

# So What's in a Name? A Rhetorical Reading of Washington's Sexually Violent Predators Act

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Society likes these nice, tidy definitions—"mentally ill," "criminal," "sane." Well, some of these people don't fit these categories. They just attack, repeatedly, over and over.<sup>1</sup>

Mother of a Seattle woman who was raped and murdered

Language lies at the intersection between legal authority and human experience. Not surprisingly, then, that legal authority is encountered through rhetorical conventions. They shape it, if not create it. A constitution is a written document; its ethos emerges from its words. The very fact that the authority of the law lies within the conventions of language offers us some control over the law. It becomes something other than force; ideally, it becomes our agent.

The convention most commonly recognized in discussions of the language of the law is that of interpretation. Does a baby carriage violate an ordinance prohibiting vehicles in the park? The answer lies, not within any abstract conception of law, but within the interpretive acts brought to bear upon the language of the ordinance.<sup>2</sup> Some might respond that the question is a silly one. Parks are meant to be enjoyed by the public and that enjoyment includes families. Baby carriages clearly belong there. With such a response, the interpretation has simply turned to another convention of language—narrative.

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1. Barry Siegal, *Locking Up "Sexual Predators,"* L.A. TIMES, May 10, 1990, at A1, A31 (quoting Ida Ballasiotes, mother of Diane Ballasiotes, who was raped and murdered in Seattle in September 1988).

2. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 7 (1983). Cover asks this old question and notes that "interpretive commitments must be used to answer it." *Id.*

It has begun to tell a story.<sup>3</sup>

Steven Winter has characterized this intermediary and "meaning-constituting" position of language in the law as an "agon," a struggle between the power of the law, with the abstracting and generalizing tendencies inherent in its use of language, and the fuller, more concrete meanings provided by narrative.<sup>4</sup> In Winter's view, narrative meanings lie closer to the plane on which we live our lives, and thus he finds that reconstructing the narratives that underlie the law has gained considerable appeal in recent legal scholarship.<sup>5</sup>

The attraction of narrative is that it corresponds more closely to the manner in which the human mind makes sense of experience than does the conventional, abstracted rhetoric of law. The basic thrust of the cognitive process is to employ imagination to make meaning out of the embodied experience of the human organism in the world. In its prototypical sense as storytelling, narrative, too, proceeds from the ground up. In narrative, we take experience and configure it in a conventional and comprehensible form. This is what gives narrative its communicative power.<sup>6</sup>

Nonetheless, Winter acknowledges that narrative as a form of discourse does not wholly fulfill the institutional functions of the law.

On the other hand, narrative is not the primary medium for the kind of institutionalized meaning that is necessary if a prevailing order is to make its claims of legitimation and justification persuasive.<sup>7</sup> "Narrative does not meet the threefold demands of generality, unreflexivity, and reliability that are

3. Others might respond that, within its plain meaning, "vehicle" simply does not mean baby carriage. They would be relying, however, upon the most common and everyday of interpretive acts—that of framing the word within its ordinary usage by some generalizable speech community called "the public." Still others might respond that city officials never intended such an ordinance to apply to baby carriages; that response, however, also relies upon the construction of a narrative. For a discussion of the interpretive practices brought to bear in the law, including intentionalism, see STANFORD LEVINSON & STEVEN MAILLOUX, *INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER* (1988).

4. Steven Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 (1989). The phrase "meaning-constituting" comes from Cover, echoing James Boyd White, *supra* note 2.

5. Winter, *supra* note 4, at 2228. The symposium containing Winter's article is dedicated to legal storytelling. See Kim Lane Scheppelle, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989).

6. Winter, *supra* note 4, at 2228.

7. *Id.*

necessary if a prevailing order is credibly to justify itself.”<sup>8</sup>

Winter concludes that narratives are important in that they help shape, or constitute, the social experiences to which the law responds, but he acknowledges that they are not the final, institutionalized form in which the law codifies meaning.<sup>9</sup>

In this Article, I will examine this socially constitutive function of narratives in the enactment of Washington State's Sexually Violent Predators Act.<sup>10</sup> This Act is a prime recent example of how social narratives—in this case, narratives of violence, pain, and outrage—lie behind the official language of the law. As Winter would point out, narrative was the vehicle that prompted legal change.<sup>11</sup> The question for this Article, however, is what happens once the story has been recast into another form, here that of a statute? How well do the immediacy of the details and the authorial voice of the story lend themselves to the generalized and categorizing language of a rule?

The immediate answer is, no doubt, not well at all. I would like to take this Article a little further, however. In some instances, and perhaps in this one, traces of the originating narrative voice remain. Are those traces sufficient? To what extent can the authority of a narrative survive translation into the structure of a legal rule, with its own forms of legitimacy and persuasion?

The Article will begin, in Part I, “Story-telling,” by looking at the originating narratives that led to the demand for a change in Washington law regarding violent and predatory sex offenders. In Part II, “Translating,” it will then examine the rewriting of these narratives into the form of a legal rule, *Revised Code of Washington* (“RCW”) 71.09, the Sexually Violent Predators Act. Part III, “Reading,” contains a detailed analysis of the language of RCW 71.09, exploring the ways in which statutory language attempts to embody meanings that had their origins in the very different form of narrative. This section will also comment on the ways in which the language

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8. *Id.*

9. *Id.* On the role of narrative in shaping social reality, see Jerome Bruner, *The Narrative Construction of Reality*, 18 *CRITICAL INQUIRY* 1 (1991).

10. WASH. REV. CODE ch. 71.09 (Supp. 1990-91).

11. Winter, *supra* note 4, at 2228. “[T]he highest use and greatest facility of narrative is as an iconoclastic tool of persuasion to legal and social change.” *Id.*

of RCW 71.09 is subtly persuasive, but necessarily falls far short of the persuasive immediacy of narratives.

In Part IV, "Consequences," this Article will look at two recent challenges to RCW 71.09, as a way of asking how effectively the ethos, or moral imperative, of the original narratives can survive translation into the form of a legal rule. When a statute is challenged in an appeal, the original narrative, as embodied in the language of that statute, faces competing narratives, each with its own moral claims. And all of these narratives face translation again, into the judicial opinion, the written form of the judges' responses to the voices, experiences, and languages of which these narratives were composed.

