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# Telling Stories Out of School: An Essay on Legal Narratives

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and Suzanna Sherry\*\*

[T]o have crafted, on occasion, something true and truly put—whatever the devil else legal scholarship is, is from, or is for, it's the joy of that too.<sup>1</sup>

## INTRODUCTION

Once upon a time, the law and literature movement taught us that stories have much to say to lawyers, and Robert Cover taught us that law is itself a story. Instead of living happily ever after with that knowledge, some feminists and critical race theorists have taken the next logical step: telling stories, often about personal experiences, on the pages of the law reviews. By 1989, legal storytelling had risen to such prominence that it warranted a symposium in a major law review.<sup>2</sup> Thus far, however, little or no systematic appraisal of this movement has been offered.<sup>3</sup> We agree with the storytellers that taking the movement seriously requires engaging its ideas,<sup>4</sup> and

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1. Arthur A. Leff, *Afterword*, 90 YALE L.J. 1296, 1296 (1981).

2. Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989). By 1992, even the *New York Times* had taken notice. See Stephanie B. Goldberg, *The Law, a New Theory Holds, Has a White Voice*, N.Y. TIMES, July 17, 1992, at A23. The footnotes in this essay confirm that legal stories have been published in most leading law reviews. The success of storytelling within the academic world is illustrated by the willingness of the *Yale Law Journal* to publish, as a "review essay," a 24-page fictional dialogue about the LSAT, law school hiring practices, and the decline of western civilization that mentions the book under "review" only in passing. Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) (purportedly reviewing DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* (1991)).

3. Mark Tushnet critiques some aspects of legal storytelling in Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992). Highly sympathetic overviews are presented in Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991), and Jane B. Baron, *The Many Promises of Storytelling in Law*, 23 RUTGERS L.J. 79 (1991) (book review). Although we have many substantive disagreements, we found Abrams' article particularly helpful.

4. See Patricia Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 30 (1991) ("feminist scholarship is not being taken seriously in the legal academy"); Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349,

that it is time for a "sustained, *public* examination of this new form of legal scholarship."<sup>5</sup>

Before we begin, it may be helpful to say a few words about what we mean by legal storytelling. Reliance on case studies and other narratives is hardly new to legal scholarship. Based on our reading of the literature, however, we have identified three general differences between the new storytellers and conventional legal scholars. First, the storytellers view narratives as central to scholarship, while de-emphasizing conventional analytic methods. Second, they particularly value "stories from the bottom"—stories by women and people of color about their oppression. Third, they are less concerned than conventional scholars about whether stories are either typical or descriptively accurate, and they place more emphasis on the aesthetic and emotional dimensions of narration. These three differences combine to create a distinctive mode of legal scholarship.

As with many intellectual movements, it is easier to point to examples of legal storytelling than to provide a crisp definition. Although legal storytelling takes many forms, Patricia Williams' "Benetton" story might be considered a classic example of the genre.<sup>6</sup> In this story, she describes at length how she was refused admission to a Benetton store, and how she encountered difficulties in persuading a law review to publish a full account of this episode. It is not extraordinary that this narrative would be published; what is new and noteworthy is that a book consisting of a series of such autobiographical narratives would be hailed as a major work of legal scholarship.<sup>7</sup>

In this article, we will provide an overview of the legal storytelling movement and evaluate its claims. Rather than asking whether storytelling is, generally speaking, a beneficial activity, we will focus on the appropriate role of storytelling in legal scholarship. That task, however, requires consideration of some subsidiary questions. In Part I, we will consider the connection between storytelling and the thesis that women and people of color write in a different voice. In Part II, we will examine legal storytelling from the perspective of practical reasoning by exploring the ways in which concrete situations function in legal thought. After concluding that stories can contribute significantly to our understanding of the law, we will suggest that although storytelling has no necessary gender-based, racial, or ideological connection, some special benefits may flow from stories "from the bottom." Having established that at least some storytelling is a legitimate form of legal scholarship, we will turn in Part III to the question of how to evaluate schol-

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1360-61 (1992); David Simon Sokolow, *From Kurosawa to (Duncan) Kennedy: The Lessons of Rashomon for Current Legal Education*, 1991 WIS. L. REV. 969, 987 n.70 (asserting that feminist scholarship is seldom cited by anyone other than feminist scholars).

5. Abrams, *supra* note 3, at 977.

6. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 44-51 (1991). For further discussion of this story, see note 146 *infra*.

7. For example, one leading scholar refers to the book as "eloquent, profoundly original, and often brilliant," remarks on the "greatness of this book," and says that the book is "both enlightening and transformative." Robin West, *Murdering the Spirit: Racism, Rights, and Commerce*, 90 MICH. L. REV. 1771, 1771, 1781 (1992).

arly efforts of this kind. How do we determine the validity of these stories? How do we assess the quality of this form of scholarship? And what do "validity" and "quality" mean in this setting?

Advocates of storytelling have questioned the traditional standards for evaluating scholarship.<sup>8</sup> A constructive response to this challenge cannot simply reassert those traditional standards. Instead, it should explore the fundamental purposes of legal scholarship. Here, we suggest that *legal* scholarship should help the reader understand law, and that *legal scholarship* should comport with the goals and attributes of the academy rather than mimic other forms of communication. The question, then, is how well a scholarly work serves these goals. In general, we conclude that legal storytelling can contribute to legal scholarship. We also believe, however, that storytellers need to take greater steps to ensure that their stories are accurate and typical, to articulate the legal relevance of the stories, and to include an analytic dimension in their work.

### I. STORYTELLING IN A "DIFFERENT VOICE"

The body of literature asserting that women and people of color have unique perspectives to contribute to legal scholarship is vast and growing rapidly. Feminist legal scholars who embrace this view often speak of women's "different voice," harkening back to Carol Gilligan's groundbreaking book, *In a Different Voice*.<sup>9</sup> Prominent scholars of color who believe that there is a distinctive "voice of color" have often denominated their own scholarship "critical race theory." Because different voice feminists and critical race theorists have much in common, we will refer to both groups collectively as "different voice" scholars, differentiating among them as necessary.<sup>10</sup>

At this point, it may be helpful to explain our understanding of the concept of different voices. So far as we are aware, there is no serious disagreement that some differences exist between the average life experiences of white males and those of other groups. It is plausible to assume that these differences in experiences cause some variations in attitudes and beliefs, particularly in those areas most closely connected with the differences in experience. Thus, for example, it would not be surprising to discover that blacks and whites have different attitudes about school busing, or that men and women tend to disagree about what constitutes sexual harassment. Our understanding of the different voice thesis, however, is that it goes beyond assuming differences only in the average attitudes and beliefs of different

8. See, e.g., WILLIAMS, *supra* note 6, at 99, 103 (academic standards are "mind funnels" and "nothing more than structured preferences"); see also Alex M. Johnson, Jr., *Racial Critiques of Legal Academia: A Reply In Favor of Context*, 43 STAN. L. REV. 137, 150-51 (1990) (speaking in favor of applying different standards to scholarship written in the voice of color).

9. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

10. Others have also noted the kinship between these two schools of thought. See, e.g., Ann Scales, *Feminist Legal Method: Not So Scary*, 2 UCLA WOMEN'S L.J. 1, 4 (1992).

groups. Instead, it also postulates that members of different groups have different methods of understanding their experiences and communicating their understandings to others. This becomes relevant to storytelling through the claim that abstract analysis and formal empirical research are less appropriate than stories for communicating the understandings of women and people of color.

It is sometimes difficult to sort out the various claims that different voice scholars make. They all seem to agree that women and people of color speak in distinct voices, and many claim further that the minority or female voice is best heard in, and uniquely suited to, legal storytelling. We find disagreement, however, on the source of the different voices. Some theorists suggest that gender and minority heritage in themselves create a unique perspective or different voice that would persist even in a completely egalitarian society. Others argue that it is the experience of oppression that creates the different perspective. Whatever the source, however, many different voice scholars also argue that traditional academic standards reflect a white male voice and therefore undervalue the work of women and people of color. In this section, we will explore the nature and source of the different voice, deferring until Part III our discussion of evaluative standards.

#### A. *Feminism*

In 1982, Carol Gilligan published *In a Different Voice*, which asserted that men and women may approach moral questions differently. Since then, scholars in a variety of disciplines, including law, have suggested that women have a general world-view that differs in significant respects from that of men. Although the details differ, these scholars share a common description of the differences between male and female perspectives: Women are inherently both more connected to others and more contextual than men.<sup>11</sup>

Feminist legal scholars who have adopted the different voice perspective contrast women's contextual voice with the male voice of the law. For example, Lucinda Finley argues that law and legal reasoning reflect a male voice by emphasizing "rationality, abstraction, a preference for statistical and empirical proofs over experiential or anecdotal evidence," and "universal and objective thinking."<sup>12</sup> Martha Fineman describes how feminist legal theory can become "an exercise in the concrete."<sup>13</sup> Margaret Jane Radin suggests that feminism shares with pragmatism "a commitment against abstract idealism, transcendence, foundationalism, and atemporal universality;

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11. For an excellent recent survey of feminist scholarship and jurisprudence, see MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 193-214 (1990).

12. Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 893-94 (1989); see also Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M. L. REV. 613, 619 (1986) ("[A]bstraction is the first step down the road of androcentric ignorance.").

13. Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 28 (1990).

and in favor of immanence, historicity, concreteness, situatedness, contextuality, embeddedness, [and] narrativity of meaning."<sup>14</sup> The feminine voice is also portrayed as more empathic and emotional.<sup>15</sup> It is important to note the breadth of these claims: Feminist "different voice" scholars do not suggest simply that women might have a different perspective on issues directly involving gender relations, but rather that women's unique perspective casts a different light on virtually all legal issues.<sup>16</sup> These feminist scholars, including one of the authors of this article,<sup>17</sup> have examined the implications of contextuality and connection in the context of a great variety of legal questions.<sup>18</sup>

Although rarely made explicit, the connection between this description of women's voice and the methodology of storytelling is obvious. If legal reasoning, especially "grand theory,"<sup>19</sup> is overly abstract, objective, and empirical, then the antidote is legal storytelling, which usually focuses on the narrator's experience of events. Stories supply both the individualized context and the emotional aspect missing from most legal scholarship.<sup>20</sup> Thus "personal narrative" is described as a "feminist method."<sup>21</sup>

Despite the widespread invocation of different voice theories, the existence of such a voice and its connection to legal storytelling are matters of

14. Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1707 (1990).

15. See MINOW, *supra* note 11, at 194; Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 26-28 (1988).

16. See Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 581, 592-613 (1986); see also MINOW, *supra* note 11, at 212-13 & n.139.

17. See Sherry, *supra* note 16.

18. For a recent overview, see MINOW, *supra* note 11, at 211-12. For examples, see Leslie Bender, *Feminist (Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848 (tort law); Mary Coombs, *Agency and Partnership: A Study of Breach of Promise Plaintiffs*, 2 YALE J.L. & FEMINISM 1 (1989) (contract law); Eric T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 STAN. L. REV. 1529, 1547-48 (1989) (water law); Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413 (evidence law). See also Carrie Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, 23 PAC. L.J. 1493, 1524-33 (1992) (citing feminist jurisprudence). One scholar has gone so far as to suggest that women have different perceptions of time, space, and causality. Ann C. Scales, *Feminists in the Field of Time*, 42 FLA. L. REV. 95, 122-23 (1990).

19. In general, "grand theory" refers to the effort to establish a deductive logical system as the basis for understanding legal issues. For a more extensive definition and devastating critique of this view, see MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 21-187 (1988). See also Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1338-41 (1988); cf. Fineman, *supra* note 13, at 29-30 (arguing that feminism may be in danger of replacing one formalist theory with its own "grand theory").

20. See, e.g., Finley, *supra* note 12, at 903-04 ("some things . . . just cannot be said using the legal voice" because it lacks emotion); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2100, 2105 (1989) (feminist storytelling adds "feeling and imagination" and "facilitat[es] empathic understanding" as part of "an overall 'call to context'"); Kim Lane Scheppelle, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2075 (1989) ("stories re-present experience, and can introduce imagination and new points of view"); cf. DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION 91 (1990) (women tell stories because of "their orientation to language as it is used in private speaking").

21. Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School"*, 38 J. LEGAL EDUC. 61, 62 (1988).

dispute even within the feminist legal community.<sup>22</sup> Gilligan's work is highly controversial within her own discipline, and Gilligan herself rejects extreme claims of differences between men and women. Her later work suggests that the moral approaches of men and women form overlapping bell curves, and that fully mature individuals of either sex should be able to use both "voices."<sup>23</sup> Other researchers in the field have been unable to duplicate Gilligan's original findings, and many have criticized her methodology.<sup>24</sup> If male and female styles of thought were radically different, one would expect more consistent empirical evidence of gender differences.

Some feminist legal scholars have condemned suggestions about women's different voice as both unsound and unwise, because they are likely to lead to further marginalization of women in economic and political spheres.<sup>25</sup> Others, whom Robin West describes as "radical" as opposed to "cultural" feminists, attribute women's different voice to the male foot on women's throats,<sup>26</sup> suggesting that "women's connection to others is the source of

22. For an excellent summary of the debate, see Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1784-89 (1991).

23. See Carol Gilligan, Annie Rogers & Lyn Mikel Brown, *Epilogue: Soundings into Development*, in MAKING CONNECTIONS 314, 317-18 (Carol Gilligan, Nona P. Lyons & Trudy J. Hanmer eds., 1989); Carol Gilligan & Jane Attanucci, *Two Moral Orientations*, in MAPPING THE MORAL DOMAIN: A CONTRIBUTION OF WOMEN'S THINKING TO PSYCHOLOGICAL THEORY AND EDUCATION 73, 82-85 (Carol Gilligan, Janie Victoria Ward & Jill McLean Taylor eds., 1988). For similar empirical findings regarding law students, see Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193, 218 nn.132-34, 222 n.144 (1991) (finding substantial differences in average percentage of use of "care ethic" versus "rights ethic" by entering male and female law students, but noting that both groups made substantial use of both ethics). For a striking graphic depiction of how great the overlap is between male and female methods of moral reasoning, see Jeanne L. Schroeder, *Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination*, 70 TEX. L. REV. 109, 145-46 & nn.89-90 (1991).

24. See, e.g., John M. Broughton, *Women's Rationality and Men's Virtues: A Critique of Gender Dualism in Gilligan's Theory of Moral Development*, 50 SOC. RES. 597 (1983); Owen J. Flanagan, Jr. & Jonathan E. Adler, *Impartiality and Particularity*, 50 SOC. RES. 576, 584-88 (1983); Linda K. Kerber, Catherine G. Greeno & Eleanor E. Maccoby, Zella Luria, Carol B. Stack & Carol Gilligan, *On In a Different Voice: An Interdisciplinary Forum*, 11 SIGNS 304, 310-21 (1986); Joan G. Miller & David M. Bersoff, *Culture and Moral Judgment: How are Conflicts Between Justice and Interpersonal Responsibilities Resolved?*, 62 J. PERSONALITY & SOC. PSYCHOL. 541, 552 (1992); Debra Nails, *Social-Scientific Sexism: Gilligan's Mismeasure of Man*, 50 SOC. RES. 643 (1983); Lawrence J. Walker, Brian de Vries & Shelley D. Trevethan, *Moral Stages and Moral Orientations in Real-Life and Hypothetical Dilemmas*, 58 CHILD DEV. 842, 844-45 (1987); Lawrence J. Walker, *Sex Differences in the Development of Moral Reasoning: A Critical Review*, 55 CHILD DEV. 677, 688 (1984).

25. See, e.g., Cynthia Fuchs Epstein, *Faulty Framework: Consequences of the Difference Model for Women in the Law*, 35 N.Y.L. SCH. L. REV. 309 (1990); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 813-21 (1989); Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296, 310-11; Wendy W. Williams, *The Equality Crisis: Some Reflections On Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 199-200 (1982).

26. Ellen C. DuBois, Mary C. Dunlap, Carol J. Gilligan, Catharine A. MacKinnon & Carrie J. Menkel-Meadow, *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFFALO L. REV. 11, 74-75 (1985) (remarks of MacKinnon); see also CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 32-45 (1987) (arguing that an important factor in inequality is gender dominance or hierarchy, not whether men and women are different); Joan C. Williams, *Domesticity as the Dangerous Supplement of Liberalism*, 2 J. WOMEN'S HIST. 69, 71 (1991) (Gilligan describing how women are taught to behave).

women's misery, not a source of value worth celebrating."<sup>27</sup> And any claim that women think differently is subject to a charge of "gender essentialism," which ascribes a unitary voice to women.<sup>28</sup>

Other scholars deny that the "voice" of context and connection is uniquely female. Joan Williams, for example, points out that the "feminine voice" is simply another in a long line of epistemological critiques of liberalism, and therefore hardly unique to women.<sup>29</sup> Margaret Jane Radin suggests that feminist jurisprudence shares much with pragmatism.<sup>30</sup> Male and female scholars alike have lamented the lack of a "human voice" in the law, describing such a missing voice in terms very similar to those used by feminists. Thus Julius Getman praises Charles Black's use of the human voice in Black's article on segregation, which (unlike traditional scholarship) used real experiences of real people to illuminate legal theory.<sup>31</sup> Without recourse to feminism, Lynne Henderson observes that legal decisions are too frequently isolated from both experience and empathy.<sup>32</sup> Both Carol Rose and Robert Cover, among others, have eloquently described storytelling by other cultures and other voices, including those of white males.<sup>33</sup>

Finally, there is a great deal of uncertainty about the source of women's unique perspective, if it does indeed exist. The earliest discussions of women's voice suggested that differences were based on biology or on childrearing practices,<sup>34</sup> and some scholars still adhere to this view.<sup>35</sup> Several of them have taken this view to extremes; one even relies on a contrast between women's lunar biological cycles and the historical importance of the solar calendar to suggest that the latter was a method for consolidating male power.<sup>36</sup> Recently, however, many feminist legal scholars have attributed women's different perspective to experiences of exclusion, discrimination, and marginalization.<sup>37</sup> We will discuss this claim and its relationship to crit-

27. West, *supra* note 15, at 29.

28. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990). See generally ELIZABETH V. SPELLMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988).

