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ANTHONY G. AMSTERDAM
JEROME BRUNER

MINDING THE LAW

关注美国法律

How courts rely on storytelling
and how their stories
change the ways we understand
the law—and ourselves

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To a decade of students and colleagues
in the Lawyering Theory Colloquium

Contents

CHAPTER ONE

Invitation to a Journey

We need some briefing to start us on our way. For we propose to go about things in an unusual fashion. Unlike most books, this one will be less concerned with familiarizing what is strange than with making the already familiar strange again.

Our intention comes not out of some contrarian perversity, but out of a conviction that familiarity is dulling—that when our ways of conceiving of things become routine, they disappear from consciousness and we cease to know *that* we are thinking in a certain way or *why* we are doing so. Thus do enterprises of potential pith and moment stagnate, coming to be as thoughtless as the most mechanical routines of our daily folkways—like keeping a certain distance between us and an interlocutor while conversing—which we follow slavishly but without awareness. It requires either a breach of the spacing rule (which usually only takes us aback) or an astute anthropologist's account of "interpersonal distancing" to make the familiar strange again, to rescue the taken-for-granted and bring it back into mind.[1]

The practice of law is full of such dissociated routines, of canonical ways of proceeding "scarcely worth a moment's thought": the proper form for a brief, the right motion to file, the obvious line of precedent to cite, the correct way to advise a client. The substantive rules of the *corpus juris,* too, appear obvious for the most part, plainly discernible by skimming the headnotes of judicial decisions, with no need to worry through the text. Yet all of these appearances conceal pitfalls. For

although lawyers ordinarily fare better when they reduce both procedural matters and settled substantive rules to habit, following the Latin maxim *scientia dependit in mores,* this is so only when things hold steady. And the lawyer who assumes that things will always hold steady is in for some very ugly surprises—or for a life of missed opportunities through want of the capacity even to experience surprise.

One of us long ago discovered this fact through trial and error (mostly error), as a noncom in the attorneys' auxiliary corps trying to defend thousands of demonstrators against arrests and prosecutions, assaults and injunctions, during the civil rights protests of the 1960s. The survivors' lore on that bivouac was that you had to learn the ropes only as a way of figuring out how to untie them—that the most effective lawyers were those who quickly made sense of the local routines and even more quickly saw how much of them could be ignored or attacked as nonsense. It is the same in large matters of legal theory as in small matters of legal practice: familiarity insulates habitual ways of thinking from inspections that might find them senseless, needless, and unserviceable.

So we take as the agenda of this book to make some very familiar routines in law-thinking strange again. We want to concentrate especially on three commonplace processes of legal thought and practice, to target them for consciousness retrieval. They are processes without which lawyers, judges, and students of the law could not possibly make do for as much as one hour: categorizing, storytelling, and persuasion.

What distinguishes a contract from something "not worth the paper it's printed on"? That's legal categorizing. How do you describe to a court the circumstances surrounding the contract's alleged breach? That's legal storytelling. You tell the story differently—in a quite different tongue—depending upon whether you represent the plaintiff or the defendant in a breach-of-contract case. That's legal rhetorics. *Categorization, narrative,* and *rhetorics*—the stuff of everyday life in the law.

But life in the law is not lived in a vacuum. It is part of a pervasive world of *culture.* If law is to work for the people in a society, it must be (and must be seen to be) an extension or reflection of their culture. Therefore we shall have to explore as well what culture is, how it operates and through what instrumentalities.

Obviously, lawyers are not the only ones steeped in these processes: *nobody* could live without them. Yet the ways of lawyers and judges and

students of the law are specialized ways, often so ostentatious in their specialization as to suggest the esoteric flimflam of a jealous guild. We will want to examine these specializations with particularity, but without assuming that they are as unique as they often appear and profess to be. So, we need to ask, how do *legal* categorizing, *legal* narrative, *legal* rhetorics, and *legal* culture differ from—and how do they resemble—similar doings outside the realm of law?

