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Review: Searching for Worlds beyond the Canon: Narrative, Rhetoric, and Legal Change

Reviewed Work(s): *Minding the Law* by Anthony Amsterdam and Jerome Bruner

Review by: Susan Bandes

Source: *Law & Social Inquiry*, Winter, 2003, Vol. 28, No. 1 (Winter, 2003), pp. 271-293

Published by: Wiley on behalf of the American Bar Foundation

Stable URL: <https://www.jstor.org/stable/1215768>

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# Searching for Worlds beyond the Canon: Narrative, Rhetoric, and Legal Change

Susan Bandes

ANTHONY AMSTERDAM AND JEROME BRUNER. *Minding the Law*. Cambridge, Mass.: Harvard University Press, 2000. Pp. 453. \$35.00 cloth.

Anthony Amsterdam and Jerome Bruner set out, in *Minding the Law*, to “make the already familiar strange again” (p. 1). This phrase captures one central goal of interdisciplinary inquiry: to allow those steeped in a field to step outside its closed, often self-referential world and view it from another vantage point. For legal scholars, studying a field that styles itself as autonomous, and that is rife with “canonical ways of proceeding” (p. 1), the turn to other disciplines has not been easy. The rewards of crossing disciplinary boundaries are palpable: the infusion of information, the jolt to our complacency, the enlarged frame of reference. Yet for the study of law, grounded in practice as well as theory, in real world consequences as well as the love of knowledge, it is worth asking: What exactly should we seek from the interdisciplinary endeavor? Is it a way to see the legal world afresh, or more than that: a source of principles for remaking it?

Amsterdam and Bruner share a conviction, which grew in part from a highly rewarding seminar they have co-taught over the past decade, that it is possible to “[e]xperience fresh ways of looking at . . . [the works that lawyers do] as the ceaseless works-in-progress of a culture that, while binding its members in a common canon, leaves them free to some extent to visualize and even realize possible worlds beyond the canon” (p. 5).

They found that the students’ most vivid insights into the workings of

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Susan Bandes is professor of law, DePaul University College of Law, Chicago. I am grateful to Anne Dailey, Carol Sanger, and Austin Sarat for reading and commenting on earlier drafts.

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0897-6546/03/2801-271\$10.00

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law came from nonlegal sources, that often literary readings helped them connect to texts in disciplines like anthropology or linguistics, and that, taken together, these sources helped liberate the students “from the deadly habit of taking the law for granted” (p. 6). The book undertakes, with great enthusiasm, to provide a similar experience for its readers.

*Minding the Law* is animated by the belief that literary, cultural, and psychological theory can illuminate legal texts, help expose the underlying psychological and cultural dynamics of lawmaking and, ultimately, make a difference in the real world of legal actors and legal consequences. Its authors are ideally suited for making the best case for this claim. Amsterdam is a renowned civil rights litigator, clinical educator, and public law scholar<sup>1</sup> and Bruner is a distinguished cognitive psychologist and a pioneer in the field of cultural psychology.<sup>2</sup> Both are committed to interdisciplinary inquiry in the best sense of the term—they approach each discipline with respect for its complexities but without undue reverence for its formal boundaries.

Amsterdam and Bruner describe their mission as to help us see afresh how legal meaning is created by demystifying several standard (and indeed, inevitable) processes of legal thought—categorization, narrative, and rhetoric—which often serve to mask the choices legal actors make and the consequences that flow from these choices. They also have a more ambitious mission: to help us not just visualize but actually “realize possible worlds beyond the canon” (p. 5). The authors have produced a book that is insightful, readable, and filled with delights. It succeeds at many of its ambitious goals—in particular its goal of demystification. As to whether the expanded understanding it offers brings us closer to achieving justice, this is a question worth focusing on as legal scholars consider the future direction of the interdisciplinary endeavor as a whole.

## STORYTELLING AND PERSUASION IN THE LAW LAID DOWN

*Minding the Law* explores “the ways in which human beings, including judges and lawyers, must inevitably rely upon culturally shaped processes of categorizing, storytelling, and persuasion in going about their business” (p. 7). The authors’ particular interest is in the influences that shape legal narratives and make them persuasive. This question contains the seeds of their other focus as well: since legal narratives are the product of deeply ingrained cognitive processes and must draw upon culturally accepted conventions in order to persuade, how much room do they contain for the possibility of change?

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1. His pathbreaking article *Perspectives on the Fourth Amendment* (1974) remains a standard in the field.

2. See, e.g., his *Acts of Meaning and Actual Minds, Possible Worlds*.

Given the sweep of the authors' interdisciplinary ambitions and the amorphous boundaries of the fields of narrative and cultural theory, it may be useful to locate the book within these fields. Much of the early narrative analysis offered by the legal academy focused on the insights to be gleaned from the content of literary works (law in literature) (Posner 2000; West 1985) or on storytelling as a means of including the voices of the marginalized in legal discourse (Abrams 1991; Delgado 1989). The pioneering work of James Boyd White and others concerned with the intersection among law, rhetoric, and literature is perhaps the closest early precursor to Amsterdam and Bruner's approach (White 1973, 1985; Fish 1982; Weisberg 1987b).<sup>3</sup> Amsterdam and Bruner's primary concern in this field is with law as literature; that is, with how narratives pervade and shape the law.<sup>4</sup> The authors bring formidable strengths to this approach, notably an impressive command of a broad range of related theoretical fields, including narrative theory, cognitive theory, and semiotics. The result is a major contribution to the literature: a rigorous and learned excavation of the narrative, cognitive, and rhetorical structure of legal opinions.

The contribution is further enhanced by the authors' approach to cultural theory. When Amsterdam and Bruner argue that narratives draw on cultural expectations for their coherence and persuasive power, they avoid the vague notions of culture that can plague such efforts. Instead they offer a sophisticated, fluid, and historically grounded notion of the cultural milieu and its intersection with law, again informed by insights from a range of fields, including anthropology, sociology, and, of course, the law, history, and practice of the struggle for racial equality.

The authors are not, in this book, concerned with the constitutive aspects of law. Their interests vis-à-vis law and culture run mostly one way: toward the beliefs justifying law.<sup>5</sup> They are concerned with the conceptions of those who produce case law and with the often unacknowledged assumptions that give meaning and coherence to the law laid down. That is, they tend to focus solely on the law as embodied in legal opinions and on the judges who author those opinions. They do not focus on the creation of law by other bodies such as legislatures or administrative agencies, or the legal narratives of ordinary people (see, e.g., Ewick and Silbey 1998), or the ways

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3. See also Weisberg (1987a), calling White the "foremost rhetorician of law in our academic culture."