The law offers one of the central forums in which we tell the stories of our experience. The law also has its own rhetoric, however, whose meanings originate in narratives but whose forms are different. In the debate about Washington's Sexually Violent Predators Act, this Article attempts to remind us that the voices, and the pain, of those originating narratives linger, vestigially, in the subsequent writings of the law, whether in the language of the statute, of the briefs, or of judicial opinions. It is beyond the scope of this Article to suggest the appropriate response of the Washington courts to the law. But that judicial response, insofar as it must encounter and acknowledge the imperatives woven into the narratives of human experience, cannot escape the deeply ethical nature of the stories that we tell about ourselves, including those told by the law.

## I. STORY-TELLING

Anyone who lived in the Puget Sound area during 1988 and 1989 and who read the local newspapers encountered the shocking stories about the abduction, rape, and murder of Diane Ballasiotes in Seattle<sup>12</sup> and, roughly eight months later, the rape, strangling, and mutilation of a seven-year-old boy in Tacoma.<sup>13</sup> Both crimes seemed so gruesome and extreme that they elicited an immediate cry of rage from the community, first to capture the assailants and then, especially after the sec-

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12. Dave Birkland, *Jailed Man a Suspect in Slaying*, THE SEATTLE TIMES, Oct. 4, 1988, at B1.

13. Bruce Rushton, *Past Sex Offender Suspect in Attack*, MORNING NEWS TRIBUNE (Tacoma), May 22, 1989, at A1.

ond crime, to change the law so that convicted sex offenders would not have the opportunity to repeat their crimes. The narratives of these events were told repeatedly in local newspapers, on television, on radio news shows, and in conversations among family and friends.

The crime in Tacoma elicited the most insistent response from the community for some kind of legislative remedy, not only because it followed so closely the crime in Seattle, but also because a child was the victim.<sup>14</sup> The personal horror of the attack and the boy's subsequent efforts at recovery emerged vividly through the voice of his mother, Helen Harlow, who was willing to speak publicly. Only three days after the attack, she granted interviews with the press from the hospital where her son was recovering, sharing her anger, pain, and uncertainty with reporters.<sup>15</sup> The rest of the community quickly joined her in her rage.

The local newspaper ran an editorial the same day, asking for a community response.<sup>16</sup> The headline read "An Offense that Calls for Outrage" and was followed by text that spoke for the feelings of the community: "First there's the horror, shock, and revulsion. . . . Then there's the outrage, frustration, and confusion. . . . [These] feelings need to be vented and the questions must be answered."<sup>17</sup> The public, as if responding directly to the editorial request, joined in a community voice calling for change. Two days after the editorial, protestors gathered on the steps of the state capitol, "venting their anger" over the incident in what the newspaper called "a public outcry."<sup>18</sup> Among the protestors was a brother of Diane Ballasites, the woman killed the year before in Seattle.

The protest on that Friday marked the end of a week in which the community began acting on behalf of the moral imperatives implicit in the story of the boy.

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14. The victim advocates group that developed in response to the crime was called the Tennis Shoe Brigade, a reference to the tennis shoe as a symbol of childhood innocence and vulnerability. See Alex Tizon, *Will 10,000 Tennis Shoes Get Gardner's Attention?*, THE SEATTLE TIMES, June 18, 1989, at A1; Mark Matassa, *A Message for the Governor*, THE SEATTLE TIMES, Aug. 8, 1989, at C2.

15. Kathleen Merryman, *The Little Boy Isn't Alone*, MORNING NEWS TRIBUNE (Tacoma), May 24, 1989, at A1.

16. *An Offense that Calls for Outrage*, MORNING NEWS TRIBUNE (Tacoma), May 24, 1989, at A10.

17. *Id.*

18. Debby Abe, *Gardner to Probe How System Failed*, MORNING NEWS TRIBUNE (Tacoma), May 27, 1989, at A8.

The rally was just the latest demonstration in a week of public uproar. From Monday, when the scope of the Shriner [the accused rapist] case became apparent, to 2 p.m. Friday, the governor's office received 1,000 calls and letters about the case. Milne [gubernatorial representative] said that's probably the most correspondence the governor has received on one issue in such a short time.<sup>19</sup>

The community quickly followed protests in the capitol with community meetings, where hundreds of people blamed the legal system and demanded changes. At one meeting, where part of an overflow crowd was turned away, a psychologist who specializes in treating sex offenders seemingly began the call for a special category of offender when he groped for the words to condemn those who molest children. "The sadistic, homicidal child molester, the pedophile—we don't know how to treat them. . . . All we can do is lock them up.'"<sup>20</sup> The need for a language, a label for people like these offenders, became part of the task of the legislature, a task made more difficult when attempted within the conventions of a rule rather than a narrative.

Narratives can help shape the experience of a community into a form that allows the public both to give meaning to and to evaluate that experience.<sup>21</sup> In the case of the Tacoma boy, the narrative helped preserve the community's very sense of its own identity and morality. It defined an act that struck the community as way beyond the bounds of normal behavior and as confounding to any sense of who a member of the community should be.

During the public hearings, the accused, Earl Shriner, was repeatedly referred to as if he were an animal, an outsider, a man who had forfeited all rights. One police officer testified that the only "cured" sex offender he knew of was a rapist whom he had "shot dead." His listeners responded with "thunderous applause."<sup>22</sup> In the legislative debates over the pending bill on sexually violent predators, legislators expressed similar attitudes that people like Shriner were outsiders to the com-

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19. *Id.*

20. Dan Voelpel, *A Demand to Change the System*, MORNING NEWS TRIBUNE (Tacoma), May 31, 1989, at A1.

21. The importance of normativity in narratives has been discussed both by Cover, *supra* note 2, at 4-10, and Bruner, *supra* note 9, at 15-16.

22. Hal Spencer, *Sex Offender Bill Cheered by Police*, MORNING NEWS TRIBUNE (Tacoma), June 3, 1989, at B1.

munity and should be treated as such. " 'Voluntary mutilation is too good for sex offenders,' said state Sen. Brad Owen (D-Olympia). 'It should be mandatory for these creeps. The Constitution was never meant to coddle these people, but that's what we use it for.' ”<sup>23</sup>

Responding to the voice of the community, Governor Booth Gardner established the Governor's Task Force on Community Protection.<sup>24</sup> Not surprisingly, the report of the Task Force opens with a reference to the originating narratives: "Governor Gardner created the Task Force on Community Protection following the murder of a young Seattle woman by an offender on work release and the brutal assault of a young Tacoma boy."<sup>25</sup> Although the members of the Task Force knew well the stories and testimony that had given rise to their work, they nevertheless conducted six public hearings across the state. As the members explained, they wanted to "discover what citizens believe are the major flaws in our state's laws regarding sexual and violent offenders."<sup>26</sup> In other words, given that the Task Force was formed in response to the voice of the community, the members wanted to hear more about the community's version of the story and about how the community interpreted it. The Task Force also wanted to discover other stories of violent sexual predation.

