

The Morals of the Story: Narrativity & Legal Ethics

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INTRODUCTION

The fact that the case is always a narrative means something from the point of view of the litigant in particular. For him the case is, at its heart, an occasion and a method in which he can tell his story and have it heard. He has the right to a jury, to ensure that he will have an audience that will understand his story and speak his language. The presence of a jury requires that the entire story, on both sides, be told in ordinary language and made intelligible to the ordinary person. This is a promise to the citizen that the law will ultimately speak to him, and for him, in the language that he speaks, not in a technical or special jargon. . . . It is our law, and it must make sense to us.¹

For many years, legal scholars failed to acknowledge the narrative dimensions of legal discourse. This failure still surprises some legal scholars. David Papke, an influential scholar of legal narratives recently asked, rhetorically, "In light of the pervasiveness and importance of narrative in the legal discourse, how is it that legal education, practice and scholarship have for the most part seemed oblivious and even disdainful of narrative?"²

The number and influence of narrative studies of legal discourse is growing. According to Jane Baron,

The notion that storytelling is ubiquitous in the law . . . has recently attained something like the status of a truth universally acknowledged. Interest in storytelling and the law has been

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1. JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING* 265 (1984) (footnote omitted).

2. DAVID RAY PAPKE, *NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW* 2 (1991) [hereinafter *NARRATIVE AND THE LEGAL DISCOURSE*]. Papke also notes that law's failure to acknowledge the importance of narratives may well arise from the law's adoption of epistemological positions (positivism and scientism) which deny the importance of narratives. *Id.* at 2-3. The prevalence of these epistemological positions is discussed, *infra*, part IV.

expressed from a dizzying variety of directions, including critical legal studies, feminist jurisprudence, law and economics, the new pragmatism, and critical race theory.³

Similarly, Robert Cover noted that “[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.”⁴ The emergence of narrative legal studies still surprises some. Steven Winter finds “something surprising in the turn to narrative by modern legal scholars” and notes that when “prestigious law reviews publish symposia reflecting on the comparison between law and literature and on the relationships between law and narrative . . . something unusual is afoot.”⁵

The place of narrative legal studies has been firmly established. Although “the dependence of law upon narrative has at times been hidden from attention under attempts to expound law as an autonomous, rational system composed of rules or principles, the work of the early legal narrativists has firmly established law’s dependence on narrative.”⁶ Thus, legal narrativists today can “get on with the business of exploring the relation without having to argue its legal-academic legitimacy.”⁷

While the eventual effect of narrative studies on legal scholarship and practice cannot now be predicted, the currently dominant positivist paradigm of legal studies⁸ might eventually give way to the narrative approach. Such paradigm shifts often occur suddenly.⁹

Legal scholars are not alone in “discovering” the importance of narratives. “Narrative has received a great deal of attention in recent

3. Jane B. Baron, *The Many Promises of Storytelling in Law*, 23 RUTGERS L.J. 79 (1991) (reviewing DAVID RAY PAPKE, *NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW*, (1991) (footnotes omitted)) [hereinafter, *The Many Promises*].

4. Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) quoted in Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280 (1989).

5. Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2227 (1989) (footnotes omitted).

6. Ball, *supra* note 4, at 2280, n.1.

7. *Id.*

8. *NARRATIVE AND THE LEGAL DISCOURSE*, *supra* note 2, at 2, 8.

9. The term “paradigm shift” is Thomas Kuhn’s. A paradigm is a world view and a way of viewing problems shared by practitioners in a field of science. “According to Kuhn’s analysis, movement from one paradigm to another—a paradigm shift—is a ‘transition between incommensurables’ and cannot be made gradually as a result of neutral experience and logic but ‘must occur all at once (though not necessarily in an instant) or not at all.’” Ernest G. Bormann, *Symbolic Convergence Theory: A Communication Formulation*, 35 J. COMM. 128, 136 (1985) (quoting THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 150 (2d ed. 1970)).

years, not simply in the corridors of literature departments but throughout the various disciplines of the human sciences, ranging from anthropology to linguistics and from jurisprudence to sociology."¹⁰ Communication ethicist Richard Johannesen has seen scholars "in such disciplines as anthropology, sociology, law, history, literary criticism, and rhetoric . . . exploring the centrality of narrative to human belief and action."¹¹

Along with a growing interest in narrative approaches to analyzing legal discourse, legal scholars have a growing interest in legal ethics. This interest is reflected in the relatively recent adoption of the American Bar Association's *Model Rules of Professional Conduct* in 1983, and the recent adoption in many jurisdictions of the Multistate Professional Responsibility Examination (MPRE) as a prerequisite for bar admission.¹²

The concern for ethics may result from a number of factors, including the fact that legally ethical conduct may violate popular moral precepts, the association of lawyers with disliked clients, the controversy among lawyers as to the exact nature of ethical conduct, and the ethical failures of too many lawyers.¹³ After all, the practice of law is fraught with ethical dilemmas. For example, zealous representation may require "the systematical presentation of falsehood."¹⁴ Even if falsehood is not required of the attorney, distortion of facts may be.¹⁵ Lawyers, as well as lay people, find these ethical dilemmas troublesome.¹⁶

10. John Louis Lucaites & Celeste Michelle Condit, *Re-Constructing Narrative Theory: A Functional Theory*, 35 J. COMM. 90 (1985) (footnotes omitted); Lucaites and Condit also note the "growing belief that narrative represents a universal medium of human consciousness." *Id.* at 90.

11. RICHARD L. JOHANNESSEN, *ETHICS IN HUMAN COMMUNICATION* 254 (3d ed. 1990).

12. As of late 1992, 42 jurisdictions require the MPRE as part of the requirements for bar admission. NATIONAL CONFERENCE OF BAR EXAMINERS, *MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION: 1993 INFORMATION BOOKLET 1* (1992).

13. Sissela Bok, *Can Lawyers Be Trusted*, 138 U. PA. L. REV. 913, 913-14 (1990).

14. Kathleen S. Bean, *A Proposal for the Moral Practice of Law*, 12 J. LEGAL PROF. 49 (1987).

15. Donald H. Green, *Ethics in Legal Writing*, 35 FED. B. NEWS & J., 402, 403 (1988).

16. One former attorney, for example, has written: "There is something odd when a lapsed lawyer writes about the practice of law, but I've got something to get off my chest. I didn't like some of the things I did as a lawyer. I took positions I didn't believe in. I made arguments that I thought bordered on untrue. I postured. I bluffed. I pursued advantages provided more by clients' resources than the value of their claims." Richard A. Matasar, *The Pain of Moral Lawyering*, 75 IOWA L. REV. 975 (1990).

The concern with ethics is multifaceted. Critics bemoan a number of evils and causes, and propose myriad cures. Shaffer, for example, believes legal ethics is dominated by the "adversary ethic," which he describes as "unique, novel, and unsound."¹⁷ Shaffer even holds that legal ethics "is not ethics" at all.¹⁸

This Note brings together these interests in legal narratives and ethics by describing previous narrative legal studies and the relationship between communication and the law. It then presents Walter Fisher's narrative paradigm of communication, and compares it with the positivist rational-world paradigm currently dominant in legal studies and practice. Finally, it demonstrates how many of the current rules of legal ethics reflect the rational-world paradigm, and analyzes legal ethics from the perspective of the narrative paradigm.

I. SELECTED NARRATIVE PERSPECTIVES ON LAW

According to Baron, narrative legal studies fall into three types. The three types of studies have examined: (1) "the place in legal education and doctrine of the personal stories of actual people;" (2) "the stories that legal doctrines tell about the world . . . ;" and (3) "the way in which stories are or can be used strategically as a method to enhance the quality of communication between actors in legal settings."¹⁹

Even a cursory discussion of the many recent narrative studies would be beyond the scope of this Note.²⁰ However, a brief survey of a few narrative studies from this third category—narrative studies of the trial—will help show the importance of narrative studies of legal discourse.

A basic but important result of the narrative studies of legal discourse has been an acknowledgment of the crucial role that narrative plays in the trial—the centerpiece of legal discourse. Kim Lane Scheppele has observed that "resolution of any individual case in the law relies heavily on a court's adoption of a particular story, one that makes

17. Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988).

18. Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987).

19. *The Many Promises*, *supra* note 3, at 80-81.

20. See *id.*, *passim*, for an excellent critical discussion of many recent narrative studies. Collections of narrative and related studies of legal discourse can be found, e.g., in 9 LEGAL STUD. F. 123 (1985); 87 MICH. L. REV. 2073 (1989); and PAPKE, NARRATIVE AND THE LEGAL DISCOURSE, *supra* note 2. Attempts to explicate language-based theories of legal discourse are found in BERNARD S. JACKSON, LAW, FACT AND NARRATIVE COHERENCE (1988); and PETER GOODRICH, LEGAL DISCOURSE (1987).

sense, is true to what the listeners know about the world, and hangs together."²¹

Narratives are essential to the law because the centerpiece of the law—the trial—“is organized around storytelling.”²² The actors in trials “organize, and analyze the evidence that bears on” the issues in the trial “[t]hrough the use of broadly shared techniques of telling and interpreting stories.”²³ Given that storytelling is the essence of trials, legal educators have been slow to provide training in storytelling. Scheppele noted:

[U]nlike rules of law, which are explicitly taught and tested in law schools, the craft of legal storytelling is generally left to the practitioner to learn and develop without formal and systematic training. And though this craft is constrained by rules of evidence and the demands of legal relevance, there are few formal legal rules providing guidance on how the lawyer or judge should structure stories.

Yet, it matters a great deal how stories are framed. The same event can be described in multiple ways, each true in the sense that it genuinely describes the experience of the storyteller, but each version may be differently organized and give a very different impression of ‘what happened.’ And different legal consequences can follow from the choice of one story rather than another.²⁴

The importance of storytelling skills was demonstrated in Bennett and Feldman’s narrative study of trials, which found that trial outcomes are, indeed, affected by participants’ storytelling skills. The study confirmed the theoretical prediction of narrative scholars that “the way in which a story is told will have considerable bearing on its perceived credibility regardless of the actual truth status of the story.”²⁵

The importance of narrative communication skills was also demonstrated by Gill’s study of the communication strategies of trial lawyer Gerry Spence. The study revealed how Spence’s use of narrative and other techniques contributes to his success.

Legal discourse and judgment have been described as storytelling, yet the narrative created by Spence goes considerably

21. Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2080 (1989) (footnotes omitted).

22. W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* 3 (1981) [hereinafter *RECONSTRUCTING REALITY*].

23. *Id.* at 4.

24. Scheppele, *supra* note 21, at 2085 (footnotes omitted).

25. *RECONSTRUCTING REALITY*, *supra* note 22, at 89.

beyond a functional method of organizing information coherently and efficiently. He creates a mythos, a reality to be believed and relived. Further, this narrative is not merely an alternate vision of what happened. . . . It is instead an epic struggle of good and evil by simplistic characters with uncomplicated motives. As Spence weaves his tale, he . . . puts himself into the drama [and] invites participation by the jury.²⁶

Narrative legal scholars have concluded that storytelling is the essence of trials, and that narrative performances affect trial outcomes. This illustrates the close connection between narrative and legal studies, but much more will be said of this connection.

II. THE RELATIONSHIP OF LAW AND COMMUNICATION

The importance of narratives in trials is hardly surprising since trials are little more than communication exercises. Trials are not about "things" and "people." They are about communication about people and things. In trials, "decisions cannot be made about individuals, but only about information about individuals."²⁷ This information "is only available to a trial's decision makers via the persuasive messages" presented to them.²⁸

But how does one know truth when one finds it? Truth isn't a property of an event; truth is a property of an *account* of the event. As such, it has to be perceived and processed by someone, or else it couldn't be framed in language to count as an account at all. On the objectivist view, the potential "someones" who might observe and report are interchangeable; as long as they approach the task of description in the proper spirit, the description does not depend on who the observers are. . . . Observers, even those not directly involved in a dispute, bring with them a conceptual scheme already formed, a set of presuppositions and expectations, that influences what they see and report. Getting a group of observers to come up with the same description simply shows that one has found a group that

26. Ann M. Gill, *The Oral Tradition of Gerry Spence in Pring v. Penthouse*, 17 SW. L. REV. 693, 695 (1988) (footnote omitted).

27. D. M. GOTFREDSON, *DECISION-MAKING IN THE CRIMINAL JUSTICE SYSTEM: REVIEWS AND ESSAYS* 68 (1975), *quoted in* Michael G. Parkinson, Deborah Geisler & Mary Hinchcliff Pelias, *The Effects of Verbal Skills on Trial Success*, 20 J. AM. FORENSIC ASS'N 16 (1983).

28. Parkinson, Geisler & Pelias, *supra* note 27, at 16.

shared the same conceptual scheme at the start and followed the same instructions for observation.²⁹

Trial outcomes, then, depend upon communication about the world, not upon the actualities of the world. Thus, the communication practices of trial participants will directly affect trial outcomes. This is not to suggest that reality has no effect on trial outcomes, but only that it has less to do with trial outcomes than most persons would believe.