4. They are not concerned with law in literature, which Robert Weisberg and Gyora Binder define as "a species of conventional literary criticism and history that treats works of imaginative literature that contain legal themes or depict legal practice" (2000, 3). A prominent example of this type of scholarship is Posner 1988, in which Judge Posner considers literature on legal themes, including *Hamlet*, *Billy Budd*, and various works of Kafka. See also Morawetz (1993, 497–99), summarizing the various aspect of the law and literature movement.

5. Paul Kahn is prominently associated with this approach (see, e.g., Kahn 1999). See also Sarat and Simon (2001), and Sarat (2000), locating Kahn in the broader field of cultural studies.

in which law operates by influencing modes of thought or social practice,<sup>6</sup> or even on legal narratives in other contexts, such as the courtroom.<sup>7</sup> Although it may seem greedy to ask for more in a book of such sweeping scope, the authors' top-down approach does raise a question: would a broader focus on other sources of legal meaning have led to a richer understanding of the cultural milieu within which legal understandings both give and take shape?

Questions about disciplinary scope are inevitable when dealing with such elastic and interlocking fields. They meld, in *Minding the Law*, into other difficult questions about emphasis, viewpoint, and content. The most basic question is, why study categories, rhetoric, and narratives? What is gained by approaching legal opinions as a species of storytelling and by revealing their narrative structure?

One claim is that exploring the usually invisible influences on judicial opinions will help us see the legal world afresh. Why is this a worthy goal? Does its value lie in the ability to demonstrate the existence of multiple perspectives and multiple narrative choices and thus to dispel the illusion of inexorability? If so, is there a value simply in the awareness of multiplicity? Or does awareness of multiplicity imply the possibility of choice?

If the claim is that once we make these underground influences visible and conscious we will be able to use tools like categories and rhetoric more responsibly, difficult questions about agency and choice follow. To the extent the authors consider cognitive processes in which we all engage, are these processes inevitable and deeply imbedded or amenable to change? If change is possible, under what conditions?

The question of change and its requisite conditions is the most difficult of all. The authors ultimately suggest the possibility of something more than just heightened awareness. They suggest that this awareness can be used to imagine and help attain better worlds. If so, ought we turn our attention decisively to distinguishing narratives, categories, and rhetorical strategies that serve justice from those that impede it? What is the relationship between narrative and social change? Does the very act of viewing law stories through the lens of narrative theory provide some normative framework for making value distinctions—is there something inherent in narrative structure that “takes directly into account the normative element upon which law is based” (p. 141)? Are particular genres inherently hegemonic or subversive, or can they become so under certain conditions?

Alternatively, when the authors invoke novels, myths, and other narratives to help illuminate case law, do these narratives function as an alternative version of social, political, or cultural reality to which the judicial

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6. See Sarat and Simon (2000, 18–20), discussing the pioneering contributions of Clifford Geertz and the legal academy's increasing engagement with constitutive approaches to law and culture.

7. See, e.g., Bennett and Feldman 1981 for a prominent example of this sort of cultural study.

opinion's version can be compared? If not, how can we best use narrative theory and our understanding of cognitive processes to achieve more just results? From where should our standards for a "better" world derive, and what role should these authors play in helping suggest such standards?

In light of the book's admirably broad sweep, the questions I raise are not meant to suggest that an even broader focus was in order. Their purpose, instead, is twofold. First, to consider whether the authors succeeded in telling the important story they meant to tell, to the audience they wanted to reach. And second, to convey the excitement, the sense of new possibilities, generated by this unique collaboration, and to suggest some directions for further exploration.

## USING UNEXPECTED SOURCES TO OPEN THE MIND

*Minding the Law* seeks to weave together insights from multiple disciplines for an audience consisting of lawyers, generalists, and academics in disciplines ranging from law to the human sciences. What began as a lawyering theory colloquium for "second and third year law students of exceptional insight and perceptiveness" (p. 5) must now make the leap into a wholly different genre: a story about legal storytelling, aimed toward a far wider, more loosely defined audience. The task of defining an audience<sup>8</sup> and "tailoring a story to suit an audience" (p. 136) is daunting in a work that seeks to introduce readers of varying backgrounds to such a wide range of disciplines. It is perhaps inevitable that those schooled in law will experience much of the ground as well trod. Conversely, lay readers may find it rough going at times. Nevertheless, the authors keep these pitfalls firmly in mind. They are true to their promise to avoid undue jargon without oversimplifying complex topics (p. 17). For even the most sophisticated reader, Amsterdam and Bruner's lively, collaborative approach to law through the lens of anthropology, linguistics, and narrative theory should offer rich rewards.

What sorts of rewards does such an approach offer? Do we gain understanding solely by studying a text, for example, a legal opinion, through the lens of narrative theory? What is gained by thinking of a judicial opinion as a story? Amsterdam and Bruner find narrative theory a useful path toward their goals for several reasons. As they observe, "the law is awash in storytelling" (p. 110). Thus narrative theory is not an optional overlay one might employ to parse legal opinions and other law stories, but a valuable means of making sense of the stories that are inevitably imbedded in the law. The turn to narrative theory is useful because it reminds us that law is not a self-

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8. See, e.g., Martin 1986, 158: "Though the writer may wish to make a narrative accessible to any potential reader, some conception of the audience is necessary to lead individuals to feel that they are the ones to whom it is addressed."

contained system, but one that can be illuminated by the knowledge of other disciplines. If law is rife with stories, surely narrative theorists, for all their internecine disagreements, can teach us much about how stories work.

How does narrative theory enrich our understanding of law? The authors make two main claims here. Their weaker claim is that it helps strip away the veneer of verisimilitude that, in “well-wrought narratives,” including legal narratives, “virtually blind[s] us to the subtle architecture of their construction” (p. 113). A judicial opinion, for example, whose reasoning and construction might at first glance seem inexorable, leading to the only possible outcome, can be exposed as partial, one narrative choice among many, a product of “perspective, circumstances, interpretive frameworks” (p. 141). The second, stronger claim the authors make for the value of narrative study is that “narrative’s inherent structure fits it for [the] task . . . of justifying legal judgment” (p. 141). I will consider the first of these here and the second in a subsequent part.