In one instance, these additional stories moved the Task Force to broaden the scope of its inquiry, looking at crimes other than only those committed by strangers.

The injury caused by a rapist who is a stranger is often physical and very apparent. But the stories heard by Task Force members in every community made it clear that the damage inflicted by acquaintances and family members also causes [sic] wounds which can endure for a lifetime. At the hearings, citizens eloquently pleaded to add these crimes to the Task Force's agenda.<sup>27</sup>

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23. Siegal, *supra* note 1, at A31.

24. Exec. Order No. 89-04, Wash. St. Reg. 89-13-055 (1989). The Task Force consisted of four legislators, plus people who had expertise with the criminal justice system or with mental health civil involuntary commitment procedures. The task force also had citizen members, including the mothers of Diane Ballasiotes and the Tacoma boy.

25. GOVERNOR'S TASK FORCE ON COMMUNITY PROTECTION, DEP'T OF SOCIAL AND HEALTH SERVICES, FINAL REPORT I-1 (1989) [hereinafter TASK FORCE REPORT].

26. *Id.*

27. *Id.*

This admission offers further evidence of the compelling nature of the narratives regarding sex crimes and their role in inducing legislation that would somehow confine those repeat sex offenders who posed a serious threat to the safety of the community.

As the Task Force Report continues to describe the problem, however, it drifts away from the narratives and voices of the public in its effort to legitimate and justify its view of the severity of the problem.<sup>28</sup> Later, for example, the arguments turn to statistics and reports of experts to document the serious nature of sexual and interpersonal violence. The report cites studies conducted by the United States Surgeon General, by the Centers for Disease Control, by the Bureau of Justice Statistics, and by numerous social scientists.<sup>29</sup> A rhetorical turn like this in the argument is understandable, given the severity not only of the crimes being examined but also of the solutions proposed. In making laws, those responsible must act upon comprehensive and reliable evidence; hence, the Task Force had to determine what experts and professionals had discovered nationally about sexual violence. In addition, the scientific or quasi-scientific nature of this evidence lent an air of objectivity and professionalism to the work of a committee that had had its origins in community outcry.<sup>30</sup> Nevertheless, this change in the nature of the rhetorical authority, upon which the Task Force relied later in the report, prefigures the radical difference between the authoritative voice of the community with which the Task Force's work began and the rhe-

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28. The Task Force, despite the broad representation of its membership, was also more than a neutral or disinterested audience for these public narratives. It represented one step in a political process that began with the governor's issuing of the executive order and that continued into the state legislative session and the passing of RCW 71.09. As a part of that process, both the Task Force and the Washington State Legislature had to choose some means of translating the normative impulses of the public's narrative into some appropriate model for criminal sanction, that model being grounded in its own normativity. *See generally* HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 149-73 (1968). A full accounting of that political process lies beyond the scope of this Article.

29. TASK FORCE REPORT, *supra* note 25, at IV-1 to IV-4.

30. To note that this kind of evidence provides the rhetorical effect of objectivity is not the same as claiming that it is grounded in objective truths. For more on the rhetoric of scientific discourse and the argued-for nature of its claims, *see* CHARLES BAZERMAN, *SHAPING WRITTEN KNOWLEDGE: THE GENRE AND ACTIVITY OF THE EXPERIMENTAL ARTICLE IN SCIENCE* (1988); ALAN GROSS, *THE RHETORIC OF SCIENCE* (1990).



torical authority of the statute that was ultimately drafted and enacted into law.

## II. TRANSLATING

The Task Force Report lies at a point midway between the originating social narratives of violence and the legislation that was ultimately passed, a point of transition that offers an opportunity to look at some of the differences between narratives and rules. Clearly the narratives derived from the incidents both of the Seattle woman and of the Tacoma boy are horrifying and shocking; they contain an affective dimension. In their concreteness and immediacy, they construct a world of terrible aggression and violence. The details, largely avoided in this Article, contribute to the nightmarish nature of these events, even when fictionally reconstructed in the minds of the listeners. Furthermore, these narratives are grounded in experiences that have links to those of our own ordinary lives, and thus they are readily comprehensible to us. We could have been where these people were. We can imaginatively project ourselves into these situations, even though to do so may be terrifying.

These affective qualities, borne of the rhetorical conventions of narrative, in turn can also make these narratives transformative.<sup>31</sup> Narratives invite us in. We imaginatively participate, and we can do so in part on the basis of concrete experiences that we share with the events depicted in the narrative. But no narrative contains events that can wholly correspond to the experiences of our own lives. Some events will be depicted, albeit concretely, that are unknown or unfamiliar to us. In this way, narratives sometimes also challenge our sense of what is ordinary, and real. In the process, we must reshape the manner in which we make meaning out of experience, and we must rethink what we expect from it. When the narrative is compelling, and successful, we develop a broader understanding of human experience and an empathy for the experience of others. These powers of narrative, long acknowledged and felt, surely contribute to narrative's ability to elicit social and legal reform. People in the Puget Sound area began to see how something unthinkable was in fact possible, and they asked for protection.<sup>32</sup>

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31. Winter, *supra* note 4, at 2277.

32. Spencer, *supra* note 22, at B1, B2. "I don't want to hear again that this person

A problem arises, however, when narratives are translated into the form of a legal rule.<sup>33</sup> Although narratives may draw upon a power to reconstruct unfamiliar and painful situations in ways that can allow others to imaginatively participate and that can spur reform, that same power becomes a liability for the rule-maker. Every reconstruction relies upon the experiences of the listener; each retelling is a reinterpretation. Thus, narratives create a risk of indeterminacy and inconsistency. Legal rules, on the other hand, must be applied consistently each time.

Furthermore, every narrative is instantiated—it takes place in a specific time and place, its setting. Thus, narratives lack the generality required of rules. The concrete, specific details of a narrative require translation into the structure of categories and labels before the imperative embodied within the narrative can be extended to other cases.

