

CHAPTER III

Legal Storytelling and Narrative Analysis

Have you ever had the experience of hearing one story and being completely convinced, then hearing an exactly opposite story, equally well told, and being left unsure of your convictions? In an everyday experience, Kim complains to the teacher that Billy has been picking fights on the playground. The teacher listens sympathetically and is ready to punish Billy. Fortunately, the teacher listens to Billy's story or that of an impartial third child. It turns out that Billy is not at fault at all; Kim started the trouble.

Or have you perhaps had the experience of watching two gifted appellate lawyers arguing a case? You hear the first and are persuaded. You see no way that the court can fail to rule in his or her favor. Then the second lawyer argues the opposite side, citing different authority, invoking different principles, bringing out different aspects of the same cases that the first lawyer relied on. Your certainty is shaken; now you are unsure which side deserves to win.

Or perhaps you have had the experience of discussing with a friend a famous case, such as the one growing out of the death of Trayvon Martin or one having to do with an accused terrorist who was tortured. You and she agree

on most of the facts of what happened, but you put radically different interpretations on them. You are left wondering how two people can see "the same evidence" in such different lights.

Critical race theorists have built on everyday experiences with perspective, viewpoint, and the power of stories and persuasion to come to a deeper understanding of how Americans see race. They have written parables, autobiography, and "counterstories" and have investigated the factual background and personalities, frequently ignored in the casebooks, of well-known cases such as *Korematsu* (the Japanese-internment case) or *Plessy v. Ferguson* (the separate-but-equal case). Other scholars have examined narrative theory in an effort to understand why certain stories work and others do not. Still others study the way trial lawyers consciously or unconsciously construct narratives—theories of a case—that they hope will resonate with the jury and induce it to adopt their interpretations of what happened and to reject those of the opposite side.

Legal storytellers, such as Derrick Bell and Patricia Williams, draw on a long history with roots going back to the slave narratives, tales written by black captives to describe their condition and unmask the gentility that white plantation society pretended to. American Indians, of course, were great storytellers who used history and myth to preserve culture, to bind the group together, and to remind it of its common destiny. In Latino society, picaresque novelists made sly fun of social convention, puffed-up nobility, and illegitimate authority. Although some writers criticize

CRT for excessive negativity and failure to develop a positive program, legal storytelling and narrative analysis are clear-cut advances that the movement can claim. Even some minority judges are finding it useful from time to time to insist on the validity of the perspective of color.

By that standard, white judges will be permitted to keep the latitude they have enjoyed for centuries in discussing matters of intellectual substance, even issues of human rights and, because they are white, still be permitted to later decide specific factual situations involving the principles of human rights which they have discussed previously in a generalized fashion. But for black judges, defendants insist on a far more rigid standard, which would preclude black judges from ever discussing race relations even in . . . generalized fashion. . . .

To suggest that black judges should be so disqualified would be analogous to suggesting that the slave masters were right when . . . they argued that only they, but not the slaves, could evaluate the harshness or justness of the system.

Federal Judge Leon Higginbotham, in refusing to disqualify himself from hearing a case, Commonwealth v. Local Union 542, International Union of Operating Engineers, 388 F. Supp. 155, 165 (E.D. Pa. 1974)

A. Opening a Window onto Ignored or Alternative Realities

One premise of legal storytellers is that members of this country's dominant racial group cannot easily grasp what it is like to be nonwhite. Few have what W. E. B. Du Bois described as "double consciousness." History books, Sunday sermons, and even case law contribute to a cultural

hegemony that makes it difficult for reformers to make race an issue. How to bridge the gap in thinking between persons of good will whose experiences, perspectives, and backgrounds are radically different is a great challenge.