The physical or "object" world enters the production of justice only at several steps removed from the terms on which judgments are ultimately based. In this fluid symbol system, the real world and the symbolic representation of it in the courtroom are in tension. On the one hand, courtroom stories must be built on definitions of the material evidence that comes from the incident in question. In this sense "the facts" do exercise some constraint over the possible stories that can emerge in a case. However, the constraint is considerably less binding than the conventional mythology of justice shared by most legal professionals and ordinary citizens would indicate.³⁰

If communication and narrative skills are important to understanding trials and successful trial practice, narrative studies are essential. And communication skills are indeed central to trial outcomes. "People who cannot manipulate symbols within a narrative format may be at a disadvantage even when, as witnesses or defendants, they are telling the truth."³¹

Other studies have found communication skills intimately tied to trial outcomes. Parkinson examined the communication of prosecutors, defense attorneys, and defendants. He found that a few specific communication skills predicted trial outcomes with over seventy-five percent accuracy for each group.³² Parkinson, Geisler and Pelias' study of civil

29. Scheppele, *supra* note 21, at 2090 (footnotes omitted) (quoting NELSON GOODMAN, *WAYS OF WORLDMAKING* 6 (1978) (footnotes omitted)).

30. *RECONSTRUCTING REALITY*, *supra* note 22, at 143-44.

31. *Id.* at 6.

32. The exact numbers were: for prosecution attorneys, 77% accuracy; for defense attorneys, 81% accuracy; and for defendants, 84% accuracy. Successful prosecution attorneys asked questions about past events, made statements about future events, and were verbose; while unsuccessful prosecution attorneys used conditional language, polite language forms, and hyper-correct grammar as defined in prior studies on women's speech. Successful defense attorneys made references to abstract concepts (e.g., honor, justice), asked questions about past events, and used legal jargon; while unsuccessful defense attorneys used grammatically complete sentences and words with concrete physical referents (e.g. car, house). Successful defendants used grammatically complete sentences

trials confirmed the findings of Parkinson's study of criminal trials. It "demonstrated that the verdicts of judges and juries in civil trials co-occur with variations in the language behavior of trial participants just as the preliminary study demonstrated a similar relationship for criminal trials."³³

A true understanding of the significance of these results requires recognition that these purely formal communication variables may be more important in dictating trial outcomes than are argument structures or evidence use.³⁴ This suggests that communication and narrative studies may be more useful to trial lawyers than the logical and doctrinal studies which have dominated traditional legal scholarship.³⁵

Understanding the narrative nature of trials is also important to legal scholars seeking to understand what occurs in actual trials. A scholar operating "under the misguided assumption that trials involve the straightforward presentation and testing of facts" and who fails to recognize the narrative nature of the trial will find it "virtually impossible to spot general patterns in the structure of cases or to identify basic prosecution and defense strategies that explain the significance of these patterns."³⁶

Contemporary scholars' interest in analyzing and discussing the interface between communication and law should not, after all, surprise us. The academic field of "speech communication" traces its roots to the first teachers of rhetoric—Corax and Tisias of Syracuse—who originated the teaching of rhetoric in the fifth century B.C., by teaching fellow citizens how to argue persuasively in the courts for the return of property confiscated by a recently toppled despot.³⁷

and polite language forms, while unsuccessful defendants made multiple references to themselves. Michael G. Parkinson, *Language Variation and Success in the System of Criminal Justice* (research report produced under LEAA Grant #77NI-99-0057, 1978), cited in Parkinson, Geisler & Pelias, *supra* note 27, at 17. The prior studies in women's speech referred to are found in R. LAKOFF, *LANGUAGE AND WOMAN'S PLACE* (1975).

33. Parkinson, Geisler & Pelias, *supra* note 27, at 22. However, translating these results into successful trial practice may be difficult, however, for "the difference between a successful and unsuccessful courtroom performance may be only a few words per thousand." *Id.* at 21.

34. *Id.* at 18.

35. Recognition that communication skills have a tremendous effect on trial outcomes does not insult juries. The jury "is not an illiterate tribe, spellbound by a chanting poet; they are rational descendants of Platonism who can listen to reason and could be persuaded to discount overly emotional presentations." If anything is to blame, it is "the format of a trial . . . with its emphasis on orality, on advocacy, and on retelling the 'story.'" Gill, *supra* note 26, at 706.

36. RECONSTRUCTING REALITY, *supra* note 22, at 93.

37. GEORGE A. KENNEDY, *CLASSICAL RHETORIC AND ITS CHRISTIAN AND SECULAR*

Although the study of rhetoric and communication³⁸ and the study of law have long been associated, their relationship in recent years appears to have been unilateral. Rhetorical scholars have continued to study the law,³⁹ while legal scholars, until very recently, have given communication issues short shrift. The key to restoring reciprocity between rhetorical and legal scholars lies in finding a theoretical perspective that provides insights into both law and communication. The subsequent section of this Note describes a communication theory which may meet this need.

III. THE NARRATIVE PARADIGM OF COMMUNICATION

Speech communication scholars have been giving a great deal of attention to communication scholar Walter Fisher's narrative paradigm. This popularity is attributable to some of the paradigm's intrinsic features and its promise as a theoretical tool for understanding communication.

TRADITION FROM ANCIENT TO MODERN TIMES 18-19 (1980). Eventually, the spark ignited by Corax and Tisias found its way to the democratized Greek city-states, which witnessed the fullest bloom of rhetorical study and practice prior to the modern age. The Golden Age's fullest expression of the art and study of rhetoric is the *Rhetoric* of Aristotle, which identified three genres of rhetoric: *epideictic* (speeches of praise and blame), *deliberative* (legislative speeches), and *forensic* (speeches to the law courts), and provided speakers with different advice for each. ARISTOTLE, RHETORIC, Book I, Chapter 3.

Among the lasting insights of Aristotle is the idea that forensic discourse entails certain stock issues or *stases*. These *stases* include: (1) the act was not committed, (2) the act did no harm, (3) the act was less than charged, and (4) the act was justified. "Later, another forensic issue was added by the Romans; it was the question of procedure. The essential issues of forensic debate are today the same as Aristotle and the Romans proposed." WALTER R. FISHER, HUMAN COMMUNICATION AS NARRATION: TOWARD A PHILOSOPHY OF REASON, VALUE, AND ACTION 30 (1987) [hereinafter COMMUNICATION AS NARRATION]. Rome's greatest rhetorical scholar and practitioner was Cicero—the pre-eminent courtroom lawyer of his time. See, e.g., KENNEDY, *supra* this note, at 90-96.

38. I am using the terms "rhetoric" and "communication" interchangeably. This may be confusing to persons outside the academic field of speech communication. Although not without some controversy, this use of these terms is common. See SONJA K. FOSS, RHETORICAL CRITICISM: EXPLORATION & PRACTICE 3-4 (1989).

39. Studies of legal communication have been a mainstay of academic journals in speech communication, are frequently presented and discussed at professional conferences in the field, and are the joint interest bringing together the members of several regional and national professional associations. Speech communication faculty often teach courses in legal communication. A good place to enter this field of inquiry would be the proceedings of the 1983 Summer Conference on Communication Strategies in the Practice of Lawyering, sponsored by the Speech Communication Association, American Forensic Association, and Western Forensic Association. RONALD J. MATLON & RICHARD J. CRAWFORD, eds., COMMUNICATION STRATEGIES IN THE PRACTICE OF LAWYERING (1983).

A. *The Attractiveness of the Narrative Paradigm*

One attractive feature of the narrative paradigm is that it appears to be a general, rather than a specific, theory. General theories attempt to account for "tendencies in human communication events that cannot be ignored or rescinded by the participants. General theories are trans-historical and transcultural; they are analogous to the theories of the natural sciences that account for broad classes of events."⁴⁰ Fisher says of his paradigm, that "what can be said about interpreting and assessing one kind of discourse, using the narrative paradigm, can in principle be said about interpreting and assessing any other kind of discourse."⁴¹

The generality of the narrative paradigm is a consequence of Fisher having begun "with the assumption that humans are essentially storytellers," and going on to assert that "beneath the *learned* and *imposed* structures by means of which we give discourse such forms as 'argument,' 'exposition,' 'drama,' and 'fiction,' the human species is always pursuing a *narrative logic* . . . Constructing, interpreting, and evaluating discourse as 'story' remains our primary, innate, species-specific 'logic.'"⁴² Thus, "regardless of genre, discourse will always tell a story and insofar as it invites an audience to believe it or to act on it, the narrative paradigm and its attendant logic, narrative rationality, are available for interpretation and assessment."⁴³

Others believe in the centrality of narrative in human communication.⁴⁴ Bennett and Edelman believe stories "are among the most universal means of representing human events" and that stories are an effective means of communication because "a well-crafted narrative can motivate the belief and action of outsiders toward the actors and events caught up in the plot."⁴⁵

40. Bormann, *supra* note 9, at 129.

41. COMMUNICATION AS NARRATION, *supra* note 37, at 86.

42. Carroll C. Arnold, *Foreword* in HUMAN COMMUNICATION AS NARRATION: TOWARD A PHILOSOPHY OF REASON, VALUE, AND ACTION ix (Walter R. Fisher, 1987).

43. Walter R. Fisher, *Clarifying the Narrative Paradigm*, 56 COMM. MONOGRAPHS 55, 56 (1989).

44. A collection of articles by scholars in speech communication on the narrative approach to human communication can be found in Colloquy, *Homo Narrans*, 35 J. COMM. 73 (1985).

45. W. Lance Bennett & Murray Edelman, *Toward a New Political Narrative*, 35 J. COMM. 156 (1985). Recognition of the irreplaceable role of narrative in rhetorical transactions has been traced to Quintilian and the Roman Empire. "Only narratives can explicate the proceedings to be judged. For Quintilian, the *narratio* is to moral reason what for Aristotle the syllogism is to dialectic and the enthymeme is to rhetoric: the structure of discourse uniquely able to communicate the ritual regularity of human moral habits." Michael Calvin McGee & John S. Nelson, *Narrative Reason in Public Argument*, 35 J. COMM. 139, 150 (1985).

Some scholars are attracted to the narrative paradigm because Fisher has presented narrativism as "a ground for resolving the dualisms of modernism: fact-value, intellect-imagination, reason-emotion, and so on. Stories are enactments of the whole mind in concert with itself."⁴⁶ The attractiveness of the paradigm to legal scholars lies in less ambitious promises.

The attraction of narrative is that it corresponds more closely to the manner in which the human mind makes sense of experience than does the conventional, abstracted rhetoric of law. The basic thrust of the cognitive process is to employ imagination to make meaning out of the embodied experience of the human organism in the world. In its prototypal sense as storytelling, narrative, too, proceeds from the ground up. In narrative, we take experience and configure it in a conventional and comprehensible form. This is what gives narrative its communicative power; it is what makes narrative a powerful tool of persuasion and, therefore, a potential transformative device for the disempowered.⁴⁷

From a communication theorist's perspective, the narrative approach is also attractive because it shares an attribute currently in vogue among speech communication scholars. Many contemporary communication theories share the proposition that communication is the means by which people construct, know, understand, and change the worlds in which they live.⁴⁸ From this perspective, rhetorical compositions produce "real-fictions." They are *real* because they relate "to reality in both subject matter and purpose" and because they concern "the actual world of everyday experience," and aim to be "a reliable guide to belief and action."⁴⁹ A rhetorical composition "ultimately is a *fiction* since its advice is not, in the final analysis, susceptible of empirical verification," but the fiction "is not hypothetical; its author

46. COMMUNICATION AS NARRATION, *supra* note 37, at 68.

47. Winter, *supra* note 5, at 2228.

48. For a discussion of many of these theories, see Ralph E. Dowling, *Rhetorical Vision and Print Journalism: Reporting the Iran Hostage Crisis to America 4-26* (1984) (unpublished Ph.D. dissertation, University of Denver); Bruce E. Gronbeck, *Dramaturgical Theory and Criticism: The State of the Art (or Science?)*, 44 W.J. SPEECH COMM. 319 (1980); and Colloquy, *Homo Narrans*, 35 J. COMM. 73 (1985). Related writings in other fields include PETER L. BERGER & THOMAS LUCKMAN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE ON THE SOCIOLOGY OF KNOWLEDGE* (1966); ERNST CASSIRER, *LANGUAGE AND MYTH* (1946); and HUGH DALZIEL DUNCAN, *COMMUNICATION AND SOCIAL ORDER* (1962).

49. Walter R. Fisher, *A Motive View of Communication*, 56 Q.J. SPEECH 131, 132 (1970).

wants and intends that it be accepted as the true and right way of conceiving of a matter; and, if he is successful, his fiction becomes one of those by which men live."⁵⁰

Narratives are uniquely able to help humans construct their worlds because of the formal devices characteristic of narratives and because of narratives' unique ability to engage social values. Narrative "can act as the mechanism for worldmaking because . . . narratives can be compellingly authentic" as they offer "an individual's experience in the world in a direct, honest, and vulnerable way," thus making real "situations that otherwise would be almost impossible to understand through the 'rational' marshalling of facts."⁵¹ In addition, narratives use imagery to communicate immediacy and narrative images "necessarily embed the values of the individual or group . . . relating the narrative."⁵² Narratives, then, function to convey social values.⁵³

The narrative paradigm is attractive because it is a general theory, it asserts that stories are the essential and uniquely human form of communication, it promises to resolve troublesome philosophical dualisms, it subscribes to the current conventional wisdom that reality is symbolically created, and it holds that stories are the essential means for conveying social values.