James Boyd White finds this translated structure of the rule deceiving in its simplicity.<sup>34</sup> “Reduced to simplest terms, the rule can be said to operate this way: a label is applied to experience, and a consequence determined by the label is imposed. The rule seems to reduce all experience to a single descriptive term.”<sup>35</sup> White quickly adds, of course, that rules are not quite this simple.<sup>36</sup> But he nevertheless finds that legal rules necessarily conform to requirements for consistency which obscure important parts of the experience that gave rise to the rule.<sup>37</sup> Every legal rule, he concludes, must find its place between, on the one hand, a recounting and description of human experience—story-telling—and, on the other, a kind of abstract, precise categorizing and defining that, at its extreme, would render the rule meaningless.<sup>38</sup>

According to both Winter and White, then, legal rules are a specialized form of language that must respond to the human experiences, and accompanying narratives, that gave rise to them in the first place. Yet legal rules must also structure that response in a way that allows them to be applied consistently

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or that person fell through the cracks. I want the cracks filled.” *Id.* at B2 (quoting Ida Ballasiotes).

33. Winter, *supra* note 4, at 2260.

34. JAMES BOYD WHITE, *THE LEGAL IMAGINATION* 229 (1973).

35. *Id.* at 229.

36. *Id.* at 229-31.

37. *Id.* at 232-35.

38. *Id.* at 240.

and reliably; legal rules have a rhetoric of their own. Given the constraints of that rhetoric, how well can Washington's Sexually Violent Predators Act retain the persuasiveness and authority of its originating narratives?

### III. READING

The Sexually Violent Predators Act does not wholly dispense with the voice of community outrage that led to the change in the law, but, in its opening section, the statute does translate that voice into one based upon a very different kind of authority. The statute begins with a section titled "Findings," which relies upon the conclusions of the Task Force and thus, by incorporation, upon the stories told about the two crimes of 1988 and 1989.<sup>39</sup> The narrative voice has changed, however, from that of an angry public or even from that of Task Force members, speaking with grave personal and professional concern, to the voice of the legislature.

*The legislature finds* that a small but extremely dangerous group of sexually violent predators exist [sic] who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act. . . . *The legislature further finds* that sex offenders' likelihood of engaging in repeat acts of predatory sexual violence is high. . . . *The legislature further finds* that the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act.<sup>40</sup>

This voice of the legislature is of course a rhetorical device, a fictional voice, as if the voice of the people were being spoken through their elected representatives.<sup>41</sup> Although this fictional voice serves a purpose, partly ceremonial and partly legitimizing for the statute that follows, it lacks the concreteness and immediacy of the earlier narratives. By means of the remnants of a generalized narrative fiction, it is the voice of the legislature. But it is no longer situated within the form of a

39. WASH. REV. CODE § 71.09.010 (Supp. 1990-91).

40. *Id.* (emphasis added).

41. On this voice of the implied author, see WAYNE BOOTH, *THE COMPANY WE KEEP: AN ETHICS OF FICTION* 169-98 (1988); WAYNE BOOTH, *THE RHETORIC OF FICTION* 70-77, 211-21 (1983).

narrative, and so it lacks the type of presence that narrative establishes so well. The voices of the actual legislators who spoke to the legislation are missing, let alone the narrative voices of the public and of the victims' families who spoke during the spring of 1989.<sup>42</sup>

Nevertheless, a constrained fictional voice is allowed for in statutory language. It is as close as a piece of legislation can probably come to representing the voice of the people while still conforming to generally accepted conventions for legislative drafting.<sup>43</sup> Such conventions allow for a voice on behalf of the people of the State of Washington, even if that voice is somewhat generalized and has considerable distance from the circumstances that gave rise to the statute. The generality and distance are part of the rhetorical convention and reinforce the guise of rationality and calmness within which legislation is, purportedly, enacted.<sup>44</sup>

Thus, despite the legitimizing function of this opening voice, the constraints of statutory conventions weaken the rhetorical authority of rules as compared with that of narratives. A close reading reveals other difficulties as well in translating stories of horrifying violence, with their accompanying moral imperatives, into the careful and precise language of the law. In the narrative accounts of the two crimes that led to this statute, the offenders acquire great presence by virtue of their rhetorical place in the narrative as a main character.<sup>45</sup> Character in a narrative is best defined by action; the brutal acts alone of these two men speak volumes about their character. In addition, public response, well-chronicled in both narratives, further defines the character of these men through the collec-

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42. See, e.g., Siegal, *supra* note 1, at A31 (quoting Senator Owen).

43. See REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* 186-87 (2d ed. 1986). In describing the basic elements of communication in drafting—author, audience, written utterance, and context—Dickerson sees the concept of author as posing “no significant problem” because the actual author of the legislation is always writing on behalf of someone else. *Id.* at 26-27. This is a naive view of any drafted document, including a statute. Dickerson ignores the complex nature of an author as a rhetorical construct, representing not only actual authors but also the reader’s fictionalized version of who the author is.

44. James Boyd White has analyzed the voice of the Declaration of Independence, noting how a similar voice of general detachment must necessarily give way to anger and a call for revolution. See JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING* 231-40 (1984).

45. See WAYNE BOOTH, *THE COMPANY WE KEEP: AN ETHICS OF FICTION* 227-91 (1988).

tive voice of social opinion and commentary.<sup>46</sup> RCW 71.09 lacks these defining powers of narrative.

Given this lack, the "Findings" section must initially define sexually violent predators.<sup>47</sup> It does so by explaining who they are not: "A small but extremely dangerous group of sexually violent predators exist who do *not* have a mental disease or defect that renders them appropriate for the existing involuntary treatment act, chapter 71.05 RCW . . . ."<sup>48</sup> The first defining statement simply explains that these offenders are not the same as the group of offenders described in an earlier rule, RCW 71.05. In part, this section of RCW 71.09 is addressing a perceived shortcoming in existing law. The earlier law, RCW 71.05, had allowed for short-term treatment and return to the community, precisely the condition that led to public outrage over the 1988 and 1989 crimes; thus, it could not offer a remedy. Given the need to establish a new category of offender, the opening section of RCW 71.09 has asserted the existence of this new offender. However, saying who a person is not, which is the definitional strategy of this opening, is different from saying who a person is.

The "Findings" section of RCW 71.09 next tries to offer a more positive definition of its category of offender; it can do so, however, only in general terms: "In contrast to persons appropriate for civil commitment under chapter 71.05 RCW, sexually violent predators *generally* have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior."<sup>49</sup> Apart from the admittedly general nature of the definition, the sentence also refers to the negative definition already offered ("features which are unamenable to existing mental illness treatment") and then offers a tautological description of the features ("and those features render them likely to engage in sexually violent behavior"). The tautology lies in the statement that sexually violent predators have features that lead to sexually violent behavior.

The difficulty of offering a positive definition continues in the next sentence, where the statute must now use the syno-

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46. See *supra* text accompanying notes 12-23.

