

JUDGING STORIES

by
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This Article uses the confluence of incitement to genocide and hate speech in a single case to explore the power of stories in law. That power defines how we see the world, how we form communities of meaning, and how we speak to one another.

Previous commentators have recognized that law is infused with stories, from the narratives of litigants, to the rhetoric of lawyers, to the tales that judges interpret and create in the form of written opinions. “Judging Stories” builds on those insights to address the problems posed by transnational speech and the question of which norms apply to inflammatory publications transmitted across borders. This Article introduces the term “master story” to make three related claims. First, states produce and rely upon master stories—constitutive legal narratives—that define political culture and shape the contours of permitted and forbidden speech. Second, judges play a unique role in constructing master stories. Judicial speech is different than other forms of commentary and serves to join law with communal fables in ways that legitimate some stories at the expense of others. Third, courts and tribunals are beginning to use incitement to genocide—but not hate speech—to write a new master story. As geographically and temporally removed tribunals are called upon to adjudicate hateful expression from outside the master story, a global process is unfolding that may serve to reset the balance between unfettered speech and the threat of dignitary harms posed by incendiary language. Channeling international human rights law and norms, judges are supplanting exhortations of hatred with the language of reason in an effort to develop a body of transnational legal rules, a new nomos for an interconnected world.

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INTRODUCTION

The language of genocide is totalizing. To condition a civilian population to participate in mass murder, *genocidaires* must convince their audience that killing is necessary, justified, or at least morally permissible. "Genocide," Philip Gourevitch has noted ironically, "is an exercise in community building."¹ Of course, that dystopic community is often cowed into obeisance, threatened with destruction, and mobilized to do the leaders' bidding. And while coercion and state violence are sometimes employed to compel reluctant persons to abet grave crimes, the invention of a threat to the populace and the dehumanization of whole segments of society are achieved primarily through language. From Nazi Germany to the former Yugoslavia to Rwanda, the production, distortion, and dissemination of language has been a central element of the "crime of crimes."²

In Rwanda, no one knew this better than Leon Mugesera, a one-time politician practiced in the use of coded double-speak. In November 1992,

¹ PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* 95 (1998).

² See William A. Schabas, *National Courts Finally Begin to Prosecute Genocide, the 'Crime of Crimes'*, 1 J. INT'L CRIM. JUSTICE 39 (2003); Patricia M. Wald, *Genocide and Crimes Against Humanity*, 6 WASH. U. GLOBAL STUD. L. REV. 621, 629 (2007).

at a time of heightened tensions between the largely Hutu Mouvement Républicain National pour la Démocratie et le Développement, (MRND) and the mainly Tutsi Rwandan Patriotic Front (RPF), Mugesera delivered an incendiary speech to a crowd of more than a thousand supporters.³ In the course of his address, Mugesera posed the now infamous question: “[W]hy do [we] not exterminate all of them [meaning Tutsis]? Are we really waiting till they come to exterminate us?”⁴

Human rights organizations reported that Mugesera’s address fanned the flames of ethnic violence in the province of Gisenyi and led to immediate violence against Tutsis.⁵ Rwanda subsequently issued a warrant for Mugesera’s arrest for inciting hatred,⁶ which he avoided by fleeing as a refugee to Spain; from there, Mugesera and his family applied for and received permanent residency in Canada.⁷

Beginning in April 1994, Hutu extremists committed genocide over a 100-day period, killing almost a million Tutsis and moderate Hutus.⁸ At approximately the same time, Mugesera was discovered living in Quebec where he had taken a job as a professor of linguistics at Laval University, the same institution where he had studied as a graduate student. Alerted to his presence by Rwandan émigrés, Canadian officials sought to deport him on the ground that his 1992 speech constituted a criminal act which rendered him inadmissible to the country.⁹ The court of first instance, as well as two subsequent tribunals, found Mugesera deportable on the basis of the Kabaya speech¹⁰ but in 2004, a three-judge panel of Canada’s Federal Court of Appeal held that the lower courts had accepted a biased

³ Joseph Rikhof, *Hate Speech and International Criminal Law: The Mugesera Decision by the Supreme Court of Canada*, 3 J. INT’L CRIM. JUST. 1121, 1121–22 (2005).