B. *Fundamentals of the Narrative Paradigm*

Fisher's narrative paradigm conceptualizes humans as *homo narrans*—the story telling animal. Fisher's presuppositions include the following:

- 1) Humans are essentially storytellers.
- 2) The paradigmatic mode of human decision making and communication is "good reasons," which vary in form among situations, genres, and media of communication.
- 3) The production and practice of good reasons are ruled by matters of history, biography, culture, and character.
- 4) Rationality is determined by the nature of persons as narrative beings—their inherent awareness of narrative probability, what constitutes a coherent story, and their constant habit of testing narrative fidelity, whether or not the stories

50. *Id.* (emphasis added).

51. Andrew Leslie, *Arguers as Worldmakers: Narrative and the Paradox of Public Debate*, in ARGUMENT AND CRITICAL PRACTICES 161 (Joseph W. Wenzel et al. eds., 1987).

52. *Id.*

53. JACKSON, *supra* note 20, at 61.

they experience ring true with the stories they know to be true in their lives.

- 5) The world as we know it is a set of stories that must be chosen among in order for us to live life in a process of continual recreation.⁵⁴

In calling narratives the essence of human communication, "narrative" is used as a term of art. Fisher notes that "narration" is not "a fictive composition whose propositions may be true or false and have no necessary relationship to the message of that composition." Instead, narratives are "symbolic actions . . . that have sequence and meaning for those who live, create, or interpret them."⁵⁵

Although Fisher holds that narrative is essential to all forms of communication, he looks with disfavor on communication theories which hold some forms of communication apart as superior to other forms—particularly theories which hold that logical or technical discourse is superior to other forms. Because all communication is narrative, Fisher favors no form or mode of discourse.⁵⁶

Because Fisher does not hold to a positivist world view⁵⁷, and because narratives are held to create reality for those exchanging narratives, the evaluation of narratives does not involve testing the correspondence of stories to reality. Stories are "supposed to persuade," and they "aim[] no higher than *plausibility*."⁵⁸ Thus, "[c]redibility is the issue, not facticity; and the mirror we hold is not to 'Nature' as an objective environment but to the correspondence between *character* and fact."⁵⁹ And, when narratives are tested for validity, the tests of a story's validity "apply not to the facts of the case but to their narration."⁶⁰

Evaluation of narratives is, instead, conducted by an examination of "good reasons." "Obviously some stories are better stories than others, more coherent, more 'true' to the way people and the world

54. COMMUNICATION AS NARRATION, *supra* note 37 at 64-65; see also JOHANNESSEN, *supra* note 11, at 254-55.

55. COMMUNICATION AS NARRATION, *supra* note 37, at 58.

56. "The most fundamental difference between narrative rationality and other rhetorical logics is the presumption that no form of discourse is privileged over others because its form is predominantly argumentative. No matter how strictly a case is argued—scientifically, philosophically, or legally—it will always be a story, an interpretation of some aspect of the world that is historically and culturally grounded and shaped by human personality." *Id.* at 49.

57. *Id.* at 192-93.

58. McGee & Nelson, *supra* note 45, at 149.

59. *Id.*

60. *Id.*

are—in perceived fact and value. In other words, some stories better satisfy the criteria of the logic of good reasons, which is attentive to reason *and* values.”⁶¹

Because correspondence with reality is not the test for narrative evaluations of discourse, the purpose of evaluating discourse under the narrative paradigm cannot be the ascertainment of objective truth. Instead, the purpose of narrative evaluation is to determine the usefulness of a narrative as a guide to human conduct.⁶² Fisher says the “primary function of the paradigm is to offer a way of interpreting and assessing human communication that leads to . . . a determination of whether or not a given instance of discourse provides a reliable, trustworthy, and desirable guide to thought and action *in the world*.”⁶³ Thus, “good communication is good by virtue of its satisfying the requirements of narrative rationality, namely, that it offers a reliable, trustworthy, and desirable guide to belief and action.”⁶⁴

Fisher has argued that all rhetorical discourse has, as its function, “the influencing of ethical choices.”⁶⁵ By ethical choices, Fisher means choices about how persons should live. That is, choices calculated to produce “the good life.” This is the classic conception of ethics.⁶⁶ Fisher asserts that the narrative paradigm “goes beyond” social-scientific communication theories by providing its own logic “for assessing stories, for determining whether or not one *should* adhere to the stories one is encouraged to endorse or to accept as the basis for decisions and actions,” while social-scientific theories “ignore the role of values”; “deny the possibility of developing rational schemes for their assessment”; and “thereby disregard ultimate questions of good and evil—of the good life.”⁶⁷ All narratives, then, have an ethical function.

61. COMMUNICATION AS NARRATION, *supra* note 37, at 68.

62. Finding guides for the proper conduct of one's life is the subject matter of the philosophical study of “ethics,” which Aristotle and his contemporaries defined as the search for principles by which people could live the good life. See WILL DURANT, *THE STORY OF PHILOSOPHY* 41-74 (1954); Martin Ostwald, *Foreword* to ARISTOTLE, *NICHOMACHEAN ETHICS* xvii-xxiv (Martin Ostwald trans., Bobbs-Merrill Paperback 1962).

63. COMMUNICATION AS NARRATION, *supra* note 37, at 90.

64. *Id.* at 95.

65. Fisher, *A Motive View of Communication*, *supra* note 49, at 131.

66. See note 62 *supra*. Fisher acknowledges his debt to Aristotle's notions of ethics. “One familiar with Aristotle's *Nichomachean Ethics* may notice similarities between the logic of good reasons, including the concepts of rationality and reasonableness, and the Peripatetic's notion of ‘practical wisdom’ (*phronesis*). . . . In short, the logic of good reasons and practical wisdom share that kind of knowledge which is the province of rhetoric.” COMMUNICATION AS NARRATION, *supra* note 37, at 119 (citing ARISTOTLE, *NICHOMACHEAN ETHICS* 6.7 (Martin Ostwald trans., Bobbs-Merrill, 1978)).

67. COMMUNICATION AS NARRATION, *supra* note 37, at 87.

Conversely, "[a]ny ethic whether social, political, legal, or otherwise, involves narrative."⁶⁸

C. *Narrative Rationality: Probability and Fidelity*

Narrative rationality is central to the narrative paradigm. Narrative rationality has two elements. The narrative rationality of communication "is tested against the principles of probability (coherence) and fidelity (truthfulness and reliability)."⁶⁹ Narrative rationality "underlies understanding and evaluation of any form of human communication that is viewed rhetorically, as an inducement to attitude, belief, or action."⁷⁰

Narrative rationality does not deny the existence of other forms of rationality. It affirms a broader view of rationality that includes, but is not confined to, the use of traditional reasoning in the form of clear-cut argumentative structures.⁷¹ Rather, "reason, the movement of thought that occurs in communicative transactions, is not restricted to clear-cut argumentative forms" and it is not "the individual form of argument that is ultimately persuasive in discourse."⁷² While arguments and argumentative forms retain importance in narrative rationality, "values are more persuasive, and they may be expressed in a variety of modes, of which argument is only one."⁷³

Narrative rationality is descriptive, not prescriptive. It attempts to describe how people *do* think, not how people *should* think. Because of this, and because narrative rationality does not favor clear-cut argumentative forms as a mode of discourse, it is more egalitarian than prescriptive approaches which favor forms which must be taught and tend to be known by elites.

Traditional rationality is, therefore, a normative construct. Narrative rationality is, on the other hand, descriptive; it offers an account, an understanding, of any instance of human choice and action, including science. . . . Where freedom and democ-

68. Walter R. Fisher, *Narration as a Human Communication Paradigm: The Case of Public Moral Argument*, 51 COMM. MONOGRAPHS 1, 3 (1984) [hereinafter *Moral Argument*].

69. COMMUNICATION AS NARRATION, *supra* note 37, at 47 (emphasis added).

70. Arnold, *supra* note 42, at ix.

71. "To test soundness, one may, when relevant, employ standards from formal or informal logic. . . . However, the narrative paradigm envisions reasons as being expressed by elements of human communication that are not always clear-cut inferential or implicative forms." Walter R. Fisher, *The Narrative Paradigm: An Elaboration*, 52 COMM. MONOGRAPHS 347, 349-50 (1985) (quoted in Barbara Warnick, *The Narrative Paradigm: Another Story*, 73 Q.J. SPEECH 172, 175 (1987)).

72. COMMUNICATION AS NARRATION, *supra* note 37, at 48.

73. *Id.*

racy are ideals, narrative rationality will imply a praxis constant with an ideal egalitarian society. Traditional rationality implies some sort of hierarchical system, a community in which some persons are qualified to judge and to lead and some other persons are to follow.⁷⁴

The elements of narrative rationality are *probability* and *fidelity*. Probability "refers to formal features of a story conceived as a discrete sequence of thought and/or action . . . ; that is, it concerns whether the story coheres or 'hangs together,' whether or not a story is free of contradictions."⁷⁵ Fidelity, on the other hand, "concerns the 'truth qualities' of a story, the degree to which it accords with the logic of good reasons: the soundness of its reasoning and the value of its values."⁷⁶

Probability, the tendency of a story to "hang together," is tested "first by internal argumentative and structural coherence; second by . . . comparison and contrast with stories in other discourses; and third by characterological coherence, the harmony of character and action, the dependability of characters both as narrators and actors."⁷⁷

While probability or coherence is an attribute of a story as a whole, "fidelity pertains to the individuated components of stories—whether they represent accurate assertions about social reality and thereby constitute good reasons for belief or action."⁷⁸ The "good reasons" analysis central to evaluating the fidelity of offered narratives was created by Fisher by "combining the means of analyzing and evaluating arguments offered by such writers as Toulmin, Perelman, and Ehninger and Brockriede" with stock critical questions "that can locate and weigh values."⁷⁹

Evaluation of communication for its narrative rationality, by examining its probability and fidelity, differs significantly from the evaluation of communication by traditional rational means. Fisher identified five components of the traditional approach.

- 1) First, one considers whether the statements in a message that purport to be "facts" are indeed "facts"; that is, are confirmed by consensus or reliable, competent witnesses.

74. *Id.* at 66.

75. *Id.* at 88.

76. *Id.*

77. JOHANNESSEN, *supra* note 11, at 256-57 (citing COMMUNICATION AS NARRATION, *supra* note 37, at 47).

78. COMMUNICATION AS NARRATION, *supra* note 37, at 105.

79. *Id.* at 47-48. The stock questions determinative of values; *fact*, *relevance*, *consequence*, *consistency*, and *transcendental issues*; are discussed *infra* note 82 and accompanying text.

- 2) Second, one tries to determine whether relevant "facts" have been omitted and whether those that have been offered are in any way distorted or taken out of context.
- 3) Third, one recognizes and assesses the various patterns of reasoning, using mainly standards from informal logic.
- 4) Fourth, one assesses the relevance of individual arguments to the decision the message concerns, not only are these arguments sound, but are they also all the arguments that should be considered in the case.
- 5) Fifth, armed with the traditional knowledge that forensic issues are those of "fact," definition, justification, and procedure . . . one makes a judgment as to whether or not the message directly addresses the "real" issues in the case.⁸⁰

"In other words," Fisher notes, "one asks whether or not the message deals with questions on which the whole matter turns or should turn."⁸¹

Following the framework provided by his description of the traditional logical analysis of *reasons*, Fisher described how this logic can be transformed into the analysis of *good reasons* required by narrative rationality.

- 1) First is the question of *fact*: What are the implicit and explicit values embedded in the message?
- 2) Second is the question of *relevance*: Are the values appropriate to the nature of the decision that the message bears upon? Included in this question must be concern for omitted, distorted, and misrepresented values.
- 3) Third is the question of *consequence*: What would be the effects of adhering to the values—for one's concept of oneself, for one's behavior, for one's relationships with others and society, and to the process of the rhetorical transaction?
- 4) Fourth is the question of *consistency*: Are the values confirmed or validated in one's personal experience, in the lives or statements of others whom one admires and respects, and in a conception of the best audience that one can conceive?
- 5) Fifth is the question of *transcendent issue*: Even if a prima facie case exists or a burden of proof has been established, are the values the message offers those that, in the esti-

80. *Id.* at 108.

81. *Id.*

mation of the critic, constitute the ideal basis for human conduct?⁸²

These "criterial questions" can be used in addition to those of "the logic of reasons," they can be "infused with" standards for formal and informal reasoning, or they can be applied within and along with Toulmin's model of argument.⁸³ Fisher sees such traditional forms of analyzing reasoning as retaining validity, but sees them as part of a broader assessment of rationality—not as the sole or privileged means of assessment.⁸⁴

In the narrative paradigm, formal and informal logic remain essential to understanding human communication.⁸⁵ But, the logic of good reasons supplements these once-privileged logics.⁸⁶ This supplementation is necessary because, although traditional logics reflect persons' enactments of formally taught reasoning processes, narrative logics provide a broader understanding because stories, unlike traditional reasoning, engage the "whole mind in concert with itself."⁸⁷ Also, unlike traditional reasoning, narrative logic is learned in socialization, not in formal education.⁸⁸

In addition to downplaying the importance of formally learned reasoning processes, narrative rationality emphasizes the role of values in human affairs, because "*humans as rhetorical beings are as much valuing as reasoning animals.*"⁸⁹ Traditional logics have discounted values, and Fisher wants to reverse this.⁹⁰

82. *Id.* at 109.