47. Chaim Perelman describes definition as a form of identification that is, at the same time, a form of argumentation. See CHAIM PERELMAN & LUCIE OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 210-18 (1969).

48. WASH. REV. CODE § 71.09.010 (Supp. 1990-91) (emphasis added).

49. *Id.* (emphasis added).

nym “sex offenders” to avoid rendering this sentence as yet another tautology. “The legislature further finds that *sex offenders*’ likelihood of engaging in repeat acts of predatory sexual violence is high.”<sup>50</sup> Were the statute to use the label for the category that it is establishing, the sentence would read that *sexually violent predators*’ likelihood of engaging in repeat acts of *predatory sexual violence* is high. This potential repetition demonstrates the descriptive nature of the label that the statute uses. Because it is largely descriptive, the label for the actor does not serve well in any sentence, such as the one above, that also describes the act.

These difficulties do not necessarily illustrate flaws in the statute. Rather, they point to the difficulty of retaining the same rhetorical authority when moving from the language of narrative to the language of legal rule and definition. Narratives are concrete, self-contextualizing, and instantiated. They are always located in the world, even if that world is imaginary (as it is not here). They contain an authorial presence, a voice, whose rhetorical authority serves as a guide to meaning.<sup>51</sup> Legal rules are general by necessity,<sup>52</sup> and, as mentioned above, either contain much weaker authorial presence or, more commonly, lack it altogether. Here, the “Findings” section contains a thinly-stated echo of the people’s voice translated as a legislative voice. But when the section begins to define its category of offender, it runs the risk of unraveling. Situated outside the narrative of anger and protest, the people’s voice, as spoken through the legislature, lacks the requisite authority to establish a clear guide to any generalizable meaning. The statute’s opening section no longer contains an authorial voice, and it suffers from the absence of other supporting narrative conventions. It could not do otherwise. Precisely because of their inherent generality, mentioned earlier, statutes cannot rely for meaning upon the concrete situatedness that narratives do.

In a narrative, the nature of a person, the “character,” is defined by action, by voice (of both the narrator and the other characters), and by style. In a statute, defining is done by

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50. *Id.* (emphasis added).

51. That meaning need not accord with the meaning implied by the narrative voice; a reader can as readily disagree as agree with a narrative voice, but in either case the voice serves as a guide to meaning. See BOOTH, *supra* note 45, at 169-98.

52. See Winter, *supra* note 4, at 2259-60 (discussing the differences between narratives and legal rules).

overt definitions. Hence, RCW 71.09 follows its "Findings" section with a "Definitions" section, a normal and acceptable statutory convention.<sup>53</sup> The voice of the legislature, however, and whatever rhetorical force it could offer, are now gone. The definitions begin with "sexually violent predator," the category of person to whom the statute applies and thus the primary definition in the section. "'Sexually violent predator' means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence."<sup>54</sup>

Like many legal definitions, this one is stipulative.<sup>55</sup> Although the definition contains common words with ordinary meanings, here they are combined into a phrase whose usage is somewhat different from what actual usage would be in an ordinary speech community.<sup>56</sup> Definitions like this one are usually stipulative because of the law's need for careful precision. Such precision is exercised in this statute so as not to include any person in the category of sexually violent predator who in fact is something else, even some other kind of sexual offender.<sup>57</sup> In addition, this definition proceeds by a rhetoric of analysis, again because of the need for precision.<sup>58</sup> That is, the section breaks down its definition into subclasses of larger classes. Here, a sexually violent predator is a subclass of a larger class—a "person who has been convicted of or charged with a crime of sexual violence," and the definition distinguishes the sexually violent predator from the other members of the larger class. The limiting language that creates the subclass, however, deserves further scrutiny.

In addition to its description of the larger class mentioned above, the analytical definition of sexually violent predator creates the subclass by describing persons who suffer from one of two conditions: "a mental abnormality or [a] personality disorder which makes the person likely to engage in predatory acts of sexual violence."

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53. See DICKERSON, *supra* note 43, at 137-52.

54. WASH. REV. CODE § 71.09.020(1) (Supp. 1990-91).

55. "Stipulative definitions" create a meaning different from actual usage within a speech community; "lexical definitions," such as those found in a dictionary, record actual usage. See DICKERSON, *supra* note 43, at 138.

56. *Id.*

57. On the requirement that the language of the law be precise, see generally DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 290-398 (1963).

58. See DICKERSON, *supra* note 43, at 139.

The first condition, mental abnormality, is further defined in subsection two. " 'Mental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others."<sup>59</sup> The definition, as for subsection one, is analytical and is limited three times. Mental abnormality is, first, a condition affecting capacity, second, in a way that predisposes a person to commit a criminal act, and third, that person thus poses a particular kind of menace.

Much of this limiting language comes from other sections of Washington laws. The larger class to which mental abnormality belongs is defined as "a congenital or acquired condition affecting the emotional or volitional capacity."<sup>60</sup> That language echoes the definition of mental disorder in RCW 71.05.020(2): "any organic, mental, or emotional impairment which has substantial adverse effects on an individual's cognitive or volitional functions."<sup>61</sup> Similarly, the definition of mental abnormality in RCW 71.09.020(2) further limits this condition as one which "predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others."<sup>62</sup> This language repeats almost verbatim the definition of sexual psychopath in RCW 71.06.010, an older statute. That statute defines a sexual psychopath as a person who suffers from a condition (in the older statute, a "form"), "which form predisposes such person to the commission of sexual offenses in a degree constituting him a menace to the health and safety of others."<sup>63</sup>

This borrowed language from the two existing statutes allows the definitions in subsection two of RCW 71.09.020 the assurance of using words whose meanings already exist, legally, in other parts of the law; the range of their usages has already been well-established by the courts. Although many of the phrases in subsection two are striking for their generality—"a congenital or acquired condition" and "emotional or volitional capacity"—that generality is controlled and limited

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59. WASH. REV. CODE § 71.09.020(2) (Supp. 1990-91).

60. *Id.*

61. WASH. REV. CODE § 71.05.020(2) (1989).

62. WASH. REV. CODE § 71.09.020(2) (Supp. 1990-91).

63. WASH. REV. CODE § 71.06.010 (1989), *repealed prospectively by* 1984 Wash. Laws ch. 209 (codified at WASH. REV. CODE § 71.06.005 (1989)).



by reference to other parts of the code. This reference is an important means of definition in the law. Because legal meaning is established through prior usage and confined by judicial precedent, the law tends to rely upon similar words and phrases for related definitions.<sup>64</sup> To the degree of care, repetition, and detail already noted above in the "Definitions" section can thus be added a kind of self-referentiality, in which already-established legal meanings form the basis for the creation of new but related meanings. What this careful enclosure of statutory meaning cannot include, however, is the ways in which narrative meaning refers to and incorporates human experience. The authority of narrative, relying upon concreteness to evoke the memory of experience, has been supplanted by an authority that depends upon precision and logical consistency within the corpus of the law.

