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Lawyering Theory: An Overview

Richard K. Sherwin
New York Law School

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LAWYERING THEORY: AN OVERVIEW
WHAT WE TALK ABOUT WHEN WE TALK ABOUT LAW*

RICHARD K. SHERWIN**

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** Professor of Law, New York Law School.

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It is perfectly proper to regard and study the law simply as a great anthropological document.¹

I. INTRODUCTION: THE LEGAL CULTURE TODAY

Now, perhaps more than at any other time in the history of American legal culture, we may be in a position to grasp the importance of Holmes's words, for we are living in the postmodern era. We are now privy to the growing realization that a cultural threshold has been crossed. The way we understand ourselves and the world that we live in has undergone significant change. And because law is both a by-product and a co-producer of mainstream culture, those of us who are concerned about law and its practices are bound to feel the need to come to grips with the change that has taken place.

This article presents a general overview of what has become an increasingly influential convergence of ideas within the current culture. The overview suggests that adjusting our sights to this new cultural terrain makes possible important shifts in our outlook toward legal theory, legal practice, and legal pedagogy. My main purpose here is to describe that terrain and to suggest why it invites a new look at what the law is and where it is to be found. My hope is that this effort will help to set the stage for the kinds of concrete studies that I and others believe can come of a lawyering-theory approach. The youngest fruits of this approach may be tasted (and tested) in the sampling of articles that follow this one. These articles are meant to be illustrative, marking perhaps the beginning of a more extensive effort to produce a broad range of similar micro-analytical lawyering case studies.

To understand our current situation, I believe it will be useful at the outset to reflect a bit on where we have come from and why we are now encountering the divisiveness and tensions that have been hectoring legal academia from within and straining its relationship with practitioners, judges, and the public at large.² Along the way, we must also be attentive

1. OLIVER W. HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 210, 212 (1920).

2. See, e.g., David Barnhizer, *The University Ideal and Clinical Legal Education*, 35 N.Y.L. SCH. L. REV. 87, 92-93 (1990):

American law schools are still caught astride a chasm that separates the Scylla of the academic university from the Charybdis of the practicing profession. . . . American law faculty have long been caught between the demands created by the seeming incompatibility of the basic visions and functions of the university and those of educating aspiring lawyers.

Id.; Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992) (expressing the "fear that our law schools and law firms are moving in opposite directions"); Robert C. Post, *Legal Scholarship*

to what the experts and the lay public believe about law and the legal process and what can no longer be believed. In the course of these inquiries, we shall be taking a closer look at the ways in which meanings are made in everyday legal practices—in courts, law offices, government agencies, and elsewhere. How are these meanings transmitted from one generation to the next and from one concrete legal context to the next in our own time? What are the symbolic forms, the inherited conceptualizations, and the attitudes, feelings, and beliefs by which lawyers and scholars, judges and legislators, law clerks and lay folk communicate, perpetuate, and develop their understanding of the law and its practices? Our focus, in short, is on the legal culture.³

As it turns out, the current era is especially felicitous to such cultural studies. For example, we are now witnessing in a variety of fields a marked sensitivity to diverse ways of thinking and talking about what we know and who we are.⁴ This approach invites us to explore the different

and the Practice of Law, 63 U. COLO. L. REV. 615, 615 (1992) ("Very few academics today doubt that American legal scholarship is experiencing a crisis of identity. . . . We are in danger of dissipating our coherence as a professional discipline."); *Behind the Bar*, CONN. L. TRIB., May 18, 1992, at 17 ("The *Wall Street Journal* lambasted Senate majority leader George Mitchell for attempting to use Senate procedure to thwart what it called 'the first Senate vote since 1986 on reforming America's runaway legal system'"); Warren E. Burger, *The State of Justice*, A.B.A. J., Apr. 1984, at 62, 62-64 (citing a sharp decline of public confidence in lawyers and assailing law schools for doing an inadequate job of training law graduates in trial-advocacy skills); Henry Rose, *Law Schools Are Failing to Teach Students to Do Good*, CHI. TRIB., July 11, 1990, § 1, at 17 ("American law schools are losing their souls. Entering the 1990s, the primary function of legal education in America is to train students to serve affluent people and business interests. At the same time, 85% of Americans cannot afford the services of an attorney."); Benjamin Sells, *The Lawyer as Mouthpiece*, ILL. LEGAL TIMES, Jan. 1992, at 32 ("Unfortunately, the current resurgence of 'lawyer bashing' leads many lawyers to circle the wagons and withdraw within the relative security of personal isolation.").

3. See CLIFFORD GEERTZ, *Religion as a Cultural System*, in *THE INTERPRETATION OF CULTURES* 87, 89 (1973).

4. For example, by shifting away from the self-conscious self as the starting point for knowledge—a point that can be located in Descartes' *cogito ergo sum* ("I think, therefore I am") and that culminated in Hegel's absolute subject—the phenomenological tradition and its offshoots opened the way to a new epistemology. In lieu of seeking universal criteria for certainty, thinkers such as Nietzsche, Schutz, Heidegger, Merleau-Ponty, Gadamer, Foucault, Ricoeur, and Bourdieu have focused a good deal of their attention upon the complex structure of human understanding, the shifting social and historical frameworks for cognition, and the multiplicity of contexts in which common sense constructs meaning and reality.

For an excellent analysis of the postmodern/phenomenological connection, see GIANNI VATTIMO, *THE END OF MODERNITY* 10-12 (Jon R. Snyder trans., Johns Hopkins Univ. Press 1988) (1985). For important insights concerning the new epistemological

ways in which our use of language—whether in everyday discourse or in technical narratives—makes meaning and judgment possible. Cognitive psychologist Jerome Bruner has recently observed that there is a natural human push or “readiness,” from quite early on, to “organize experience narratively.”⁵ In this view, the stories young children hear from their parents and others are no mere diversions. These stories lay down the basic tools by which we organize our experience and our memory of human events.⁶ How humans act in the world on the basis of their beliefs and desires, how they strive to achieve particular goals, how they meet and overcome obstacles, all this, set in a discretely structured sequence in time, is conveyed by narrative.⁷

status of rhetoric, see HANS-GEORG GADAMER, *TRUTH AND METHOD* 414-15 (Joel Weinsheimer & Donald G. Marshall trans., 2d ed., Crossroad Publishing Corp. 1990) (1960); HERBERT W. SIMONS, *THE RHETORICAL TURN* 2 (1990); Michael J. Hyde & Craig R. Smith, *Hermeneutics and Rhetoric: A Seen but Unobserved Relationship*, 65 Q.J. SPEECH 347, 347 (1979).

5. JEROME BRUNER, *ACTS OF MEANING* 34-35, 45, 80-81 (1990).

6. See Jerome Bruner, *The Narrative Construction of Reality*, *CRITICAL INQUIRY*, Autumn 1991, at 1, 4; see also JUDY DUNN, *THE BEGINNINGS OF SOCIAL UNDERSTANDING* 141-48 (1988); *NARRATIVES FROM THE CRIB* 62-63 (Katherine Nelson ed., 1989); RUTH WEIR, *LANGUAGE IN THE CRIB* 144-45 (1962); E. Ochs Keenan, *Conversational Competence in Children*, in *ACQUIRING CONVERSATIONAL COMPETENCE* 3, 3-25 (1983).

7. See, e.g., Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992). In their pathbreaking study, the authors describe how two opposing attorneys in a criminal case constructed different realities by deploying two sharply contrasting stories: one in which jurors were cast in the role of the “Quest Hero” and one in which they were cast as “seekers of the truth.” In Amsterdam and Hertz’s words, “[t]he lawyer’s power to create his or her chosen tale is exercised, and its exercises can be detected, largely in terms of language structuring. Much of what a jury argument says is conveyed by implicit narrative and dialogic structure and by linguistic microstructure.” *Id.* at 58; see also JOHN M. CONLEY & WILLIAM M. O’BARR, *RULES VERSUS RELATIONSHIPS*, at ix (1990) (describing two different genres of storytelling in typical small claims court proceedings—one oriented to rules and principles, the other, which fared poorly in court, displaying what the authors call a “relational orientation,” i.e., a narrative that reflects personal and social wrongs undergirded by a strong sense of social interdependence).

For other discussions of the properties of narrative, see BRUNER, *supra* note 5; KENNETH BURKE, *A GRAMMAR OF MOTIVES* (Univ. of Cal. Press 1969) (1945); STEVEN COHAN & LINDA M. SHIRES, *TELLING STORIES* (1988); ALGIRDAS J. GREIMAS, *ON MEANING* (Wlad Godzich & Jochen Schulte-Sasse eds. & Paul J. Peron & Frank H. Collins trans., Univ. of Minn. Press 1987) (1983); VLADIMIR PROPP, *MORPHOLOGY OF THE FOLKTALE* (Louis A. Wagner ed. & Lawrence Scott trans., 2d ed., Univ. of Tex. Press 1968) (1928); PAUL RICOEUR, *OF TIME AND NARRATIVE* (Kathleen McLaughlin & David Pallauer trans., 1984); THEODORE R. SARBIN, *NARRATIVE PSYCHOLOGY*

The attention now being paid in diverse quarters to the different ways in which meaning and reality are narratively constructed marks a rather sharp break with the modernist view that the mind consists of "natural" rational categories.⁸ The consequences of this shift are significant. For example, the move from a "logical" to a narrational organization of mind holds out a version of reality whose acceptability is governed not by empirical verification and logical soundness, but rather by social convention and "narrative necessity."⁹ In this respect, one might say that

(1986); Bruner, *supra* note 6.

8. See IMMANUEL KANT, *CRITIQUE OF PURE REASON*, at A139, A313, B177, B370 (Norman K. Smith trans., 1965) (noting that "subsumption," the ability to bring experience under concepts of judgment, is the way we acquire knowledge); JEAN PIAGET, *THE CONSTRUCTION OF REALITY IN THE CHILD*, at xi-xiii (Margaret Cook trans., 1954) (describing a natural sequence of psychological stages of human development); 1 LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT* 16 (1981) (adding further stages to Piaget's developmental hierarchy).

Similar "objectivist" tendencies can be found in structural anthropology, see CLAUDE LÉVI-STRAUSS, *THE SAVAGE MIND* (George Weidenfeld & Nicolson Ltd. 1966) (1962), structural linguistics, see Jerrold Katz & Jerry Fodor, *The Structure of Semantic Theory*, 39 *LANGUAGE* 170, 170 (1963), and formalist philosophy, see LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* 3-4 (D.F. Pears & B.F. McGuinness trans., 1974). See generally *CULTURE THEORY* (Richard A. Shweder & Robert A. LeVine eds., 1984) (discussing social scientists' characteristic preference, at least until very recently, for research studies that seek out universals and/or automatic processes and that aspire to quantified findings).

9. Bruner, *supra* note 6, at 4. See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 94 (2d ed. 1970) ("[T]he choice . . . between competing paradigms proves to be a choice between incompatible modes of community life"). As Gianni Vattimo aptly notes, Kuhn's approach to scientific revolutions can be understood as a reduction of scientific logic to rhetoric in that scientific theories now come to be viewed as demonstrable only from within paradigms, which, in turn, are not "logically" verifiable, but are accepted on the basis of "a rhetorical kind of persuasiveness." VATTIMO, *supra* note 4, at 137. Hermeneutics similarly places human knowledge and truth within a distinctly sociolinguistic ("form of life") context. See, e.g., HANS-GEORG GADAMER, *supra* note 4, at 414 (noting that language is not so much something the individual speaks as that which speaks the individual); VATTIMO, *supra* note 4, at 133 (noting that the *logos*, rather than attaining to universal truth, as is the case in the Cartesian/European Enlightenment view, is a form of social understanding in the finite and highly contextualized discourse of historical human beings) (citing GADAMER, *supra* note 4, at 497-98); see also DONALD P. SPENCE, *NARRATIVE TRUTH AND HISTORICAL TRUTH* 135 (1984) ("[O]nce we have chosen a particular construction, we have fixed, in language, the form of the event we are seeking; the words define the object (and frequently the outcome) of our search."); BERNARD S. JACKSON, *LAW, FACT AND NARRATIVE COHERENCE* 10-11, 27-30, 58-60 (1988) (describing the Greimasian school of semiotics as a "non-referential" approach to narrative in contrast to the Legal Realists' conventional representation).

the better our understanding of how stories inform and captivate belief, the better our understanding will be of how particular constructions of reality gain ascendancy (or lose it) in particular contexts in particular cultures at a given point in time.¹⁰

This perspective also casts a different light on the value of subjects like interpretation theory, literary criticism, sociolinguistics, cognitive psychology, and cultural anthropology. For these fields may now be seen as leading us into a domain once claimed as the sole province of philosophy, where metaphysicians and epistemologists ask: What is real, and what constitutes knowledge? The shift to narrative (the so-called "interpretive turn") is now directing us to new sources of knowledge not only about the different ways in which we experience ourselves, others, and the social and natural world around us, but also about the nature of the human mind, how it operates in the construction of meaning and

In the nonreferential view, meaning in narrative is independent of any necessary relationship with the outside world but is still analyzable within a particular framework of signification. The latter framework is based on the coherence of language in use (pragmatics), not on objective or universal properties of language per se. The affinity that has been discerned of late between pragmatic philosophy, Wittgenstein's later writings, and the work of Martin Heidegger reflects this general epistemological shift to a non-referential/non-Cartesian view of meaning and truth. See, e.g., RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 7, 125-27 (1979) (discussing the differences between seventeenth-century notions of knowledge and the epistemologies of Wittgenstein, Heidegger, and Dewey); Dennis Patterson, *Postmodernism/Feminism/Law*, 77 *CORNELL L. REV.* 254, 273 (1992) (claiming that postmodernism "replaces the modernist picture of Sentence-Truth-World with an account of understanding that emphasizes practice, warranted assertability, and pragmatism").