83. *Id.* at 110. Toulmin's model of argument is explicated in STEPHEN E. TOULMIN, *THE USES OF ARGUMENT* (1958), and discussed in *COMMUNICATION AS NARRATION*, *supra* note 37, at 110-14.

84. *COMMUNICATION AS NARRATION*, *supra* note 37, at 48, 88.

85. Not all scholars agree that narrative rationality is consistent with traditional rationality. Lewis thinks narrative and traditional logic "can be distinctive and incommensurable." William F. Lewis, *Telling America's Story: Narrative Form and the Reagan Presidency*, 73 Q.J. SPEECH 280, 297 (1987).

86. Arnold, *supra* note 42, at x.

87. *COMMUNICATION AS NARRATION*, *supra* note 37, at 68.

88. Craig W. Cutbirth & Sandra M. Metts, *The Conversational Bases of Narrative Rationality: An Extension of Fisher's Narrative Paradigm*, 4 (Nov. 8, 1985) (unpublished manuscript available from author) (citing Fisher, *Moral Argument*, *supra* note 68, at 8).

89. *COMMUNICATION AS NARRATION*, *supra* note 37, at 57.

90. Fisher has argued that "the role of values in the constitution of knowledge, truth, or reality has been generally denied"; that "in serious matters . . . technical discourse has been assigned almost unquestioned superiority over rhetorical and poetic discourse"; that "the reasons for this assignment of superiority deserve to be questioned severely"; and that "values function in constituting all that we consider knowledge." *Id.* at xi.

Fisher denounces any implication that his emphasis on values and his devaluation of traditional logics reflect an assumption that people are incapable of rational decisions. Instead, he advocates a broader conception of rationality that respects persons' rationality. "Narration implies, however, that the 'people' judge the stories that are told for and about them and that they have a rational capacity to make such judgments."⁹¹ This view of rationality is egalitarian and is inimical to "[t]he sort of hierarchy" created by assuming "that some people are qualified to be rational and others are not" because it "assigns basic rationality to all persons not mentally disabled."⁹² Both senders and receivers of messages are persons capable of reason.

D. *The Rational World Paradigm*

As has been implicit throughout the foregoing description of the narrative paradigm, Fisher constructed the paradigm as a response to the dominance of the prevailing rational world paradigm, which has "been in existence since Aristotle's *Organon* became foundational to Western thought about reasoning."⁹³ In all of its various forms, the rational world paradigm holds that:

- 1) [H]umans are essentially rational beings;
- 2) the paradigmatic mode of human decision making and communications is argument—discourse that features clear-cut inferential or implicative structures;
- 3) the conduct of argument is ruled by the dictates of situations—legal, scientific, legislative, public, and so on;
- 4) rationality is determined by subject-matter knowledge, argumentative ability, and skill in employing the rules of advocacy in given fields; and
- 5) the world is a set of logical puzzles that can be solved through appropriate analysis and application of reason conceived as an argumentative construct. In short, argument . . . is the means of being human, the agency of all that humans can know.⁹⁴

These assumptions give rise to the "logic of reasons" by which discourse, including legal discourse, has traditionally been assessed.⁹⁵ The logic of reasons is related to another important aspect of the

91. *Id.* at 67.

92. *Id.*

93. *Id.* at 59.

94. *Id.* at 59-60.

95. *See supra*, text accompanying note 80.

rational world paradigm. "The rational-world paradigm implies that rationality is a matter of argumentative competence: knowledge of issues, modes of reasoning, appropriate tests, and rules of advocacy in given fields."⁹⁶ The dominance of the rational world paradigm and its logic of reasons is evidenced by the fact that part of "the historic mission of education in the West has been to . . . instruct citizens in at least the rudiments of logic and rhetoric."⁹⁷ The rational world paradigm "places a premium on formal laws or structures of thought and relies on education as the means of learning the rules of logic and reasoning."⁹⁸

As discussed above, Fisher attempts to subsume elements of the rational world paradigm, including use of principles of logic and reasoning when appropriate.⁹⁹ He does not reject the paradigm; he rejects some aspects of the paradigm. One of those rejected aspects is the pretension that it has a monopoly on truth.

The presumption is that narrative has more to do with hiding sins than with revealing truths . . . Ideologists of science claim a monopoly on truth, and they reject without qualification anything that acquiesces to the status of fiction or fails to distinguish storytelling within or about science from telling stories when caught with a hand in the cookie jar.¹⁰⁰

The rational world paradigm believes it has a monopoly on truth because it believes in objective inquiry and reason as the means for discovering truth. This mirrors modern science. "[T]he commitment that makes Western philosophy into modern science is the prejudice that 'Nature' is the ultimate arbiter of all 'facts'—that human understanding is a Mirror of Nature. As Herbert Marcuse contended, this is a commitment to: Reason = Truth = Reality."¹⁰¹

The dominant rational world paradigm reflects a positivist ontology and epistemology. Positivism asserts an actual object world with laws that can be certainly known by persons applying proper methods of inquiry. Believers in the rational world paradigm "see an objective world that speakers can mirror in their communication and against which its logic and argument can be tested and evaluated."¹⁰²

96. COMMUNICATION AS NARRATION, *supra* note 37, at 66.

97. *Id.* at 60.

98. Cutbirth & Metts, *supra* note 88, at 1.

99. *See* note 85 *supra*.

100. McGee & Nelson, *supra* note 45, at 144.

101. *Id.* at 147 (citing HERBERT MARCUSE, ONE-DIMENSIONAL MAN 123 (1964)).

102. Bormann, *supra* note 9, at 135.

The rational world paradigm is not new and did not gain dominance overnight. Fisher devotes a great deal of space in his book to explicating the historical genesis, evolution, and continued dominance of the rational world paradigm.¹⁰³ Before the Pre-Socratics, Plato, and Aristotle, no form of discourse was privileged for a unique connection to truth.¹⁰⁴ Socrates' student, Plato, and Plato's student, Aristotle, were influential proponents of the idea that "some forms of discourse are superior to others" by virtue of their "relationship to true knowledge."¹⁰⁵ This idea remained popular until the time of Descartes, and the "eventual result of Descartes's views was the doctrine of the logical positivists, who held that no statement could claim expression of knowledge unless it was empirically verifiable—at least in principle or it involved a logical entailment."¹⁰⁶

While the positivists have been dominant in many areas of inquiry and society, their dominance is not unquestioned. In fact, Fisher identifies "much ferment about the consequences of these views," lists some of the most prominent contemporary thinkers who have attacked positivism, and offers the narrative paradigm as a remedy to the deficiencies of positivism.¹⁰⁷

Positivists and other adherents to the rational world paradigm fail to account for human values. In positivism, values—because they are not empirically verifiable—are literally "non-sense."¹⁰⁸

Another disturbing aspect of both the rational world paradigm and positivism is that they privilege some forms of discourse, and discount others. To the ancient Greeks, the word "*logos*" had many meanings, the central one referring to serious rational discourse. As Fisher tells the story, the development of the rational world paradigm, from the time of Aristotle, is a story of the privileging of philosophical discourse and the technical discourse of subject-matter experts over rhetorical and poetic discourse. Fisher says that *logos* ("serious, rational discourse") had, "by the twentieth century come to be thought of as occurring primarily in philosophical and technical discourse. Rhetoric and poetic were widely thought of as vacuous or irrational modes of communication."¹⁰⁹ This twentieth century state of affairs in which logic and rhetoric have been separated is attributable to the ascendance

103. COMMUNICATION AS NARRATION, *supra* note 37, at 5-22.

104. *Id.* at 6.

105. *Id.* at 7.

106. *Id.* at 8-9.

107. *Id.* at 9 (the philosophers he lists are Richard Bernstein, George-Hans Gadamer, Jurgen Habermas, Richard Rorty, and Calvin Schrag).

108. *Id.* at 9, 34.

109. *Id.* at 24.

of "positivism and mathematical (symbolic) logic" and to the attendant relegation of metaphysics to the status of "idle speculation" and of values to the status of "emotive 'non-sense.'"¹¹⁰

Legal discourse that does involve strict deductive application of legal principles to facts determined by a finder of fact often falls into that category of rhetorical discourse which the rational world paradigm is bound by its principles to reject. Much trial-related discourse—particularly opening and closing statements—and much appellate discourse—particularly briefs and opinions—is openly rhetorical. Since legal discourse, like other rhetorical discourse, "is replete with what Chaim Perelman called 'confused notions,' such as wisdom, justice, honor, the true and good, it obviously cannot be taken as a serious intellectual activity within a positivist framework."¹¹¹

The positivist rejection of values, emotions, and the rhetorical use of such "confused notions" as justice, honor, and the true and the good, are not consistent with human nature. Rhetorical scholars have long acknowledged that such variables play an important role in legal decisions, perhaps a more important role than the rational-world logic of the law. Rhetoricians have rarely found controversial Cicero's statement that "men decide far more problems by hate, or love, or lust, or rage, or sorrow, or joy, or hope, or fear, or illusion, or some other inward emotion, than by reality, or authority, or any legal standard, or judicial precedent, or statute."¹¹²

Because of its rejection of values, emotions, and rhetorical appeals, the rational world paradigm's view of rationality is much narrower than the value-oriented narrative rationality. While narrativists recognize traditional logics and reasoning as part of the narratives people share, rationalists do not reciprocate. The rational world paradigm holds that "unless one deduces a conclusion from recognizable premises or infers a claim from particulars, one presumably does not argue."¹¹³

The rational world paradigm's privileging of formal logic and reasoning skills to the exclusion of other skills would not be problematic if such skills were sufficient to account for human behavior and to provide sound guidance in ethical decisions. However, the privileged reasoning skills do not provide either. Studies in argumentation conducted by many of the notables of that field have demonstrated that

110. *Id.* at 34.

111. *Id.* (quoting CHAIM PERELMAN & L. OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 132 (John Wilkinson & Purcell Weaver trans., 1969)).

112. *COMMUNICATION AS NARRATION*, *supra* note 37, at 37 (quoting CICERO, *DE ORATORE* 2.4.178 (E.W. Sutton trans., Harvard University Press, 1949)).

113. *COMMUNICATION AS NARRATION*, *supra* note 37, at 158.

“principles of formal logic inadequately explain informal rationality and human valuing.”¹¹⁴

The inherent inadequacy of formal logic to account for human decision making or to guide ethical choice is revealed in a simple analysis of the following textbook syllogism:

All men are mortal.

Socrates is a man.

Therefore, Socrates is mortal.

The syllogism “begins by asserting a truth . . . then applies a particular instance . . . and concludes with what is obvious from the outset.”¹¹⁵ The problem with this model of logic is that properly formed syllogisms “yield only consistent statements. Put another way: the syllogism is a verbal maneuver the terms of which have no necessary connection with real things.”¹¹⁶

Despite the inadequacies of the logical model favored by adherents to the rational-world paradigm, its adherents claim a monopoly on truth because they rely upon favored methods of discovering truth. Delgado has argued that legal scholars are among the rational world adherents who claim a monopoly on truth. “Traditional legal writing purports to be neutral and dispassionately analytical, but often it is not,” at least partially because “legal writers rarely focus on their own mindsets, the received wisdoms that serve as their starting points, themselves no more than stories, that lie behind their quasi-scientific string of deductions.”¹¹⁷ The problem with this “supposedly objective point of view” is that it “often mischaracterizes, minimizes, dismisses, or derides without fully understanding opposing viewpoints,” while “[i]mplying that objective, correct answers can be given to legal questions” and thus “obscur[ing] the moral and political value judgments that lie at the heart of any legal inquiry.”¹¹⁸

In opposition to the positivist model and its pretensions to a monopoly on truth, the narrative paradigm equalizes all forms of communication, by concluding that all communication contains “ideas that cannot be verified or proved in any absolute way.”¹¹⁹ Fisher does

114. Arnold, *supra* note 42, at ix (listing Stephen Toulmin, Chaim Perelman, Douglas Ehninger, and Wayne Brockriede as those whose studies have established this premise).

115. COMMUNICATION AS NARRATION, *supra* note 37, at 32.

116. *Id.* at 33.

117. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2440 (1989).

118. *Id.*

119. COMMUNICATION AS NARRATION, *supra* note 37, at 19.

not deny that "some discourse is more veracious, reliable, and trustworthy in respect to knowledge, truth, and reality than some other discourse," but at the same time contends that "no form or genre has final claim to these virtues."¹²⁰

The adherence of legal scholars' to the rational world paradigm is ironic in the face of other fields' moves away from positivism.¹²¹ A full discussion of the various sciences' rejection of positivism is well beyond the scope of this Note. However, some very important thinkers' ideas have since become an important part of post-positivist thinking about human behavior.¹²²

Legal scholars' adherence to positivism is even more ironic in light of the attempts of modern argumentation scholars' to replace formal logics based on mathematics with more workable models of reasoning based on jurisprudential models.

In both works [Stephen Toulmin's *The Uses of Argument* and Chaïm Perelman & L. Olbrechts-Tyteca's *The New Rhetoric: A Theory of Argumentation*], the geometric model of reasoning was replaced by a jurisprudential model. Toulmin wrote: "Logic (we may say) is generalized jurisprudence. Arguments can be compared with law-suits, and the claims we can make and argue for in extra-legal contexts with claims made in the courts, while the cases we present in making good each kind of claim can be compared with each other." And Perelman wrote: "*law plays a role in regard to argumentation analogous to that of mathematics in regard to formal logic.*"¹²³

In recognizing the centrality of narrative to communication, rhetoric, and legal discourse, legal scholars are rediscovering what was known to classical rhetorical scholars. In Cicero and Quintilian's time, educated Romans were taught that an essential part of any oratory—

120. *Id.* at 19.