The first goal, then, is to strip away the veneer of ordinariness that insulates legal processes from scrutiny. To accomplish this goal, the book begins by introducing the reader to, respectively, categories, narratives, and rhetoric, which the authors characterize as “three commonplace processes of legal thought and practice without which lawyers, judges, and students of the law could not possibly make do” (p. 2). It then illustrates the application of the process to particular legal cases.

This material provides an accessible, well-written, and richly sourced introduction to the processes covered. It does run, perhaps inevitably, into the problem endemic to its loosely defined audience. For the motivated reader unfamiliar with the terrain, these introductory chapters both offer a complex and useful introduction and alert the reader to the multiple disciplinary strands she might explore to gain a richer understanding of the processes of categorization. For the legal reader, some of it—particularly the material on categories—is pedestrian. The message that categories serve certain functions, that these functions are variable and manipulable, and that undue reliance on categories without recognition of these functions can lead us to error is a message with which the educated legal reader even lightly schooled in legal realism will be familiar. Nevertheless, Amsterdam and Bruner provide a well-organized summary of the chaotic world of narrative theory without flattening it of nuance.<sup>9</sup> They approach the minefield with sensitivity, providing an overview of the right breadth, depth, and complexity for the purposes of the book.

Legal scholars have drawn on increasingly sophisticated and diverse sources as they mine narrative structure to help reveal the assumptions and cultural norms undergirding legal thought. Such work is most successful

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9. Though their overview is not much focused on incorporating the work of legal scholars (many of whom are simply string cited in a single footnote, see pp. 355–56, n. 1).

when coupled with extensive knowledge of narrative theory, and when it is capable of giving substance to the notion of cultural norms. Amsterdam and Bruner's unique combination of gifts has made their work on this subject a notably serious and useful look at the structural underpinnings of literary meaning—how narrative frame, plot, character, time line, moral, and other essential aspects of narrative structure are implicated, through the lens of culture, in the production of meaning.

Once the veneer of verisimilitude is stripped away, it is revealed that narrative choices, like where the story should begin and end, what characters should populate it, what motivates them, what fate they meet, and what moral the story conveys, are deeply influenced by cultural and political assumptions. These assumptions, which help shape the raw legal materials, albeit invisibly, into a narrative that will be received as coherent and convincing, can be more easily unearthed when the narrative's structural underpinnings are exposed (Bandes 1999, 1310). This claim is no longer particularly controversial in the abstract. Nevertheless, legal scholars have rarely focused on illustrating it, and this book does so masterfully. The authors' vast collective knowledge of anthropology, rhetoric, cognitive psychology, and of course both law and literature, engender a rich, far-ranging, and often delightful exploration of the ways in which culture influences legal thought. Their thoroughly interdisciplinary approach goes beyond the summary observation that culture influences narrative and gives us a thick description of how it might do so.

For example, even the sophisticated reader should be fascinated by the discussion of *Michael H. v. Gerald D.* (491 U.S. 110 [1989]), a case about the efforts of a child's biological father to gain recognition of his status, despite the child's out-of-wedlock birth. The discussion of *Michael H.* uses both linguistic analysis and an exegesis of the opinion's underlying mythic structure to illustrate how categorization "is performed against a ground of notions and narratives about the nature of the world" (p. 78). The authors' claim here is that the opinion's portrayal of the participants in the lawsuit and what they have at stake is illuminated when viewed as a choice between two traditional mythic structures dealing with a wife and her adulterous lover. Michael H., who seeks the right to visit his biological daughter, Victoria, is portrayed as a predator-invader seeking to despoil the sacred and unsailable family unit constituted by Victoria's mother, Carole, and Carole's husband, Gerald. Justice Scalia's version, they assert, is a story of villainy ("adultery as combat myth") rather than weakness (or "lack of moral or physical capacity") (p. 83). Their linguistic and narrative analysis of how the opinion achieves its effects and masks its legal and cultural choices is nuanced and entirely helpful in making sense of the opinion.

Likewise, the fine discussions of *Prigg v. Pennsylvania* and *Freeman v. Pitts* are particularly insightful about the effect of the American dialectic on changing narratives of racial "trouble" (p. 159) and why the trouble



at hand might at different times require an integrative (increasing federal power) or disintegrative (dispersing federal power to states) fix (pp. 159–160). And the two penultimate chapters, “On the Dialectic of Culture” and “Race, the Court, and America’s Dialectic,” provide a complex and hopeful view of the possibility of cultural change.

One problematic omission from this otherwise fine treatment of narrative is its failure to make use of the work of narrative theorists at the intersection of law and sociology, such as Patricia Ewick and Susan Silbey or Francesca Polleta, who focus on questions of narrative and social change central to this book’s focus. This omission is part of the larger neglect of “the law on the ground”: legal narratives from sources other than judges and how law, thus broadly defined, constitutes culture. This choice of focus creates unfortunate strictures for a book that is centrally concerned with the relationship between law and social change, as arguably little such change occurs through the agency of judges.

## MAKING SENSE OF CULTURAL CONTEXT

The concept of culture is crucial to the book’s ambitions. There are many ways to engage in a cultural analysis of law. In Paul Berman’s useful summary, these include (1) helping us go beyond the stated rationale for legal norms by considering their symbolic content; (2) providing us with data about how people actually understand or respond to legal norms; (3) studying narratives used in official legal settings for insight into how “law’s stories both structure and reflect our experience of the world,” and (4) broadening our notions of legal discourse to understand how “the ‘law talk’ that is diffused throughout everyday life and popular culture can become a source of alternative conceptions about law” (Berman 2002, 1134). With a few exceptions, such as their treatment of the iconic stature of *Brown v. Board* and their discussion of legal institutions in two towns in Italy and Ireland, Amsterdam and Bruner are wholly concerned with the third of these possibilities, the study of legal opinions.

