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Law Frames: Historical Truth and Narrative Necessity in a Criminal Case

Richard K. Sherwin*

*Postmodern storytellers can fashion narratives that convey many different, yet equally convincing, visions of reality. Although these stories replicate our experience of the quick-cut image sequences that define contemporary popular culture, they can have only limited persuasive force in the legal arena when they prevent their audience from reaching articulable, justifiable conclusions. Faced with such important tasks as ascertaining truth and promoting justice, this audience will favor storylines that offer meaningful resolution. In this article, Richard K. Sherwin examines the interplay of a traditional linear story with a discursive postmodern story in Errol Morris' film *The Thin Blue Line*. Professor Sherwin concludes that Morris' linear tale effectively eclipses the uncertainties introduced by its acausal counterplot, and he attributes the failure of this second story to the more general epistemological failure of skeptical postmodernism. As an alternative to orthodox linear narratives, which reach closure only by concealing or denying inconsistent details, and to skeptical postmodern narratives, which never reach closure or even attempt to make sense of their details, Professor Sherwin urges lawyers and legal scholars to engage in "affirmative postmodern" storytelling. Affirmative postmodern tales embrace the multiplicity and complexity of details, but they orient their audience within a shared cultural storyline—a popular myth, a stock metaphor, a familiar character type—that allows one to create meaning out of the mass of information presented. Because they respect the complexity of reality and yet facilitate meaningful decisionmaking, Professor Sherwin argues, affirmative postmodern narratives offer an alternative way for the law to define truth and justice.*

"You reasoned it out beautifully," [Dr. Watson] exclaimed in unfeigned admiration. "It is so long a chain, and yet every link rings true."

*The Adventures of Sherlock Holmes*¹

* Professor of Law, New York Law School. I wish to thank Professor Natalie Zemon Davis for the opportunity to present my ideas on legal storytelling at her colloquium on "Proof and Persuasion" at Princeton University. I benefited greatly from the insights of Professor Davis and the colloquium members. I also wish to thank Professor Steve Ellmann and members of the Clinical Theory Workshop at the New York Law School, as well as those who provided helpful comments at the 1993 annual meeting of the Law & Society Association. For their critical comments on early drafts, I am indebted to Neal Feigenson, Ruti Teitel, Robert Blecker, Michael Perlin, and Michael Sinclair. Laura Colatrella and Charles Hellman provided invaluable help at the final stage of this essay's preparation. Finally, I wish to express my gratitude to Charlie Musser for his early assistance in this project.

1. ARTHUR CONAN DOYLE, *The Red-Headed League*, in 1 *THE ANNOTATED SHERLOCK HOLMES* 418, 438 (William S. Baring-Gould ed., 1976) (1891-1892).

The matter of interest seems to be the configuration formed by chance events in the moment of observation, and not at all the hypothetical reasons that seemingly account for the coincidence.

C.G. Jung, Foreword to *The I Ching*²

I. INTRODUCTION: LEGAL REALITIES, LEGAL FICTIONS

We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion.

Lord Raymond³

People prefer stories neat. Recognizable characters, familiar motives, and recurring scenarios of conflict and resolution are typical elements of our workaday narrative world. Legal narratives are no different.⁴ And trial lawyers, especially prosecutors and defense attorneys, are only too glad to indulge a preferred image or storyline if it will help win a case.

The trouble with having one's stories neat, however, is that they tend to leave things out—the things that make a story messy, hard to keep in mind. Of course, such infelicitous details can be dealt with. That's what recurring storylines, familiar genres and plots, and typical characters, conflicts and resolutions are for.⁵ They keep the mess out. It simply won't do to be telling a

2. C.J. Jung, *Foreword to THE I CHING* i, xxiii (Richard Wilhelm trans., 1961).

3. *Scott v. Shepherd*, 96 Eng. Rep. 525 (1773), *reprinted in* RICHARD EPSTEIN, *CASES AND MATERIALS ON TORTS* 76 (5th ed. 1990) (quoting Lord Raymond).

4. *See, e.g.*, MICHAEL E. TIGAR, *EXAMINING WITNESSES* 5 (1993) ("People, including judges and jurors, understand and restate events in terms of stories. They take the available evidence and weave it into a coherent whole. If pieces are missing, they will fill in the gaps based on intuition, probability, or prejudice. . . ."); ALBERT J. MOORE, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 *UCLA L. REV.* 273, 277 (1989) ("In an actual case there will be many potential frames of reference which could be recalled by jurors from their schematic databases and contribute to assessments of similarity. However . . . cognitive biases and limitations cause jurors to filter out many of these potential frames of reference."). *See generally* REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* 22-23 (1983) (describing the hypothesis that jurors impose a narrative structure on trial information based on case-specific facts, knowledge of similar events, and generic expectations provided by traditional storylines.); ANTHONY G. AMSTERDAM & RANDY HERTZ, *An Analysis of Closing Arguments to a Jury*, 37 *N.Y. L. SCH. L. REV.* 55 (1992) (examining the impact of metaphors on jurors' responses to closing arguments).

5. For example, according to Nisbett and Ross:

Few, if any, stimuli are approached for the first time by the adult. Instead, they are processed through preexisting systems of schematized and abstracted knowledge—beliefs, theories, propositions, and schemas. These knowledge structures label and categorize objects and events quickly and, for the most part, accurately. They also define a set of expectations about objects and events and suggest appropriate responses to them. A price is paid for this mental economy, however. The knowledge structures themselves are not infallible guides to the nature of physical or social reality.

RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 7 (1980); *see also* JEROME BRUNER, *ACTS OF MEANING* 20-22 (1990); ROGER C. SCHANK & ROBERT P. ABELSON, *SCRIPTS, PLANS, GOALS AND UNDERSTANDING: AN INQUIRY INTO HUMAN KNOWLEDGE STRUCTURES* 36-38 (1977). *See generally* HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* 299-327 (1983) (discussing the socialization of human intelligences through symbols); GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 5-7 (1987) (describing categorization as the primary way people make sense of their experiences); RICHARD K. SHERWIN, *Lawyering Theory: An Overview—What We Talk About When We*

story and have it trail off, or break up, or have another story poke its nose in. When you tell a story, you make a choice. That's the story you're telling. It could have been otherwise, but it isn't. The story told, in order to be told, represses other possibilities.

Since stories are supposed to make sense, and since the sense they make is supposed to be believable, it helps if the recounted events, actions, characters, and backgrounds involved seem necessary. If it were otherwise, if it seemed that other stories could just as easily be told, perhaps with equal truth (or incredibility), who'd want to accept the offered version as true? When making meaning happen, it helps to suppress chance and multiplicity. That, at least, is the lesson of narrative necessity.

This essay is about the murder of a Dallas police officer named Robert Wood and the different kinds of stories that were subsequently told about that crime. First there was the story told at trial, which led to the conviction of Randall Dale Adams and his sentence of death by the electric chair.⁶ Then there was the story told by filmmaker Errol Morris in *The Thin Blue Line*.⁷ Morris' story made so many people disbelieve the trial story that the courts eventually reexamined the case. That reexamination led to Randall Adams' release from prison. Adams had served twelve years inside, a good part of it on death row. Morris' film was credited as the catalyst that righted a wrong and set the Dallas criminal justice system straight.⁸

How did these different stories achieve what they achieved? By what craft? And what are we to think when a legal reality, freedom for a supposed cop killer, follows hard upon the heels of a cinematic "docudrama"? It is this mingling of forms, art on the one hand, legal reality on the other, this shifting back and forth between ways of making meaning in narrative and the ways people see and make judgments about reality, that drives this inquiry.

In this article, I explore how it happens that law's demand for truth and justice can clash with the modern mind's demand for closure and certainty. When truth defies certainty and becomes complex, justice requires difficult decisions on the basis of that doubt. The struggle between shifting cognitive needs and legal duty is commonplace, and without a way to question how a given narrative shapes and informs our desire for certain and tidy justice, that desire, and competing ones, cannot be adequately understood. As a result, the kind of justice operating in a particular case at a given cultural juncture may remain confused or hidden from view. The emergence in our time of a postmodern narrative of justice, one that is spontaneous, contingent, and irre-

Talk About Law, 37 N.Y. L. SCH. L. REV. 9, 18 & n.23 (1992) (explaining how a narrative approach may be developed to tap into various cognitive models).

6. See discussion in Part II *infra*.

7. *THE THIN BLUE LINE* (Third Floor Prods. 1988) (transcr.) [hereinafter TRANSCRIPT].

8. Philip Gourevitch, *Interviewing the Universe*, N.Y. TIMES, Aug. 9, 1992 (Magazine), at 18 (identifying Errol Morris as the man "whose film 'The Thin Blue Line' saved a man from death row"). Movie critic Clarke Taylor opened his review with this hook: "Will a new movie succeed in getting convicted murderer Randall Dale Adams freed from prison? Director Errol Morris and Miramax, the distributor of 'The Thin Blue Line,' frankly acknowledge that they hope the answer is yes." Clarke Taylor, *Thin Blue Line: Advocate for a Killer*, L.A. TIMES, Aug. 28, 1988, at 28.

pressibly messy, provides a case in point. The challenge is to tap the salient cultural storylines, both familiar and newly emerging, that give meaning and coherence to uncertainty, so that when a case demands, we can feel sure enough in our reasonable doubt.

In some of what follows, I shall be arguing uphill, in favor of complexity, insinuating ambivalence about the kind of order legal stories typically create. I shall approach the disorder that lurks beyond the bounds of these well-told tales. Perhaps more unforgivable, I shall question whether the specific tale of Randall Dale Adams might be less tidy than we'd prefer. What if the modernist penchant for dichotomies that produces starkly polar choices like guilt/innocence, frameup/frameup undone, injustice/injustice corrected—the very mindset that gives us such satisfaction in seeing justice's scales finally balanced—were part of the problem? I want to suggest that the simplicity of these polarities, and the calm they induce, are at least partly responsible for making us leave things out. The messy things. The things that leave a sense of disorder and lack of control, the unsettling things we refuse to see or discuss. These are the things that make it hard to make legal decisions, decisions that can have irrevocable effects upon the body and soul of a person: prison, prison life, perhaps even death. No less grave, they are decisions that could lead to erroneous acquittal and the recurrence of violence by the liberated defendant. It is precisely because the stakes are so high that I want to examine how we might guard against facile resolutions without getting mired in indecision and meaninglessness. In particular, I want to explore a form of postmodern legal storytelling that can serve a sustainable sense of justice as well as order. But to follow this path we must learn to question our own complicity in making truth appear overly neat and coherent. Thus, rather than share in the triumph of having seen the system set straight, we must ask ourselves whether we are not accomplices in a form of realitymaking that let the Adams frameup occur in the first place and that could let similar frameups occur in the future.

Uncontrollable disorder within the criminal justice system is an admittedly disturbing topic, and I don't enjoy dwelling on it any more than you do. But surely it is a good thing to increase our awareness of how we deal with the omnipresent possibility of disorder, as well as the possibility that conflicting legal stories may simultaneously be true.⁹ This sort of knowledge helps us

9. See, e.g., JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE: TWENTIETH CENTURY ETHNOGRAPHY, LITERATURE, AND ART* 277-346 (1988) (analyzing in the context of a land claim filed by the Mashpee Native-American group the different meanings attributed to the terms "tribe" and "community" by the Mashpee, local residents, ethnographic experts, and Clifford himself); Kim Lane Scheppele, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y. L. SCH. L. REV. 123 (1992) (analyzing several common sense notions about truth and lying that operated in the Anita Hill/Clarence Thomas hearings and that arise in cases involving delayed reports by sexual harassment victims).

Also notable in this context is a disturbing essay by Anton Kaes, *Holocaust and the End of History: Postmodern Historiography in Cinema*, in *PROBING THE LIMITS OF REPRESENTATION: NAZISM AND THE FINAL SOLUTION* 206 (Saul Friedlander ed., 1992). Discussing Hans Jürgen Syberberg's film, *Hitler—A Film from Germany* (1978), Kaes analyzes Syberberg's multiple accounts of Hitler (Romantic, aestheticized, dehistoricized) in connection with the rise of Nazism. The danger of these accounts, accord-

guard against deception by others, and by ourselves,¹⁰ and better enables us to distinguish credible from incredible narratives. In criminal law, where lives hang in the balance of a tale, this ability is critical.

Ironically, my effort to pursue the topics of order and disorder in legal storytelling risks the same fate as the film I set out to describe. *The Thin Blue Line* has become a cultural symbol. It is, after all, Morris' story that helped free a man from the corrupt grip of an ugly frameup. But Morris' film is not simply an exposé of injustice. It also confronts the complexity of seeking the truth and the multiplicity of its forms. Like the film, whatever is simple in these pages, or what can be made by popular preference to seem so, will most likely eclipse what is not. Each of us is well equipped to deny complexity, particularly when it threatens to destabilize what we want or need to believe about ourselves, others, and the world around us.

But to beat that temptation I had better get on with my story and tell you more about the event that spawned so many stories, including this one, which is also a story about legal storytelling in criminal cases.

II. THE EVENT: MURDER IN DALLAS

We still haven't reached any consensus on the specifics of the crime: the number of gunmen, the number of shots . . . the list goes on and on. Beyond this confusion of data, people have developed a sense that history has been secretly manipulated I think we've developed a much more deeply unsettled feeling about our grip on reality.

Don DeLillo¹¹

I begin this way, but it could be otherwise:¹²

On Thanksgiving night, November 25, 1976, Randall Dale Adams and his brother arrived in Dallas, Texas. The two were heading to California from their home in Ohio. Meantime, they took up residence in a Dallas motel. The day after their arrival, Adams landed a job at an abandoned airport near Fort Worth.

On that same day, Friday, November 26, 1976, a month after his sixteenth birthday, David Harris decided to run away from home. That afternoon, he broke into a neighbor's home and stole some money. Later that evening, Harris also stole his neighbor's 1972 blue Mercury Comet. He packed some clothes, a 12-gauge shotgun, and his father's .22-caliber nine-shot pistol. Harris put the

ing to Kaes, lies in their apocalyptic longing, a theme that insulates Syberberg's film from the contamination of (and perhaps the responsibility for) the historical event of Nazism. *Id.* at 222.

10. See RUTH MORSE, *TRUTH AND CONVENTION IN THE MIDDLE AGES: RHETORIC, REPRESENTATION AND REALITY* 56-57 (1991) ("The only defense against the manipulation of the listener's emotions was an alert ear trained to discriminate not only good from bad arguments, but successful from unsuccessful ploys. . . . [W]e may pity the speaker, or be seduced by her, but we are meant to think and to resist.").

11. Anthony DeCurtis, "An Outsider in This Society": *An Interview With Don DeLillo*, *S. ATLANTIC Q.* 281, 286 (1990).

12. I have assembled the following "facts" from a number of sources: *RANDALL ADAMS, ADAMS v. TEXAS* (1990); *TRANSCRIPT*, *supra* note 7; local newspaper articles about the case; and the entire corpus of legal papers, the trial transcript, and official statements made by Adams, Harris, and Police Officer Turko. See notes 20-28 & 34 *infra*.

fully loaded pistol and a plastic box of .22-caliber ammunition underneath the driver's seat of the Comet and then left his hometown of Vidor, Texas.

Harris drove late into the night, finally stopping in the northern outskirts of Houston where, parked in a department store lot, he slept. When he awoke, it was daylight. Harris proceeded to Dallas, arriving sometime Saturday afternoon. It was his first time in the city.

After purchasing brake fluid and gasoline, Harris picked up a hitchhiker. The twenty-eight-year-old man who entered Harris' car, wearing blue jeans and a dark jacket and sporting bushy brown hair and a drooping mustache, was Randall Dale Adams. Adams, whose car had run out of gas, thanked Harris for the lift.

The boy and the man proceeded to find a gas station and returned to fill Adams' car. Adams then drove his car, with Harris following, to the Dallas motel where Adams and his brother were staying.

Adams and Harris went in. Adams' brother was watching TV. Adams changed his shirt and left with Harris in Harris' car. Adams brought some stereo equipment and three 8-track tapes. Harris had some electrician's tools in the car. They drove to several pawn shops in an effort to get money for the things they had with them. Along the way, Harris showed Adams the loaded handgun under the driver's seat. They did not pawn the gun; either Harris told Adams that it was not for sale¹³ or he asked Adams to pawn it, and Adams refused.¹⁴

With the pawn money in hand, Adams and Harris hung out together for the rest of the day and evening. They drove to the airport where Adams worked, smoked some marijuana, drank some beer. They went back to town, to the Bronco Bowl, to have some lunch, some beer, and perhaps to play some pool. After, they went to a store to buy more beer, wandered around a shopping mall, drank the beer. Adams asked Harris if he would like to see a film. They went to a drive-in. *The Swinging Cheerleaders* was playing—soft porn. Maybe Harris chose the film, or maybe Adams did. They drank beer, smoked more pot. The next film, *The Student Body*, came on, and they watched that one too.

Adams wanted to go. It was close to midnight now, or maybe it was only 10:00 p.m. They left the drive-in.

Then, according to Harris:

Adams drives the Comet down Inwood Road. Soon, a police car, lights flashing, appears behind them. Adams pulls over, tells Harris to get down. A policeman approaches the driver. Adams rolls down the window, reaches beneath the seat for the pistol and, as the officer comes up to the car, fires five or six shots. Adams and Harris drive off, returning to the motel. Adams asks Harris if he needs a place to sleep. Harris says he does. Adams goes in to get the okay from his brother. Once Adams is inside, Harris slides behind the wheel and drives off.

