Glen Burton Ake was arrested and charged with murdering a couple and wounding their two children. He was arraigned in the District Court for Canadian County, Okla His behavior at arraignment, and in other prearraignment incidents at the jail, was so bizarre that the trial judge, <i>sua sponte</i>, ordered him to be examined by a psychiatrist "for the purpose</p>	<p>Petitioner Ake and his codefendant Hatch quit their jobs on an oil field rig in October 1979, borrowed a car, and went looking for a location to burglarize. They drove to the rural home of Reverend and Mrs. Richard Douglass, and gained entrance to the home by a ruse. Holding Reverend and Mrs. Douglass and their children, Brooks and Leslie, at gunpoint, they ransacked the home; they then bound and gagged the mother, father, and son, and forced them to lie on the living</p>

9. See *Ake v. Oklahoma*, 470 U.S. 68 (1985).

10. See *id.* at 72-73. The only psychiatric testimony consisted of those who had examined Ake at the state hospital. "[T]here was no expert testimony . . . on Ake's sanity at the time of the offense." *Id.* at 72.

of advising with the Court as to his impressions of whether the Defendant may need an extended period of mental observation." The examining psychiatrist reported: "At times [Ake] appears to be frankly delusional He claims to be the 'sword of vengeance' of the Lord and that he will sit at the left hand of God in heaven." He diagnosed Ake as a probable paranoid schizophrenic and recommended a prolonged psychiatric evaluation to determine whether Ake was competent to stand trial.

In March, Ake was committed to a state hospital to be examined with respect to his "present sanity," *i.e.*, his competency to stand trial. On April 10, less than six months after the incidents for which Ake was indicted, the chief forensic psychiatrist at the state hospital informed the court that Ake was not competent to stand trial. The court then held a competency hearing, at which a psychiatrist testified:

"[Ake] is a psychotic . . . [H]is psychiatric diagnosis is that of paranoid schizophrenia—chronic, with exacerbation, that is with current upset, and that in

room floor. Ake and Hatch then took turns attempting to rape 12-year-old Leslie Douglass in a nearby bedroom. Having failed in these efforts, they forced her to lie on the living room floor with the other members of her family.

Ake then shot Reverend Douglass and Leslie each twice, and Mrs. Douglass and Brooks once, with a .357 magnum pistol, and fled. Mrs. Douglass died almost immediately as a result of the gunshot wound; Reverend Douglass' death was caused by a combination of the gunshots he received, and strangulation from the manner in which he was bound. Leslie and Brooks managed to untie themselves and to drive to the home of a nearby doctor. Ake and his accomplice were apprehended in Colorado following a month-long crime spree that took them through Arkansas, Louisiana, Texas, and other States in the western half of the United States.

. . . Three days after his arrest, he asked to speak to the Sheriff. Ake gave the Sheriff a detailed statement concerning the above crimes, which was first taped, then reduced to 44 written pages, corrected, and signed by Ake.

Ake was arraigned . . . and again appeared in court with his codefendant Hatch Hatch's attorney requested and obtained an order transferring Hatch to the state mental hospital for a 60-day observation period to determine

addition . . . he is dangerous . . . [B]ecause of the severity of his mental illness and because of the intensities of his rage, his poor control, his delusions, he requires a maximum security facility within—I believe—the State Psychiatric Hospital system.”

The court found Ake to be a “mentally ill person in need of care and treatment” and incompetent to stand trial, and ordered him committed to the state mental hospital.

Six weeks later, the chief forensic psychiatrist informed the court that Ake had become competent to stand trial. At the time, Ake was receiving 200 milligrams of Thorazine, an antipsychotic drug, three times daily, and the psychiatrist indicated that, if Ake continued to receive that dosage, his condition would remain stable. The State then resumed proceedings against Ake.*

* *Ake v. Oklahoma*, 470 U.S. 68, 70-72 (1985) (citations omitted) (alterations in original) (third alteration added).

his competency to stand trial; although Ake was present in court with his attorney during this proceeding, no such request was made on behalf of Ake.

[B]oth Ake and Hatch were bound over for trial at the conclusion of a preliminary hearing. No suggestion of insanity at the time of the commission of the offense was made at this time.

. . . Ake appeared for formal arraignment, and at this time became disruptive. The court ordered that Ake be examined by Dr. William Allen, a psychiatrist in private practice, in order to determine his competency to stand trial. . . . [A] competency hearing was held[,] at the conclusion of which the trial court found that Ake was a mentally ill person in need of care and treatment, and he was transferred to a state institution. Six weeks later, the chief psychiatrist for the institution advised the court that Ake was now competent to stand trial, and the murder trial began At that time Ake’s attorney withdrew a pending motion for jury trial on present sanity. Outside the presence of the jury the State produced testimony of a cellmate of Ake, who testified that Ake had told him that he was going to try to “play crazy.”**

** *Id.* at 88-89 (Rehnquist, J., dissenting).

The story told by Justice Marshall commences with an extremely abbreviated description of the events that led to Ake’s conviction. Ake was

arrested and charged with murdering a couple and wounding their two children. Neither the names of the victims nor the circumstances or details of the affair are revealed. This brevity makes it difficult to focus on victims, or fully imagine their ordeal.

