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Narrative Theory and the Law: A Rhetorician's Invitation to the Legal Academy

INTRODUCTION

Law's foundations are rooted in rhetoric. In ancient Greece, rhetoricians trained citizens to defend themselves in the legal arena and prepared citizens to participate in the polity. The scholarly domain of rhetoric remains valuable to legal scholars and practitioners for both its classical theories of persuasion and for more contemporary rhetorical theory, especially the theories exploring dramatism and the concomitant power of narrative.

Legal practitioners recognize the importance of storytelling in the courtroom. Yet while lawyers recognize the effectiveness of narrative and metaphor, they have largely ignored the rhetoric rationale behind the potency of language. The study of law is, at its base, grounded in the study of stories. Through the Socratic method — another manifestation of Greek rhetorical theory — professors and students laboriously proceed through cases to arrive at fundamental principles of law. In courtrooms, witnesses tell their stories, attorneys aim to make their client's story the most persuasive, and the laws of evidence aim to diminish the impact of the emotions engendered by these stories while privileging the realm of rationality. Ultimately jurors arrive at verdicts based on their stock of stories derived from experience.¹ Stories, at their base level, are integral to the study of law:

[L]aw is in a very important sense all about competing stories, from those presented at the trial court — elicited from witnesses, rewoven into different plausibilities by prosecution and defense, submitted to the critical judgment of the jury — to those retold at the appellate court, which must pay particular attention to the rules of storytelling and the conformity of narratives to norms of telling and listening, on up to the Supreme Court, which must tress together the story of the case at hand and the history of constitutional interpretation, according to the conventions of *stare decisis*

1. Paul Gewirtz, *Narrative and Rhetoric in the Law*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 2, 7-8 (Peter Brooks & Paul Gewirtz eds., 1996).

and the rules of precedent, though often, because dissents are allowed, presenting two different tellings of the story, with different outcomes.²

The study of law and the practice of law are infused with stories, and, thus, attention must be paid to the inherent power of stories. In addition, while lawyers talk about the need to connect with experience and common sense, they fail to explore the rhetorical rationale for this necessity. Narrative theory explains the power of stories and, perhaps most importantly, recognizes that stories do not have to be exactly accurate to be persuasive; rather, they have to be plausible (narrative fidelity) and make sense (narrative coherence).³

Legal scholarship based upon narrative tends to focus on the increasing use of narrative in the courtroom and the resulting implications of such use for practicing attorneys. In addition, legal theorists discuss the impact of narrative on the traditional rules of the court, especially its challenge to traditional evidentiary theory and its potential for empowering previously silenced voices.⁴ Paul Gewirtz, in the introduction to a Yale symposium on narrative and the law, wrote that “[b]ooks about law typically treat it as a bundle of rules and social policies. This book is different. It looks at law not as rules and policies but as stories, explanations, performances, linguistic exchanges — as narratives and rhetoric.” Gewirtz implores legal scholars to cross disciplinary borders: “[T]his book reflects what might be called an interdisciplinary leap — an a priori commitment to the worth of engaging people from different disciplines to confront problems of common interest.”⁵ However, Gewirtz acknowledges that most of the contributors to the symposium “have no particular literary training or literary expertise.”⁶

While literary training would assist in assessing the power of narrative in the law, rhetorical training would immeasurably add to legal scholarship in the realm of narrative. Rhetoric is, at its base, the study of persuasion and the study of language in all its permutations. Thus, rhetorical theorists would certainly applaud

2. Peter Brooks, *The Law as Narrative and Rhetoric*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 14, 16 (Peter Brooks & Paul Gewirtz eds., 1996).

3. WALTER R. FISHER, *HUMAN COMMUNICATION AS NARRATION* 5 (1987).

4. Symposium, *Narrative and Rhetoric in the Law*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* (Peter Brooks & Paul Gewirtz eds., 1996).

5. See GEWIRTZ, *supra* note 1, at 4.

6. See *id.*

this effort by legal scholars, while at the same time lamenting their failure to cross disciplinary borders and thereby reach into the wealth of knowledge and theory offered by rhetoricians. For in failing to make such a leap, legal scholars make the all-too-common mistake of separating rhetoric from form, of granting reason and rationality an undeserved privilege over emotion and desire. Through this disconnection of reason and emotion, through fatally severing the very essence of humans as symbol-using creatures, legal scholars miss the essential reason why language is persuasive, ultimately capable of uniting and dividing. The dramatic nature of humans also provides the basis for democracy through the functioning of the Constitution as a privileged document.