29. Williams, *Deconstructing Gender*, *supra* note 25, at 805-06.

30. Radin, *supra* note 14.

31. Julius G. Getman, *Voices*, 66 TEX. L. REV. 577, 584 (1988).

32. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1649-50 (1987).

33. Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 183-86 (1985) (Talmudic storytelling); Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 38 (1990) (Locke and Blackstone used storytelling); see also Baron, *supra* note 3, at 97 (litigators always tell stories).

34. See Sherry, *supra* note 16, at 580 n.168.

35. For an insightful summary of some of the "cultural feminist" perspectives, see West, *supra* note 15, at 20-30.

36. Scales, *supra* note 18, at 107 & n.37. Oddly, Scales relies on the computation of the date of Easter as an example of the consolidation of male power under the solar calendar. Unfortunately for her theory, however, the computation of Easter depends in part on the lunar calendar: It falls on the first Sunday after the first full moon after the vernal equinox. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 615 (2d ed. 1987).

37. See Finley, *supra* note 12, at 893-94; Sharon Elizabeth Rush, *Understanding Diversity*, 42 FLA. L. REV. 1, 21 (1990); Williams, *Deconstructing Gender*, *supra* note 25, at 844; Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 ETHICS 250, 261 (1989).



ical race theory later in the article.

Thus, although some evidence exists that men and women possess different perspectives on the law, the weight of the evidence does not support either of the strong versions of the different voice thesis: i) that the voices of men and women are so different that the former normally can neither understand nor evaluate the work of the latter, or ii) that women are in a unique position to transform legal scholarship. At most, the empirical evidence suggests that women may write about or emphasize different aspects of the law than men, potentially providing a more complete vision of the legal system.

## B. *Critical Race Theory*

Because the feminist version of different voice theory is older and therefore better developed than the critical race theory version, we found arguments regarding the voice of color particularly difficult to evaluate. However debatable Gilligan's conclusions regarding women's different voice may be, critical race theory has not yet established a comparable empirical foundation. We know of no work on critical race theory that discusses psychological or other social science studies supporting the existence of a voice of color.<sup>38</sup> Most critical race theorists simply postulate the existence of a difference, often citing feminist scholarship for support, and thus implicitly equating a male voice with a white voice. One scholar denies that the existence of a distinct voice of color can or need be proven, as it is solely a matter of authorial intent: Those who intend to speak in the voice of color do so.<sup>39</sup> The best evidence supporting the existence of a voice of color is said to be that minority "scholarship raises new perspectives—the perspectives of [minority] groups."<sup>40</sup> Thus far, however, there has been no demonstration of how those new perspectives differ from the various perspectives underlying traditional scholarship.<sup>41</sup>

Related to the lack of evidence for the existence of a distinct voice of

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38. *But cf.* Linda C. McClain, "Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence, 65 S. CAL. L. REV. 1171, 1194 n.105 (1991) (feminist work citing to other feminist studies, and one feminist "conversation," that reached conflicting results applying Gilligan's approach to race). One study, based on interviews with a small sample of minority students, concludes that the voice of color is more like the male voice that Gilligan describes. *See* Gilligan & Attanucci, *supra* note 23, at 81. The other, based on what the author concedes is "circumstantial evidence," concludes that the voice of color is likely to be more like Gilligan's female voice. Joan C. Tronto, *Beyond Gender Difference to Theory of Care*, 12 SIGNS 644, 650-51 (1987).

39. Johnson, *supra* note 8, at 138, 160-61.

40. Rush, *supra* note 37, at 22. In response to a question at a colloquium about the evidence for a unique voice of color, Jerome Culp made a similar argument, noting that studies are unnecessary because black scholars know that their views are different, and this is apparent in their work. Jerome McCristal Culp, Jr., Remarks at Faculty Colloquium, University of Minnesota Law School (Apr. 7, 1992); *see also* Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 103 (suggesting that "there are some common reference points for all blacks in thinking about the law and legal change").

41. *See* Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1749 (1989) (arguing that these scholars do not persuasively support their claims that people of color are systematically excluded or that legal scholars of color produce a racially distinctive brand of scholarship).

color, we have found little exploration of the content of such a voice. Although descriptions of how women focus on context and connection may be vague, laden with impenetrable jargon, and sometimes even inaccurate, they are often detailed and rich with examples. In contrast, descriptions of the voice of color are less common in the literature, and again often piggy-back on feminist scholarship. The voice of color is described as contextualized,<sup>42</sup> opposed to abstraction and detachment,<sup>43</sup> and "grounded in the particulars of . . . social reality and experience."<sup>44</sup> The most concrete description we could find is that the voice of color "rejects narrow evidentiary concepts of relevance and credibility."<sup>45</sup>

These rather vague descriptions fail to identify the content of a distinct voice of color. Because the few examples offered focus on racially charged issues such as affirmative action and hate speech regulations, they provide little insight into any broad differences between voices of color and supportive white voices. Indeed, Mari Matsuda suggests that "multiple consciousness," her term for the perspective of women of color, is accessible to everyone.<sup>46</sup> And Patricia Williams, a feminist often cited as one of the foremost voices of color, seemingly implies that the voice of color has at least entered into that of western humanity generally, when she argues that "people of color have always been part of Western Civilization."<sup>47</sup> A recent book by an African scholar suggests that the commonality of African cultures is a white myth invented to dominate blacks.<sup>48</sup> Of course, the difficulty in describing the voice of color does not disprove its existence, but it does make analysis more difficult.

Finally, although many critical race theorists claim a special affinity between storytelling and the voice of color, the connection is unclear. Two separate links have been suggested. First, several critical race scholars note that minority cultures have a strong tradition of storytelling, as opposed to more formal types of literature.<sup>49</sup> Second, storytelling is said to be a method of communication that can convey new truths that "just cannot be said by

42. Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 95 & n.1 (1990).

43. Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, Address at the Yale Law School Conference on Women of Color and the Law (Apr. 16, 1988), in 11 WOMEN'S RTS. L. REP. 7, 9 (1989).

44. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2324 (1989).

45. Matsuda, *supra* note 43, at 8. By contrast, in another article Matsuda argues that theories of racial inferiority should not be published unless supported by credible evidence. Matsuda, *supra* note 44, at 2365.

46. Matsuda, *supra* note 43, at 9.

47. Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2136 (1989).

48. KWAME ANTHONY APPIAH, *IN MY FATHER'S HOUSE* (1992).

49. See, e.g., Derrick Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382, 2394 (1989) (discussing African tradition of storytelling); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2435-37 (1989) (discussing African American, Mexican American, and Native American traditions of storytelling).

using the legal voice."<sup>50</sup> Thus, Richard Delgado suggests that "counterhegemonic" storytelling is one cure for the prevailing racist mentality.<sup>51</sup> Indeed, Alex Johnson contends that white men do not tell stories because they would have to tell of their own dominance.<sup>52</sup>

These efforts to link stories with the voice of color are problematic. White men clearly *do* tell stories. In fact, many European cultures have rich storytelling traditions. Moreover, a number of critical race theorists themselves assert that dominant groups, as well as conservative members of minority groups,<sup>53</sup> tell their own stories, and that the difference between their stories and those of outsiders is simply that the former are more readily accepted.<sup>54</sup>

The problem, then, is to identify the distinctiveness of stories told in the voice of color. Like many recent feminist voices, the voice of color sometimes seems to be defined on the basis of content: It embodies a certain view of race or gender relations (and occasionally other hot political topics). This becomes most apparent when we examine critical race scholars' attempts to explain the source of the voice of color. While an occasional statement suggests that culturally ingrained differences<sup>55</sup> account for the distinct voice,<sup>56</sup> most critical race theorists attribute the voice of color to the "experience of domination"<sup>57</sup> and "marginal status."<sup>58</sup> Like the feminists who attribute women's distinctive voice to gender oppression, these scholars define the voice in political terms. Matsuda notes that outsider scholarship concerns itself with such issues as affirmative action, pornography, and hate speech regulation because those with a different voice "recognize that this has al-

50. Finley, *supra* note 12, at 903.

51. Letter from Richard Delgado, Professor of Law, University of Wisconsin, to Kevin Kennedy, Editor-in-Chief, *Michigan Law Review* (June 1, 1988), reprinted in Scheppele, *supra* note 20, at 2075.

52. Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2047 n.170 (1991); see also Robin D. Barnes, *Politics and Passion: Theoretically a Dangerous Liaison*, 101 YALE L.J. 1631, 1654-55 (1992) (reviewing STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1992) and WILLIAMS, *supra* note 6).

53. Richard Delgado, *Enormous Anomaly? Left-Right Parallels in Recent Writings About Race*, 91 COLUM. L. REV. 1547, 1551-52 (1991) (book review).

54. See, e.g., Delgado, *supra* note 49, at 2412 (claiming that the dominant group's stories remind the group that its "superior position is seen as natural"); Scheppele, *supra* note 20, at 2079-81 (contrasting "those whose self-believed stories are officially approved" with "those whose self-believed stories are officially distinguished"); Jerome McCristal Culp, Jr., *Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy*, 1992 DUKE L.J. 1095, 1098 n.8 (stating that the storytelling techniques of scholars of color "have been adopted by white scholars").

55. Young, *supra* note 37, at 268 (defining cultural differences as "differences in language, style of living, body comportment and gesture, values, and perspectives on society").

56. See, e.g., Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 361 (1987) ("There is something about color that doesn't wash off as easily as class."); cf. Culp, *supra* note 54, at 1109 ("Randall Kennedy, who may have had cultural experiences different than mine, is still black.").

57. Johnson, *supra* note 52, at 2027-28.

58. Delgado, *supra* note 42, at 95. For similar discussions of the derivation of the voice of color, see, for example, Barnes, *supra* note 52, at 1656 (arguing that "while skin color alone means nothing, the shared experience that accompanies that skin color has great significance"); Matsuda, *supra* note 56, at 324-26 (claiming that the voice of color is derived from "the experience of the bottom").

ways been a nation of dominant and dominated, and that changing that pattern will require affirmative, non-neutral measures designed to make the least the most."<sup>59</sup> She also suggests that the purpose of storytelling is to demonstrate how the pain caused by racism outweighs the pain of ending it.<sup>60</sup> Alex Johnson characterizes the voice of color as any voice that addresses "the plight of people of color."<sup>61</sup> Jerome Culp describes the voice of color as "based not on color, but on opposition to racial oppression."<sup>62</sup> And Richard Delgado asserts that the purpose of storytelling is to "subvert" the status quo.<sup>63</sup> Finally, Toni Massaro characterizes the goal of the new storytellers, including critical race theorists, as "a hope that certain specific, different, and previously disenfranchised voices . . . will prevail."<sup>64</sup> According to this view, then, the true voice of color belongs only to a subgroup of people of color who have certain political views.

In addition, it would be helpful to have a more complete explanation of how black law school professors—whose occupation confers social and economic privilege, and who may come from privileged backgrounds similar to their white counterparts—have a special claim to represent the views of poor blacks in urban ghettos.<sup>65</sup> Indeed, there is evidence that they do not fully share the views of most African Americans. Stephen Carter points out that while most critical race theorists are politically to the left of their academic colleagues, most studies show African Americans to be considerably more conservative than whites on many issues.<sup>66</sup> This suggests that perhaps only a minority of African Americans truly speak with a political voice of color. As Alex Johnson notes, critical race theorists may conflate race and

59. Matsuda, *supra* note 43, at 10.

60. Matsuda, *supra* note 56, at 359. She continues: "A theory of the good . . . derived [from consciousness-raising about race] will require an end to racism." *Id.*

61. Johnson, *supra* note 52, at 2016.

62. Culp, *supra* note 54, at 1097.

63. Delgado, *supra* note 49, at 2413.

64. Massaro, *supra* note 20, at 2113; *see also* Fineman, *supra* note 13, at 32-33 (stating that feminist storytelling "must be . . . politically rather than . . . legally focused"); Mary Jo Frug, *Possessive Feminist Scholarship: Can We Claim "A Different Voice?"*, 15 HARV. WOMEN'S L.J. 37 (1992) (suggesting that women's different voice is authentic only if it is "progressive"); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1285 (1991) (describing feminist voice as "exist[ing] to . . . create consciousness, to make change," and "not, in a word, academic").

65. *See* Johnson, *supra* note 52, at 2038-39 (finding it "surprising" that privileged law professors have sought to speak with the voice of the "bottom" of society). Confusion regarding the connection between race and class is also reflected in Jerome Culp's effort to educate his students about the difference between black and white professors by telling them that he was the son of a coal miner, and that this was important to his self-definition. As it turned out, two of his white colleagues were also children of coal miners, but did not emphasize their deprived backgrounds in their teaching or writing. Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539, 558 (1991).

66. Stephen L. Carter, *Academic Tenure and "White Male" Standards: Some Lessons from the Patent Law*, 100 YALE L.J. 2065, 2077 (1991); *see also* Lee Sigelman & James S. Todd, *Clarence Thomas, Black Pluralism, and Civil Rights Policy*, 107 POL. SCI. Q. 231, 243-44 (1992) (arguing that "the civil rights establishment distances itself from a substantial portion of the black public" when it espouses racial preferences); *cf.* Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 623 (1990) (noting that "contemporary survey research suggests that the vast majority of women do not experience the world in the terms that most critical feminists describe").

socioeconomic class: "If one substitutes the word 'poor' or 'oppressed' for 'color' in much of the literature advocating the existence of the voice of color, or claiming to speak in that voice of color, the content of that literature would be, by and large, unchanged."<sup>67</sup> Ideology, then, may be as important as race or class in defining the speaker's "voice." For instance, many of the stories that feminists and critical race theorists tell about the hiring and promotion practices of law schools are similar to those told by white male critical legal scholars.<sup>68</sup>

Because critical race theorists have not articulated their claims as fully as feminists have, their theories are more difficult to evaluate. Without a clearer conception of the "voice of color," it is difficult to assess the arguments on behalf of its existence. If those who argue the existence of fundamental cognitive differences between races or genders have the burden of proof,<sup>69</sup> they clearly have failed to carry that burden. Even if they do not bear the burden of proof, we think there are sound reasons to reject such claims. If radical differences did exist, we would expect that empirical studies or at least everyday observations would consistently reveal some differences, even if the results were not all of the magnitude predicted by the theory. Moreover, the most clearly articulated claim of the proponents, that different voices are characterized by contextuality and concreteness, may well be true as a description of overlapping bell curves, but is clearly false if those traits are claimed to be the sole property of any single group. Finally, the argument for a unique voice of color is undermined by the inability of the proponents to agree on its attributes or on paradigm cases. For these reasons, the claim for fundamental group differences is not only unproven but implausible.

As we have seen, there is some evidence for a weaker form of the feminine voice thesis, which claims that women are more likely than men to exhibit certain cognitive traits. A similar case for the existence of a voice of color has yet to be made, but we are reluctant to dismiss such claims out of hand for three reasons. First, there is substantial (though hardly ironclad) evidence to support some version of the "different voice" thesis regarding women. If such a voice exists, it may be a product of social subordination, something that people of color have also experienced. Second, some minority groups, such as Native Americans, reflect cultures that are clearly quite different from the dominant American culture. It seems plausible that these cultural differences would lead to different perspectives on the legal system. Other groups, such as African Americans and Hispanics, may manifest less fundamental but nevertheless significant cultural differences;<sup>70</sup> to the extent

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67. Johnson, *supra* note 52, at 2035.

68. For arguments made by white males against meritocratic standards that embody virtually all the arguments made by different voice theorists, see Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705; Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758.

69. Because of the obvious potential that such arguments can be exploited for racist or sexist purposes, there is some argument for assigning their proponents the burden of proof.

70. JACQUELINE JORDAN IRVINE, *BLACK STUDENTS AND SCHOOL FAILURE: POLICIES,*

these differences exist, they too might result in distinctive perspectives on law. Third, we give some weight to the unified insistence of so many minority scholars that there is indeed a different voice; where there is so much consensus, it would be rash to dismiss completely the possible existence of some intergroup differences.<sup>71</sup>

In the remainder of this article, we will examine the contribution that stories—especially those “from the bottom”—can make to legal scholarship. We will then consider how traditional standards of evaluating scholarship might apply to storytelling. Our analysis is based on a somewhat agnostic view of the different voice theory. While we reject the strongest version of the theory, which postulates radical distinctions that would make the scholarship of women and men, whites and people of color, almost unintelligible to one another, we accept as a working hypothesis a weaker version—that women and people of color can sometimes provide a perspective that is not as easily accessible to white men. The new voice is not an entirely new hue, but simply a different shade.

## II. THE VIRTUES OF NARRATIVES

Our next task is to consider whether stories, as concrete depictions of events, can contribute to understanding law. Because we have concluded that there is no radical distinction between the forms of reasoning used by different groups, we must phrase our question in terms of how concreteness and contextuality function in human reasoning (rather than in specifically “feminine” or “African American” reasoning). Having established some of the functions that stories serve in human reasoning, we can then ask whether the particular stories told by members of oppressed groups have any distinctive contribution to make. Our mission in this section is to construct an argument on behalf of narrative in general (and “stories from the bottom” in particular), without relying on any radical differences in the voices or world-views of different groups.