According to Adams, it happened like this:

13. See TRANSCRIPT, *supra* note 7, at 67 (statement of David Harris).

14. ADAMS, *supra* note 12, at 22.

They leave the drive-in and head back to the motel. Adams picks up some cigarettes and a newspaper at the convenience store next to the motel. Maybe Harris asks Adams if he can stay at the motel with him. Maybe Adams says no.¹⁵ Adams says he will see if he can get Harris a job at the place where he works. They arrange to meet on Monday morning. Adams goes in. His brother is asleep with the TV on. It's the end of *The Carol Burnett Show*.

Later, while in police custody, Adams will say in an illegally obtained statement that he drove that evening onto Inwood Road, the site of the murder. Adams will say in the statement that he remembers nothing more until he turned left onto Fort Worth Avenue.

Years later, while on death row for a different murder, David Harris will tell an interviewer that he was alone in the car when Officer Wood was shot and that he held the gun when the five bullets were fired.

III. THE TRIAL: CONVICTION AND APPEAL

Many techniques of the effective advocate . . . involve the undermining of rational argument rather than its promotion: they include techniques for keeping relevant information out, for trapping or confusing witnesses, for "laundering" the facts, for diverting attention or interrupting the flow of argument, and for exploiting means of non-rational persuasion.

William Twining¹⁶

Initially, the trial sets up a swearing contest: David Harris' word against Randall Dale Adams'. Each accuses the other of the shooting. The Adams defense is fairly confident. Adams has no prior criminal record, and there appear to be no eyewitnesses to the shooting. The slain police officer's partner cannot describe the lone occupant of the car that they stopped that night for driving without headlights. The sole witness against Adams is David Harris, who at sixteen already has a criminal record that includes three burglaries. After returning to Vidor, Harris was also involved in yet another series of crimes, including burglary and armed robbery. And it was Harris himself who led the police to the murder weapon, and to his own arrest.

After the shooting of Officer Wood, Harris had given the pistol to his friend Alvin "Hooty" Nelson. Nelson and his brother Frank say Harris claimed at the time to have shot the Dallas officer, but they figured he was just joking around.¹⁷ Alvin and Frank Nelson's father subsequently found the gun in the house and dumped it in a swamp after his sons told him it had been used to shoot a policeman.

In the meantime, Harris' father reported his gun stolen. Someone else reported to police that David Harris had been bragging about killing a cop in

15. Adams recounts this part of the exchange in his book, *id.* at 25, but his description of these events in the film omits it. See TRANSCRIPT, *supra* note 7, at 13-14.

16. WILLIAM TWINING, RETHINKING EVIDENCE: EXPLORATORY ESSAYS 22 (1990).

17. Dennis Johnson and Randy Hayes, classmates of Harris at Vidor High School, also heard Harris' claim that he killed a police officer. They testified for the defense. See ADAMS, *supra* note 12, at 88.

Dallas. The Vidor police visited Harris, and he told them that he gave the gun to the Nelsons. The police then convinced Charles Nelson to take them to the swamp where he dumped the gun.

With this information in hand, the defense feels it has a decent chance of creating a reasonable doubt about Adams' guilt in the minds of the jurors. It is a matter of discrediting Harris and the three polygraph tests reportedly showing that Adams lied when he denied shooting the officer and denied that Harris told the truth when he claimed Adams was responsible. But then the trial took a different turn.

Contrary to defense requests, the trial judge refuses to admit evidence of Harris' prior criminal convictions or of the postshooting offenses then pending in the courts.¹⁸ The Vidor sheriff's office claims it cannot locate any of the Nelsons, so the defense subpoena for their testimony remains unexecuted. Then the prosecution introduces three surprise rebuttal witnesses. Suddenly, there they are in the courtroom, ready to be sworn in.

Each of the new witnesses claims to have been driving by the scene of the murder just as the shooting took place. Each identifies Adams in court as the man who shot Officer Wood. The defense seeks to discredit the alleged eye-witnesses on cross-examination. But Adams' attorneys have nothing with which to impeach their testimony—the District Attorney has unlawfully withheld the witnesses' prior written statements.¹⁹ It is not until the recess before closing arguments that one statement is finally turned over and another is read to the defense over the telephone. According to the written statement, one eye-witness had described the gunman to police as a Mexican or a light-skinned black man. The only possible gunmen, however, were Harris and Adams, both white. The statement received by telephone casts doubt on another eyewitness. Yet when Adams' attorney seeks to confront these two witnesses with their prior inconsistent statements,²⁰ the trial judge accepts the prosecutor's argument that the statements are consistent and refuses to admit them for impeachment.²¹

The legally admissible evidence is now in: The attorneys' closing arguments end. The jurors leave to deliberate. When they return, they read their verdict: Randall Dale Adams is guilty of capital murder.

The state requests the death sentence. The jury now hears from two psychiatrists, Dr. John Holbrook and Dr. James Grigson, both of whom interviewed

18. See *Adams v. State*, 577 S.W.2d 717, 720-21 (Tex. Crim. App. 1979) (en banc) (upholding the trial court's exclusion of Harris' prior criminal record).

19. See *Zanders v. State*, 480 S.W.2d 708 (Tex. Crim. App. 1972) (holding that it is reversible error to deny defendant the opportunity to inspect prior written statements of a state witness and have such statements present in the appellate record for purposes of showing injury); *Gaskin v. State*, 172 Tex. Crim. 7, 353 S.W.2d 467 (Tex. Crim. App. 1961) (holding that when a timely request is made, defendant is entitled to use prior written statements by a state witness for cross-examination); see also *Brady v. Maryland*, 373 U.S. 83 (1963) (finding that prosecutorial suppression of evidence favorable to an accused, after a request for such evidence has been made, violates the due process rights of a criminal defendant); *United States v. Bagley*, 473 U.S. 667 (1985) (defining "materiality" of state-suppressed *Brady* material in terms of whether disclosure would have altered the outcome of the trial).

20. Record at 1162-68, *State v. Adams*, No. F-77-1286-1 (Tex. Crim. App. 1979).

21. *Id.*

Adams in prison. Dr. Grigson, known as "Dr. Death" for his repeat performances in capital sentencing cases, gives his standard testimony: Randall Dale Adams is a killer who, if released into the community, will almost certainly kill again. In a similar vein, Dr. Holbrook tells the jury that Adams is a sociopath, a predator without conscience. The jury has all it needs. Randall Dale Adams is sentenced to death for the murder of Dallas Police Officer Robert Wood.

Several months after sentencing, the defense team files a motion for retrial. They have uncovered evidence indicating that the three alleged eyewitnesses committed perjury in court. But the information comes too late; as a matter of state law, this kind of impeachment evidence must be presented within thirty days after sentencing to warrant a new trial.²² Adams waits on death row as his appeals continue, moving first through the state judicial system, where he loses,²³ then through the federal system.²⁴

On June 25, 1980, three and a half years after Adams' arrest in Dallas, the United States Supreme Court declares unconstitutional the Texas death penalty statute under which Adams was sentenced.²⁵ The state now has the option of trying Adams for capital murder a second time under a corrected sentencing procedure.²⁶ Instead, the Dallas District Attorney, the trial judge who presided over Adams' trial, and the Dallas Sheriff petition the Governor for a commutation of Adams' sentence to life imprisonment.²⁷ On July 11, 1980, the Governor complies.²⁸ And that proclamation of commutation removes the only legal taint remaining in Adams' case. All the irregularities and potential due process violations at trial have been dismissed. Adams' legal remedies have run out.

22. See TEX. CODE CRIM. PROC. ANN. art. 31(a)(1) (West Supp. 1994); see also *Herrera v. Collins*, 113 S. Ct. 853, 860 (1993) (holding that a claim of factual innocence based on newly discovered evidence is not grounds for reversal on collateral review).

23. *Adams*, 577 S.W.2d at 717.

24. *Adams v. Texas*, 448 U.S. 38 (1980) (reversing the imposition of the death penalty and remanding to the Texas Court of Criminal Appeals).

25. *Id.* at 49-50. The Supreme Court's decision surprised defense attorneys working on the *Adams* case. Interview with Joel Berger, Attorney for Adams' Federal Appeal, in New York, N.Y. (Feb. 12, 1993). It now appears that the *Adams* appeal affected the fate of numerous other prisoners on death row—each of whom had been sentenced under similarly flawed, and thus unconstitutional, state sentencing statutes. *Id.*

26. The sentencing procedure declared unconstitutional had required a prospective juror to state "under oath that the mandatory penalty of death or imprisonment for life [would] not affect his deliberations." TEX. PENAL CODE § 12.31(b) (Vernon 1974). The statute was amended to eliminate this requirement. TEX. PENAL CODE § 12.31(b) (Vernon Supp. 1994).

27. Letter from Henry Wade, Criminal District Attorney, Dallas County, Don Metcalfe, Judge, Criminal District No. 2 & Carl Thomas, Sheriff, Dallas County, to Connie Jackson, Chairman, Board of Pardons and Paroles (July 9, 1980) (on file with the *Stanford Law Review*). The Board of Pardons and Paroles proceeded to recommend commutation to the governor. Letter from Connie L. Jackson, Chairman, Ruben M. Torres, Vice Chairman & George C. Killinger, Member, Board of Pardons and Paroles, to Bill Clements, Governor of Texas (July 11, 1980) (on file with the *Stanford Law Review*).

This decision resulted from the bifurcated structure of the trial. In the first phase of a capital trial, the jury determines guilt or innocence. If there is a conviction, the jury must determine the sentence to impose in a second phase. The Supreme Court decision only addressed the sentencing portion of the trial and did not affect the guilty verdict.

28. Proclamation by the Governor of the State of Texas, No. 80-6242 (July 11, 1980) (on file with the *Stanford Law Review*).

And there the story would end, but for a strange and serendipitous event. In the course of making a film about the infamous "Dr. Death," Errol Morris hears the story of an inmate named Randall Dale Adams.²⁹ Intrigued, he decides to change the focus of his film. The film Morris makes and releases narrates the frameup of Randall Adams. It is this story that ignites the public's attention, but the film also takes up a larger theme. According to Morris, the film is also about the contingency of truth and the manifold ways in which truth may be constructed.³⁰ It is to this process of meaningmaking that we now turn.

IV. FRAMING THE FRAMEUP—THE DETECTION AND THE MYSTERY: CONVENTIONS AND COMPLICITY

[The detective] reassures us of an ultimate rationality, "a benevolent and knowable universe," "a world that can be interpreted by human reason, embodied in the superior intellect of the detective." . . .

. . . The detective's skill is precisely the ability to code "seemingly unrelated data into a coherent system of signs, a text identifying the malefactor." . . .

. . . [T]o the degree the crime novel puts the signification process into doubt or even exploits the gap between socially accepted signification and ultimate reality, it subverts the reassurances of the detective novel.

Tony Hilfer³¹

The prosecutors at the trial of Randall Dale Adams told a convincing story about a hitchhiker, a drifter up to no good, who smoked marijuana and drank no mean amount of beer with a sixteen-year-old kid, took the kid to a soft-porn drive-in and then to his motel. They described a guy whose luck ran out late that night when he happened to be seen by five local Texans, including the young David Harris and the slain officer's partner,³² each of whom either saw Adams shoot Officer Wood or could place him at the scene of the murder. Adams denied his guilt, but there were no witnesses to support his claims at trial.

Now, according to the popular media, and in the minds of many who saw it, *The Thin Blue Line* correctly resolved a murder case.³³ Perhaps it did, and perhaps it didn't. From the point of view of the legal system, of course, it did

29. See Lawrence Van Gelder, *Movie Is Its Own Murder Probe*, CHI. TRIB., Sept. 1, 1988, at 11J; Press Release by American Playhouse Television, *Errol Morris, 'The Thin Blue Line' Filmmaker, Says Movie has Taken Control of his Life* (1988).

30. Peter Bates, *Truth Not Guaranteed: An Interview with Errol Morris*, 17 CINEASTE 16, 17 (1989) ("The *Thin Blue Line* is a story about how easy it is to deceive ourselves into thinking that we have some privileged access to the truth" (quoting Morris)); see also Gourevitch, *supra* note 8, at 53 (citing Morris' characterization of another of his "miscarriage of justice" films as concerning "how we piece together a picture of the world").

31. TONY HILFER, *THE CRIME NOVEL: A DEVIANT GENRE* 7 (1990) (footnotes omitted).

32. Officer Turko, the partner, told the jury that from where she was standing at the rear of the car, she thought that the driver had brown bushy hair like Adams'. TRANSCRIPT, *supra* note 7, at 26 (paraphrasing Randall Adams' account of Turko's statements). That testimony differed significantly from her statement immediately following the shooting but before her "internal review" process with the Dallas police force. *Id.*

33. See note 8 *supra* and accompanying text.

just that. The film triggered an official inquiry into the case that culminated in Adams' release from prison³⁴—an innocent man scapegoated by a corrupt D.A. and a biased judge. But I believe there is more to it than that. The film tells us a good deal about how people—lawyers, jurors, judges, witnesses, police officers, criminal defendants—typically make sense of guilt and innocence in a criminal case.³⁵ But it also presents a way of making meaning that we tend to reject. In fact, I believe the film elucidates my contention that our habits of making meaning are so entrenched when it comes to matters like determining guilt or innocence that to oppose them becomes a highly subversive act—assuming that we allow such opposition to register at all.

Before proceeding to that argument, however, a word is due on the different ways in which people “make meaning” in the legal culture.

A. *The Construction of Meaning*

According to recent studies in cognitive and cultural psychology and anthropology, making sense of things involves applying a good deal of everyday cultural knowledge.³⁶ The way we organize experience—how we interpret what happens around us and arrive at judgments concerning truth and justice—depends on many components of such knowledge. The components of cultural knowledge are the products of numerous influences, including our everyday interactions with family members, neighbors, merchants, colleagues, and professionals. Cultural knowledge also derives from a host of other common experiences, ranging from films, television, theater, and literature, to gossip,

34. In 1988, the year of its release, *The Thin Blue Line* generated sufficient public interest to pressure Dallas authorities into investigating the need for a new trial. After a hearing on the matter, Judge Larry W. Baraka, who succeeded District Judge Don Metcalfe in 1984, recommended granting Adams' motion for a new trial. *State v. Adams*, No. W-77-1286-I (Nov. 30, 1988) (ruling on motion). Following this recommendation, the Court of Criminal Appeals vacated Adams' conviction and ordered a new trial. *Ex parte Adams*, 768 S.W.2d 281 (Tex. Crim. App. 1989). The court found that: (1) the state illegally suppressed witness Emily Miller's prior inconsistent statement, (2) the prosecutor failed to correct Mrs. Miller's perjured testimony that she had identified Adams in a lineup, and (3) the improper police coaching of Miller and failure to disclose problems with her testimony deprived Adams of a fair trial. *Id.* at 291-92.

Following the reversal of his conviction, Adams said: “Without the facts that came from the movie, no, I wouldn't be here in this courtroom today.” David Denby, *The Wrong Man?*, N.Y. MAG., Sept. 5, 1988, at 62, 70 (quoting Adams). Adams' attorney, Randy Schaffer, echoed that sentiment: “No, if Errol had not decided on his own that this story was a story worth telling, Randall Adams would have been buried forever.” *Id.* (quoting Schaffer).

35. Errol Morris has said: “The scary part is that our desire to seek the truth is a lot weaker than our desire to tell ourselves what we want to hear, to perpetuate our own beliefs.” Bates, *supra* note 30, at 17. Elsewhere, reflecting on what he calls “truth by convenience” and “the enormous gulf between belief and reality,” Morris recalls the scene from the film “where a police officer is heard saying about Harris, ‘I didn't want him to tell us what he thought; I wanted him to tell us what we knew.’” Alvin Klein, *Film Dissects Murder and Justice*, N.Y. TIMES, Oct. 23, 1988, at 14 (quoting Morris).

36. See BRUNER, *supra* note 5, at 11-14; Sherwin, *supra* note 5, at 18, 34-36 & n.69; see also RICHARD A. SHWEDER, *THINKING THROUGH CULTURES* 8 (1991) (noting that “traditions not only obscure but also illuminate”); cf. HAYDEN WHITE, *TROPICS OF DISCOURSE: ESSAYS IN CULTURAL CRITICISM* 1 (1978) (“[W]e never say precisely what we wish to say or mean precisely what we say. Our discourse always tends to slip away from our data towards the structures of consciousness with which we are trying to grasp them . . .”).

newspapers, and other written and "paratextual"³⁷ sources. These sources of knowledge help construct our understanding of many things, including our own personal, professional, and social identity; how to behave in particular situations; and how we make sense of one another's speech and actions. In the context of the law and legal judgments, the internalized frameworks that we draw upon to organize and interpret events, experiences, and actions are necessary to the most basic acts of separating out the believable from that which is false, incredible, or simply unacceptable.

One example of such an organizing framework is the "schema." This knowledge structure facilitates understanding by generating appropriate inferences. Charles Nuckolls illustrates this process with the following two sentences: "John went to a party. The next morning he woke up with a headache."³⁸ It is common knowledge that people who go to parties often drink too much and wake up the next morning with a hangover. The point here is that this causal explanation "goes considerably beyond the information given."³⁹ The schema acts like a familiar story that we carry around in our heads asking for completion. By calling upon such schemata, we infer what should happen next.⁴⁰

A related knowledge structure that enables us to make sense of things is a "script." "Scripts represent knowledge about events that are widely known and shared, like eating in a restaurant and visiting a doctor's office. A script for such events consists, in part, of the ordered sequence of actions, its standard characters and subjects."⁴¹ So, for example, entering a restaurant triggers behavior that follows the appropriate script: being shown a table, receiving a menu, discussing the food, and ordering. A kind of script hierarchy operates here. The master script, "a visit to a restaurant," breaks down further into superordinate actions or "scenes," such as "eating" and "ordering." Each of these actions is taken for granted. It is simply "what everyone does." Indeed, someone who enters a restaurant and fails to behave "restaurant-like" is likely to cause other diners to search for a set of meanings that will explain such deviant behavior.⁴² In short, any violation of the commonly known rules governing ordinary speech and social situations demands interpretation. We must make sense of an interference with the script.