10. See, e.g., Robert F. Blomquist, *An Introduction to American Toxic Tort Law: Three Overarching Metaphors and Three Sources of Law*, 26 *VAL. U. L. REV.* 795, 797-99 (1992) (describing the structure and development of toxic tort law in late twentieth century American culture based on the interaction of three overarching metaphors: "a morality play," "a town meeting," and "a public lecture"); Kenneth Gergen, *The Checkmate of Rhetoric (But Can Our Reasons Become Causes?)*, in *THE RHETORICAL TURN: INVENTION AND PERSUASION ON THE CONDUCT OF INQUIRY* 292, 303 (1990). Gergen writes:

To the extent that any given paradigm gains adherents to its discursive procedures and related practices, it may be said to generate enclaves of power. That is, the reigning system of intelligibility promotes certain patterns of organized social action and at the same time forbids or discourages a range of competitors. In effect, each paradigm operates simultaneously as a productive and repressive force.

Id.; see also Richard K. Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 *U. PA. L. REV.* 729, 733 (1988) (making a point similar to Gergen's regarding the distribution of knowledge and power in the legal culture based on historically dominant forms of legal discourse).

reality,¹¹ and how social and cultural forms of expression help determine the way we think, speak, and feel about events in the world.¹²

To proceed in this fashion tracks a number of contemporary themes. For example, postmodernists have persistently sought to undercut the modernist faith in an objective reality that is "out there" and that can be reliably known were we but to get our method of analysis right.¹³ Similarly, we are witnessing growing skepticism toward the modernist belief in universal reason: that supposedly unchanging source of absolute

11. See BRUNER, *supra* note 5, at 33; Bruner, *supra* note 6, at 5-6; John M. Conley et al., *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L.J. 1375, 1395 (1990); see also RICHARD A. SHWEDER, THINKING THROUGH CULTURES 1-2 (1991) (discussing the process of "thinking through" cultures "by means of the other" [as an expert in some realm of human experience], "by getting the other straight" [rational reconstruction of the other's beliefs and practices], "by deconstructing and going right through and beyond the other" [revealing what the other has suppressed], and "witnessing in the context of engagement with the other" [revealing one's own perspective on things]); EVE SWEETSER, FROM ETYMOLOGY TO PRAGMATICS 1-13 (1991) (reflecting the shift to a narrative-based or non-representational construction of meaning and reality). Lev Semenovich Vygotsky was an early pioneer in seeking out the interrelationships among language, culture, and cognition. See JAMES V. WERTSCH, VYGOTSKY AND THE SOCIAL FORMATION OF MIND 133 (1985).

12. For one thing, this view puts pressure on the familiar Western liberal ideal of the "autonomous" self. In light of current knowledge in cultural and cognitive psychology and sociolinguistics, it becomes more and more difficult to separate out individual "mind" and collective "culture." Developments in these and related fields also vex the modernist aspiration to organize knowledge into ever-expanding rational systems. Once we recognize the social and metaphoric construction of knowledge, it becomes increasingly apparent that there are discrete and incommensurable forms of knowledge and discourse at the local level that will not simply meld together. In view of this pluralistic reality, choosing a dominant form of "power talk" may invite an enhanced appreciation of the consequences of such choices for "non-dominant" discourse communities. See Pierre Schlag, *A Cognitive Approach to Law*, 67 TEX. L. REV. 1195, 1208 (1989) ("In part, misunderstandings arise not only because the conversants are not operating within the same cognitive frameworks but also because they are not aware that they are not operating within the same cognitive frameworks."); see also SHWEDER, *supra* note 11, at 148 (observing that "the metaphors by which people live and the world views to which they subscribe mediate the relationship between what one thinks about how one thinks."); Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Judicial Field*, 38 HASTINGS L.J. 805, 838 (1987):

Law is the quintessential form of the symbolic power of naming that creates the things named, and creates social groups in particular. It confers upon the reality which arises from its classificatory operations the maximum permanence that any social entity has the power to confer upon another, the permanence which we attribute to objects.

Id.

13. See, e.g., RORTY, *supra* note 9.

and enduring categories of knowing.¹⁴ In addition, for better or worse, there has been continued erosion in the modernist belief in a unitary, stable self.¹⁵ Freud and his followers were early pioneers in that effort.¹⁶

As part of the current shift away from the modernist frame for mind and reality, instead of concentrating on rational methods or objective categories, contemporary humanities scholars and social scientists are increasingly focusing upon how meanings are created, preserved, and altered over time and in different contexts. It is no longer taken for

14. See, e.g., RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM* 8-9 (1983) ("The concept of rationality . . . must be understood as relative to a specific conceptual scheme, theoretical framework, paradigm, form of life, society, or culture"); cf. ERNST CASSIRER, *THE PHILOSOPHY OF THE ENLIGHTENMENT* 6 (1951) ("The eighteenth century is imbued with a belief in the unity and immutability of reason. Reason is the same for all thinking subjects, all nations, all epochs, and all cultures.").

15. See, e.g., COHAN & SHIRES, *supra* note 7, at 149 ("The subject, continually (re)activated and (re)positioned in the multiple discourses of culture, is an effect of signification."); see also BRUNER, *supra* note 5, at 20-21 ("[C]ulture and the quest for meaning within culture are the proper causes of human action. The biological substrate, the so-called universals of human nature, is not a cause of action but, at most, a constraint upon it or a condition for it."); Charles Taylor, *Interpretation and the Sciences of Man*, in 2 *PHILOSOPHY AND THE HUMAN SCIENCES* 15, 40 (1985) (stating that "we are aware of the world through a 'we' before we are through an 'I'").

16. See SIGMUND FREUD, *INTRODUCTORY LECTURES ON PSYCHOANALYSIS* 22 (James Strachey ed. & trans., W.W. Norton & Co., Inc. 1966) (1920) (Psychoanalysis "defines what is mental as processes such as feeling, thinking and willing, and it is obliged to maintain that there is unconscious thinking and unapprehended willing."); Marcia Cavell, *Interpretation, Psychoanalysis, and the Philosophy of Mind*, 36 *J. AM. PSYCHOANALYTIC ASS'N* 859, 860 (1988) (describing Freud's model of mind, according to which "the meaning of a thought or utterance is not the exclusive property, so to speak, of the thinker," given that "mind is inherently interpersonal in its very structure (as in the claim of the Oedipal theory that identifications with others play a central role in forming . . . the values of any individual)"); see also JACQUES A. LACAN, *ECRITS: A SELECTION* 165 (Alan Sheridan trans., 1977) ("It is not a question of knowing whether I speak of myself in a way that conforms to what I am, but rather of knowing whether I am the same as that of which I speak."); JACQUES A. LACAN, *THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS* 211 (Jacques-Alain Miller ed. & Alan Sheridan trans., W.W. Norton & Co., Inc. 1978) (1973) (noting that the subject gains meaning in language only at the expense of being: "If we choose being, the subject disappears, it eludes us, it falls into non-meaning. If we choose meaning, the meaning survives only deprived of that part of non-meaning that is, strictly speaking, that which constitutes in the realization of the subject, the unconscious."); COLIN MACCABE, *TRACKING THE SIGNIFIER* 65 (1985) ("As speaking subjects we constantly oscillate between the symbolic and the imaginary—constantly imagining ourselves granting some full meaning to the words we speak, and constantly being surprised to find them determined by relations outside our control.").

granted that familiar canons of logic will suffice for argument's sake. Indeed, there is now under way a broad-based effort to explore new canons and multiple "logics"¹⁷—like the logic of common sense,¹⁸ desire,¹⁹ or discrete comprehensive systems,²⁰ as well as the logic of

17. See, e.g., Herbert W. Simons, *The Rhetoric of Inquiry as an Intellectual Movement*, in *THE RHETORICAL TURN, INVENTION AND PERSUASION ON THE CONDUCT OF INQUIRY* 1, 2 (1990). According to Simons:

In place of covering laws, there is talk of contingent, historically situated truths, reflective of values and interests, and found more or less useful by cultures and communities which are themselves symbolically constituted. And there are faint suspicions that scholarly communities are no less influenced by "fuzzy" logics than by formal, deductive, "close-fisted" logics; by arguments from sign and analogy; by anecdotes and exemplars; and even by appeals to authority, tradition, convention, intuition, and aesthetic goodness-of-fit.

Id.; see also Robert A. LeVine, *Properties of Culture: An Ethnographic View*, in *CULTURE THEORY*, *supra* note 8, at 76-84 (stating that it is only by constantly switching frames that we honor the multiplex world); Richard A. Shweder, *Divergent Rationalities*, in *METATHEORY IN SOCIAL SCIENCE* 163, 180 (Donald W. Fiske & Richard A. Shweder eds., 1986) (considering a third logic of "divergent rationality" to process subjective experience); Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 *STAN. L. REV.* 509, 513 (1992):

The printed page—with its unchanging form, linear structure, and conceptual abstractions amenable to rational processing—reduces and frames the context of "reality" in a manner that effectuates the rule of law. In the electronic world, however, text and context are preserved and replayed as never before. Paratexts release legal reality from the confines of the printed page by representing more fully the oral dimensions of legal events and by introducing their visual element. As a result, paratexts enframe legal reality by throwing unruly context in text, thereby particularizing our legal experience.

Id.; Nelson Goodman, *Notes on the Well-made World*, 51 *PARTISAN REV.* 274, 276 (1984) ("[O]ne might say that there is only one world, but this holds true for each of the many worlds."). See generally FRANCO FERRAROTTI, *THE END OF CONVERSATION* (1988) (noting that each new medium of communication is a result of institutional developments, popular reactions, and cultural forces).

18. See generally CLIFFORD GEERTZ, *LOCAL KNOWLEDGE* 76 (1983) (observing that "if common sense is as much an interpretation of the immediacies of experience, a gloss on them, as are myth, painting, epistemology, or whatever, then it is, like them, historically constructed and, like them, subjected to historically defined standards of judgment"); Sherwin, *supra* note 10, at 737-39 (describing multiple forms of common sense).

19. See generally Roy D'Andrade, *A Folk Model of the Mind*, in *CULTURAL MODELS IN LANGUAGE AND THOUGHT* 112, 120-27 (Dorothy Holland & Naomi Quinn eds., 1989) [hereinafter *CULTURAL MODELS*] (discussing the connection between feelings and desires and the means-end relation between intentions and wishes).

20. For example, in linguistic theory, see GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 22-24 (1980); SWEETSER, *supra* note 11, at 1-13. Pertinent

certain non-systematizable situations involving particular parties and particular texts that are invoked and interpretatively applied to provide mutually acceptable resolutions to specific conflicts.²¹

In sum, the narratival approach that I have been describing builds on a basic and far-reaching insight. It tells us that while a great deal of order may exist in the reality we experience, much of the order we perceive is there only because we put it there.²² We are only just beginning to realize how much of our knowledge and daily practices acquire and maintain their present form by the force of underlying cultural models that we have created by social agreement.²³ By this dispensation, all social

developments in sociology, media genre theory, and legal theory may also be noted here. See Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 CARDOZO L. REV. 1419, 1420 (1992) (defining autonomous systems); S.J. Schmidt, *Towards A Constructivist Theory of Media Genre*, 16 POETICS 371, 373-76 (1987) (describing how genre concepts and their communicative labels govern the cognitive operations of actors in and by the media); Gunther Teubner, *How the Law Thinks: Toward A Constructivist Epistemology of Law*, 23 LAW & SOC'Y REV. 727, 745 (1989) (claiming that "[l]aw is forced to produce an autonomous legal reality and cannot at the same time immunize itself against conflicting realities produced by other discourses in society").

21. See, e.g., GADAMER, *supra* note 4, at 394:

The organisation of words and things, that is undertaken by each language in its own way, always constitutes a primary natural formation of concepts that is a long way from the system of the scientific formation of concepts. It follows entirely the human aspect of things, the system of man's needs and interests. What a linguistic community regards as important about a thing can be given a common name with other things that are perhaps of a quite different nature in other respects, so long as they all have the same quality that is important to the community.

Id.; see also NATALIE Z. DAVIS, *FICTION IN THE ARCHIVES* 16-18 (1987) (noting a discrete repertoire of narratival sources that shaped and informed the legal discourse of the time).

22. Naomi Quinn & Dorothy Holland, *Culture and Cognition*, in CULTURAL MODELS, *supra* note 19, at 3; see also Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 496 (1987) ("Certainty results not from any eternal verities untouched by human hands, but rather from our culture, our customs, our politics, and our forms of life. This message has at once reassuring and frightening implications, for it highlights our responsibility for the certainties we choose.").

23. The phrase "cultural models" is rich with implications. Under this rubric we find such related terms as "the social construction of reality," "simplified worlds," "prototypical events," "ideal cognitive models," to name but a few now found within the precincts of sociolinguistics, cognitive psychology, cultural anthropology, and other fields. See Quinn & Holland, *supra* note 22, at 35.

practices and institutions may come to be seen as orderings of the world that have been established jointly by participants who share the same understanding and presumptions. As Naomi Quinn and Dorothy Holland recently said, “[a] very large proportion of what we know and believe we derive from . . . shared models that specify what is in the world and how it works.”²⁴

What these different terms seek to capture has been nicely described in Roger Keesing’s analysis of “folk models”—what he also calls “culturally constructed common sense.” According to Keesing, these models represent “a set of operating strategies for using cultural knowledge in the world; they comprise shortcuts, idealizations, and simplifying paradigms that work just well enough yet need not fit together without contradiction into global systems of coherent knowledge.” Roger M. Keesing, *Models, “Folk” and “Cultural” Paradigms Regained?*, in CULTURAL MODELS, *supra* note 19, at 380.

In a similar vein, “metaphorical schemas” have been described as “factor[ing] out contingent complexities of real life in proposing homologies of form, pattern, and relationship between the source domain and the metaphorized one. A world thus simplified becomes a world of the prototypical.” *Id.* at 386; *see also* LAKOFF & JOHNSON, *supra* note 20, at 22-24. Robert Abelson describes an analogous phenomenon under the rubric of “scripts”:

The casual definition of a script is a “stereotyped sequence of events familiar to the individual.” Implicit in the definition are two powerful sources of constraint. One is the notion of an event sequence which implies the causal chaining of enablements and results for physical events and of initiations and reasons for mental events. . . . The other constraint generator comes from ideas of stereotypy and familiarity. That an event sequence is stereotyped implies the absence of fortuitous events. Also, for events to be often repeated implies that there is some set of standard individual and institutional goals which gives rise to the repetition.