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PRACTICES, AND PRESCRIPTIONS 22-33 (1990) (summarizing research on cultural differences of black students); Kennedy, *supra* note 41, at 1817 n.304 (discussing social science research on cultural differences).

71. Notably, even minority critics of critical race theory may agree with aspects of the different voice thesis. See Carter, *supra* note 66, at 2070 (commenting that a different voice may exist but is irrelevant for assessing scholarship); Kennedy, *supra* note 41, at 1816-18 (arguing that although differences exist in the sensibilities of racial groups, focusing on these differences encourages stereotyping).

It may be helpful to explain more fully the connection between the different voice thesis and the rest of this essay. In our view, the different voice thesis supports, but is not necessary for, the acceptance of storytelling as a form of scholarship. If different voices exist, men of color and women may find storytelling a more important method of expression than do white men. Thus, our qualified adoption of the different voice thesis (as at least a working hypothesis) tends to support the idea of storytelling as a useful addition to legal scholarship. However, if the thesis is false, different groups of scholars should find the same utility in storytelling. On the other hand, if all scholars share the same voice, it is still possible that the stories of men of color and women can play a particularly useful role in the writings of all scholars, regardless of race or gender. Thus, the reader who rejects the different voice thesis should continue reading, rather than dismiss storytelling as a form of scholarship.

## A. *Practical Reasoning and Storytelling*

### 1. *An introduction to practical reason.*

The strongest arguments in favor of legal storytelling are best understood within the context of the current intellectual reaction against formalism and grand theory. A broad array of recent legal commentary has suggested a movement away from these dominant forms of legal analysis, which focus on abstract, deductive reasoning from high-level principles or general rules, toward something new, sometimes called practical reason or pragmatism.<sup>72</sup> This movement is often associated with the emerging interest in republicanism<sup>73</sup> and often feminist legal theory.<sup>74</sup> Here, we will use "pragmatism" as the generic name for this movement and will refer to the forms of thought endorsed by pragmatists as "practical reason."<sup>75</sup> Storytelling is allied with pragmatism in its rejection of formalism, and with practical reason in its regard for concreteness. Pragmatist theories of practical reason, we believe, illuminate both the uses and limitations of storytelling.

As Frank Michelman observes, practical reason "seems always to involve a combination of something general with something specific," so that judgment "mediates between the general standard and the specific case."<sup>76</sup> In applying a standard, we must interpret it, he says, thereby reconstructing "the standard's meaning and rightness."<sup>77</sup> Michelman also notes that "[t]his process, in which the meaning of the rule emerges, develops, and changes in the course of applying it to cases is one that every common law practitioner will immediately recognize."<sup>78</sup> The search, then, is for contextual justification for the best legal answer among the potential alternatives.<sup>79</sup> Or, to use an image common in discussions of practical reasoning, justification is thought to be more of a web than a tower, drawing on the coherence of many sources, rather than building on a single unified foundation.<sup>80</sup>

It is easier to give examples of practical reason and to distinguish it from

72. See Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992); Symposium, *The Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1991). For related works among philosophers outside legal academia, see, for example, HILARY PUTNAM, *REALISM WITH A HUMAN FACE* (1990); RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM* (1982).

73. See, e.g., Frank I. Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Sherry, *supra* note 16, at 543.

74. See, e.g., Katharine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Fineman, *supra* note 13; Radin, *supra* note 14; Sherry, *supra* note 16.

75. Because a large body of scholarship already exists on this topic, we will not undertake a broad defense of pragmatism. We will, however, attempt to sketch a picture of practical reason that will allow readers to understand its relationship to storytelling and to draw their own conclusions about its usefulness in legal analysis. Readers who, after reading this section, reject practical reason in favor of more formal modes of analysis will most likely also reject storytelling as a methodology.

76. Michelman, *supra* note 73, at 28; see also Tushnet, *supra* note 3, at 252-53.

77. Michelman, *supra* note 73, at 28.

78. *Id.* at 28-29.

79. See John Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332, 349 (1986).

80. This perspective has been particularly attractive to many feminist legal theorists. See note 74 *supra* and accompanying text.

other forms of thought than to describe its operation.<sup>81</sup> As Michelman indicates, practical reason does not mean, as is sometimes thought, replacing rules or principles with ad hoc decisionmaking or raw intuition. Rather, pragmatism rejects the view that rules in and of themselves dictate particular outcomes.

The work of cognitive psychologists has provided some insight into the nature of practical reason. Studies of expert decisionmaking confirm the widespread use of the kind of reasoning described by Michelman, which moves between the concrete and general. This body of literature<sup>82</sup> provides three major conclusions about how experts make decisions. First, expertise does not simply consist of knowing a greater number of facts or rules. Instead, it involves the skill of picking out the key features of a new situation. Second, this skill is learned primarily through experience with large numbers of past situations.<sup>83</sup> Third, expertise is not merely an act of intuitive perception. Radiologists, for instance, do not merely perceive x-rays more accurately than lay people; they give better reasons for their interpretations and are better able to test those interpretations against additional information.<sup>84</sup>

Moreover, the acquisition of expertise may be linked with the use of stories. For instance, an anthropological study of Xerox repair technicians concluded that they acquired expertise not through formal training programs but through examining actual problems.<sup>85</sup> In particular, they learned from "the stories tech-reps tell each other—around the coffee pot, in the lunch-

81. See Tushnet, *supra* note 3, at 254. As we said in our discussion of the voice of color thesis, such definitional vagueness is frustrating, although legal pragmatists have made somewhat greater progress in elucidating the workings of practical reason.

82. For a more detailed discussion, see Farber, *supra* note 72, at 554-58.

83. Consider the following analysis of the nature of expertise:

The expert spends proportionally more time building up a basic representation of the problem situation before searching for a solution . . . The novice takes much *longer* but devotes a *small proportion* of his total processing time to finding/generating an initial problem representation. In some domains, even the absolute time spent on building the right initial representation is *longer* for experts.

A schema with a high probability of being at least in the right problem space is invoked very rapidly by the expert. This schema guides further processing, including the building of a basic representation.

Experts are able to tune their schemata to the specifics of the case. This permits them to test more completely whether the schema they have invoked is in fact the right one.

Alan Lesgold, Robert Glaser, Harriet Rubinson, Dale Klopfer, Paul Feltovich & Yen Wang, *Expertise in a Complex Skill: Diagnosing X-Ray Pictures*, in *THE NATURE OF EXPERTISE* 311, 312 (Micheline T.H. Chi, Robert Glaser & M.J. Farr eds., 1988) (citations omitted). This description is strikingly similar to Steve Winter's account of the everyday use of experience-based cognitive templates by nonexperts. See Steven L. Winter, *The Cognitive Dimension of the Agony Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 (1989).

84. As the radiology example indicates, belief in practical reason does not imply skepticism about reality. Knowing, for example, that radiologists use practical reason rather than formalist methods provides no reason to doubt the reality of the cancers they diagnose. Nor does practical reason suggest any reason to embrace value relativism. On the contrary, practical reason suggests that our ordinary moral judgments are defensible rather than merely arbitrary. Finally, contrary to a view that advocates of storytelling sometimes express, practical reason is a form of rational decisionmaking, not an alternative to rationality.

85. John Seely Brown, *Research that Reinvents the Corporation*, HARV. BUS. REV., Jan.-Feb. 1991, at 102, 109.



room, or while working together on a particularly difficult problem.”<sup>86</sup> These stories are crucial to the technician’s acquisition and application of expertise:

In a sense, these stories are the real “expert systems” used by tech-reps on the job. They are a storehouse of past problems and diagnoses, a template for constructing a theory about the current problem, and the basis for making an educated stab at a solution. By creating such stories and constantly refining them through conversation with each other, tech-reps are creating a powerful “organizational memory” that is a valuable resource for the company.<sup>87</sup>

The literature of cognitive psychology thus seems to support the existence of practical reason and suggests that it is linked with storytelling.<sup>88</sup> Pragmatism accommodates storytelling by stressing that “reason” can include informal and nonalgorithmic forms of thought, and by viewing concrete situations as useful for understanding more general rules or principles. In contrast, foundationalism and formalism leave little room for “stories” as a useful intellectual exercise, emphasizing instead abstract theory and highly rigorous empirical research. But while practical reason involves the interplay between the general and concrete, it may require greater connections with general theories and standards than some legal storytellers wish to make. We will return to that question in Part III.

## 2. *The role of stories in practical reasoning.*

Before we turn specifically to stories “from the bottom,” it is worth briefly noting several general benefits that flow from attention to the kind of concrete examples found in narratives. First, consideration of concrete situations provides a method of testing and refining normative principles. A classic explanation of this method appears in John Rawls’ discussion of reflective equilibrium. According to Rawls, the best available method of moral reasoning involves moving between general theories and intuitions about specific moral judgments. General theories are tested for their fit with specific intuitions, which are themselves subject to rejection if they cannot be reconciled with some coherent theory.<sup>89</sup> This approach should seem particularly familiar to lawyers, given its close resemblance to common law rea-

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86. *Id.*

87. *Id.*

88. Because the study of expertise by psychologists is in a relatively early stage of development, the current wisdom may evolve with further research. Moreover, legal analysis may be different from the expertise involved in the areas that have been most intensively studied. Nevertheless, it is striking how much the current view of expertise focuses on what Llewellyn called “situation sense”—the ability to classify a situation in the most appropriate manner. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 268-69 (1960). (Llewellyn himself also used stories to probe legal thought. See KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941).) Efforts by psychologists to explain this ability often seem little more illuminating than Llewellyn’s, but the experimental evidence of its existence is strong.

89. JOHN RAWLS, *A THEORY OF JUSTICE* 20-21, 48-52, 579 (1971).

soning. In fact, the process of testing proposed rules against concrete intuitions is the core of the "Socratic method" in law school teaching.

Second, concrete situations—particularly those in which the participants make normative judgments—may also demonstrate the appropriate exercise of practical reasoning. Richard Eldridge argues that reading literature allows us to reconcile the particular with the universal.<sup>90</sup> He denies that either particular circumstances or universal moral principles alone can define what it means to be a moral person, and suggests instead that both inform human deliberation about morality and the good life.<sup>91</sup> Narratives, then, as "the fullest reflective accounts there are of deliberation and action in specific circumstances,"<sup>92</sup> help us understand both the universal and particular aspects of moral personhood.

Similarly, Martha Nussbaum suggests that stories involving difficult moral decisions help us understand the process of moral reasoning.<sup>93</sup> On this neo-Aristotelian account, stories can augment personal experience in developing the kind of background necessary to make sound moral judgments. The process Nussbaum describes is not unlike that by which experts—ranging from chess masters to radiologists—learn to make good judgments. That process involves both personal practice and careful study of case histories (or, in the case of chess masters, past games). One of us has likewise suggested that some judicial decisions function as models, providing lawyers with examples of how best to analyze problems in a given area of the law.<sup>94</sup>

Finally, on an empirical level, study of concrete situations provides an obvious source of information. Case histories and fieldwork have long been used in such disciplines as psychoanalysis, anthropology, political science, and medicine. As we will discuss in Part III, there are familiar methodological risks to relying on these techniques. Nevertheless, even the social scientists who consider these techniques less reliable than more formalized statistical and experimental methods would be hard-pressed to dismiss them as useful starting points, which can then be subjected to more rigorous testing procedures. For example, by closely examining the record in a leading case, lawyers may formulate general theories about an area of the law.<sup>95</sup>

These uses of concrete examples are not necessarily tied to any ideologi-

90. RICHARD ELDRIDGE, *ON MORAL PERSONHOOD: PHILOSOPHY, LITERATURE, CRITICISM, AND SELF-UNDERSTANDING* 26-27 (1989).

91. *Id.* at 26-33.

92. *Id.* at 33.

93. MARTHA C. NUSSBAUM, *LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* (1990) (developing this thesis at length, with specific literary examples).

94. See Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 *UCLA L. REV.* 1615, 1630-39 (1987); see also Winter, *supra* note 83, at 2270 (explaining how stories can become the basis of cognitive models). Note that these normative functions of stories can be achieved through fiction as well as through autobiographical narratives.

95. For an excellent recent example of this genre, see Lea S. VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 *YALE L.J.* 775 (1992); see also Daniel A. Farber, *Risk Regulation in Perspective: Reserve Mining Revisited*, 21 *ENVTL. L.* 1321, 1324-37 (1991) (using a case history of a key decision to explore general policy issues).

cal position, nor are they the unique domain of a particular race or gender. The Aristotelian lineage of practical reason is itself proof that European males are quite capable of utilizing concreteness as well as abstract analysis.<sup>96</sup> The affinities between practical reason and the best of the common law tradition illustrate the same point. Justiciability doctrine, which is based on the assumption that legal issues are best decided in the context of concrete cases,<sup>97</sup> was the invention of white males. As Part I indicates, although concreteness and contextuality may be more frequently found in the thought of some groups, such as women or people of color, they are not the exclusive province of any single group.

The uniqueness of legal storytelling thus does not lie in its focus on the concrete rather than the abstract. That focus is characteristic of the much broader movement away from formalism and grand theory in contemporary scholarship. Rather, legal storytelling's most distinctive claim is that particular types of concrete examples—those drawn from the experiences of the downtrodden—have a special claim on our attention. We explore this claim in the next section.

## B. *Stories from the "Bottom"*

### 1. *Stories and ideological transformation.*

The core of the storytelling movement is the claim that stories told by the oppressed have special value. The broadest claims credit stories with substantial ideological power through which they either "constitute" a community of outsiders or transform the viewpoints of insiders.<sup>98</sup>

One frequent claim on behalf of storytelling is that stories build solidarity among the members of an oppressed group, thereby providing psychological support and strengthening community.<sup>99</sup> We have no reason to question these effects, or to dismiss them as negligible. Nevertheless, we do not believe that these effects in themselves are sufficient to validate the stories *as scholarship*. As Kathryn Abrams says, "It seems reasonable to ask of narrators who are, in fact, legal scholars that their stories be framed in such a way as to shed light on legal questions."<sup>100</sup> The crucial test of scholarly writing must be whether it provides an increased understanding of some issue relating to law. Community-building may be valuable, but it is an enterprise quite distinct from increasing understanding of the law.

96. Linda Hirshman has argued that feminist practical reasoning resembles traditional practical reasoning. Linda R. Hirshman, *The Book of "A"*, 70 TEX. L. REV. 971, 973 (1992); see also McClain, *supra* note 38, at 1175 (questioning the "simple dichotomy drawn to date between . . . male and female jurisprudence and experience" and suggesting that much "common ground" remains "unexplored").

97. See *Ashwander v. TVA*, 297 U.S. 288, 341, 345-48 (1936) (Brandeis, J., concurring).

98. Some advocates rely entirely on these claims, rejecting the view that stories provide information about the world outside of them. See Milner S. Ball, *The Legal Academy and Minority Scholars*, 103 HARV. L. REV. 1855, 1859 n.30 (1990) (arguing that stories are not "tools for accessing information").

99. See, e.g., Delgado, *supra* note 49, at 2412, 2437.

100. Abrams, *supra* note 3, at 1030.

Supporters of storytelling also maintain that stories by the oppressed can transform the consciousness of "dominant" readers by introducing them to a radically different world-view. For example, Richard Delgado has suggested that "[s]tories, parables, chronicles, and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place."<sup>101</sup> Delgado argues that the mindset of the dominant group is the "principal instrument" of subordination,<sup>102</sup> and for this reason concludes that storytelling has greater potential to produce radical social change than other techniques like litigation:

Stories attack and subvert the very "institutional logic" of the system. On the rare occasions when law-reform litigation is effective for blacks, the hard-won new "rights" are quietly stolen away by narrow interpretation, foot dragging, delay, and outright obstruction. Stories' success is not so easily circumvented; a telling point is registered instantaneously and the stock story it wounds will never be the same.<sup>103</sup>

Delgado's argument presupposes that members of dominant groups share a coherent "mindset" which underlies the "institutional logic" of the system, while members of subordinated groups have a different and incompatible mindset. Although Delgado is not entirely clear on the meaning of "mindset," he seems to be referring to something more fundamental than a mere set of empirical presuppositions; for example, he also refers in similar terms to the "thought structure by which we create our world."<sup>104</sup> One possible interpretation of Delgado's statements is that groups have radically different ways of thinking about the world, which can be effectively bridged through stories. This is a strong claim, possibly stronger than he intends to make. In any event, it is a position that we find untenable. In Part I, we called into question the assumption that the "different voices" of subordinated groups reflect radically different ways of thought. Moreover, if whites did inhabit a socially constructed reality wholly distinct from people of color, it would be difficult to understand how communication across this gulf could take place.<sup>105</sup> Any sentence uttered by a person of color, under this assumption, would be connected with one coherent world-view in the mind of the speaker, but a white listener could only understand the sentence within her own, equally coherent but quite different, world-view. In essence, the speaker would be using one language and the hearer would be listening

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101. Delgado, *supra* note 49, at 2413. Recently, Delgado has expressed reservations about this position. See Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992); Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929 (1991). Nevertheless, we believe that his earlier writings state views that are sufficiently pervasive to warrant discussion.

102. Delgado, *supra* note 49, at 2414.

103. *Id.* at 2429 (footnote omitted).

104. *Id.*

105. See Gerald Torres & Kathryn Milun, *Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 628-29 (1990).

to a completely different one, even though the words of both languages would sound identical.<sup>106</sup> Thus this view calls into question the enterprise of storytelling itself as a means of communication.