⁴ Mugesera v. Canada, [2005] 2 S.C.R. 100, 181 (app. III) (Can.); see also ALISON DES FORGES, “LEAVE NONE TO TELL THE STORY”: GENOCIDE IN RWANDA 85–86, 100 (1999).

⁵ Rikhof, *supra* note 3, at 1122; Mugesera v. Canada, [2004] 1 F.C.R. 3, 111–12 (Can. F.C.A.).

⁶ GOUREVITCH, *supra* note 1, at 97; Mugesera v. Canada, [2005] 2 S.C.R. 100, 109 (Can.); Gregory S. Gordon, *Incitement in Rwanda: The Path to Genocide, in THE CHANGING FORMS OF INCITEMENT TO TERROR AND VIOLENCE: THE NEED FOR A NEW INTERNATIONAL RESPONSE*, JERUSALEM CENTER FOR PUBLIC AFFAIRS 117, 118 (Marian Shay trans.) (2012). See also Mugesera v. Canada, [2004] 1 F.C.R. 3, 235 (Can. F.C.A.) (“We can hardly be surprised at the Attorney General’s activism toward Mr. Mugesera when we know that a few years later he was Minister of Justice in the FPR government.”).

⁷ See Mugesera, [2005] 2 S.C.R. at 109.

⁸ *Rwanda: How the Genocide Happened*, BBC NEWS (Dec. 18, 2008), <http://news.bbc.co.uk/2/hi/1288230.stm> (estimating 800,000 killed).

⁹ Section 19 of Canada’s Immigration Act excludes persons who there are “reasonable grounds to believe” have committed an act or omission outside of Canada that constituted a war crime or a crime against humanity within the meaning of subsection 7(3.76) of the Criminal Code. Immigration and Refugee Protection Act, S.C. 2001, c. 27, §§ 33, 34, 35 (Can.).

¹⁰ Mugesera v. Canada, [1998] I.A.D.D. No. 1972 (QL); William A. Schabas, *Mugesera v. Minister of Citizenship and Immigration*, 93 AMER. J. INT’L L. 529, 529–30 (1999).

translation of the address and were “patently unreasonable” in their finding that he had incited violence.¹¹

The government appealed to the Supreme Court of Canada. Three weeks before the Supreme Court hearing, Guy Bertrand, Mugesera’s lawyer, filed a motion alleging that the Court was incompetent to hear the case because of an asserted abuse of power by Canada’s Minister of Citizenship and Immigration and Minister of Justice. Mugesera’s pleading insisted that the Government of Canada had been improperly influenced and “that an extensive Jewish conspiracy was hatched to ensure that the Minister’s appeal would succeed and that the respondent Mugesera and his family would be deported.”¹² Twelve years and eight thousand miles later, Mugesera’s race-baiting speech resurfaced, this time in Canadian Supreme Court proceedings.¹³

Mugesera’s double story, separated by a world of legal and contextual difference but united by a common thread of hateful expression, raises the question of why authorities police some tales but not others. This Article provides one answer: speech is regulated when it implicates a society’s master story or stories and if the content of the speech serves to challenge or disrupt tenuous political conditions.

Recognizing the presence of master stories can and should allow courts and policy makers to sharpen their analysis and define the balance between unregulated speech and the dignitary dangers inherent in unfiltered expression. Instead of a content-centric analysis that looks solely at what is or may be said, a focus on narrative calls attention to the diverse inputs—history, the activation of context, the form and structure of argument, and the role of the speaker—that influence the receipt of speech. A narrative-based approach also makes clear that law is more than rules and policies—it is itself a collection of outputs, lessons, performances, and linguistic exchanges. Nearly 30 years after Robert Cover’s *Nomos and Narrative* and 16 years after Paul Gewirtz’s and Peter Brooks’ publication of *Law’s Stories*, the trials of Leon Mugesera demonstrate that the study of language and rhetoric remains an essential component of the construction, evaluation, and expression of law.¹⁴

This Article offers a three-part analysis of the multidirectional relationship between dominant tales and the operation of law. Part I uses the anti-Tutsi polemic at the heart of the Mugesera drama to introduce the

¹¹ Mugesera v. Canada, [2004] 1 F.C.R. 3, 115 (Can. F.C.A.).