Quinn & Holland, *supra* note 22, at 19-20 (quoting Robert P. Abelson, *Constraint, Construal, and Cognitive Science*, in PROCEEDINGS OF THE THIRD ANNUAL CONFERENCE OF THE COGNITIVE SCIENCE SOCIETY 1, 3 (1981)).

The interpenetration of cultural models—the various ways in which a widely applicable model may be used or “nested” within other more specialized models, thereby lending cultures their convergent thematicity—is a phenomenon that has also been studied with fascinating results. *See generally* Paul Kay, *Linguistic Competence and Folk Theories of Language: Two English Hedges*, in CULTURAL MODELS, *supra* note 19, at 67, 69, 73 (using the concept of folk theory to analyze the meaning of “loosely speaking” and “technically”); Naomi Quinn, *Convergent Evidence for a Cultural Model of American Marriage*, in CULTURAL MODELS, *supra* note 19, at 35 (suggesting that our understanding of marriage is derived from our folk physics of difficult activities, which is itself a cultural model within a cultural model); Eve E. Sweetser, *The Definition of Lie: An Examination of the Folk Models Underlying a Semantic Prototype*, in CULTURAL MODELS, *supra* note 19, at 43 (examining the local social understanding of lying in conjunction with popular beliefs about information).

24. Quinn & Holland, *supra* note 22, at 3; *cf.* RICHARD NISBET & LEE ROSS,

If we take this view seriously, and recent studies increasingly suggest that we should,²⁵ it follows that an adequate understanding of our social practices and institutions, including legal practices and institutions, cannot be gained without adequate knowledge of the various underlying cultural models that create and sustain them. Thus we are led to wonder: What are the models that individual participants in the legal culture carry around inside their heads? What must they know in order to act as they do and to interpret their experience in the distinctive way that they do?²⁶ By what narrative constructions is their shared sense of human and social reality maintained or altered?²⁷

A cultural view, which lawyering theory adopts, takes up precisely these kinds of questions. It looks for those taken-for-granted models, prototypes, schemas, or images of self, others, and social institutions that make up particular social domains and legal practices. It looks for the simplified "scripts"²⁸ that participants use to explain how the world works and how people can be expected to behave in different social settings.²⁹ Much of our communication relies upon tacit assumptions. It

HUMAN INFERENCE 293 (1980) ("Once one recognizes that the same data would look quite different, and could easily support different beliefs, if those data were viewed from the vantage point of alternative theories, the groundwork for a humbler epistemic stance has been laid.").

25. See, e.g., Sweetser, *supra* note 23, at 16-18 (discussing how the semantic structure of one English word depends on, and reflects, models of discrete areas of experience). The articles in this symposium similarly support a "constructivist" viewpoint grounded in highly contextualized analyses of knowledge and perception.

26. See Quinn & Holland, *supra* note 22, at 4.

27. See WERTSCH, *supra* note 11, at 138 ("[A]s soon as speech and the use of signs are incorporated into any action, the action becomes transformed and organized along entirely new lines.") (quoting Lev Semenovich Vygotsky).

28. See, e.g., ROGER C. SCHANK & ROBERT P. ABELSON, *SCRIPTS, PLANS, GOALS AND UNDERSTANDING* 42-46 (1977) (describing what has now become the classic "restaurant script"). *But cf.* SWEETSER, *supra* note 11, at 14-15 (cautioning against false universalization of features within a given language).

29. Consider, for example, how during the late nineteenth century personal injuries involving *strangers* often prompted a negligence or "fault-based" judicial analysis, while injuries involving *defective products* usually triggered a contract analysis and injuries involving, say, *entrants on land* prompted an entirely different analysis shaped and informed by talk about property rights and duties. See Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981) (discussing the "tenacity of established patterns of thought" in late nineteenth-century judicial opinions involving liability for accidental harm); M.A.K. HALLIDAY, *LANGUAGE AS SOCIAL SEMIOTIC* 32 (1978) ("All language functions in context of situation . . . The question is not what peculiarities of vocabulary, or grammar of pronunciation, can be directly accounted for by reference to the situation. It is *which* kinds of situational

could not be otherwise. In the course of conversation we could never comfortably spell out in detail—even if it occurred to us to try³⁰—the various causal links and shared inferences that allow for the relatively smooth exchange of meanings that takes place in everyday discourse. Yet, studies show that the cultural knowledge that allows us, for the most part intuitively, to utilize one particular cultural model or linguistic “tool kit”³¹ rather than another to facilitate communication in a particular situation can be specified. This sort of linguistic or rhetorical analysis leads to interesting and not so obvious findings. For example, some studies are beginning to suggest that certain unified themes pervade our

factor[s] determine *which* kinds of selection in the linguistic system.”); M. KRECKEL, COMMUNICATIVE ACTS AND SHARED KNOWLEDGE IN NATURAL DISCOURSE 17-22 (1981) (describing situational and contextual features of speech).

The existence and effects of subconsciously held or habituated, or ideologically driven responses to discrete conflict situations offers a rich subject for future legal sociolinguistic research. *See, e.g.*, Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise 1870-1920*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70, 109 (Gerald L. Geison ed., 1983):

The project of trying to link legal changes in particular fields of law to large-scale ideological change derives much of its appeal from the fact that one seems to be able to see similar changes in the background conventions of discourse that take place concurrently across a variety of legal fields that are occupied by entirely different lineups of interests.

Id.; *see also* George P. Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469, 469 (1976) (explaining how the common law of larceny can be understood in terms of two structural principles: possessorial immunity and manifest criminality); Sherwin, *supra* note 10, at 730 (arguing that a court’s discourse should be assessed in light of the particular dialect that it privileges and the way in which such official sanction is given, and suggesting a method for reading legal arguments and judicial decisions within the confines of a particular dialect).

30. *See generally* Dorothy Holland & Debra Skinner, *Prestige and Intimacy*, in CULTURAL MODELS, *supra* note 19, at 79 (discussing conversation that has been steeped in unspoken expectations and implicit common knowledge among members of the same cultural group).

31. *See* BRUNER, *supra* note 5, at 11; Bruner, *supra* note 6, at 2. The analogy linking language and tools can be traced to Vygotsky’s extension of Engel’s notion of “psychological tools.” *See* WERTSCH, *supra* note 11, at 77-80; *see also* Kay, *supra* note 23, at 68-69 (explaining that cultural models may be thought of as resources or tools); Patterson, *supra* note 9, at 310 (“With the abandonment of the modernist aspiration toward a master discourse . . . comes the realization that progressive change in a discipline must be reconceived as coming not from without but from within. That is, change must come from the redesign of our tools.”) Patterson quite rightly notes in this regard the relevant work of Kenneth Gergen, *Correspondence Versus Autonomy in the Language of Understanding Human Action*, in METATHEORY IN SOCIAL SCIENCE, *supra* note 17, at 136.

cultural knowledge.³² If this turns out to be the case within our legal culture as well, it may help to account for the ways in which shared meanings create and maintain a dominant legal regime through conventional discursive practices.³³ We may soon come to realize that we understand one another, to the extent that we do, not because we see the same things, but because we see in the same way, with the same internalized cultural models.³⁴

Beyond increasing our knowledge about the way we frame our experience, the cultural view being proposed here can also expose to detailed analysis the variety of linguistic tools that may be utilized with more or less efficacy in a given situation.³⁵ As a result of such focused

32. See Taylor, *supra* note 15, at 34-35.

33. By "discursive practice," I mean the mode of action, or what an actor does with language in a particular communicative context. See, e.g., Bronislaw Malinowski, *The Problem of Meaning in Primitive Languages*, in *THE MEANING OF MEANING* 296, 307 (C.K. Ogden & I.A. Richards eds., 1989) ("A statement spoken in real life is never detached from the situation in which it has been uttered."). As Charles Taylor notes:

Even in an area where there are no clearly defined rules, there are distinctions between different sorts of behaviour such that one sort is considered the appropriate form for one action or context, the other for another action or context; for example, doing or saying certain things amounts to breaking off negotiations, doing or saying other things amounts to making a new offer.

Taylor, *supra* note 15, at 34; see also Amsterdam & Hertz, *supra* note 7, at 60-63 (noting conventional sources of argumentation that shape and inform legal narratives in criminal law practice); William M. O'Barr & John M. Conley, *Lay Expectations of the Civil Justice System*, 22 *LAW & SOC'Y REV.* 137, 137 (1988) (describing persistent patterns in civil litigants' values, expectations, and misapprehensions with regard to the litigation process and its outcome); Sherwin, *supra* note 10, at 733 (describing discrete forms of legal discourse in criminal procedure which persist, in varying degrees of cultural ascendancy or decline, from one generation to the next).

34. Cardozo gets at this sort of thing in one of his pithy remarks: "Metaphors [begin by] . . . liberat[ing] thought, they end often by enslaving it." *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926). The same notion resonates in the commonplace "life imitates art."

35. An intriguing parallel may yet be drawn between recent analyses of cultural models in sociolinguistics, cognitive and cultural anthropology, psychology and pragmatics, and the ancient Greek, classical Roman, and medieval European rhetoricians' efforts to compile arguments or "topics" for training in effective public discourse. May these rhetorical collections of commonplaces be viewed as an archive of social knowledge or operative cultural models or schemas that could be dipped into for purposes of facilitating effective communication? See, e.g., Isocrates' *Antidosis*, the *Tetralogies* of Antiphon, Gorgias' *Encomium of Helen* and *Defense of Palamedes*, Demosthenes' *corpus* (including 60 speeches), Plato's *Phaedrus*, Aristotle's *Topics*, and Cicero's *Topics* and *On Oratory*, to name a few well-known rhetorical compilations. See generally GEORGE KENNEDY, *THE ART OF PERSUASION IN GREECE* (1963) and its companion text *THE ART*

analysis, specific choices of discourse can be made with greater deliberation and care. That this enhanced knowledge of, and subsequent sensitivity to, choice of language and its consequences stands to improve communication and persuasiveness, and help to avoid misunderstanding, should not be lost upon a group as dependent upon discourse as is the legal profession.³⁶

By this accounting, then, it may not seem surprising to say along with Holmes that the study of law puts us on the road to anthropology. For it is anthropology, with the aid of linguistics, psychology, and other disciplines, that opens the way to studying not only how people use language to make persuasive arguments and to tell stories describing individuals and events in particular settings, but also how to discern the different patterns of meaning that their language embodies and, in varying degrees, conveys to others.³⁷ Thus, the cultural turn that takes us beyond modernist rationalism leads us from narratives made up of "objective" truths and "universal" categories of "natural" reason to a path of reflection about how meanings emerge in the first place. This path invites us to explore a distinct set of issues, such as: (1) how various narratives construct or obscure meaning in everyday legal practices; and (2) how dominant legal discourses frame our experience and judgments, telling us what is there (what the relevant facts are, or what a "fact" is in the first

OF RHETORIC IN THE ROMAN WORLD (1972); RUTH MORSE, TRUTH AND CONVENTION IN THE MIDDLE AGES (1991); Jeremy Paul, *The Politics of Legal Semiotics*, 69 TEX. L. REV. 1779 (1991).

36. See, e.g., Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and 'Feminine' Style*, 66 N.Y.U. L. REV. 1635, 1680-81 (1991) (demonstrating how a "feminine" style of attorney discourse, one that is "appropriately uncertain" and "appropriately deferential" to client needs and interests, may invite a broader search for meaning within a broader range of possibly applicable norms and facts than the more controlling, interruptive, and loquacious "male" style of attorney discourse). See generally Naomi R. Cahn, *Styles of Lawyering*, 43 HASTINGS L.J. 1039 (1992) (discussing male and female styles of lawyering).

37. See, e.g., Catherine Lutz, *Goals, Events, and Understanding in Ifaluk Emotion Theory*, in CULTURAL MODELS, *supra* note 19, at 291, 291:

The study of ethnotheory involves the identification of the knowledge structures that underlie speech, and more generally, understanding. This knowledge is largely below the level of explicit awareness and generally remains un verbalized. One special circumstance that permits the recognition of both one's own and others' tacit knowledge is the crossing of cultural boundaries. The (at least partial) nonsharing of knowledge across those boundaries encourages the identification and verbalization of taken-for-granted realities.

Id.; see also Alan Hunt, *Foucault's Expulsion of Law: Toward A Retrieval*, 17 LAW & SOC. INQUIRY 1, 32 (1992).

place), what norms apply, and what goals should be pursued by what methods in a given context.

From just this brief listing, one may begin to see how valuable this approach can be to legal practitioners and scholars alike. For example, if it turns out that discrete cultural models motivate human behavior in different ways, it becomes of interest to identify how people make sense of different kinds of behavior within a particular social setting. Some underlying cultural models may authorize or condemn certain kinds of behavior only in certain contexts. For instance, what constitutes a lie in one context may be persuasively redescribed as a socially acceptable "white lie" in another.³⁸ Or consider criminal cases involving behavior that may be construed as "murder" when described according to one narrative style or genre but may be persuasively redescribed as "manslaughter" by switching to another narrative form.³⁹ In short, whether it be scholars seeking to make sense of evidentiary rules, or practitioners whose job it is to make facts tell a certain kind of story, adopting a lawyering-theory perspective is likely to produce new and useful insights.⁴⁰

Legal doctrine can also be mined for cultural models and operative tool kits. Take, for example, the common law's past reliance upon the discourse of ordinary common sense (i.e., legal folk models) to tell us what a thief looks like⁴¹ or why under certain circumstances a criminal defendant's "confession" after arrest cannot be trusted in court.⁴² Compare this once common way of thinking and speaking with the more contemporary, specialized discourse of legislative policy making—according to which "theft" can mean such counter-intuitive things as taking "non-public information," as in cases of insider stock trading. Or consider the specialized discourse of constitutional interpretation—according to which a post-arrest "confession" may be excluded from court as a matter of principle *regardless* of the statement's factual reliability.⁴³

38. See Sweetser, *supra* note 23, at 53-54 (discussing white lies and social lies).

39. See Amsterdam & Hertz, *supra* note 7. See generally Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988) (discussing the shift away from law-oriented discourse in child custody cases toward the discourse of the helping professions).