It may be that Delgado, as well as other storytelling advocates, employs a more narrow definition of "mindset" that directly concerns only race or gender issues. According to this interpretation, the differences in perceptions among the various groups are limited to certain areas of life. Consequently, all groups possess similar thought processes in general, and common ground exists as a basis for communication on most subject matters. The claim, then, is only that racial or gender attitudes of "insiders" can be powerfully transformed by exposure to stories.<sup>107</sup> However, even this limited claim about the effect of stories seems implausible. Some advocates of storytelling place excessive confidence in the ability of language to change fundamental beliefs; one scholar goes so far as to call rhetoric "a magical thing . . . [that] transforms things into their opposites" and makes "[d]ifficult choices become obvious."<sup>108</sup> Although we agree that stories can sometimes significantly affect their audiences, these writers seem to have markedly unrealistic expectations about the magnitude of the effects.<sup>109</sup>

Despite the many general assertions about how narratives can transform the political perspective of "insiders," conversion stories are notably scarce. As storytelling advocates admit—and as cognitive psychologists would predict<sup>110</sup>—responses by "insiders" are typically defensive or dismissive.<sup>111</sup> Stories undoubtedly can have beneficial effects, at least at the margin, on public attitudes, yet current storytelling seems ill-conceived for creating such an effect. Effective communication requires bridging the gap between the viewpoints of speaker and listener, rather than simply presenting the speaker's views without regard to the standpoint of the listener.<sup>112</sup> But in

106. An even stronger claim is that there is only one language, but it is male, so that women's experiences cannot even be expressed. Lucinda Finley, for example, suggests that "all language, as we currently know it, is male." Finley, *supra* note 12, at 892 n.28. If so, it is difficult to see how telling stories in any existing language can ever communicate a female perspective.

107. See T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1081-86 (1991).

108. Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 2 (1990); see also WILLIAMS, *supra* note 6, at 88 (claiming that law teachers "define the boundaries of the legitimate and the illegitimate, in a more ultimately powerful way than almost anyone else in the world").

109. See WILLIAMS, *supra* note 6, at 151 (arguing that stories describing the needs of blacks have not led to activity providing for those needs and therefore have been a dismal failure as a political activity).

110. See Elizabeth F. Loftus & Lee Roy Beach, *Human Inference and Judgment: Is the Glass Half Empty or Half Full?*, 34 STAN. L. REV. 939, 947-48 (1982) (reviewing RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE AND SHORTCOMINGS OF SOCIAL JUDGMENT* (1980)); see also W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* 171 (1981) (arguing that the plausibility of a story depends on hearers' preconceptions); Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273, 276, 292 (1985) (stating that jurors assess stories based on similarities with their own experiences).

111. See Delgado, *supra* note 4 (describing the means by which insiders ignore or marginalize the writing of outsiders).

112. See William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609,

our extensive reading of the storytelling literature, we have found few efforts to connect the events in the stories with the experiences of white or male readers. Thus, whatever potential storytelling might have to change attitudes is unlikely to be realized by the current generation of efforts.

## 2. *Stories, cases, and legal scholarship.*

Although current storytelling efforts are unlikely to have a major impact on public attitudes, stories from the bottom may still provide some benefits by helping to identify and eliminate biases in the legal system. The storytelling literature contains a good deal of rhetoric, such as the following eloquent statement by David Luban, suggesting that the legal system "silences" certain stories:<sup>113</sup>

Equally important is the parallel power over local narratives, the power of the victor to build whatever facts he or she wishes into the fabric of legal decisions by (re)interpreting the record. Just as in the case of political narratives, losers endure not only the material burdens of defeat, but also the ignominy of helplessly witnessing their own past edited, their own voices silenced in the attempt to tell that past. And thus the fight of those voices that have been silenced by the law—and those obviously include not only the voices of miscreants and justifiably unsuccessful litigants, but also the voices of racial minorities, of women, of homosexuals, of the poor—is, as Benjamin put it, "the fight for the oppressed past."<sup>114</sup>

The metaphor of "silencing" is powerful but elusive. In what respect, for instance, is losing a lawsuit the same as being gagged? Losers are in fact often very vocal, perhaps more so than victors (who seem just as likely to enjoy their victory in smug silence). In part, the "silencing" metaphor invokes some broader concepts about the relationship between power and truth, but it does not elucidate that relationship. The basic idea seems to be that we fail to receive information about the experiences of outsiders because the legal system itself filters out these stories. Or, turning to social science jargon, the claim is that our present sample of stories is biased. Although the claims are perhaps exaggerated, they do have some substance. To evalu-

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623 (1990) (discussing the "fusion of horizons" that is required for communication). Some storytelling advocates have recognized this limitation. Joseph Singer, for example, reports on his inability to use stories of plant closings to engage the sympathy of his students for the plight of the workers. Only when he told them an analogous story in which they were expelled from school as part of a retrenchment did the students grasp the perspective of laid-off workers. Joseph William Singer, *Persuasion*, 87 MICH. L. REV. 2442, 2455-57 (1989). Similarly, Steve Winter recounts an episode of the television series *Taxi* in which a woman tries to make her supervisor understand why she felt so horrible when she learned of his "peeping Tom" activities. Despite his pretenses of understanding, he grasps her viewpoint only when he realizes that her feeling is like his own experience of humiliation when, because of his short stature, he had to buy clothes in the boys' section of a store. Winter, *supra* note 83, at 2277-79. What is notable in both instances is that telling the victim's story was quite ineffective until it was explicitly connected with a parallel experience of the listener.

113. A similar claim is that the oppressed may not be able to "see and name" their oppression. Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1623 (1990).

114. David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2155-56 (1989).

ate this substance, we must examine the sources of the bias and ascertain what the value of the missing information would be.

One source of bias is simply that people tend to associate with those similar to themselves and, consequently, possess few informal methods of tracking the experience of other groups. A related problem is that our perceptions of the frequency of a problem may depend on vantage point. For example, if relatively few men engage in sexual harassment, men might think sexual harassment occurs relatively infrequently. Women, on the other hand, may view it as a widespread problem if, for instance, a small number of men each harasses many women. Moreover, behavior that is widespread may seem trivial to members of a dominant group but quite significant to members of subordinated groups.<sup>115</sup> Because legal analysis is often based on informal experience and folk wisdom rather than rigorous social science, these problems may lead to mistaken policy recommendations.<sup>116</sup>

Legal storytelling is unlikely to correct these forms of bias because the problems themselves stem from broader social conditions. More effective solutions include integration and affirmative action, both of which attack the problem directly by broadening the personal contacts of the individuals involved. And to the extent that vicarious contacts through stories can be used to supplement these direct solutions, there is little reason to think that the publication of stories in law reviews is the best solution. For example, novels can provide much more textured versions of individual experiences, while movies and television have greater dramatic impact and reach far larger audiences than law review prose. Moreover, there is reason to question whether the personal stories of middle-class law professors can accurately convey the perspectives of the truly disadvantaged.

The more interesting sources of bias stem directly from the legal system itself. First, as several advocates of storytelling have pointed out, the facts in appellate opinions are usually stated in terms most favorable to the victor. As a result, stories told in appellate opinions are likely to be biased in favor of a group consisting of successful litigants. This group will therefore systematically exclude individuals whose problems are not yet addressed by existing legal rules, since they will have lost the litigation. For example, if the

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115. As one scholar eloquently explains:

The significance that others find in our words and deeds tends to increase in proportion to the amount of power we have over their fate. What may seem to be a casual expression or an inconsequential indulgence can, and often does, have tremendous consequences for the less powerful individuals affected by such an action. We can, of course, make an effort to be sensitive to the unintended consequences of seemingly inconsequential actions. But, given our lack of omniscience, no one can recognize all of these consequences of her actions. Thus a whole range of harmful consequences will be apparent only to those whom they victimize. We will learn about these harmful consequences only if we listen to the voices of the individuals who feel victimized by our words and actions. These individuals may frequently look for victimizers even when none exist; but they also have insights into the harmful consequences of public actions we can get from no other source.

Bernard Yack, *Injustice and the Victim's Voice*, 89 MICH. L. REV. 1334, 1342-43 (1991).

116. See Paul E. Meehl, *Law and the Fireside Inductions: Some Reflections of a Clinical Psychologist*, 27 J. SOC. ISSUES, no. 4, at 65, 65-67 (1971).

legal system provides no remedy for victims of hate speech, they will not win lawsuits, and their version of the facts will not be reflected in appellate opinions. Although most legal scholars recognize that appellate opinions are highly unreliable and biased sources of empirical evidence, we are all prone to rely on them nonetheless, given that they are so easily accessible.

Second, some facts are filtered out even before the opinion-writing stage. For example, if the legal system disallows damages for emotional distress, evidence of these damages will be considered irrelevant. Cases involving certain fact patterns will simply not be brought if the law clearly offers no remedy. Hence, lawyers, judges, and scholars may be unaware of widespread problems.<sup>117</sup> For instance, before sexual harassment became a potential cause of action, a victim of harassment would have had no reason to bring a clearly futile lawsuit. Therefore, male legal observers would be unaware that this was a widespread problem.<sup>118</sup> Similarly, prosecutors may be reluctant to bring acquaintance rape cases, which may lead criminal law specialists to assume that this form of rape is uncommon.

Some cases may not be brought because they fail to fit existing legal categories. For example, allegations about heterosexual abuse often surface in divorce cases. But because the law does not recognize lesbian marriages and thus cannot recognize lesbian divorces, information about physical abuse between lesbians is less likely to come to the attention of the legal system.<sup>119</sup> More subtly, in the effort to force grievances into existing legal categories, lawyers may strip away crucial aspects of the victim's experience.<sup>120</sup>

A third source of bias emerges from the impact of legal rules on conduct. When legal rules disfavor certain kinds of conduct, we may rarely observe such conduct and conclude that few people are motivated to engage in it. For example, if the legal system generally disfavors altruism, it may produce a self-confirmatory body of evidence about the weakness of altruistic motivations. This evidence might then mislead legal theorists into rejecting altruism as a potentially powerful social force.<sup>121</sup> An even clearer case involves intentional racism. Given the existence of Title VII, only a very poorly informed employer will ever explicitly state that he is firing an employee out of

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117. For a discussion of some other ways in which the dynamics of litigation create distortions, see Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 2-3 (1991).

118. See Matsuda, *supra* note 44, at 2330-31 (arguing that because the mainstream press often ignores racist and anti-Semitic incidents, they are viewed as isolated and inconsequential outside the victim communities).

119. Mahoney, *supra* note 117, at 49-51. Because of the phenomenon of "closeting," information about the lives of gay men and lesbians may be unavailable to scholars. In this case, storytelling may be particularly useful as a way of filling in informational gaps. See Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 512-22 (1991); William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333, 385-86 (1992) (book review).

120. See Gerald Torres, *Re-Understanding the Voices Debate: Culture, Pluralism, and Law*, Thomas Distinguished Lecture at the Yale Law School 3, 4 (Apr. 3, 1990) (transcript on file with the *Stanford Law Review*).

121. Rose, *supra* note 33, at 53-56.



racial animus. In the absence of such cases, lawyers and scholars may conclude that racial animosity has vanished from the workplace.<sup>122</sup>

There are certainly ways of correcting such biases apart from storytelling. Survey research, for example, may document the existence of behavior that is overlooked by the legal system. Still, storytelling can at least suggest areas where more formal social science research might be helpful. The use of narratives can also provide several other special benefits.

To begin with, careful study of a case history may provide important insights that are missing from statistical analysis.<sup>123</sup> Social science data may be crude or unreliable, and formalized research often says more about what is happening than why it is happening. It takes considerable skill to identify causal relationships from cross-sectional or even the less commonly available longitudinal data. Often, these relations are elusive despite use of the best available statistical techniques.

Moreover, even if we are able to describe or predict behavior, our understanding may be incomplete without some awareness of how the person in question experiences the situation. Stories can be a source of empathetic understanding about members of outsider groups.<sup>124</sup> This type of understanding may be particularly important for some kinds of legal policy analysis. Much of legal analysis involves balancing trade-offs of various kinds. Our ability to engage in such balancing is heavily dependent on our ability to assimilate the emotional experiences of those affected by a legal rule.<sup>125</sup>

Finally, stories may be useful to counteract weaknesses in the ways in which we process information. Vivid examples often influence us more than statistical evidence, which explains, for example, why many people are more afraid of airplane crashes (which are statistically rare) than car crashes (which are statistically more common but less horrifying). Also, statistical information is subject to "framing" effects: A treatment with an eighty-percent survival rate sounds better than one with a twenty-percent mortality rate, even though the two are equivalent.<sup>126</sup> If used carefully, stories can help counter these distortions. As we will discuss in the next section, however, stories can also make these problems worse.

### III. STANDARDS FOR EVALUATING STORIES AS SCHOLARSHIP

We have seen that stories can make a legitimate contribution to legal

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122. This source of bias is discussed in Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L.J. 583 (1992).

123. These observations are merely a specific application to the social sciences of the general views about practical reason. See text accompanying notes 72-97 *supra*.

124. Massaro, *supra* note 20, at 2105; Robin West, *Economic Man and Literary Woman: One Contrast*, 39 MERCER L. REV. 867, 875 (1988).

125. West, *supra* note 124, at 872, 875; see also Lawrence B. Solum, *Virtues and Voices*, 66 CHI.-KENT L. REV. 111, 136-37 (1990) (arguing that those who are oppressed have different insights from those who come to know about oppression in other ways).

126. See JONATHAN BARON, *THINKING AND DECIDING* 332 (1988); Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747, 749-60 (1990).

scholarship, defined broadly as writing that increases our understanding of the legal system. This says nothing, however, about the validity or quality of any particular exercise in storytelling. We now turn to the question of how to assess scholarship in this genre.

Evaluating scholarship, particularly scholarship of a new type, raises two separate issues. The first is the question of validity: When should a story be considered a valid source of insight? One might view this as the question of whether the raw "data" of the stories themselves are sufficiently reliable that they can be put to further use, regardless of whether the information is new or important. Just because a text contains valid material, however, does not necessarily mean that it is good scholarship. Thus, the second issue involves determining the standards for evaluating quality.<sup>127</sup>

## A. *Validity Issues*

### 1. *The problem of fiction.*

Legal scholars use the fictional form in a variety of ways. Sometimes, it serves simply as the framework for developing an argument, as in Plato's *Republic*.<sup>128</sup> In this form, the author does not claim to be narrating true events, but merely claims to be presenting true ideas. The work must stand or fall on its conceptual merits. Similarly, a story may be an extended hypothetical, used to work out in detail the consequences of a given position.<sup>129</sup> These forms of scholarship pose no inherent challenge to conventional intellectual standards.<sup>130</sup>

The fictional form might also be used for some of the purposes discussed in Part II: for example, to suggest a new hypothesis to test or to provide an

127. In this part, we assess an avowedly unconventional form of scholarship in a rather traditional manner. We do so for two reasons. First, the new storytellers explicitly target mainstream academics as one audience for their work. Thus, unless we admit that we are incapable of evaluating this scholarship and take a stance of uncritical admiration, we must at least begin our critique from within our own mainstream perspective. Second, in order for storytelling to be considered legal scholarship, it has to play by the rules as they exist or at least provide a cogent argument for changing them.

128. *THE REPUBLIC OF PLATO* (A.D. Lindsey trans., 1950). For example, in the allegory of the cave, Socrates uses light and dark to discuss the physical and the intellectual in one of the best known stories in classical philosophy. *Id.* at 256-63.

129. See David P. Bryden, *On Race and Diversity*, 6 CONST. COMMENTARY 383 (1989) (using a fictional faculty retreat to explore the issue of affirmative action—a notable example of conservative white male storytelling); Daniel A. Farber, "Terminator 2 1/2": *The Constitution in an Alternate World*, 9 CONST. COMMENTARY 59 (1992) (using fiction to explore the interpretive flexibility of the Constitution).

130. Where fiction purports to mirror reality, however, the concerns are more pressing. See notes 134-156 *infra* and accompanying text. Derrick Bell tells a fictional story about a law school's refusal to hire a superbly qualified black candidate (whose qualifications included editing the law review at a top school and a Supreme Court clerkship). DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 140-61 (1987). Bell notes that most white faculty members would perceive the story as unrealistic, and his response is that "[t]he record of minority recruitment is so poor as to constitute a *prima facie* case that most faculties would reject" such a candidate. *Id.* at 155. Randall Kennedy points out, however, that Bell sidesteps the major issue raised by the story by assuming it away. See Kennedy, *supra* note 41, at 1762-63.

empathetic understanding of a situation.<sup>131</sup> A story may still serve these functions well even if it is a composite of many people or episodes, rather than a precise depiction of particular events. The more fictionalized the story, however, the more troublesome its use as empirical evidence becomes. Relying on fiction as evidence is rather like an episode recounted by Patricia Williams: "An image that comes to mind is that of movie star Jessica Lange, who testified to Congress about the condition of farms in the United States because she had *played* a farmer's wife. What on earth does 'testimony' mean in that context?"<sup>132</sup> As this example suggests, a convincing fictional portrayal risks creating a spurious aura of empirical authority. This risk is compounded when the author of the fiction is a scholar, publishing in a scholarly journal, because the audience is unsure whether the author is speaking as a scholar or solely as an artist.<sup>133</sup>

## 2. *Truthfulness in nonfiction.*

Relatively little legal storytelling is presented as fiction. Rather, the majority of stories are presented as descriptions of specific experiences, whether of the author or of someone else. Thus, the author is claiming that the stories are true. Some advocates of storytelling, however, question whether empirical accuracy is an important aspect of these stories.<sup>134</sup> While we acknowledge that the meaning of "truth" is itself contested,<sup>135</sup> we do not

131. See Stephanie M. Wildman, *Integration in the 1980's: The Dream of Diversity and the Cycle of Exclusion*, 64 TUL. L. REV. 1625, 1631 n.21 (1990). For an example, see *id.* at 1643-44.