Justice Marshall's story does not hint at the possibility that Ake may be faking mental illness. More than that, we are directed by Justice Marshall's story to the assumption that Ake's symptoms are authentic, and that the quoted opinion of the psychiatrist who examined Ake before he received his drug treatment, and found that Ake was suffering from paranoid schizophrenia, reflects reality. Already at the beginning of his story, Justice Marshall describes Ake's behavior at his arraignment as "so bizarre."¹¹ Despite the abridged description of the offenses, the judge explicates in great detail the progression of the medical and legal treatment that Ake undergoes. The trial judge orders him to be examined by a psychiatrist, and the psychiatrist indeed examines him. Ake is hospitalized, and the chief forensic psychiatrist at the state hospital determines that he is not competent to stand trial. The courts hold a hearing on this matter, the psychiatrist gives testimony, and the court declares Ake mentally ill and commits him. Ake is prescribed many drugs that are all mentioned in the story, and after six weeks he is declared competent to stand trial.

Justice Marshall's narrative leads toward a clear outcome. A new trial must be held, as Ake was entitled to the aid of which he was deprived, the aid of a state-funded psychiatrist who would support the defense claim of mental instability.¹²

Justice Rehnquist, in a dissenting opinion, questions the factual interpretation suggested in the majority opinion. "I do not think that the facts of this case warrant the establishment of such a principle,"¹³ says

11. *Id.* at 71.

12. *See id.* at 86-87.

13. *Id.* at 87 (Rehnquist, J., dissenting).

Justice Rehnquist. In contrast to Justice Marshall, who provides an extensive description of the treatment Ake was given, Justice Rehnquist compiles a detailed account of the criminal act itself. He mentions, among other facts, the shocking attempted rape of twelve-year-old Leslie, a fact missing from Justice Marshall's account. Justice Rehnquist attributes to Ake and his accomplice a deliberate and rational intent by describing the actions prior to and during the crime. Ake and his codefendant "quit" their jobs, "borrowed" a car, and "went looking" for a location "to burglarize." They "drove" to the rural home, "gained" entrance by "a ruse," they "held" their victims at gunpoint, they "ransacked" the home, "bound" the victims, "forced" them to lie on the floor, and "attempted to rape" 12-year-old Leslie.¹⁴ The active, calculated, cold-blooded, and ruthless nature of their act is significantly enhanced by these choices. The details of the murder and injury are also set out in minute detail, including the number of shots, the type of armament, and the causes of the victims' deaths.

In addition, Justice Rehnquist calls the victims by name, and so brings them into the story. He also makes use of words having great emotive weight, such as "brutal murders"¹⁵ and "a month-long crime spree."¹⁶

Following this, Justice Rehnquist expresses his doubts relating to Ake's alleged mental instability when he notes that Ake's detailed statement to the Sheriff did not show any suggestion of insanity. He also notes that when his accomplice was taken to hospital for an examination of his mental competency no similar request was made by Ake, that only three months after his arraignment did Ake become disruptive (as Justice Rehnquist termed it), and that the State produced his cellmate, who testified (out of the

14. *Id.* at 88.

15. *Id.* at 90.

16. *Id.* at 88.

presence of the jury) that Ake had told him that he was going to try to "play crazy."¹⁷

3.2. A Drug Offender or a Hero in Distress?

William Lance McNeely was convicted of drug offenses and appealed to the Arkansas Court of Appeals.¹⁸ There he argued that the trial court had erred when it rejected his motion to suppress without conducting an evidentiary hearing on the motion.¹⁹ His appeal was dismissed. Judge Cooper wrote the majority opinion and Judge Mayfield the dissenting opinion:

Judge Cooper	Judge Mayfield
<p>The appellant was convicted in a jury trial of possession of a controlled substance and possession of drug paraphernalia. He was sentenced to one year in the county jail and fined \$500.00 and was sentenced to six years in the Arkansas Department of Correction and fined \$5,000.00, respectively. On appeal, the appellant argues that the trial court erred in denying his motion to suppress without conducting an evidentiary hearing on the motion.*</p> <p>* <i>McNeely v. State</i>, 925 S.W.2d 177, 178 (1996).</p>	<p>The appellant, who has been paralyzed and confined to a wheelchair for ten years as the result of an injury suffered when he broke his neck diving into water to save a friend, is thirty years old; lives with his mother; and smokes a little marijuana to help him live during the day and relax enough to sleep during the night. One day, while he was visiting in the apartment of his girl friend, four police officers burst into the apartment, with weapons drawn, arrested the appellant, and seized the ounce and one-half of marijuana and some drug paraphernalia he had in a bag lying beside his wheelchair.**</p> <p>** <i>Id.</i> at 178 (Mayfield, J., dissenting).</p>

17. See *id.* at 88-89.

18. See *McNeely v. State*, 925 S.W.2d 177 (1996).

19. See *id.* at 178.

Judge Cooper's story commences with the outcome of McNeely's trial: the conviction and the sentence. The audience gets no clue as to the identity of the appellant or the circumstances leading to his conviction. Judge Cooper implies by his silence that this is yet another routine case of drug crime.