40. See Kim L. Scheppelle, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123 (1992); see also WILLIAM TWINING, *RETHINKING EVIDENCE* 24 (1990) ("A direct approach to the analysis of evidence [and related matters] may also help to illuminate the relations between rational and nonrational factors and different conceptions of rationality.").

41. See Fletcher, *supra* note 29, at 473.

42. See Sherwin, *supra* note 10, at 750-51.

43. See *Rogers v. Richmond*, 365 U.S. 534, 541 (1961) (opposing convictions based

These shifts in the way law narrates reality not only change the way "justice" is done, but also the language that is allowed to do it.

Changes in mainstream culture frequently affect the law both in terms of how it is understood and taught and how it is practiced.⁴⁴ What is now happening to the way we understand self, reason, and knowledge is likely to have its own distinctive impact upon the legal culture. This overview and the articles that follow suggest a way of grasping significant and overlapping patterns within the mainstream and the legal culture. This work also encourages further efforts to begin building bridges both *intramurally* (establishing ties among different legal scholars and between legal scholars and practitioners) and *extramurally* (reaching out to experts in other fields and to the public at large). If we succeed in this, perhaps we will have managed to take a step toward reviving the law's historic role as a widely respected intellectual, artistic, and political force within American society.⁴⁵

In Part II of this article, I set out in further detail why I believe that Holmes's insight regarding the anthropology of law is just right for where we are now in the history of the legal culture. The effort here is to pull together various strands from recent developments in the legal field and in other relevant disciplines, including cultural anthropology, cognitive psychology, linguistics, and philosophy. Part III provides an overview of the new insights lawyering theory has to offer with regard to conventional practices of lawyering and law teaching. Here, the effort is to see what the often discussed process of judicial decision making and the much less discussed topic of lawyering practices in everyday life look like when viewed from a lawyering-theory perspective. This discussion will lead to an expanded understanding of what law is and where it takes place—which is to say, not simply in the realm of judicial decision making or of statutory or regulatory enactment, but also between lawyers and clients, lawyers and bureaucrats, complainants and court clerks, and elsewhere.⁴⁶

on coerced confessions, not because they were untrue, but "because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system").

44. See, e.g., *infra* part II.A. (discussing the impact of modernism on legal theory and law teaching).

45. See ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 9-10 (1984).

46. As Robert Gordon has aptly stated, "every legal practice—from drafting a complaint for simple debt to writing a constitution—makes a contribution to building a general ideological scheme." Gordon, *supra* note 29, at 72. Gordon also notes that

[w]hen a lawyer helps a client arrange a transaction so as to take maximum advantage of the current legal framework, he or she becomes one of the army

Because this symposium is meant to provide a point of departure, Part IV concludes with a research program describing the kinds of studies that might be undertaken in the future by those who have been sufficiently enticed to pursue further a lawyering-theory perspective.

II. CURRENT INTRAMURAL AND INTERDISCIPLINARY CONVERGENCES

A. *Some Background in the History of Ideas*

Writing with an ear for the music and deceptive simplicity of everyday language, Raymond Carver once framed a collection of short stories under the title, *What We Talk About When We Talk About Love*.⁴⁷ There, as elsewhere in his work, Carver calls attention to the artful and subtle ways in which ordinary discourse carves meaning from experience. Carver makes us see what we so often take for granted: without discourse there would be no place for us to be in. No place, and no us.⁴⁸ We are creatures of language. We know ourselves, others, and social realities through the language that is at our disposal: the language in which we speak or write to others, and the language that goes on inside our heads. The central insight is this: language is not epiphenomenal. It is not the servant of reality or ideas. It is not something that, having done its job freighting meanings about, simply drops away. What we know and perhaps also what we feel about ourselves and reality are inextricably tied to the language we use.

This insight about the *phenomenality* of language—that discursive meanings in particular times and places do not “contain” objective or universal “data” or “Ideas,” but rather constitute human understanding—marks one of the key points of departure for the postmodern

of agents who confirm that framework by reinforcement and extend it by interpretation into many niches of social life. The framework is an ideological one, i.e., a set of assertions, arguments, and implicit assumptions about power and right.

Id. at 110; see also Bourdieu, *supra* note 12, at 827; Austin Sarat, “. . . *The Law Is All Over*”: Power, Resistance and the Legal Consciousness of the Welfare Poor, 2 YALE J.L. & HUMAN. 343 (1990); Michael McConville & Chester Mirsky, Teaching Poor People Compliance with Law: The Ideology of Rights in Criminal Court (unpublished manuscript, on file with the author).

The “oral tradition” in landlord-tenant law, which has increasingly supplanted statutory and case law, may offer another interesting source for “everyday lawmaking.” I am indebted to Rick Marsico, an active practitioner in housing law, for this suggestion.

47. RAYMOND CARVER, *WHAT WE TALK ABOUT WHEN WE TALK ABOUT LOVE* (1981).

48. See MARTIN HEIDEGGER, *POETRY, LANGUAGE, THOUGHT* 165-86 (Albert Hofstadter ed. & trans., 1971).

movement.⁴⁹ Convergent patterns in the works of many contemporary cultural anthropologists, sociologists, psychologists, psychoanalysts, linguists, and philosophers flow around this realization: Psyche and culture, folk knowledge and individual imagination, self-identity and social convention, are mutually constitutive. As this perspective increasingly influences mainstream culture, it is likely to become more conspicuous within the legal culture as well. Is this a big deal? A little history suggests that it's plenty big.

With the modern Enlightenment, science came into its own. The genre and canons of logic, strict causality and prediction provided the most persuasive (i.e., authoritative) terms for talking about and assessing the world of nature and humanity. Newton metaphorically set the universe running like a big clockwork, and ever since scientists and philosophers have been calculating the causal mechanics of observable human behavior and natural events. Absent rigorous quantitative methods, they said, nothing could be reliably known. And so it went: the natural and human world was constituted on the basis of what could be "proven," which is to say, measured—empirically, statistically, or duplicably by others. What escaped the calculus was meaningless. Across the board—in philosophy, sociology, anthropology, and psychology—if it didn't measure up, it wasn't knowable, and if it wasn't knowable, it didn't warrant being considered a part of our world.

Now the adherents of the Enlightenment were an enthusiastic bunch, but they had their detractors. This was so from the beginning. For example, folks like Bishop Berkeley began seriously to worry when the Liberal philosopher John Locke tried to take Newton's causal system a step further. Locke insisted that we can only know the world by the way it causes innate ideas to light up in our heads. Heresy! cried Berkeley.

49. To be sure, these are not entirely new ideas. The ancient Greeks seem to have been gripped by similar notions. See Charles P. Segal, *Gorgias and the Psychology of the Logos*, 66 HARV. STUD. CLASSICAL PHILOLOGY 99, 109-10 (1962). Around the middle of the fifth-century B.C., Gorgias wrote: "For that by which we impart information is *logos*, but *logos* is not the things that are or that exist; we do not then impart to others the things that exist, but only *logos*, which is other than the things that exist [S]peech . . . is its own master." *Id.* (quoting Gorgias of Leontini). Segal comments: "'Reality' for [Gorgias] lies in the human psyche and its malleability and susceptibility to the effects of linguistic corruscation." *Id.* at 110. It is notable that even as Descartes' rationalist influence was reaching its height in Europe, the rhetorical reality-making perspective was not entirely lost from view. See THE NEW SCIENCE OF GIAMBATTISTA VICO 1-6 (Thomas G. Bergin & Max H. Fisch trans., Anchor Books 1961) (1744); 1 ANTHONY EARL OF SHAFTESBURY, CHARACTERISTICS OF MEN, MANNERS, OPINIONS, TIMES, ETC. 189 (John M. Robertson ed., 1963). According to Shaftesbury, "[t]he most ingenious way of becoming foolish is by a system." *Id.*; see also CASSIRER, *supra* note 14, at 332.

What room does this mechanical, strictly causal system leave for God? So Berkeley countered: Locke's got this mechanical causation business all wrong. The only reason we can know anything at all of the world (or of other beings, or of ourselves for that matter) is because *God wills* ideas about these things to light up in our heads. According to Berkeley, without God's will to guarantee causation all we could do is project hypotheses. And that, Berkeley implies, would be like living in a dreamworld.⁵⁰ This is a notion to which we will return.

There were other detractors of Newton and his scientifically enlightened crowd as well. Those who felt left out of the scientists' mechanical systems: the poets and free spirits in particular, such as Blake, Wordsworth, Goethe, and the later German Romantics, Schiller, Heine, and Holderlin. What of the Spirit? they and others like them cried. What of the human genius for living life through feeling, heroics, novelty, or sacrifice? Where is there room for these things within the scientists' quantified world of data?

So the modern Enlightenment gave rise to its Romantic *Doppelgänger*. In the memorable words of Dostoevsky's underground man, better insanity than to become an integer in someone else's system.⁵¹ In short, the mechanistic reductivism of science gave rise to a surge of the irrational. The ensuing tension—between universal, unchanging Reason and nature's calculable order on the one hand, and the incalculable, disordered flux of Spirit (in the world and through the soul) on the other hand—is one that typifies the modernist age.⁵² Notwithstanding their radical differences, however, the scientists and the romantics shared one thing in common: they both believed that what they were thinking and talking about were the things themselves. Whether it was the dictates of universal reason or of universal spirit, it was irreducibly real. In short, they believed they were

50. See GEORGE BERKELEY, A TREATISE CONCERNING THE PRINCIPLES OF HUMAN KNOWLEDGE 21-22, 110-11 (G.J. Warnock ed., Open Court Publishing Co. 1986) (*A Treatise Concerning the Principles of Human Knowledge* was first published in 1710; *Three Dialogues Between Hylas and Philonous* was first published in 1713).

51. See *Notes from the Underground*, in GREAT SHORT WORKS OF FYDOR DOSTOEVSKY 279 (Ronald Hingley ed. & David Magarshack trans., 1968); see also HENRY D. THOREAU, WALDEN AND CIVIL DISOBEDIENCE 396 (Penguin Books 1986) (1849) (urging that if the machinery of government requires one to be an agent of injustice, then one should let his or her life be "a counter friction to stop the machine"); 2 MAX WEBER, ECONOMY AND SOCIETY 476 (Guenther Roth & Claus Wittich eds., Bedminster Press Inc. 1968) (discussing the increasing secularization, bureaucratization, and impersonality of everyday life).

52. Not the modernist age alone, of course. See, e.g., NANCY S. STRUEVER, THE LANGUAGE OF HISTORY IN THE RENAISSANCE 12 (1970) (discussing Gorgias's rejection of the ideal of pure reason); Segal, *supra* note 49, at 102-03 (discussing post-Platonic Academy skepticism).

describing if not "the way things are," at least the way the natural categories of reason ordered them to be.⁵³ This commonplace would change.

But before taking up that break with the modernist tension which we call postmodernism, a word is due on how the culture of modernism has given form and content to our understanding of law.

B. *Some Developments in the History of the Legal Culture*

During the nineteenth century, law was touted by many as a handmaiden to the methods and categories of science. This was, at the time, the royal road to respectability. As a science, law gained authority. The move in this direction was most apparent from the pervasive systematizing of teacher/scholars like Langdell. In their view, common law, like nature itself, could be read as a system of order; it was made up of logically consistent abstract principles. Textbooks were to be written, cases were to be studied, and law classes were to be taught along strictly inductive and deductivist lines.⁵⁴

Of course, in time, as a practical matter, the effort to systemize law fully could not succeed.⁵⁵ Yet, faith in the ordering power of reason did not fail. It simply sought new sources.

53. See SHWEDER, *supra* note 11, at 356-58; Richard A. Shweder, *Anthropology's Romantic Rebellion Against the Enlightenment, Or There's More to Thinking than Reason and Evidence*, in CULTURE THEORY, *supra* note 8, at 27, 45.

54. See, e.g., William P. LaPiana, "A Task of No Common Magnitude": The Founding of the American Law Institute, 11 NOVA L. REV. 1085, 1096 (1987) (describing Christopher Columbus Langdell's taxonomic definition of legal science); William P. LaPiana, *Swift v. Tyson and the Brooding Omnipresence in the Sky: An Investigation of the Idea of Law in Antebellum America*, 20 SUFFOLK U. L. REV. 771, 774-77 (1986) (quoting Justice Story's definition of the law as "a system of elementary principles and of general juridical truths," and explaining that practitioners in antebellum America regarded law as a deductive process of applying principles to specific cases).

55. See, e.g., Jerome Frank, *Why Not A Clinical Lawyer-School*, 81 U. PA. L. REV. 907, 908 (1933):

The so-called case-system . . . was the expression of the strange character of a cloistered, retiring bookish man. Due to Langdell's idiosyncracies, *law school came to mean "library-law."*

It was inevitable that those who have administered those numerous university law schools which are shaped according to the Langdell pattern should, for the most part, seek as law teachers those who have had little or no contacts with or a positive distaste for the rough-and-tumble activities of the average lawyer's life.

Id.; see also J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 389 (connecting critique of Langdellian formalism to a shift in ideology). See generally Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489 (1912) (shifting the analysis and critique of law from mechanical jurisprudence to a jurisprudence based on social conditions and social progress).