Scripts tend to organize information in a particular order or sequence. For example, one study has shown that when people were presented with popular stories with their plot sequences out of order, they would nevertheless recount

37. A "paratext" is an electronic recording produced by technologies that record the images and sounds of persons, places, and events. See Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509, 510 (1992).

38. Charles W. Nuckolls, *Culture and Causal Thinking: Diagnosis and Prediction in a South Indian Fishing Village*, 19 ETHOS 3, 4 (1991) (discussing theories of knowledge construction).

39. *Id.* at 4-5; cf. Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 528 (1991) ("A story is plausible to the extent that it corresponds to the decision maker's knowledge about what typically happens in the world and does not contradict that knowledge.")

40. Nuckolls, *supra* note 38, at 5.

41. *Id.* at 9-11 (discussing SCHANK & ABELSON, *supra* note 5, at 36-37).

42. BRUNER, *supra* note 5, at 48.

the stories with the actions shifted toward their proper sequence.⁴³ In other words, we tend to distort things in the direction of the familiar, with scripts acting as templates toward which we tailor the unfamiliar. Similarly, another study has shown that people have much more trouble determining the proper order of two actions that generally occur in sequence if the actions are presented as temporally distant.⁴⁴ This finding suggests that a temporal order is also embedded in our mental representations of events and that temporal memory, like scripts themselves, influences the way we make sense of things.⁴⁵

Other mental representations, aside from schemata and scripts, also help us organize information in such a way as to give it meaning. They include metaphors, stereotypes, narrative genres, and recurrent plot lines. These cultural artifacts enable us to construct and deploy (often without reflection) the knowledge we have about ourselves, others, and the world.⁴⁶ An understanding of these epistemological devices is crucial to an appreciation of the power of legal narrative. By studying how knowledge is organized and made operational in specific legal contexts, we can better understand how people make decisions and judgments. For example, an analysis of our common sense knowledge, by helping to discern under what circumstances a particular framework for making meaning is used, and by whom,⁴⁷ opens up to critical reflection the means people use to test, evaluate, and negotiate the explanations or accounts they have constructed.⁴⁸

43. Nuckolls, *supra* note 38, at 9 (citing Gordon H. Bower, John B. Black & Terrence J. Turner, *Scripts in Memory for Text*, 11 *COGNITIVE PSYCHOL.* 177 (1979)); *see also* Sherwin, *supra* note 5, at 18 (“[M]uch of the order we perceive is there only because we put it there.”).

44. *Id.* at 10 (citing James A. Galambos & Lance J. Ripps, *Memory for Routines*, 21 *J. VERBAL LEARNING & VERBAL BEHAV.* 260, 277 (1982)); *cf.* Nisbett & Ross, *supra* note 5, at 23-28, 43-61, 113-37 (discussing perceptual and cognitive deceptions and mistakes); Dorothy Holland & Naomi Quinn, *Cultural Cognition, in CULTURAL MODELS IN LANGUAGE AND THOUGHT* 3, 33 (Dorothy Holland & Naomi Quinn eds., 1987) (discussing “causal chainings” by which people simplify the world into predictable sequences of events).

45. *See* Nuckolls, *supra* note 38, at 9-10; *cf.* TEUN A. VAN DIJK, *PREJUDICE IN DISCOURSE* 25 (1984) (noting that when people recall a text or event, instead of simply reactivating actual representations of it, they conjure a more general model of the situation from which they will infer what has probably taken place).

46. They may also be described as heuristic processes. *See, e.g.*, John A. Robinson & Linda Hawpe, *Narrative Thinking as a Heuristic Process, in NARRATIVE PSYCHOLOGY: THE STORIED NATURE OF HUMAN CONDUCT* 111 (Theodore R. Sarbin ed., 1986).

47. *See* Jerome Bruner, *The Narrative Construction of Reality*, 18 *CRITICAL INQUIRY* 1 (1991) (discussing how we organize our experience and memory); Richard A. Shweder & Maria A. Sullivan, *Cultural Psychology: Who Needs It?*, 44 *ANN. REV. PSYCHOL.* 497, 507-17 (1993) (discussing some processes by which meanings inhere in different contexts).

48. Consider, for example, how film director Lawrence Kasdan uses latent stereotypes from popular culture. In an opening scene from his film *Grand Canyon*, a white male in a late model Lexus sedan chats on his car phone while driving through a poor neighborhood of Los Angeles. Several young black males in a new BMW pass in the other direction. They exchange glances. Minutes later the Lexus begins to lose power. The BMW passes by again, its occupants staring at the Lexus and its driver. The Lexus driver glances nervously back at the BMW. *GRAND CANYON* (Twentieth Century Fox 1992). Without having presented a single explicit image of violence, Kasdan infuses the scene with a sense of foreboding by triggering images already inside the viewer's mind. In other words, Kasdan manages to tell part of his story, and to provoke the participation of a significant number of viewers, by drawing upon latent stereotypical imagery of contemporary urban violence.

These unspoken inferences represent bits of sociocultural knowledge within the common stock of things people generally know, or think they know, about themselves and the world. One might say that

B. *A Tale of Two Tales*

I propose to test the potential helpfulness of this cognitive and cultural approach to meaningmaking within the legal system by using it in a detailed analysis of both the Adams case and Morris' film about it. This analysis will parallel the two contemporaneous but opposing plot lines that make up Morris' film: the story as told in a classically linear fashion (beginning, development, conclusion) and the provocative yet unresolved nonlinear narrative.

First I will examine the operation of knowledge constructs within the context of a classic linear storyline. This narrative style is perhaps best exemplified by the familiar genre of the detective story wherein the detective-hero, by identifying and combining significant clues, resolves a disturbing mystery.⁴⁹ In Morris' film, the audience as detective/juror traces the clues that point to a sinister plot by state officials to frame Randall Dale Adams. The clues fit neatly into a story that ends when the mystery of the frameup is revealed and solved. Once revealed, the plot is obvious and familiar: Lies, corruption, and abuse of power made Adams a scapegoat for a crime that he did not commit.

Next I will examine how knowledge constructs operate within the context of a less familiar, nonlinear (arguably postmodern) form of storytelling. Rather than offering closure, this form leaves a disquieting sense of inadequate resolution and residual mystery.⁵⁰ Was Harris the gunman? If he was, is that all there is to the story? What about the loose ends? Where was Adams at the time of the murder? What were the two of them up to that day? Does it take a serendipitous interview with an artful filmmaker to save a prisoner from a life in jail or a death by execution? What if the plotting of chance or fate⁵¹ actually played a larger part in the criminal justice system? Surely such uncontrollability of events and human actions dissipates, in rather short order, the complacent

Kasdan stimulates his viewer to supply the suppressed premise (violence) for the visual enthymeme that the scene creates. See ARISTOTLE, ON RHETORIC 31-33 (George A. Kennedy trans., 1991) (describing a similar inferential process triggered by what Aristotle calls the "enthymeme," a syllogism with a suppressed premise); JEROME BRUNER, ACTUAL MINDS, POSSIBLE WORLDS 7 (1986) ("[T]he story is not by itself the model. It is, so to speak, an instantiation of models we carry in our own minds."); cf. Amsterdam & Hertz, *supra* note 4, at 86 (describing defense counsel's strategic transformation of juror factfinding into "a Drama with the jury as protagonist").

49. See HILFER, *supra* note 31, at 2-4 ("The function of the detective hero is to guarantee the reader's absolution from guilt. This is basic to the genre's form of wish fulfillment What matters is the detective's revelation, not the murderer's punishment, for in this myth of rationality truth takes priority over justice. (footnote omitted)); cf. WALTER J. ONG, ORALITY AND LITERACY 149 (1982) (describing the classic detective story's relentless ascension to an unbearable tension, followed by climactic recognition and release as details fall into place and the mystery is solved).

50. In this sense it emulates the crime novel rather than the classically linear detective story. Again, consider Hilfer: "[T]he central and defining feature of the crime novel is that in it self and world, guilt and innocence are problematic. The world of the crime novel is constituted by what is problematic in it." HILFER, *supra* note 31, at 2. A crime novel maneuvers its reader into various forms of complicity, managing to subvert the reassurances of the detective novel by "put[ting] the signification process into doubt or even exploit[ing] the gap between socially accepted signification and ultimate reality." *Id.* at 3, 7.

51. See WILLIAM CHASE GREENE, MOIRA: FATE, GOOD AND EVIL IN GREEK THOUGHT 8 (1944) (distinguishing fate, the due portion or moral share assigned to a person, from chance, the unforeseeable forces that affect life but have little or no moral quality).

“all’s right with the world because truth and justice will out in the end” attitude that the linear story would have us believe.⁵²

In short, there are two tales here, and one subverts the other. When framed as a causal-linear documentary and detective story, Morris’ film employs conventional wisdom (including schemata, scripts, and stereotypes) about lying, madness, official corruption, local prejudice, and psychological trauma to take us along a straight path of meaning: from mystery (why is this man in jail?) to resolution (because he was framed!). Within this frame, we know that human nature and the world operate according to causal-linear principles.⁵³ Things make sense, and judgments are not difficult. When the film is framed as a nonlinear composite of symbols, however, we find ourselves in a universe of fate and fortune, circularity and irresolution. The nonlinear story about the murder of Officer Wood suggests that our conventional knowledge about causation and meaning may not be sufficient. It suggests that while the conventional mystery genre often shapes and informs the way lawyers tell their clients’ tales, it may not do justice to what is going on in the world. As distasteful as it may be, it suggests that it may not be possible for us to wholly account for truth and justice within a conventional, causally sequenced storyline. Perhaps the mythic narratives of ancient Western (and even some current non-Western) cultures, most notably the classical culture of Sophocles and Aeschylus, with their vast interjaculating array of nonhuman forces, are also (perhaps have always been) shaping our world. If so, coming to grips with disruptive forces like deceit, corruption, and pathology is not enough—not enough if chance and necessity must also be reckoned with when assessing individual accountability.

But if more than one story about Officer Wood’s murder is believable, which one do we choose as a matter of law? Surely the legal system, which enforces official decisions about truth and justice with the power of the state, can be expected to resist judgments that take root in shifting standards of style and taste. Little wonder, then, that after vacillating between linear resolution and nonlinear complexity, so many will succumb to the pull of the familiar, the

52. One of only a handful of film reviewers who discerned the complex structure of Morris’ film commented:

“The Thin Blue Line” is more than just a sterling investigative documentary about a miscarriage of justice; in expanding into a uniquely perceptive film about the limits and distortions of perception, “The Thin Blue Line” is one of film’s few works of epistemological reach. It’s not only a brilliant detective story, but an even more brilliant evocation of the ultimate tension between chaos and order tugging at every atom in the universe.

Jay Carr, *More than a riveting whodunit*, BOSTON GLOBE, Sept. 22, 1988, at 81, 83. Janet Maslin also remarked on the film’s complexity: “[E]ach interview invariably creates more questions than it answers. And the more maps, diagrams and key details the director assembles, the more frighteningly the truth slips away.” Janet Maslin, *Anatomy of a Murder: A Real-Life Whodunit*, N.Y. TIMES, Aug. 26, 1988, at C6. Errol Morris’ comments about the film support this interpretation: “On one level, it’s the story of a miscarriage of justice. On another level—at least I like to think of it as such—it’s a story about self-delusion and fantasy.” David Sterritt, *Film focuses on possible mishandling of criminal case*, CHRISTIAN SCI. MONITOR, Aug. 26, 1988, at 21 (quoting Morris). Elsewhere, Morris hits the note more severely: “Truth isn’t guaranteed by style or expression. It isn’t guaranteed by anything.” Bates, *supra* note 30, at 17.

53. See, e.g., Denby, *supra* note 34, at 62 (“In Morris’ film the truth is knowable.”).

path of least dissonance, with a preferred sense of resolute justice, or redress, or right outcome. For here we witness the actualization of deep modern beliefs about what justice is and how it gets done in the world. Yet, at the same time, these beliefs operate so deeply that the way they shape our understanding and our practical judgments remains largely hidden from view. Perhaps this is so because we deal here with things that could not be otherwise.⁵⁴ The beliefs at stake may be so necessary to a particular culture's or community's collective sense of order and coherence that, like gravity or causality, once they are questioned the universe seems irrevocably disturbed.⁵⁵ Perhaps that is why we do not let them be questioned.⁵⁶ In law, as elsewhere, radical change rarely comes without resistance.

It is the hypothesis of this essay that familiar mental constructs not only help shape the outcome of criminal cases and predispose us to play out certain scripts, schemata, and stereotypes, but that they also demand those narrative genres that best reflect a preferred sense of truth and justice. I apply this hypothesis to *The Thin Blue Line* precisely because the film enacts but also refutes the classic modern narrative of straight-arrow truth and constant justice. Morris activates this polarity by directly implicating the viewer (as juror) in the frameup of reality. Unlike some of its more distant forebears in classical tragedy, however, *The Thin Blue Line* offers no transcendent resolution. The gods do not intervene when meaning fails.⁵⁷ In this respect, the film's existential credentials might appear impeccable. Yet such a comparison misses the mark. It is the existential hero who anchors our faith in the human will to meaning.⁵⁸ But here, no such hero can be found.

54. Wittgenstein suggests that it may be impossible for humans to escape inherited paradigms: [W]hen someone says: "If you follow the rule, it *must* be like this," he has not any clear concept of what experience would correspond to the opposite.

Or again: he has not any clear concept of what it would be like for it to be otherwise. . . .

. . . What compels us to proceed according to a rule . . . ? What compels us to talk to ourselves in the forms of the languages we have learnt?

For the word "must" surely expresses our inability to depart from *this* concept.

LUDWIG WITTGENSTEIN, REMARKS ON THE FOUNDATIONS OF MATHEMATICS 121e (G.H. von Wright, R. Rhees & G.E.M. Anscombe eds. & G.E.M. Anscombe trans., 1964).

55. See *id.*; see also Dennis Patterson, *The Metaphysics of Legal Formalism*, 77 IOWA L. REV. 741, 761 (1992) (discussing the implausibility of doubting or questioning everything).

56. One may recall here Nietzsche's quip: "[M]an would sooner have the void for his purpose than be void of purpose." FRIEDRICH NIETZSCHE, *THE GENEALOGY OF MORALS* 299 (Francis Golfing trans., 1956) (1887); see also Don Oldenburg, *Typing a Cast of Character*, WASH. POST, July 4, 1988, at D5 (" 'People love to get marching orders [They] would rather have guiding fictions than ambiguities.' " (quoting Auke Tellegen, professor of psychology at the University of Minnesota)).

57. *The Thin Blue Line* has some precedent in the ancient world. Consider Euripides' *Hecuba*. EURIPEDES, *HECUBA* (Christopher Collard trans., 1991); see MARTHA CRAVEN NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* 397, 400 (1986) (discussing Hecuba's contention that no higher moral authority existed beyond human convention: "Deep human agreements (or practices) concerning value are the ultimate authority for moral norms. If 'convention' is wiped out, there is no higher tribunal to which we can appeal.").

58. *E.g.*, Fyodor Dostoevsky, *CRIME AND PUNISHMENT* (Richard Pevear & Larissa Volokhonsky trans., 1991) (1866); see Jean-Paul Sartre, *Existentialism*, in *A CASEBOOK ON EXISTENTIALISM* 275, 288 (William V. Spanos ed., 1966).

No, Morris does not chant with Sartre: God is dead—long live humanity!⁵⁹ Rather, he moves us closer to the postmodern world of Beckett: We go on, yes, but not because we understand why.⁶⁰ In this view, there is no longer a straight path to truth and justice, no longer the autonomous will to meaning. More than one frame for meaning now lies before us, and while surely it is up to us to decide which frame to believe in, the task of choosing which to accept grows increasingly difficult: Standards are clouded, meaning's possibilities proliferate, while human agency itself seems close to dissolution.

In the arena of criminal law, this indeterminacy of meaning can be fatal to judgment. Even the criminal defense attorney, who deliberately sets out to activate uncertainty in order to establish that the state has failed to carry its burden of proving guilt beyond a reasonable doubt, may go too far. For uncertainty, without more, is highly volatile. It is a state that cannot be maintained. Jurors in its grip will seek relief elsewhere, in any respite of meaning, grasping for a way to tolerate the difficult responsibility of deciding whether to acquit or condemn.⁶¹

Uncertainty alone, under the onerous strictures of the law, will not do. The defense must buttress any uncertainty it induces with something stable, or risk sending the jurors scurrying for any scrap of certainty the prosecution offers. And to be sure, the prosecution will be offering certainty. After all, it is the prosecution's task to provide a smooth and easy ride on the currents of historical truth and legal necessity.⁶²

In what follows, I will draw upon the Randall Adams case to support what I have so far only asserted. I believe that the epistemological difficulties that the film presents offer important insights for lawyers and legal scholars. I suggest that the key lies in more self-reflective discernment of the multiple worlds of meaning and mental representations (or structures of knowledge) by which the law plays out: whether through the causal-linear (the realm of historical truth and legal necessity), the rhetorical (the realm of factual probabilities and legal persuasion), or the poetic (the realm of narrative necessity and the willing suspension of disbelief).