Judge Mayfield's version of the same event reveals additional details. He describes the appellant at length. McNeely, reveals Judge Mayfield's story, is paralyzed. He has already been confined to a wheelchair for ten years. Judge Mayfield even specifies the reasons for his paralysis: McNeely broke his neck when diving into water in order "to save a friend." An anonymous criminal is so transformed into a young, tragically unfortunate hero. Judge Mayfield continues by describing the ordeal of the appellant as a disabled person. He is thirty years old, but (still) lives with his mother. He smokes a little marijuana, since it helps him to pass the day and makes him sufficiently relaxed so that he can sleep during the night. By choosing to relate these facts, Judge Mayfield managed to neutralize the criminal value of McNeely's deeds, and to present them as a rather harmless and even acceptable use of drugs, like any medicine, for relieving his pain. Judge Mayfield then describes the events that led to the conviction, emphasizing the invasion of McNeely's privacy by the police, and again his suffering, disability, and weakness—this time, when confronted by the force of the police. The story opens dramatically: "One day," while the appellant was visiting in the apartment of his girlfriend, four police officers "burst" into the apartment, with "weapons drawn" and arrested him. Judge Mayfield emphasizes that the quantity of drugs seized was negligible. The police found an "ounce" (about 30 grams) and "one-half" of marijuana and "some" drug paraphernalia. He notes: The drug paraphernalia found by the police were "in a bag lying beside his wheelchair"²⁰ (notice that the word "wheelchair" is mentioned twice in the short text), and thus reminds his audience of the special circumstances of the incident.

As mentioned, all of this is absent from Judge Cooper's rendition of the facts. He prefers to portray the incident as one of many of its type: "The appellant filed a motion to suppress,"²¹ the trial court denied the motion to suppress after he did not appear at the hearing that was set. McNeely argued in his appeal that the "court erred in denying his motion . . . [since] the State

20. *Id.* (Mayfield, J., dissenting).

21. *McNeely*, 925 S.W.2d at 178.

had the burden of proving the validity of the search and seizure."²² Prior to trial, the appellant's counsel filed a similar motion, based on other facts and grounds, to suppress the marijuana. Judge Cooper states that McNeely's argument on appeal was not made to the trial court and hence it was not preserved for appeal.²³ He adds that the proponent of a motion to suppress has the initial burden of establishing that the search and seizure have violated his Fourth Amendment rights.²⁴ Judge Cooper's narration is simple, dry, toneless, and technical. This simple story leads to a simple conclusion. It does not allow doubt or emotional debate.

Judge Mayfield, on the other hand, aims to depict the uniqueness of the case. He is very successful in pointing out the particular nature of it, and the need for a special decision. Judge Mayfield refers to a judgment of the Arkansas Supreme Court that considered a case in which a police officer was not present to testify at a hearing to suppress the statements of the appellant.²⁵ The Supreme Court of Arkansas held that the State had to produce the officer at the hearing or explain his absence, and because it failed to do so, the court remanded for a new hearing on the suppression motion. There is a difference between the circumstances of this case and the circumstances of the case cited, admits the Judge. However, he stresses that when the issue at stake is "the question of effectiveness of counsel, basic constitutional rights, and notions of fair play,"²⁶ we must follow the procedure which was adopted in the previous case. The narrative that Judge Mayfield created refers to each of these factors and clearly marks the path toward upholding the appeal.

3.3. *Interim Summary*

All the judicial narratives referred to here are much more than chronologies of the relevant events, or technical tools intended to inform us

22. *Id.*

23. *See id.*

24. *See id.*

25. *See id.* at 179 (Mayfield, J., dissenting) (citing *Bell v. State*, 920 S.W.2d 821 (1996)).

26. *Id.*

of the relevant facts. All of them are also *argumentum ad hominem*, that is, arguments that appeal to the personal emotions of every reader.²⁷ This function is achieved by means of the selections made by judges when shaping the narrative.²⁸

Each of the narratives discussed is carefully organized and leads to a certain target. Each has, on its face, an identical purpose—to describe the factual background and chronology of events that the judge now has to confront. But each is also more than this. Each of the four narratives comprises an appeal not only to the logic but also to the emotions of the audience. Though no flaw can impair their formal objectivity, and despite focusing on the facts and refraining from valuing the facts cited, each of the narratives intends to influence. Their aim is to direct and to convince. In this regard, there is no difference between the narratives that attempt to arrive at their goal by way of expansiveness and those which choose the path of abridgement.

Of course, even forgoing a fuller narrative is a matter of choice. Such restraint is on occasion a form of manipulation. For instance, it might be used when the judge wishes to avoid a difficult question or problem raised by a fuller narrative, or to “save” her audience from the discomfort generated by certain occurrences.²⁹

The point is that each narrative path taken by a judge has a substantial impact on the readers of the final judgment. Actually, it is the key for acceptance and acknowledgment of the final legal outcome.

27. It is interesting to notice, in this context, the linguistic analogy between a plot and an argument. The literary term “argument” refers to a plot summary or abstract that is brought as the preface to a work. See J.A. CUDDON, *DICTIONARY OF LITERARY TERMS AND LITERARY THEORY* 59 (3d ed. 1991).

28. The examples chosen reflect only some of the diverse possibilities available from the use of narrative for the purpose of persuasion. Thus, a judge may create a narrative which is *prima facie* contradictory to the internal narrative which guides her, and the determination made in accordance with that narrative, in order to persuade her listeners that the legal path and the legal outcome are inevitable.