Consider the following clash of stories. According to one leading CRT writer, the majority's story of race would probably go something like this:

Early in our history there was slavery, which was a terrible thing. Blacks were brought to this country from Africa in chains and made to work in the fields. Some were viciously mistreated, which was, of course, an unforgivable wrong; others were treated kindly. Slavery ended with the Civil War, although many blacks remained poor, uneducated, and outside the cultural mainstream. As the country's racial sensitivity to blacks' plight increased, federal statutes and case law gradually eliminated the vestiges of slavery. Today, blacks enjoy many civil rights and are protected from discrimination in such areas as housing, public education, employment, and voting. A black president occupies the White House. Many entertainers and sports figures—millionaires all—are black. The gap between blacks and whites is steadily closing, although it may take some time for it to close completely. At the same time, it is important not to go too far in providing special benefits for blacks. Doing so induces dependency and welfare mentality. It can also cause a backlash among innocent whites who believe they have suffered reverse discrimination. Most Americans are fair-minded individuals who harbor little racial prejudice. The few who do can be punished when they act on those beliefs.

That's the first story. Yet coexisting with that comfort ing tale are others of black, Chinese, Japanese, Latino, Filipino, and American Indian subordination in the United States, a history "gory, brutal, filled with more murder, mutilation, rape, and brutality than most of us can imagine or easily comprehend" (Derrick Bell, *And We Are Not Saved* 217 [1987]).

That history continues into the present and implicates persons still alive. It includes infant death rates among minorities nearly double those of whites, as well as arrest and incarceration rates that are among the highest in the world. School dropout rates among blacks and Latinos are worse than those in practically any industrialized country, and the gap between whites and nonwhites in income, assets, educational attainment, and life expectancy is as wide as it was thirty years ago, if not wider. Violence against Middle Eastern-looking people, as well as against sexual minorities, has increased alarmingly.

The new accounts dare to call our most prized legal doctrines and protections shams—hollow pronouncements issued with great solemnity and fanfare, only to be silently ignored, cut back, or withdrawn when the celebrations die down.

How can there be such divergent stories? Why do they not reconcile? To the first question, critical race theory answers, "experience." People of different races have radically different experiences as they go through life. (Derrick Bell would add a further reason: "interest convergence"—people believe what benefits them.) To the second, it answers that empathy is in short supply. (See the discus-

sion of the empathic fallacy in chapter 2.) Literary and narrative theory holds that we each occupy a normative universe or "nomos" (or perhaps many of them), from which we are not easily dislodged. Talented storytellers nevertheless struggle to reach broad audiences with their messages. "Everyone loves a story." The hope is that well-told stories describing the reality of black and brown lives can help readers to bridge the gap between their worlds and those of others. Engaging stories can help us understand what life is like for others and invite the reader into a new and unfamiliar world.

"Race may be America's single most confounding problem, but the confounding problem of race is that few people seem to know what race is." (Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 Harv. C.R.-C.L. L. Rev. 1, 5-6 [1994]). In part, what makes race a confounding problem and what causes many people to not know what race is, is the view that the problems of race are the problems of the racial minority. They are not. The problems of race belong to all of us, no matter where our ancestors come from, no matter what the color of our skin. Thus, concluding that race is not an issue in this case because juror 32 is not a member of a racial minority, misses the point. Race is an issue.

State v. Buggs, 581 N.W. 2d 329, 344 (Minn. 1998)

B. Counterstorytelling

Some of the critical storytellers believe that stories also have a valid destructive function. Society constructs the social world through a series of tacit agreements mediated

by images, pictures, tales, tweets, blog postings, social media, and other scripts. Much of what we believe is ridiculous, self-serving, or cruel but is not perceived to be so at the time. Attacking embedded preconceptions that marginalize others or conceal their humanity is a legitimate function of all fiction.

In legal discourse, preconceptions and myths, for example, about black criminality or Muslim terrorism, shape mindset—the bundle of received wisdoms, stock stories, and suppositions that allocate suspicion, place the burden of proof on one party or the other, and tell us in cases of divided evidence what probably happened. These cultural influences are probably at least as determinative of outcomes as are the formal laws, since they supply the background against which the latter are interpreted and applied. Critical writers use counterstories to challenge, displace, or mock these pernicious narratives and beliefs. (See, e.g., Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 Va. L. Rev. 503 [1994], pointing out that white-collar and corporate/industrial crime—perpetrated mostly by whites—causes more personal injury, death, and property loss than does all street crime combined, even on a per capita basis.)