The Legal Realists turned on Langdell and his scientific sympathizers. The Realists convincingly argued that belief in the inherent order of the common law, and the classificatory system that "rational" doctrine allegedly gave rise to, could not be maintained. The role of hunches in the judicial decision-making process and the seemingly endless manipulability of precedents in the service of subjective preferences seriously undercut the previous generation's faith in the law's ultimate rationality. So rather than operate deductively, applying general abstract principles derived either from nature, history, or from extant case law,⁵⁶ Legal Realist reason turned thoroughly *inductive*. Cast out amid pressing social realities, the Realists sought a home in policy science. If legal conflicts were to be properly settled, decision makers would now have to obtain normative guidance from the particulars of the situation before the court. Once the specific needs or social interests embodied within a particular conflict situation were discerned (and Jerome Frank, for one, apparently believed that accurate fact-finding would provide jurists with a reliable basis for such discernment),⁵⁷ those interests could be properly balanced in accordance with an appropriate social calculus. Interest balancing, it was thought, could then build up, if not a systematic, then at least a coherent body of law that would do justice to the realities of the present—rather than the abstract rationalist phantoms of the past.

In this way, the Realists kept the case method alive, but turned it on its head. The cases were now taught largely to subvert the Langdellian universe. Instead of showing coherent principles simply waiting to be discovered, the Realist law teachers showed conflict. Instead of showing a squarely deductive-reasoning process at work in the caselaw, they showed subjectivity. And the muddle that this dumped in everyone's lap? The new faith the Realists held out was that policy science would set things straight. All that was needed was the right comprehensive view regarding the good that social policy demands. With that in hand, duly implemented through statutory or regulatory enactments, the proper

56. See William P. LaPiana, *Jurisprudence of History and Truth*, 23 RUTGERS L.J. 519, 534-45, 558 (1992) (describing the use of history by notable nineteenth-century American jurists as an adjunct to the study of "scientific jurisprudence"—which is to say, the study of the "true principles of law"). Whether universal principles of justice were thought to be discoverable in reason itself, as attorney and legal scholar George H. Smith believed, in history's *natural progression*, a notion attributed at the time to Sir Henry Maine, or in common-law cases, a nontheistic notion popularized by Langdell, the pre-Legal Realist emphasis on law's susceptibility to scientific systemization remained strong. See *id.*

57. Frank's critique of the modern trial implies that the application of various reforms would facilitate the search for truth. In this view, it is not that external truths are unattainable, it is simply that our present court procedures stand in the way of their acquisition. See JEROME FRANK, *COURTS ON TRIAL* 102 (1949).

balance could be made from case to case.⁵⁸ Of course, whether the operative policy should measure things exclusively in *consequentialist* terms (and if so, what specific sense of the social good to be maximized should be chosen), or whether policy should instead be a matter of enhancing a particular sense of the *right* (whether it be a principle of fair process or of individual integrity) was never resolved by the Realists. It was a problem others would inherit.⁵⁹ Suffice it to say, the shift in the legal culture wrought by the Legal Realists may still be viewed as an event that occurred within the modernist framework. For in the Realists' view, reason orders things fairly well—provided that it works inductively from the facts to organizing policy systems rather than deductively from unduly abstract conceptualizations.

In the next generation, new critical voices would arise to take on the Realists' persistent faith in the power of reason and in the organizational efficacy of policy science. One group of critics complained that the methods of science are no more or less resourceful—or, for that matter, "objective"—with regard to choice of norms when they operate *inductively* than when they operate *deductively*.⁶⁰ The Realists may have succeeded in displacing the controversy about reason from a level of abstract generality to one of concrete particularity, these critics maintained. But in the end the Realists, too, were caught up short: for the certainty of a rational order lies no more in facts than it does in doctrine.⁶¹

It was at this juncture in the legal culture that the post-Realist radicals entered the scene. According to some in the recent critical legal studies (CLS) movement, for example, the Realist critique failed to go far enough. In this view, the Realists got the critique of conceptualism right,

58. See Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L.J.* 203, 203 (1943); Karl N. Llewellyn, *On Warranty of Quality and Society: II*, 37 *COLUM. L. REV.* 341, 408-09 (1937) (arguing that "conscious regulative policy" would be required to give shape to an incoherent case law).

59. See Note, *Round and Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 *HARV. L. REV.* 1669, 1686 (1982).

60. See Alan D. Freeman, *Truth and Mystification in Legal Scholarship*, 90 *YALE L.J.* 1229, 1233 (1981); Peter Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 *MINN. L. REV.* 601, 601 (1977); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 *STAN. L. REV.* 591 (1981); Mark Tushnet, *Post-Realist Legal Scholarship*, 15 *J. SOC'Y PUB. TCHRS. L.* 20, 21-23 (1980). See generally Shweder, *supra* note 53, at 44-45 (pointing to insights regarding the contingency of culture as the most significant development to emerge within cognitive anthropology in recent years).

61. See, e.g., Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 *N.Y.U. L. REV.* 429, 444-54 (1987) (describing the demise of the Realists' "new objectivism" with regard to "the facts").

but they were naive in another respect. They failed to realize that there are no immanent social goals waiting to be judicially induced from particular fact scenarios.⁶² What the Realists did not adequately appreciate, these new critics said, is the thoroughly political nature of the social policies that are operating in the case law. And the politics, these critics argued, are plain wrong.⁶³

Of course, one could take up the new critics' charge and turn it around. For example, one could say that by replacing one set of policy objectives with another—by urging greater maximization of equality, say, rather than individual autonomy⁶⁴—the new critics did not really break with the Realists' model of reason.⁶⁵ They simply posited a different comprehensive view through which particular facts could be inductively sifted to get the "right result" in each case. In this respect, these new critics' version of post-Realist critique, like the Realist movement before them, may also be viewed as a "modernist" phenomenon.⁶⁶

62. See, e.g., Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1028-29 (1981) (discussing the legal formalists' inclination to seek immanent rationality in social life).

63. See Al Katz, *Studies in Boundary Theory: Three Essays on Adjudication and Politics*, 28 BUFF. L. REV. 383, 434 (1979); Duncan Kennedy, *Cost-Reduction Theory as Legitimation*, 90 YALE L.J. 1275, 1276 (1981).

64. Consider, for example, Duncan Kennedy's use of binary oppositions, such as the one between the individual and the community. See Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 211-12 (1979).

65. There seems to be an unarticulated assumption shared by some CLS scholars that uncovering contradictions within liberal theory or legal doctrine suffices as a catalyst for progressive political change. This implicit conviction reflects a continuing commitment to modernist rationality. For one thing, it continues the modernist dichotomy between rationality and disorder (i.e., if the law is not rationally coherent it must be irrational and indeterminate). The CLS message that emerges here is that the only (logical?) alternative to irrational contradiction, aside from chaos, must be an alternative (presumably a more politically "progressive") form of legal rationalization. But, of course, as J.M. Balkin lucidly points out, keying into the rhetoric that characterizes a form of legal discourse does not in and of itself encourage any particular political agenda. Nor is any particular form of political discourse free from "rhetorization." See J.M. Balkin, *The Promise of Legal Semiotics*, 69 TEX. L. REV. 1831, 1843-44 (1991); Williams, *supra* note 61, at 477-91.

66. In other words, the modernist quest for certainty and the concomitant inclination to reduce things to absolutes—"the law is either structurally coherent or indeterminate"—remains operative in much CLS literature.

Other contemporary legal scholars have actively sought to adopt a "postmodern" stance that moves beyond these familiar modernist dichotomies. Consider, for example, the cultural and cognitive orientation of Pierre Schlag and Steven Winter. See Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441,

To be sure, many in the post-Realist generation were left unpersuaded by the critics' call for a new politics of law. Among them were those who maintained that there are sufficiently objective, "self-evident" first principles to generate a workable comprehensive view of law. For believers in the market system, in individual autonomy and free choice, and in the existence of a calculus by which to measure one's choices, the rational systemization of law once again becomes a viable goal. Whether such a clear-cut calculus exists, whether human pleasure and pain are to be measured in wealth-maximization terms or in accordance with some other sense of social welfare, whether such a calculus, conceding it does exist, could operate neutrally, apart from the tug of politics and ideology, and whether interest-maximization can do justice to a constitutional regime that includes certain "incalculable" individual rights over and beyond contract and property rights, remain hotly contested matters.

It is at this juncture that lawyering theory may provide some assistance. Whether the effort is to develop a more consistent or contextually astute approach to measuring social utility, or to explore more fully our understanding of human reason (e.g., to assess how rational or self-interested one may expect everyday decision making to be, or what "rationality" means in everyday practices),⁶⁷ or to replace comprehensive social objectives such as utility-maximization with some other schema or schemata (e.g., one that reflects society's multicultural and multivocal reality), or, on a more mundane level, to improve the services lawyers render to their clients, a better knowledge base is likely to help. And it is in this capacity, as a contributor to knowledge, that lawyering theory now seeks to make its mark in the current legal culture.

C. *On Legal Constructivism: The Emergence of a Lawyering-Theory Perspective*

From what has been said so far, the postmodern moment may be construed as a moment of great opportunity. For example, we now have the chance to take leave of some of modernism's outworn and unproductive dichotomies, like the antagonism that still exists between theory and practice, facts and norms, rational knowledge and emotional knowledge, truth and metaphor, to name a few.⁶⁸ A major objective of

1442 (1990).

67. See generally D'Andrade, *supra* note 19, at 112 (explaining that "through hierarchical organization, human beings can comprehend a schema containing a very large and complex number of discriminations" but that the "amount of work involved in unpacking a complex cultural schema can be quite surprising").

68. By suggesting the opportunities postmodernism may present, I do not mean to say that the postmodern era does not give rise to its own set of challenges. In this regard,

lawyering theory is to work within the current postmodern framework in an effort to provide novel approaches to inherited and contemporary conflicts while also building upon extant practices within the legal culture.

New insights from other fields can provide much assistance in this effort. And with the pivotal question, "How are meanings generated in everyday life?" in hand, we are now in a better position to appreciate what drives a great deal of the work that is currently under way in such fields as cultural and cognitive psychology, natural-language philosophy and pragmatics, as well as in linguistics, sociology, history, and, to a lesser (but hopefully increasing) degree, legal studies.⁶⁹ Studying

one may point to the impact of international commerce and global telecommunications (wedded by their joint fabrication of a glistening electronic stream of fashion-making imagery) as a cultural force. As a result of that force, life in our time not only imitates art, it imitates the commercials as well. No doubt today's sophisticated tele-viewers (those natural postmoderns who have come of age in an age when the absence of television is no longer thinkable) feel at home with the fast-cut, slo-mo reframing of reality—like the one used, apparently to such great effect, by defense attorneys in their refashioning of the "video-reality" of the Los Angeles police beating of Rodney King.

Cultural anthropologist Richard Shweder has shrewdly and wittily described the postmodern mentality as being dominated by the "placebo" effect. Belief being no longer necessary, one says things like, "I've got a headache; I think I'll take a placebo for it. . . . [And] it works." This suggests that in our postmodern existence, we had better hold onto our prejudgments—or at least keep our options for prejudice open—for it may turn out that that is all we've got to see and judge the world with. See Richard Shweder, *The Authority of Voice*, 37 N.Y.L. SCH. L. REV. 251, 252 (1992).

If Shweder has his finger on something here, one might reasonably expect that the curious blend of complacency and disbelief that he describes must surely raise questions about the continued efficacy or stability of moral and ethical judgments, not to mention judgments of fact. For my own part, I think Ruth Morse points us in the right direction (although surely she does not end the controversy) when she says:

The only defense against the manipulation of the listener's emotions [is] an alert ear trained to discriminate not only good from bad arguments, but successful from unsuccessful ploys. The best arguments used in a bad case might be persuasive, but they ought not to succeed with someone educated [W]e may pity the speaker, or be seduced by her, but we are meant to *think* and to resist.

RUTH MORSE, *TRUTH AND CONVENTION IN THE MIDDLE AGES* 56-57 (1991).

In short, to understand what an event or a text or statement "means" calls for rhetorical sophistication. We need to be as alert to form and context as to substance. See J.M. Balkin, *Essay: What is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966, 1971-72 (1992) (describing at least one aspect of postmodernism not as a model to be followed, but as a cultural event that needs to be studied and understood to see how culture has changed "for better or worse").

69. See, e.g., Elizabeth Mertz, *Law and Social Theory: Preface*, 83 NW. U. L. REV. 1, 4-5 (1988); Elizabeth Mertz, *Creative Acts of Translation: James Boyd White's Intellectual Integration*, 4 YALE J.L. & HUMAN. 165, 166 (1992) (book review); Albert

J. Moore, *Trial By Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273, 277, 278 (1989); Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195, 1208 (1989); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1106-07 (1989); Naomi R. Cahn, *Speaking Differences: The Rules and Relationships of Litigants' Discourses*, 90 MICH. L. REV. 1705 (1992) (reviewing CONLEY & O'BARR, *supra* note 7) (Conley and O'Barr analyze the relationship between different storytelling styles of litigants and how their language affects results in the legal system); Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards An Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1339-57 (1992).

A good deal of the legal-cultural studies that have been appearing have been showing up in the journal *Law & Society Review*. See, e.g., William L.F. Felstiner et al., *The Emergence Transformation of Disputes: Naming, Blaming and Claiming . . .*, 15 LAW & SOC'Y REV. 631, 632 (1980-1981); Christine B. Harrington & Sally E. Merry, *Ideological Production: The Making of Community Mediation*, 22 LAW & SOC'Y REV. 709, 711 (1988) (analyzing the formation of community mediation reform through an ethnography of the culture and practices of local mediation programs); Lynn Mather & Barbara Yngvesson, *Language, Audience and the Transformation of Disputes*, 15 LAW & SOC'Y REV. 775, 818 (1980-1981) (attempting to develop an analytical framework for relating the management and outcome of individual disputes to the maintenance and ongoing development of broader patterns of social order); Austin Sarat and William L.F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC'Y REV. 93, 94 (1986) (noting that the interaction between lawyer and client provides "one important setting where law and society meet and where legal norms and folk norms come together to shape responses to grievances, injuries and problems"); Barbara Yngvesson, *Making Law at the Doorway: The Clerk, The Court, and the Construction of Community in a New England Town*, 22 LAW & SOC'Y REV. 409, 411 (1988) (focusing on the way exchanges between clerks and citizens produce legal and moral frameworks that produce decisions to handle a case in a particular way).