The second condition listed in subsection one, "personality disorder," receives no further definition, probably because the term itself has an accepted clinical definition.<sup>65</sup> It does, however, receive additional qualification, and that qualification descends into the tautological language already discussed above under the section "Findings." That is, a sexually violent predator is a person who suffers from a "personality disorder" that results in "predatory acts of sexual violence."

This tautology, as mentioned earlier, reveals the difficulty of translating the very strong normative impulses of narrative into the objective, voiceless language of a statute. In the context of a narrative, what constitutes a sexually violent predator is readily understood; the whole is the sum of its individual words, each word being readily comprehensible in ordinary usage. Here, the statute cannot rely upon these ordinary usages. Nevertheless, the continuing impulse toward repetition and tautology in the statute evokes the presence of the story behind the statute, as if these words can speak for themselves, their meaning breaking through for anyone who knows the story.

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64. See MELLINKOFF, *supra* note 57, at 374-87.

65. According to the American Psychiatric Association, Personality traits are enduring patterns of perceiving, relating to, and thinking about the environment and oneself, and are exhibited in a wide range of important social and personal contexts. It is only when personality traits are inflexible and maladaptive and cause either significant functional impairment or subjective distress that they constitute Personality Disorders.

AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, DSM-III-R (3d ed. rev. 1987).

The third definition in RCW 71.09.020, "predatory," is a key definition in the statute. This word is important for characterizing the type of sexual offender to whom the statute applies. The noun form, "predator," appears more often in the statute than does the adjectival form "predatory." As noted above, however, that noun form "predator" is defined in subsection one as a person who engages in "predatory" acts, and so a careful definition of "predatory" will, by virtue of the tautology, also define "predator."

"Predator" is a word with strong connotations in its ordinary usage.<sup>66</sup> The common usage of the word indicates a general rapaciousness and destructiveness. In addition, the word is commonly applied to animals, and so when it refers to humans, somewhat metaphorically, it carries over with it an entailment of instinctual savageness. For these reasons, the statute must carefully provide its own stipulative definition of the word, to control the usage. The fact that the statute must do so, however, points again to efforts within the language of the statute to be tacitly persuasive. To acknowledge that this statutory "predator" is unlike the commonly conceived predator is to argue for a particular, and special, type of predator.<sup>67</sup>

Like the first two definitions discussed above, the definition of predatory is also analytical. It means "acts directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization."<sup>68</sup> As do the other definitions, it begins with a larger class, "acts directed towards strangers or individuals," and then isolates a subclass within it, "with whom a relationship has been established . . . ." The narrative portion of the Task Force Report (referred to earlier)<sup>69</sup> has already explained the purpose for the alternative construction of either "strangers" or "persons with whom a relationship has been established."<sup>70</sup> Another important definitional qualification comes at the end, "for the primary purpose of victimization."<sup>71</sup> Here, the definition works almost by synonym, rather than tautology

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66. See, e.g., WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1785 (unabridged, Merriam-Webster, 1971).

67. See PERELMAN & OLBRECHTS-TYTECA, *supra* note 47, at 212-13.

68. WASH. REV. CODE § 71.09.020(3) (Supp. 1990-91).

69. See TASK FORCE REPORT, *supra* note 25, at I-1.

70. *Id.*

71. WASH. REV. CODE § 71.09.020(3) (Supp. 1990-91).

or repetition. "Predatory" means "victimizing." The synonym has a common and vivid meaning in common usage, with a connotation that is sometimes associated with "predatory." The statute has carefully allowed that connotation from common usage to carry over into statutory usage.

The fourth definition, of "sexually violent offense," differs from the other three in being a denotative definition rather than an analytical one.<sup>72</sup> Denotative definitions work by listing. Subsection four lists, at considerable length, the types of acts that would constitute a sexually violent offense. It carefully makes reference to other places in Washington law where these types of offenses are defined. Because of the care of its listing, this definition adds considerable detail to the "Definitions" section. For example, part (a) of the subsection lists the following:

[R]ape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree.<sup>73</sup>

The full list of subsection four seems exhaustive rather than partial and thus allows for little or no ambiguity as to the acts that fall within its domain.

This discussion has offered an excruciatingly close reading of the first two sections of the Sexually Violent Predators Act, but not without purpose. The point of the reading is, simply, that the language of the Act must be persuasive language, even if its available persuasive devices are somewhat limited. The first persuasive device, the use of the voice of the legislature in the opening section, echoed, although somewhat weakly, the stronger rhetorical authority provided by the authorial voice of some of the other narratives underlying the writing of the statute.

The need for additional persuasion is created by the opening sentence of the first section—"[t]he legislature finds that a small but extremely dangerous group of sexually violent predators exist."<sup>74</sup> This finding is, of course, not a finding so

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72. *Id.* § 71.09.020(4). On definitions by listing, see DICKERSON, *supra* note 43, at 139.

73. WASH. REV. CODE § 71.09.020(4) (Supp. 1990-91).

74. *Id.* § 71.09.010.

much as it is a construction. Such a category of offenders did not exist previously, waiting to be discovered, but rather was constructed by the legislature as a result of the investigations of the Task Force. Those investigations themselves were a reading and interpretation, in a sense, of the stories that the Task Force had heard in hearings and testimony. The category of "sexually violent predators" does not exist as a scientific category, a "hard" fact that can rely upon a rhetorical authority derived from another field; rather, the category must be argued for. This is the initial task of the statute.

The second persuasive tactic in the statute is embodied in the entire "Definitions" section, discussed above.<sup>75</sup> This tactic might best be called that of "presence," a matter of depicting certain concepts in such a way as to call the reader's attention to them and to elicit a sense of their fullness and presence.<sup>76</sup> The tactic is largely psychological.<sup>77</sup> It might be viewed as equivalent, although much less evocative, to the kind of concreteness that is one of the stock tools of narrative.