In the first several chapters, the authors seek to help readers step back from the law’s “canonical ways of proceeding” (p. 1)<sup>10</sup> and see law afresh as the “ceaseless works-in-progress of a culture” (p. 5) that imbues the categories, narratives, and rhetoric through which lawyers ply their trade. In these chapters, Amsterdam and Bruner take on cultural theory and its implications for legal change. This is a daunting task, admirably executed. In a lesser treatment of legal canonicity, the term *culture* might serve simply as an empty rhetorical flourish to elevate the description of the legal canon. As

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10. E.g., “the proper form for a brief, the right motion to file, the obvious line of precedent to cite, the correct way to advise a client . . . the substantive rules of the corpus juris” (p. 1).

Naomi Mezey recently observed in a pair of insightful articles about cultural theory, it is often a “quirky, ill-defined hash of insights from different disciplines” (2001b, 151) that is “everywhere invoked and virtually nowhere explained” (2001a, 35). But, as she continued, “[w]hen we make the effort to clarify what we mean by the term and are cautious about the sort of work we ask it to do, the concept may still prove to have teeth” (2001a, 39).

A discussion of legal culture divorced from the many overlapping cultural frameworks in which any particular legal culture exists would be profoundly unsatisfying. Happily, the authors’ collaborative method and rich mix of disciplinary interests come to full flower in this section, as they consider of what, precisely, the relevant culture consists.

The authors begin with a heroic attempt to map the contours of the debate about the nature of culture as an anthropological construct. As in their discussions of categories, narrative, and rhetoric, they manage to present a highly contested and complex terrain accessibly. One overriding lesson they take from their exploration of anthropology is the importance of avoiding monolithic, time-bound, exaggeratedly coherent notions of what constitutes a culture. Their method is not to attempt a tidy summary of legal culture or legal culture in America. It is instead to provide some “snapshots of the Court in action” (p. 248) and suggest a possible explanatory theory for the road from *Plessy* through *Brown* to *Pitts* and *Jenkins*, albeit one “full of clashing texts and subtexts” (p. 279). Their method of revisiting these four cases, introduced earlier, allows them to flesh out the concept of culture first explicated in the earlier chapters on categories, narratives, and rhetoric.

The authors posit a deeply ingrained dialectic between what they call “the American Creed and the American Caution,” or, in simplified terms, “the need to be inclusive and the need to be exclusive” (pp. 261–65). They deftly chart the ebb and flow of these warring influences on the historical and cultural forces that led to the landmark racial desegregation opinions they examine. Although they might have made a more explicit link between what they call the “cardinal features” (p. 250) of the opinions (their rhetorical and narrative framework) and the influence of these cultural forces, nevertheless their analysis is beautifully done. Their demonstration of the effect of the American Caution on the discourse of affirmative action, leading to what the authors aptly call “a new kind of racism,” is chillingly acute. Particularly arresting is their discussion of the dissonance between the article of faith that *Brown* remains not only good law but also an icon of our national commitment to equality<sup>11</sup> and the bitter reality embodied in cases like *Pitts* and *Jenkins*, which virtually gut *Brown* of legal vitality and, they argue, hew more closely to the de facto legal world of *Plessy* (pp. 248–57).

In light of these achievements, perhaps one should not ask for more. Yet the analysis of the law in the courts, as influenced by culture, would

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11. Or as Reva Siegel has called it, our “civic religion” (1997, 1135).

have been enhanced by discussion of the law on the ground—reflections on how culture experiences legal change. Some sense of the complex interaction between legal and cultural change is necessary for a fuller depiction of the dynamics of law reform, which—as Tony Amsterdam knows better than most of us—does not occur only from the top down.<sup>12</sup> If law is a “distinctive manner of imagining the real” (Geertz 1983, 184), it would be a shame for the reader to be trapped solely in the imagination of judges.

### NORMATIVE—AND WHERE TO GO? NARRATIVE AND JUSTICE

I now turn to the second, stronger claim the authors make for the value of narrative study, which is that “narrative’s inherent structure fits it for [the] task . . . of justifying legal judgment” (p. 141). Or as the authors elaborate in the following paragraph:

[N]arrative is a mode of discourse that takes directly into account the normative element upon which law is based—the existence of a legitimate, canonical state of things that has been complicated by some human action in some particular context or setting. Narrative takes for granted—indeed, takes it as a necessary condition—that in human affairs, the actors are agents whose acts are in some significant way under their own responsible control. Narratives require and provide an accounting of the justifiability of those acts that are alleged to have violated the legitimate expectations of another party or of the community. And in its very nature, narrative requires resolution. (P. 141)

In addition, the authors claim that, because the possibility of alternate narratives always exists, narrative “leaves room for the possibility that things have changed” (p. 141).

The notion of “narrative’s inherent structure” (p. 141), what it is suited for, and whether it has normative content, is a fascinating one. The requisites of particular genres and their amenability to progressive aims offer a ripe topic for further exploration.<sup>13</sup> It is also a topic that seems essential to the authors’ thesis. Therefore, it would have been helpful had the authors developed it more fully. In what sense does narrative’s inherent structure suit it for justifying legal judgment? In what sense does the study of legal opinions as narratives help us evaluate legal judgment? And finally, does

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12. For a fascinating treatment of the complex interaction between judicial decisions and cultural and social change in the civil rights era, see Greene 1992.

13. See, e.g., Scheurer 1999 for a fertile exploration of this topic. See also Bandes 2000.

engaging in such study bring us closer to achieving justice, and are the authors making that claim?

Perhaps, as I suggested earlier, the authors' claim is simply that narrative structure introduces the possibility of conflicting narratives, and therefore brings the reader face to face with the notion of choice and indeterminacy or allows entry into what they later refer to as "noetic space—an imaginative space, teeming with alternatives to the actual" (p. 237). But this claim is more true for literature than it is for law and in both fields is complicated by the narrative drive toward coherence and closure. Literary narratives have a slight edge over legal narratives, because the former *do not require* resolution, while the latter do. Admittedly, as literary critic Gary Saul Morson put it, a novelist seeking to convey "freedom and contingency" must struggle to escape "the prejudice of structure and closure" (1994, 8). It is possible, though risky, to flout narrative convention and offer novelistic verisimilitude without conventional closure. Mikhail Bakhtin famously praised the novels of Dostoevsky for achieving this feat, which he described thusly: "Nothing conclusive has yet taken place in the world, the ultimate word of the world and about the world has not yet been spoken, the world is open and free, everything in the future is still in the future and will always be in the future" (Bakhtin 1984, 93).