Therefore, to relegate the study of narrative to the form through which such stories are transmitted is to dismiss the power of stories in the very nature of language itself. Stories are controlling because humans influence each other through symbols to create a shared past and present, and to imagine a better future. In this essay, I will focus on the dominant rhetorical theorist of the twentieth century, Kenneth Burke, and his theory of dramatism. I will also explore the work of Walter Fisher whose narrative theory, grounded in the dynamics of dramatism, helps to explain why stories are so persuasive.

I. KENNETH BURKE'S THEORY OF DRAMATISM

"Wherever there is persuasion, there is rhetoric. And wherever there is 'meaning,' there is 'persuasion.'"⁷ Every utterance is an invitation to persuade, according to Kenneth Burke, because the basic function of rhetoric is the use of words by human agents to form attitudes or to induce actions in other human agents — rhetoric "is rooted in an essential function of language itself, a function that is wholly realistic, and is continually born anew; the use of language as a symbolic means of inducing cooperation in beings that by nature respond to symbols."⁸

Inducing cooperation is only necessary because man is divided — "[i]dentification is compensatory to division. If men were not apart from one another, there would be no need for the rhetorician to proclaim their unity. If men were wholly and truly of one substance, absolute communication would be of man's very

7. KENNETH BURKE, *A RHETORIC OF MOTIVES* 172 (1950).

8. *See id.* at 41, 43.

essence."⁹ Persuasion is not just the use of words; it is style itself, it is form — “[i]n its simplest manifestation, style is ingratiation.”¹⁰ Form itself leads to persuasion:

Once you grasp the trend of the form, it invites participation regardless of the subject matter Thus, you are drawn to the form, not in your capacity as a partisan, but because of some “universal” appeal in it. And this attitude of assent may then be transferred to the matter which happens to be associated with the form.¹¹

The seductiveness of form, as evidenced by the ritualistic power of the courtroom, is possible because of the nature of man as a symbol-using creature. To understand the psychology of persuasion, one must understand the nature of human souls. Burke found this necessary for “the arousing and fulfillment of desires.”¹² Persuasion entails the whole being: “[y]ou persuade a man only insofar as you can talk his language by speech, gesture, tonality, order, image, attitude, idea, *identifying* your ways with his.”¹³

“Man [is] the symbol-using, symbol-misusing, [and] symbol-making animal.”¹⁴ The ability to talk about the past, the present, and the future is the only feature of humans that distinguishes us from all other animals: “[L]anguage is a *collective* product and the capacity of complex symbolic action is distinctive of the human race.”¹⁵ To study man is to study motives, why people act as they do. Burke’s analysis of motives has profound implications for the study of law and for the investigation of the reasons behind man’s acts:

Men may violently disagree about the purposes behind a given act, or about the character of the person who did it, or how he did it, or in what kind of situation he acted; or they may even insist upon totally different words to name the act itself. But be that as it may, any complete statement about motives will offer *some kind* of answers to these five questions: what was done (act), when or where it was done (scene), who did it (agent), how he did it (agency), and why (purpose).¹⁶

9. *See id.* at 22.

10. KENNETH BURKE, PERMANENCE AND CHANGE 50 (1935).

11. *See* BURKE, *supra* note 7, at 58.

12. KENNETH BURKE, COUNTER-STATEMENT 124 (1931).

13. *See* BURKE, *supra* note 7, at 55.

14. KENNETH BURKE, LANGUAGE AS SYMBOLIC ACTION 63 (1966).

15. KENNETH BURKE, A GRAMMAR OF MOTIVES 300 (1945).

By way of example, a few commonplaces in law illustrate the potency of Burke's terminology. An act may be so heinous as to dominate — a gruesome murder. An actor may similarly take precedence — an F. Lee Bailey at trial. The scene itself may overwhelm all others — the formality of the courtroom.

The above pentad of act, scene, agent, agency, and purpose allows an explication of any persuasive act in terms of the dominant ratios. Ten such ratios are possible: scene-act, scene-agent, scene-agency, scene-purpose, act-purpose, act-agent, act-agency, agent-purpose, agent-agency, and agency-purpose.¹⁷ Burke in later works would add a sixth element to his pentad, transforming it into a hexad, with his addition of the term attitude, which he labeled an incipient action. It is attitude that lays the foundation for action.

Basic to understanding Burke's terminology is distinguishing action from motion:

As for "act," any verb, no matter how specific or how general, that has connotations of consciousness or purpose falls under this category. If one happened to stumble over an obstruction, that would not be an act, but a mere motion. However, one could convert even this sheer accident into something of an act if, in the course of falling, one suddenly *willed* his fall.¹⁸

Lawyers make this very distinction between action and motion in distinguishing act as a necessary element of many "causes of action." Man is not punished for thoughts. Man is not punished for mere motions. A classic example — being pushed onto another's property — does not constitute trespass. Similarly, Burke is not concerned with mere motion, or with the non-creative manipulation of signs. While dogs, for example, can bark at another's approach, they cannot converse about the past, present, and future.