Here, good fortune smiles upon us. For much insightful study has recently delved these ubiquitous human doings in their general aspects, outside the law. We are in a position to draw upon these studies—in psychology, linguistics, anthropology, even in such seemingly remote disciplines as literary theory, neurology, and the computational sciences—for an enriched understanding of the general nature of the processes of categorizing, storytelling, and persuasion whose specialization makes up the life of law. And for a deeper appreciation, too, of how culture interfaces with these processes.

In speaking of the "general nature" of the processes, we do not overlook the vital point that everything that human beings do, including categorizing, narrating, and persuading, is in some sense specialized, reflecting the particular roles people are playing, the specific aims they are pursuing, the context-dependent position they occupy in their society. In that sense, one can give no *general* account of human pursuits. But we are not searching for some sort of "average" or benchmark account against which to compare what lawyers do. We seek, rather, a sense of the *possible* ways in which human pursuits can be carried out, and how the *legal* way fits into this picture. Doubtless, as many non-lawyers have learned to their grief, to "get into the hands of lawyers and the law" is to enter a different way of life. But in seeking to understand what way of life that is, we should consider the surrounding ways. And we should not imagine that law can ever be so specialized as to be altogether alien, foreign to life itself, *lebensfremd*. In this respect law must resemble literature a little. It will imitate life—or life will imitate it. Law that was totally alien to life would be as inconceivable as literature completely removed from the experience of its readers.

To be sure, law has special functions, institutional and cognitive. The law, we are told, saves us from forgetfulness of our most basic obligations to each other and the state, from endless cycles of revenge, from the

tyrannies of public powers and the blindnesses of private passions, from fecklessness and faction. Yet if the law does any of these things at all well, it must do them by establishing continuities with the ways in which the people of a society conceive of it and of themselves, the ways in which they classify and comprehend, envision and dispute and puzzle out who they are and what they need and want, and why. For this reason also, we may have much to learn—even about those features of the law that are the most peculiar to it—by looking at them against the backdrop of what is known concerning other forms of ideation and imagination, controversy and discourse, within cultures. But to do this we must, once again, take off the blinders of familiarity.

There are many ways of making the familiar strange, if we are moved to use them. Juxtaposing the past and the present is surely one way—the historian's honored way of quickening consciousness. But it is no mythic whim that Clio, the Muse of History, has four sisters who are muses to poets of divers sorts. For poets, like historians, toil relentlessly to estrange the familiar, though they do it differently. Their tropes and metaphors, conceits and images and evocations cut across our daily, dulled perceptions of the world and lure us, even yank us, out of the banality of routine. In the chapters that follow, we will sometimes use both the historian and the poet to help us on our quest.

But our efforts to explore the processes of categorization, narrative, rhetorics, and culture will also lead us to use other techniques of estrangement. Perhaps the most powerful trick of the human sciences is to decontextualize the obvious and then recontextualize it in a new way. We will be about this constantly; and if some of the new vantage points from which we examine the familiar rituals of the law seem remote—as when we view the United States Supreme Court's 1992 opinion terminating the era of school-desegregation efforts in *Freeman v. Pitts* through the lenses of the dramaturgic structure classically used to write the quietus of Agamemnon and Julius Caesar—that will only be with the aim of getting far enough outside law's enclave to see afresh what appears to be going on unseen inside.

To some extent, this estranging methodology is the natural consequence of our collaboration. For, as our readers doubtless have remarked, the authors of this volume are an odd pair—a cultural psychologist and a

litigator. That happy mismatch has required both of us to spend a good deal of effort over the last decade helping each other to "see" the world of the law differently—the cultural psychologist to see its inner workings as they look from up close; the litigator to see its larger features as they look from some distance. We cannot claim that this is a formula for keener vision, but we guarantee that it is one to make the sights of the legal universe constantly curiouser and curiouser.