In law, however, resolution, not nuance or complexity, is the reason for the whole exercise. Under no circumstances is it optional. Indeed, the authors cite Robert Cover's well-known caution about confusing law with literature: that law is played out upon "a field of pain and death" (p. 226). And as the book's discussion of rhetoric explains, the opinion writer seeking to impose and justify a resolution will make every effort *not* to acknowledge the possibility of alternative narratives, perhaps not even to himself (p. 176). He will adopt what Robert Ferguson called "the rhetoric of inevitability" (Ferguson 1990, 213) and his doing so cannot be viewed simply as a choice of narrative strategies. Although the authors recognize rhetoric's inherently conservative function of "concealing contestability" (p. 177), they nevertheless maintain a rather rosy view of rhetoric as having the ability to "open possibilities of interpretation instead of shutting them down" (p. 193). It is the sort of view that Judge Posner attributed to literary critic Wayne Booth and to James Boyd White: the view of rhetoric as "edifying discourse, discourse that preserves and enhances culture and decency" (Posner 2000, 202).

I have argued that judicial narratives are under tremendous pressure to be hegemonic, that "[j]udges feel the powerful pull of the expectations of the genre"; they are "expected to create a story that portrays the evolution of doctrine as the linear result of doctrinal logic" (Bandes 2001, 856, 868). The aura of authority and inevitability is achieved largely by the very refusal to acknowledge alternate viewpoints (Ferguson 1990, 213–16; Cover 1975,

233). Ferguson describes the adoption of the rhetoric of inevitability, the tendency toward formalist expression, as “an innate psychological impulse” (Ferguson 1990, 208). I do not mean to suggest that judges lack choice in the matter (and, as I will discuss shortly, the extent of judicial choice is a troubling topic in this book). However, the difficulty of breaking the mold of the genre (a genre that bounds and domesticates alternative viewpoints within the structured confines of majority, concurring, and dissenting opinions) and the deeply ingrained forces pulling for the status quo present formidable hurdles (Bandes 2001, 856). The language of activism is not necessarily antithetical to judicial narratives (Polleta 1998, 154–55), but it will take some getting used to.

The difficulty of breaking the mold of the genre brings us back to the original question. What are the requisites of the genre, and do they “take directly into account the normative element upon which law is based” (p. 141)? Perhaps the authors simply mean to say that since a lawsuit involves a disturbance to “the existence of a legitimate, canonical state of things” (p. 141), it must lead to consideration of whether that state of things is indeed legitimate or ought to be disturbed. But does the structure of narrative encourage such consideration?

Amsterdam and Bruner seem to make this argument, calling noetic space “profoundly narrative in its ordering” (p. 238). But as the authors note, a judicial opinion must convey a story that is “culturally comprehensible” (p. 141) and even convincing (p. 238) to its audience. The demand for narrative coherence may be, if anything, profoundly conservative. The canonical state of things is, by definition, the state that seems most familiar, and narratives seeking the reassuring verisimilitude that makes a convincing story must tread carefully when challenging settled expectations (Bandes 2000, 577; Chatman 1978, 18). In this way, narrative “risks merely recapitulating existing community norms” (Kingwell 1994, 331) and “may actually be complicit in constructing and sustaining . . . patterns of silencing and oppression” (Ewick and Silbey 1995, 205). The examples of *Prigg*, *Pitts*, *Michael H.*, and *Jenkins*, and particularly the powerful example of *McCleskey v. Kemp*, seem to demonstrate that it is quite possible to construct an opinion that is internally coherent, that achieves verisimilitude, that draws upon culturally resonant imagery, and yet still reaches a result that both the authors and I would agree is unfortunate or even repugnant, and not legally required.

In other ways, as well, the inherent structure of narrative might insulate the status quo from challenge, thus avoiding normative judgment. The authors note that “narrative takes for granted—indeed takes it as a necessary condition—that in human affairs, the actors are agents whose acts are in some significant way under their own responsible control” (p. 141). They imply that the ascription of agency encourages normative judgment, but, in fact, ascribing human agency to governmental entities may have the oppo-

site effect. The authors explicitly recognize this problem in their discussion of the Whorf-Sapir hypothesis (p. 37).<sup>14</sup> They note narrative's possible Whorfian "tendency to overemphasize the role of agency rather than circumstances, fault rather than unindictable conditions, intent rather than cultural conscription" (p. 142), because these characteristics endow the narrative with dramatic shape and verisimilitude.

The narrative drive toward character and agency, toward simple causal links, toward good and evil motives is not conducive to convincing portrayals of systemic or structural harms caused by the acts, or failures to act, of multiple governmental actors, often proceeding without malevolence (p. 39; see also Bandes 1990, 2323; Bandes 1999, 1335–38). Surely this is one lesson of *McCleskey v. Kemp* (481 U.S. 279 [1987]), which ignored a long historic pattern of racial discrimination in the administration of capital punishment in North Carolina, ostensibly because the plaintiffs could not demonstrate a simple and intentional causal link between the wrongful acts of particular defendants and the sentence of the particular plaintiff.<sup>15</sup> Conversely, as the authors vividly illustrate in their appendix material comparing the frequency of references to people and institutions in *Prigg*, *Pitts*, and *Brown* (pp. 293–307), an opinion can all but erase humans and their travails from its cast of characters when doing so serves a purpose.

Another possible claim for narrative's transformative potential is that literary narratives are "intrinsically more authentic or sincere than other social practices" (Binder and Weisberg 2000, 208). This sentimental assumption seems an attractive trap for lawyers—Amsterdam and Bruner included—in the field of law and literature. Sophisticated legal scholars, who are well aware of the political influences that shape legal opinions, at times treat literary works as if they exist free from such influences. For example, in their discussion of culture, the authors seek to support their claim of a dialectical clash between honor and terror at work in racial relations in the changing South as follows: "We know of this inner dialectical clash not from the canonical social- or political-history accounts, but from Lillian Hellman's *Little Foxes* and from William Faulkner, Tennessee Williams, Robert Penn Warren, and more recently, Harper Lee and Michael Malone"

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14. The Whorf-Sapir hypothesis holds that "one makes distinctions in experience more easily if the distinction is present in [one's] language, [and that] we entrench in the lexicon only those categorical distinctions that are *useful* in a linguistic community" (p. 37).