The dangers of "covert advocacy" or hidden forms of persuasion based on lawyers' increased use of psychological (and one might add, linguistic, rhetorical, or other cognitive-based) techniques of persuasion may also be worth noting here. See, e.g., Victor Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C. L. REV. 481, 498 (1987) ("Covert advocacy erodes jury cognitive independence because a juror cannot scrutinize and choose to reject a message from the advocate that is received on a subconscious level. Once the message is received, it can then subconsciously affect other choices made by the jury about subsequently received evidence."). Of course, the complaint against lawyer persuasion is hardly new: the Sophists and rhetoricians of ancient Greece were perhaps the first—at least as seen through Plato's lens—to give lawyers a bad name. Nevertheless, ethical vigilance against inappropriate manipulation of knowledge and belief surely requires ongoing professional monitoring. At the very least, what constitutes "inappropriate manipulation" in practice must be clearly articulated. See Richard J. Burke, *Politics as Rhetoric*, 93 ETHICS 45, 45 (1982):

[T]he attempt to persuade someone [rather than compelling him] risks failure to persuade and thus recognizes his freedom as a human being to make up his own mind. The difficulty of drawing the line in borderline cases—manipulative

everyday life for patterns of meaning making allows us to see familiar activities in a new light. Indeed, this approach has the power to convey a sense of seeing things for the first time; and, in a certain respect, that may be quite literally the case. So many of our discursive practices are constructed by unconsciously internalized models, scripts, or cultural schemas, that it seems quite natural for their ordering properties to operate invisibly. For example, what makes something "common-sensical" is precisely its obviousness. Common sense tells us "the way it is." The fact that underlying structures—norms, metaphors, narratives of different sorts—make up "the way it is" goes unrecognized. Common sense, like most forms of local or folk knowledge, appears transparent: it is experienced as an open window, rather than the refractive lens that it is. One of the objectives of adopting a cultural perspective is precisely to make the complex operation of folk and other underlying cultural models come into view.

What has shown up in other fields as a result of this new attentiveness to meaning making in everyday life? A great many things. For example, a different view of the *self*—as something *distributed*, through stories shared with others in local settings, as opposed to the classical liberal (and existential) picture of an acontextual, autonomous "I."⁷⁰ Scholars are also coming up with a different view of emotions: as something of real cognitive interest, rather than a kind of "static" that interferes with useful psychological understanding.⁷¹ For its part, common sense itself has

advertising, religious cults, etc.—should not lead us to draw the fallacious inference that all persuasion or even irrational persuasion, is a form of coercion.

Id.; see Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 721-32 (1987) (discussing what constitutes coercion of a client). I believe that Aristotle's response to complaints about inappropriate persuasion remains apt:

And if it be objected that one who uses such power of speech unjustly might do great harm, that is a charge which may be made in common against all good things except virtue, and above all against the things that are most useful, as strength, health, wealth, generalship. A man can confer the greatest benefits by a right use of these, and inflict the greatest injuries by using them wrongly What makes a man a "sophist" is not his faculty, but his moral purpose.

ARISTOTLE, *THE RHETORIC* 23-24 (W. Rhys Roberts trans., Modern Library 1954).

70. See BRUNER, *supra* note 5, at 107; Richard A. Shweder & Edmund J. Bourne, *Does the Concept of the Person Vary Cross-Culturally?*, in *CULTURE THEORY*, *supra* note 8, at 158.

71. See, e.g., George Lakoff & Zoltan Kövecses, *The Cognitive Model of Anger Inherent in American English*, in *CULTURAL MODELS*, *supra* note 19, at 195, 195:

The Logic of Emotions would seem . . . to be a contradiction in terms, since emotions, being devoid of conceptual content, would give rise to no inferences at all, or at least none of any interest. We would like to argue that the opposite

come to be seen as a culture-specific phenomenon of great complexity and variability from context to context.⁷² In addition, various frames of meaning have been “thickly”⁷³ described in a variety of cultural settings radically different from our own, revealing local concepts of time or self that, for all their differences with our own understanding of these matters, nevertheless operate on the basis of an explicable logic.⁷⁴ Patterns of meaning making in everyday language have been studied in rhetorical terms,⁷⁵ as a matter of cooperative rules and the meanings that flow from their violation,⁷⁶ and in the context of participatory research in the workplace.⁷⁷ Historians have shown the influence that narrative styles have on the way reality can be known or recounted.⁷⁸ The way racial or ethnic prejudices show up in everyday conversation, unbeknownst to the speaker (if not to the victim), has been thickly studied—revealing recurrent dialogical and narrational, among other structural and cognitive, components.⁷⁹ And a variety of covert frames of meaning (“folk models” of knowledge) have been uncovered in a broad range of everyday activities, such as dating practices among college-age women,⁸⁰ local

is true, that emotions have an extremely complex conceptual structure, which gives rise to [a] wide variety of nontrivial inferences.

Id.; see Robert I. Levy, *Emotion, Knowing, and Culture*, in *CULTURAL THEORY*, *supra* note 8, at 214, 218.

72. See GEERTZ, *supra* note 18, at 73-93.

73. See CLIFFORD GEERTZ, *Thick Description: Toward an Interpretative Theory of Culture*, in *THE INTERPRETATION OF CULTURES*, *supra* note 3, at 3-30.

74. See Lutz, *supra* note 37, at 291; Shweder, *supra* note 53, at 40:

[C]ognitive scientists have advanced our understanding of the type of ideas underlying nonrational action, and it has become more apparent that language, thought, and society are built up out of ideas that fall beyond the sweep of logical and scientific evaluation, ideas for which there are no universally binding normative criteria.

Id.

75. See BURKE, *supra* note 7, at 51; KENNETH BURKE, *A RHETORIC OF MOTIVES* 42 (1962).

76. See PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 118 (1989).

77. See Max Elden, *Sharing the Research Work: Participative Research and Its Role Demands*, in *HUMAN INQUIRY* 253, 253-65 (Peter Reason & John Rowans eds., 1981); William F. Whyte et al., *Participatory Action Research*, 32 *AM. BEHAVIORAL SCIENTIST* 513, 537-38 (1989) (redefining labor/management roles and the local theory of work organizations).

78. See DAVIS, *supra* note 21, at 43-45, 107-09.

79. See TEUN A. VAN DIJK, *PREJUDICE IN DISCOURSE* 1-4 (1984).

80. See generally Holland & Skinner, *supra* note 30, at 78-108 (discussing data from a group of college-age people using gender-marked conversation).

efforts to describe lying,⁸¹ marriage,⁸² and even how home heat-control systems work.⁸³

What has begun to emerge from these studies, aside from new knowledge about how meanings are made and remade in different times and places, is the degree to which discrete cultural practices may consist of basic building blocks—what some refer to as recurrent scripts and simplified worlds.⁸⁴ What is being suggested here is that there may be more standardized ways of organizing experience—familiar stories, say, which make various practices in everyday life consistent and expectable—than a simple survey of external behavior might otherwise suggest.⁸⁵ In short, to some explorable extent, worlds of meaning are being built upon, and sustained by, recurrent and interlocking frameworks—the stories,⁸⁶ metaphors,⁸⁷ rituals,⁸⁸ prototypical scenarios,⁸⁹ and scripts⁹⁰ that are embodied in local practices. Studying culture as the repository of such frameworks—including prototypical events, prototypical roles for actors, and more⁹¹—is what anthropologists in particular, and postmodern “constructivist” scholars in general, are setting out to do.

81. See Sweetser, *supra* note 23, at 44.

82. See generally Quinn, *supra* note 23, at 174-88 (describing metaphors of marriage that enable the speaker to express feelings about the marital experience).

83. See Willett Kempton, *Two Theories of Home Heat Control*, in CULTURAL MODELS, *supra* note 19, at 222, 222-43.

84. Quinn & Holland, *supra* note 22, at 19; see also Shweder, *supra* note 53, at 35 (“Memory drifts in the direction of preexisting semantic intuitions, and these intuitions are far more structured and coherent than actual experience.”).

85. See generally BRENT BERLIN & PAUL KAY, BASIC COLOR TERMS (1969) (describing a classic study on color perception).

86. See Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073, 2074-75 (1989).

87. See LAKOFF & JOHNSON, *supra* note 20, at 85; GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS (1987).

88. See VICTOR W. TURNER, DRAMAS, FIELDS, AND METAPHORS 23 (1974); VICTOR W. TURNER, THE RITUAL PROCESS 4 (1969).

89. See Winter, *supra* note 69, at 1148 (drawing upon Lakoff and Johnson’s “ideal cognitive models” [ICMs] in an analysis of legal argumentation). *But cf.* Dennis Patterson, *Law’s Pragmatism: Law as Practice and Narrative*, 78 VA. L. REV. 937, 968 (1990) (critiquing as “science fiction” Winter’s reliance upon “the mysteries of unconscious structures”); Quinn & Holland, *supra* note 22, at 27 (noting studies questioning Lakoff and Johnson’s suggestion that our bodily interaction with the physical environment provides an objective or universal source for metaphor production).

90. See SCHANK & ABELSON, *supra* note 28, at 36-68.

91. See Kempton, *supra* note 83, at 223.

What, then, is the postmodern framework being described here? Recall Bishop Berkeley's response to Locke: Without God in the works to guarantee causality, humans alone would be responsible for the meanings they project as reality. To think of the natural world in these terms struck Berkeley as obviously untenable. Humans making up meanings for events in nature? Absurd. But putting aside matters of teleology or metaphysics, in the *human sciences*, as in the realm of arts and letters, it is precisely the human authorship of meaning—the way we construct self and social realities in our everyday discursive practices—that preoccupies the postmodern thinker and observer. It is this fascination with the construction of meaning in everyday life that brings us back to the reality-maintaining (or transforming) power of narrative. What stories do we tell ourselves and one another to act as we do, to know what we know, to say the things we say in our dealings with others in society? What cultural models are currently at work framing and explaining our experience of ourselves, others, and the world around us? How do these models guide our actions and motivate the behavior of others? How does communication get formalized in discrete legal practices? And what sorts of communication proceed most effectively in particular situations?

In short, in a postmodern legal framework in which discourse and narrative take center stage, it seems most fitting to ponder (echoing Carver) *what we talk about when we talk about law*. How do people who are either engaged in or influenced by the law's diverse practices understand what's going on?⁹² How do they think and talk about their situation and their role in it, and how might others interpret what they are saying?⁹³ What frames of reference, what cultural models or genres of discourse, and what recurrent metaphors do they use?⁹⁴ Upon what canons of authority do they rely?⁹⁵ What are their beliefs, hopes, desires?⁹⁶ It is by following this line of inquiry that lawyering theory aspires to broaden the scope of scholarly and practical analysis. Consistent with this approach, it is of no less interest to explore how lay actors understand what is going on around them, and how they communicate their knowledge, beliefs, interests, goals, and so on, than how professionals do so. In addition, from this viewpoint, actors in the legal

92. See GEERTZ, *supra* note 18, at 92.

93. See generally WILLIAM LABOV & DAVID FANSHIEL, *THERAPEUTIC DISCOURSE* (1977) (exploring the goals and techniques of therapeutic discourse through a close examination of the linguistic forms used by a patient and a therapist in the first 15 minutes of one session).

94. See BERLIN & KAY, *supra* note 85.

95. See Bourdieu, *supra* note 12; TZVETAN TODOROV, *GENRES IN DISCOURSE* (Catherine Porter trans., Cambridge Univ. Press 1990) (1978).

96. See BRUNER, *supra* note 5, at 43.

culture may also come to be seen not simply as seeking to settle or avoid disputes, but also as helping to make up who they and others are in the role of lawyer, client, judge, clerk, bureaucrat, juror, witness, and so on. Indeed, we may now recognize that it is by virtue of these diverse and overlapping understandings and multiple discursive practices that the legal culture is being created and maintained (or altered). Put differently, amid a myriad of individual actions, in a broad variety of social settings, lie the symbolic forms, the inherited conceptualizations, the attitudes, feelings and beliefs, by which we—lawyers and law teachers, judges and legislators, administrators and lay persons—communicate, perpetuate, and develop our understanding of the law and its practices.

By taking seriously the way participants in an activity understand and experience what they are doing or what they perceive to be going on around them, operative patterns of meaning—and the ways in which they are constructed in everyday practices—may be brought to light. In this way, the normative or strategic choices that a particular discourse allows or inhibits can be made conscious and, as a result, subject to choice rather than habit.⁹⁷ Awareness of the ways in which people tend to think and speak about what is going on in certain kinds of situations also permits more accurate analyses of the efficacy of communication in those situations: Are the concerned parties speaking in different languages? Is the meaning of a particular utterance different to different individuals under different circumstances? Or, conversely, are there standard patterns of discourse in certain types of conflict or conflict-avoidance situations?⁹⁸

In sum, lawyering theory sets out to explore whether there are cultural models that we should know about in our own neck of the woods, models

97. See Williams, *supra* note 22, at 496.

98. For an example of how one might uncover, in order to focus on and perhaps change, the way people think about a particular conflict-ridden situation, consider Peter Lazes, *Innovative Approaches to Saving and Creating Jobs*, NAT'L PRODUCTIVITY REV. 146, 146-54 (1985) (discussing resolution of labor/management disputes to the satisfaction of both sides by "changing the shape of the box"—which is to say, by persuading the participants to redefine habituated patterns of thinking and talking about the role of labor and management in the workplace); see also Whyte et al., *supra* note 77, at 549:

We believe that progress in understanding the correlates of worker participation depends upon a radical paradigm shift: changing the definitions of variables and the specification of what is to be measured. If a paradigm shift is necessary to advance theory, it appears to us that [participation action research] is more likely to cause such a shift than standard research methods.