132. WILLIAMS, *supra* note 6, at 30-31.

133. Gordon Wood has discussed this risk in connection with the writing of fictional accounts by historians. See Gordon S. Wood, *Novel History*, N.Y. REV. BOOKS, June 27, 1991, at 12, 15-16 (reviewing SIMON SCHAMA, *DEAD CERTAINITIES (UNWARRANTED SPECULATIONS)* (1991)). For further discussion of the relation between legal storytelling and fiction, see text accompanying notes 193-199 *infra*.

134. Abrams, *supra* note 3, at 1026-27; see also Delgado, *supra* note 49, at 2434 (supporting generalization and exaggeration).

135. For example, Lucinda Finley contends that "objective thinking is male language," as are "[r]ationality, abstraction, [and] a preference for statistical and empirical proofs over experiential or anecdotal evidence." Finley, *supra* note 12, at 893. Similarly, Kim Scheppelle questions whether law should privilege the "objectivist account" that identifies reality with the perceptions of a disinterested observer. Scheppelle, *supra* note 20, at 2089-91; see also WILLIAMS, *supra* note 6, at 9-11, 47, 169; Stuart Alan Clarke, *Color-Blind Prophets and Bootstrap Philosophies: Straw Men, Shell Games and Social Criticism*, 3 YALE J.L. & HUMAN. 83, 91 (1991) ("It is naive if not disingenuous to suggest that all that matters is the promotion of truth."); Johnson, *supra* note 52, at 2016-17 & n.43 (questioning "objective truth" as being a "majoritarian" standard). Patricia Cain summarizes the position taken by some leading feminist legal theorists such as Catharine MacKinnon: "They argue that to ask 'who speaks the truth?' is inappropriate. To ask the question is to adopt a patriarchal view of truth as something that is objectively verifiable. The point of feminist critique is to question all basic premises of the patriarchy, including its objectivist epistemology." Cain, *supra* note 4, at 27. As Gary Peller explains, a similar rejection of objectivism has been a strong theme in the scholarship of black nationalist scholars:

In general, the radical critique launched by black nationalist sociologists and cultural critics claimed that objective reason or knowledge could not exist, because one's position in the social structure of race relations influenced what one would call "knowledge" or "rationality." The cultural differences between blacks and whites could not be studied through a neutral frame of reference, because any frame of reference assumed the perspective of either the oppressed or the oppressor, either African Americans or whites, either the sociologist or the subject. . . . There could be no neutral theory of knowledge—knowledge

believe it necessary to explore philosophical disputes over the nature of truth in order to resolve the standards for assessing nonfictional stories. In particular, we need not subscribe to any form of positivist or correspondence theory of truth. The real question here is not objective "truth," but honesty: Is the author's account what it purports to be?

We can distinguish three different statements about the perception of an event:

- (1) "If you had been watching, this is what you would have seen";
- (2) "The situation might not have looked this way if you had been watching, but this is how it felt to me"; and
- (3) "The situation didn't feel this way to me at the time, but this is how it seems to me now."

The first standard is the customary test for the truth of a description of events. The argument that, unlike white men, women and people of color use only the second or third standards for truth is a version of the "strong" different voices position, which we rejected in Part I. In any event, since the first standard is the ordinary understanding of truth, it would be dishonest to present statements that are only true under the second or third standards without an explicit disclaimer. Whether or not those standards are as valid as the conventional standard, the reader is entitled to notice of when they are in use. Saying, "if you had been there, especially if you were a male observer, you probably would not have seen anything that appeared to be violence, but I felt exactly as if he had slapped me," is entirely different from saying, "he slapped me," without notifying the reader that your statements should be given an unconventional interpretation.<sup>136</sup> Again, the issue is one of honesty and fair dealing. Just as it is a basic principle of contract law that a party may not knowingly take advantage of a mistaken understanding by the other party,<sup>137</sup> it would be similarly wrong for a scholar to take advantage of an audience that he knows will believe a story to be literally true unless told otherwise. Misleading the reader on this crucial point amounts to intellectual deception.<sup>138</sup>

It would be especially undesirable to foster doubts about whether statements by women or people of color imply the same notions of truth as those

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was itself a function of the ability of the powerful to impose their own views, to differentiate between knowledge and myth, reason and emotion, and objectivity and subjectivity.

Peller, *supra* note 68, at 806; *see also id.* at 804 (asserting that, to black nationalist sociologists, the relationship between a researcher and his subject "mirrors the relationship between dominant and suppressed cultural groups").

136. This example is a variant on one found in Scheppele, *supra* note 20, at 2089 (using man choking woman as an example).

137. *See* 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.9, at 399, § 4.10, at 402-04, § 4.11, at 404-07 (1990).

138. As one literary critic observes:

In practice, we simply read differently when we believe that a story claims to be true than we do when we take it as "made-up." . . . [W]e never read a story without making a decision, mistaken or justified, about the implied author's answer to a simple question: Is this "once-upon-a-time" or is it a claim about events in real time?

WAYNE C. BOOTH, *THE COMPANY WE KEEP: AN ETHICS OF FICTION* 16 (1988).

of white males. One of the staples of feminist literature is that women's assertions are treated as presumptively unreliable and lacking in credibility.<sup>139</sup> Patricia Williams has made the same point about African Americans.<sup>140</sup> It would be disastrous to reinforce the idea that women and people of color do not adhere to the same standards of "truthfulness" as white men.<sup>141</sup>

Because the issue is one of honesty, we also reject Kathryn Abrams' argument that it would be untroubling, at least with respect to narratives that are presented as factual, if they were to turn out "not to track the life experiences of their narrators in all particulars" or to be composites.<sup>142</sup> As a general matter, we do not believe that deliberate, material changes in the factual content of narratives should be acceptable. In a narrative that purports to be a rendition of actual events, misrepresentation of these events can come perilously close to what is known in other fields as research fraud: doctoring data to fit your thesis.<sup>143</sup>

Professor Abrams also makes another, more nuanced argument concerning honesty and truth: "Creating any narrative involves a process of mediation, of muting and amplification, of selection among details. What sorts of modifications 'insider' narrators should be required to disclose to their readers is a difficult question . . ." <sup>144</sup> There is clearly some validity to this argument. Just as journalists modify even direct quotes to increase intelligibility,<sup>145</sup> any narrative necessarily involves selectivity. Specifying the

139. See, e.g., MacKinnon, *supra* note 64, at 1298-99 (women deprived of "credibility" by social oppression); Unified Court System of the State of New York, *Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L.J. 11, 113-14 (1986-1987) ("Perhaps the most insidious manifestation of gender bias against women—one that pervades every issue respecting the status of women litigants—is the tendency of some judges and attorneys to accord less credibility to the claims and testimony of women because they are women."); see also *id.* at 113 n.329 (citing social science research); Mary Louise Fellows, *Usurping Women's Procreative Powers: Sexual and Racial Myths Reflected in the Law of Legitimacy* 16 (Mar. 1992) (unpublished manuscript, on file with the *Stanford Law Review*) ("Woman as untrustworthy speaker is a theme that continually winds its way through the law.").

140. WILLIAMS, *supra* note 6, at 47, 67-68, 170.

141. Suppose, for example, it became generally understood that when a woman says a man forced her to have sex at gunpoint, it didn't mean that an observer would have seen a gun, only that she felt *as if* she were being coerced.

142. Abrams, *supra* note 3, at 1025 (she "would not be particularly disturbed" by such a narrative, although a "narrative that turned out to be a complete fabrication . . . would be a greater problem"); see also Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761, 775, 800 (1990).

143. A panel of the National Academy of Science recommended that research fraud should be defined as "fabrication, falsification, and plagiarism." David P. Hamilton, *A Shaky Consensus on Misconduct*, 256 SCIENCE 604, 605 (1992) (the consensus was "shaky" because others wanted a broader definition). The University of Minnesota defines academic misconduct as "the fabrication or falsification of data, research procedures, or data analysis; plagiarism; or other fraudulent actions in proposing, conducting, reporting, or reviewing research or other scholarly activity." Board of Regents, University of Minnesota Policies and Procedures for Dealing with Academic Misconduct 2 (Oct. 1992) (on file with the *Stanford Law Review*). To the extent that stories are presented as true, and told to make a point, they are analogous to other forms of research. And if they are not "research," then they are not scholarship and do not belong in scholarly journals.

144. Abrams, *supra* note 3, at 1026.

145. See *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2431-32 (1991).

bounds of permissible behavior may be less a matter of adherence to a clear rule than the responsible exercise of practical reason to avoid the problems identified above. Because we believe that using analytic arguments together with stories adds a type of "quality control" that minimizes these dangers, we will return to questions of selectivity in our discussion of quality issues in Part III.B.

We do not mean to imply that any of the new storytellers are engaging in deliberate falsehoods. The question of honesty or truth is primarily important for preventing *unintentional* distortion. All of us—insiders and outsiders alike—have faulty memories and a limited perspective of events. When making statements that claim to represent more than our current feelings about past events, we should recognize and guard against the pitfalls of our partiality. The safeguards we discuss in the remainder of this article are designed to counter those lapses.

### 3. *Methods of judging truthfulness.*

A major difficulty with storytelling is verifying the truthfulness of the stories told. One genre of storytelling for which challenging accuracy is particularly troublesome is the "first-person agony narrative" in which the author's experience of pain is used to criticize a social practice.<sup>146</sup> Just as lawyers normally are not allowed to offer testimony at trial, or to vouch for witnesses,<sup>147</sup> scholars should not be readily allowed to offer their own exper-

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146. See Abrams, *supra* note 3, at 1021-22. Robin West has recently acknowledged the difficulty of assessing the truthfulness of personalized accounts, but she argues nonetheless that the only way to understand the situations of oppressed groups is "the inclusion of just such personalized, subjective accounts." West, *supra* note 7, at 1781 (reviewing WILLIAMS, *supra* note 6). There would appear to be a wide range of other possible methods, however, including comparing the accounts with journalistic studies of disadvantaged individuals and common social science techniques. Necessity does not seem an adequate justification for relying on sources that can be characterized, as West herself puts it, as "nonfalsifiable, overly idiosyncratic, discomfitingly moralistic, nonuniversalizable." *Id.* at 1780.

Although the accuracy of personal accounts is difficult to verify, storytelling scholarship sometimes displays a troubling sloppiness in its use of more readily verifiable information, which suggests that the stories themselves may not be crafted with scrupulous care. For example, in retelling her famous "Benetton" story, see text accompanying note 6 *supra*, Patricia Williams complains that the editors of a law review refused to take her word for what happened: "I could not but wonder, in this refusal even to let me file an affidavit, what it would take to make my experience verifiable. The testimony of an independent white bystander? (a requirement in fact imposed in U.S. Supreme Court holdings through the first part of the century)." WILLIAMS, *supra* note 6, at 47. The accompanying endnote reads: "See generally *Blyew v. U.S.*, 80 U.S. 581 (1871), upholding a state's right to forbid blacks to testify against whites." *Id.* at 242 n.3. Even on its face, this citation fails to support the textual assertion about the Supreme Court: The date is three decades *before* "the first part of the century," the requirement turns out to be a product of state law rather than being "imposed in U.S. Supreme Court holdings," and a "See generally" cite to a single case does not document a statement about multiple "holdings." Moreover, *Blyew* actually did not uphold the state law on the merits. Instead, the Court merely (though probably erroneously) held that the state law did not provide a justification for removing a state criminal case to federal court under a Reconstruction-era statute.

147. It is unethical for a lawyer to appear as an advocate and a witness in the same trial, except under special circumstances. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 (1984) ("A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness . . ."). As the official comment to the rule explains:

A witness is required to testify on the basis of personal knowledge, while an advocate is

iences as evidence. The norms of academic civility hamper readers from challenging the accuracy of the researcher's account; it would be rather difficult, for example, to criticize a law review article by questioning the author's emotional stability or veracity.<sup>148</sup>

Even third-party accounts of victimhood raise serious problems. In criticizing conservative stories about "political correctness," Mark Tushnet has quite aptly pointed out these problems in connection with a particular story:

The *Christian Science Monitor's* off-hand summary of [the story] is unfortunately typical of the reporting on political correctness. Its most characteristic feature, in fact, is that it relies on no reporting whatsoever. The victim's account of the incident is the only source of evidence. The reports never note that victims have a perfectly understandable desire to present what happened to them in a way that makes them appear best. When the reports are offered by people with a political ax to grind, one can fairly wonder exactly what happened. The proper conclusion, I think, is that accounts offered by politically interested people drawn almost entirely from the victim's side of the story almost certainly overstate the extent to which something called political correctness came into play.<sup>149</sup>

The point is well taken, and applies to stories about discrimination just as much as to stories about political correctness.

Assessments of truth are made more difficult by the impracticability of independent investigation. Kathryn Abrams argues that stories may carry their own indicia of truth by providing "a complex, highly particularized account of an experience unfamiliar to many readers"<sup>150</sup> or by creating a "flash of recognition."<sup>151</sup> She is not alone in believing that a high level of detail provides internal evidence of veracity: The Supreme Court has said exactly the same thing in holding that detailed but unverified accounts by anonymous informants may constitute probable cause.<sup>152</sup> The argument is no more convincing when offered by feminists than it is from Chief Justice Rehnquist.<sup>153</sup> The "flash of recognition" argument is also troubling, creat-

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expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

*Id.* Rule 3.7 cmt. For similar reasons, Rule 3.4(e) provides that a lawyer may not "assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused." *Id.* Rule 3.4(e). The lawyer is entitled—even obligated—to argue those points; it is not, however, permissible to ask the trier of fact to take the lawyer's own personal credibility as evidence on behalf of the client's position. See also 1 AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE standard 3-5.8(b) (2d ed. 1980) (prohibiting prosecutors from expressing any personal belief about evidence or the guilt of the defendant). For a general discussion, see ROGER C. PARK, TRIAL OBJECTIONS HANDBOOK 379, 383-91 (1991).

148. It is also difficult for authors to be critical of their own recollections. For a telling example, see Tushnet, *supra* note 3, at 263-65.

149. Mark Tushnet, *Political Correctness, the Law, and the Legal Academy*, 4 YALE J.L. & HUMAN. 127, 131 (1992).

150. Abrams, *supra* note 3, at 1022.

151. *Id.* at 1024.

152. *Illinois v. Gates*, 462 U.S. 213, 233-35 (1983).

153. See *id.* at 282 (Brennan, J., dissenting) (arguing that detail may establish a basis for knowledge but corroboration is needed to show veracity).

ing the risk that the author gains credibility by appealing to the reader's preconceptions and biases.<sup>154</sup>

The ultimate problem with Abrams' argument, however, is that it relies on our intuitive ability to determine whether a person is telling the truth. Unfortunately, the substantial body of social psychology research on this subject has very discomfiting conclusions. Human beings are actually extremely poor at determining whether a person is lying, even in face-to-face contexts.<sup>155</sup> For this very reason, disciplines such as anthropology and history that rely on informants or documents have evolved rigorous methodological standards for the use of such evidence.<sup>156</sup> It is an error to think that

154. Should a magistrate issue a search warrant on the sole ground that an anonymous informant's account provided a "flash of recognition"?

155. The basic research finding is that "[i]n every study reported, people have not been very accurate in judging when someone is lying," including professionals whose jobs require them to make credibility judgments, such as FBI agents, police officers, and judges. Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 AM. PSYCHOL. 913 (1991) (finding that only Secret Service agents performed better than chance in detecting lying); see also Gerald R. Miller & Judee K. Burgoon, *Factors Affecting Assessments of Witness Credibility*, in THE PSYCHOLOGY OF THE COURTROOM 169, 184-86 (Norbert L. Kerr & Robert Bray eds., 1982) (reporting that people are highly confident of their ability to detect lies, but quite mistaken in this belief). Moreover, people tend to be trusting of others, except perhaps of used-car sellers, and speakers are presumed to be telling the truth. See Bella M. DePaulo, Carol Steele LeMay & Jennifer A. Epstein, *Effects of Importance of Success and Expectations for Success on Effectiveness at Deceiving*, 17 PERSONALITY & SOC. PSYCHOL. BULL. 14, 21-22 (1991). A related body of research shows that people are similarly overconfident about their powers of observation and memory; in reality, they function poorly even in making simple identifications. See Steven Penrod, Elizabeth Loftus & John Winkler, *The Reliability of Eyewitness Testimony: A Psychological Perspective*, in THE PSYCHOLOGY OF THE COURTROOM, *supra*, at 119, 150-51. Nevertheless, eyewitness testimony is highly credited by juries: An identification from a witness known to have had vision raised conviction rates in mock trials from 18% to 68%. *Id.* at 154-55. Jurors place heavy weight on the witness' appearance of confidence, which is only weakly related to accuracy. *Id.* at 155.