59. Sartre, *supra* note 58, at 297.

60. See, e.g., SAMUEL BECKETT, *The Unnamable*, in *THREE NOVELS BY SAMUEL BECKETT* 291, 414 (Samuel Beckett trans., 1958) ("[P]erhaps they have carried me to the end of my story . . . I don't know, I'll never know, in the silence you don't know, you must go on, I can't go on, I'll go on."); see also Katherine Dieckmann, *Private Eye*, *AM. FILM*, Jan.-Feb. 1988, at 38 ("Why did this happen? The answer is, I don't know. Maybe it happened for no good reason, except that evil things happen to people.") (quoting Morris); Mark Singer, *Profiles: Predilections*, *NEW YORKER*, Feb. 6, 1989, at 38, 46 ("One of the things that have always fascinated me about abnormal behavior is that we can't really explain it to our satisfaction. . . . Almost everything I do now in my work is about epistemic concerns: how do we come by certain kinds of knowledge?" (quoting Morris)).

61. See TIGAR, *supra* note 4, at 20.

62. See *id.* at 5-6.

1. *The causal-linear frame: a documentary exposé.*

[I] did not get my picture of the world by satisfying myself of its correctness; nor do I have it because I am satisfied of its correctness. No: it is the inherited background against which I distinguish between true and false.

Ludwig Wittgenstein⁶³

Just because the framework for our beliefs is invisible, that does not mean it is not actively shaping the way we see and understand ourselves, others, and the world around us. So it is with common sense. And so it is with common sense that Errol Morris molds our perception of the official frameup that landed Randall Dale Adams in prison. Morris makes deceit and corruption look simple; each of the characters' motives fits the archetypal plot of a frameup.

Consider first official corruption. Everyone knows that unchecked power breeds corruption and oppression. And everyone knows what oppression looks like. We recognize it in the film's opening image: Randall Adams sitting incommunicado in police custody, a false confession placed before him, the barrel of an officer's revolver held inches from Adams' face. Yes, that's what oppression looks like. And when Adams talks about a nightmare from which he cannot awake,⁶⁴ we tend to agree: Yes, that's what oppression must feel like. It's Kafkaesque.⁶⁵

So, too, do we recognize the confident, smiling face of the interviewing officer when he smugly describes the same interrogation scene as a "casual friendly conversation"⁶⁶—yes, this is what one would expect an oppressor to look like. And when the officer can't see through his own bias, but we can, when an accused's protestation of innocence is only taken to signify a lack of conscience, we are persuaded. Adams had it right when he said, "They did not want to believe me."⁶⁷

Everyone knows consistency bespeaks truth, and contradiction lying. What Adams says about his situation is consistent with what we are shown—a gun, a false confession, threats. Thus we are inclined to believe him. In contrast, the police officer's words reflect contradiction: There was nothing friendly about that initial encounter between them. But what can you expect? Oppressors lie. It makes sense. Adams is in the hands of oppressive liars. The frameup has begun.

Knowing what we know so early on in the film, we are not surprised to learn later that the District Attorney got David Harris to lie about the exchange of immunity for his testimony against Adams,⁶⁸ or that the D.A. "reminded"

63. LUDWIG WITTGENSTEIN, ON CERTAINTY ¶ 94 (G.E.M. Anscombe & G.H. von Wright eds. & Denis Paul & G.E.M. Anscombe trans., 1969).

64. TRANSCRIPT, *supra* note 7, at 39.

65. Kafkaesque refers to the terrible and absurd power of nameless, inscrutable bureaucracies. *See, e.g.,* FRANZ KAFKA, THE TRIAL 174 (Willa Muir & Edwin Muir trans., 1992) ("A detached observer might sometimes fancy that the whole case had been forgotten . . . No one really acquainted with the Court would think such a thing. No document is ever lost, the Court never forgets anything.")

66. TRANSCRIPT, *supra* note 7, at 3 (statement of Officer Gus Rose).

67. *Id.* (statement of Adams).

68. *Id.* at 49.

Harris of the chronology of events leading up to the murder.⁶⁹ That's what official corruption is like. And when Adams describes what it's like to be caught up in such a mechanism, that it's like living in a "Hell on Earth"⁷⁰—yes, that's the right image for oppression. That's true. Adams is telling the truth.

Power corrupts, everyone knows that. Now consider greed. Greed, too, corrupts. And like oppression, greed has familiar guises. Consider Mr. Miller, one of the eyewitnesses that got Adams convicted. Mr. Miller was heard to have said that for enough money, he would testify to anything.⁷¹ Yes, that's what a greedy and corrupt person would say. We also discover that Mr. Miller and his wife only decided to testify against Adams after they had already been in police custody following three days of domestic violence. They'd been booked for disorderly conduct and drunkenness. Besides, their cooperation got their daughter out of some robbery charges that could've landed her a life sentence.⁷² These folks are indeed the sort who would lie for money. Greed, deceit, corruption: They fit the image and they fit the script.

As does that other eyewitness, Michael Randall. As a black man in Dallas, he knows the score: "The D.A. will put something in your mouth if he wants too. That's why they call it the 'Hall of Justice'—the scales are not balanced. The scales are in the hall and they go up and down."⁷³ Randall's behavior is consistent with his experience of the world, and his experience has been awash in corruption and deceit. And again, the persuasive image of a quid pro quo. Randall, too, lied to get what was his for the taking—his share of the reward money.

Greed and power corrupt. But there is also madness, which needs no reward. And anyone with eyes in her head could see that Mrs. Miller, the third eyewitness, is mad. She sees crimes happening all around her: "[I]t's always happening to me, everywhere I go, you know. Lots of times there's killings or anything, even around my house."⁷⁴ And it's Miller who wants to solve the crime, quicker than the cops.⁷⁵ Anyone can recognize such blatant pathology. Even her husband, whom she once had arrested for carrying fantasized drugs in the trunk of his car, said: "[O]h man, she's . . ." ⁷⁶ Though he chuckles without finishing the sentence, it's not hard for us to fill in the blank: Yeah, she's crazy.

Almost all the main players in the frameup are before us now, the corrupt officials—from Dallas cops to the District Attorney—as well as the greedy, self-interested, or delusional eyewitnesses. The only characters that remain are

69. *Id.* at 46-47.

70. *See id.* at 53 (Adams describing his mother's first impression of Dallas).

71. *Id.* at 32 (statement of Elba Carr).

72. *Id.* at 40.

73. *Id.* at 49 (statement of Randall).

74. *Id.* at 27 (statement of Mrs. Miller).

75. Mrs. Miller proudly declares, "I'm always trying to decide who's lying, or who killed who before the police do; see if I can beat them." *Id.*

76. *Id.* at 30 (statement of Mr. Miller).

the trial judge and David Harris himself. And common sense, Morris shows, has no trouble placing them in the thick of the plot.

Everyone knows that arbitrary justice is no justice at all. When a person can be sentenced to death simply because he's an unwanted outsider, and his sacrifice will save the neck of a local boy, common sense stirs our outrage. And outrage at local prejudice could hardly find a better catalyst than in the person of Judge Metcalfe.

Metcalfe knows who the good guys are. He's known since childhood, for he's been taught the greatest respect for law enforcement. You see, his dad was a G-man in the days of gangsters like Baby Face Nelson and John Dillinger. Judge Metcalfe has a personal understanding of what it's like to risk life and limb in service to law and order. He learned it from his dad. We are not surprised that he choked up during the D.A.'s summation.⁷⁷ We know what side Metcalfe is on.

And who is Randall Dale Adams, anyway? As Metcalfe puts it, he is just a drifter.⁷⁸ Not worth blotting the perfect win record of a legendary D.A. Besides, it's a matter of local justice. Consider Metcalfe's response to the United States Supreme Court's reversal of the death sentence he'd imposed: "[I]n Austin, in our State Appeals Court, I was nine [votes] to nothing correct and in Washington I was one to eight incorrect. If you tally all those votes, I come out ten to eight, and yet the case was reversed."⁷⁹ For Metcalfe, it's as if the Civil War went the other way. The federal Constitution remains on par with state law. It is what you'd expect of an old boy network: Insiders count more. And when Randall Dale Adams, with his bushy hair and drooping mustache, stops off in Dallas on his way to California, a better outsider would be hard to imagine.

Last but not least, there's David Harris, the local boy from Vidor. Common sense tells us he committed the murder. Morris even gets Harris to say that Adams is innocent. Harris says he's the one who should know. And we believe him. After all, hasn't he been straight with *us*? Hasn't he come clean about the deceitful way that he played into the hands of the authorities in the Adams case?⁸⁰ We understand Harris. His behavior makes sense. Everyone knows that a terrible trauma at a tender age can lay down a pattern of aggressive behavior for the rest of one's life. And just look what happened to him when he was a little kid. His older brother drowned in a neighbor's pool when Harris was only three years old. His father, who was supposed to be watching them, never dealt with the guilt. And when a new child took the deceased sibling's place, Harris never could gain his father's acceptance.⁸¹ As Harris says, "There you go."⁸² The pattern was laid down. Harris became the kind of

77. *Id.* at 35 (statement of Judge Don Metcalfe).

78. According to Adams' defense attorney, Judge Metcalfe once inquired of someone interested in the case, "Well, what do you care? He's only a drifter." *Id.* at 22 (statement of Edith Jones).

79. *Id.* at 43 (statement of Judge Metcalfe).

80. *See id.* at 46-48.

81. *See id.* at 55.

82. *Id.* at 56 (statement of Harris).

person who would beat up his commanding officer⁸³ or shoot a cop. Uncontrolled aggression against authority figures. It was like he was acting out his hatred toward his father and then punishing himself by making sure he got caught. It doesn't take Freud. Common sense tells you Harris is the kind of person who would shoot a cop.

It's common sense. In a world of official corruption, greed, cynical self-interest, madness, local prejudice, and profound psychological trauma, these things happen. Innocent outsiders get framed, and local sociopaths go free. It makes sense. Randall Dale Adams should never have been in prison at all. The film sets the record straight. Justice miscarried, but truth will out in the end. The causal-linear metaphysics of common sense triumphs. Morris' exposé allows us to rest easy: Error can be corrected, order can be reimposed, and, above all, our belief in the ultimate triumph of justice can be confirmed.

The persuasive force of Morris' techniques within the documentary frame of the film is strong. We want to believe Adams is innocent; he fits our image of a likely victim of official abuse. Similarly, it is easy for us to distrust the people who participate in the frameup; they fit the script for the corrupt and deceitful. Nevertheless, Morris' linear exposé frame is not without fissures and unanswered questions. Even this narrative, which offers certainty, does not banish doubt. In a film about the different forms of deception, Morris leaves room to realize that certainty often demands self-deception.

Consider, for example, the following factual ambiguities: Two local officials,⁸⁴ Officer Turko (the slain officer's partner),⁸⁵ David Harris,⁸⁶ and Harris' friend Dennis Johnson⁸⁷—all claimed that there were two people in the car when the shooting occurred. And Adams, who conceded that the statement he made while in custody was "basically what I liked,"⁸⁸ seems to admit at one point that he was driving when he and Harris drove onto Inwood Road, the scene of the murder.⁸⁹ Why did Adams have nothing to say about the period of time after he turned onto Inwood Road until he got back to his motel room ten minutes later? Did he really forget? Was Adams with Harris at the time of the shooting? Why did so many different people say there were two people in the car? In one account, Harris says he and Adams returned to the motel and Adams went in to ask his brother if Harris could stay with them that night. According to Harris, the brother "[didn't] like to do that."⁹⁰ So Harris left. In another version offered by Harris, he drove off without waiting for the brother's word.⁹¹

83. *See id.* at 46.

84. *See id.* at 5 & 10.

85. *Id.* at 26.

86. *Id.* at 11.

87. *Id.* at 9.

88. *Id.* at 14.

89. *Id.* (statement of police official Jackie Johnson).

90. *Id.* at 11.

91. *Id.* at 14 (statement of Harris).

But why didn't Adams' brother confirm Adams' story or at least verify one of Harris' versions of events at the trial?⁹² If Harris made it all up, why such detail? The climax of the movie comes when Harris mysteriously proclaims that Adams might only be in jail because "he didn't have no place for somebody to stay that helped him that night That might be the only, total reason why he's where he's at today."⁹³ Consider the ambiguity of this statement. It might mean that had Adams' brother agreed to let Harris stay over, the shooting would not have occurred. It might mean that had Harris stayed over, Adams would not have found himself on Inwood Road that night with David Harris. It might mean that there would have been no grudge, no basis to pin the murder on Adams.

But why would Adams drive off at night with David Harris? Perhaps the answer comes in response to a broader question: What was twenty-eight-year-old Adams doing spending the day with sixteen-year-old Harris, drinking and smoking dope, going to a soft-porn drive-in movie? The sexual connotations fit the schema we have for such things, that sort of thing of which Adams' brother disapproved. Why were the car's lights off that night on Inwood Road?⁹⁴ Some connection between a tryst that night along a dark road and the shooting of the police officer cannot be ruled out. It may be the sort of thing neither Harris nor Adams would care to own up to. We do not know. But the film invites this sort of speculation and does not resolve it.

So was Randall Dale Adams in the car at the time of the shooting? Even if he did not pull the trigger, was he an accomplice in the murder of Officer Wood? Even within the linear framework of Morris' documentary, these uncertainties remain, defying the reassuring conclusiveness of the genre. Such doubt invites us to confront our desire to be taken in by the metaphysics of linear resolution, our desire to suppress all of the messy and disturbing details. Is it more important to have a simple frameup, with its concomitant certainty about truth and justice, than to wind up with a set of mysteries?

If a certain amount of denial—framing out unpleasant, dissonant details for the sake of a neat and reaffirming ending—attends even the linear exposé frame of the film, it should come as little surprise that the film's nonlinear, antidocumentary frame may be met with denial on an even grander scale. Is it seen at all? Yet, there it is: An acausal theme, presented both discursively and stylistically, pervades this work.

To appreciate Morris' acausal counterplot we must leave the ordered world of the detective for the mystery of the crime novel. We must abandon the causal thinking that has long dominated common sense. But if this antidocumentary frame isn't commonsensical, then what is it? What must one believe in order for Morris' counterplot to make sense? To address this question we must explore the metaphysics of acausality. This analysis will sweep us into Morris' antidocumentary frame.

92. See *id.* at 25.

93. *Id.* at 57 (statement of Harris).

94. See *id.* at 4.

2. *The acausal/nonlinear frame: fateful reversions.*

The heavens themselves, the planets, and this centre
 Observe degree, priority, and place,
 Take but degree away, untune that string,
 And, hark! what discord follows . . .
 Force should be right; or rather, right and wrong—
 Between whose endless jar justice resides—
 Should lose their names, and so should justice too.

William Shakespeare⁹⁵

As a paradigm of how we make sense of social reality, the Adams case draws our attention not only to how we recognize truth and justice, but also to those underlying shared beliefs that allow us to agree upon a particular interpretation or meaning of an event. The discrete mental representations that constitute our social knowledge, our common sense, tell us why Harris is guilty and Adams innocent. A deep belief in the straight path of truth and justice convinces us that the mystery of the Adams frameup has finally been solved.

But the Sherlock Holmes world of linear logic is not the only one that Morris puts before us. He also has us ponder: What if rationality, rather than being a triumphant force in the world, turned out to be the loser? What if chance (coincidence) or fate (necessity) were instead the dominant forces? Then human agency would be greatly diminished, and human responsibility along with it. Things would “just happen” to us.⁹⁶ This vision is one of the emplotting threads that runs through *The Thin Blue Line*. It is a vision that leads us into a peculiarly nonlinear, antidocumentary frame.

If Morris had wanted to tell a purely linear tale, he certainly would have proceeded differently. Consider, for example, the film’s failure to provide captions identifying who is speaking. Why this blatant defiance of the conventional documentary style? Instead of telling us how to take the words of the speaker in terms of his or her social or legal status, we are left with the words themselves, and perhaps also with the felt need to know the speaker’s status in order to know how to take what he or she is saying. This technique of nondisclosure provokes a feeling of disorientation.⁹⁷ And this disorientation is only the beginning. Morris goes much further to knock us out of the standard causal-linear cognitive loop.

Consider how fate and chance are introduced early on in the film and maintained discursively throughout. At the very outset we have the classic image of endless possibility in America: Like so many others before them, Randall Ad-

95. WILLIAM SHAKESPEARE, *Troilus and Cressida*, in *THE COMPLETE WORKS OF WILLIAM SHAKESPEARE* 667, 672 (W.J. Craig ed., 1959).

96. As Odo Marquard notes: “Fateful accidents are the reality of our life, because as human beings we are always ‘entangled in stories.’” ODO MARQUARD, IN *DEFENSE OF THE ACCIDENTAL* 120 (Robert M. Wallace trans., 1991) (quoting William Schapp).