Still, we would not have written this book in its present form, or at all, on the basis of that shared experience alone. We have come to write it as the consequence of a broader sharing—of a decade of teaching together, and with a small group of brilliant colleagues,[2] a seminar for second- and third-year law students of exceptional insight and perceptiveness. The nominal subject of the seminar is "lawyering theory": how to understand more richly the work that lawyers do in crafting arguments and cases and in counseling clients and negotiating, the work that judges do in deciding cases and crafting opinions, preserving and modifying the rules and traditions of the law. What we end up having done each year is to experience fresh ways of looking at these sorts of legal work as the ceaseless works-in-progress of a culture that, while binding its members in a common canon, leaves them free to some extent to visualize and even realize possible worlds beyond the canon.

And we have learned some lessons doing that—intriguing, rather humbling lessons. For example, though we and our students read quite a few Supreme Court opinions as well as a good deal of anthropology, it often turns out that neither of these provides our most vivid insights into the law. The insights are just as likely to come from, say, a close reading of a play by Aeschylus, a novella by Melville, a West African folktale, or even the memorable scene on Mt. Moriah in Genesis 22 where God commands Abraham to kill his only son, Isaac. All in the provinces of Clio's sisters. Reading these texts while reading law, we have found, has astonishing consciousness-retrieving effects.

We don't pretend to know why this is so—why, for instance, the dramatized conflict over the plea for asylum in Aeschylus' *The Suppliants* so vivifies the issues of interstate rendition procedure decided by the Supreme Court in the 1842 "fugitive slave case" of *Prigg v. Pennsylvania,* as well as today's most difficult "affirmative action" issues. Or why the Baila tale *The Child and the Eagle* freshens our students' and our own

understanding of contemporary issues of deportation policy and capital-punishment law (and of potentially gendered perspectives on both). Perhaps these effects are the same stuff as the "estrangement" of the Russian Formalists (like Roman Jakobson and Viktor Shklovsky),[3] or of historical distance. But what has struck us repeatedly is that the combination of case law with Clio and her sisters not only opened the cases to a fuller range of possible readings but also readied our students for ideas in anthropology and linguistics, in psychology and even in Artificial Intelligence. And by the end of each year's trip, we had another crew of young lawyers who were so thoroughly liberated from the deadly habit of taking the law for granted that they could help us, in turn, to keep from lapsing back into the habit.

That, more than anything else, encouraged us to write this book.

But once launched on our task, we faced the occupational hazard shared by all who would reflect upon controversial doings—human scientists, law professors, lofty critics of all kinds. Can one rise above it all, *au delà de la bataille,* to achieve (as Thomas Nagel so aptly puts it) the "view from nowhere"?[4] Is that, indeed, our intention?

Hardly. After all, our concern is with the law as practiced, not with an abstract *corpus juris* and its commentaries. And as practiced, law has three related qualities that defy our best efforts to stand above it.

First, law is not simply a system of ideas but a series of consequences that human beings inscribe on the lives of other human beings through the medium of those ideas. However dispassionately one may seek to analyze the ideas, it is foolish to suppose that one's appraisal of the consequences will be dictated *exclusively* by that analysis. The analysis will help to expose the availability of choices and to elaborate some of the connections between ideas and consequences. But which consequences—and therefore which choices—one regards as tolerable or intolerable will necessarily depend in part upon one's values, faiths, and beliefs about the way in which human beings should be treated.

Second, law is adversarial. To take a position in relation to most legal subjects that have any interest at all is to occupy a position on a battlefield. One may join the battle more or less deliberately, provide support or cover more or less avowedly to one contending party or another, observe rules of combat that are fairer or unfairer; but neutrality is vouchsafed

only to the dead—and to them involuntarily.