15. Alan Freeman's classic article on law's maintenance of the status quo, although written well before the decision in *McCleskey*, provides a superb explanation for the status-quo-enforcing nature of what he calls "the perpetrator perspective," the insistence on focusing on a single intentional perpetrator (1978, 1052–57). More recently, Reva Siegel's elegant piece (1997), in demonstrating the mechanics by which law preserves the prerogatives of power even while ostensibly transforming them, emphasizes the status-enforcing nature of the requirement for intentional discrimination, generally and in the context of *McCleskey*.

(p. 228.) Similarly, in the following chapter on race and culture they claim that:

the racialization of African-Americans has take many convoluted turns that economic competition alone cannot explain, as we know from [citing several historians] and know still better from the pages and plays of William Faulkner, Langston Hughes, Lillian Hellman, Richard Wright, Robert Penn Warren, and Tennessee Williams. (P. 265)

The references to Lillian Hellman should underscore the problem. Many would agree she was a superb playwright, memoirist, and essayist whose writing about the South was richly evocative, but her reputation is decidedly not based on her factual accuracy (see Goodman 1983; McPherson 1984; Melnick 1997; Bernstein 1998) or on her work's insulation from political ideology (see, e.g., Rollyson 1988). Literature can provide valuable perspectives on a time and place like the Jim Crow South, but epistemological certainty (p. 184) is as out of place in describing works of literature, even those by less controversial authors, as in works of law.

### ARE JUDGES (OR AUTHORS) FREE AGENTS? CHOICE AND CULTURAL CONTEXT

The search for epistemological certainty is not a trap into which these authors are likely to fall very often. On the contrary, the importance of acknowledging perspective is a central tenet of this book. But it exists in uneasy tension with other principles animating the work, specifically the concepts of agency, choice, and subjectivity, both in respect to judicial decision making and in respect to Amsterdam and Bruner's own authorial role.

Amsterdam and Bruner claim, quite plausibly, that the processes they discuss—categorization, storytelling, the use of rhetoric—are universal (see, e.g., p. 287).<sup>16</sup> Yet there is a tension throughout the book between the claim that the constructs around which legal concepts are organized are culturally shaped and deeply imbedded and the implication that they operate on a conscious level. As Naomi Mezey explains, the concept of culture is itself susceptible to this tension. She says: "Culture can be conceived as the almost unconscious meaning-systems that people inhabit and enact without choice" or as a more self-conscious and temporary deployment of symbols (Mezey 2001a, 42). The authors tend to portray judges as choosing certain frameworks, certain narrative structures, certain modes of categorization, certain types of rhetoric. Although this portrayal sends the important message that judges are responsible for the choices they make and the conse-

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16. The authors do not claim the processes work identically in various cultures, only that the processes exist cross-culturally and are deeply imbedded in the structure of our thought.

quences these choices engender, it is to some extent at odds with the book's portrayal of the deeply imbedded nature of the various thought processes it reviews. This is not to suggest that choice and cultural influence are mutually exclusive. Rather, the ambiguity about the nature of their relationship would have benefited from closer inspection.

Moreover, the authors' claim of the universality of these processes sits uneasily with the cases they choose and with the unarticulated specter of their own judgment of the results in these cases. The failure to articulate their own judgment, in turn, has the effect of obscuring some of their insistent message about the pervasiveness of choice and viewpoint in narrative.

As Barbara Herrnstein Smith observed, "there are always *multiple* basic stories that can be constructed" (1980, 217). "No narrative version can be independent of a particular teller and occasion of telling, and, therefore . . . we may assume that every narrative version has been constructed in accord with some set of purposes or interests" (Herrnstein Smith 1980, 215). As a general matter, this notion of narrative choice is at the heart of Amsterdam and Bruner's message. The authors frequently exhort their readers to use the tools they provide to scrutinize the authors' own ideological leanings and how they influence their interpretations (see, e.g., pp. 8, 248). Such an exhortation could have been underscored had the authors modeled it through more self-reflection about how they shaped their story and the likely effects of their choices on the audience.

Can this ambitious work, which seeks to convey the importance of the concept of noetic space, the "imaginative space where mind can envision other possible worlds" (p. 237) succeed without taking a position on what sorts of worlds we should envision and why the status quo is not sufficient? That is, can their story succeed without a more transparent, self-reflective account of its organizing aesthetic, its prescriptive point, its driving force? It is obvious the authors have struggled with this question, and the reader does, as well.

"Stories go somewhere. They have an end, a *telos*," as Amsterdam and Bruner explain (p. 127). The notion of narrative coherence must encompass more than simply the mechanics of plot, character, motivation, and causality (Ricouer 1984, 174). It requires some measure of significance, some standard for shaping these elements into a satisfying whole. A satisfying story is one "in which there is some appropriate *match* between a story's *telos* and the obstacle to its attainment" (p. 127). Amsterdam and Bruner's book, for all its richness, is at times frustrating, perhaps because of some contradictory signals about its *telos*.

Essayist Vivian Gornick, in a recent work contemplating the role of the narrator, usefully observed: "Every work of literature has both a situation and a story. The situation is the context or circumstance, sometimes the plot; the story is the emotional experience that preoccupies the writer: the insight, the wisdom, the thing one has come to say" (2001, 13).



Amsterdam and Bruner illustrate their forays into narrative, rhetoric, and categorization with cases whose results strike them as unjust, cases that *matter* to them (p. 7), but they disclaim any intention to sell their own ideological point of view, desiring instead “to increase vigilance and to sharpen scrutiny” (p. 8). The authors are aware of their conundrum. They understand the impossibility of achieving the “view from nowhere” (p. 6, quoting Thomas Nagel), admit to having “a definite ideological point of view,” but assert that, although they cannot “stand above the battle,” neither will they “seek to fight the battle here” (p. 8). Although they are largely successful in helping the reader see the legal world afresh, perhaps they set themselves an impossible task when they try to avoid taking sides in the battle over how that world should change.

It is not entirely convincing that the need for increased vigilance is really the thing they have come to say, the reason they undertook this important project. The problem that appears to preoccupy the authors, to make the need for vigilance and scrutiny *matter*, is their deep concern for the injustices perpetrated under cover of these standard processes. The tension between situation and story, or between the authors’ stated aim and what seems to be the unstated *telos* of their tale, leads ultimately to a less than satisfying match between problem and solution. If the problem is insufficient scrutiny, across the ideological spectrum, of the inevitable tools of legal thought, then heightened scrutiny is a plausible solution. If the problem is injustice—for example deeply etched racial inequality that leads to consequences that include substandard, segregated schools and systematic bias in capital sentencing—the call for heightened scrutiny seems oddly out of sync with the problem.