156. See, e.g., MARK ABRAHAMSON, SOCIAL RESEARCH METHODS 332-47 (1983) (discussing methods of conducting interviews and training interviewers); JOHN A. BRIM & DAVID H. SPAIN, RESEARCH DESIGN IN ANTHROPOLOGY: PARADIGMS AND PRAGMATICS IN THE TESTING OF HYPOTHESES 91 (1974) (advocating use of alternative methods where possible because of high risk of observer bias). Recent scholarship has become, if anything, even more sensitive to the potential pitfalls of relying on the stories of informants or even first-hand observations:

[A]s recent critics, Western and indigenous, have noted, informants often had their own agendas and always had their own situated views of the culture. By what warrant could the ethnographer assume that their views were common to or representative of the culture at large or some groups within it? To consider only the most obvious form of this problem, how could she or he assume those views to be shared by the women who were almost totally excluded as informants from classical ethnographies? Corresponding assumptions underlay the typical accounts of ethnographers undergoing rites of initiation into sacred mysteries or taking instruction in some form of privileged knowledge. . . . In a word, reexamination of the use of informants in classical studies has made clear the necessity of locating the subjects with whom the ethnographer interacts within the larger society and of allowing for differences in point of view due to social situations, for biases owing to group loyalties, for omissions prompted by strategic considerations, for dissimulations motivated by personal loyalties, and the like.

Thomas McCarthy, *Doing the Right Thing in Cross-cultural Representation*, ETHICS, Apr. 1992, at 635, 639-40 (footnotes omitted).

The problems of conducting an adequate field study are even greater when an anthropologist seeks to study her own society, particularly if she has other ties to the particular group being studied. See SHARON TRAWEEK, BEAMTIMES AND LIFETIMES: THE WORLD OF HIGH ENERGY PHYSICISTS 6-15 (1988) (discussing the problems of the "repatriated" anthropologist; notably, the author of this



skepticism of witnesses is typical of "white male thinking." On the contrary, these standards are a relatively late development in intellectual history. Like other groups, white males are all too willing to credit stories without critical examination. Individuals overcome this proclivity only through rigorous training.

One aspect of the rejection of "objectivity" deserves further consideration. Doubts about "truth" and "objectivity" as white male standards may be based on a not-unreasonable fear that these standards have a disparate impact. Dominant groups such as governments and corporations have the resources to maintain massive record-keeping systems, organizational structures to facilitate systematic observation, and funds to procure formal social science expertise. Those "on the bottom" may have only their own voices in which to offer their conflicting experiences. For example, a tribe may find that it has only oral history to offer against the formal land records of the dominant culture.<sup>157</sup> To make matters worse, members of subordinated groups sometimes may lack the kinds of middle-class life histories on which our culture tends to base credibility.<sup>158</sup> This disparity is another source of bias in our access to stories. The solution is not, however, to sweep the problem under the rug by simply accepting all "stories from the bottom" as gospel. Rather, it is to take whatever steps we can to test the credibility of both the "official" and the "counterhegemonic" versions of events.

We do not mean to assert that legal scholars should consider only evidence meeting formal social science standards. We cannot always afford the luxury of waiting for definitive findings. Furthermore, practical reasoning allows other forms of experience to supplement formalized research. Nevertheless, we need to be aware of the risks in relying on unverified narratives, and take whatever steps are possible to guard against those risks.

#### 4. *Typicality.*

Even if a story is true, it may be atypical of real world experiences. The importance of typicality depends partly on the use of a particular story. If the story is being used to suggest a hypothesis or a possible causal mechanism, then a prior showing of typicality is unnecessary. On the other hand, if the story is being used as the basis for recommending policy changes, it should be typical of the experiences of those affected by the policy. Owen Fiss has cogently argued that when the Supreme Court "lays down a rule for

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anthropological study of particle physicists decided to work in a Japanese lab before returning to study the culture of a more familiar American particle accelerator, in order to "acquire strangeness").

157. See Torres, *supra* note 120, at 12-13.

158. Cf. Francis C. Dane & Lawrence S. Wrightsman, *Effects of Defendants' and Victims' Characteristics on Jurors' Verdicts*, in *THE PSYCHOLOGY OF THE COURTROOM*, *supra* note 155, at 83 (concluding that, although research results are mixed, they suggest that case outcomes are influenced by extralegal characteristics of the defendant and the victim); Martin F. Kaplan, *Character Testimony*, in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE* 150 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985) (concluding that character evidence has a significant effect on juries).

a nation . . . [it] necessarily must concern itself with the fate of millions of people . . . Accordingly, the Court's perspective must be systematic, not anecdotal . . ."<sup>159</sup>

Studies by cognitive psychologists demonstrate that humans tend to overrely on atypical examples.<sup>160</sup> Because individuals assume that dramatic or easily remembered events are typical, they often overestimate the likelihood of such events.<sup>161</sup> Even when they correctly appraise a trait as typical, they overestimate its prevalence, assuming that more members of the group possess the trait than really do.<sup>162</sup> In other words, people frequently engage in what we commonly call stereotyping. Finally, people are too quick to assume the presence of a pattern from a small number of cases.<sup>163</sup>

Like the careful treatment of narrative sources, the use of modern empirical techniques to correct for these misperceptions and distortions is not the natural outgrowth of "white male thinking." If formal empirical techniques were inherent in white male culture, they would have developed much earlier, and would be much easier to teach to white men than they actually are. Instead, such techniques are painfully developed methods of avoiding genuine errors. We have already made clear our view that these methods can be significantly supplemented by individual case studies, but we must always be vigilant when doing so.

It bears repeating that typicality is unrelated to any commitment to "objectivity" as a philosophical position. Instead, we are merely asking, "If we checked with more people in the same situation, how many of them would tell similar stories?" If most of their stories would be different, then the informational value of the particular story selected by the author is limited.<sup>164</sup> Moreover, to ignore the typicality concern would be to allow an

159. Owen M. Fiss, *Reason in All its Splendor*, 56 BROOK. L. REV. 789, 802-03 (1990). Compare Stuart Clarke's criticism of Stephen Carter. According to Clarke, Carter focused on "an extreme case of intolerance" against a black conservative, to show the existence of a civil rights orthodoxy, in order to justify "his turn to an opposite extreme." Clarke, *supra* note 135, at 86. Christine Littleton has also endorsed typicality as a standard in criticizing the legal system for "bypassing the question of statistical frequency" in cases involving gender issues. Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 37 (1989); see also *id.* at 26 (acknowledging reality of the criticism that feminism is "partial because it rests only on some women's experience"). Thus, the typicality argument is not the exclusive domain of conservatives. Indeed, President Reagan was often accused of "government by anecdote." See, e.g., Lon Cannon, *Two Sides of Reagan*, WASH. POST, Feb. 3, 1986, at A2; see also MICKEY KAUS, *THE END OF EQUALITY* 176 (1992) ("How did Ronald Reagan get elected governor and then president? By telling anecdotes about welfare."). For a social science admonition about typicality, see Paul L. Joskow, *The Role of Transaction Cost Economics in Antitrust and Public Utility Regulatory Policies*, 7 J.L. ECON. & ORGANIZATION 53, 81 (1991) ("individual case studies are no substitute for more systematic empirical work").

160. BARON, *supra* note 126, at 210-13; Loftus & Beach, *supra* note 110, at 944; Noll & Krier, *supra* note 126, at 754-55.

161. This practice is referred to as the "availability heuristic." See BARON, *supra* note 126, at 210-12; Loftus & Beach, *supra* note 110, at 944-45.

162. See BARON, *supra* note 126, at 204-08.

163. See Loftus & Beach, *supra* note 110, at 941-44.

164. See Tushnet, *supra* note 3, at 260. But see Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29, 34 (1987) ("'truth' may be found with the statistical 'outliers'").

unrepresentative individual to speak for a group, in effect silencing other members.

Stories that are presented without minimum safeguards for truthfulness and typicality do not even qualify as scholarship, much less good scholarship. Although some of the stories currently appearing in law reviews seem shaky when measured by these criteria, we are confident that other stories will meet the threshold requirements. We therefore turn to issues of quality.

### B. *Assessing Quality*

Questions about the quality of academic scholarship arise in many different situations. When we discuss the latest scholarship with colleagues, we make judgments about what we have read. When we write, we choose which works to cite or to build on, and which to ignore. On occasion, we may be asked to make judgments about the quality of a candidate's scholarship in connection with personnel decisions. And when we teach, we must decide which scholarship can best contribute to the education of our students.

Within the profession, what constitutes poor, competent, or outstanding legal scholarship is disputed. Much of the dispute stems from disagreements about the purposes of legal scholarship: Are we writing for each other or for legal decisionmakers outside academia? Is doctrinal analysis the core of legal scholarship, or is it too pedestrian and practice-oriented? Should we engage in "internal" critiques of legal rules, or "external" critiques of legal practice (including the practice of scholarship)? Must our work be prescriptive, or ought it to be mainly descriptive?<sup>165</sup>

Although most of this debate concerns the distinctive nature and purposes of legal scholarship, our concern here is with the more basic question of what qualifies as good scholarship in general, in any academic discipline. Most academics would agree that traditional standards of merit do exist. And most would concede that the standards can often be applied unevenly, or too leniently. We are not suggesting that all extant scholarship *does* meet the standards we propose, only that it aspires to.

Different voice theorists argue, however, that those traditional standards operate unfairly against the scholarship of women and people of color generally, and against storytelling in particular. They are thus claiming to be exempt from conventional standards, which differentiates their work from other scholarship (including traditional but standard scholarship). Before discussing the specific standards that might be applied to stories, we need to consider the attack on the general standards of the academy.

The issue of evaluating scholarship often arises in personnel decisions.

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165. For good overviews of current disputes, see *A Symposium On Legal Scholarship*, 63 U. COLO. L. REV. 521 (1992); Symposium, *Legal Scholarship: Its Nature and Purposes*, 90 YALE L.J. 955 (1981). Edward Rubin suggests that much of the dispute stems from our lack of any theory of evaluation. Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889 (1992).

Attacks on faculty hiring and promotion practices have, by and large, moved away from claims of intentional discrimination, and most critics now concede that the same standards are usually applied to everyone, at least superficially.<sup>166</sup> The more common argument is that the universal standard of “merit” is ideologically and culturally defined in a way that excludes the unconventional voices of women and people of color.<sup>167</sup> To remedy this problem, different voice scholars, especially critical race theorists, argue that traditional standards should not be applied to the work of minority scholars.

Alex Johnson, for example, argues that “the meritocratic evaluative standard . . . embodies white, majoritarian norms,”<sup>168</sup> and that that standard is “inappropriate when applied to scholarship written in a distinct voice of color,”<sup>169</sup> because it is “culturally biased against the inclusion of a voice of color.”<sup>170</sup> Similarly, Richard Delgado states that the meritocratic standard “measures the black candidate through the prism of preexisting, well-agreed-upon criteria of conventional scholarship and teaching. Given those standards, it purports to be scrupulously meritocratic and fair.”<sup>171</sup> Despite this purported fairness, however, Delgado suggests that “[m]erit criteria may be the source of bias, rather than neutral instruments by which we determine whether or not that bias exists.”<sup>172</sup> Indeed, according to Delgado, merit is “potentially hostile to the idea of voice,”<sup>173</sup> has “a special affinity for procedural racism,” and is “the perfect excluder of ‘deviant’ or culturally stigmatized groups.”<sup>174</sup> Likewise, Derrick Bell suggests that the refusal to recognize even outstanding nontraditional scholarship disproportionately harms blacks, “whose approach, voice, or conclusions may depart radically from traditional forms.”<sup>175</sup> And Jerome Culp implies that ordinary scholarly standards impose a “herculean task” on black legal scholars.<sup>176</sup>

These arguments assume that the work of women and minority scholars is different—so different that it cannot be judged by conventional standards of merit. As noted earlier, available evidence does not support such a strong

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166. *But see* Rush, *supra* note 37, at 15-16 (suggesting that various women may have been denied tenure because of sex discrimination); Wildman, *supra* note 131, at 1643-44 (fictional story about superbly qualified minority woman denied job because last hire was minority or woman); Roy L. Brooks, *Anti-Minority Mindset in the Law School Personnel Process: Toward an Understanding of Racial Mindsets*, 5 LAW & INEQ. J. 1, 6 (1987) (suggesting that law schools apply a double standard in the personnel process in judging minority candidates more harshly).

167. One scholar has recently suggested that the development of this line of argument is an inevitable result of affirmative action in academic hiring. Christopher T. Wonnell, *Circumventing Racism: Confronting the Problem of the Affirmative Action Ideology*, 1989 B.Y.U. L. REV. 95, 119-44.

168. Johnson, *supra* note 52, at 2018 n.47. For a similar argument from a white critical legal scholar, see Peller, *supra* note 68, at 803-07.

169. Johnson, *supra* note 8, at 138.

170. *Id.* at 148; *see also* Young, *supra* note 37, at 271 (arguing that neutral evaluative standards are impossible because different cultural experiences cannot be equated).

171. Delgado, *supra* note 49, at 2421.

172. Delgado, *supra* note 42, at 101.

173. *Id.* at 100.

174. *Id.* at 107.

175. Bell, *supra* note 49, at 2388.

176. Culp, *supra* note 54, at 1098-99 & n.9.

claim about "different voices." The critique of traditional standards as biased appears to be based largely on the fact that the works of some outsider scholars have not fared well under those standards.<sup>177</sup> As Randall Kennedy points out, however, this might be because those specific works lacked merit.<sup>178</sup> The arguments also assume that people of color cannot meet the traditional standards of merit, a suggestion that many scholars of color naturally find demeaning,<sup>179</sup> and for which no evidence exists.

Thus, we find little support for the general claim that traditional standards are inherently unfair to work by women and minorities. A narrower, and more interesting, claim is that these standards are inappropriate for assessing legal storytelling as a particular genre of scholarship.<sup>180</sup> In examining this claim, we first reject the alternate standards proposed by some different voice scholars to evaluate legal stories. We then return to a consideration of the traditional standards, attempting both to articulate them more fully and to reply to attacks on specific aspects of those standards. In particular, we will address the question of whether some analytical component is a requirement of good scholarship.

### 1. *Different standards.*

Little has been written about what standards ought to apply to different voice scholarship in place of traditional standards. Richard Delgado argues that it is too soon to apply *any* standards,<sup>181</sup> leaving one to wonder how the work of these scholars ought to be evaluated for purposes of promotion and tenure, or even for purposes of deciding what readings to recommend to others.

Mary Coombs has proposed a pragmatic standard: The scholarship should be judged "in terms of its ability to advance the interests of the outsider community,"<sup>182</sup> with the caveat that any criteria for evaluating new articles must "definitionally give high marks to the works of" the movement's own heroes, Patricia Williams, Catharine MacKinnon, Martha Fineman, Mari Matsuda, Derrick Bell, and Richard Delgado.<sup>183</sup> Judging scholarship by its political effect suffers from two independent flaws. First, it is questionable whether academic work, however sharply directed at shaping external decisions, should be judged solely by its influence. As others—in-

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177. See Kennedy, *supra* note 41, at 1745-46.

178. *Id.* at 1765-66, 1774-75, 1814.

179. *Id.* at 1818-19. This is one theme of STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1992).

180. These two claims would collapse into one, of course, if we accepted the strong version of the different voice position, which would identify storytelling as the distinctive mode of scholarship for women and minorities.

181. Richard Delgado, *Legal Scholarship: Insiders, Outsiders, Editors*, 63 U. COLO. L. REV. 717, 722-23 (1992). Alex Johnson has attributed to Delgado the view that merit is based simply on authorship: If it is written by a person of color it is "presumptively meritorious." Johnson, *supra* note 8, at 145 & n.49.

182. Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 713 (1992).

183. *Id.* at 712, 708 n.5.

cluding those sympathetic to different voices—have noted, scholarship that is only indirectly geared toward outside decisionmakers is often of great value to other scholars.<sup>184</sup> Moreover, to the extent that success depends on the actions of the established legal hierarchy of judges and legislators, Coombs is proposing a standard that very few academic lawyers—of any sex, color, or political persuasion—will be able to meet. Coombs apparently recognizes this, and makes this standard aspirational rather than absolute.<sup>185</sup> Even so, the focus on outside decisionmakers detracts from the basic question of whether the work is good scholarship as opposed to good advocacy.

The second flaw in Coombs' proposal is that it imposes a single ideological veneer on a broad spectrum of scholarship. Only those who agree both on the problems facing the outsider community and on the policies that count as solutions will have their work evaluated positively. Thus, a person of color whose scholarship attacks the notion of a voice of color (or affirmative action) as dangerous to the community of color is likely to be judged harshly by Coombs' standard.<sup>186</sup>

Potentially more useful is the suggestion that standards of quality take certain individual scholars as their benchmark. Unfortunately, Coombs does not defend her choice of particular heroes except to say that each is central to the enterprise of storytelling and that each has "transformed the way we think about law and legal culture."<sup>187</sup> But transformations can occur by means and in directions that might not entitle their authors to adulation.<sup>188</sup> Articles based on inaccuracies, for example, or which rely on deception or other illegitimate means, should not be considered great scholarship, no matter how noble their goals.

Another problem is that Coombs implies that "we"—those whose views have been transformed—includes only the outsider community, which itself seems to be limited to individuals whose views have been transformed by these scholars.<sup>189</sup> This tautological analysis effectively renders the choice of

184. See *id.* at 694; Meir Dan-Cohen, *Listeners and Eavesdroppers: Substantive Legal Theory and Its Audience*, 63 U. COLO. L. REV. 569, 586 (1992); Edward L. Rubin, *What Does Prescriptive Legal Scholarship Say and Who is Listening to It: A Response to Professor Dan-Cohen*, 63 U. COLO. L. REV. 731, 750 (1992).