Burke explicates the Constitution in terms of his pentad: "A legal constitution is an *act* or body of acts (or enactments), done by *agents* (such as rulers, magistrates, or other representative persons), and designed (*purpose*) to serve as a motivational ground (*scene*) of subsequent actions, it being thus an instrument (*agency*) for the shaping of human relations."¹⁹ Yet the unity of a constitution cannot disguise the basic divisiveness inherent in its terms:

16. *See id.* at xv.

17. *See id.* at 15.

18. *See id.* at 14.

19. *See id.* at 341.

A constitution may . . . propound a set of generalized rights or duties, and all these may be considered a grand promissory unity, a *panspermia* in which they all exist together in perfect peace and amity. Yet when, in the realm of the practical, a given case comes before the courts, you promptly find that this *merger* or *balance* or *equilibrium* among the Constitutional clauses becomes transformed into a *conflict* among the clauses — and to satisfy the promise contained in one clause, you must forego the promise contained in another.²⁰

The ideals of the Constitution embody what should be, which is intimately defined by what should not be: “For what a Constitution would do primarily is to *substantiate an ought* (to base a statement as to *what should be* upon a statement as to *what is*). And in our ‘agonistic’ world, such substantiation derives point and poignancy by contrast with notions as to what should not be.”²¹

A system of law privileges the agent in an idealistic philosophy.²² A system of law can unite by “aiming at a kind of justice that mediated among the differing ways of differing classes.”²³ However, a system of law can also function as a “compensation for disunity” — “hence, any term for ‘ideal’ justice can be interpreted as a rhetorical concealment for *material injustice*, particularly when the actual history of legal decisions over a long period can be shown to have favored class justice *in the name of* ideal justice.”²⁴ Over time, Burke writes that “our very notions of reality are affected, since the idealistic fictions have been written into the very law of the land, and the law is our ‘reality’ insofar as it is a public structure of *motives*.”²⁵ Idealistic legal fictions become our reality:

The courts themselves often come to accept the ingenious misinterpretations proposed by our corporation lawyers such as the legal fiction that financial corporations are persons (thereby deserving the freedom granted to human beings by divine, natural, or Constitutional law). For the judges talk the

20. See BURKE, *supra* note 15, at 349.

21. See *id.* at 358.

22. See *id.* at 171.

23. See *id.* at 173.

24. See *id.*

25. See BURKE, *supra* note 15, at 174.

same language, usually having been corporation lawyers themselves.²⁶

Thus, “an ideal . . . may lead to new real conditions.”²⁷ Theories of positive law are also encompassed by idealism, therefore “constitutions and similar legal enactments are to be taken as the ground by reference to which judgments of legality are substantiated.”²⁸ The Constitution is thus accorded ultimate significance as the ground for the United States legal system:

The idealistic perspective is further accentuated, in the United States, by the fiction that the will of the people today is consubstantial with the will of the Founding Fathers. Those who established the Constitution are co-agents with those who perpetuate it — and the document itself, considered as a structure of motivations, is a creature of the human will. Hence, though it is a *ground* of action, its essential feature is in its derivation from the attitudes of human *agents*.²⁹

The Constitution provides the justification for the protection of private property in the name of nationalism:

[T]he greater the development of the financial rationale, the greater is the “spirituality” in man’s relations to material goods, which he sees less in terms of their actual nature as goods, and more in the “ideal” terms of the future and of monetary (symbolic) profit. And any actual divisiveness in the social body which the inequalities of money intensify, is one more call upon idealistic philosophies of “unification,” which can set up group “ideals” (embodied in “laws”) to protect private wealth in the name of the commonwealth.³⁰

Our Constitution emphasizes the protection of property in the name of freedom. Freedom is to a great extent defined in economic terms. The potency of the combination of freedom and economics is self-evident — free-market capitalism, the triumph of truth in the marketplace of ideas, freedom from want. The guiding principles provided by a constitution, though, must adapt to the scene to survive:

26. *See id.*

27. *See id.*

28. *See id.* at 175.

29. *See id.*

30. *See BURKE, supra* note 15, at 176.