In RCW 71.09.020, presence is developed largely through the construction of an analytical taxonomy. The section begins by defining "sexually violent predator," but immediately follows that stipulative definition with a definition of each of the major parts of the original definition. As noted earlier, some of the definitions become tautological if read carefully, but the section risks that tautology in order to repeat key terms—for example, "sexual," "violent," "predator," and "predatory"—in the first definition. Both strategies, that of enumeration of parts and that of repetition, are common to the tactic of developing presence.<sup>78</sup>

The section also relies upon a third strategy, accumulation of detail.<sup>79</sup> This strategy might also have its counterpart in narrative. Again, the diminished effect of this accumulation of detail in the statute demonstrates, by contrast, the strong shaping force that narrative lends to its own component parts, such as narrative detail. In the statute, the first three definitions, in their analytical delineation of a particular subclass, incorporate considerable detail into the definition. The fourth definition,

75. See PERELMAN & OLBRECHTS-TYTECA, *supra* note 47, at 210-18.

76. *Id.* at 115-20; CHAIM PERELMAN, *THE REALM OF RHETORIC* 35-36 (1982).

77. See PERELMAN & OLBRECHTS-TYTECA, *supra* note 47, at 116-18; PERELMAN, *supra* note 76, at 35-40.

78. PERELMAN, *supra* note 76, at 37.

79. *Id.*

by denotation, simply lists various acts that exemplify a sexually violent offense, but in the act of listing amplifies the concept of sexual violence and its contribution to the presence of the major concept of sexually violent predators. The longer the list of acts, the stronger the presence.<sup>80</sup> This final act is important because the listing is referential; other violent sexual offenses are invoked, and their existence lends status to the existence of the new category of sexually violent predation.

The question remains of how to evaluate the rhetorical effects of the statute.<sup>81</sup> Two recent legal challenges to the constitutionality of the statute provide an opportunity to investigate its initial consequences.

#### IV. CONSEQUENCES

Shortly after the Sexually Violent Predators Act was passed, two people were charged under the new law. Both were convicted of being a sexually violent predator, and both quickly challenged their conviction in the Washington State Supreme Court.<sup>82</sup> With these charges and the accompanying trials and appeals, the law had returned to the realm of narrative. Any legal case revolves around a story, and part of the trial process entails the narrative reconstruction of that story in court.<sup>83</sup>

Opposing parties will, of course, reconstruct the story from different points of view and, in certain respects, will tell somewhat different stories. In the appeals mentioned above, both sides open their statements of the case by presenting different versions of the appellants' characters. The prosecutor/respondent's brief opens with three sentences that immediately estab-

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80. I count 25 separate acts that would constitute a "sexually violent offense."

81. This statement may strike some as an odd way of looking at challenges to a statute—the more common test being that of constitutionality. The two are not unrelated. Any arguments about the constitutionality of the statute will surely look at the ways in which the statute has defined "sexually violent predator." As argued in this Article, definition is in part a device of persuasion, one important question being its ability to establish rhetorical authority. See, e.g., Amicus Curiae Brief of the Washington State Psychiatric Association in Support of Petitioners, *In re Young* (Wash. filed Sept. 20, 1991) (No. 57837-1) [hereinafter WSPA Brief].

82. See Brief of Appellants, *In re Young* (Wash. filed Oct. 10, 1991) (No. 57837-1) [hereinafter Appellants' Brief]. As of this writing, the court has not yet issued a decision.

83. See generally LANCE W. BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM* (1981).

lish the subject as the type of person, or character, who could be a sexually violent predator.

In the 28 years before this civil commitment action was commenced, [the appellant] has been convicted of six felony rapes. He has been at large in the community, with the opportunity to rape, only 11 of those 28 years. All of appellant's known rapes have been against adult female strangers.<sup>84</sup>

The brief continues with the chronology of the appellant's sexual offenses, each told with sufficient detail to lend strong narrative authority to the type of character that the prosecution is presenting.<sup>85</sup> In the narrative thus reconstructed, the appellant is the primary agent in a saga of repeated episodes of rape. His story, as told, defines him through character and action as a sex offender who is violent and who preys upon women. The brief establishes the character of the second appellant in the same manner.<sup>86</sup>

The brief filed by the other side also develops portraits of the characters of the appellants, this time showing them as victims. In the narrative as reconstructed, the primary agent is the law, represented by corrections officials and judges and accompanied by state psychologists. The appellants are the victims of a procedural system that allowed them to be charged and detained immediately upon their having already served their sentences and upon their having been released from correctional facilities.<sup>87</sup>

In describing the second appellant, the brief also spends several pages recounting testimony from family, friends, and employers, as well as from the appellant himself, that he is a victim of psychological inadequacies and social shortcomings that account for his troubled character. He is portrayed as being dyslexic and thus a high school dropout who accordingly suffered from poor self-esteem and who was forced to accept menial jobs.<sup>88</sup> The testimony also notes his recent efforts to overcome these problems, an effort at self-improvement of his character.<sup>89</sup>

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84. Brief of Respondent and Cross-Appellant State of Washington at 2, *In re Young* (Wash. filed Oct. 29, 1991) (No. 57837-1) [hereinafter Respondent's Brief].

85. Respondent's Brief, *supra* note 84, at 3-6.

86. *Id.* at 10-13.

87. Appellants' Brief, *supra* note 82, at 11-47.

88. *Id.* at 41-45.

89. Wayne Booth has recently described the strong tendency in Western

These narratives, however, do not have the same rhetorical status as the originating social narratives discussed earlier in this Article. To begin with, they are conflicting narratives, rather than a unitary narrative. At trial, the law tells, not one story, but multiple stories.<sup>90</sup> Each side offers a different telling of the facts, emphasizing a different point of view. At the level of the appeal, these conflicting stories continue to underlie the arguments made. In fact, the heart of appellate arguments, in certain respects, lies within the normativity of the underlying stories, within the ethos that emerges from their telling. Here, one story emphasizes the right of the community to be free of harm from persons found to be extremely dangerous and likely to repeat sexual offenses. The opposing story emphasizes the right of each citizen to constitutional safeguards such as due process and equal protection. In its underlying ethos, each story makes a compelling claim.

In addition, the narratives told at trial and in appeal are constrained by the definitional and procedural boundaries of the legal rule, RCW 71.09. Not surprisingly, then, each brief recounts the testimony of psychological experts summoned by both the state and by the defense. The state's leading psychologists carefully track the definitional categories of RCW 71.09 in finding that the appellants suffer from personality disorders and mental abnormalities that indicate with a "reasonable psychological certainty" that the appellants would again commit predatory acts of sexual violence.<sup>91</sup> Similarly, the defense's expert witnesses attack the categories provided in the statute and thus conclude that the state's labelling of the appellants lacks predictive power or psychological validity.<sup>92</sup>

These arguments are all based upon defining and labelling strategies that go beyond the concrete instantiation of character provided by straightforward narrative. They are necessary because of the shaping presence of the statute and its turn to careful legal definitions as a substitute for the narrative device of character. Interestingly, the rhetorical authority of those legal definitions must be realized, and challenged, through the testimony of psychological experts. The very qualities of the statutory definitions that lend them their authority as part of a

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narratives to portray character in terms of self-improvement. See BOOTH, *supra* note 45, at 230-37.