The reader, whatever the authors’ stated intentions (which, as they are the first to admit, cannot be taken at face value [p. 17]) must grapple with the book’s unstated intentions as well. Its success must be measured both by how well it uses unexpected sources to open the reader’s mind to “worlds beyond the canon” and also by how well it helps the reader understand why these other worlds *matter* and whether it provides better tools for achieving them.

Although the authors disclaim intent to advance a particular viewpoint, they are candid about choosing examples in which the results seem wrong to them. For example, the authors choose two cases with whose outcome they obviously disagree, *Michael H.* and *Missouri v. Jenkins*, to illustrate their treatment of categorization. Categories, Amsterdam and Bruner tell us, “imply a world that contains them” (p. 29). That world is shaped by a variety of cultural influences, and these influences are in turn deeply imbedded in our linguistic, narrative, and other cultural conventions (Lakoff and Johnson 1980, 3–6; Winter 1989, 2225, 2228; White 1985, 168–74). We surely cannot think and reason without the help of categories, but to what extent are we free to stand above and outside their content or to choose

different categorical constructs when those familiar to us lead us into error? This is an important question and indeed an essential one for both purposes of this book—its ambition to open our minds to alternative possibilities and its ambition to help us realize them. Thus it is an odd choice to focus solely on cases in which categorization has led its author into error. In a later treatment of narrative and mythic structure (chapter 5), the authors contrast two cases of this same ilk (that is, with outcomes they consider unjust), *Prigg v. Pennsylvania* (16 Pet. 539 [1842]) and *Freeman v. Pitts* (503 U.S. 467 [1992]) with *Brown v. Board of Education* (347 U.S. 483 [1954]), a case whose approach and outcome they clearly find more desirable. But the 90 pages introducing us to categorization provide no such counterexamples that might illustrate the pervasiveness of the processes they seek to illustrate. The authors thereby seem to flirt with the possibility that Justice Scalia, as well as Chief Justice Rehnquist in *Jenkins*, have used categorization as a convenient tool to mask conscious decisions to choose one path over another. This possibility is particularly plausible as to *Michael H.*, which tends to paint Justice Scalia as actively in charge of the choices he makes, the opinion he signs, and the consequences it engenders.

Another possible interpretation is that the very act of drawing on categories and narratives is itself normatively undesirable. Neither seems to be the intended message. Instead the authors want to encourage more awareness that choices exist, more sensitivity to the influences and assumptions that lead to particular choices, and more individual responsibility for the path eventually chosen. Cultural influence and choice coexist: we are shaped by cultural context, yet we make choices within that context. The question is how much room to move exists and at what level of awareness. It is possible that the tension that seems to surround this topic reflects a similar tension in the field of psychology itself between “scientific” approaches concerned with innate cognitive processes and “humanistic” approaches more concerned with choice and transformation. If so, some clarification of this point would have been useful in elucidating the authors’ own view of the psychology of choice and responsibility in legal decision making.<sup>17</sup>

To the extent the authors’ position on these questions is obscured, their failure to examine their own narrative choices contributes to the problem. We are left uncertain both about the pervasiveness and precise contours of the problem they suggest exists and about how it might be addressed. Although their decision not to conduct such an examination was evidently the result of much soul-searching, it nevertheless detracts from the insistent (and important) theme of the book, that transformation is possible and that the failure to examine one’s choices leads to self-deception, deception of

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17. Thanks to Anne Dailey for her insights on this topic.

others, failure of responsibility, and, perhaps, unjust results (see, e.g., pp. 8, 176, 188, 216, 285).

The book's generally enlightening and useful treatment of rhetoric contains a similar tension. The authors suggest that the persuasive legal rhetorician will mask the contestability of his premises, assertions, and arguments, and that, in doing so, he will delude not only others but also himself. Their typology of common rhetorical tricks used for concealment, titled "rhetorical devices for managing contestability" (pp. 177–92) is particularly helpful. It nicely demonstrates not only how contestability may be concealed but also some of the mechanics of how the language of opinions ratifies accepted cultural and legal norms.

What is not entirely clear is on what level these rhetorical strategies operate and, therefore, how best to pierce them. Categories, the authors suggested earlier, are a necessary part of thought (p. 19). Certain types of categorization are, if not innate, at least endemic (p. 39). Recent studies suggest that certain category mistakes are also common, for judges as well as other humans (Guthrie, Rachlinski, and Wistrich 2001). Further, differences in individual use of categorization may go quite deep: it may be that, to use the authors' terms, some judges are "relatively category-centered" and others "relatively situation-centered" (p. 108).

This uncertainty about the innateness of categories is replicated in the discussion of rhetorical strategies. When judges are in the process of "structuring what's possible and imaginable" (pp. 181–84), no doubt they, like other people, will be deeply influenced by their notions of "the way the world works" (p. 183). Studies reveal that it is quite common to believe in what psychologists call "just world thinking," that what is, should be (Bandes 1999, 1319; Staub 1989, 79). I have suggested elsewhere that judges are likely to be particularly susceptible to such thinking (Bandes 1999, 1324–26). Or an appeal to the way the world works might be the product of a particular interpretive framework. Perhaps, for example, a category-centered judge, one who prefers certainty and order, maintains a strong belief in the status quo as an essential part of his worldview. The emerging field of the cultural theory of risk, associated most prominently with the work of Mary Douglas and Aaron Wildavsky (1982), is generating interesting data suggesting, for example, that an individual's cultural orientation exerts tremendous influence not only over which norms he subscribes to but also over what information he finds relevant and what weight he assigns it. As Dan Kahan and Donald Braman (2002) argue, such findings have important implications for the ways in which our arguments are constructed, if they are to be persuasive.

These interlocking tensions—between universally imbedded ways of thought and the possibility of choice and between the authors' rejection of objectivity and their own refusal to make value judgments about particular judicial choices—become most pronounced in the treatment of *McCleskey*

*v. Kemp* (481 U.S. 279 [1987]). The authors explain their decision to focus on *McCleskey* as based on the hope that the “opinion will offer an instructive study of the means by which rhetorics achieve a self-justification that is strong enough to kill with, although not strong enough to endure much beyond the killing” (p. 194). This statement refers to the fact that Justice Powell, who cast the deciding vote for execution in the 5–4 case, found only four years later, after his retirement, that he could no longer “accept his own grounds for rejecting *McCleskey*’s argument” (p. 194).