97. As Morris attests, “All my interviews are staged for the camera with the same lighting and poses.” Bates, *supra* note 30, at 17. This compilation of visual and auditory data in Morris’ film has been described as “an apt parallel to the randomness of evidence.” Luc Sante, *Murder In the Raw*, INTERVIEW, Sept. 1988, at 152, 152.

ams and his brother are making their way across the country.⁹⁸ Possibility—or destiny? Destiny—or chance? The main characters in the film, Harris and Adams, play up both the necessity and the fortuity of the circumstances. For example, Adams muses at the beginning: “I’m not in town a half a day and I’ve got a job. It[’s] just . . . everything clicked. It’s as if I was meant to be [in Dallas].”⁹⁹ Adams’ gloss on fate is immediately followed in the film’s opening sequence by Harris: “[T]his all started when David was running away from home. And he takes . . . I took a pistol from my dad’s, a shotgun Ended up coming to Dallas.”¹⁰⁰ Thus, a strange pattern is set. At times the dominant operative force for both Adams and Harris seems to be fate as necessity; at other times it seems to be fate as chance. But the upshot remains the same: Both Adams and Harris appear to suffer events rather than cause them to happen. Things are simply playing themselves out. As Adams says: “[W]hy did I meet this kid? I don’t know. Why did I run out of gas at that time? I don’t know. But it happened. It happened.”¹⁰¹

For Harris, fate is the dominant force in the universe. At one point he states, “Everybody’s life’s going to take some kind of path regardless of what happens.”¹⁰² He seems to be saying that whether his violent behavior was an effort to “get back at [his father] for the way he treated me”¹⁰³ or was “nothing but hurting myself,”¹⁰⁴ he had no choice in the matter. It’s as if he’d been born into a life predestined to unfold as it did. And it’s not just Harris’ life that’s dominated by fate rather than reason. Harris says, “There’s probably been thousands of innocent people convicted and there will probably be thousands more. Why? Who knows.”¹⁰⁵

Who knows? Things just happen. The only problem is that in a universe run by fate, truth or justice may be impossible. Truth requires a reasonable basis for certainty, and justice requires a reasonable basis for assigning responsibility. In their own discursive accounts, Harris and Adams question the possibility of both individual responsibility and certainty.¹⁰⁶ Moreover, the film’s stylistic techniques in what I call its nonlinear antidocumentary frame do much to reinforce this theme.

Morris conveys the film’s nonlinearity through recurring metaphors of reversion. We keep seeing the endlessly circling red police light; we keep returning to the scene of the shooting—obviously fictional but replayed again and again as if seeing it one more time would tell us something new.¹⁰⁷ The film offers other breaks from representational reality. For example, Morris

98. TRANSCRIPT, *supra* note 7, at 1.

99. *Id.*

100. *Id.*

101. *Id.* at 2.

102. *Id.* at 55.

103. *Id.* (statement of Harris).

104. *Id.*

105. *Id.* at 56.

106. *See, e.g., id.* at 26, 38, 46, 50, 55-57.

107. “[E]ven the causal order does not escape parodic circularity, which is somehow the revenge of the reversible order.” JEAN BAUDRILLARD, *FATAL STRATEGIES* 84 (Jim Fleming ed. & Philip Beitchman & W.G.J. Niesluchowski trans., 1990).

splices in black and white clips of Hollywood detective movies from the 1940s,¹⁰⁸ a Tinseltown landscape of crimesolving offered to illustrate the mental reality that Mrs. Miller inhabited. Or consider the G-man and gangster images offered to convey the trial judge's mental construction of the world. And permeating the film is that reversionary score by composer Philip Glass in which chords melt into one another like floating arabesques in an opium dream.

These pervasive figures of reversion do not tell us anything specific about the events themselves. Rather, they are metaphysical tropes that tell us something about how reality is framed in both life and art. Part of this story, they tell us, is about storytelling itself. The film offers not just one frameup, the causal-linear frameup of Randall Dale Adams, but perpetual, repeat frameups, indifferent to narrative logic and linear time. Sometimes these frames conflict, leading us to wonder: What world are we in? What sense does it make?

In sum, *The Thin Blue Line*, in its antidocumentary, antidetective frame, implicates not just a few deranged or corrupt folks around Dallas, the kind we like to condemn in the service of our own dedication to truth and justice in a causal-linear world. The film implicates all of us in our complacency about how easily we employ ready-made notions of truth and justice to save ourselves from the anxiety and doubt that might otherwise plague our judgments.¹⁰⁹ By exposing some of the epistemological devices that we all use to make meaning out of chaotic life, the film makes it more difficult to laugh contentedly at Mrs. Miller's pathetic inner world of Hollywood gangsters and her delusions about her own ace detective skills. Such laughter is a defense, a way to distance ourselves from other people's seemingly bizarre internal scripts and views of the world. Surely, no ill-conceived constructs filter our view of reality, no odd cultural artifacts interfere with our discernment of who's who and what's what.

Informed by the film's acausal, nonlinear frame, we come to see that the same common sense wisdom that allowed us to solve a mystery now breaks reality into fragments that we cannot neatly reassemble. The discrete elements of the Adams case, each rotating on its own axis of impersonal truth and necessity, may invite too many stories, each of whose meanings are too overdetermined, potent, and varied for any confidence in the overarching order of things to survive. The nonlinear frame leaves us uncertain, mystified. What really happened, and why? What might it mean? Who can we blame?

Faced with radically different ways in which to see and make sense of the world—the causal-logical system of the documentary genre on the one hand,

108. TRANSCRIPT, *supra* note 7, at 27.

109. All of us inherit prejudices; they make judgment possible. See Richard A. Shweder, *The Authority of Voice*, 37 N.Y. L. SCH. L. REV. 251, 257 (1992) ("Almost everyone in the academy these days has heard of the continental dictum that it is our prejudices that makes it possible for us to see, which means that in thinking, as in life, if you do not fix a starting point you'll never get started."). Shweder also cites a relevant quip from the literary critic Anatole Broyard: "'Hang on to your prejudices, they are the only taste you have got.'" *Id.* See generally HANS-GEORG GADAMER, *TRUTH AND METHOD* 270, 276-77 (Joel Weinsheimer & Donald G. Marshall trans., 1989) (1960) ("[P]rejudice certainly does not necessarily mean a false judgment, but part of the idea is that it can have either a positive or a negative value. . . . [T]he prejudices of the individual, far more than his judgments, constitute the historical reality of his being . . .").

and the acausal-reversionary system of the antidocumentary on the other—we are left to wonder which frame to choose. To be able to ask this question confirms the artistic triumph and social importance of Morris' film. *The Thin Blue Line* is undoubtedly important as an exposé of injustice and official corruption in the Dallas criminal justice system. But on an allegorical level, the film depicts a battle that rages back and forth, moment by moment, across a thin blue line of representational order. It is a battle against chaos, fate, and deception, forces that could easily destroy human agency and make individual responsibility impossible. Metaphorically, the film asks a fundamental and daring question: Who (or what) polices meaning?

It is a daring question that Morris does not quite see through. For in the end, the counterplot does not take hold. Having raised the specter of unaccountability, of the unknowability (or perhaps the untellability) of truth, the film ultimately reverts back into linear certainty and resolution. After all, we know Randall Adams was framed.¹¹⁰

By describing the critical storytelling failures that occur within *The Thin Blue Line*, I hope to elucidate important lessons for lawyers and legal scholars about the art of persuasion in legal storytelling. It is, one hopes, a truism to say that law does not operate in a cultural vacuum. Yet strangely enough, few have explored the implications of culture generally, and cultural postmodernity specifically, for law and lawyering. Overcommunication, a surplus of images, a popular culture with more signs than referents,¹¹¹ and an increasingly mass-mediated reality are cultural phenomena that lawyers and legal scholars cannot ignore.¹¹² This is all the more true in light of the salience of media images of

110. Perhaps part of our experience of a reversion to linearity stems from Morris' decision to end the film with a "moment of truth," namely, David Harris' tape-recorded "confession," in which he very nearly admits to shooting Officer Wood. See note 127 *infra* and accompanying text; cf. ONG, *supra* note 49, at 142-43 (linking climactic linear plotting to literate and typographic cultures).

111. See, e.g., BAUDRILLARD, *supra* note 107, at 52 ("Illusion is not false, for it doesn't use false signs; it uses senseless signs, signs that point nowhere. This is why it deceives and disappoints our demand for meaning, but it does so enchantingly."); JAMES B. TWITCHELL, CARNIVAL CULTURE: THE TRASHING OF TASTE IN AMERICA 51 (1992) ("What characterizes the condition of culture since World War II is . . . that now we have more signs than referents [sic], more images than meanings that can be attached to them. The machinery of communication often communicates little except itself—signs just refer to each other, creating a 'simulacra' [sic] of reality.').

112. Actually, legal scholars ignore these phenomena more than do practitioners. See Philip N. Meyer, "Desperate for Love": Cinematic Influences Upon a Defendant's Closing Argument to a Jury, 18 VT. L. REV. 721, 740-45 (1994) (describing criminal defense attorney Jeremiah Donovan's use of cinematic stylizations in litigation). Considering their audience, it may not be surprising that trial practitioners can ill afford not to keep a close eye on the public. As for what the public is eyeing, consider for example June 17, 1994, when most major television networks suspended their prime-time programming to broadcast images of a phalanx of police cars in pursuit of a white Ford Bronco driving down a Los Angeles freeway. Inside the Bronco, football icon O.J. Simpson allegedly sat with a gun to his head. These images captivated the public. See, e.g., Tom Bierbaum, *ABC in Court Beats NBC's Hardcourt*, DAILY VARIETY, June 29, 1994, at 6 (noting that Nielsen ratings generated by one network's coverage of the O.J. Simpson case overshadowed even the ratings for the national basketball championships).

Especially striking in the O.J. Simpson case are the complex interpenetration of media and reality and the near impossibility of telling one apart from the other. Consider again the infamous "chase" scene: It is the media that created the allure of Simpson's initial celebrity; it is the media that established the prototype of the car chase sequence; and it is the media that helped to generate a state of public fascination simply by interrupting the familiar feel of viewers' everyday lives with prolonged, live national news coverage, an event reminiscent of the aftermath of the John F. Kennedy assassination.

the law.¹¹³ As the advertising experts caution: "To be successful today, you must touch base with reality. And the reality that really counts is what's already in the prospect's mind."¹¹⁴ Likewise, the only reality that counts for a trial lawyer is the one in the jury's mind. And we have a fairly decent idea of what's there—a barrage of television images:¹¹⁵ quick cuts, multiple-montage, slow dissolve, animation, computer graphics, magnified close-ups, wild angles, rock stars, starving children, catastrophes, Patriot missiles, Nike tennis shoes. Electronic images of the commercial and the political flow together in one puls-

See, e.g., Jack Mathews, *The Chase Scene in the Twilight Zone*, *NEWSDAY*, June 26, 1994, at 4 (describing the Simpson chase scene as "one of the most riveting moments in television since the Kennedy assassination"). Noteworthy as well is the media's notoriously self-referential representation of reality. *See, e.g.,* Noel Holston, *Shockmaster Howard Stern is Not Just Heard, But Seen—on Cable Show*, *STAR TRIBUNE*, June 21, 1994, at 3E (describing the Simpson chase scene as an "impromptu remake of *The Fugitive*"); Mathews, *supra*, at 4 (comparing the chase scene to Oliver Stone's film *Natural Born Killers*).

More ominously, media image control today has become more pervasive and subtle. For example, was what the public saw on June 17, 1994, really, as most commentators called it, a chase scene? Or was it a neatly orchestrated image of self-restraint deliberately intended by the L.A.P.D. to displace another, starkly contrasting, media image of recent vintage—a group of out-of-control Los Angeles police officers beating Rodney King?

113.

Almost one-third of all prime time entertainment shows since 1958 have concerned law enforcement and crime, and nearly a third of the characters on prime time television are involved in either the enforcement or violation of the law. In a normal week, the average television viewer sees approximately thirty police officers, seven lawyers, and three judges in prime time, a figure that does not even include the large number of lawyers featured on popular daytime soap operas and syndicated courtroom dramas, such as *Divorce Court*, *The People's Court*, and *Miller's Court*.

Steven D. Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and Police as Television Heroes*, 42 U. MIAMI L. REV. 229, 230-31 (1987) (footnote omitted).

The accumulation of media portrayals of the law has had a similar blurring effect on reality. *Id.* at 231-32 (noting that children have been particularly affected by television's depictions of the legal system, and that, according to a recent poll, 73% of the children surveyed "could not cite any difference between judges depicted on television shows and those in real life"); *see also* TWITCHELL, *supra* note 111, at 238 (observing that the attraction of reality-based television crime shows "depends on blurring the line between street action and street theatre"). Consider the prosecutor's examination of an uneducated and naive defendant, a farmer accused of murdering his brother in the recent documentary *Brother's Keeper*. The prosecutor must test his witness' ability to understand a preconfession waiver of rights: Do you watch television? What do you watch? Perhaps *Hunter, Mayberry RFD*? In this questioning, the sequence of life and art reverses such that, in court, a legal reality follows the televised one. *BROTHER'S KEEPER* (Orion 1992); *see also* Debra Seagal, *Tales from the Cutting Room Floor: The reality of reality-based television*, *HARPER'S MAG.*, Nov. 1993, at 50 (offering a story analyst's account of how producers of the reality-based cop show *American Detective* molded and embellished real-life videos, using the same formulas as the famous, old cop shows, such as *Dragnet*, *The Mod Squad*, and *The Rookies*, to fulfill viewers' expectations).

114. AL RIES & JACK TROUT, *POSITIONING: THE BATTLE FOR YOUR MIND* 5 (1981). The authors suggest that advertising, like any narrative, must fight the overaccumulation of meaningless signs and follow cognitive scripts: "The mind, as a defense against the volume of today's communications, screens and rejects much of the information offered it. In general, the mind accepts only that which matches prior knowledge or experience." *Id.* at 6.

115. Over 95% of households in the country have at least one television set, which "is on more than six hours a day." TWITCHELL, *supra* note 111, at 195. That is the equivalent of a full day per week of watching television. *Id.* In addition, more than 55% of American households are wired for cable, a service that costs viewers a total of over \$14 billion each year. *Id.* at 214. And, according to one estimate, Americans own 224 million remote control units for commanding the show. Anthony Ramirez, *When the New Remotes Zap, Everything Listens*, *N.Y. TIMES*, June 24, 1993, at C2.

ing mosaic.¹¹⁶ There's no mistaking it: Postmodernism is an everyday si(gh)t(e).¹¹⁷ And so it is to postmodernism and its relevance to legal storytelling that we shall now turn.

V. HISTORICAL TRUTH AND NARRATIVE NECESSITY: SKEPTICAL AND AFFIRMATIVE POSTMODERNISM FOR LAWYERS

With all due respect, Justice Brennan's proposed ending to this lawsuit is as unsatisfying as the conclusion of a bad mystery novel: we learn on the last page that the victim has been done in by a suspect heretofore unknown, for reasons unrevealed.

Justice Byron S. White¹¹⁸

There is no inside story; there are only images.

James B. Twitchell¹¹⁹

Law and lawyering are inescapably part of postmodern culture. Yet postmodern ideas about the demise of the author and of authority in general,¹²⁰ the dissolution of the autonomous, rational subject, the end of linear time and causation, the erasure of difference between truth and error, reality and fiction, and the abandonment of stability to the contingency of truth and justice, seem to have limited appeal and dubious utility for persuasive legal storytelling.¹²¹

116. See TWITCHELL, *supra* note 111, at 267.

117.

A central fact about the present seems to me to be that both of these—the perception of reality, and fiction increasingly take on a semifictive character, and thus tend to converge with each other. That is why it is so easy, nowadays, to ignore really terrible things . . . , and almost easier, even, to believe in imagined terrible things and to be blind to really positive ones—in other words, to accept what suits one and to suppress what does not.

MARQUARD, *supra* note 96, at 80; see also RICHARD A. LANHAM, *THE ELECTRONIC WORD: DEMOCRACY, TECHNOLOGY, AND THE ARTS* 5 (1993) (noting that the “textual surface has become permanently bi-stable” in the sense that “[w]e are always looking first AT and then THROUGH it”).

The image-inundated techniques of MTV are beginning to appear in literature as well as television. See, e.g., MARK LEYNER, I SMELL ESTHER WILLIAMS AND OTHER STORIES (1983) (emulating the techniques of MTV by telling a story in staccato, fast-moving image bites); William Grimes, *Providing in Prose the Eerie Voice of Madness*, N.Y. TIMES, June 15, 1993, at C13 (describing Irish novelist Patrick McCabe's addiction to the television series *Miami Vice* and his “appetite for lurid colors and nonstop action, a sneaking fondness for the cheap thrill, the instant gratification of modern advertising and consumer packaging. He is attuned to the poetry of the advertising slogan. He understands the iconic power of a candy bar wrapper.” (reviewing PATRICK McCABE, *THE BUTCHER BOY* (1992))).

118. The quotation is taken from a memo written by Justice White, regarding a recent civil rights case, and discovered among Justice Marshall's papers. David Johnston, *Marshall Papers Reveal Court Behind the Scenes*, N.Y. TIMES, May 24, 1993, at A10.

119. TWITCHELL, *supra* note 111, at 236.

120. See PAULINE MARIE ROSENAU, *POST-MODERNISM AND THE SOCIAL SCIENCES: INSIGHTS, INROADS AND INTRUSIONS* 28-32 (1992) (tracing the “death of the author” phenomenon in postmodernism).

121. See, e.g., Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 845 (1993) (asserting that “to the extent that fictional or fictionalized accounts purport to be scholarship, they jeopardize the credibility of legal scholarship”); Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647, 655-60 (1994) (discussing the difficulty of incorporating postmodernist philosophical insights into legal scholarship); see also Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 226-28 (1984) (arguing that legal nihilism, as represented by the critical legal studies movement, is inconsistent with the role of law schools in training professionals).

This may be due to the law's natural conservatism, its affinity for stable meanings and clearly delineated rules. Moreover, on the law's field of violence and death,¹²² the postmodernist's playful irony and obsessive deconstruction seem misplaced.¹²³ In law, we are less eager to forgo the aspiration to find shared normative ideals. While intellectuals may view such ideals as illusory universals whose meanings are inherently suspect,¹²⁴ within the legal culture it may be that shared ideals are vital. For at stake are the values and beliefs that make stories of guilt and innocence cohere. And these are the stories that make judgment possible.