Constitutions are of primary importance in suggesting what coordinates one will think by. That is, one cannot "guaranty" a people any rights which future conditions themselves make impracticable; and whatever the limits and resources of liberty in the future may be, if they are there, they need no Constitutional guaranty; but Constitutions are important in singling out certain directives for special attention, and thus in bringing them more clearly to men's consciousness. During the era of the New Deal, for instance, we saw attempts to introduce the "principle" or "directive" of "private economic security without private property" into a Constitution that lacked such a coordinate.³¹

A constitution is necessarily selective, forcing a certain guiding perspective:

A Constitution is "binding" upon the future in the sense that it has centered attention upon one calculus of motivation rather than some other; and by thus encouraging men to evaluate their public acts in the chosen terms, it serves in varying degrees to keep them from evaluating such acts in other terms.³²

The partiality of language necessarily affects the scope of the Constitution: "the Constitution, as a necessarily very limited calculus of motives, must be used as the basis of reference, in courts of law, for the judgment of acts more widely or richly motivated."³³

Burke traces the development of constitutional law from a focus upon "higher law" to a body of law that relies more and more upon precedent. This, according to Burke, is backwards because it is the present that should shape the past into an appropriate vessel to guide the future:

The ironic fact about reference to precedent is that, in a nation whose scenic conditions were changing constantly, one might well expect precedent to count most if used *in reverse*. That is, one might adduce precedents to justify the *opposite* kind of decision now, on the grounds that the scenic conditions are now so different from those when the

31. *See id.* at 367.

32. *See id.* at 368.

33. *See id.* at 374.

precedent was established. However, “higher law” and the precedents based upon it referred not to changing material conditions, but to the kind of “immutable scene” that could be idealized and generalized in terms of “eternal truth, equity and justice.”³⁴

Law in the present defines the past in terms of an ideal future. Man’s grasp for the ideal is rooted in language itself.³⁵ Thus, Burke’s theory of dramatism goes far beyond revealing the effectiveness of any given piece of persuasion. It explains the very structure of human society, for man’s status as a symbol-using creature has led to an elaborate hierarchy and, thus, a code of behavior, inherent in man’s invention of the negative and the parallel rise of “shalt nots.” According to Burke, “man is the inventor of the negative.”³⁶ Man defines things according to what they are not — God is immortal; freedom is not being restrained. Man “is goaded by the spirit of hierarchy,” with the resultant compulsion for a “sense of order.”³⁷ This hierarchy, this sense of order, has made man “rotten with perfection.”³⁸ As one example, in the courtroom this hierarchy has resulted in a demand for the highest measure of truth, and thus the necessity of taking an oath.

This hierarchy inevitably results in the creation of ultimate terms: “There are two primary generalizations that characterize the quality of motives: freedom and necessity. And whenever they appear, we may know that we are in the presence of ‘God-terms,’ or names for the ultimates of motivation.”³⁹ In our polity, we have a governing document, the Constitution, with freedom as its core, the ultimate God-term.

Language forms our reality, and necessarily alters this reality via “terministic screens,” resulting in “trained incapacity.”⁴⁰ The language of any field defines the nature of human perception. Doctors see injury, insurance agents see losses and fraud, lawyers see negligence and potential lawsuits: “Insofar as any science has a

34. See *id.* at 380.

35. For further analysis of American constitutional and political history, see Burke’s explication of strict and broad constructionalism, Justice Marshall’s linguistic rationale for judicial review, the President’s role as national unifier, and the nature of political rhetoric as secular prayer found in KENNETH BURKE, *A GRAMMAR OF MOTIVES* 380-94 (1945).

36. James L. Golden et al., *Kenneth Burke’s Dramatistic Theory of Rhetoric*, in *THE RHETORIC OF WESTERN THOUGHT* 230 (1992).

37. See *id.*

38. See *id.*

39. See BURKE, *supra* note 15, at 74.

40. See BURKE, *supra* note 14, at 44-62.

nomenclature especially adapted to its particular field of study, the extension of its *special* terms to provide a definition of man *in general* would necessarily oversociologize, overbiologize, overpsychologize, overphysicize, etc., its subject."⁴¹ Lawyers see causes of action, recoverable losses, billable hours.

Hearken back to the governing principle in Burke's theory that every utterance is an invitation to persuade. Every word, every terminology is but a selection of reality: "Men seek for vocabularies that will be faithful *reflections* of reality. To this end, they must develop vocabularies that are *selections* of reality. And any selection of reality must, in certain circumstances, function as a *deflection* of reality."⁴²

It is not surprising that law has become a business, that the monetary motive has come to dominate the profession as it has come to dominate society itself. Burke would posit that man's hierarchical nature, combined with the separate and distinct religious motives in our culture, has led to just such a unifying structure: "For the incentive of monetary profit, like the One God, can be felt to prevail as a global source of action, over and above any motivations peculiar to the locale. And it serves the need of empire precisely because it 'transcends' religious motives, hence making for a 'tolerant' commerce among men whose religious vocabularies of motivation differ widely."⁴³