The most salient characteristic of the chapter is its pervasive, entirely justifiable, yet never explicitly expressed anger at the result and the reasoning in *McCleskey*. The palpable anger and the failure to acknowledge it or make it manifest send confusing signals. At times the discussion reads as if Justice Powell’s use of rhetoric caused him to fall into self-deception (p. 215), at other times as if it simply provided him a convenient tool for masking choices he made quite consciously (see, e.g., p. 216). The possibility that Justice Powell’s reasoning was shaped by his historical and cultural context is raised in a brief coda to the chapter (p. 216). But the unarticulated message or at least subtext of the discussion seems to be that Justice Powell well knew what choices he was making and well knew that he was using rhetoric to paper them over. This may be a misreading, but had the authors been more direct and self-reflective about their own moral and emotional reaction to the opinion, it might have been easier to disentangle it from their viewpoint about Justice Powell’s role in it.

The emotional undercurrent of the chapter also raises questions about why the authors chose *McCleskey* as the sole means of illustrating a neutral principle about rhetoric rather than coupling it with cases in which rhetoric does not lead its user so far astray. The authors wish us to understand rhetoric as a pervasive feature of the legal system, one which they do not regard as itself problematic. They argue for “more examination, not less rhetoric” (p. 192). This message is not well served by the *McCleskey* chapter.

The specter the chapter raises of “a self-justification that is strong enough to kill with” (p. 194) is powerfully disturbing. But it is not evident that the cure for *McCleskey* is more self-examination or even more dialectic. The *McCleskey* opinion is a testament to the proposition that mere facts, or mere evidence, no matter how strong, cannot persuade judges of a moral proposition they are not inclined to accept. As the authors observe, “the Baldus study—the centerpiece of *McCleskey*’s case—never enters the realm of factuality” (p. 208). Randall Kennedy noted that the opinion was “haunted by anxiety over the consequences of acknowledging candidly the large influence of racial sentiment in the administration of capital punishment in Georgia” (Kennedy 1998, 336–37; see also Bandes 1999, 1320). What set of circumstances could have enabled the plaintiffs to change this central, and fatal, disconnect between their case and the majority’s reaction to it? Alternative viewpoints were well expressed by both the Eleventh Cir-

cuit and the four dissenters in the Supreme Court. Yet the majority opinion, rather than engage in a dialectic on the strength of the plaintiff's case, seems to exist in a separate interpretive universe in which the strength of the plaintiff's case is beside the point—or perhaps more accurately, is the very problem. The intractable question remains: how can such gaps be bridged?

### DISMANTLING THE MASTER'S HOUSE: THE PROBLEM OF CHANGING THE WORLD THROUGH NARRATIVE

Amsterdam and Bruner observe ruefully that their “theoretical journey yields no clue” (p. 120) about why sometimes transformative and sometimes restorative narratives triumph. They sell themselves short; their book is brimming with information about how legal opinions entrench and safeguard existing power relationships. The difficult question, with which they struggle valiantly, is how to mount a successful challenge to the status quo. The soul of the book is its claim that it is possible, not just to see law afresh, but to “visualize and even realize possible worlds beyond the canon” (p. 5). To the extent the struggle to maintain legal power is a struggle to wall off the ability to imagine other worlds (see, e.g., White 1973, 757–61; Gordon 1984, 108), the tools Amsterdam and Bruner provide should be helpful in opening up the noetic space of which they speak. For judges and other legal actors open to increased self-reflection, and indeed for all of us engaged in the national dialogue about what sort of community law ought to strive to establish (p. 193, quoting James Boyd White), this book may make us more alive to the possibilities of interpretation. Yet the question stubbornly remains: What is it that sometimes, but only sometimes, allows us, and particularly those with the power to effectuate change, to “[s]ee the unseeable, speak the unspeakable, and aspire to change what our more usual mythology declares to be natural and unchangeable” (p. 265)? When Amsterdam and Bruner give two examples of the dialectic of culture, examples designed to illustrate the possibility of a productive and stable marriage between canonicity and change, they choose a small Irish village and the city of Reggio Emilia (pp. 239–45). Both examples, while delightful, seem to rest on a historically entrenched (though fluid) equilibrium achieved in a geographically small and fairly homogeneous community. The question, as the authors recognize, is whether such a dialectic can be achieved in a broad, heterogeneous, culturally splintered community with no common core of consensus.

The more basic question is whether an equilibrium that rests on the unequal distribution of power and privilege can be upset through the provision of more or better interpretive tools. As the work of Patricia Ewick and Susan Silbey suggests, sometimes the very existence of a dialectic is the means by which power perpetuates itself. Under their theory, the grand narrative of the law as majestic and impartial could not long exist unless medi-

ated by more cynical and pragmatic counternarratives (Ewick and Silbey 1995, 1998). That is, the existence of the counternarratives does not deal a fatal blow to the rigid and inaccurate grand narrative. Instead, the counternarratives permit it to flourish by absorbing and assimilating evidence of its fallibility (Bandes 2000, 575–76). McCleskey and *Brown*, unfortunately, illustrate this phenomenon all too well. We pay lip service to the majestic ideals of *Brown*, but McCleskey illustrates the infinite ability to iconize the ideal of *Brown* while interpreting away *Brown*'s guarantee of equality in order to avoid destabilizing an entrenched power regime.

If the goal is not just illumination but reform, it is also worth questioning the intensity of the focus, both in this book and by the legal academy generally, on the work of judges. Should the turn toward other disciplines bring with it a broader focus on the range of actors, legal and nonlegal, who constitute the legal landscape and who, ultimately, create and sustain the cultural milieu in which judges operate?

But no doubt it is too much to expect of a book that it help us “realize possible worlds beyond the canon” (p. 5). The lack of a blueprint for unsettling existing power relations is not a shortcoming one can, in fairness, complain about. To see the legal world afresh, and sometimes even visualize better worlds, through the eyes of two passionately committed, humanistic professors, writing in the best tradition of interdisciplinary work, is a rare delight, a journey well worth taking.

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