None of this implies that textual meaning is secure or free from postmodern subversion, or even that such subversion is suspect or wrong. Nor should non-linear, image-steeped meanings be rooted out of the legal culture. Indeed, given the mass mediation of most aspects of life, any expectation that one might rely exclusively upon stable, textual, causal-linear meanings is simply a pipedream. Atextual, nonlinear, image literacy is an inescapable part of contemporary culture and deeply informs the way people make sense of their lives and the world. The question for lawyers and legal scholars, then, is not whether to postmodernize, but rather what kind of postmodernity we shall enact.

Conventional wisdom dictates that although criminal defense lawyers may pursue a variety of different trial tactics, three reliable strategies stand out: "[I]f you've got the facts on your side, argue the facts to the jury. If you've got the law on your side, argue the law to the judge. If you've got neither, confuse the issue with other parties."¹²⁵ The first strategy is that of the good historian: Defense counsel reconstructs the past and shows the jurors that the defendant "didn't do it" and must be found innocent. Or she establishes the fact of an

For a recent critical response to Farber and Sherry, see Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 256-67 (1994) (criticizing Farber and Sherry for premising their argument on unexamined assumptions about truth, reason, and analysis). For earlier, similarly aligned views, see Alan Hunt, *The Big Fear: Law Confronts Postmodernism*, 35 MCGILL L.J. 507, 514 (1990) (arguing against the false dichotomy between truth and relativism); Allan C. Hutchinson, *Inessentially Speaking (Is There Politics After Postmodernism?)*, 89 MICH. L. REV. 1549, 1550 (1991) (noting the anguish and fear that has accompanied postmodernist scholarly assertions about the end of modernism); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 6, 51 (1984) (discussing the charge of nihilism that traditional legal theorists have directed at scholars who question the rational, objective, and apolitical foundation of the legal system).

122. See Robert M. Cover, *The Supreme Court, 1982 Term, Foreword: NOMOS and Narrative*, 97 HARV. L. REV. 4, 7 (1983).

123. Richard Shweder has noted this possibility, but without fully developing its implications for law:

Of course, special problems may arise in the study of "lawyering," which do not arise in the study of "sciencing," "philosophizing," or "internationalizing theory." Other things are at stake in legal settings besides simply binding you to a reality. A higher-order goal seems to be operating, which is to bind judges or juries to a reality such that someone gets nailed or someone gets off the hook.

Shweder, *supra* note 109, at 258.

124. See, e.g., BARBARA HERRNSTEIN SMITH, *CONTINGENCIES OF VALUE: ALTERNATIVE PERSPECTIVES FOR CRITICAL THEORY* 181-83 (1988) (advising wariness toward normative ideals).

125. *Nomination of Clarence Thomas to be Associate Justice of the Supreme Court: Hearings before the Senate Committee on the Judiciary*, 102d Cong., 1st Sess., pt. 4, at 241 (1991) (statement of Senator Heflin).

other's guilt. The defense thus battles the prosecution on the prosecution's own turf: the playing field of historical truth and legal necessity. This is the site of the imperative, linear story frame, for here a particular historical truth mandates a particular legal outcome.

The third strategy of "confusing the issue" is consistent with an acausal, nonlinear frame and often employs postmodern tactics. The defense attempts to attack the prosecutor's history, impeach the credibility of the state's witnesses, and deconstruct the linear narrative that the prosecutor offers, breaking it up until it is transformed into a nonsensical, incredible tale too full of inconsistencies and loose ends to withstand the onslaught of reasonable doubt.¹²⁶ Unlike historical narration, the most important time frame for historical deconstruction is the present, not the past. A good historical narrative account is temporally closed off and can simply be accepted. ("Makes sense to me. That must've been the way it happened.") A good deconstruction, by introducing hesitation, emphasizes and dilates the present moment of doubt. ("Hey, wait a minute. First he said it was 10 p.m., then he said midnight. He must be lying.") The believable history is what already happened; the deconstructed history is what happens in the courtroom.

In *The Thin Blue Line*, Morris adopts the first and third defense tactics I have described. With the film's viewer cast as juror, Morris not only deconstructs the state's causal-linear history ("Those witnesses are lying! They didn't see Adams shoot anyone that night."), but he also substitutes a linear, prosecutorial history of his own, pointing to someone else. ("It's Harris, not Adams, who shot Police Officer Wood.") The film's linear plot shows us why the witnesses lied (greed, delusion) and why the frameup was set in motion in the first place (the only suspect old enough to electrocute was Adams). At the film's close, the historical truth of David Harris' guilt is sealed with Harris' own words: Morris: "[W]hat do you think about whether or not he's innocent?" Harris: "I'm sure he is . . . 'Cause I'm the one that knows."¹²⁷

It is partly due to the strength of Morris' linear plot that his counterplot fails. When I say it fails, I mean that it does not stimulate us sufficiently to question the certainty that the linear plot induces; without such stimulation, the audience is borne along with much the same ease that created the frameup in the first place.¹²⁸ Ironically, by simply stranding the viewer in a domain of echoing reversions and uncertainty, the practical effect of the film's nonlinear techniques is to reinforce its linear plot—strengthening our willingness to blame Harris and exonerate the long-suffering Adams. These techniques fail to take us in when they are in plain view as servants of radical subversion. Put differently, the counterplot does not hold our imaginations because its techniques are those of a skeptical, rather than affirmative, postmodernism.

126. See, e.g., Amsterdam & Hertz, *supra* note 4, at 62-63 (describing how a defense summation attempted to subvert the coherence of the prosecution's linear narrative by proffering 10 incommensurable accounts which made the crime in question).

127. TRANSCRIPT, *supra* note 7, at 56.

128. See note 110 *supra*.

A. *Skeptical Postmodernism*

As an example of the kind of postmodernism I have in mind here, consider contemporary sociologist Jean Baudrillard's assertion that in the current media age, conventional dialogue has become too slow: "Looking is much faster; it is the medium of the media Everything must come into play instantaneously. We never communicate. In the to-and-fro of communication, the instantaneity of looking, light and seduction is already lost."¹²⁹ In Baudrillard's view, our culture is rapidly slipping from communication with content, into "simulation," what he calls the "ecstasy of the real."¹³⁰ According to Baudrillard, this state of ecstasy is a state of empty form; it is reality aesthetically heightened to the point that it is stripped of all meaning and becomes pure seduction. Like pornography. Like fashion. When the ecstatic form absorbs all the energy of its opposite, that which gives it meaning, the result is sheer simulation. The commercial media best embody this absorption.¹³¹

The cultural vision shared by writers like Baudrillard may be called "skeptical postmodernism."¹³² Skeptical postmodernism manifests a cultural preference for contingency, for the surface play of images, for the sensual jolt of unexpected juxtapositions—the flattening out of meaning.¹³³ In short, the skeptical postmodern denies the possibility of truth, authority, and history. Reality and human agency are viewed as illusory; objective representation is deceptive. Yet without intentionality and causation, or the means with which to reliably narrate human activity, individuals can no longer be held accountable

129. BAUDRILLARD, *supra* note 107, at 8; *see also* ONG, *supra* note 49, at 175-76 (contrasting communicative exchange and the media's "pipeline transfer" of information).

130. BAUDRILLARD, *supra* note 107, at 9.

131. *Id.* at 8-10; *see also* FREDRIC JAMESON, *Diva and French Socialism*, in SIGNATURES OF THE VISIBLE 55, 60 (1990) (remarking on the media's "new gratification in surfaces" as well as their "new ground tone," which inverts high modernism into "a strange new exhilaration").

A scene from Oliver Stone's television program *Wild Palms* exemplifies this ecstatic accumulation of self-referential images. We see a room where a television is on, and on that television (which is on our television) we see Oliver Stone playing Oliver Stone being interviewed. He is asked what it is like to have been vindicated in his conspiracy theory of the JFK assassination, now that the unsealed Kennedy papers have undercut the credibility of the Warren report. Here is a conflation of images whose meanings keep circling back on themselves: We watch a television show about a television interview of a filmmaker, who is also the show's producer, discussing his film about JFK, in which he uses both historical film footage of the actual shooting as well as fake footage made to look real. JFK (Warner Bros. 1992). Is this an instance of poetic license or poetic justice?

132. *See* ROSENAU, *supra* note 120, at 14-17.

133. While not a necessary component of the skeptical view, the role of chance in human affairs is a recurrent theme of many postmodernist artists because it aptly captures an other-than-rational, not-in-control, "desubjectivized" sense of people and events. *See, e.g.*, PAUL AUSTER, *THE MUSIC OF CHANCE I* (1990) ("It was one of those random, accidental encounters that seem to materialize out of thin air—a twig that breaks off in the wind and suddenly lands at your feet."); MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* 230-31 (A.M. Sheridan Smith trans., 1972) ("The fundamental notions now imposed upon us are no longer those of consciousness and continuity . . . nor are they those of sign and structure We must accept the introduction of chance as a category in the production of events."). This fascination with chance events and serendipitous juxtapositions is evident in the music of John Cage, the paintings of Jackson Pollock, the novels of William Burroughs, the films of Robert Altman, as well as in the work of the artists who staged "happenings" at Black Mountain College, to mention only a few. *Cf.* Stephen Holden, *Films From New Directors Taking Literary License*, N.Y. TIMES, Mar. 19, 1993, at C24 (describing a new theme that pulsed through the 1993 New Directors/New Films series as the lack of control characters have in relation to events).

for having "authored" or caused an event to happen.¹³⁴ Consequently, the skeptical postmodern is left only with endless irony and play. It is to the extent that Errol Morris' acausal, nonlinear counterplot in *The Thin Blue Line* embodies such a vision that it fails. Indeed, the counterplot fails in the same way that skeptical postmodernism is likely to fail in law and lawyering generally. In a legal context, the reality that it portrays is aesthetically and psychologically untenable. In matters of life and death, whether it be the execution of the accused or the possibility of his killing again, we instinctively reject the message of skeptical postmodernism. Human traits like prejudice, deceit, greed, abuse of power, and the reality of a deliberate frameup are things we can understand. But mystification, time's circularity, fate, and coincidence defeat the practical demands of human judgment.

In *The Thin Blue Line*, Morris employs bizarre imaging techniques to persuade viewers that Adams was framed. We see the cartoonish cops-and-robbers clip that accompanies Mrs. Miller's account of the Dallas shooting, the Chicago gangster shootout scene that overlays Judge Metcalfe's wistful reflections on law and order and his dad's golden days. These images engage the viewer in an act of deconstruction. We see why the defense case for Adams makes sense: The judge and Mrs. Miller cannot be trusted; police and prosecutorial corruption fueled the state's frameup of Adams.

But now consider the equally obvious and deliberately cartoonish reenactment of the shooting, the chocolate malt flying slo-mo and oozing like blood on the ground,¹³⁵ the single-framed revolver flame lighting up the night, the slam of the gun echoing off the butt-littered interrogation room table, the lonely echo of cowboy boots in the early morning hours of Randall Adams' ordeal.¹³⁶ Yet these parodic, postmodern, self-conscious images are eventually overwhelmed by the linear detective plot. The viewer resists the invitation to find problems in the film's linear plot. We refuse to entertain the possibility that the purported "documentary" nature of the film is itself merely another dramatic reenactment. We reject the parody and prefer to play it straight.

The counterplot fails both aesthetically and psychologically to make us question our craving for certainty and the ease with which we embrace it. Aesthetically, the causal-linear frame of the detective story is familiar and easy to

134. See ROSENAU, *supra* note 120, at 32-33 (discussing the demise of causality and responsibility in skeptical postmodernism).

135. Morris uses this image as a visual trope for deceit; it reminds the viewer of Officer Turko's questionable account of her whereabouts when her partner was shot. According to Turko's testimony, she had exited the squad car and taken up a position right behind the Comet while her partner approached the driver. But some investigating officers speculated that Officer Turko had actually remained inside the squad car drinking her chocolate malt while Officer Wood approached the Comet driver. TRANSCRIPT, *supra* note 7, at 7 (statement of Dale Holt). Morris invokes the latter account by focusing on the malt as it flies out the squad car window—presumably thrown by Officer Turko the moment she heard shots fired. Later in the film, Morris uses the image of Officer Turko drinking a malt to play up the inconsistent accounts of her whereabouts.

136. Morris exaggerates these sounds in the film. Take, for instance, the hallucinated echo of the pen that drops, in slow motion, onto the purportedly fake confession papers that Adams is asked to sign. This is as it would sound in a dream or a nightmare from which, as Adams himself puts it, he could not wake up. TRANSCRIPT, *supra* note 7, at 38-39.

follow; it is built from and produces conventional, contextualized, graspable meanings.¹³⁷ In contrast, the counterplot operates within the strange and mystifying domain of the criminal novel.¹³⁸ It is a world that appears to be dominated by chance and fate. It is a place where events are difficult, if not impossible, to explain—causal reasoning fails; things just happen. Such a place offers no outcomes, no closure; the only constant is uncertainty.

Such unresolved mystery points to a second ground for the failure of Morris' counterplot—a psychological one. Psychologically, we crave meaning. Meaning lends order and control.¹³⁹ Chaos is disorienting and unpleasant, especially in matters of life and death. Decisions of such consequence are no time for epistemological conundrums or aesthetic musings. Thus, once nestled in the sobering frame of a criminal trial, storytelling fictions such as Morris' self-consciously cartoonish images and their playful interference with the linear documentary have a boomerang effect. These caricatures of reality only send us running back to a "truer" reality, the reality that the linear plot alone is able to provide.¹⁴⁰ Faced with untenable disorder on the one hand, and a meaningful drama on the other, there is no choice. There is no meaning in a story in which Adams just happens to meet Harris on the side of a Dallas highway; in which Harris happens to act out the rage of a father's rejection; in which a filmmaker happens to hear a story that culminates in a movie that happens to get a convicted murderer out of prison. Such acausal "happenings" take and leave us nowhere. They conjure a world robbed of personality, motivation, intentionality, and a story robbed of a structure that allows the listener to make sense of human actions and interactions.¹⁴¹ Such psychological fatality is intolerable to those—judges, jurors, lawyers, victims, suspects, spectators, the media—who face the law's demand for public judgment. Without coherent stories, judgment becomes impossible.¹⁴²

The Thin Blue Line's aesthetic and psychological failures offer a cautionary lesson about the art of persuasive legal storytelling: The law has little use for the kind of skeptical, radically subversive postmodernism that has been featured of late in some legal and much nonlegal scholarship.¹⁴³

137. See Bruner, *supra* note 47, at 6-20 (describing the elements of successful narrative).

138. See note 50 *supra*.

139. See, e.g., BRUNER, *supra* note 48, at 153 ("The transcendent is an unshakable, axiomatic acceptance of 'meaningfulness,' like Descartes' axiom that God will not falsify our perceptions of the world or Einstein's that He will not play dice with us."); FRIEDRICH NIETZSCHE, TWILIGHT OF THE IDOLS, OR, HOW ONE PHILOSOPHIZES WITH A HAMMER, reprinted in THE PORTABLE NIETZSCHE 463, 497 (Walter Kaufmann ed., 1954) (1889) ("First principle: any explanation is better than none.")

140. See Daniel S. Bailis & Deborah A. Prentice, Biased Assimilation of Fictional and Factual Information 1-3 (June 25, 1993) (unpublished manuscript, on file with the *Stanford Law Review*) (demonstrating that people's prior attitudes have a greater effect on their processing of fictional information than of factual information).

141. See BRUNER, *supra* note 48, at 20-21, 27-28 (discussing how story structure enables readers to understand and interpret the text).

142. See Pennington & Hastie, *supra* note 39, at 527-28 (discussing how coherence influences jurors' acceptance of a story).

143. E.g., Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 23 (1984) ("I want paradox and unconsciousness. Paradox and unconsciousness allow one experientially, existentially, to exist outside of the contradiction-space of separateness and unity."); see also BAUDRILLARD,

B. Affirmative Postmodernism

The Thin Blue Line, however, offers a second lesson about a form of postmodern legal storytelling that can succeed in practice and that may represent an increasingly popular style of legal persuasion for today's television-bred lawyers and juries. This genre of storytelling may be called "affirmative postmodernism."¹⁴⁴ Affirmative postmodernism employs postmodern storytelling techniques, but unlike its skeptical cousin, it either closes around a coherent meaning or at least points to one.¹⁴⁵ Thus, while it is postmodern in its use of popular cultural images and symbols, it does not employ these images and symbols in an insular or solely self-referential manner.¹⁴⁶ While the affirmative postmodern concedes the demise of the autonomous modern subject, s/he still finds meaning through the distributed self: an identity made up of discrete cultural and social constructs shared by others.¹⁴⁷

Like skeptical postmodernism, affirmative postmodernism also recognizes the irreducibility of truth and justice to any abstract meta-narrative (e.g., system based on axiomatic principles such as fairness, liberty, or some felicitic calculus). But the affirmative postmodern still sees truth and justice as coher-

supra note 107, at 11-13, 74; ROBERT SCHOLES, *PROTOCOLS OF READING* 56 (1989) (asserting that "[s]ince there is no Truth there is no error either, and all beliefs are equal"); Klaus Scherpe, *Dramatization and Dedramatization of "The End": The Apocalyptic Consciousness of Modernity and Post-Modernity*, *CULTURAL CRITIQUE*, Winter 1986-1987, at 95 (describing the meaninglessness and hopelessness of the present and the sense of waiting for catastrophe); Pierre Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 *Geo. L.J.* 37, 55 (1987) (maintaining that there is no reason to believe in interpretive communities or in the relatively autonomous self); Gianni Vattimo, *Myth and the Destiny of Secularization*, *Soc. Res.*, Summer 1985, at 347, 360 (asserting that "[w]e have to keep on dreaming, while being conscious of the fact that all is a dream").