121. "The equation between impartiality, objectivity and distance, on the one hand, and 'facts' or 'truth' on the other, has come to be questioned in virtually every area of intellectual life." Baron, *The Many Promises*, *supra* note 3, at 82.

122. "The investigations of Kurt Godel and Werner Heisenberg made it clear that even scientific thinking is not carried out entirely within the confines of formal systems. Formal logic was found by an early true believer, Ludwig Wittgenstein, in his later writings, to be irreducibly limited in providing an account of what actually goes on in ordinary discourse and action. It was superseded by the jurisprudentially grounded informal logics proposed by . . . Toulmin and Perelman. And it was opposed by existentialism and hermeneutics." COMMUNICATION AS NARRATION, *supra* note 37, at 35.

123. *Id.* at 44 (footnotes omitted) (quoting STEPHEN TOULMIN, *THE USES OF ARGUMENT* 7 (1958); and Chaïm Perelman, *The New Rhetoric and the Rhetoricians: Remembrances and Comments*, 70 Q.J. SPEECH 195 (1984)).

forensic or otherwise—was the *narratio*. The significance of the *narratio* is lost on those who adhere to the rational world paradigm because the subjective, personal nature of the classical *narratio* is not translatable into logical-positivist language and thinking. McGee & Nelson note that “[w]hen you go to court, you tell a story (*narratio*) that you purport to be true,” and telling this story often is referred to as “mak[ing] a statement.”¹²⁴ Perceiving such stories as statements is important because a statement “is also a proposition, a declarative sentence about a state of affairs: it asserts an objective, even absolute reality [and] . . . particularly in climates of scientism, statements are supposed to ‘mirror nature,’ and the ‘truth’ of statements depends on their correspondence with ‘the facts,’ and is ‘independent of their representation in any story.’”¹²⁵ Thus, viewing stories as statements transforms the stories into something altogether different. And, while Quintilian understood that facts “are not independent of the story that structures them,” the dominance of the rational world paradigm indicates that contemporary legal society, with its emphasis on statements rather than stories, reflects a culture that believes it discovers truth rather than makes truth.¹²⁶

A narrativist would look to the stories in forensic statements and in the *narratio*. A rationalist would look for the statement in the *narratio*, and dismiss as nonsense anything but statements that can be analyzed for their accuracy in mirroring the world.

E. Summary

The growing popularity of narrative approaches to legal communication mirrors the popularity of Fisher’s narrative paradigm in the communication field. Fisher’s approach is attractive to communication scholars because of its generality, its synthesis of communicative forms and human nature, its adoption of the view that reality is symbolically constructed, and its emphasis on values. Fisher assumes that humans are best conceptualized as the story telling animal, that good reasons, which are affected by history, biography, culture and character, are the paradigmatic mode of human decision making and communication, that rationality is narratively defined, and that the world we know is a series of stories from which we must choose.

Consistent with those assumptions, Fisher rejects the positivism of the reigning rational world paradigm. Fisher is concerned with good reasons as a guide to human ethical choices, and rejects the rational

124. McGee & Nelson, *supra* note 45, at 148.

125. *Id.*

126. *Id.*

world paradigm's focus on using formal reasoning to find truth in the logical puzzles which constitute the world.

IV. LAW, LEGAL ETHICS, AND THE RATIONAL WORLD PARADIGM

The major contention of this section is that law and legal ethics, on the whole, reflect the assumptions of the rational world paradigm. This is important, because any attempt to analyze legal ethics from a narrative perspective is influenced by the realization that the current rules of ethics reflect competing philosophical and theoretical assumptions.

A. *The Rational World Paradigm Dominates Law*

Discovering that legal scholars, teachers and practitioners are positivists who subscribe to the dominant rational world paradigm would hardly be a surprise because of the dominance of that paradigm. "Most people, when pressed, subscribe to what might be called the objectivist theory of truth. The objectivist theory of truth holds that there is a single neutral description of each event which has a privileged position over all other accounts."¹²⁷ Objectivism is consistent with the rational world paradigm.

The law reflects the dominance of positivism and of the rational world paradigm. "In the United States, Christopher Columbus Langdell's understanding of law as a science has so far proven impossible to eject from the legal academy and the practitioners' mind-set."¹²⁸ The legal community asks judges to aspire to "[i]mpartiality, independence, disengagement [and] lack of bias" because the rational world paradigm is suspicious of "the personal and emotional" and, in "pursuit of this goal, law students are taught to give 'reasons,' not 'opinions.'"¹²⁹

The dominance of the rational world paradigm is perpetuated as law students are exposed to this same world view. Papke believes a major reason the law has been slow to acknowledge the importance of legal narratives is that legal education is "imbued with lingering commitments to a post-enlightenment scientific paradigm and directed by positivist presumptions."¹³⁰ Law school teaching often reflects positivism as students are repeatedly asked to "articulate a 'right' answer. Students continually provide one, only to have it undermined and replaced by another. Yet, the quest remains: find the 'true' answer."¹³¹

127. Scheppelle, *supra* note 21, at 2088-89 (footnotes omitted).

128. NARRATIVE AND THE LEGAL DISCOURSE, *supra* note 2, at 2.

129. Baron, *The Many Promises*, *supra* note 3, at 82.

130. NARRATIVE AND THE LEGAL DISCOURSE, *supra* note 2, at 8.

131. Matasar, *supra* note 16, at 976.

If legal education is imbued with rationalism, we should not be surprised that legal scholarship is, as well. As Papke has complained, "Too much legal scholarship . . . merely gathers large numbers of opinions together, assuming with positivist doggedness that 'the law' will emerge from the crowd."¹³² Jackson argues that legal scholars have traditionally accounted for legal decisions by focusing on the adjudicatory syllogism, which they have "conceived as a deductive process [in which] a general rule (major premise) is applied to the facts of the case (minor premise), these facts having been established as an instance of the facts mentioned in the general rule (or 'subsumed' within it), with the result that the conclusion necessarily follows."¹³³ This preoccupation with deduction and "facts" is classical rational world thinking.

With education and scholarship dominated by positivism, it is inevitable that legal practice is similarly dominated. The rational world paradigm's explanation of the practice of law as a truth-finding process was summarized by Scheppele as follows:

If one task of the law is to find truth then, on the objectivist account, the task of the law is to locate this privileged description, the one that enables the audience to tell what *really* happened as opposed to what those involved *thought* happened. Truth can be found by removing the self-serving accounts of those who stand to gain . . . [by] being partial. Truth, in this view, is what remains when all the bias, all the partiality, all the 'point-of-viewness' is taken out and one is left with an objective account free of the special claims of those who stand to gain. And though legal advocates may emphasize partial versions, judges or juries are thought to be able to sort through those partial accounts to find the bits that are 'really true.'¹³⁴

Officials of the American Bar Association have articulated the same perception that the trial is a search for truth. A formal opinion issued by the Committee on Professional Ethics and Grievances spoke of perjury in terms suggesting that it is banned because it contaminates the truth-seeking of trials. "*Canon 29* is based upon sound public policy which singles out perjury because perjury strikes at the roots

132. David Ray Papke, *Discharge as Denouement: Appreciating the Storytelling of Appellate Opinions*, in *NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW* 206 (David R. Papke ed., 1991).

133. JACKSON, *supra* note 20, at 37.

134. Scheppele, *supra* note 21, at 2089-90 (footnotes omitted).

of our American system of jurisprudence. Perjured testimony poisons the well-springs and makes a mockery of justice."¹³⁵

Schwartz's account of the reasoning of the Supreme Court in *Nix v. Whiteside*¹³⁶ indicates that the objectivist view dominated the Supreme Court as it considered the conflict between a defense attorney's compliance with ethical obligations and a client's right to effective assistance of counsel. Schwartz noted:

Whatever the limitations and disagreements, all members of the Court expressed the view that the reason for the prohibition of perjury is that it undermines the principal objective of the trial: the determination of truth. The majority was explicit about 'the very nature of a trial as a search for truth' and 'the responsibility of an ethical lawyer, as an officer of the court and a key component of a system of justice, dedicated to a search for truth, [being] essentially the same whether the client announces an intention to bribe or threaten witnesses or jurors or to commit or procure perjury' The concurring Justices agreed: 'All perjured relevant testimony is at war with justice since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial.'¹³⁷

Some evidence, then, shows that the legal community generally, legal scholars, legal educators, and legal practitioners share the rational world paradigm.

Unfortunately, law is not good positivism. That is, even if the tenets of logical positivism are valid, legal processes are not well suited to discovering truth. As but one example of legal processes which preclude the discovery of truth, Schwartz discusses the rules of evidence. "It is a commonplace that evidentiary privileges and exclusionary rules can and do keep truthful, probative evidence from the trier of fact."¹³⁸ No method that omits such evidence can make a serious or credible claim to seeking or finding "truth"—at least not by the objectivist

135. ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953) (Brucker & White, dissenting).

136. 475 U.S. 157 (1986).

137. Murray L. Schwartz, *On Making the True Look False and the False Look True*, 41 Sw. L.J. 1135, 1138 (1988) (quoting *Nix v. Whiteside*, 475 U.S. 157 (1986)). The *Nix* court also referred to the trial as "a search for truth," 475 U.S. at 173, while the concurring opinion concluded that "the proposition that presenting false evidence could contribute to . . . the *reliability* of a criminal trial is simply untenable," *Nix v. Whiteside*, 475 U.S. at 185 (Blackmun, J., concurring) (emphasis added).

138. *Id.* at 1139.

account. Harold See, who offers a different account of the truth-finding account of the law,¹³⁹ asserts that it is “misleading to suggest that truth is the objective of the adversary system,” and that it is “a potentially serious misperception to believe that courts seek truth or that lawyers are engaged in helping the courts find truth.”¹⁴⁰

Even if legal processes were designed to discover the truth, legal scholars have failed to recognize that language and communication are not neutral instruments to convey the raw data from which truth is constructed, but are themselves instruments which introduce “bias,” “subjectivity,” and “perspective”—the enemies of objectivity.

The physical or ‘object’ world enters the production of justice only at several steps removed from the terms on which judgments are ultimately based. In this fluid symbol system the real world and the symbolic representation of it in the courtroom are in tension. On the one hand, courtroom stories must be built on definitions of the material evidence that comes from the incident in question. In this sense “the facts” do exercise some constraint over the possible stories that can emerge in a case. However, the constraint is considerably less binding than the conventional mythology of justice shared by most legal professionals and ordinary citizens would indicate.¹⁴¹

Hence, until legal scholars can account for the role of symbol use in trials, the trial’s usefulness as an instrument for discovering truth cannot be seriously discussed. Expressing the prevailing epistemological view of communication scholars, Gill says that “the outcome of a trial . . . can be only probable truth.”¹⁴²

B. *The Narrative Account of Trials*

The prevailing view within the law is that judges and juries should aspire to objectivity so they can make unbiased decisions about what “really happened” and what law should be applied. The narrative approach to legal studies “offers a different vision of . . . legal decisionmaking. In this vision, the goal is not ‘objectivity.’ Rather, it is consciousness of the multiplicity of accounts—all in their way true,

139. See argues that courts are operated so as to produce results that would approximate “truth” (defined as the results an omniscient society would obtain for the same case). This view is not consistent with the narrative approach. Harold See, *An Essay on Legal Ethics and the Search for Truth*, 3 GEO. J. LEGAL ETHICS 323-26, 331 (1989).

140. *Id.* at 324, 331.

141. RECONSTRUCTING REALITY, *supra* note 22, at 143-44.

142. Gill, *supra* note 26, at 703.

all inevitably partial—that compete for attention and belief.”¹⁴³

The narrative approach defines “truth” as inherently subjective; that it is all the more true because it is “partial, engaged, biased and felt.”¹⁴⁴ Thus, narrativism holds that courts do not seek truth. Instead, courts decide which stories to accept and reject. Courts do not make these selections by determining which stories reflect “truth.” Scheppele gave this account:

Stories may diverge, then, not because one is true and another false, but rather because they are both self-believed descriptions coming from different points of view informed by different background assumptions about how to make sense of events. In law, the adoption of some stories rather than others, the acceptance of some accounts as fact and others as falsehood, cannot *ever* be the result of matching evidence against the real world to figure out which story is true. Despite the popularity of correspondence theories of language, courts *cannot* do what would be necessary to determine whether words corresponded to things and hence were being used properly. . . . Judges and jurors are not witnesses to the events at issue; they are witnesses to stories about the events. And when litigants come to court with different stories, some are accepted and become ‘the facts of the case’ and others are rejected and cast aside. Some of what is cast aside may indeed be false (and some of what is accepted may be too). But some of the rejected stories may be accurate versions of events that grow from experiences different from the experiences of those who are doing the choosing.¹⁴⁵

Thus, courts do not always choose between a true and a false story. In fact, “stories that lead to very different legal conclusions can be different plausible and accurate versions of the same event.”¹⁴⁶ In choosing among stories, “the choice is not between ‘fact’ and ‘fiction,’ or between ‘objectivity’ and ‘subjectivity.’ *Someone’s* story will emerge in legal decisions; the only question is whose.”¹⁴⁷

The opposing accounts of the purpose and nature of trials and stories offered by the dominant rational world legal community and by legal narrativists are essential. The fundamental differences in perspective provided by the rational world and narrative paradigms suggest

143. *The Many Promises*, *supra* note 3, at 104.