¹² Mugesera v. Canada, [2005] 2 S.C.R. 91, 95–96 (Can.).

¹³ The author was director of the University of Toronto Faculty of Law International Human Rights Clinic when the *Mugesera* case reached the Supreme Court of Canada and, with the Canadian Jewish Congress and Human Rights Watch, an intervener party to the proceedings.

¹⁴ Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz eds. 1996). See also, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989), a remarkable collection of essays edited by Kim Lane Scheppele that advances the literature on the use of stories in law.

concept of “master stories,” legally-supported narratives that are intimately connected to national myths and historical experience.¹⁵ Master stories are so powerful that they contribute to the definition of political cultures, the domestic interpretation of hateful expression, and the absorption of contradictory legal sources. Equal parts legal history and communal fable, master stories offer nuanced explanations for the interstices of permitted and forbidden speech.

Part II analyzes the role of judges and specifically the tendency of the judiciary to reinforce powerful narratives from within master stories, the exercise of interpretive independence outside or across stories, and the disconnect between these two approaches. Most domestic courts read and evaluate the effects of stories inside contexts that strengthen familiar themes, a process that commonly results in the enforcement of speech laws governing specific subjects. But in transnational encounters, courts demonstrate the range of possibilities inherent in the receipt and adjudication of unfamiliar speech. How culturally removed outsiders interpret geographically unbounded stories exposes both the strength and limits of legal narratives to determine outcomes in cases involving the regulation of language.

Part III explores the phenomenon through which an expanding universe of legal authorities is beginning to contribute to a global judicial narrative. Channeling international human rights law and norms, courts and tribunals around the world are using incitement cases to develop a new regulatory language for an increasingly internationalized audience. The result suggested, but rarely articulated, is that incitement—not hate speech—warrants sanction. If stated clearly, this outcome holds the potential to frame the contours of transnational legal rules, a new *nomos* for an interconnected world.

I. THE MAKING OF MASTER STORIES

There are two intertwined stories at work in this saga, Leon Mugesera’s anti-Tutsi rant and Guy Bertrand’s paranoid tale of Jewish influence on the Canadian judiciary. Each represents a particular form of threat, each emerges in a specific context for a particular audience, and each receives a distinct juridical treatment. Rather than asking whether a common hatred animates anti-Tutsi and anti-Semitic thought, this Article addresses the ways that stories make demands upon diverse listeners and the socio-legal consequences of receiving those messages.

Speech occurs through many channels—verbal utterances, written publications, and electronic messaging are all carried through multiple media, ever more frequently in memorialized, searchable, and transmit-

¹⁵ See James D. Ridgway, *Patternicity and Persuasion: Evolutionary Biology as a Bridge Between Economic and Narrative Analysis in the Law*, 35 S. ILL. U. L.J. 269 (2011) (arguing that evolutionary biology explains how human beings approach economic and narrative analysis).

table forms. But the core notion of conveying ideas through language does not change; story and narrative are central to meaning.