Burke is difficult to interpret, yet an understanding of his system of dramatism and the corresponding terminology explains much about human motivation and the privileged terms which we have come to accept as natural:

And when we have arrived at the stage where the sheer symbols of exchange are treated as the basic motives of human relations, when we have gone from "God's law" to "natural law," and thence to the "market law" that had become a "second nature" with those raised in a fully developed capitalist ethic, we find many pious apologists of the *status quo* who would deduce human freedom itself from the free market, as the only scene from which a free social act could be drawn. They thus attribute to the mechanics of price the position in the genealogy of action once held by no distinguished a Personage than God Himself, formerly defined

41. Kenneth Burke, *Dramatism*, in *THE RHETORIC OF WESTERN THOUGHT* 241 (1992).

42. See BURKE, *supra* note 15, at 59.

43. See *id.* at 44.

as the ground of all possibility.⁴⁴

Money has become the motivation for action, in Burke's terms a "transubstantiation," transformed from "its function as an *agency* of economic action into a function as the *ground* or *purpose* of economic action. That is, instead of *using* money as a medium to facilitate the production and distribution of goods, men . . . [are] moved to produce and distribute goods in response to money as motive."⁴⁵ This monetary symbolism brings with it a special rationality: "Many acts that would be 'rational,' as tested by the rationality peculiar to the monetary motive, would be 'irrational' in its absence."⁴⁶ Money is law's god, and we sacrifice ourselves on the altar of billable hours.

Not all humans are constrained to the same extent by the monetary motive. Burke recognizes that "the diversity of the materials that compose the human situation necessarily involves a corresponding diversity of motives. In this sense, each man's motivation is unique, since his situation is unique, which is particularly obvious when you recall that his situation also reflects the unique sequence of his past."⁴⁷ Yet there are overarching motives that guide all men: "[T]here are motives and relations generic to all mankind—and these are intrinsic to human agents as a class."⁴⁸ Money is one such "God-term" — "the monetary reference is the over-all *public* motive for mediating among the endless diversity of occupational and private (or 'preoccupational') motives."⁴⁹ Think of what this has done to our system of laws: "[M]oney is *not a mere agency*, in our civilization, but is a *rationalizing ground* of action."⁵⁰ Thus, even those who attempt to minimize this preoccupation with the monetary motive are defined by their very attempt to escape it:

Given any pronounced social structure, there will be a "psychosis" corresponding to it. That is, there will be a particular recipe of overstressings and understressings peculiar to the given institutional structure. And the tendency of the culture will be to see everything in terms of this particular

44. See *id.* at 92.

45. See *id.*

46. See *id.* at 94.

47. See BURKE, *supra* note 15, at 103.

48. See *id.* at 104.

49. See *id.* at 111.

50. See *id.* at 113.

recipe of emphases, as the typical apologist of ideal *laissez-faire* capitalism would think “freedom” itself lost if we lost “free market freedom,” since he conceived of freedom in these terms.⁵¹

Kenneth Burke’s writings were shaped by the major events of the twentieth century — the Depression, the New Deal, and World Wars I and II. Such fundamental upheavals, though, were sound fodder for examining the governing motives of the times, and the resultant hierarchy that remains fundamentally unquestioned. Kenneth Burke’s writings, however, are not transitory impressions because they are steeped in ancient Greek theories of rhetoric and law. What Kenneth Burke brings to legal thought is a framework for understanding why narrative is so powerful. It is powerful because man is, at his base, a storytelling animal, so enmeshed in language that its effects are invisible to most. As Burke states:

[O]ur concern is primarily with the analysis of *language* rather than with the analysis of “*reality*.” Language being essentially human, we would view human relations in terms of the linguistic instrument. Not mere “consciousness of abstracting,” but *consciousness of linguistic action generally*, is needed if men are to temper the absurd ambitions that have their source in faulty terminologies. Only by such means can we hope to bring ourselves to be content with humbler satisfactions, looking upon the cult of empire as a sickness, be that empire either political or financial.⁵²

Kenneth Burke’s theory of dramatism provides a framework for understanding man’s unique nature as a symbol-using creature whose distinct ability to use language provides the very foundation for society, and results in a hierarchical order with the presence of certain God-terms revealing the motives permeating his culture. While difficult to digest on first reading, Burke’s works are replete with legal implications. His insights concerning the effectiveness of dramatic form, the suggestive yet blinding perspectives inherent in legal terminology, the power of the Constitution, and the current dominance of the monetary motive in both society and law are certainly instructive for legal scholars and practitioners.