144. *Id.* at 85.

145. Scheppele, *supra* note 21, at 2082 (footnotes omitted).

146. *Id.* at 2097.

147. *The Many Promises*, *supra* note 3, at 85.

that ethical principles consistent with one paradigm will not be consistent with the other. Because the rational world paradigm is reflected in many of the Model Rules of Professional Conduct,¹⁴⁸ a paradigm shift in the law from the rational world to the narrative paradigm would necessitate a reconsideration of ethical principles.

The remainder of this Note examines current ethical rules, analyzes these rules from the narrative perspective, and suggests changes in the rules that would be necessitated by widespread adoption of the narrative view.

V. THE MODEL RULES FROM A NARRATIVE PERSPECTIVE

A scholar interested in examining ethics from a narrative perspective has many choices. For example, the scholar might examine the Model Rules of Professional Conduct ("Model Rules") as a narrative and attempt to reveal the story they tell about lawyers and their ethics. One might examine better ways to tell this story so as to improve the public image of lawyers or to encourage more ethical conduct among lawyers. One could examine the stories told about the Model Rules by scholars, practitioners, and students. In addition, one could look at the stories told by the published opinions of lawyer disciplinary authorities. Finally, one could look at stories and narratives as ways of inculcating legal practitioners with a more personal and humanistic sense of ethical conduct, as some legal scholars have begun to do.¹⁴⁹

A. Introduction

A pressing question raised by the adoption of a narrative perspective on law and legal ethics is the compatibility between ethical guidelines

148. Model Rules of Professional Conduct (1983).

149. Johnson calls traditional legal ethicists such as those who draft the legal ethics codes, those who write treatises on legal ethics, those who compile digests on legal ethics, and those who favor use of the MPRE, the "law-givers," and says they "view legal ethics as chiefly concerned with the identification, transmission, and enforcement of uniform standards governing the conduct of lawyers." Vincent Robert Johnson, *Law-givers, Story-tellers, and Dubin's Legal Heroes: The Emerging Dichotomy in Legal Ethics*, 3 GEO. J. LEGAL ETHICS 341-43 (1989).

Johnson sees an opposing camp of legal ethicists, the "story-tellers," as a "dedicated circle of spiritually kindred academics" who place "a higher value on persons and context than on principles and procedures, and on the cultivation of a deeper, less mechanical sense of professionalism than detailed rules can provide." *Id.* at 343. The story-tellers "endeavor . . . to focus on the interpersonal, humanistic dimensions of law practice, and on the larger question of "What is just?" through the use of classroom simulations, videotapes which bring lawyers and clients into the classroom, and other, less traditional teaching techniques." *Id.* at 344-45 (footnotes omitted). While the story-tellers' efforts are consistent with a narrative approach and are to be encouraged, this Note takes a different approach.

and the understanding of legal practice provided by the narrative approach.¹⁵⁰ The Model Rules are the most popular ethical guidelines, so they make an excellent starting point.

However, an analysis of the Model Rules in their entirety is a weighty project unnecessary for the purposes of revealing the fundamental implications of adopting the narrative paradigm. The Model Rules attempt to regulate a great deal of attorney conduct, including: competence, goals of representation, diligence, fees, conflicts of interest, loyalty, confidentiality, business transactions, law firm organization, and provision of *pro bono* services. The rules governing these matters simply do not regulate communication *qua* communication, and thus are not directly implicated by the adoption of the narrative paradigm. The present Note examines only the Model Rules which directly regulate lawyers' communication.

This Note was inspired, in part, by Johannesen's attempt to produce a narrative ethics for political communication in place of the rational world ethics that have dominated that field.¹⁵¹ Johannesen noted that two ethical analyses of the rhetoric of Ronald Reagan from the rational world perspective concluded that Reagan badly violated ethical standards,¹⁵² yet Lewis' narrative analysis found Reagan's rhetoric far more ethical.¹⁵³

The differing conclusions of these studies result from the different assumptions and ethical standards of the rational world and narrative paradigms. One important difference is that rational world ethics, consistent with its epistemological view that the truth about reality can be known through objective inquiry, requires ethical communicators to provide verifiable facts and sound reasoning to support their claims.¹⁵⁴ The narrative paradigm rejects positivism. "When narrative dominates, epistemological standards move away from empiricism."¹⁵⁵ Ethical narrative communicators must meet different standards. If the story being told "is not true, it must be true-to-life; if it did not actually happen, it must be evident that it could have happened or that, given the way things are, it should have happened."¹⁵⁶

150. A speech communication scholar has taken up the challenge of constructing a new set of narrative ethics for *political communication* to replace the rational world ethics which have dominated the field. See JOHANNESSEN, *supra* note 11, at 253-63.

151. *Id.*

152. Ralph E. Dowling & Gabrielle Marraro, *Grenada and the Great Communicator: A Study in Democratic Ethics* 50 W.J. SPEECH COMM. 350 (1986); Richard L. Johannesen, *An Ethical Assessment of the Reagan Rhetoric: 1981-1982* in POLITICAL COMMUNICATION YEARBOOK 1984 226 (Keith R. Sanders et al. eds., 1985).

153. Lewis, *supra* note 85.

154. JOHANNESSEN, *supra* note 11, at 255-56.

155. Lewis, *supra* note 85, at 288.

156. *Id.*

Thus, one important foundation of narrative ethics is the realization that "truth," in the sense of correspondence with an objective world, *cannot* be the goal of communication nor the ethical standard for the narratives offered by lawyers. "Judgments based on story construction are, in many important respects, unverifiable in terms of the reality of the situation that the story represents."¹⁵⁷

Many scholars have recognized the impossibility of discovering a single, truthful, privileged description of even a single object or event. Legal narrativist Delgado noted that a single object "can be described in many ways," and gave the example of a red rectangular object on the floor which may be a nuisance if a toe is stubbed on it, a doorstep if so used, evidence of poor housekeeping, a child's toy, or just a brick left over from a project.¹⁵⁸ "There is no single true, or all-encompassing description" of objects because we "participate in creating what we see in the very act of describing it."¹⁵⁹ Litigation, of course, requires decisions about more than single objects or events. And, as Delgado noted, "[s]ocial and moral realities . . . are just as indeterminate and subject to interpretation as single objects or events, if not more so."¹⁶⁰

The rational world paradigm's belief in the ability of legal decision makers to determine what "really happened" is a major difference between rational world and narrative ethics. It is important because many legal ethical standards are based on this assumption of the rational world paradigm.

One way in which the Model Rules reflect the rational world paradigm is their condemnation of deceit. "[L]egal codes and guidelines rule out deceit unequivocally."¹⁶¹ Deceit is forbidden because it interferes with the positivist ideal of the purpose of litigation—discovering truth. The Supreme Court indicated, in *Nix v. Whiteside*,¹⁶² that courts forbid deceit because it is inconsistent with the truth-finding function of trials.¹⁶³

Thus, the Model Rules which forbid deceit, to the extent they are based on the belief that deceit interferes with truth-finding in litigation and bar admissions and discipline, are based on rational world rather than narrative assumptions.¹⁶⁴ Making these rules consistent with the

157. RECONSTRUCTING REALITY, *supra* note 22, at 33.

158. Delgado, *supra* note 117, at 2416.

159. *Id.*

160. *Id.*

161. Bok, *supra* note 13, at 923.

162. 475 U.S. at 157.

163. *See* note 136 *supra*.

164. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.3(a)(1), 3.3(a)(4), 3.3(c)-(d), 3.4(b), 4.1(a), 8.1(a), 8.2(a) (1983).

narrative paradigm would require that they be modified to reflect the narrative assumptions that "truth" is relative, subjective, and conditional. A narrative ethic would require, consistent with its epistemology, that stories, if not true, must be "true-to-life" and that if a narrated event did not "actually happen, it must be evident that it could have happened or that, given the way things are, it should have happened."¹⁶⁵

Other rules require the lawyer to disclose facts and legal authority contrary to their clients' interests.¹⁶⁶ These, too, reflect the rational world paradigm's belief that full and accurate presentation of relevant "facts" is essential to discovering the truth, and that legal procedures seek to discover truth.

B. *The Nature of Narrative Ethics*

Before analyzing the Model Rules, a discussion of the general nature of narrative ethics is in order. We know that narrative ethics would not reflect the positivist views that "true facts" can be known and can lead to accurate decisions about what really happened. But, narrative ethics vary from rational world ethics in other ways.

Although Fisher argues that the standards of good evidence and reasoning from the rational world paradigm are subsumed within the narrative paradigm, Lewis argues persuasively that the latter are inconsistent with the narrative nature of communication, and thus unavailable for use as ethical guidelines in narrative analyses.¹⁶⁷ Lewis believes narratives should be analyzed for internal consistency and coherence, the implicit and explicit morals and values they promote, and their consistency with "common sense."¹⁶⁸

Farrell suggests that a narrative ethic of public discourse would involve answers to the following questions:

- 1) What public character is implied by the course we have taken?
- 2) What forms of social learning are yet available to us?
- 3) What legacy of experience do we wish our story to yield to future generations?
- 4) Which episodes in our unfinished and unbounded narrative of collective action are irretrievable or lost?
- 5) Which [episodes] need to be ended altogether, which prolonged, which begun anew?

165. See note 85 *supra*.

166. MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.3(a)(2)-(3), 3.3(d), 3.4(f), 4.1(b), 8.1(b) (1983).

167. See Lewis, *supra* note 85, at 280.

168. *Id.* (discussed in JOHANNESSEN, *supra* note 11, at 258-59).

- 6) Which audiences, thus far neglected, need to have their own stories articulated?¹⁶⁹

A narrative ethic cannot, then, be based on a preference for efficacious means of discovering truth. A narrative ethic must emphasize values. A narrative ethic would be concerned with the coherence and consistency of a narrative as a guide to action, the morals and values supported by a narrative, the consistency of a narrative with common sense, the effect of a narrative on the public, the effect of a narrative on future generations, the interaction of a narrative with past and future narratives of collective action, and the extent to which a narrative gives voice to the voiceless. These are the concerns which must illumine a narrative ethical analysis.

C. *Analysis of Selected Rules*

The Model Rules examined in this Note are a "mixed bag." Some of the Rules are, or can be interpreted to be, consistent with the narrative paradigm. Others are consistent in part and inconsistent in part. Still others are completely inconsistent with the narrative paradigm and would need to be abandoned in a world governed by a narrative view of the law. The present analysis begins with the rules most consistent with the narrative paradigm, before moving on to the rules inconsistent with narrativism.

1. *Model Rules Consistent With the Narrative Paradigm.*—Rules 1.2, 6.1 and 6.2 are welcome ethical standards to narrativists, many of whom believe that encouraging the telling of more and different stories by more persons is one of the benefits that will flow from recognition of the role of narratives in law.¹⁷⁰ Independently, because theory and research have suggested that storytelling ability and communication skills affect trial outcomes,¹⁷¹ these rules would be welcomed by narrativists because representation by a skilled legal storyteller¹⁷² would be recognized as essential in assisting marginalized persons so that the wheels of justice do not run over the marginalized persons

169. Thomas B. Farrell, *Narrative in Natural Discourse: On Conversation and Rhetoric*, 35 J. COMM. 109 (1985).

170. See, e.g., Delgado, *supra* note 117, at 2437-41; Farrell, *supra* note 168, *passim*.

171. See notes 27-35 *supra* and accompanying text.

172. In a post-rationalist narrative legal world, all competent lawyers presumably would be trained in the skills of storytelling. In a narrative world, lack of storytelling skills would be the very essence of lack of competence.

whose storytelling skills probably are in the greatest need of assistance from a trained storyteller.¹⁷³

Rule 1.2 of the Model Rules decrees: "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."¹⁷⁴ To the extent that this rule tries to remove the stigma attached to representing marginal elements of society, it is consistent with the desire of many narrativists to provide a voice for the voiceless. While not arguing that the rule actually serves to encourage such representation, narrative scholars would embrace the rule for attempting to ensure that the stories of the voiceless are told before legal decisions are made.¹⁷⁵ The "voiceless" includes the poor, the apparently guilty, the politically marginal, ethnic and cultural minorities, and others for whom legal representation and fair public hearings are difficult to obtain.

Narrativists would also embrace rules 6.1 and 6.2 as ethical standards because those rules encourage lawyers to provide public service. Rule 6.1 encourages *pro bono* legal services by asserting that a lawyer "should render public interest legal service" by providing (1) "professional services at no fee or a reduced fee" to the poor or to charities, (2) "service in activities for improving the law, the legal system or the legal profession," and (3) "financial support for organizations that provide legal services" to the poor.¹⁷⁶ The first and third of these recommended activities serve to provide legal services to assure that marginal and disenfranchised persons' stories have a chance to be heard. Thus, this rule is consistent with a narrative ethic.