29. For a description of this phenomenon and illustration of it in the context of Herman Melville’s work, see Richard H. Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor with an Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1, 34 (1982).

4. JUDICIAL NARRATIVE AS A CLAIM OF KNOWLEDGE

Narratives are powerful tools. They shape our consciousness, our imagination, and the way we see and comprehend reality. We use narratives in order to convince, to influence, to gain sympathy, or to achieve any purpose desired. The creation of every narrative though entails a manipulative element: “[Storytelling] is never innocent.”³⁰ The manipulative element reflects the power embedded in story telling: power to shape reality by means of the language, to suspend the disbelief of the listeners to the story, to influence and persuade. This potential is relevant to every narrative. Judgments are no exclusion. Judges that wish to stress one aspect of the matter under discussion, to dim another, to lead in a particular fundamental direction, to come closer to the desired solution, and to persuade of its validity continuously use narrative as an effective tool. Still, there is a highly significant difference between the outcome of literary or other stories, and the outcome of legal stories.

Unlike literary stories, the power of legal stories is normative. The narrative in a judgment does not expose the reality or “reveal” it; rather it *declares* that a particular occurrence is reality. Literary stories, at their best, lead readers to temporarily suspend disbelief, thereby enabling them to “enter” the world created by the story and accept its rules and norms. In contrast, the stories in a judgment are directed (even if not always successfully) at *entirely eliminating* disbelief, at transforming the narrative in the judgment to something having authoritative, final, and absolute meaning. Every judicial narrative is a *claim of knowledge*, and a *claim to absolute authority*. Cliched metaphors have a tendency to be transformed into matter of fact and highly relevant reports, when placed in a judgment. When judges narrate, our initial reaction is to treat their narration as an accurate reflection of reality, and not as an artificial construction.

Some qualms stem from these observations. Even if we assume that some of the story telling and rhetorical choices are spontaneous, other

30. In the wording of Brooks, see Peter Brooks, *The Law as Narrative and Rhetoric*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW*, *supra* note 3, at 14, 17.

choices are highly calculated, and the following questions deal with those choices that are made consciously. Should we not consider those conscious preferences and choices aimed at shaping the narrative as a deliberate distortion of reality? Is not a judge obliged to describe things as they are and refrain from any prejudice or use of a tool that is capable of “falsifying” her description of the true state of affairs? Are not judges bound, by virtue of their judicial office, to refrain from various story telling and rhetorical techniques? Does not judicial focus on the narrative divert the determination—both of the judges and of the audience—towards an aesthetic dimension that is hardly relevant? In other words, is not the creation of a narrative contrary to the very substance of the judicial function, so that it would be proper for the judges to refrain from engaging in it?

Alan Dershowitz presents an extreme position and attacks the infiltration of narrative into law. Dershowitz indeed refers, primarily, to the prosecution’s use of narrative during the course of the legal trial;³¹ however, his criticism is also relevant to other legal situations, including judicial use of narrative forms. By means of the narrative, he argues, the jurists try to describe reality in terms of order, logic and meaning. Yet, reality often consists of meaningless events, which are random and lack any connection to what preceded them or took place after them.³² When we import storytelling techniques into the legal system, we blur the boundaries between fact and fiction, and undermine the ability of the judicial process to uncover the truth.³³ In the world of Chekhov, Dershowitz tells us, a gun hanging on the wall in the first act of a play always fires in the third act. Pains in the chest always precede a heart attack, and purchase of a life insurance policy for a relative is always a sign that the purchaser is a potential murderer. In reality, not all guns fire, most chest pains are the result of digestive problems, and the outcome of purchasing a life insurance policy is long years of paying premiums to the insurance company.³⁴

31. See Alan M. Dershowitz, *Life Is Not a Dramatic Narrative*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW*, *supra* note 3, at 99, 103.

32. See *id.* at 101.

33. See *id.*

34. See *id.* at 99-100.

Human experience, he concludes, cannot be translated into a story structure, and all those dealing in the law must be careful not to judge reality through Chekhov's eyes.³⁵

The position taken by Dershowitz raises a preliminary and practical difficulty that presents itself instantly. It seems that the structure of the human psyche drives most of us to understand reality through stories.³⁶ Every process of determining fact is actually an examination of the compatibility between the stories told us and the stories we know as members of the society in which we operate. The legal process is organized around the narrative whether we wish it or not.³⁷ Even in the restrictive field of law, the narrative constantly struggles in order to blaze a trail through the procedural rule restrictions and constraints of legal language which hamper it. It seems that all those restrictions are not potent enough to prevent the force of the narrative from manifesting itself. The human experience is to a large extent a narrative experience. It may not be an exaggeration to term human beings *homo fabulans*,³⁸ and we remain storytelling and story-seeking creatures when we engage in law.

Even if reality is chaotic and random, human experience is a constant effort, albeit necessarily a limited and partial one, to bring meaning to the chaos, to understand, to seek order and justice. One of the important means available to us to accomplish this effort is the narrative. We must term our stories "reality," even if they do not reflect the full scope of reality, because we do not have another option, and this is also reflected in Dershowitz's own arguments.³⁹ In fact, even Dershowitz does not refrain from making

35. See *id.* at 99-105.

36. See Robert Weisberg, *Proclaiming Trials as Narratives: Premises and Pretenses*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW*, *supra* note 3, at 61, 67.