185. Coombs, *supra* note 182, at 703-04.

186. Coombs herself gives no indication that she intends this ideological bias to infect her standards. Indeed, in a letter to the authors commenting on an earlier draft of this article, she writes that she "would hope and assume that the criteria of what does advance the interests is not set in stone but is subject to revision in part based on the stories and arguments advanced in the scholarship that is generated." Letter from Mary Coombs to Suzanna Sherry 2 (1992) (on file with author). Unfortunately, others are not so open-minded. See, e.g., CARTER, *supra* note 179, at 102-12 (providing example of scholar of color punished for straying from party line); Stephen L. Carter, *Loving the Messenger*, 1 YALE J.L. & HUMAN. 317, 345 (1989) (same); Scott Brewer, *Introduction: Choosing Sides in the Racial Critiques Debate*, 103 HARV. L. REV. 1844, 1846 (1990) (colloquy on Kennedy, *supra* note 41) (noting criticism of Kennedy for questioning the work of other scholars of color).

187. Coombs, *supra* note 182, at 712.

188. James Kilpatrick played a major role in transforming the southern reaction to *Brown v. Board of Education* from cautious dislike to outright defiance, but no one would suggest that his form of undisguised racism should count as legal scholarship. See Garrett Epps, *The Littlest Rebel: James Kilpatrick and the Second Civil War*, 10 CONST. COMMENTARY (forthcoming 1993).

189. See, e.g., Coombs, *supra* note 182, at 697-701, 712 & n.119 (repeatedly using "we" and

benchmarks immune from criticism.<sup>190</sup> Especially in light of both Coombs' explicit criterion of political impact and the tendency, noted earlier, to equate different voices with radical ideology, it is too likely that the benchmarks were chosen (whether by Coombs or by her informants) for their ideological positions rather than for the excellence of their scholarship. Consequently, a storyteller who tells a more conservative story, however skilled in the techniques exemplified by the benchmark scholars, is not likely to be rated highly. For example, how many of the outsider scholars would support the recent Supreme Court decision to allow introduction of victim impact statements in criminal trials,<sup>191</sup> which surely can be as poignant and well-crafted as the stories in law reviews? Moreover, to the extent that only outsider scholarship is transformed by the specified scholars, the use of benchmarks seems to undermine Coombs' general requirement that the work be useful.<sup>192</sup> For example, scholarship that persuades only such a limited audience may be therapeutic for outside scholars, but is unlikely to help outsider communities substantially. A more useful approach might be to analyze why benchmark scholars' work is particularly meritorious, rather than defining merit by its presence in their work. This would force Coombs (or her informants) to defend the choice of benchmarks, and thus to confront directly the potential for bias.

Several scholars have suggested that stories ought to be judged by aesthetic standards, perhaps similar to those we apply to works of fiction (whatever those might be).<sup>193</sup> This standard coincides nicely with viewing legal storytelling as serving a transformative purpose. In this regard, storytelling might serve the same functions as novels or plays in helping us to understand our lives. Martha Nussbaum argues that great works of fiction can develop philosophical positions that cannot be articulated as well in conventional discursive prose.<sup>194</sup> For example, she finds deep insights on some issues of moral philosophy in the novels of Henry James.<sup>195</sup>

Whether or not stories about the law, written by lawyers, can serve this function is somewhat beside the point. Nussbaum is not arguing, after all, that Henry James should have published his short stories in philosophy journals, or that he should have been given tenure in a philosophy department.

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"our" to include only the outsider community; referring to "[f]eminist and critical race theorists" as "we" and "ourselves"; listing only feminists and people of color as "our heroes"; proposing that standards be developed by outsider community rather than imposed from outside). Mari Matsuda apparently disagrees, asserting that outsider scholarship is designed to "transform . . . mainstream consciousness." Matsuda, *supra* note 56, at 335.

190. Thus, for example, we cannot criticize the choice of Richard Delgado as a storyteller over Clarence Thomas—whose oratory on "high-tech lynching" was quite successful—if we do not know what makes Delgado's scholarship particularly meritorious.

191. Payne v. Tennessee, 111 S. Ct. 2597 (1991).

192. See text accompanying note 182 *supra*.

193. Ball, *supra* note 98, at 1862; cf. Abrams, *supra* note 3, at 1048 & n.245 (declining to address whether these standards would be appropriate). Delgado, on the other hand, criticizes those who "evaluated [outsider scholarship] as a journal of the author's individual thoughts and feelings" or "praise [it] for its passionate or emotional quality." Delgado, *supra* note 4, at 1366.

194. See generally NUSSBAUM, *supra* note 93.

195. See, e.g., *id.* at 4, 9, 52, 126-33, 140-41, 162, 169, 176-79, 183-85, 205.

Thus, such work might fail to be good legal scholarship, not because it falls short of particular criteria, but because it transcends the scholarly enterprise. While *Crime and Punishment* may increase our knowledge of the legal system, so too do the Federalist Papers have a narrative structure. But to call Dostoevsky a legal scholar may be just as misleading as calling James Madison a novelist. Without denigrating the abilities of legal storytellers, we see no reason to expect them to produce great literary works of the caliber of a Dostoevsky (or a Virginia Woolf or a Toni Morrison, for that matter).<sup>196</sup>

In rejecting the creation of literature as a form of legal scholarship, we are admittedly indulging a mild presumption in favor of institutional specialization. While works of literature may well be a source of important insights for lawyers,<sup>197</sup> we contend that creating literature has little nexus with the specific institutional traits of law schools, and seems far more congenial to other settings such as creative writing departments or traditional communities of writers and artists. Thus, we do not believe that the production of literature ought to be considered part of the mission of law schools.<sup>198</sup> Just because something is worthwhile does not mean that it should take place under a law school umbrella. Indeed, to the extent that fictional or fictionalized accounts purport to be scholarship, they jeopardize the credibility of legal scholarship.<sup>199</sup>

Finally, both Mary Coombs and Kathryn Abrams suggest general criteria of good scholarship that are essentially weak versions of traditional standards of quality, including that it "facilitate further discussion within the legal academic community,"<sup>200</sup> and that it not be badly written or "simply repeat what has already been stated or shown to be invalid."<sup>201</sup> Both scholars, however, reject the notion that good legal scholarship must necessarily convey some analysis or reasoned arguments; narrative alone can apparently be sufficient.<sup>202</sup>

Reason and analysis, in fact, seem to be prime targets of those who criti-

196. One of our colleagues has a cartoon on her door in which a woman is explaining that her painting was really strengthened by her three years in law school. The humor is telling. Although artists may emerge in any context (after all, Wallace Stevens was an insurance company lawyer who wrote poetry, see Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1570 (1990)), we see no reason to expect that three years of law school, followed by a teaching position, is a particularly conducive atmosphere for writers of novels or short stories.

197. We do not mean to join the debate over the validity of the "law and literature" movement.

198. What of the law professor who also writes great novels? In principle, that activity ought not to be rewarded within the law school setting. Could a tenured position for a great novelist (or a great sculptor or musician) be justified as a subsidy to a valuable activity in a society that fails to devote enough resources to the arts? On the same theory, it would be equally reasonable to give the same person a medical position at a hospital (but not allow her, of course, to perform surgery).

199. Cf. Wood, *supra* note 133, at 15 (arguing that fictional history "puts the integrity of the discipline of history at risk").

200. Abrams, *supra* note 3, at 1041.

201. Coombs, *supra* note 182, at 711.

202. See *id.* at 714-15 & n.125; Abrams, *supra* note 3, at 1048-51 (suggesting that her own preference for the kind of "normative elaboration" rejected by many feminist storytellers is merely a strategic choice designed to provide maximum impact for scholarship, rather than a judgment about



cize traditional criteria of merit. For example, Bell says that traditional standards unjustifiably require “analytical [and] historical scholarship.”<sup>203</sup> Delgado makes a similar point in a fictional portrayal of an attack on a candidate of color: “The faculty had disliked his colloquium, finding it devoid of history, economics, or theory. It struck them as the talk of ‘just a practicing lawyer’; it was ‘too much like a brief.’”<sup>204</sup> Mary Coombs has given the most detailed description of the traditional standards to be rejected: “Scholarly” work is “analytic, tightly reasoned, elegantly anticipating and effectively refuting counter-arguments.”<sup>205</sup> These, then, are the standards that critics say are inappropriately applied to storytelling in a different voice.

Unlike these critics, we believe that storytelling—and outsider scholarship in general—can and should be judged by standards that include the requirement of an analytic component. The remainder of this article will attempt to define those standards and explore how they might be applied to legal stories.

## 2. *Application of conventional standards.*

Despite their differences, outsider scholars and traditional scholars agree that the criteria for evaluating scholarship can only come from the practices of those within the academic community.<sup>206</sup> Here, we will explore some overarching requirements shared by all academic communities—the standards that distinguish scholars from politicians, novelists, newsgatherers, clergy, demagogues, lovers, and other assorted communicators. Although feminists and critical race theorists may be a community distinct from traditional legal scholars,<sup>207</sup> they are still part of the academic community in general. Thus, their stories should be evaluated by the same standards as traditional scholarship to whatever extent those standards reflect the goals and methods of “scholarship” as a distinct form of communication.

We emphasize that we are not proposing rigid formal characteristics for good legal scholarship. Nor do we suggest that, in speaking of “good scholarship,” all other writing by law professors is lacking in value. Other types of writing may be worthwhile ways of laying a foundation for later researchers, educating lawyers and judges about complex areas of the law, or increasing public awareness of legal issues. Instead, we are suggesting that the lack

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the scholarship’s intrinsic worth); *id.* at 1038-39 (Patricia Williams’ failure to include analysis of a particular proposal “does not detract substantially from [Abrams’] positive evaluation of the piece”).

203. Bell, *supra* note 49, at 2387 n.15.

204. Delgado, *supra* note 49, at 2426 n.45.

205. Coombs, *supra* note 182, at 706.

206. *See, e.g., id.* at 703; William E. Nelson, *Standards of Criticism*, 60 TEX. L. REV. 447, 477 (1982) (proposing criteria for legal scholarship); Robert Post, *Legal Scholarship and the Practice of Law*, 63 U. COLO. L. REV. 615, 615-17 (1992) (distinguishing between “internal” and “external” perspectives on the practice of law); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1838-47 (1988) (discussing the critique of methodology within traditional legal scholarship).

207. *See* Coombs, *supra* note 182, at 703. Edward Rubin has suggested that they constitute only a partial subdiscipline because although their ideology differs from that of mainstream legal scholars, their methodology does not. Rubin, *supra* note 165.

of certain formal attributes makes it difficult for a work to function as scholarship. While it might be a mistake to say *a priori* that an airplane must have wings on both sides of the body, it is probably hard to design a plane that works well otherwise. Similarly, although it is conceivable for a work that is, for example, poorly written or lacking in reasoned analysis to be good scholarship, we believe that it is unlikely.

Therefore, our aim is to identify the core goals of legal scholarship. To that end, we propose to divide the traditional standards of scholarship into three categories: (1) consensus standards, which provoke little controversy even among the new scholars; (2) reason and analysis, which many outside scholars label as a source of bias and explicitly reject as necessary for scholarship; and (3) methods of evaluating the importance of a work, the task that is the most difficult and potentially fraught with prejudice.

Almost everyone would agree that a work of scholarship should be comprehensible to its audience, say something new, and demonstrate familiarity with the relevant literature.<sup>208</sup> Despite their vagueness,<sup>209</sup> these standards can still help expose some stories as not very good scholarship. For example, a much-cited article by Marie Ashe<sup>210</sup> exemplifies one form of feminist narrative that would not constitute good scholarship under our definition. It contains a "torrent of physical detail"<sup>211</sup> about her own reproductive experiences (including graphic descriptions of the births of her children), with some brief and cryptic suggestions about law interspersed among the stories. Even Kathryn Abrams, who praises storytelling in general and some aspects of Ashe's piece in particular, notes that "[g]rasping the relation between her narratives and her prescriptions is . . . truly strenuous."<sup>212</sup> In fact, Abrams had to read the article three times before she even "began to suspect" that the point of the article was to urge the deregulation of reproduction.<sup>213</sup> Clearly, an article whose thesis a knowledgeable and sympathetic reader can barely understand on the third try fails the requirement of comprehensibility.

The Ashe article also implicates a broader question about comprehensibility. Part of the problem for Abrams, and presumably for most readers, is that Ashe does not effectively link her narratives to her legal analysis. What, then, of articles that contain virtually no legal analysis at all? While the stories themselves may be comprehensible, the reason for publishing them in

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208. See, e.g., Coombs, *supra* note 182, at 714-15; Nelson, *supra* note 206, at 478-85. We have already explained why legal scholarship must say something that is both true and about law. For other disciplines, of course, the scholarship must say something that is new, true, and comprehensible about that discipline.

209. See Coombs, *supra* note 182, at 711 (asserting that these criteria are "uncontroversial only because they say so little"); see also Nelson, *supra* note 206, at 479-82 (suggesting that comprehensibility includes a broad range of writing styles).

210. Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. REV. 355 (1989).

211. The description is Kathryn Abrams'. Abrams, *supra* note 3, at 1040.

212. *Id.* Abrams states that she "admire[s]" and "learn[s] from" Ashe's article and its non-linear approach, although she "dissent[s] from her methodological choice." *Id.*

213. *Id.*

law journals is not. The criterion of comprehensibility, which is simple and uncontroversial when limited to questions about misuse of the English language, becomes much more difficult as it shades into questions about how readers understand the law-related point of the story. Thus, although we treat the need for analysis as a separate issue because of its controversial nature, it might also be considered a more nuanced aspect of comprehensibility.

The criterion of originality poses similar hurdles for storytellers. The first problem is determining what it means for a piece of scholarship to be original. William Nelson argues that a work cannot be new merely to the author or to some readers; rather, it should be "knowledge that no one had possessed before,"<sup>214</sup> knowledge that is new to the community of legal academics. Whether it consists of new facts or new ideas, Mary Coombs agrees that scholarship should not "simply repeat what has already been stated."<sup>215</sup>

Beyond this minimum, Stephen Carter suggests that the idea be "nonobvious": Good scholarship should contain ideas that "would [not] have been obvious to the ordinary scholar in the field."<sup>216</sup> Coombs rejects this standard as too strict,<sup>217</sup> and, in any event, it would almost certainly exclude much of existing traditional scholarship. The nonobviousness criterion is also flawed for two other reasons. First, the best scholarship often makes its conclusions *seem* obvious: We all want our readers to respond by exclaiming "Of course! Why didn't I think of that?" Second, not all good scholarship contributes nonobvious ideas. Sometimes, especially in critiques, it is necessary to state the obvious, especially if no one else will. Thus Carter's suggestion of nonobviousness, though intriguing, is unworkable in practice.

Even if we limit our inquiry to the minimal standard of "add[ing] to the totality of knowledge,"<sup>218</sup> it will still prove difficult to determine whether a particular narrative has had an additive effect. For example, the tenth story documenting how it feels to be discriminated against is not as original as the first, and does not contribute to knowledge unless it either proposes a new legal solution or describes as discriminatory something that might not ordinarily strike us as particularly hurtful.<sup>219</sup> Moreover, it is unclear how much the *first* story contributes to our knowledge. Many of us know that discrimination hurts because we have experienced at least some form of arbitrary treatment, and can extrapolate how it might feel to suffer the same arbitrary treatment over and over again.<sup>220</sup> And, to the extent that we do not know

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214. Nelson, *supra* note 206, at 449.

215. Coombs, *supra* note 182, at 711.

216. Carter, *supra* note 66, at 2082.

217. Coombs, *supra* note 182, at 711 n.214.

218. Nelson, *supra* note 206, at 450 n.10.

219. For examples of the latter, see Mari Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991).

220. The new storytellers, we suspect, would claim that our knowledge is superficial: We cannot "know" discrimination until we have felt it in our bones on a daily basis. This is not the place, however, for an epistemological debate about what it means to "know" something. Even if it is true that we cannot "know" discrimination, stories about it won't help for the reasons outlined in the text.

what it feels like to be discriminated against, these stories are unlikely to teach us. As noted earlier, research has shown that we are most likely to believe and understand stories that resonate with something we *have* experienced.<sup>221</sup> The irony is that if the pain of discrimination is similar to what we have experienced, the stories may teach us little we do not already know; if it is dissimilar, stories that simply describe the pain can't teach us about it. A more effective format for outsider scholars would be a combination of narrative and more traditional scholarship that draws analogies among different legal problems, or scholarship that proposes new legal solutions to the problems of discrimination. As with the criterion of comprehensibility, then, requiring scholarship to contribute to knowledge becomes problematic when applied to stories that convey no analysis or reasoned arguments.

Similar problems beset the superficially uncontroversial criterion that scholars be knowledgeable in their fields. The difficulty here is identifying the relevant body of literature with which storytellers should be cognizant. Only other stories? Other outsider scholarship? Traditional scholarship in civil rights? If we limit the relevant literature to outsider scholarship, then we are admitting that traditional scholarship and outsider scholarship have little to say to one another. And however we define the relevant literature, how are we to know whether a pure narrative containing no legal analysis reflects a familiarity with other legal scholarship? The story might be the same whether or not the author had even attended law school, much less kept up in her field.

Any attempt to evaluate scholarship that goes beyond the superficial agreement on the noncontroversial standards thus raises the thorny question of whether good scholarship should be expected to convey some degree of analysis or reasoned argument.<sup>222</sup> In other words, can an unadorned account of personal experiences, standing alone, constitute good scholarship? Unlike many current legal storytellers, we conclude that it cannot.