Rule 6.2 forbids attorneys from "seek[ing] to avoid appointment by a tribunal to represent a person except for good cause."¹⁷⁷ Because this rule assists courts in forcing attorneys to represent the same marginalized persons whose representation is encouraged by Rules and 1.2 and 6.1, narrative scholars would also embrace this rule as a standard of ethics.

Rule 2.1 would be a welcome part of a narrative ethic, but for different reasons than the previously discussed rules and for different reasons than made it part of the Model Rules. Rule 2.1 says that a

173. Basil Bernstein has established that those occupying the lower socioeconomic classes have different and—by majority standards—inferior communication skills. See, e.g., BASIL BERNSTEIN, *CLASS, CODES AND CONTROL* (1971).

174. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(b) (1983).

175. Many proponents of narrative legal studies believe narrative can be a powerful tool for the voiceless and disenfranchised members of society. See, e.g., note 5 *supra*.

176. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983).

177. *Id.* Rule 6.2.

lawyer, “[i]n rendering advice . . . may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”¹⁷⁸ This rule encourages lawyers to look beyond the narrow perspective and guidelines provided by “the law” and to base their advice to clients on additional considerations.

Legal advice based strictly on legal considerations—such as likelihood of prevailing on the merits in a lawsuit or prosecution—tells only part of the story. And, unless the law is a perfect reflection of social values, it omits any consideration of values. Narrativists believe in telling fuller stories and in using stories to convey social values. Thus, omission of “the rest of the story” and of social values from legal advice makes that advice incomplete. And, since clients lack legal training, the partial story told by a lawyer who omits non-legal considerations cannot easily be understood and evaluated by the standards of narrative rationality which the clients have learned.

A narrative version of Rule 2.1 doubtless would add a consideration of values to the other factors lawyers should consider in giving advice, and might well mandate consideration of these other factors as a means of assuring client comprehension. And, a legally defensible position might require advancing a defense or claim which can only be supported by an ethically suspect narrative performance in subsequent legal proceedings. Ethical advice would require that lawyers attempt to avoid this possibility.

As was mentioned earlier in this section, one possibility available to the narrative critic is to examine the stories told by the Model Rules. Without elaborating this road not taken, Rules 1.2, 6.1 and 6.2 provide a simple example to illustrate. These rules tell lawyers, and citizens who read the Rules, that lawyers are not people who endorse the views or actions of their clients, but are playing a role assigned them by the legal system. These rules also tell a story of a legal community which takes seriously its obligations under the system by sacrificing time, money, peace of mind, and freedom to assure everyone of the right to counsel.

If this Note were emphasizing the stories told by the Model Rules, Rule 1.2 would also be consistent with narrativism, because it appears to recognize that a stock narrative operating in contemporary society is that an attorney’s choice of clients represents an endorsement of the clients’ activities.¹⁷⁹ Having recognized the prevalence of this stock

178. *Id.* Rule 2.1.

179. The existence of such a stock narrative does not seem controversial. One recent example of the currency of this stock narrative can be found in the recent

narrative, Rule 1.2 provides a counter narrative in which representation is not endorsement. This narrative competes with the stock narrative for public acceptance.

2. *Model Rules Inconsistent With the Narrative Paradigm.*—Several of the Model Rules run afoul of the narrative paradigm because they make philosophical assumptions at odds with those of the narrative paradigm. The first set of inconsistent rules are those which forbid making false or misleading statements of law, fact, or both. Rules 3.3(a)(1), 4.1, and 8.1 forbid knowingly making false statements of material fact in various contexts.

Rule 3.3(a)(1) says a lawyer “shall not knowingly . . . make a false statement of material fact or law to a tribunal.”¹⁸⁰ Rule 4.1 forbids making “a false statement of material fact or law to a third person” while representing a client.¹⁸¹ Rule 8.1(a) forbids bar admission applicants and lawyers involved in admission or disciplinary matters from “knowingly mak[ing] a false statement of material fact.”¹⁸²

These rules clearly reflect the rational world paradigm in assuming the existence and knowability of things called “facts” and “law.” Enforcement of this rule would require that tribunals be able to discern what a lawyer “really” knew, what the law and facts “really” were, and that the law or facts actually stated by the attorney failed to correspond to the actual law and facts.¹⁸³ The standards of narrative rationality—probability and fidelity—are not part of the rule.

Rule 3.3(a) introduces its many requirements with the words: “A lawyer shall not knowingly . . .”¹⁸⁴ The Model Rules say “knowingly” refers to “actual knowledge of the fact in question.”¹⁸⁵ Thus, the requirements imposed by Rule 3.3(a) flow from the positivist assumption of the existence of “facts” which persons can actually “know” in some absolute sense. This is itself inconsistent with the narrative paradigm, which holds that “facts” are elements of stories and obtain

campaign for attorney general in Indiana, in which the voters elected a candidate whose primary campaign tactic was attacking her opponent as a defender of drug dealers and drunk drivers. This strategy makes sense only in a society in which a prevailing stock narrative considers representation as a form of endorsement.

180. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1(a)(1) (1983).

181. *Id.* Rule 4.1.

182. *Id.* Rule 8.1(a).

183. The Rules acknowledge the limited truth-discerning ability of lawyers by “presuppos[ing] that disciplinary assessment of a lawyer’s conduct will be made on the basis of facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon certain or incomplete evidence of the situation.” *Id.* Scope 5.

184. *Id.* Rule 3.3(a).

185. *Id.* Terminology 5.

their significance and meaning from the context of the stories in which they are told. And, persons are not assumed to know or to be able to know "the truth" about facts or the law. Therefore, a narrative version of Rules 3.3(a)(1), 4.1 and 8.1 would require lawyers to advance only claims which can be supported by rational narratives. A tribunal determining compliance with this standard would not have the impossible task of determining the actual facts and the law and their correspondence with the stated facts and law.

A narrative ethical system could either require the lawyer to tell only legal and factual stories which a subsequent tribunal would find rational, or limit the lawyer to presenting stories which they themselves find rational at the time they presented the facts or law questioned as unethical. However, the dilemma of choosing an objective or subjective standard would be mooted by a standard which measured ethicality by the narrative rationality of the story told by the lawyer whose ethicality is challenged.

A potential problem with this standard is that lawyers would be allowed to present facts or law which they do not believe to be "true" or rational, so long as a trier of fact could be convinced that a rational story supports the statements. Since this would allow what most people would call lying, the values endorsed by this rule might be called into question. However, since narrativism acknowledges that truth is personal and subjective, this conduct may not be morally objectionable from a narrative perspective and thus the rule's allowing of this kind of conduct would be acceptable. However, in the absence of a wholesale public paradigm shift to narrativism, a rule allowing "lying" in this limited sense might tell an undesirable story about the honesty and integrity of the legal profession.¹⁸⁶

Some of the other Model Rules require the lawyer to make legal or factual disclosures under certain circumstances. There are two sets of such rules. Rules 8.1(b), 3.3(d), and 3.3(a)(3) require disclosures under circumstances where such disclosure aids in discovering the "truth." Rules 3.3(a)(2) and 4.1(b) require disclosures only when necessary to avoid fraud. These two sets of rules require separate analysis.

Rule 8.1(b) forbids bar admission applicants and lawyers involved in admission or disciplinary matters from failing "to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail[ing] to respond to a lawful demand for [non-confidential] information from an admission or disciplinary authority."¹⁸⁷ Rule 3.3(d) requires that a lawyer in an *ex parte*

186. The current rule tells a public story of moral lawyers subject to sanctions for the immoral conduct of lying.

187. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.1(b) (1983).

proceeding "inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse."¹⁸⁸

Rule 8.1(b) assists the Bar's attempts to enhance the credibility of its members and admission and disciplinary procedures. The requirements of rules 8.1(b) and 3.3(d) are inconsistent with the narrative paradigm in that both require disclosure of facts "known" to the lawyer. Given the objectivist and positivist assumptions dominant in law, these rules prohibit conduct based on the objectivist concept of what the lawyer actually "knows." The Model Rules themselves require such a reading by defining "knowingly" as referring to "actual knowledge of the fact in question."¹⁸⁹ Such knowledge is not consistent with narrativism. Additionally, these rules apparently assume that tribunals attempting to enforce these rules can determine what a person actually knew and what the facts and law actually were.

Rules 8.1(b) and 3.3(d) require disclosures, presumably in order to provide all the relevant raw materials from which "truth" can be distilled.¹⁹⁰ While this reflects the rational world view that a full presentation of the facts is necessary to discovering the truth, the rule itself is not inconsistent with narrativism. Narrativism is not opposed to full consideration of what is relevant to a case. Thus, narrative versions of Rules 8.1(b) and 3.3(d) would encourage lawyers to disclose all "facts" which their self-believed stories or the stories offered by adverse parties make relevant to the legal decision involved.

Rule 3.3(a)(3) is a bit different. It forbids a lawyer from knowingly failing "to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."¹⁹¹ This rule is intimately tied to the positivist conception of the law as an existing and knowable entity. According to the comments, "[t]he underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case."¹⁹² Legal narrativist Jackson has rejected this "underlying concept" that law proceeds by establishing that the facts of a particular case bring the particular case

188. *Id.* Rule 3.3(d).

189. *Id.* Terminology 5.

190. In discussing a state evidence rule, the California Supreme Court wrote that the rule was "predicated on common sense, and public policy" because the "purpose of a trial is to arrive at the true facts." *Williamson v. Superior Court*, 582 P.2d 126, 130, n. 2 (Cal. 1978) (quoting *Breland v. Traylor Engineering & Mfg. Co.*, 126 P.2d 455, 461 (Cal.App. 1942)).

191. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(3) (1983).

192. *Id.* Rule 3.3 cmt. 3.

(minor premise) within the class of cases to which a given rule of law (major premise) applies.¹⁹³ The requirement for disclosure of controlling legal authority is premised on the assumptions that the controlling law can be known and that the law operates in the deductive syllogistic way narrativists deny.

A narrative ethic regarding disclosure of legal authority is difficult to foresee, since such an ethic could not be imposed on a legal system which still operates as if the law is little more than the mechanical application of given major premises to discovered minor premises to draw foregone conclusions. However, adoption of a narrative law would lead to attorneys presenting competing stories as to the best disposition of cases. Lawyers would be obliged by their duty of competence to present the most rational narrative on behalf of their clients. A duty to disclose controlling authority would make no sense in such a narrative legal system, where the lawyer's job would be to research, present and support the narrative which best supports the client's case.

Rules 3.3(a)(2) and 4.1(b) require disclosures when needed to prevent fraud. Rule 3.3(a)(2) forbids the lawyer from knowingly failing "to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client."¹⁹⁴ Rule 4.1(b) requires an attorney, in the course of representing clients, "to disclose a [non-confidential] material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."¹⁹⁵

These rules regulate communication, but only instrumentally in that they require disclosures to prevent crimes and fraud. These rules incorporate the rational world assumption that "material facts" are objectively knowable, and that lawyers' knowledge of these facts can be objectively discerned by disciplinary tribunals. Narrativists would, of course, condemn fraud. The narrative paradigm, however, would recast Rules 3.3(a)(2) and 4.1(b) for enforcement purposes in terms of whether the lawyer could tell a narratively rational story to explain any challenged failure to disclose.

Model Rules 3.3(a)(4), 3.4 and Rule 7.1 forbid or regulate lawyers offering evidence that is false or believed to be false, and making false or misleading statements about their services. These rules require separate analysis.

Rule 3.3(a)(4) forbids the lawyer knowingly offering "evidence that the lawyer knows to be false."¹⁹⁶ Similarly, Rule 3.4(b) provides, in

193. JACKSON, *supra* note 20, at 37-39, 55, 58-59.

194. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.3(a)(2) (1983).

195. *Id.* Rule 4.1(b).

196. *Id.* Rule 3.3(a)(4).

pertinent part, that a lawyer shall not "falsify evidence" or "counsel or assist a witness to testify falsely."¹⁹⁷

These rules clearly adopt the objectivist view that an attorney can "know" evidence is false. The lawyer must be able to know what is true and be able to test evidence for correspondence with what is true in order to know it is false. The narrative paradigm rejects the idea that the lawyer can "know" that evidence is "false." Instead, it measures stories by their probability and coherence. A narrative ethic might require an attorney to present only probable and coherent stories on behalf of clients. This, however, would merely duplicate a requirement of competent and diligent representation,¹⁹⁸ and no rule in this regard would be needed.

However, because the narrative paradigm is concerned with the values implicitly and explicitly supported by the stories we tell, some limits on deception are needed. Since "truth" cannot be the basis of a narrative legal ethic, a narrative ethic might instead forbid lawyers from offering or creating "facts" and narratives which they do not find credible, or from counseling others to offer such materials.¹⁹⁹ This often would result in lawyers being unable to present evidence and stories which their clients want advanced and which might be rational enough to convince a jury or factfinder of the justness of the client's cause. This would produce a major conflict between lawyers' other ethical obligations and their duty of diligent representation.

The extent and frequency of such conflicts could be reduced by a rule along the lines of Rule 3.3(c), which merely says a lawyer "*may* refuse to offer evidence that the lawyer reasonably *believes* is false."²⁰⁰ A narrative rule, however, could not measure reasonableness by rational world standards. A lawyer could refuse to offer evidence out of which sense cannot be made by any probable and coherent narrative offered by the client. Those asked to evaluate the appropriateness of the lawyer's refusal to offer evidence would only need to evaluate the narrative rationality of the story told by the client to justify punishing the lawyer for not offering the evidence.²⁰¹

197. *Id.* Rule 3.4(b).