37. For a description of the inevitable process of weaving the narrative into the legal procedure, see W. LANCE BENNETT & MARTA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* (1981). This study deals with the manner in which a jury constructs a decision. It should be remembered that there is a significant difference between jurors, who are satisfied with the internal narrative for the purpose of their decision, and judges, who are obliged in most cases to produce an external narrative, which shall form the basis of the determination.

38. As suggested by MARK CURRIE, *POSTMODERN NARRATIVE THEORY 2* (1998).

39. See Dershowitz, *supra* note 31.

use of stories. Dershowitz would tell us: Even if you see a gun on the wall—perhaps no shot will be fired. And even if a shot is fired—it will not necessarily be fired from the gun you saw hanging on the wall. Dershowitz, however, does not say that no story exists connected with the relevant situation. He merely draws our attention to the possible existence of other stories—which are incompatible with the story that at first seems preferable. He cautions us against choosing the wrong story, a warning that in any event is supposed to be in the forefront of the minds of those granted the power to make judicial decisions.

Thus, it would seem unrealizable to screen out the narrative from the legal process, and it is unfeasible to deny the important role it fulfills in legal activity in general, as well as in judicial activity in particular. At the same time, the indispensable nature of narrative does not exempt us from looking at questions relating to its use.

5. ETHICS OF JUDICIAL NARRATIVE

Is it possible to define a certain judicial narrative as having desirable and laudable qualities, and another judicial narrative as being undesirable? Is there a judicial narrative which is unethical and which should not be employed?

Creation of the internal narrative, which reflects each judge's inner resources, is a mental process that represents an unavoidable private process. It cannot be supervised, influenced, judged, or assessed. However, the external narrative, which is expressed in the judgment, can, of course, be judged, assessed, interpreted, and criticized. The choices that are expressed in the external narrative may practically be subjected to a value judgment, guided by our way of perceiving "good narrative" and "bad narrative."⁴⁰

40. Robert Weisberg formulates the question as follows:

Some scholars . . . assume that there is good narrative and bad. Good narrative is concrete; it identifies the social and political facts that belie traditional legal categories. Bad narrative deceives with the illusion of concreteness, selecting and deleting facts and naming people and things to distort them to fit a

Discourse relating to ethical virtue of narrative is not particular to the legal context. The work of Wayne Booth explores the ethical meaning of *literary* narratives. Booth contends that every narrative has an ethical dimension, and it may be seen as an implied critique of a differing narrative.⁴¹ This analysis leads him to the conclusion that there is no inherent reason to prevent an author from choosing any literary technique that may help her to achieve her aims.⁴² One major difficulty in this regard is the inability to attach a definite outcome (from the reader's point of view) to any particular choice made by the author. Even if an author chose a particular rhetorical tool with the intention of leading his readers to a specific value outcome, it is always doubtful whether he will achieve his intended goal. Each of us may come to a different value judgment upon reading the very same book, according to the specific circumstances in which the reading takes place, alongside with the unique personality of each one of us.

An additional difficulty is that even if it is possible to point to an ethical quality connected to a particular text, it is not always workable to identify this quality within a specific writing technique. It is invariably part of the general experience generated by the text as a whole. This is true even when the writer makes use of unusual or distinctive narrational or rhetorical tools, which have a fairly predictable effect on readers. There are always readers that will react different from what was expected. Booth's conclusion is that there is no ethical reason for refraining from any technique which may assist in achieving what the writer wishes to achieve.⁴³

Booth centers his discussion on the writing of fiction; however, he correctly points out that the same discussion may be equally appropriate in

conventionally acceptable legal conclusion . . . [G]ood narrative is associated with good decisions.

Weisberg, *supra* note 36, at 67.

41. See WAYNE C. BOOTH, *THE COMPANY WE KEEP: AN ETHICS OF FICTION* 13-17 (1988).

42. See Wayne C. Booth, *Are Narrative Choices Subject to Ethical Criticism?*, in *READING NARRATIVE: FORM, ETHICS, IDEOLOGY* 57, 75 (James Phelan ed., 1989).

43. See *id.* at 75.

relation to the use of narrative in other fields.⁴⁴ Indeed, Booth's conclusion regarding the inability to attach a particular narrative choice to a certain outcome in terms of the reader is highly applicable to legal narrative.

In an associated discussion, Sanford Levinson examines the need to apply predetermined rules to judicial rhetoric.⁴⁵ Indeed, the questions relating to judicial rhetorical usage resemble questions concerning judicial narrative usage. The effect of rhetoric and narrative in the judgment is similar. Just as the narrative chosen by a judge diverts the reader's attention from one aspect of the dilemma and focuses it on another, so does rhetoric. Just as the narrative may channel the discussion toward a particular dimension (emotional, rational, private, public, and the like), so too may rhetoric function. Rhetoric places the emphasis on a particular aspect of fact, and when we choose what fact on which to place the emphasis, as E.D. Hirsch pointed out, we make an ethical choice.⁴⁶ Accordingly, even when reference is to rhetoric it may be asked, in the same manner as we asked in relation to narrative, whether there is (or should be) ethical or appropriate judicial rhetoric. Should we aspire to make use of formal models of argument and rhetoric, which may be used by judges when writing their judgments?