Id.; Max Elden, *Varieties of Workplace Participatory Research* 6 (July 15, 1981) (unpublished manuscript, on file with author) ("Progress is measured by how well the locally evolved theory explains the situation to the satisfaction of both insiders and outsiders [experts].").

that have been internalized and that are being played out in diverse legal practices. Can we too find recurring patterns, or scripts, or simplified worlds embodied in the stories that we hear and tell ourselves and others about the way the law works? The *raison d'être* of this symposium consists not only in raising such questions, but also in persuasively showing the constructive role that a lawyering-theory perspective can play in answering them.

In what follows, I would like to push further along this path by reconsidering *what law teachers and scholars talk about when they talk about law*.

III. LAWYERING, LAW TEACHING, AND LEGAL SCHOLARSHIP RECONSIDERED

A. *Genres and Canons in the Discursive Activities of Law*

Traditionally, the question of how jurists think and talk about the law and its practices, to the extent that it is raised at all, has been kept on a rather tight rein. For example, while clinical legal education has grown over the years, its intellectual status remains a source of great controversy.⁹⁹ Should it be a respectable thing for a law teacher to spend time thinking and talking about what lawyers do *before* their client's problem becomes a matter for the courts? Is consideration of how lawyers initially get a client's story, how they perceive the client's goals and generate possible means for achieving them, how they obtain and arrange facts to facilitate a particular legal theory of the case, or how they settle

99. See, e.g., Lawrence M. Grosberg, *Introduction: Defining Clinical Scholarship*, 35 N.Y.L. SCH. L. REV. 1, 2 (1990) ("Should clinicians produce scholarship? . . . If it is found that they should, what kind of scholarship should it be and at whose expense will it be produced?"); Marjorie A. McDiarmid, *What's Going on Down There in the Basement: In-House Clinics Expand Their Beachhead*, 35 N.Y.L. SCH. L. REV. 239, 268, 274 (1990) ("Clinicians believe they are excluded from full participation in their schools. . . . A majority of clinicians surveyed rate the attitude of other faculty toward their work as the major challenge posed by their job. They do not consider themselves as having full faculty status within their institutions."); Scott Turow, *Law School v. Reality*, N.Y. TIMES, Sept. 18, 1988, § 6 (Magazine), at 52, 71-72 (noting that the words "practice" and "practice skills" are often associated by law professors with a form of roving anti-intellectualism); see also Stephen Wizner, *What is a Law School?*, 38 EMORY L.J. 701, 713 (1989):

The goal of *clinical* legal education—and it should be the goal of legal education—is to teach students to *be* lawyers, not just to "think like lawyers" or "act" like lawyers. This means that we must teach law students—provide a setting in which they can learn—the proper and effective representation of clients

Id.

problems in non-adversarial settings, a less sophisticated activity than pondering the complexities of appellate advocacy and decision making?

Advocates of lawyering theory find good reason to respect the study and teaching of appellate court decisions as well as other non-appellate lawyering practices. Indeed, I suggest that the meaning-making ("constructivist") analysis that I have been discussing not only expands the ways in which we understand what is going on in judicial opinions, but it also widens the focus of scholarly interest to include the kinds of out-of-the-courtroom lawyering activities described above. Put differently, lawyering theory asks us not only to consider conventional sources of law such as courts and legislatures, but also how law gets made, and how legal ideology may be maintained or altered, in such quotidian lawyering activities as drafting a complaint, taking a deposition, setting up a corporation, or otherwise helping a client arrange a transaction so as to take advantage of the existing legal framework.¹⁰⁰ In this view, exploring how lawyers think and talk in discrete, concrete contexts opens up a whole new batch of significant and perplexing questions well worth pursuing both in law school and in scholarly research.

We may now also begin to focus as never before on the lay participant's role in the legal system. For example, do we know enough about the lay client's response to how a particular problem is being addressed through law? Is the client's sense of reality and personal need being adequately translated into the discourse of law?¹⁰¹ Do different client groups have different perceptions about how the law is responding or failing to respond to their respective needs and desires? How do attorneys understand what a particular client's "problem" is? What "facts" do attorneys perceive or seek to obtain, and what "facts" escape them? Do some client groups bear information, perspectives, theories, or beliefs about their situation that typically are ignored by professionals?

A shift in our thinking about what the law is and where it takes place can lead to other queries as well. For example, how do we know from studying a particular Supreme Court decision, say, what is going to happen in society as a result? How do we know that the decision has been effectively assimilated in the practices of particular individuals at the local level and in the practices of other judges, legislators, or administrators

100. See Gordon, *supra* note 29, at 72, 109-10.

101. See, e.g., JAMES B. WHITE, ON JUSTICE AS TRANSLATION 20-21, 260-61, 269 (1990) (questioning whether lawyers can find a wider range of voices and offer a wider range to others and arguing for "recognition of the equal value of each person as a center of worth and meaning"); Christopher Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 883 (1992) (asserting that "universalized legal narratives of victim, work, and family impede and constrain the stories that can be heard in legal fora").

who are charged with the task of (re-)interpreting what the High Court has said? Are lawyers giving their clients different advice? Do some people at the local level discern new entitlements, which prompt new legal actions in their pursuit?¹⁰² Or, do some feel that they have lost something and are consequently persuaded to rechannel their responses to a particular social conflict along extrajudicial lines—whether through self-help, political action, or some other course?

In sum, once we begin to focus more of our attention on what lawyers and clients, judges and bureaucrats, among others, think and say in the course of their respective activities within the legal culture, we are increasingly likely to appreciate what their language can tell us about how law in its everyday actions constructs meaning and reality.¹⁰³ While undoubtedly useful in this regard, the study of appellate case law alone clearly will not suffice for us to obtain such an expanded knowledge and understanding of what the law is and how it operates in practice.¹⁰⁴ Indeed, once we recognize the importance of studying law through everyday legal practices, from first client contacts to appellate advocacy and decision making, it becomes increasingly evident that we must also assess the social context in which these diverse rhetorical activities go on. For whether we are dealing with the skill of identifying an “apt” analogy to extant case law, carving out exceptions, spotting new trends in the law, or engaging in a myriad of other “lawyering tasks,” various and complexly interrelated cultural models will be called into play. Without studying what those underlying models are, how they operate in specific situations, and how they shape the way people see, feel, think, and talk about particular social realities and human activities, none of these skills will attain a level of sophistication that may otherwise be available. Taking up a cultural view of law thus asks lawyers and legal scholars specifically to consider how each of the lawyering skills noted above are being—or can be—used to construct specific meanings and realities in particular concrete contexts. Lacking that, we will not be able to tell with confidence what a particular “law case” is really about or what the meaning and social significance of a court’s subsequent adjudication of that case are. Put simply, from a study of court cases alone, we will not adequately learn the meaning and significance even of court cases.

By virtue of what has been said so far, I hope to have been able to suggest that building upon traditional appellate case-oriented skills with

102. See Marc Galanter, *The Life and Times of the Big Six; or, The Federal Courts Since the Good Old Days*, 1988 Wis. L. REV. 921.

103. See, e.g., Lakoff & Kovecses, *supra* note 71, at 221 (claiming that linguistic evidence is an extraordinarily precise guide to the structure of cultural models).

104. See, e.g., McDiarmid, *supra* note 99, at 240 (noting that, “[a]t best, fewer than 1% of legal matters arrive at the doors of the appellate courts”).

skills that reflect other role- and discourse-specific aspects of lawyering, in all of its phases, is a natural consequence of adopting lawyering theory's cultural view of the law and its practices. When we realize just how much law making goes on every day at the local level—where documents are being drafted and signed, where various strategies are being considered and implemented, and so on—it becomes apparent that more knowledge about these activities is essential to an adequate understanding of what the law is and how it operates in society. The importance of such knowledge goes beyond helping lawyers and law teachers improve upon what they do—for example, through the development of critical studies of lawyering activities at the local level. In a more general sense, cultivating this kind of knowledge adds to our understanding of what the law *means* to academics, practitioners, judges, and the public.

Some of this work has already begun.¹⁰⁵ Among the early pathbreaking studies of how case law gets framed by the ways in which judges think and talk about the law are H.L.A. Hart and A.M. Honoré's study of causation in the law¹⁰⁶ and George Fletcher's study of the transformation of larceny.¹⁰⁷ Hart and Honoré began with the seemingly simple claim that judges often apply common-sense notions of causation in determining responsibility. Upon subsequent critical examination of this claim, Hart and Honoré discovered that what passes for plain common sense in the cases masks a complex network of concepts that are latent in ordinary causal language. The concept of "conditions" versus that of "cause and effect," the concepts of "inducing" or "enticing" others to act, and the concept of "providing an opportunity" are examples of this. In short, common sense turns out to be far from a simple thing.

In his study of larceny, Fletcher also took common sense as a point of departure. He discovered that the early common-law cases relied upon common sense to identify what a thief looks like and what kind of behavior warrants blaming. Fletcher went on to show that the "drive for consistency" in the law has resulted in the abandonment of common sense for the sake of a more unified law of theft offenses. The new systemization of the law in this area was made possible, according to Fletcher, by substituting a legislative—policy science—approach, based on

105. Time, space, and constraints upon my own knowledge limit the examples I can cite of various aspects of the cultural view that lawyering theory adopts. No doubt traces of a legal-constructivist approach can be found across a broad spectrum of legal topics. My intention here is simply to illustrate that this kind of scholarship has already begun to take shape. For other examples of the newly emerging "cultural studies" genre in the legal literature, see *supra* note 69.

106. See H.L.A. HART & A.M. HONORÉ, CAUSATION IN THE LAW (1959).

107. See Fletcher, *supra* note 29, at 469.

the unifying concept of intent, for a common-sense recognition of criminality. In this way, a collective social image of wrongdoing is replaced by a general theory of property interests. Under the sway of utilitarian reformers like Bentham and Beccaria, the law has come to reflect an instrumental concern with the maximization of human happiness. Specifically, this has meant redesigning the law so that individuals who might pose a threat to protected interests, like property rights, would be persuaded that the costs of punishment outweigh the gains of criminal activity. On this basis, a "rational" system of deterrence could replace the previous impetus for punishment, namely, the shared sense that a disturbing event—a breach of the peace—had occurred.

In my own study of the development of the law of confessions,¹⁰⁸ I too have found a shift from law talk based on the folk models embodied in ordinary common sense to an increasingly uniform policy-based instrumentalism. From conflicting common-sense impressions in the case law about whether a criminal defendant's statements to police after arrest are credible, the courts have increasingly moved into the genre of deterrence talk. As a result, maximizing society's interest in controlling crime has replaced the common-sense concern for when someone is or is not likely to be telling the truth. In my study, as in Fletcher's, we see how a shift in the genre and canons of legal discourse results in different pictures of reality, different stories about the events and individuals concerned, as well as different standards for assessing the meaning of what has happened. For example, whether the actors in question are viewed as rational calculators facing the quantifiable consequences of an applicable social policy (such as crime control through deterrence), or whether their actions are to be assessed on the basis of local contexts (i.e., how people can be expected to behave under certain circumstances and what that behavior means in light of those circumstances), depends upon the discursive form (or genre) in which their story is officially (i.e., "authoritatively") framed.

This insight regarding the constitutive power of discourse has also been noted in other areas of the law. For example, in the area of child-custody decision making Martha Fineman has shown how the discourse of the helping professions (i.e., the therapeutic talk of social workers) has displaced legal models of discourse in resolving custody disputes.¹⁰⁹ In a broader context, Donald McCloskey has shown how the discourse of economics, playing upon the dominant belief in—and consequent prestige of—the genre and canons of science, has managed to disguise its own rhetorical constructions and present itself as a reliable, stabilizing way of

108. See Sherwin, *supra* note 10, at 773.

109. See Fineman, *supra* note 39, at 727.

thinking and talking about legal matters.¹¹⁰ Taking McCloskey's point a step further, James Boyd White has invited judges, lawyers, and law teachers to consider law talk in all its forms as "constitutive."¹¹¹ According to White, the way we talk about individual identity and social roles, as well as substantive issues in the law, constructs a discrete world of meaning. In this view, by virtue of our choice of discourse, we share responsibility for the way things are.

Of course, the weight of responsibility in this matter increases in proportion to one's authority to impose or deny one form of discourse rather than another within the official channels of decision making. Viewed in a broader social context, then, increased awareness of the consequences of discrete rhetorical choices draws our attention to those particular forms of discourse that are culturally dominant, whose use more readily captures an official decision-maker's beliefs about the way the world is and what individual actions and events mean. Consider in this regard John Conley and William O'Barr's recent study of discourse patterns among claimants in small claims court.¹¹² Their study suggests that choosing one way of telling one's story in court as opposed to another (speaking informally and contextually, say, rather than in a formalistic, rule-based manner) may devastate one's chances of success. Trial lawyers seem to have picked up this lesson.¹¹³ For example, John Griffiths¹¹⁴ and, in a separate study, Austin Sarat and William Felstiner,¹¹⁵ have shown how lawyers constructed the identity of their clients in divorce cases and retold their clients' stories in a way that reflected and facilitated the attorney's sense of legal reality.¹¹⁶ Even more poignantly, Gerald

110. See Donald N. McCloskey, *The Rhetoric of Law and Economics*, 86 MICH. L. REV. 752, 754 (1988).

111. See JAMES B. WHITE, HERACLES' BOW 37-39 (1985).

112. See CONLEY & O'BARR, *supra* note 7, at ix.

113. With what degree of consciousness as to their choice of discourse and with what knowledge of the consequences of that choice, I cannot tell. In any event, a related concern here is whether the trial attorney's goal (victory in court) need always take priority over her concern that the client's voice be heard at all. This has become an issue of some controversy. See Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2111 (1991) (describing how poverty lawyers misconstrue client stories). *But see* Lucie White, *Paradox, Piece-Work, and Patience*, 43 HASTINGS L.J. 853, 855 (1992) (contending that Professor Alfieri unwittingly displays a form of client disempowerment by imposing the dictates of abstract theory).