Third, all but the most trivial legal statements—in opinions from the bench, in advocate's arguments, in treatises and hornbooks and philosophies of law, even in connection with the judgment of what constitutes a relevant fact—are *interpretive* in nature. There are no logically unique solutions to the law's problems, though there are customary ones. The makers of legal arguments and rules and theories and their critics alike must constantly decide what they will talk about, and what they will say about it, guided by some vision of *what matters.* And so must we.

The aim of this book, as we have said, is to explore the ways in which human beings, including judges and lawyers, must inevitably rely upon culturally shaped processes of categorizing, storytelling, and persuasion in going about their business. Because these processes are ubiquitous in the law (as elsewhere), we might have chosen any of a wide variety of legal texts to illustrate them. The principal texts we chose are opinions of the Supreme Court of the United States in cases where the Court's results struck us as unjust. It was partly because their results seemed unjust (and partly because, as Supreme Court decisions, they had broad impact) that the cases *mattered* to us enough to deserve close study. Like everyone involved in the law, we have convictions about what is and what is not a just result. Those convictions are grounded in our views about how human beings should treat one another. Our views are debatable and are among the views that generate some of the fiercest political, moral, and legal debates in contemporary American culture. So be it. Despite their debatability, they make some legal subjects—and some Supreme Court opinions—far more interesting to us than others. We have chosen to study and to write about some of those that interest us the most.

But this does not mean that our purpose in writing about these cases is to criticize their results. We subject their *texts* to close reading; and where the reading shows that Supreme Court Justices have made undeclared categorial choices—or have chosen to take one narrative, rhetorical, or cultural direction rather than another without explaining why—we do not hesitate to say that the choices lack any justification *in the text.* To say this is not to say that the choices, let alone the results announced in the Justices' opinions, are unjustifiable. To criticize those choices and results would require normative analyses (including, conspicuously, a statement

of our own values and the reasons for them) that constitute a wholly different subject than the subject of this book.

Thus, our answer to the question "shall we strive to stand above the battle?" is *no, but neither shall we seek to fight the battle here.* We will limit our efforts to examining the construction and the uses of some of the implements with which the battle is constantly fought. And that limitation entails two others, which we want to make explicit.

One: In examining how Supreme Court Justices construct the implements they use in battles, we do not intend to portray the Justices as either villains or heroes. Just as our purpose does not extend to criticizing the Justices' results, it does not extend to analyzing their motives. We have neither the information nor the competence to offer assessments in any of the dimensions that distinguish Goodies from Baddies—or to pretend to know what those dimensions might be.

Two: In examining particular Justices' opinions as illustrative of the uses of judicial battle implements, we do not intend to suggest that these opinions exhibit *more* or *different* uses of the implements than could be found in the opinions of Justices who are doing battle on the other side. To the contrary, we believe that the implements are used by justices and judges of all ideological orientations and that similar implements are used by lawyers on both sides of every controversy, and by all sorts of critics and students of the law, ourselves included. By increasing their visibility, we hope to encourage increased attention to them wherever they are found; and we would be astounded if sensitive students and critics could not find them in abundance in our own book.

So, yes, we have a definite ideological point of view; and, yes, that point of view has had a lot to do with our selection of the legal texts that we examine in the following chapters. But our object is not to sell our ideological point of view or even to offer a dissent from the ideologies reflected in the texts. It is to increase vigilance and to sharpen scrutiny. If we succeed in that object, the reader will, we are sure, be astute to catch us out wherever our ideological leanings have influenced our interpretations or uses of categorization, narrative, rhetorics, and culture.