51. *See id.*

52. *See BURKE, supra* note 15, at 317.

II. WALTER FISHER: NARRATIVE AS A PARADIGM FOR HUMAN COMMUNICATION

Walter Fisher's narrative theory extends Kenneth Burke's premise that man is fundamentally a symbol-using creature. Fisher focuses on man's dramatic nature as a story-telling animal, defining man in light of his distinct narrative character, and contrasting this narrative preference with traditional theories of persuasion privileging rationality:

In short, the narrative paradigm is a philosophical statement that is meant to offer an approach to interpretation and assessment of human communication — assuming that all forms of human communication can be seen fundamentally as stories, as interpretations of aspects of the world occurring in time and shaped by history, culture, and character.⁵³

Fisher writes: "The *Homo narrans* metaphor is thus an incorporation and extension of Burke's definition of 'man' as the 'symbol-using' (symbol-making, symbol-misusing) animal."⁵⁴ Fisher adheres to Burke's choice of identification as the fundamental concept in persuasion: "The operative principle of narrative rationality is *identification* rather than deliberation."⁵⁵ In its essence, Fisher's narrative theory decries the privileged status of the rational-world paradigm because it necessarily denigrates the power of emotions and values in reasoning. The rational-world paradigm separates reason from emotion in a false dichotomy that eliminates the essence of persuasion: "The role of values in the constitution of knowledge, truth, or reality has been generally denied. The result has been that in serious matters of social or political significance, technical discourse has been assigned almost unquestioned superiority over rhetorical and poetic discourse."⁵⁶ As an alternative, Fisher offers the narrative paradigm, integrating reason and emotion into a coherent whole:

- (1) Humans are storytellers.
- (2) The paradigmatic mode of human decision making and communication is "good reasons," which vary in form among situations, genres, and media of communication.
- (3) The production and practice of good reasons are ruled by matters of history, biography, culture,

53. See FISHER, *supra* note 3, at xii.

54. See *id.* at 63.

55. See *id.* at 66.

56. See *id.* at xiii.

and character. . . . (4) Rationality is determined by the nature of persons as narrative beings — their inherent awareness of *narrative probability*, what constitutes a coherent story, and their constant habit of testing *narrative fidelity*, whether or not the stories they experience ring true with the stories they know to be true in their lives. (5) The world as we know it is a set of stories that must be chosen among in order for us to live life in a process of continual creation.⁵⁷

Dramatism and narrative theory recognize that through language man fundamentally structures society: “Knowledge . . . is ultimately configured narratively, as a component in a larger story implying the being of a certain kind of person, a person with a particular worldview, with a specific self-concept, and with characteristic ways of relating to others.”⁵⁸ Fisher draws two distinctions between Burke’s dramatism and the narrative paradigm. First, Fisher emphasizes the active role accorded people in the narrative paradigm as they interpret and assess meanings in their choices of behavior:

Burke’s dramatism *implies* that people function according to prescribed roles; they are actors performing roles constrained or determined by scripts provided by existing institutions. The narrative paradigm sees people as storytellers, as authors and co-authors who creatively read and evaluate the texts of life-providing “plots” that are always in the process of re-creation rather than existing as settled scripts. Viewing human communication narratively stresses that people are full participants in the making of messages, whether they are agents (authors) or audience members (co-authors).⁵⁹

Second, Fisher writes that Burke, although preferring the end of humane, reasonable action, prefers a performance standard: “The notion that people are actors leads to the supposition that human behavior is to be assessed by a presentational standard. The question becomes how well one performs one’s various roles.”⁶⁰ Fisher’s narrative paradigm cannot ensure the end of humane, reasonable action, but it can further it through the assessment of a

57. See *id.* at 5.

58. See FISHER, *supra* note 3, at 17.

59. See *id.* at 18.

60. See *id.* at 19.

logic intrinsic to narrativity.⁶¹

Fisher formulates a public, moral imperative that reclaims the public's decision-making power from the realm of experts:

[S]ome discourse is more veracious, reliable, and trustworthy in respect to knowledge, truth, and reality than some other discourse, but no *form* or *genre* has final claim to these virtues. Some persons know more than others, are wiser, and are more to be heeded than others. But no one knows all there is to know about his or her own area of specialization. I contend further that human communication in all of its forms is imbued with mythos — ideas that cannot be verified or proved in any absolute way.⁶²

This is a valuable precept for legal scholars and practitioners. As technology advances, and expert testimony extends its grasp over the trial process, it is jurors who ultimately retain the decision-making power. The tendency of legal practitioners to downgrade the intelligence of the jury, especially if the decisions rendered are adverse to their client, neglects the narrative wisdom that attorneys should use to confine expert testimony and, thus, win cases.