C. *Cure for Silencing*

Stories also serve a powerful additional function for minority communities. Many victims of racial discrimination suffer in silence or blame themselves for their predicament. Others pretend that it didn't happen or that they "just let

it roll off my back." All three groups are more silent than they need be. Stories can give them a voice and reveal that other people have similar experiences. Stories can name a type of discrimination (e.g., microaggressions, unconscious discrimination, or structural racism); once named, it can be combated. If race is not real or objective but constructed, racism and prejudice should be capable of deconstruction; the pernicious beliefs and categories are, after all, our own. Powerfully written stories and narratives may begin a process of correction in our system of beliefs and categories by calling attention to neglected evidence and reminding readers of our common humanity. Even the conservative judge Richard Posner has conceded that major reforms in law often come through a conversion process or paradigm shift similar to the one Thomas Kuhn describes and minority storytellers advocate (Richard Posner, *The Problems of Jurisprudence* 459 [1990]). Barack Obama's *Dreams from My Father* (1995) seems to have served a vital function in explaining to many readers the young president's racial journey.

The philosopher Jean-François Lyotard's concept of the *differend* helps explain the value of narratives for marginalized persons. The *differend* occurs when a concept such as justice acquires conflicting meanings for two groups. A prime example would be a case in which a judge seeks to hold responsible an individual who does not subscribe to the foundational views of the regime that is sitting in judgment of him or her. In situations like this, the subordinate person lacks language to express how he or she has been injured or wronged. (See, e.g., George Martinez,

Philosophical Considerations and the Use of Narrative in the Law, 30 Rutgers L.J. 683 [1999].) For example, when contemporary Euro-Americans resist even discussing reparations for blacks on the grounds that a black person living today has never been a slave and so lacks standing, nor has any white person alive today been a slaveholder, the black person who wishes to discuss these questions and is shunted aside suffers the differend. The prevailing conception of justice deprives him or her of the chance to express a grievance in terms the system will understand. Until very recently, women who suffered childhood incest or battered-wife syndrome were victims of the differend, as were Latino undocumented persons who suffered workplace discrimination but could not complain for fear of being deported. Narratives provide a language to bridge the gaps in imagination and conception that give rise to the differend. They reduce alienation for members of excluded groups, while offering opportunities for members of the majority group to meet them halfway. In our time, Middle Eastern writers describe the alienation and pain of dealing with daily suspicion that they are terrorists, when they may be law-abiding accountants, teachers, office workers, or doctors. (See, e.g., John Tehranian, *Whitewashed: America's Invisible Middle Eastern Minority* [2008].)

D. Storytelling in Court

Attorneys and teachers of clinical law have been applying storytelling and narrative analysis to understand how the dynamics of persuasion operate in the courtroom. They also use them to understand the interplay of power and

interpretive authority between lawyer and client. Suppose, for example, the lawyer favors strategy A because it is 60 percent likely to win. The client, however, favors strategy B because it is "truer" to his experience or his world, even though it is less likely to produce a victory. Writers such as Lucy White and Anthony Alfieri show that attention to the narrative side of lawyering can enable lawyers representing the poor and disenfranchised to achieve a better brand of justice. This has prompted some critics to charge that CRT teaches unmitigated manipulation of emotions and playing the race card. For example, when the O. J. Simpson verdict came down, Jeffrey Rosen, legal affairs writer for the *New Republic*, charged that Johnny Cochran's successful defense of his famous client was an outrage and a case of "applied critical race theory." Despite this and other criticisms, law has been slowly moving in the direction of recognizing the legitimacy and power of narrative. Children and certain other witnesses are permitted to testify in the form of an uninterrupted narrative, rather than through question-and-answer examination. With sexual-offense victims, shield laws and evidentiary statutes protect them against certain types of examination, even though the Sixth Amendment's Confrontation Clause would otherwise permit the other side to attack their narrative forcefully.