90. JAMES BOYD WHITE, HERACLES' BOW 174 (1985).

91. Respondent's Brief, *supra* note 84, at 7-8, 14-15.

92. Appellants' Brief, *supra* note 82, at 25-28, 39-41.

legal rule—their generality and their differentiation from everyday usages and meanings—also preclude any straightforward or self-evident reading of what they mean in a particular context. They lack the concreteness of character in a narrative. In accordance with current legal conventions and social norms, the law turns outside to psychology, relying upon that discipline's efforts to create categories and predict behavior in ways that are warranted by empirical observations and systematic methodologies. Thus, when the categories of the statute are applied to real situations, the authority of the statutory definitions must be backed by other forms of authority.

In addition, the statute's partial reliance upon psychological terms becomes problematic because the purposes of the statute and its definitions differ from the purposes of psychology and its diagnostic categories. The statute must translate stories about people who commit violent acts into a language of categories for identifying such people. That language overlaps, however, with the diagnostic language of mental health professionals, who employ schemes of classification to identify mental dysfunctions, just as a physician diagnoses physical dysfunctions. The mental dysfunction itself may or may not result in sexually deviant forms of behavior, just as an inflamed throat may or may not lead to hoarseness. The emphasis among mental health professionals is upon dysfunctions that have been agreed upon by a medical community. The outward behavior may be a symptom of the dysfunction, but not a necessary condition for defining it.<sup>93</sup>

## V. CONCLUSION

The difficulty with legal reforms is that, although they often rely upon acts of imagination in their creation, they must finally employ a language that is inadequate for such tasks. The narrative authority giving rise to the reform is silenced by the overriding demands of the language of the rule. The rule contains its own kind of rhetorical authority, but that rhetoric necessarily lacks the immediacy of narrative. In addition, although every trial offers a retelling of the original story—in another version—that retelling involves conflicting narratives and competing ethical demands.

Furthermore, the process for legal reforms in situations

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93. See WSPA Brief, *supra* note 81, at 3-5.



such as that described here relies upon shifting audiences. Whereas the social narratives of violence and pain began with an audience, first of the community, then of a governor's task force, and finally of legislators, the ultimate audience has become the judiciary, which must respond to the original narrative as translated by a rule and as retold in competing narratives. Judges as readers are situated differently, and they read for different purposes.

Some recent commentators have questioned whether narratives, no matter how compelling, can reliably initiate legal reform.<sup>94</sup> Here, the question is not so simple. The narratives were compelling, and they did result in a new statute. The statute, however, must translate the ethical imperatives of the narrative into the general language of a rule. Even were the language of the originating narrative to survive translation, the retelling at trial has broadened the field of ethical imperatives to which the narrative must respond. If the courts ultimately uphold the conviction of the first two appellants, they will have done so by silencing voices that have made due process and equal protection claims. Legal interpretation imposes silence, and pain, upon others.<sup>95</sup> On the other hand, a reversal would, in effect, deny the voices of pain and violence found in the originating narratives, voices which demanded embodiment in a statute and its application.<sup>96</sup> Either decision, either judicial reading, is an exercise of power.

It may be, however, that the judge wields something more important than power. In making a decision, the judge must also tell yet another version of the story and, in doing so, must make an appeal once again to the community. The question, ultimately, is that of how convincing is this appeal. In his most recent work, James Boyd White has adopted the metaphor of translation to describe this re-telling by the judge.<sup>97</sup> In part, White calls it "translation" because of the impossibility of writing a judicial opinion that does not encounter multiple stories, that does not include some voices and exclude others, and that

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94. See Symposium, *Law, Literature, and Social Change*, 43 VAND. L. REV. 1663 (1990).

95. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601-09 (1986).

96. Martha Minow claims that the courts all too often ignore these kinds of voices. See Martha Minow, Comment, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665 (1990).

97. JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* 224-25, 257 (1990).

does not select certain details and fashion its own story.<sup>98</sup>

Translation as I am now defining it is thus the art of facing the impossible, of confronting unbridgeable discontinuities between texts, between languages, and between people. As such it has an ethical as well as an intellectual dimension. . . . It requires one to discover both the value of the other's language and the limits of one's own. Good translation thus proceeds not by the motives of dominance or acquisition, but by respect.<sup>99</sup>

In this work, as in his others, White is arguing for a view of law as a rhetorical activity, and thus an activity that can never escape its deeply ethical nature. The judge, in wielding his or her power, has a responsibility to the community as well as to the law. The judge's decision cannot be purely scientific, the product of a wholly linear calculus. It must also acknowledge the limits of our own ways of understanding, the contingent nature of the world we inhabit, and the chaos or silence that always threatens to engulf the fragile communities we have constructed.<sup>100</sup> It must be understood as another story, as another retelling of the original narrative.

To suggest that the response of the courts to RCW 71.09 be viewed as a retelling of the narrative is not to resolve the normative conflicts raised by the statute, nor to perfect statutory definitions that may be unavoidably imperfect. No one is a god or goddess these days; no one can adopt an omniscient view; no one telling of a story can heal all pain and injustice. To return to the suggestion made at the beginning of this Article, however, narratives as a rhetorical form may lie closest to the level of our daily experience and, as such, may be one means for us to evaluate the judicial response. Judicial decisions provide a language for determining not only the adequacy of the facts or the constitutionality of a rule, but also for determining whose point of view should prevail in the story, whose voice must be heard, and what the boundaries of the telling will be. In listening to the story, we can decide for ourselves how responsible the teller has been to our shared social experiences, how adequate the language has been to the telling.

The law, perhaps more than any other cultural activity, is our predominant forum for telling our stories, and for asking

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98. *Id.* at 262-63.

99. *Id.* at 257.

100. *Id.* at 40-41.

that others listen. Sometimes the language of the law may be inadequate to that telling. We may decide that it is inadequate here, that we should search for another forum. What no one would argue with is the need for the telling. The alternative is to lose a sense of ourselves as a community. The alternative is also a silence and a pain that lie beyond language, and thus beyond our own limited and very human powers.