Emotions win cases more than reasoned logic. Fisher quotes Cicero on this point: "For men decide far more problems by hate, or love, or lust, or rage, or sorrow, or joy, or hope, or fear, or illusion, or some other inward emotion, than by reality, or authority, or any legal standard, or judicial precedent, or statute."⁶³ People persuade each other through stories because emotions rule over strict logical precepts. Logic is not irrelevant, but it takes the form of coherence and fidelity. Stories have to make sense and ring true with experience. And to judge the truth of stories, the character of the teller comes to the fore:

Human communication is tested against the principles of probability (coherence) and fidelity (truthfulness and reliability). Probability, whether a story "hangs together," is assessed in three ways: by its *argumentative* or *structural coherence*; by its *material coherence*, that is, by comparing and contrasting stories told in other discourses (a story may be internally consistent, but important facts may be omitted,

61. *See id.*

62. *See id.*

63. *See FISHER, supra* note 3, at 37.

counterarguments ignored, and relevant issues overlooked); and by *characterological coherence*.⁶⁴

Stories are dependent on character, and the importance of courtroom-based testimony logically follows from it: "Central to all stories is character. Whether a story is believable depends on the reliability of characters, both as narrators and as actors."⁶⁵ Evidentiary theory inherently recognizes and attempts to discount people's reliance on past actions as predictors of future actions. Nevertheless, jurors assess character by consistency:

Coherence in life and in literature requires that characters behave characteristically. Without this kind of predictability, there is no trust, no community, no rational human order. Applying this consideration of coherence is an inquiry into motivation. Its importance in deciding whether to accept a message cannot be overestimated. Determining a character's motives is prerequisite to trust, and trust is the foundation of belief.⁶⁶

Fisher's assessment of the importance of motives also builds on Kenneth Burke's theory of dramatism. Evaluating the merit of an argument based on pure logical form, as in the syllogism, will not explain the persuasiveness of stories:

The concept of narrative rationality asserts that it is not the *individual form* of argument that is ultimately persuasive in discourse. That is important, but *values* are more persuasive, and they may be expressed in a variety of modes, of which argument is only one. Hence narrative rationality focuses on "good reasons" — *elements that provide warrants for accepting or adhering to the advice fostered by any form of communication that can be considered rhetorical*.⁶⁷

Fisher provides a theoretical underpinning for what lawyers are beginning to recognize — the power of stories in the courtroom: "No matter how strictly a case is argued — scientifically, philosophically, or legally — it will always be a story, an interpretation of some aspect of the world that is historically and

64. See *id.* at 47.

65. See *id.*

66. See *id.*

67. See *id.* at 48.

culturally grounded and shaped by human personality.”⁶⁸

What Fisher is proposing is not a disavowal of reason and rationality, but rather a recognition that every form of persuasion naturally reaches beyond the strict boundaries of traditional argument through inclusion of both metaphor and mythos. Fisher delineates the rational-world paradigm as a contrast to the narrative paradigm. The rational-world paradigm presupposes that:

- (1) humans are essentially rational beings;
- (2) the paradigmatic mode of human decision making and communication is argument — discourse that features clear-cut inferential or implicative structures;
- (3) the conduct of argument is ruled by the dictates of situations — legal, scientific, legislative, public, and so on;
- (4) rationality is determined by subject-matter knowledge, argumentative ability, and skill in employing the rules of advocacy in given fields; and
- (5) the world is a set of logical puzzles that can be solved through appropriate analysis and application of reason conceived as an argumentative construct.⁶⁹

The rational-world paradigm presumes an informed citizenry: “It further demands a citizenry that shares a common language, general adherence to the values of the state, information relevant to the questions that confront the community, and understanding of argumentative issues, the various forms of reasoning, and their appropriate assessment.”⁷⁰ The narrative paradigm does not deny a hierarchy of stories. What it denies is the assumption that only those formally schooled in reason and argument can make legitimate judgments:

Narration implies, however, that the “people” judge the stories that are told for and about them and that they have a rational capacity to make such judgments The narrative paradigm does not deny that the “people” can be wrong. But, then, so can elites, especially when a decision is social or political The sort of hierarchy to which the narrative paradigm is inimical is hierarchy based on the assumption that some people are qualified to be rational and others are not.⁷¹

What the law is beginning to explicitly recognize is the

68. See FISHER, *supra* note 3, at 49.

69. See *id.* at 59.

70. See *id.* at 60.

71. See *id.* at 67.

connection of values to reason — in Fisher's terms: "*Humans as rhetorical beings are as much valuing as they are reasoning animals.*"⁷² Embracing the idea that all humans are capable of judging the worth of arguments does not deny that, in specialized fields, specific knowledge is necessary: "One establishes one's rationality in special fields by knowing and using the warrants indigenous to that field and adhering to the particular rules of advocacy followed in it."⁷³ If one is to be capable in law, for example, it is necessary to know the laws of evidence. But these are the constraints imposed by legal theory, and mastering these rules is not equivalent to mastering the art of persuasion. Jurors will be swayed by emotions, by stories, by the credibility of witnesses, by their judgments of the character of defendants.