144. See ROSENAU, *supra* note 120, at 14-17.

145. Of course, the image seized upon may not always fit the bill. Recall how the investment firm Merrill Lynch floundered with one of its advertising campaigns, "Bullish on America," after it botched the applicable myth by presenting a herd of bulls, rather than the lone, rugged one who braves the odds and follows his own instinct instead of the herd's. The image of the lone bull provides a better fit with the classic American profile, and the firm ultimately featured it in a subsequent commercial, "A Breed Apart." Oldenburg, *supra* note 56, at D5. For a discussion of another cinematic use of this symbol of individualism, see FRANK MCCONNELL, *STORYTELLING AND MYTHMAKING: IMAGES FROM FILM AND LITERATURE* 98-100 (1979).

146. That is, an image is not used merely for the quick-fix zap of gratification that characterizes the world of MTV or the image surfing of the remote control.

147. See BRUNER, *supra* note 5, at 107-09; ROSENAU, *supra* note 120, at 42-44, 52-61.

While the archetypal modernist discovers the self by systematically cutting off sensory stimulation in search of universal reason within, the archetypal postmodernist takes the reverse course—seeking massive sensory stimulation along superhighways of informational input. Compare RENE DESCARTES, *MEDITATIONS CONCERNING FIRST PHILOSOPHY* 90-91 (Laurence J. Lafleur trans., 1960) (1641) (describing the modern, thinking self that follows from systematic sensory closure) with JAY DAVID BOLTER, *WRITING SPACE: THE COMPUTER, HYPERTEXT, AND THE HISTORY OF WRITING* 213-14 (1991) (describing the destabilized, mutable self that is presented by electronic technology) and MARK POSTER, *THE MODE OF INFORMATION: POSTSTRUCTURALISM AND SOCIAL CONTEXT* 14-15 (1990) (describing how electronic technology alters the modern self). See generally ANTHONY SMITH, *BOOKS TO BYTES: KNOWLEDGE AND INFORMATION IN THE POSTMODERN ERA* 126-27 (1993) ("In passing from analogue signal to digital we seem to be passing also from the objective view of knowledge . . . to the relativistic, endlessly interpretative view of knowledge.").

The dissolution of the modern self appears less threatening when one realizes its cultural and historical contingency. As Walter Ong has shown, oral cultures have always lacked an abstract sense of self. ONG, *supra* note 49, at 54-55 (citing A.B. LURIA, *COGNITIVE DEVELOPMENT: ITS CULTURAL AND SOCIAL FOUNDATIONS* (Michael Cole ed. & Martin Lopez-Morillas & Lynn Solotaroff trans., 1976)).

ent. Abstraction may give way to particularity, contextuality, multiplicity; judgment may turn toward individual voices and localized accounts.¹⁴⁸ But for the affirmative postmodern such localization and contextualization is not fatal to meaning. In addition, while acknowledging the distortions inherent in representation and linear causation, the affirmative postmodern also finds meaning in the contingency, unpredictability, and spontaneity of concepts like truth and justice.¹⁴⁹ The postmodern subject responds to the demand for judgment with culturally specific pragmatism, drawing meaning from known storytelling genres, familiar social stereotypes, and deeply rooted cultural myths. And like myths—or dreams or film—the meanings affirmative postmodernism narrates also lack classic linear form. Persuasiveness here comes from the sudden power of an isolated phrase or image or type¹⁵⁰ or from novel juxtapositions of familiar mental representations. Such meanings are irreducible to, though they may not be wholly cut off from, traditional forms of deductive and inductive reasoning.¹⁵¹ Thus, unlike the skeptical postmodern montage of ever-shifting impersonal surfaces, here there is a human depth. In the affirmative postmodern world, internal forces (like motivation and intention) rather than wholly external forces (like chance or fate) can still account for events and provide a basis for narrative coherence and individual accountability.¹⁵²

148. See SMITH, *supra* note 124, at 183 (explicating the contingency of relativism in terms of a particular systems interacting at “particular time and place”); GIANNI VATTIMO, *THE TRANSPARENT SOCIETY* 4-5 (David Webb, trans., 1992) (noting the decisive role of mass media in the birth of postmodern society, which has been accompanied by a giddy proliferation of communication as increasing numbers of subcultures have their say); see also ROSENAU, *supra* note 120, at 66-67, 82-85 (noting the importance of genealogies, studies of local cultures, ordinary life and ordinary people, and of community-based narratives as substitutes for truth and theory).

149. ROSENAU, *supra* note 120, at 32-33, 92-105; see also BOLTER, *supra* note 147, at 3, 7-9, 31, 35 (correlating modes of human thought and representation with technological developments and noting the shift from print-based linearity, stability, and authority to the unstable, deplotted, and deauthorized intertextuality of electronic writing spaces); SMITH, *supra* note 124, at 30-32, 43, 54 (noting the constructed and radically contingent nature of value and beliefs); cf. ONG, *supra* note 49, at 142-45 (remarking that oral narratives typically do not follow a linear path or strict temporal sequence, but instead mimic the way ordinary memory operates).

150. See, e.g., ONG, *supra* note 49, at 151 (noting that in oral cultures the “type character” serves both to organize a storyline and to manage its nonnarrative elements); see also note 163 *infra*.

151. See, e.g., ERNST CASSIRER, *LANGUAGE AND MYTH* 18 (Susanne K. Langer trans., 1946) (describing mythological consciousness as “instantaneous, a fleeting, emerging and vanishing mental content, whose objectification and outward discharge produces the image of the ‘momentary deity’”). According to Cassirer, the symbols of myth, art, language, and science are not mere figures representing reality but “forces” that produce and posit worlds of their own. *Id.* at 8; see also ROLAND BARTHES, *MYTHOLOGIES* 109 (Annette Lavers trans., 1972) (describing myth as a type of speech); YVETTE BIRÓ, *PROFANE MYTHOLOGY: THE SAVAGE MIND OF THE CINEMA* 42-43 (Imre Goldstein trans., 1982) (noting that consciousness contains “a whole gallery of visual images,” and that even a fragment or tiny detail can evoke a whole experience, as when hearing a rattling wagon induces seeing the wagon, and vice versa). Following Barthes, Biró states: “[M]yth is defined by the way it makes use of certain messages, social or otherwise. Myth uses material already processed—beliefs, views, concepts already formed—which it then retransmits in its own language.” *Id.* at 104-05.

152. Affirmative interpretations of events build on the projected mental scripts from which our common sense of things is constructed. Eliade, for example, identifies the salience of one familiar narrative:

On the one hand, the reader [of a detective novel] witnesses the exemplary struggle between Good and Evil, between the Hero (=the Detective) and the criminal (the modern incarnation of the Demon). On the other, through an unconscious process of projection and identification, he

To sense the efficacy of an affirmative postmodern account, consider the story told at an actual homicide trial by a criminal defense attorney who framed reasonable doubt within a meaningful myth-based narrative.¹⁵³ After having thoroughly deconstructed the linear history of the crime,¹⁵⁴ the defense attorney went on to provide the jury with a meaningful exit from the chaos and unremitting uncertainty that such an attack might leave behind. The proffered exit would lead the jury into a drama of compelling significance—a drama enacted in the real time of trial. Playing upon the deep, persistent cultural myth of the hero called to the difficult task of solving the riddle of the evidence,¹⁵⁵ defense counsel sought to seduce the jury away from the prosecution's straightforward narrative about what happened before trial into the present performance of the heroic courtroom drama.¹⁵⁶ As the defense put it at the end of closing argument:

So what I'm really asking you to do is to do what I think will probably be one of the hardest things that you have ever been required to do in public, which is to stand up and at some point look over at [the defendant] and while looking at him vote not guilty of charges brought against him. Thank you.¹⁵⁷

In this contemporaneously enacted drama, the challenge for the jurors, as for the quest hero of the myth, is to resist the temptation to summarily convict—despite the passions the crime may arouse and the sense of justice a conviction may inspire—and to stay true to their heroic and sworn duty to convict only in the absence of reasonable doubt.¹⁵⁸ Notably, this mythic counterframe is mobilized and sustained by unreflective associations to popular cultural images of the heroic quest, images that derive from classical as well as contemporary sources.¹⁵⁹

This is an example of affirmative postmodern storytelling. The defense employed mythic images that resonated deeply to pull the jury into the dramatic tension of a personal drama that operates according to its own narrative logic and necessity. This differs from conventional lawyerly recourse to text-based

takes part in the mystery and the drama and has the feeling that he is personally involved in a paradigmatic—that is, a dangerous, “heroic”—action.

MIRCEA ELIADE, *MYTH AND REALITY* 185 (Willard R. Trask trans., 1963); see also Amsterdam & Hertz, *supra* note 4, at 112 n.145 (showing how narrative and storytelling serve as basic instruments for understanding and interpreting human experience).

153. This discussion is based on an actual criminal case argued in 1991, in New York City. See Amsterdam & Hertz, *supra* note 4, at 55 & n.2.

154. *Id.* at 61-63.

155. *Id.* at 64-65.

156. *Id.* at 58.

157. *Id.* at 65; see VICTOR TURNER, *THE ANTHROPOLOGY OF PERFORMANCE* 101 (1986). Turner highlights the significance of such courtroom performance:

Most cultural performances belong to culture's “subjunctive” mood. “Subjunctive” is defined by Webster as “that mood of a verb used to express supposition, desire, hypothesis, possibility, etc., rather than to state an actual fact, as the mood of *were*, in if I were you.” Ritual, carnival, festival, theatre, film and similar performative genres clearly possess many of these attributes.

Id.; see also BRUNER, *supra* note 48, at 26 (noting that the use of the subjunctive mode in discourse “traffic[s] in human possibilities rather than in settled certainties” and thereby tends to “recruit presuppositions” to fill gaps or uncertainties in the narrative).

158. Amsterdam & Hertz, *supra* note 4, at 58, 64-65.

159. See *id.* at 65 & n.23, 108 & n.139.

linear logic.¹⁶⁰ There are no explicit syllogisms or analogies at work here. Instead, seeking to induce the jury to believe that the defendant lacked the requisite intent to murder, the defense challenges the jurors to act out, then and there in the courtroom, the role of quest hero.

In *The Thin Blue Line*, Morris' use of gangster filmstrips and cops-and-robbers clips attempts to create a similar dramatic tension. He draws upon popular images of caricatured reality to communicate the absurdity of the prosecution's case against Randall Adams. Such associative, nonlinear storytelling techniques may be persuasive in the context of law, if they are used in the service of a discrete and coherent storyline. Thus, Morris' postmodern storytelling succeeds when it serves the film's causal-linear plot but fails when it is used in the service of the film's radically subversive, what I have called skeptical postmodern, counterplot. One wonders how the film's destabilizing counterplot might have fared had it tracked a more affirmative postmodern narrative form.

C. *Errol Morris' Revisions Revisited*

Although the more subversive techniques of Morris' film fail to affect the linear storyline of the frameup, one could imagine a different counterplot, one made of the same material but fashioned to fit the affirmative postmodernist frame that I have described above. Imagine the same techniques of the nonlinear counterplot harnessed to reach the opposite outcome—a defense of Harris. Around what tropes or myths would the film's images now curve?

The character trope of the trickster fits Harris well: the playful prankster, the shadowmaster and shapeshifter,¹⁶¹ always in control, always mocking, especially of those invested with authority (like police officers and documentary filmmakers). The film could easily portray Harris as acting out a drama of almost-confessions for the sake of spiteful playfulness, for the pure thrill of manipulation. With this in mind, consider the following *possible* sequence from Morris' film:

[Adams:] "The kid scares me. Kid scares me."

[Cut to Harris, in dirty saffron prison garb. He's smiling, inscrutably.]

[Harris:] "Everybody's life's going to take some kind of path regardless of what happens"

[Morris:] "Is he innocent?"

[Harris:] "Did you ask him?"

[Morris:] "Well he's always said he's been innocent."

[Harris:] "Didn't believe him, huh? Criminals always lie."¹⁶²

160. See Sherwin, *supra* note 5, at 17-18 (describing texts invoked to provide mutually acceptable resolutions to conflict).

161. Christopher Vogler describes the shapeshifter as the one who seeks to seduce or entrap the hero. For example, "[t]he wicked Queen in *Snow White* assume[d] the form of an old crone to trick the hero into eating a poisoned apple." CHRISTOPHER VOGLER, *THE WRITER'S JOURNEY: MYTHIC STRUCTURES FOR SCREENWRITERS AND STORYTELLERS* 80 (1992).

162. TRANSCRIPT, *supra* note 7, at 53-56.

Cut to a film clip as Harris speaks: a sequence in which we see an arch trickster, W.C. Fields or perhaps Bugs Bunny, foil the hapless aggressor.¹⁶³ Watching from such an affirmative postmodern frame, do we really believe that Harris, the trickster-sociopath,¹⁶⁴ suddenly tells the truth on film but not at trial?¹⁶⁵ Has Harris really seen the light? Has he experienced, as one of his self-serving monologues suggests, self-transformative psychological insight?¹⁶⁶ Might this be remorse? Is this introspective voice Harris' "true" voice, or just another prank?

We could also imagine a retelling in defense of Harris that tracks the prosecution's causal-linear style. This argument might emulate defense lawyer Barry Slotnick's strategy in his successful defense of Bernhard Goetz, the man who shot four black youths who he claimed were about to rob him on a New York subway.¹⁶⁷ The argument, which attempts to discredit the defendant's own incriminating statements, might run something like this:

Ladies and gentlemen of the jury, you cannot trust this man, speaking to you on tape from prison. In fact, David Harris is his own worst witness. What we know of him establishes that what he says is of questionable reliability. Consider the previous lies; the desperate need to get people's attention; the pitiful show of bravado. It makes sense that he'd try to claim yet another macho, anti-authoritarian act. There was a reason his friends didn't believe him when he bragged about killing the cop: He had a lot of hot air but no guts. Harris would say anything. Even if we were to rely on Harris' account of these events, what do we really know? All of Harris' ambiguous statements care-

163. Compare Joseph Campbell's Nigerian story, recounted by Vogler, of the trickster god Edshu who walks down a road in a hat that's red on one side and blue on the other. Fights ensue between people who traveled on opposite sides of the road about whether the man they passed had been wearing a red or blue hat. The god takes credit for the trouble, saying "[s]preading strife is my greatest joy." *Id.* at 91.

164. Notably, Officer Sam Kittrell remarks on David Harris' trickster quality: "Just anything he could do to make a joke and cut up out there. He was just really having a good time." *TRANSCRIPT, supra* note 7, at 52.

165. Harris' confessions on film could easily be as unreliable as his defense at trial. Morris himself attested to the difficulty of interviewing Harris, recounting that once Harris missed an interview "because he was off killing someone." Eileen Daspin, *The Plot Thickens: Erroll Morris Finds There's a Thin Line Between Art and Obsession*, *ROLLING STONE*, Aug. 25, 1988, at 23, 23 (quoting Morris). But did Harris tell Morris this? And if so, how does Morris know Harris told the truth? See Dieckmann, *supra* note 60, at 38 ("By gradually winning Harris' trust, and by a canny use of reverse psychology, Morris eventually prodded Harris to give a confession that is *The Thin Blue Line's* chilling denouement . . .").

166. See *TRANSCRIPT, supra* note 7, at 55.

167. In this attempted homicide case, Goetz told police on videotape that he deliberately shot four teenagers who he thought were about to mug him on a New York City subway car. In his account, Goetz stated that after he shot each of the four teenagers once, he walked up to his fourth victim and said, "You seem to be doing alright; here's another." GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 117 (1988). That statement, carefully released to the public by the prosecutor after the first grand jury's refusal to indict on any offense more serious than illegal gun possession, contributed to a turn in the public mood against the subway gunman. *Id.* at 1, 4-5. For a discussion of other factors contributing to the turn of public opinion against Goetz, see Jimmy Breslin, *The Gunner Grows Smaller as the Facts Mount*, *DAILY NEWS* (New York), Jan. 3, 1985, at 6.

At Goetz's trial, defense attorney Slotnick sought to show through eyewitness accounts that Goetz fired all the shots in rapid succession, leaving no time for the pause, the inspection, and the infamous, self-condemning words that Goetz (in his mind, ladies and gentlemen, in his mind) thought he had uttered. FLETCHER, *supra*, at 122.

fully stop short of actual confession, and Adams' denial of guilt is obviously self-serving. On what basis can we confidently conclude that Harris rather than Adams committed the crime?

In the face of either the linear or nonlinear counterplot, could we walk away as content in the knowledge that the mystery had been conclusively solved? Is it possible that Harris didn't do it after all? Could it be that our desire for firm resolution is powerful enough to let a film (rather than the Dallas D.A.) create a frameup? Only *this* frameup gives us a different scapegoat. The "young sociopath" David Harris steps in for the "long suffering" Adams. Can we cling heroically to our legal duty, content to convict neither Harris or Adams, as long as a reasonable doubt remains in our minds? Or should we convict both?¹⁶⁸

Fortunately for us, we need not decide this case one way or the other. My point here is simply this: Set within an affirmative postmodern frame, *The Thin Blue Line's* counterplot might have induced more uncertainty than its unsuccessful skeptical postmodern frame. For the affirmative postmodern story to work, however, there must be a coherent storyline to cling to. There must be something to make us feel, if not heroic, at least gratified and confident that justice in some form has been done. And it is precisely the demands of that unavoidable judgment that make even an unbelievable truth (Adams'? Harris'? Morris'? mine?) coupled with a believable myth (hero? scapegoat? trickster?) preferable to no coherent story at all.