Here is a rough sketch of the following chapters: Where there be law, so too must there be categories. For law defines categorically the limits of the permissible or, more often, of the impermissible. Since human

imagination cannot conceive of the full variety of possible transgressions, law requires a system of categories to reduce that variety. So an innumerable array of natural and unnatural, potentially harm-wreaking temptations is dealt with under the rubric of "attractive nuisance," for example; and the courts must decide, case by case, whether the harm-wreaker at bar is indeed an *attractive nuisance* or nay. With regard to some categories—such as the "liberty" protected by the Constitution's Due Process Clauses—one would be hard-pressed to capture their "defining" attributes in any compendious tag and would be tempted to allow as how they can only be defined by reference to a line of precedent. But how is a line of precedent to be understood—as a progressive refinement of the terms used to mark the boundaries of a legal rule, as some abstract idea evolving logically along lines dictated by the doctrine of *stare decisis,* as a continuing story to be spun by a succession of tale-tellers? The typical law dictionary is a *vade mecum* of category specifications, few of them safe to bank on. All the more astonishing that, in the main, the nature of legal categories has not been much studied.

In the following chapter we take a look at theories of categorization as they have emerged over recent years in fields like cognitive psychology, anthropology, and linguistics. It was, after all, "the category problem" that precipitated the Cognitive Revolution in modern psychology.[5] It was also a categorial question—whose categories matter, the anthropologist's or the native's?—that brought anthropology into modern times.[6] And it was Roman Jakobson's paramount contribution to show that at every level of language, category rules were crucial to well-formedness, whether of phonemes, words, or sentences.[7]

The burden of this new work in the human sciences, to oversimplify a bit, is that categories are *made in the mind* and not found in the world. They are made in response to certain demands that derive both from the nature of human cognition (that is, the human capacity to discriminate far more things than we can possibly respond to—such as the millions of colors we can differentiate but which we reduce for use to a few dozen color categories), and from the constraints on communal living in a human culture (as in the case of the distinction between kin and non-kin, or private and public property). The appropriate questions then become functional ones: What functions do categories serve in general, and what function is served by any particular category system? Why do we *create*

our categories as we do, *justify* them in what are often very odd ways, and *put things into them or not* by what are often dubious procedures? How can categorizing lead us into trouble and error? After considering these questions, we conclude Chapter 2 with a look at one domain of legal categorizing—the category of incest—to see whether there is anything special about legal categories, even so highly charged a one as incest.

In Chapter 3, partner of the preceding one, we proceed not by undertaking a conspectus of legal categorizing, but by a close reading of two United States Supreme Court opinions in which issues of categorization are decisive. We look first at Chief Justice Rehnquist's opinion for the Court in *Missouri v. Jenkins,* holding that a lower federal court had gone too far in its efforts to desegregate the public schools of Kansas City. The case ultimately turns on his categorization of the lower court's orders as a forbidden "interdistrict remedy," but, as we shall see, the Chief Justice marches through an intriguing parade of other categorizing moves in setting this move up and bringing it off.

Our reading of the *Jenkins* opinion does not refrain from voicing some strong criticisms of the Chief Justice's categorizing methods. Indeed, it should be abundantly clear that, in our view, Chief Justice Rehnquist's opinion does not face up to the key issue of racial desegregation remedies presented by the case but skirts that issue by a specious categorization of the remedy ordered by the lower federal courts to desegregate the Kansas City, Missouri School District as "interdistrict" as opposed to "intradistrict." And when we get to Chapter 9, the reader will perceive that, again in our view, *Jenkins* represents a major step in the Supreme Court's retreat from the landmark desegregation decision in *Brown v. Board of Education.*

This brings us back to an issue we raised earlier: our inability to achieve—or even to aspire to—a stance of neutrality, *au dela de la bataille.* It is impossible to explore a Court's opinion with complete neutrality. To attempt to do so would entail considering all the alternative ways in which the Court *might have* categorized the issues in the case, *might have* told the story behind the litigation, *might have* deployed its arguments, and *might have* responded to contending strains in American culture. But to carry out such an analysis in full, one would also need to consider all those *might haves* from all possible legal and political perspectives. That kind of algorithm is beyond ordinary human capacity.