198. *Id.*, Rules 1.1 and 1.3.

199. "One of the advantages of viewing humanity dramatically is that we approach ethics without confronting "Truth" or knowledge as a major preemptive concern." Richard E. Crable, *Ethical Codes, Accountability, and Argumentation*, 64 Q.J. SPEECH 23, 25 (1978).

200. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(c) (emphasis added).

201. By the narrative account, disciplinary fact-finders are always evaluating stories for their reasonableness, but are unaware of this because they are trained to act as if they are discovering the truth about what really happened. Thus, the change in evaluation

Rule 7.1 forbids a lawyer making any "false or misleading communication about the lawyer or the lawyer's services," and goes on to define false or misleading.²⁰² A narrative perspective would not condone chicanery in advertising legal services, but doubtless would define the offense differently, so a discussion of the definitions found in subsections (a)-(c) is needed.

Subsection (a) defines a communication as misleading if it "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."²⁰³ This definition is objectionable from a narrative perspective because it relies on the positivist assumptions that the "facts" and the "law" are objects which can be "known" and that statements about them can be found to be false by direct comparison. The narrative paradigm would prefer a rule forbidding making statements the lawyer does not believe are "true," or for which the lawyer cannot offer a narratively rational story.

Subsection (b) defines as false or misleading any communication that is "likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law."²⁰⁴ The second part of this subsection forbids lawyers from claiming they will use means forbidden by the Model Rules or other law, and seems little more than part of the American Bar Association's attempt to tell a story in which lawyers act under the law and face punishment for any transgressions. Lawyers promising to violate the rules and law would undermine the credibility of this narrative.

The first part of subsection (b), however, is inconsistent with the narrative paradigm because it labels as misleading even narratively rational communications. The logic behind this premise can only be that potential consumers of legal services cannot rationally appraise accurate information. This is made manifest in the comments, which note that subsection (b) "would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements."²⁰⁵ If such narra-

standards for disciplinary tribunals are more formal than real, but the fact-finders' awareness that they are evaluating stories rather than finding truth might at least make their findings consistent with the nature of human thought processes and thus easier to do well than a process which pretends to do what it cannot do.

202. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (1983).

203. *Id.* Rule 7.1(a).

204. *Id.* Rule 7.1(b).

205. *Id.* Rule 7.1, cmt.

tively and logically relevant information is seen as likely to create unjustified expectations by legal consumers, the Model Rules foresee potential legal consumers as irrational and incapable of evaluating the meaning of such relevant evidence.

Rule 7.1(c) defines as false or misleading any communication which "compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated."²⁰⁶ The rational world requirement of factual substantiation is too narrow and privileges rational world standards of "truth." A narrative ethic would forbid lawyers from comparing their services with those of other lawyers unless the lawyer can offer a rational narrative justifying the comparison.

Model Rule 3.1 is very troublesome. That rule provides that a lawyer "shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."²⁰⁷ The rule is troublesome because its standards of frivolousness and good faith incorporate a number of positivist assumptions rejected by the narrative paradigm.

The first of these assumptions is that "the law" is a singular entity which exists and can be known. The comments indicate that "the law . . . establishes the limits within which an advocate may proceed."²⁰⁸ This comment ultimately grounds ethical conduct in what the lawyer "knows" about "the law," and is not consistent with the narrative assumption that knowledge is inherently subjective and personal.

The comments go on to note that an action, defense, or claim is frivolous "if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring" another, or "if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law."²⁰⁹

Judging a claim as frivolous if the client has primarily malicious motives for bringing it is objectionable to narrativism because it suggests a tribunal ultimately will be able to find the "truth" about the client's motives, and thus makes an epistemological assumption inconsistent with narrativism. While this may seem to be splitting hairs, a narrative ethic regarding the bringing of frivolous claims would have to ground the test of frivolousness in some conception of the ability of the client to present an acceptable story to convince a tribunal that their motives were not primarily malicious.

206. *Id.* Rule 7.1(c).

207. *Id.* Rule 3.1.

208. *Id.* Rule 3.1 cmt. 1.

209. *Id.* cmt. 2.

Allowing the lawyer to bring claims for which they can offer good faith arguments might be less objectionable if "good faith" were defined as an argument self-believed by the attorney to represent a rational story. Defining good faith as what a *reasonable lawyer* would believe to be a reasonable argument to extend, modify, or reverse existing law is objectionable for two reasons. First, it implies that the law is a knowable objective entity available for comprehension. Second, it implies the application of rational world rather than narrative standards for reasoning and evidence.

A narrative version of the good faith requirement would allow lawyers to bring claims which can be supported by narratives which meet the tests of narrative rationality (probability and fidelity). While narratives within the legal context might be judged by standards adapted to legal contexts, such standards do not yet exist. Therefore, only general standards of narrative rationality are now available to replace the good faith requirement of Rule 3.1.

Another objectionable rule is Rule 3.4(e), which says that a lawyer, while in trial, shall not:

[A]llude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.²¹⁰

This rule is objectionable on several grounds, and its several requirements require separate explication.

First, the rule forbids lawyers from mentioning any matter they believe is irrelevant. Since irrelevant materials inhibit rather than enhance decision making by *homo narrans* as well as *homo sapiens*, a narrative ethic would also favor omitting irrelevant matters from trial. A narrative rule would prohibit lawyers' alluding to matters unless they can offer a rational narrative which makes them relevant.

Second, the rule forbids the lawyer mentioning anything which will not be supported by admissible evidence. This creates some real dilemmas for the narrative analyst, because it requires adherence to evidence rules which may not allow the lawyer to present clients' stories. In fact, evidence rules often exclude evidence a lawyer might see as essential to support a client's story. Evidence rules often exclude ev-

210. *Id.* Rule 3.4(e).

idence judged to be too prejudicial.²¹¹ Such rules of evidence assume that the "proper" rational value of evidence can be determined (presumably by rational world standards of evidence and reasoning). These judgments also tend to assume that jurors, who lack subject matter knowledge and training in the finer points of logic and reasoning, cannot assign evidence its "proper" probative value. This is all alien to the narrative paradigm, which sees as relevant any evidence which supports litigants' stories, and which sees little to fear in the possibility of prejudice because all members of society are presumed to be imbued with the ability to evaluate the rationality of narratives.²¹² This part of Rule 3.4(e) would have no place or equivalent within a narrative legal ethic.

Rule 3.4(e) forbids an attorney from asserting "personal knowledge of facts in issue" unless they are testifying, and from stating "a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused."²¹³

The purposes of this rule are difficult to discern, but since it serves to exclude certain statements from trial, the rule apparently functions, like the previously discussed part of Rule 3.4(e), to reinforce evidence rules by excluding irrelevant or prejudicial materials. Like the other portions of this rule, this part would be consistent with a narrative ethic to the extent that it reduces the confusion and wasted effort caused by the introduction of irrelevant materials into trials. To the extent that it attempts to exclude potentially "prejudicial" materials, the rule assumes that jurors lack the ability to evaluate properly the stories competing for their adherence, and is inconsistent with the narrative paradigm, which assumes the ability of all non-incapacitated persons to judge narratives rationally.

The last objectionable rule to be examined is Rule 3.6, which regulates lawyers' making out-of-court statements about trials. Rule 3.6(a) forbids making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication" when the lawyer "knows or reasonably should know" that such communication "will have a substantial likelihood of materially

211. See, e.g., FED. R. EVID. 403 (relevant evidence is excludable if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or misleading of jury), 412 (evidence of alleged sex-crime victim's past sexual history admissible only if hearing shows probative value outweighs danger of unfair prejudice), and 609(a) (evidence of certain felony criminal convictions admissible to impeach witness only if court determines probative value outweighs prejudicial effect to defendant).

212. See note 91 *supra* and accompanying text.

213. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(e) (1983).

prejudicing an adjudicative proceeding."²¹⁴ This rule incorporates several objectionable positivist assumptions.

Rule 3.6(a) only limits communications "if the *lawyer knows or reasonably should know*" of the likely prejudicial effect.²¹⁵ According to the Model Rules, "'Reasonably should know' when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question."²¹⁶

Unless the second appearance of the word "lawyer" in the Rule is surplusage, this rule assumes that a reasonably prudent and competent *lawyer* would ascertain the prejudicial effect differently than would a reasonably prudent and competent *person*. Presuming that the rule does not set a *lower* standard for lawyers, the rule suggests that lawyers' subject matter knowledge and training in formal reasoning give them a superior ability to ascertain the likelihood of a prejudicial effect. To this extent, the rule privileges training in logic and subject matter knowledge. Since narrativism holds that all persons not mentally incapacitated have the capacity to evaluate rationally the stories through which persons obtain knowledge of the world around them, a lawyer's knowledge and training do not necessarily provide a superior ability to ascertain the likelihood of a prejudicial effect. A narrative approach would agree that if lawyers rely on their expertise and training rather than their narrative rationality, they will view things differently than laypersons. However, narrativism would reject the implication that lawyers' perceptions will be superior.

The second aspect of Rule 3.6 that is objectionable from a narrative perspective is that the rule's very existence assumes that certain information is likely to produce a "prejudicial" effect on jurors. The earlier discussion of Rule 3.4(e) has noted that the idea of "prejudicial effects" itself implies that judges and legal experts are capable of determining, on the basis of their superior knowledge and reasoning skills, classes of evidence and information which, if introduced to a jury, will short-circuit the rational truth-finding process the jury is supposed to perform. This kind of thinking produces an elitism based on formal training that narrativists reject.²¹⁷

Narrativism is not necessarily hostile to the apparent purpose of Rule 3.6 to see that trial outcomes are decided by what is presented at the trial, not what appears in the media. Since equal media access cannot be assured by the free market system and free speech guarantees

214. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(a) (1983).

215. *Id.* (emphasis added).

216. MODEL RULES OF PROFESSIONAL CONDUCT Terminology 9 (1983) (emphasis added).

217. See note 74 *supra* and accompanying text.

that are immovable features of the American landscape, attempts to assure that accused and accuser have equal opportunities to present their competing stories may require restricting lawyers' publication of the stories they eventually will present at trial. The narrative approach, however, would disagree with limitations based upon the admissibility or alleged prejudicial nature of information as irreconcilable with the narrative paradigm's assumptions about the rationality of all persons and rejection of the privileging and elitism produced by positivism.

Rule 3.6(c) lists things a lawyer normally can release to the public. This rule allows certain basic information to be released "without elaboration," including the general nature of a claim or defense, contents of a public record, existence of investigation and persons being investigated, scheduling and results of steps in litigation, requests for assistance in investigation, warnings that a person's behavior may be dangerous (when reasonably necessary), and, in a criminal case, "the identity, residence, occupation and family status of the accused"; information "necessary to aid in apprehension" of a suspect; "the fact, time and place of arrest"; and "the identity of investigating and arresting officers or agencies and the length of the investigation."²¹⁸

This rule is consistent with the narrative paradigm in the sense that the rule limits disclosure to isolated bits of information about a supposed crime, and requires disclosure made "without elaboration." This rule would prevent a prosecutor, who may have greater access to the media than a public defender or unknown private defense lawyer, from unfairly presenting an elaborate and persuasive narrative to potential jurors. And, to the extent that the rule keeps any lawyer from trying their case in the media, the inherent possibility of the law providing a fair hearing for competing stories at trial is preserved. A narrative paradigm would not reject this part of the rule.

D. Summary

This brief analysis of those selected Model Rules which directly regulate lawyers' communications with others reveals that the rules are consistent with the assumptions and practices of the dominant rational world paradigm and inconsistent with the narrative paradigm. It also reveals that a narrative legal ethic would and could alter rather than abandon most of these rules.

CONCLUSION

After too many years of ignoring the communicative and narrative dimensions of law, a number of legal scholars have begun to study

218. *Id.* Rule 3.6(c).

legal narratives and to advocate a paradigm change from the positivist view of law which is currently dominant. The adoption of the narrative paradigm would require that legal scholars, teachers, and practitioners make wholesale changes in their understanding of every aspect of the law. Given the current interest in, and dissatisfaction with the current state of, legal ethics, a natural area for concern is the effects the adoption of a narrative perspective would have on how legal ethics is viewed.

There are myriad views of the nature of narrative. This Note has described the influential narrative paradigm of speech communication scholar Walter Fisher and used it to analyze legal ethics. Fisher's paradigm is very explicit about its underlying assumptions and differences with the positivist rational world thinking that currently dominates law. Thus, it is an appropriate perspective for analyzing the effects of a switch to a narrative paradigm.

Analysis of selected rules from the Model Rules has revealed that they reflect the rational world paradigm in ways that make them partly or entirely inconsistent with the narrative paradigm. The analysis has also revealed that many of the rules analyzed would be modified and retained in a narrative legal ethic.

This Note has shown the desirability of a greater emphasis on narrative legal studies and described one narrative theory in some detail. The Note has also shown how that paradigm opposes the dominant rational world paradigm shared by most legal scholars, teachers, and practitioners. Finally, it has revealed the foundations of a narrative legal ethic to help evaluate the implications of a paradigm shift from the rational world to the narrative paradigm. That being the moral of this story, there is but one part of the story remaining—The End.