There is no justification for such an aspiration, responds Levinson, since there is no basis for the assumption that use of any particular formal rhetorical model is what will determine to what extent the judgment succeeds in being persuasive.⁴⁷ If someone defines a judgment as "persuasive," it reveals that person's ideas and commitments, more than the abstract persuasiveness qualities of the judgment.⁴⁸ Accordingly, it follows from Levinson's remarks that even if a judicial opinion is "rhetorical performance," there is no good reason to limit this performance by means of any particular formal model.

44. *See id.* at 74.

45. *See* Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW*, *supra* note 3, at 187.

46. *See* Eric Donald Hirsch, *Three Dimensions of Hermeneutics*, in *TWENTIETH-CENTURY LITERARY THEORY: A READER* 55 (K.M. Newton ed., 2d ed. 1998).

47. *See* Levinson, *supra* note 45, at 204.

48. *See id.*

Levinson's approach is tangential to Booth's approach. Both Levinson and Booth repudiate ethical dictates or binding narrative models for a similar reason. In fact, both of them consider the subjectivity underlying the influence of the text on those exposed to it. There is no reason to dictate to an author ethical rules concerning the tools of building a story, says Booth, as we cannot know in advance how any particular narrative or rhetorical utterance will influence the reader.⁴⁹ There is no reason to instruct a judge to write her judgment in accordance with formal models, says Levinson, since the persuasive force of a judgment is created by means of the personality of every reader.⁵⁰ The basic assumption implied in this reasoning is the inability to predict the precise reaction of each reader to a certain text.

Such an assumption is questionable within legal contexts. Indeed, it is not possible to predict with absolute certainty the precise influence of a given text on every reader. However, the law often finds itself forced to confront the problem of the discrepancy and gap between one's subjective and objective feelings, beliefs, or knowledge. Numerous doctrines and guidelines were designed in order to give diverse practical answers to this discrepancy, such as the various theories of reasonableness and foreseeability. Accordingly, it is perhaps possible to think of a model of binding guidelines regarding ways of charting a "reasonable" and unified judicial narrative, or admissible or inadmissible judicial rhetoric. It is true that one cannot predict the reaction of *all* the people to a certain text; however, it is perhaps possible to predict a "reasonable" response to that text. The legal prohibitions against libel, some forms of symbolic speech, hate speech, and racist speech are actually based on the same rationale. The probable influence of certain utterances is assessed in those cases according to certain standards.

Levinson also tells of his personal experiences, and of conversations held with academic colleagues who persuaded him that only in very rare cases will a court judgment cause a person to modify his views on a subject

49. See Booth, *supra* note 42, at 71.

50. Levinson, *supra* note 45, at 187, 201.

on which he regards himself as an expert.⁵¹ Applying this kind of reasoning to the examples brought at the beginning of this article is like saying that it does not really matter which way a judicial story is told. What matters is our previous beliefs and conceptions. In the *McNeely* case, for instance, if we believe that there should be an absolute ban on drugs, the story told by Judge Mayfield will leave us indifferent. If we believe, on the other hand, that the existing law concerning drugs is disputable, whichever way Judge Cooper relates the story will not convince us that *McNeely* has done wrong.

Levinson tells of his personal experiences in such matters. However, a different personal experience may, of course, lead to a different conclusion. I have had conversations with people that admitted changing their previous opinions after reading certain legal judgments. Apart from this, on occasion there will also be readers who have not yet made up their minds on a particular issue, but will do so through exposure to reading judgments. Moreover, judgments are not directed only at the litigants and at those who regard themselves as experts in the field, but also at the public as a whole. I believe that among the public there are many who will make up their minds or even change their minds as a result of reading a judgment, and will do so by reason of the rhetorical or narrative power of the judgment and not necessarily because the legal argument convinced them.

Thus, it would seem that the practical reason given by Levinson is insufficient to justify abandoning discussion concerning the ethics of narrative, or of dismissing the idea of adopting models which will chart the boundaries of judicial narrative choices. Nevertheless, there is a substantial argument for supporting the free judicial use of narrative. I shall now elaborate on this argument by means of examining a number of possible judicial narrative modes.

6. MODES OF JUDICIAL NARRATIVE

A possible distinction exists between blank narrative and interpretive narrative. Blank narrative incorporates as minimalist and neutral a description as possible of the facts necessary for understanding the matter.

51. *See id.* at 201.

Interpretive narrative is a richer and denser description of events, where signs of the various choices and value judgments of its author can be easily discerned.

Even if the use of internal narrative during the course of the judicial act cannot be prevented, one may argue that the external narrative should be an empty one, i.e., narrative that has a style which is uniform, minimalist, "neutral" to the extent possible, and free of any hint regarding value assessment or personal interpretation concerning the facts referred to.

The first reservation that comes to mind is linked to a presumption that is implied by the above argument. According to this presumption, it is always possible to separate between the description of a thing on one hand, and an evaluation of it on the other. Yet, this presumption is far from being undoubted. Even if we assume that an appropriate and preferred legal narrative is one that is comprised of an "empty" description of facts, at least according to one approach, it is doubtful that one can arrive at such a narrative. According to this approach, every *determination* of fact inevitably involves the *assessment* of such fact. Often the two form one utterance, with no possibility of separating its components.⁵² According to this approach, every narrative amounts to an interpretive choice. In this sense, there is no "innocent" narrative,⁵³ because it is impossible to create such a narrative. Even the decision to negate a particular dimension of the narrative, such as creating it as "empty" and blank as possible, is actually a form of interpretation and manipulation. As it prevents those exposed to the blank narrative from seeing the facts in a certain manner, it necessarily drives them in a different direction. Accordingly, even the choice of a highly limited, even obscure narrative, such as is frequently adopted in

52. For a description of the place of this issue in philosophical debate and a number of opinions expressed in this context, see GEOFFERY JAMES WARNOCK, *CONTEMPORARY MORAL PHILOSOPHY* (1967).