Although following a path distinct from Burke, who analyzed the rhetorical basis of the Constitution, Fisher assesses the rhetorical effectiveness of President Ronald Reagan to arrive at the same fundamental bases of American political thought — economics and freedom. Fisher labels these concepts "the materialistic myth of individual success" and "the moralistic myth of brotherhood":

Each myth entails certain values. The materialistic myth espouses a work ethic and endorses such qualities as effort, persistence, "playing the game," initiative, self-reliance, achievement, and success. Competition is its presumed way of determining personal worth; hence the free-enterprise system, freedom from controls and regulations; and ascent in society's social-economic hierarchies are numbered among this myth's implied goods. The moralistic myth is, for example, well expressed in the Declaration of Independence: "all men are created equal" and "are endowed by their Creator with certain unalienable rights," among which are "life, liberty, and the pursuit of Happiness." Governments "are instituted to secure these rights," and governments derive "their just powers from the consent of the governed." One should observe also that the moralistic myth implies such goods as tolerance, charity, compassion, and true regard for the dignity and worth of each individual.

The materialistic myth fosters a concept of freedom *to do* as one pleases; the moralistic myth stresses freedom *to be* as one conceives oneself.⁷⁴

72. See *id.* at 105.

73. See FISHER, *supra* note 3, at 120.

Kenneth Burke's and Walter Fisher's close attention to the hierarchical structure of language, and the resultant ideology present in governing documents, reveals fundamental values that orators would do well to pay homage to in their rhetoric. Unification is achieved through adherence to fundamental values; division occurs in conflict over specifics. Defining a client's actions as consistent with these broad, governing ideals is critical to successful persuasion.

A final note on Fisher: legal theorists sometimes suggest, and rhetoricians commonly assert, that reasons are given to justify decisions already made. Fisher would heartily assent: "I suggest that *all good stories function in two ways: to justify (or mystify) decisions or actions already made or performed and to determine future decisions or actions.*"⁷⁵ Judges reach a conclusion about the right outcome of a case, and find the law to justify such a decision. Judges rely on precedent and continually affirm its worthiness while manipulating the same precedent to reach their preferred conclusions.

CONCLUSION

Legal scholars are beginning to formulate theories that assess why narrative is so powerful in the courtroom as well as in judges' chambers. United States Supreme Court Justice David Souter, in *Planned Parenthood v. Casey*, wrote: "Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession The Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."⁷⁶ Justice Souter's master narrative echoes Burke's concept of an "unending conversation":

Where does drama get its materials? From the "unending conversation" that is going on in history when we are born. Imagine that you enter a parlor. You come late. When you arrive, others have long preceded you, and they are engaged in a heated discussion, a discussion too heated for them to pause

74. See *id.* at 149.

75. See *id.* at 187.

76. *Planned Parenthood v. Casey*, 505 U.S. 833, as cited in Peter Brooks, *The Law as Narrative and Rhetoric*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 21 (Peter Brooks & Paul Gewirtz eds., 1996).

and tell you exactly what it is about. In fact, the discussion had already begun long before any of them got there, so that no one present is qualified to retrace for you all the steps that had gone before. You listen for a while, until you decide that you have caught the tenor of the argument; then you put in your oar. Someone answers; you answer him; another comes to your defense; another aligns himself against you, to either the embarrassment or gratification of your opponent, depending upon the quality of your ally's assistance. However, the discussion is interminable. The hour grows late, you must depart. And you do depart, with the discussion still vigorously in progress.⁷⁷

Unfortunately, the conversation as it currently exists is being carried on in different rooms, with disciplinary boundaries unnecessarily constraining and, thus, warping the discussion. Rhetoric and law developed concurrently, but have since traveled separate paths. Kenneth Burke's dramatism and Walter Fisher's narrative paradigm go far in explaining the power of persuasion in the law. Legal theorists would do well to join in this conversation, and rhetoricians would well serve society by inviting them into the fold.

Delia B. Conti

77. KENNETH BURKE, PHILOSOPHY OF LITERARY FORM 110-11 (1941).