114. See John Griffiths, *What Do Dutch Lawyers Actually Do In Divorce Cases?* 20 LAW & SOC'Y REV. 135, 160 (1986).

115. See Sarat & Felstiner, *supra* note 69, at 116-17.

116. See also DAVID A. BINDER & PAUL BERGMAN, FACT INVESTIGATION 11-13,

Torres has described how differences in the way that members of the Mashpee Native American community told the story of their history as a nation and a culture, and the "official" version of that story as told by the courts resulted in the Mashpee's failure to gain official recognition as an independent people.¹¹⁷

This last illustration of the momentous legal consequences that may flow from the way people (in positions of power or supplication) tell their own or another's stories, points up an affinity among those who are now seeking to explore more fully than before the ways in which legal meanings are constructed in everyday legal practices, and others who are beginning to examine the nature of legal storytelling for its own sake,¹¹⁸ from the standpoint of critical race theory,¹¹⁹ legal feminism,¹²⁰ or clinical law studies.¹²¹ This affinity should not be surprising. If dominant modes of discourse give rise to worlds of meaning that reflect the cultural or subcultural reality of a particular discursive community, those who find themselves located outside the dominant community may similarly find themselves closed out of the dominant language of power.¹²²

45 (1984).

117. See Gerald Torres & Kathryn Milun, *Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 630 (1990):

The central problem addressed by this essay is whether the limitations of the legal idiom permit one party to truly inform the other, or conversely, whether the dimension of power hidden in the idiomatic structure of legal storytelling forecloses one version in favor of another The law does not permit the Mashpee's story to be particularized and still be legally intelligible [T]he inability of the law to hear, or equally to weigh, culturally divergent versions of "the truth" should be examined to help us understand how social knowledge is constructed.

Id.

118. See Symposium, *supra* note 86.

119. See DERICK BELL, AND WE ARE NOT SAVED 271 (1987); David Hall, *The Constitution and Race: A Critical Perspective*, 5 N.Y.L. SCH. J. HUM. RTS. 229 (1988); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

120. See Patterson, *supra* note 9, at 278 (discussing postmodernist insight regarding the constructed aspect of self and gender); see also SIMONE DE BEAUVOIR, THE SECOND SEX 267 (H.M. Parshley trans., 1953); JUDITH BUTLER, GENDER TROUBLE 4 (1990).

121. See Phyllis Goldfarb, *Beyond Cut Flowers: Developing A Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L.J. 717, 720 (1992); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1642 (1991).

122. Viewing the issue of law's legitimation as a matter of heterogeneous versus shared or mutually acceptable narratives of self and social reality reflects one way in

B. *Lawyering Theory: Point and Counterpoint*

Before concluding this overview, it may be helpful to anticipate objections to a lawyering-theory approach and to provide a few brief responses. I shall note four possible grounds for criticism.

First, consider the charge of relativism: "You lawyering-theory people put these different ways of meaning making before us and say different discourses make up different worlds. But then you leave all these different narratives on an equal footing. It is as if one world were as good as any other." That is not so. To acknowledge that there are no absolute truths good for all places at all times does not mean that all values are consequently co-equal. As Jerome Bruner has noted, values are "communal and consequential in terms of our relations to a cultural community. They fulfill functions for us in that community."¹²³ Lawyering theory seeks to unfold from everyday practices the local knowledge and operative beliefs that frame the participants' understanding of what is going on. The knowledge comes first; possible bases for critique come after. The choice of how best to think and talk about resolving social conflicts is not mooted by such knowledge. To the contrary, by enhancing our awareness of how we "come to our knowledge," how we know what we know, and what the reality-making ramifications of that knowledge are, lawyering theory enhances our sense of responsibility for choosing one discursive practice rather than another as a suitable means for discerning and resolving conflicts.

"Perhaps so," critics may respond. "But that raises a second charge—call it the charge of *laissez-faireism*. You lawyering-theory people 'unfold local knowledge and beliefs,' as you put it, only to leave things exactly as they are. If local beliefs 'fulfill a function in the community,' doesn't that mean 'so just leave them alone?' Are you not simply glorifying the status quo?" No, this charge misconstrues the lawyering-theory project. As conceived here, that project seeks neither to glorify or condemn. It seeks to add to our knowledge of the legal culture by offering new ways of thinking and talking about the law and its practices. Of course, lawyering studies are likely to uncover legal practices that are well rooted in local community beliefs. But, if past experience is any guide, it is no less likely that critics will subsequently come forward to challenge those beliefs. In any event, if upon closer study a local "prejudice"¹²⁴

which a lawyering-theory approach might affect the way we think and talk about the rule of law.

123. BRUNER, *supra* note 5, at 29.

124. See GADAMER, *supra* note 4, at 239 (regarding the non-pejorative sense of "prejudice," Gadamer notes that "the recognition that all understanding inevitably involves some prejudice" is "what gives the hermeneutical problem its real thrust").

emerges from the preconscious domain of habituated thought and practice into the light of critical reflection, this visibility is likely to provide a useful opportunity for public deliberation and conscious choice. It is impossible to say in advance of such discussions what changes they may inspire—or whether they may ultimately solidify, perhaps on new grounds, existing beliefs and practices.¹²⁵

“Well perhaps,” critics may respond. “But your response fails to address a third charge, and it is this: You lawyering-theory people are playing with fire. Your way of exploring different narrative ‘genres’ and ‘canons’ in local practice, as you quaintly put it, threatens to undercut the stability of the legal culture. By unfolding a multiplicity of incommensurable discourse practices at the local level you contribute to an already pervasive sense of cultural fragmentation. Surely what we don’t need now is more knowledge about our differences.” But that charge, too, falls wide of the mark. To begin with, before we undertake more studies at the local level it is premature to conclude that an increased sense of our differences lies in store for us. Indeed, it may well turn out, as some studies have begun to suggest, that there is greater commonality among practicing lawyers and other participants in the legal system than was previously thought. Perhaps there is more reason to appreciate the efficacy of our communication and conflict-resolution (or avoidance) practices than we have been giving ourselves credit for of late. In this respect, lawyering theory may ultimately lead to a stronger sense of shared community, not a weaker one, as opponents (without empirical support) may suppose.¹²⁶

Gadamer also notes that it is “the tyranny of hidden prejudices that makes us deaf to the language that speaks to us in tradition.” *Id.*

125. Consider, for example, Ernest J. Weinrib’s suggestion that we should anchor tort law not in the instrumentalist, goal-oriented analysis relied upon by numerous jurists committed to a law and economics approach, but rather in “the coherence of its own interior structure.” See Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 525 (1989):

Central to this article is the distinction between conventional and intrinsic ordering. These two forms of ordering are, literally, rival syntaxes, two different ways of arranging-in-association (syn-taxis) the elements of tort law. Whereas intrinsic ordering treats those elements as the mutually illuminating bearers of a coherent meaning [Weinrib’s view], conventional ordering [such as Richard Posner’s economic analysis] makes tort law a normative gibberish in which the components of the discourse, when combined, lose whatever sense they have.

Id. Weinrib finds support for the “intrinsic” approach “in an intellectual tradition that stretches from Aristotle’s account of justice to Kant’s and Hegel’s philosophies of right.” *Id.* at 526.

126. Of course, to the extent that the existence of a “shared” community means that differences are lost (blended into the whole) or denied (by the conventional majority),

But even were we to discern certain disparities in our discourse practices at the local level, surely this is better than simply pretending that they do not exist. The latter practice not only ensures that no effective response to existing disparities will be developed (for without a problem, there is nothing to solve). Even more objectionably, turning a blind eye to local disparities (to the extent they exist) disparages belief in the democratic process of open and candid debate. Put simply, there is a disturbingly patronizing quality to the charge that we are better off not knowing certain things about our situation. Who determines what is to be known and openly discussed, and what must be kept under wraps? There is too much of the "professional guardians of the people" in this charge.

"Perhaps," opponents may reply. "But your response raises a fourth charge. You lawyering-theory people threaten us with a new *populism*. You covet local knowledge at the expense of sophisticated theory and expert analyses of the legal system. Surely what we don't need now is a new 'no-nothing' 'nativism.'" But, again, such a charge is misplaced. It is not for the sake of displacing expertise that lawyering theory advocates sensitivity to lay participants' knowledge, beliefs, and understanding regarding a particular situation. Rather, the point of increasing sensitivity to ordinary ("non-specialized") points of view is precisely to enhance professional (academic and practitioner) analysis and to improve the communication skills that lie at the heart of the lawyering process. Increased sensitivity to how meanings unfold in language and how different styles of discourse shape reality in different ways in different contexts serves not only to increase our knowledge of what is going on within the legal field, but it also conduces to a more sophisticated understanding of how best to convey meanings within the various idioms and narrative structures that make up the legal culture.¹²⁷

Let us turn now from this brief excursus in point and counterpoint to some closing reflections on what might lie ahead.

use of the phrase "shared community"—or perhaps the concept itself—may be questioned. See Gerald Torres, *Critical Race Theory: The Decline of the Universalist Ideal and the Hope of Pluralist Justice*, 75 MINN. L. REV. 993, 1006 (1991) ("There must be strong democratic support for group difference and, from those differences, complex equalities.").

127. Correlatively, to the extent that a given community invests exclusive authority in a particular intellectual source and a concomitant discourse form, lawyering theory may sound a cautionary note. Enhancing sensitivity to diverse modes of reality- and meaning-construction alerts us to the cognitive and perceptual limitations or "out-group" exclusions from which a particular authority inevitably suffers. Thus, for example, exclusive reliance on abstract conceptualization—whether bent on utilitarian calculation or deontological theory—becomes suspect.

IV. A PROGRAM FOR FUTURE RESEARCH AND INNOVATION

Lawyering theory is only just beginning to take shape within the legal culture. It is too soon to come to any firm conclusions about the nature and fate of this new way of thinking and talking about law. Much more work needs to be done. So, in lieu of a conclusion, I want to suggest a program for future research and innovation. As a result of such efforts, we will be in a better position to assess lawyering theory's potential contribution to our understanding of law and its practices.

First, we need more local studies of how participants in particular areas of the law think and talk about what is going on. What patterns of meaning may be discerned? Are there common scripts, schemas, models, metaphors, or prototypical worlds that actors bring to their situation? What makes up their expectations about how to define, and resolve, a "legal" problem? Whether broader theories may be built up from such studies must await the outcome of this localized research. In the mean time, law schools should be encouraged to look upon their clinics as a potential source of research data for this kind of work. Moreover, this data should be organized on an intramural basis, within particular clinical settings as well as in the form of interacademic networking, so that our collective knowledge of discrete topics of research can be built up by a coordinated (national and even international) research effort.

Second, additional links should be forged between academia and the domain of legal practice. Lawyers, judges, and administrators, among others within the profession, should be apprised of the research efforts under way and be invited to join in. In this way, not only may researchers gain a valuable resource,¹²⁸ but in addition, those who participate from outside academia are likely to gain an opportunity to learn more about their own practices. The business of learning and teaching may thus achieve a level of mutual scholar/practitioner reinforcement that can help to reintegrate a now seriously fragmented legal culture.

Third, new efforts should be made to bring the public into the conversation. We need more studies on how lay people think and talk about what is going on in the legal field. For example, are there serious disparities between the profession's sense of justice, of what constitutes conflict "resolution," and the public's sense of these things? Is the law adequately serving clients' needs? Is the law serving client's needs in some areas more than others? Does the law in some areas deter or otherwise

128. See, e.g., Lazes, *supra* note 98 (discussing "participatory action research" and how to reconstruct labor-management discourse); see also WHITE, *supra* note 111, at 855 (describing "reconstructed" theory as a "collective practice" of "ongoing conversational reflection about how to describe problems, make alliances, devise strategies").

discourage the lay public's reliance upon the legal system as a viable problem-solving mechanism? I believe these and other matters are not simply of local concern. The continued legitimacy of the legal system depends upon a broad-based understanding and active public acceptance of law and its practices.¹²⁹ Accordingly, we need to establish a mechanism by which members of the legal profession can gauge the public's mood and understanding of what is going on in the law. This effort from within the profession, when it is perceived by those outside, is not only likely to contribute to legitimation maintenance; it is also the kind of communication that legal professionals owe to the public the system is designed to serve.

Fourth, concrete efforts should be made to reconstruct traditional law teaching methods to more adequately reflect the changes that have occurred in our legal culture. For example, applying a lawyering-theory approach may help to overcome the unproductive and unnecessary divisions that now separate clinical and "lawyering skills" courses on the one hand, and so-called "doctrinal" courses on the other. Lawyering theory can enhance students' appreciation of what a law case is by encouraging closer examination of how a case gets started (or how it doesn't) and how it is routed through (or moved outside of) the adjudicatory process. Case talk could also be expanded to include analyses of narrative construction. For example, additional consideration might be given to the operative genres (or discourse types) and canons (or sources of authority) that explain and justify a particular judicial outcome in a given case. Students might also be invited to attend more closely to the constitutive consequences of telling the parties' story in one way as opposed to another. Of relevance here is an added concern for the kind of self and social reality that one helps to construct when one narrates the legal world. As the articles that follow show, such narration draws upon the persuasive power of a broad array of cognitive and cultural tools. These are the tools of legal meaning.

Developing further the kinds of research studies, innovations, and concerns suggested above may have the potential to take us past, or at least reduce, the divisiveness and tensions that have for too long been

129. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2814-15 (1992) (upholding the authority of *Roe v. Wade*, 413 U.S. 113 (1973), and observing that "legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation. . . . [T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy . . ."); see also Richard K. Sherwin, *Rhetorical Pluralism and the Discourse Ideal*, 85 Nw. U. L. REV. 388, 439 (1991) ("The ultimate security of the social order depends upon more than the use of the state's police power. Of even greater importance is a broad and active commitment, by officials and citizens alike, to shared basic principles of government.").

hectoring legal academia from within and straining its relationship with judges, practitioners, and the public at large. Whether a new flowering of legal culture¹³⁰ may lie ahead no one can say. That possibility, however, cannot be ruled out. It will depend upon our frame of mind.

130. Perhaps akin to the prominent cultural standing that law once attained in America—at least according to the stories de Tocqueville and Robert Ferguson have told. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 272-79 (1945); FERGUSON, *supra* note 45, at 272-80.