53. As Brooks has concluded, see Brooks, *supra* note 30.

continental judgments,⁵⁴ is, as a matter of fact, interpretive as well as manipulative.

54. See *supra* note 7 and accompanying text. As already noted, the judicial style customarily applied in the common law system of law permits trial judges, and also appellate judges, who generally are not responsible for fact finding, great freedom of narrative and rhetoric. In several Continental legal systems the style is different. It is concise, dry, and free of personal tone. This style is also applied, of course, to the narrative and rhetorical expressions of the judgments in the higher instances, which tend to be as minimalist as possible.

For a review of the differences in this connection between the common law legal systems and the continental legal systems, and a consideration of the historical reasons for these differences, see Orucu, *supra* note 7. See also MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* 133-41 (1982). The authors particularly point out the extreme brevity of the statement of facts in the "cryptic" judgments of the French Court de Cassation. See *id.* at 135.

At the same time, on occasion, we encounter surprising brevity in the statement of facts in states that operate systems of law based on the common law. These abridgements are perhaps particularly surprising in judgments that contain important rulings of law. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973). Justice Blackmun, who wrote the majority opinion in the judgment, is satisfied with the following story:

Jane Roe, a single woman who was residing in Dallas County, Texas, instituted this federal action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes.

Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that she was unable to get a "legal" abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions.

Id. at 120 (footnote omitted). It would seem that the extreme succinctness seen here leaves a narrative gap that requires filling. The gap is exposed by the fact that there is no reference in the judgment to the feelings and desires of Jane Roe. Such reference is important and would even seem inescapable, as personal autonomy is extremely significant issue here. The judgment, to a certain extent, distances itself from Jane Roe's role in the story and transforms it from Jane Roe's story to an affair that is primarily concerned with the interests of others. Compare the way in which Judge Fernandez in the *Becker* case constructs an elaborate personal story which is attributed by him to Phillip Becker, a child who is unable to present his own story. See *FAMILY MATTERS*, *supra* note *.

The manipulative force of the concise narrative is no smaller than the force of the more expansive narrative. For instance, one may argue that Judge Cooper's sort of blank narrative in *McNeely* has no less a manipulative force than Judge Mayfield's narrative, which has interpretive qualities.⁵⁵

It also seems that in the eyes of an outside observer too, in many cases there is no certainty regarding the value of a statement as interpretive or as a determination of fact. Generally, these two aspects merge, and it is often difficult to distinguish between them. Unsolvable disputes may arise in relation to whether a particular statement belongs to the model of a blank narrative or the model of an interpretive narrative. Consider, for example, the sentence: "Ake and his accomplice were apprehended in Colorado following a month-long crime spree,"⁵⁶ which Justice Rehnquist chose to incorporate in the Ake case. Some would assert that this is an interpretive statement that represents, in a nutshell, Justice Rehnquist's standing on the matter. Others would say that all this statement contains is a presentation of a dry fact. Be that as it may, it seems that an attempt to distinguish substantively between narratives gives rise to doubt as to the possibility of the existence of a blank narrative, and therefore, it being preferable to an interpretive narrative.

Another distinction between narratives can be based on the identity of the authors of the narrative. One possible model is of a "unified narrative,"—when a number of judges sit in judgment, all of them make use of the single narrative which is created by one member of the panel. In fact, most American judgments are written using a model of unified narrative; therefore, examples for different judicial stories to the same set of facts are not easily found. Still, judgments that are written in accordance with the unified narrative model are characterized by a significant weakness. The narrative is the sole window to the concealed adjudicative process of which the determination is merely the final step, so in turn, the *kind* of narrative a judge has selected is an important and integral part of the judgment. It is the key to the judicial consciousness that shapes the judgment and the internal narratives that direct it. Neutralizing the *personal* narrative by means of creating a *single* set of facts by the majority judge, which shall

55. See *supra* text p. 484.

56. *Ake v. Oklahoma*, 470 U.S. 68, 88 (1985) (Rehnquist, J., dissenting).

serve and bind all the judges sitting on bench, causes the loss of that key. A coercive model of a unified judicial narrative cannot and will not prevent a judge from using a personal internal narrative. However, it will transform the personal internal narrative into something entirely hidden. When the author of a judgment does not have the opportunity to attach to it a personal narrative, the judgment will be an opaque and technical text, inaccessible to serious and deep critical discourse.