So our biases will show, sometimes clearly enough, as in our reading of Chief Justice Rehnquist's *Jenkins* opinion in Chapters 3 and 9, sometimes not. Even when our criticisms are addressed solely to particulars of narrative construction in an opinion, or to fine points of wording, or to the means through which claims to factuality are advanced, it is our own point of view that will steer us to the topics we take up. For writing, whether of love or law, in fiction or essay, is never alien to drama, designed to enliven, not simply to inform neutrally. And while some authors may aspire to recede further from the stage than others, the greatest distance we can hope to achieve from ours is rather like the posture of a Greek chorus, commenting on the passing scene yet remaining part of the play.

Now to the second half of Chapter 3. Here we inspect the pivotal categorizing move in an opinion by Justice Scalia, *Michael H. v. Gerald D.*, which concludes that the relationship between a natural father and the child born of his extramarital union with another man's wife is not such an interest in "liberty" as the Due Process Clause of the Fourteenth Amendment protects against destruction by state law. *Michael H.* will give us an early occasion to observe the powerful interdependence of legal categorization and narrative. Justice Scalia, intentionally or not, draws his categories not just from the law but from an ancient, almost mythic story of adultery, a precursor of the classic tale of Lancelot, Guinevere, and King Arthur. We examine the story in some detail and try to place Justice Scalia's opinion in that narrative line, to understand his categories in relation to the narrative choices available within it. For adultery is not defined merely by legal statute; its canonical variants take their life from archaic but changing habits of thought—and of storytelling. It is by examining that immemorial but still emerging narrative tradition that we can fully appreciate the power of the Guinevere legend in shaping Justice Scalia's portrayal of adultery—and, perhaps as well, the very lives of the case's troubled protagonists. It is not just a Fourteenth Amendment "liberty interest" and a State's prerogatives that are at issue in *Michael H.*, but the narrative form by which we make sense of marriage, fidelity, and human bonds.

In the next pair of chapters, the central focus is on narrative. Why narrative, following categorization? Because we believe that the connection between the two processes exposed by our examination of

Michael H. is not adventitious. When you inquire where categories come from, you quickly recognize that they are almost never constructed arbitrarily. Typically, they are extracted from some larger-scale, more encompassing way of looking at things—either from some *theory* about the world or from a *narrative* about the human condition and its vicissitudes. Theories are accounts of things framed in terms of causes and effects: lightning struck a barn and caused it to catch fire; a particular poison entered the bloodstream and caused a failure in the immune system. From theories of this sort we get such useful categories as "natural hazards" and "toxic agents."

Narratives cohere differently, not through the mechanics and chemistries of cause and effect but through the play of human intentions and purposeful acts in the worlds of striving, accomplishment and failure, victory and defeat. Narratives do not contradict theories but cut across them; the two are incommensurate. (Nonetheless, as we will discover later in the book, narrative may masquerade as theory—or vice versa—for the purpose of persuasion in particular situations where one or the other is supposedly more authoritative; and the implementation of this masquerade is one of the chief offices of rhetorics.) "Good faith effort" is a category extracted from narrative; so is "golden opportunity" and "gutsy kid." And so are "willful ignorance" and "informed consent" and "malice aforethought."

Because so many legal categories derive from narratives, we examine the nature of narrative in general in Chapter 4 and then focus on narrative at work in judicial decisionmaking in Chapter 5. Still another reason for our concentration on narrative—or perhaps simply a different expression of the same reason—is that litigation, a crucial law-making procedure in the Anglo-American common-law tradition, is centrally concerned with the *fit* of competing stories to presumably controlling points of law. This is what is usually afoot in the process that lawyers call (with a confident simplicity that is truly astounding when one considers the mysteriousness of the process) "applying the law to the facts."

Chapter 4 sets the stage, summarizing what we know about narrative from literary theory, linguistics, classics, psychology, historiography, even biblical exegesis. What makes a narrative, what does it do to the "facts" that it comprises, how does it manage to impose its values and its reality, even when it is admittedly fiction? In Chapter 5, again we look at