D. A Working Hypothesis

By way of summary, let me offer the following hypothesis: The array of deeply ingrained, culturally inherited, and socially instilled storylines that we carry, often subconsciously, in our heads recapitulate an equally deep sense of how truth and justice operate in the world. We believe truth travels a straight line and deceit curves. We believe justice will out in the end because the law's machinery, once set in motion, ensures that it must, and because the narrative demands of the story promise that it will. Yet we can also tolerate a nonlinear tale, as long as it appears to be serving truth's straightforward ends. Just as we can tolerate the justice in factual ambiguity, in reasonable doubt, as long as we locate it in a tale that lets us feel certain about something—even if it is only the certainty that we are heroic in resisting the temptation to yield to a false certainty.

If people's judgments about truth and justice reproduce deep social, cultural, and psychological frames of meaning, then there are important practical

168. Morris' film omits references to the trips that Harris and Adams made together to Dallas pawnshops. See Voluntary Statement of Randall Dale Adams, *State v. Adams* (No. F-77-1286-I 1979). Perhaps the suggestion that the two shared an interest in thievery, in addition to beer and marijuana, might have tainted the film's well-crafted image of Adams as an innocent scapegoat.

Morris also seems to have played a role in shaping the interviews that went beyond the obvious demands for directorial selection and editing. See, e.g., Dieckmann, *supra* note 60, at 38 ("Finally, we get [Adams] to talk, and as soon as he gets to . . . David Harris' name, he stops. . . . And I want him to keep going. I was telling him, 'Look, I really believe you're innocent, this is your only chance!'") (quoting Morris).

lessons that attorneys should attend to. For example, we may begin to see that regardless of content, the form of one legal story may give it significantly more credibility than another story whose form fails to trigger any of the applicable tropes, narrative genres, and familiar storylines that are in our minds.¹⁶⁹ More generally, one might say that for a lawyer to persuasively convey an idea, it must be expressed in a way that comports with how the relevant audience typically makes sense of such an idea.

This suggests that the conventional wisdom about successful legal storytelling in criminal cases should be enlarged. The lawyer's goal is not simply to argue the facts and play the good historian for the jury when the facts look good, or to argue the law to the court when the facts may hurt, or to distract the jurors by pointing to another when all else fails. While these are important strategies, attorneys need to pay close attention to the uses of narrative framing. A knowledgeable attorney's deliberate choice of appropriate meaningmaking tools¹⁷⁰ presupposes a familiarity with at least some of the cognitive structures and mental representations—the popular myths, narrative genres, familiar metaphors, schemata, and so on—through which an advocate can persuasively frame particular topics within a given context. While this practical knowledge of the way meanings get triggered involves storytelling skills that may be intuitively grasped and developed by the naturally gifted, they are skills that lawyers can study and reflectively cultivate.¹⁷¹

Finally, as a cultural phenomenon, legal storytelling must also keep current with changing culture. The stories that lawyers tell, and the frames within which they tell them, must reflect the changing narrative conventions and meaningmaking structures that resonate with one's audience. In this respect, culturally attuned lawyers probably have an edge over those who are not. But culture comes in a variety of forms. Films such as Spielberg's *E.T.*¹⁷² and Lucas' *Star Wars*¹⁷³ stand alongside classical textual sources like the Bible, Homer, and Shakespeare as sources of enduring myths. And the nonlinear plot, reflected by TV image-surfing or MTV montage, must assume its narrative place alongside the causal-linear form. As litigators are increasingly realiz-

169. See text accompanying notes 36-48 *supra*.

170. See BRUNER, *supra* note 5, at 11 (discussing the "symbolic systems" that individuals use to construct meaning and how deeply entrenched they are in culture and language).

171. Amsterdam & Hertz, *supra* note 4, at 118 (commenting that although they "doubt any lawyer's ability to consciously mobilize all of the linguistic strategies . . . , this is not to say that conscious attention to the nature of these strategies is impractical").

172. *E.T.* (Universal 1982).

173. *STAR WARS* (Twentieth Century Fox 1977).

ing,¹⁷⁴ in legal storytelling, as in other cultural narratives, life imitates art, and vice versa.¹⁷⁵ The question to pursue is, how so? What frame when?

Although I have focused on the meaning of one criminal case, the capital murder case against Randall Dale Adams, far more is at stake here. The modernist view, dominant in our culture since the Enlightenment, has taught us to discard rhetoric as mere window dressing, that which obscures reality. This bias against rhetoric distracts us from the rational, scientific rhetoric that champions of the Enlightenment have used so effectively. According to the modernist, correct storytelling proceeds on the basis of a causal-linear frame of meaning. Anything else is fiction, myth, or just plain nonsense. As a result, the sciences have long dominated our legal reasoning and our beliefs about truth. The postmodern age allows us to see that the causal bias of scientific modernism is but one among many rhetorical strategies. In today's complex culture, the challenge has become to articulate the appropriate limits and contexts within which to use the multiple forms of narrative meaningmaking at our disposal.¹⁷⁶ The challenge may be greater than before, but this is, after all, the price to be paid, if we are willing, for the responsible exercise of enhanced freedom in the creation of meaning.

In both mainstream and legal culture, fear and uncertainty have accompanied an awareness of the multiplicity of narrative frames. The temptation is to lock ourselves within a familiar world of parochial meanings. But a world of forced certainty is a dangerous one. As I have attempted to show in the case of Randall Adams, popular local notions of truth and justice may unwittingly coincide with prejudice, deceit, and corruption. Exposing such injustices to popu-

174. For example, consider the video that plaintiff's counsel used as part of the closing argument in a suit against the accounting firm Price Waterhouse. Standard Chartered PLC v. Price Waterhouse, No. 88-34414 (Ariz. Super. Ct. 1988). Dubbed *The Titanic*, the 18-minute documentary-style tape interspersed scenes from a British movie about the sinking of the Titanic, *A NIGHT TO REMEMBER* (J. Arthur Rank 1958), with information and graphics about how a faulty Price Waterhouse audit of United Bank caused the investment bank Standard Chartered PLC to suffer huge financial losses. The plaintiffs won a stunning \$338 million verdict for negligence and an additional \$3.8 million for securities fraud. Rorie Sherman, *And Now the Power of Tape: Videos are being used to argue the case and not just demonstrate the "facts,"* NAT'L L.J., Feb. 8, 1993, at 1, 30 (noting that the general counsel of the accounting firm Ernst & Young was so impressed with the video that he held four in-house screenings of it for his legal staff); see also Robert F. Seltzer, *Improving Trial Efficiency with Visual Communication*, LEADER'S LEGAL TECH. NEWSL. (Litigation Science Inc., Culver City, Cal.), Sept. 1991, at 2 ("Studies have shown that, after 72 hours, people remember as little as 10 percent of the information presented to them orally, yet they are likely to retain as much as 85 percent of what is presented both orally and visually.").

175. At a recent meeting of the Los Angeles County Lawyers Association, a writer for the television series *L.A. Law* recounted how practicing trial attorneys had emulated some of the characters from the show. His message to the lawyers was, in essence, "Lighten up, folks, it's just a TV show." But one could sense the response: "If it's good enough for the Nielsens, it's good enough for us."

176. Witness the modern/postmodern war over authoritative canons and cultures that has spread from the academy to popular culture. For example, the television miniseries *Wild Palms* passionately reenacts Allan Bloom's defense of the traditional classical or modernist curriculum against the challenges it sustains from those who call for "multiculturalism" and the eradication of "cultural hegemony." *Wild Palms* (ABC television broadcast, May 16-19, 1993). Compare ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987) (urging universities to stop stifling their intellectual freedom with concern over society's problems) with STANLEY ARONOWITZ, *ROLL OVER BEETHOVEN* (1993) (defending the value of contemporary cultural studies in the United States and Great Britain).

lar scrutiny does not guarantee its cure. There is no guarantee, but cautionary steps may be taken. We must learn to discern and guard against the more repugnant forms of narrative manipulation. For ordinarily, only our own prejudices—our ingrained perceptions, understandings, and beliefs—stand between narratives of truth and justice and the exercise of power over the criminal defendant. Sometimes, perhaps, all that stands between such narratives and a person's death is fate. For this reason, we must carefully examine how decisions are being made under the color of law.

VI. CONCLUSION: PROOF AND PERSUASION IN LEGAL STORYTELLING

What has been well called the long conversation of mankind may be growing so cacophonous that ordered thought of any sort, much less the turning of local forms of legal sensibility into reciprocal commentaries, mutually deepening, may become impossible. But however that may be, there is . . . no choice. The primary question, for any cultural institution anywhere . . . is whether human beings are going to continue to be able . . . to imagine principled lives they can practicably lead.

Clifford Geertz¹⁷⁷

Forces beyond our reckoning and control—forces like chance, fate, or even illusion—seem to have no place in the legal system.¹⁷⁸ For how could we judge in a universe that does not recognize human agency? What could judgment mean in a world without motivation and intentionality, in a world where things just happen? Without order and certainty about the past (historical truth) and the present (narrative necessity) there is no place for us. Fear of human obsolescence and chaos may thus make even the lie a haven.¹⁷⁹ At least there, there is a place to be in, and a place from which judgments can be made.

The ancient Greeks wondered whether it was fate or chance that ruled our lives and dictated justice.¹⁸⁰ Others in the Judeo-Christian tradition have wondered whether the secular order allows for revelatory insights into justice.¹⁸¹ Or, if prophecy fails, does justice then depend on individual virtue and heroic

177. CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 234 (1983).

178. See MARQUARD, *supra* note 96, at 80 (“[W]e need a confidence that resists being undermined by . . . experience [of overwhelming, incomprehensible complexity]. If necessary, the guarantees of this confidence are invented . . . in the form of postulates of practical reason.”).

179. Caveat deconstructor: In the domain of legal storytelling, a repugnant truth, perhaps even an unbelievable one, is often preferable to none at all. The question is not whether, but *how*, truth can be framed.

180. See, e.g., AESCHYLUS, *ORESTEA* 3 (David Grene & Wendy Doniger O’Flaherty trans., 1989) (depicting necessary retribution passing from one generation to the next by the messengers of fate, the Furies, until they are tamed by civil law).

181. See Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 *CAP. U. L. REV.* 179, 183 (1985) (suggesting that “there are sacred narratives of jurisdiction that might constitute the texts to ground judicial commitments”); Richard K. Sherwin, *Law, Violence, and Illiberal Belief*, 78 *GEO. L.J.* 1785, 1807-11 (1990) (critiquing Cover’s argument that law can provide a bridge of redemption, bringing the Messiah); cf. WALTER BENJAMIN, *Theses on the Philosophy of History*, in *ILLUMINATIONS* 255, 264-66 (Hannah Arendt ed. & Harry Zohn trans., 1968) (comparing materialist historiography with conceptions of Messianic time).

imagination? Or is justice simply another futile fiction in a world governed by chance?¹⁸²

Errol Morris' film about the capital murder case of Randall Dale Adams provokes these sorts of musings. By offering us two opposing narrative frameworks for the organization of meaning, the causal-linear detective story and the acausal tale of irresolvable mystery, Morris invites us to see how reality can be fashioned in very different ways. He also depicts the lapses and manipulations that plague each of these framings. In the comforting form of linear narrative, all the clues add up. Its narrative necessity assures us that truth and justice will triumph in the end. Adams is innocent. He was framed. End of story. We want so much for it to be so, that we forget or ignore the details that get in the way. Especially in a case of capital murder, we prefer causality, closure, and factual resolution over the discomfort of unending mystery.

I have argued that this desire for order effectively buries the nonlinear and mystifying aspects of Morris' film. I advocate a far less comforting complexity. The Adams case *should* make us uneasy. To leave unchallenged our belief that "truth and justice will out in the end" ignores the tapestry of interwoven yet opposing frameworks that Morris skillfully invites us to contemplate. As Morris suggests, that tapestry, its acausal threads no less than the causal, is a product of the mind.

Yet in law, unlike in academia or in film, official decisionmakers get to have their meanings enforced by the police. What responsibility must be shouldered, then, for the framing of reality that the law and human judgment often require?

As an important part of our obligations, we must increase our knowledge of cultural and cognitive tools and tendencies—the preconceptions and mental pictures that enable us to frame reality through the legal narratives we use. The Adams "frameup" highlights the need to scrutinize more closely the different ways in which we perceive and assess events and others' actions. It is simply not enough to see and judge. If we are to guard against our unwitting participation in convenient and comforting frameups of reality, we must be better acquainted with the filters through which we see and judge. How do we hear another's story? How do we translate it into terms consonant with our own experience, desires, and preferences? What do we tend to omit or distort in an effort to tell a smoother tale—a tale whose prototype waits in the mind to be triggered?

Lawyers and legal scholars can learn to assess more candidly their own and others' meaningmaking habits. This includes evaluating omissions, inconsistencies, and plotlines that flow from deep (usually hidden) beliefs and assumptions about what truth and justice are and how they operate in the world. These beliefs in turn often stem from subconsciously assimilated story forms, myths, and popular images. If this is so, we need to recognize and assess the effect of these ingrained preferences on how we tell stories as well as on how we hear

182. Consider the way in which David Mamet's film *Homicide* makes the case for empty coincidence rather than order imposed by human agency. *HOMICIDE* (Triumph 1991).

them, being particularly alert to the exploitation of instinctive preferences for narrative techniques like causal linearity, story closure, and tantalizing scripts and stereotypes.¹⁸³

This heightened sociocultural and psychological knowledge may also enable us to expand our meaningmaking capacities,¹⁸⁴ adding new resources, cognitive tools, and mental representations to the narrative repertoire. For example, we may be able to better appreciate how someone who lives outside the range of our ordinary experience makes sense of a particular situation. Such an enhanced capacity for localized seeing and understanding can also expand our ability to translate from one cultural context to another, perhaps cultivating more widely shared notions of individual dignity and equal justice under law. Without such knowledge, I do not believe we can take adequate responsibility for the judgments we make nor for the concrete consequences that our narratives of truth and justice produce.

If better training in the possibilities of narrative meaningmaking leaves lawyers and judges more sensitive to the multiple forms of legal proof and persuasion, it will also provoke increased critical reflection in the profession upon those forms of proof and persuasion that look like unacceptable manipulation, triggers for judgmental error. Lawyers, judges, scholars, and the lay public may thus more readily recognize unacceptable stereotypes (e.g., Harris as the good old local boy, Adams as just a drifter), false closure based on a denial of uncertainty, and unsupported assumptions about what truth and justice look like.

This cultural and cognitive approach to legal meaningmaking offers no guarantee of certainty. It does, however, alter our impression that meaning is something that we passively receive; rather, we come to see how we all actively construct meaning both culturally and psychologically. Because any frameup of legal reality implicates us all, we must accept greater responsibility for the legal realities we help to establish when we tell or accept one legal story rather than another.

Aristotle reminds us of the enormous creativity and responsibility in the human act of making meaning: Midway between the unintelligible and the commonplace, it is a metaphor which most produces knowledge.¹⁸⁵ Classical or postmodern, it is the metaphor—the mental image, the deeply rooted mythic tale, the resonant story form—by which we take account of others' and our own actions. These judgments, these accounts, may become most truly ours when we knowingly claim them as ours. Yet to do this we must understand the mechanisms by which we judge: What cognitive tools, what stock narratives,

183. See, e.g., Vicki L. Smith, *When Prior Knowledge and Law Collide: Helping Jurors Use the Law*, 17 *LAW & HUM. BEHAV.* 507, 509 (1993) (describing the conflict between jurors' naive mental representations of crimes and judicial instructions and discussing ways to improve decisional accuracy); see also note 46-48 *supra* and accompanying text.

184. We may also learn to live within our epistemological means—identifying what we can know as well as what we may not be able to know with certainty. See MARQUARD, *supra* note 96, at 113-14.

185. ARISTOTLE, *supra* note 48, at 244 ("Metaphor most brings about learning; for when Homer calls old age 'stubble,' he creates understanding and knowledge" (footnote omitted)).

what assumptions about truth and justice make up the legal stories that capture belief?

VII. EPILOGUE

Although I was continually inspired by his historic achievements, I have perhaps been most personally affected by Justice Marshall as raconteur.

...

... [Once] he told me about the time he and his mentor, Charles Hamilton Houston, the vice-dean at Howard Law School, traveled to Loudoun County, Virginia, to help a man on trial for his life. The man, George Crawford, had been indicted by an all-white Grand Jury of murdering a white woman from a well-to-do Virginia family, as well as her white maid. Despite their defense challenge to the exclusion of African Americans from the jury, Crawford was convicted of murder by an all-white jury, and sentenced to life. "You know something is wrong with the government's case," Justice Marshall told me, "when a Negro only gets life for murdering a white woman."

After the trial, Justice Marshall said, the media asked if Crawford planned an appeal based on the exclusion of African Americans from the jury. "Crawford said, 'Mr. Houston, if I have another trial, and I got life this time, could they kill me the next time?' Charlie told him yes. So Crawford told Charlie: 'Tell them the defendant rests.'"

Justice Sandra Day O'Connor, Summer 1992¹⁸⁶

[F]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.

Chief Justice William Rehnquist, writing for the majority in *Herrera v. Collins*.¹⁸⁷

Justice O'Connor concurred in the opinion, Winter 1993.¹⁸⁸

186. Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217-20 (1992).

187. 113 S. Ct. 853, 860 (1993) (holding that claims of factual innocence based on newly discovered evidence do not in themselves entitle a prisoner facing execution to have those claims considered by a federal court).

188. *Id.* at 870.