A personal narrative where *every* judge on a panel shapes the relevant story in accordance with his or her personal perception represents the desirable alternative rationale underlying the use of personal narratives in judicial writing, and is similar in its character to one of the rationales which is customarily attributed to freedom of speech. By means of freedom of speech, we create a "marketplace of ideas," that either complement or compete with each other, which in turn creates a perpetual dynamic of exchange, examination, analysis, and assessment of ideas. The right to know means the right to be exposed to this "marketplace of ideas." Similarly, the parties to a hearing and the members of the public are also entitled to be exposed to a broad matrix of relevant circumstances which are connected to the case. An essential part of this matrix is the narratives chosen by judges. Together, these narratives create the "marketplace of stories." Exposure to these competing judicial stories makes it possible to read the judgment in its full context, and thus form a better assessment of it. A unified judicial narrative, which binds all the judges, would not allow such exposure of the individual backgrounds and perceptions of those on the bench, which comprise an inseparable part of adjudication.

To summarize the position so far: A personal narrative which allows, even encourages, different judicial stories which appear in the judgments, enriches and deepens the possibility of examining, analyzing, and assessing the normative determination and its reasoning. It adds additional data and viewpoints. It ably serves our right to know. In other words, there is no inherent flaw in different choices made by judges for the purpose of shaping the narrative they present in the judgment. In any event, it is not possible to create a narrative without making choices. The creation of a narrative by means of a list of choices indeed signifies power. Indeed, use of this power is proper and desirable. It forms a part of legitimate judicial activity. Yet, it does not follow from the above that shaping the external judicial narrative should be free of any restriction or limitation whatsoever. Naturally, a narrative is only supposed to contain those facts that in the opinion of the judges are relevant for the purpose of the legal determination.

However, in accomplishing such the law does not have to supervise the process by which the judge determines the set of facts and events which are relevant, and hence the manner in which the judges choose to bring those facts to the knowledge of the public.

7. CONCLUSION: IN PRAISE OF JUDICIAL NARRATIVE

As Austin Sarat points out, the connection between law and language and the perception of the law as a "literary" occupation may be seen by some as threatening because it emphasizes the manipulative aspects of the law, and raises arguments concerning its unswerving objectivity.⁵⁷ Perhaps for this reason, there are those who tend to ignore altogether the legal use of language and rhetoric, or declare it irrelevant to legal discourse. A possible reply might emphasize that narrative is not a lone player in the legal arena; it does not come as a substitute for a legal doctrine, for a certain world view, or for fundamental principles. It joins all of these, as one of the components in a web, and together with them creates a coherent and homogenous judgment, which is linked to the life conducted outside it.

It is precisely the "literary" and rhetorical characteristics of the legal discourse which may provide a new and unfamiliar angle from which to consider issues of justice and injustice.⁵⁸ Narrative kindles the use of our imagination and stimulates a careful and sensitive reading of the judgment. A narrative which is created by a judge may influence and strengthen the reader's conclusion regarding the legal outcome, but it may also lead to the opposite result, for it may cause the readers to reject it, to prompt the creation of an alternative narrative which leads to a different legal conclusion. This ultimately can lead toward public debate, exchange of opinion, and eventually, legal change.

In summary, narrative is not only an irrepressible element on the path to the judicial determination, which often also has an external expression in the judgment—it is also an important element of adjudication. Even if it were possible to create a model which charts and limits the boundaries of judicial choice in relation to the narrative aspects of the judgment, it would

57. Austin Sarat & Thomas R. Kearns, *Editorial Introduction to THE RHETORIC OF LAW* 1 (Austin Sarat & Thomas R. Kearns eds., 1994).

58. *Id.* at 3.

not be proper to do so, since the narrative logic, which is expressed in each personal narrative, is a valuable phenomenon. As has been demonstrated, the different narratives incorporated within judicial determinations enrich and deepen the possibility of significant critical discourse.

As judges translate the legal conflict with which they are faced into the language of narrative—they transform it from an isolated element, which may relatively easily be distinguished and considered, into a part of the complex, borderless, fabric of human experience. The narrative enables us to observe a conflict against the rich background of endless contexts that are “opened” from the story, and grant weight to the judgment as a whole. The use of narrative does not mean ignoring the chaotic qualities of reality. Rather, it acts as a tool that enables us to achieve a certain understanding, and at the time hints at its only partial nature. Because the chaos is mixed into the background, because the entirety is inconceivable, we are obliged to make use of a story that offers temporal sequence and some kind of structure. Every story has, indeed, an element of seduction, but “the storyteller’s art constitutes a kind of honest seduction.”⁵⁹ In a similar sense, every speech and every utterance that involve choices are also kinds of seductions. Yet, this kind of “seductions” is an essential means of communicating, of convincing, and of igniting shifts and changes of reality.

Narrative represents a dynamic process. Any narrative is subject to continuous interpretation. Almost every story, including judicial stories, will never be “closed.” Every component thereof hints at an entire range of possibilities, questions and details which were not “put into” the judgment, but which are to be found in the background and every story is subject to personal interpretation.

In this regard, judicial narrative is idiosyncratic. Judges are, in a way, the most “official” storytellers in contemporary human existence. In the wake of the third millenium, their stories, sometimes, gain wider dispersion and higher “rating” than any other story. It is high time to focus our gaze on this unique genre, and start seriously exploring its legal and cultural functions and complexities, and its force and limits.

59. GLENN ROBERTS & JEREMY HOLMES, *Preface* to HEALING STORIES: NARRATIVE IN PSYCHIATRY AND PSYCHOTHERAPY at ix (Glenn Roberts & Jeremy Holmes eds., 1999).