Reason and analysis are the traditional hallmarks not only of legal scholarship, but of scholarship in general. According to one scholar, neither the exercise of power nor "strategic arguments designed to persuade by their emotional effect on the listener" are acceptable scholarly techniques.<sup>223</sup> The new storytellers, however, challenge this view of scholarship as overly narrow and culturally biased. Consequently, the standards they propose for evaluating stories do not consider analysis or reasoned arguments essential to good scholarship. Rather, the emotive force of the stories is seen as their primary appeal. In our view, however, emotive appeal is not enough to qualify as good scholarship.<sup>224</sup>

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221. See note 110 *supra*.

222. Even as to the minimum standards (such as accuracy and familiarity with the relevant literature), significant questions remain about the quality of some of the current stories. See notes 2 (relevant literature barely mentioned), 36 (factual inaccuracy), 130 (difficult question deliberately avoided) & 146 (inaccuracy) *supra*; notes 237 (unconventional selection distorted facts) & 241 (numerous inaccuracies) *infra*.

223. Rubin, *supra* note 206, at 1846.

224. It is worth repeating that, although we conclude that narratives alone cannot be consid-

The point of all scholarship—including the nontraditional forms—is to increase the reader's understanding (here, of law). The goal of conveying ideas helps distinguish scholarship from other forms of communication, which might be designed primarily to give pleasure or to influence action.<sup>225</sup> A second distinguishing feature of scholarship is that it invites reply. Whether it purports to describe the world or to prescribe human action, scholarship is addressed, at least in part, to other scholars engaged in the same activity. Because articles are part of an ongoing scholarly dialogue, even biting criticism is preferable to silence from other scholars.<sup>226</sup> A third feature distinguishes scholarship from what George Fletcher has called "declarations": Scholarship, in our opinion, takes as its subject "matters about which no one has the authority to make declarations. No one has the authority to declare what is historically true, morally right, beautiful, or even efficient."<sup>227</sup>

Because scholarship is an interactive activity, the reader must be able to disagree with the author and dispute her ideas. What we propose here is a weaker version of the scientific doctrine of falsifiability—something cannot be scholarship if it cannot be disputed. Persuasion, the ultimate goal of all scholarship, requires the active participation of the reader and thus must admit some form of counter-argument.<sup>228</sup> Personal narratives devoid of analysis generally do not satisfy this requirement because it will often be

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ered good scholarship, our endorsement of practical reason includes an appreciation for the contribution that stories can make when coupled with more traditional arguments. See text accompanying notes 113-126 *supra*. In this, we part company with Rubin, who expresses doubt about practical reason as a form of scholarship: "The scholar's specialty is not practical judgment but structured argument, not general intuition but specialized knowledge, not ad hoc decision-making but systematic analysis." Rubin, *supra* note 206, at 1879. As we discuss at some length in Part II, we do not agree with his characterization of practical reason.

Nor do we claim that insights or conclusions must occur to the scholar initially as a result of reason or analysis. Discovery can also flow from intuition. See Nelson, *supra* note 206, at 450-51 (arguing that new knowledge need not be discovered through reasoned analysis). However, there is a difference between "intuition as a means of discovery" and "intuition as a substitute for proof." John P. Burgess, Book Review, 99 AM. MATHEMATICAL MONTHLY 688, 689 (1992) (also contrasting reasoned argument with "rhetorical tropes"). One feminist scholar has suggested that men and women may have different "creative thought processes," influencing the formation of hypotheses, but similar approaches to verification. Schroeder, *supra* note 23, at 147. If that is true, we can still use traditional standards to evaluate the resulting scholarship.

225. See Rubin, *supra* note 165 (following Habermas, who described all communicative action, including scholarship, as designed to increase understanding). Of course, scholarship can also evoke pleasure or influence actors, but those are not its primary purposes. Indeed, there is some debate about whether traditional legal scholarship is too focused on influencing official action, thereby sacrificing its primary value of increasing understanding. See, e.g., Dan-Cohen, *supra* note 184; Post, *supra* note 206; Rubin, *supra* note 184; Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990); Mark Tushnet, *Legal Scholarship: Its Causes and Cures*, 90 YALE L.J. 1205 (1981).

226. Richard Delgado makes this point when he suggests that ignoring the work of outsider scholars, rather than engaging their ideas, is one technique for marginalizing them. Delgado, *supra* note 4, at 1360.

227. George P. Fletcher, *Two Modes of Legal Thought*, 90 YALE L.J. 970, 974 (1981).

228. For a somewhat different elaboration of this idea, see Richard Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 MICH. L. REV. 543, 566-67 (1988) (arguing that the individual engages in "the discourse of rhetorical persuasion").

impossible to make counter-arguments to them.<sup>229</sup> Requiring the author to justify the claim that a story deepens or advances our understanding of some aspect of the legal system enables us to assess the validity and persuasiveness of that claim.

The best scholarship not only adds to the reader's knowledge directly but inspires further thought beyond the text.<sup>230</sup> This reflection may take the form of elaboration or disagreement, but ultimately those engaged in scholarship will enter into an ongoing dialogue about their common project. Without reasoned arguments, neither understanding nor dialogue are likely to flourish. Robin West refers to the "unequivocal shock of recognition" upon reading certain articles,<sup>231</sup> and Kathryn Abrams believes Patricia Williams' stories because they "resonate" with her experiences.<sup>232</sup> But for those readers who neither resonate nor recognize, and for those who passionately disagree, there is no way to enter the dialogue. Thus, as Gerald Torres says, unless augmented by analysis, storytelling may "function as an authoritarian conversation-ending move."<sup>233</sup>

Reasoned argument also helps to counteract the peculiar dangers of anecdotal evidence. The value of grappling with concrete examples is lost if we allow ourselves to move away from rigorous standards of honesty and completeness. Maintenance of those standards requires that the author not only present the story but explain why it was selected and how it was verified.

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229. "I have not had that experience" is not a counter-argument, since the point of the story is to broaden the reader's horizons. "So what?" is essentially a request for analysis: It asks the author to explain the prescriptive ramifications of the narrative. "Eureka!" and "No, that's wrong" are instances where the reader has consciously or unconsciously supplemented the narrative by supplying the missing analysis and mediating between the particular narrative and some more general theory. Martha Fineman, for example, suggests that feminist jurisprudence should "mediate[] between the material circumstances of women's lives and the grand realizations that law is gendered, that law is a manifestation of power, and that law works to the detriment of women." Fineman, *supra* note 13, at 29.

Unadorned narratives generally fail to perform the mediating function. If the reader must perform the mediating function, this supports our claim that reason and analysis are necessary to legal scholarship. The moment we begin to draw conclusions from the narrative—which even the storytellers apparently want us to do, given their goal of consciousness-raising—we are essentially doing the author's work for her. It is one thing to be inspired by a work to ponder great ideas; it is quite another to be required to supply the work with ideas.

230. Philip Kissam has drawn a similar distinction between "instrumental reading in which we read to acquire knowledge directly without further reflection or thought" and "reflective reading" in which we read "to obtain background information and ideas that may stimulate or inspire some project." Philip C. Kissam, *The Evaluation of Legal Scholarship*, 63 WASH. L. REV. 221, 248 (1988).

231. West, *supra* note 15, at 56.

232. Abrams, *supra* note 3, at 1002.

233. Torres, *supra* note 120, at 21. Indeed, some advocates of storytelling come close to suggesting that silence is the only permissible response to stories. Whites who sympathetically attempt to analyze or even recount stories told by people of color are said to be guilty of misappropriating the storyteller's pain. See Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (Or Other -isms)*, 1991 DUKE L.J. 397, 408. For example, when a white woman at a CLS summer camp referred to a story told by a Native Canadian woman as an example to defend the use of personal experiences, the original storyteller protested: "Did that woman intend to appropriate my pain for her own use, stealing my very existence, as so many other White, well-meaning, middle and upper class feminists have done?" *Id.* at 408 n.34.

Early in this article, we defined legal scholarship as an effort to improve our understanding of the law. Although a story that merely dramatizes some preconceived theory of law may be a useful rhetorical device, it does not teach the reader anything new.<sup>234</sup> It is specifically the risk that the example may *not* fit our preconceived theories that opens up the possibility of learning something new. A scholar who refuses to take that risk is not engaged in genuine research.<sup>235</sup> In particular, a failure to confront available contrary evidence, or at least to present that evidence to the reader, is dishonest. One form of dishonesty is for the narrator to apply unconventional principles to select examples without notifying the reader. A related form of intellectual dishonesty is to delete facts that undermine the scholar's thesis.<sup>236</sup> Inclusion of such facts will often indicate good scholarship, for it demonstrates that the author has grappled seriously with contrary arguments.<sup>237</sup> If a story is presented without any methodological discussion or effort to connect it to a thesis, both the author and the reader are more likely to allow it to slide by without rigorous questioning.

Stories can also be deceptive in subtler ways. As a form of rhetoric, stories can "tak[e] the other in, deflecting her on unacknowledged, perhaps deliberately hidden grounds."<sup>238</sup> Often this is the unintentional result of using first-person narratives. Gordon Wood recognizes that "participants [do not] have a privileged access to knowledge of the events they are involved in."<sup>239</sup> Thus, the accounts may be mistaken or distorted. Stories also tend to "favor those who are near at hand," ignoring more distant voices.<sup>240</sup> Sometimes the deception, whether intentional or not, is the result of treating complex

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234. Tushnet gives examples of stories used for rhetorical effect that lack critical examination. See Tushnet, *supra* note 3, at 261-65.

235. On the significance of self-criticism, see Catharine Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1727, 1735-36 (1990).

236. Indeed, even with regard to fiction, it is usually considered a ground for criticism if the details of the story are all neatly chosen to prove some didactic point.

237. Mari Matsuda's article regarding accent discrimination illustrates this problem. Matsuda movingly tells the story of Manuel Fragante, based on interviews with him and on the trial record in his case. She devotes a total of nine pages to this story. Matsuda, *supra* note 219, at 1333-40, 1384-86. But the reader who examines the published opinion in the case may be surprised to learn that the two interviewers responsible for rejecting him were named George Kuwahara and Kalani McCandless. *Fragante v. City & County of Honolulu*, 888 F.2d 591, 593 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990). (Kuwahara is mentioned in a footnote, Matsuda, *supra* note 219, at 1337 n.23; the text refers to the interviewers only as "a supervisor and a secretary." *Id.* at 1337.) These two might have had interesting and quite different stories about the events, and about the role of language and ethnicity in their lives. Matsuda later speaks in passing of the "irony" that the defense witnesses had the typical accent of nonwhite speakers of Hawaiian Creole. *Id.* at 1338. Is this to be dismissed as a mere irony, or does it tell us that the story of accents is deeper than the saga of elite domination that Matsuda seeks to reveal? Most journalists or historians would have most likely wanted to hear the defense witnesses' stories as well.

238. Sherwin, *supra* note 228, at 568.

239. Wood, *supra* note 133, at 14. Jean Bethke Elshtain notes, for example, that Patricia Williams' "hotch-potch of particularistic meanderings privilege one voice: her own," and that "[t]he upshot is that what any text, or exchange, or encounter, or event means is what Williams takes it to mean." Jean Bethke Elshtain, *Alchemy and the Law: Why This Marriage Can't Be Saved*, 25 U.C. DAVIS L. REV. 1171, 1172, 1174 (1992) (reviewing WILLIAMS, *supra* note 6).

240. Mark G. Yudof, "Tea at the Palaz of Hoon": *The Human Voice in Legal Rules*, 66 TEX. L. REV. 589, 603 (1988).

human dramas as morality plays.<sup>241</sup> Occasionally, it stems from willful ignorance.<sup>242</sup> Reasoned argument and critical analysis might evoke more awareness of the limitations of the genre. As we argued earlier, a valid exercise in storytelling must involve efforts to assure the truthfulness and typicality of the story. Because these attributes are not self-documenting, the author must present some analysis to show that the story is credible and representative. This is similar to how a historian must defend her credibility judgments about historical sources and the inferences she has made from the historical record.

To the extent that a narrative merely conveys a concrete experience, it only partially achieves the purposes of legal scholarship. This conclusion flows from our belief in practical reason as a mediation between the concrete and the abstract; the purely concrete narrative remains fixated at one of these poles rather than mediating between them. Stories are best suited, in our view, for enriching legal scholarship with concreteness, but they need to be supplemented with reason and analysis. It is possible, at least in theory, that a narrative could be effectively used not only to convey concrete experiences, but also to encode abstract arguments which the reader could then analyze. On the whole, we are dubious about how successfully this encoding can be achieved. In any event, while such narrative would not explicitly provide analysis, it would effectively meet our requirement that analysis be conveyed to the reader. In one form or another, good scholarship must include but also move beyond the concrete.

The last criterion for evaluating scholarship, and perhaps the most difficult to articulate, is significance, which involves judging the importance of a piece of scholarship. Responsible storytellers should aspire to tell stories

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241. Some illustrations can be found in Mari Matsuda's work, which we admire in other respects. In her article on accent discrimination, she is so determined to present a cut-and-dried case of discrimination that she ignores the complex questions that actually arise when some accented speakers reject those with other accents. See note 237 *supra*. In another article, she misdescribes Robert Gould Shaw as a "Negro colonel," thus assuring him the status of a victim. Matsuda, *supra* note 56, at 354 n.132. (In fact, as any Civil War history—or even the movie *Glory*—will tell you, Shaw was white. PETER BURCHARD, ONE GALLANT RUSH: ROBERT GOULD SHAW AND HIS BRAVE BLACK REGIMENT (1965)). The story of how he came to lead a black regiment—and to die and be buried with them—might be much more interesting than the stereotypical vision conjured up by mischaracterizing his race.) Finally, Matsuda somewhat naively assumes that all outsider communities understand and have sympathy for one another. Matsuda, *supra* note 56, at 360. This reassuring assumption contrasts poorly with the true complexities of relationships among communities of color and between men of color and women. For example, the mutual discrimination suffered by African Americans and Asian Americans did not bring them together during the 1992 Los Angeles riots, when Korean-owned stores were targeted by the rioters. Nor are all outsider communities especially admirable in their treatment of women. See Menkel-Meadow, *supra* note 164, at 51 (suggesting that "we may be witnesses to the exploitation of one underclass by another"); Peller, *supra* note 68, at 819 (describing the "insistence by many 1960s black nationalists that male domination was a part of authentic black culture").

242. See Timothy Egan, *Did Chief Seattle Really Say That?*, MINNEAPOLIS STAR TRIB., Apr. 22, 1992, at 4A (author of book on Chief Seattle apparently unconcerned with whether Seattle actually gave the speech she quotes). For a discussion of what Chief Seattle *did* say, see Paul Wilson, *What Chief Seattle Said*, 22 ENVTL. L. 1451 (1992).



that are not merely meaningful but significant as well. As Thomas Ross aptly notes:

“The fact that a story is true is never by itself sufficient reason to tell the story.” If I tell a story that I cannot imagine has any purpose, or meaning, or use, and if it has no meaning for you, however true the assertions, perhaps I have violated the central ethical responsibility of the storyteller.<sup>243</sup>

Importance cannot be measured purely by breadth or by actual influence. A scholar who successfully grapples with a narrow but intractable problem, or who crafts an elegant and persuasive argument that encounters a brick wall of ideological opposition, cannot be faulted. How, then, can we measure importance and thus distinguish the competent from the good and the good from the outstanding? It is here that practical reason may provide the best technique. Evaluating the importance of a work requires judgment, not application of wooden standards. It is ultimately a judgment about how the scholarship will stand the test of time.<sup>244</sup> Every imaginative and critical faculty must be brought to bear, and, in the end, it is still a judgment.

### CONCLUSION

In this article, we have tried to take legal storytelling seriously, yet without simply acceding to the storytellers' views about scholarship. Although we have not found sufficient evidence to support strong versions of the “different voice” thesis, we do find weaker versions credible; we also conclude that legal stories, particularly those “from the bottom,” can play a useful role in legal scholarship. Unlike some advocates of storytelling, however, we see no reason to retreat from conventional standards of truthfulness and typicality in assessing stories. Nor do we see any reason to abandon the expectation that legal scholarship contain reason and analysis, as well as narrative. A legal story without analysis is much like a judicial opinion with “Findings of Fact” but no “Conclusions of Law.”

We suspect that these conclusions will please no one. Arch-traditionalists will believe that, in the name of “practical reason,” we have jettisoned intellectual rigor by giving any credence at all to legal storytelling. Advocates of legal storytelling will find us guilty of an illicit attempt to apply white male standards to their outsider jurisprudence: yet another effort by the establishment to domesticate and thereby neutralize a new radical movement. And scholars in the middle—those who like us believe in being open-

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243. Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 411 (1989).

244. As Geoffrey Stone has recently noted, evaluating scholarship—particularly nontraditional scholarship—demands care and respectful dialogue, in order to avoid the twin mistakes of rejecting the new merely because it is unfamiliar or accepting it merely because it is trendy. See Geoffrey Stone, *Controversial Scholarship and Faculty Appointments: A Dean's View*, 77 IOWA L. REV. 73, 74-75 (1991); see also Rubin, *supra* note 165. Rubin sets out criteria that should be used to evaluate scholarship (normative clarity, persuasiveness, significance, and applicability, all overlaid by “sensibilities” of doubt and anxiety when evaluating work in a different subdiscipline), but concedes that “[t]he purpose of articulating a criterion is not to replace judgment, but to deploy it in a disciplined, productive manner.” *Id.* at 929.

minded but not empty-headed in response to new ideas—may have the most wounding critique of all: that we have merely stated the obvious. Our consolation is that, serious as these criticisms may be, they cannot *all* be correct.