E. Storytelling on the Defensive

Storytelling, as exemplified by the best-selling books of Derrick Bell, Patricia Williams, and others, has enjoyed a considerable vogue that has spread to other disciplines. It should not be a surprise, then, that the legal storytelling

movement has come in for sharp criticism. Some of it comes from conservatives, like federal judge Richard Posner, who disagree, substantively, with what the critics are saying. But criticism also comes from leftist scholars, like Mark Tushnet, who consider that the genre is an ineffective and analytically unsound form of discourse, and from self-professed liberals, like Daniel Farber and Suzanna Sherry, whose critiques are discussed in chapter 6.

QUESTIONS AND COMMENTS FOR CHAPTER III

1. Why are most legal storytellers black or brown (Derrick Bell, Richard Delgado, Patricia Williams, Tara Yosso, Matthew Fletcher, Mari Matsuda, etc.)?
2. Do white people tell stories, too, but deem them not stories at all but the truth?
3. If one wanted to change another person's mind about something, say, the death penalty, what would be more effective, an array of statistics or a good story or movie?
4. "Once upon a time . . ." Do stories (at least ones that are well told) cause the reader or listener to suspend disbelief, and, if so, is this a good or a bad thing?
5. Suppose you have a particular account of the world. For example, as a result of experience you have come to believe that virtue is almost always rewarded and that people generally get what they deserve. Social handouts and welfare just make matters worse. Someone tells you a story about a welfare recipient who used her allotment to raise her children, then went to school and became a Ph.D. and owner of a start-up computer company. How do you react? Do you reconsider your views—or merely pronounce her an exception?
6. What stories do you tend to hear in the debate over affirmative action? Which ones do you hear over and over again during presidential campaigns? (Self-made man? Patriotic American? Tells it like it is? Defender of the Constitution?) During judicial confirmation hearings? (Will stick to the rule of law? Future judicial activist? Understands the common man?)

7. Is capitalism—our society's dominant mode of doing business—a collection of stories, for example, that the market is the best way of allocating resources, that if everyone pursues his or her own self-interest, society will benefit from the citizenry's energy and inventions, and that state control is almost always bad? If it is, will capitalism's periodic crises and crashes eventually cause its supporters to modify their views? Or are stories of this kind impervious to experience?
8. If you hear a given story too often, does a discrepant item of evidence merely cause you to ignore it?
9. Suppose you have a friend who believes in a militarized border and strict enforcement of immigration laws. During a discussion, you learn that she believes that immigration brings Mexican criminals and terrorists into the country and increases the chances of the "next 9/11." You have read studies showing that regions that have experienced increased immigration, including the undocumented kind, see decreasing (not increasing) crime rates. You have also read that to date not a single foreign terrorist is known to have sneaked across the border from Mexico. Are studies like these likely to persuade her to change her views on immigration, and, if not, why not?
10. How can a community activist employ storytelling in his or her work?

SUGGESTED READINGS

- Allieri, Anthony V., *Resistance Songs: Mobilizing the Law and Politics of Community*, 93 *Texas L. Rev.* 1459 (2015).
- Amsterdam, Anthony G. & Jerome Bruner, *Minding the Law: How Courts Rely on Storytelling and How Their Stories Change the Ways We Understand the Law—and Ourselves* (2001).
- Bell, Derrick A., Jr., *And We Are Not Saved: The Elusive Quest for Racial Justice* (1987).
- Delgado, Richard, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 *Mich. L. Rev.* 2411 (1989). *Law Stories Series* (West Pub. Co.).
- Martinez, George A., *Race, American Law, and the State of Nature*, 112 *W. Va. L. Rev.* 799 (2010).
- Matsuda, Mari J., *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *Harv. C.R.-C.L. L. Rev.* 123 (1987).
- Symposium: *Legal Storytelling*, 87 *Mich. L. Rev.* 2073 (1989).
- Trount, David D., *The Monkey Suit and Other Short Fiction on African Americans and Justice* (1998).
- White, Lucie E., *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *Buff. L. Rev.* 1 (1990).
- Williams, Patricia J., *The Alchemy of Race and Rights: Diary of a Law Professor* (1991).
- Yosso, Tara J., *Critical Race Counterstories along the Chicana/o Educational Pipeline* (2006).