A. *Two Tales*

1. *The Rwandan Speech*

Mugesera delivered his November 1992 speech in person before a large crowd at a party meeting in the town of Kabaya, in the Rwandan prefecture of Gisenyi.¹⁶ By all accounts, Mugesera was impassioned, commanding, and effective in his use of stories. Read in its entirety, Mugesera's address represents a compilation of personal and political grievances designed to demonize Rwanda's Tutsi minority. Mugesera refers to Tutsis exclusively as *inyenzis* (cockroaches), a term loaded with interethnic invective.¹⁷ In Alexander Tsesis' parlance, Mugesera succinctly "synthesize[d] semantic designations to create ideologies easily understandable to the audience because they appeal to their emotional impulse to find a vulnerable target on whom to vent frustrations."¹⁸

The speech featured specific warnings ("beware of kicks by the dying M.D.R.") disparaging comments about individuals ("the thief Twagiramungu"), and heavy use of accessible homilies ("Hyenas eat others, but when you go to eat them they are bitter!" and "When you allow a serpent biting you to remain attached to you with your agreement, you are the one who will suffer.").¹⁹ Insofar as Mugesera's speech combined strident moralism and slang with advocacy of awakening and action to protest perceived corruption, it followed the conventions of the rhetorical form of a diatribe.²⁰ Mugesera then shifted focus and directed part of his remarks to the absent Tutsi population: "your home is in Ethiopia," Mugesera thundered, "we will send you by the Nyaborongo so you can get there quickly."²¹ For Hutus in attendance, the invocation of the Nyaborongo river was a well-understood storytelling reference to the site

¹⁶ Rikhof, *supra* note 3, at 1122.

¹⁷ See *Mugesera v. Canada*, [2005] 2 S.C.R. 100, 180–81 (app. III) (Can.). Mugesera's resort to the language of "verminization" exemplifies Mikhail Bakhtin's notion of genre memory—in which an anti-Tutsi diatribe draws on the register of anti-Semitism, complete with the same degrading referents. See MIKHAIL BAKHTIN, *PROBLEMS OF DOSTOEVSKY'S POETICS* 106 (Caryl Emerson ed. & trans., 1984). For a discussion of vermin, see *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) at 4–5 (1994).

¹⁸ ALEXANDER TSEKIS, *DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS* 88 (2002).

¹⁹ *Mugesera*, [2005] 2 S.C.R. at 175–81 (app. III).

²⁰ See Theodore Otto Windt, Jr., *The Diatribe: Last Resort for Protest*, 58 Q.J. SPEECH 1, 1–3 (1972) (tracing the use of diatribe by the Cynics of Athens and revived by the Yippies to protest the war in Vietnam; it is a rhetorical form forged by circumstances that rhetors believe exclude conventional means of protest).

²¹ *Mugesera*, [2005] 2 S.C.R. at 184 (app. III).

of previous massacres, a vocal reminder to the crowd that Rwandan history is littered with the corpses of ethnic violence.²²

Mugesera reprised the myth of the alien Tutsi and dehumanized his political enemies while harkening toward the presence of the Tutsi-led RPF army in neighboring Uganda. He then concluded his speech by using a classic technique of pre-genocidal inciters known as “accusation in a mirror,” that is, falsely accusing opponents of planning to massacre your group in order to frame the commission of mass murder as an act of collective—and preemptive—self-defense.²³

Mugesera’s speech also made liberal use of the enthymeme, a deliberately incomplete syllogism.²⁴ Aristotle famously defined an enthymeme as a device through which speakers capitalize on semantic familiarity to tell persuasive stories.²⁵ Because the audience knows something about the context in which the storyteller’s claim is referenced (but not completely spelled out), the listeners take an inferential leap and fill in the missing conclusion.²⁶ The success of enthymemes depends on the speaker’s ability to predict that audiences will insert premises or conclusions derived from a shared understanding of community stories.²⁷

In the contextual tinderbox of 1992 Rwanda, Mugesera’s enthymematic speech tapped into a familiar and hostile storyline of violent Hutu nationalism; his was a story that wove elements of national and regional realities into a fabric of identity and belonging. Unlike most speeches of

²² See ALAIN DESTEXHE, RWANDA AND GENOCIDE IN THE TWENTIETH CENTURY 49 (Alison Marschner trans., 1995) (acknowledging that during the 1994 genocide, Tutsi corpses were in fact thrown into the Nyaborongo river).

²³ See, e.g., 3 RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 1081 (3d ed. 2003); Kenneth L. Marcus, *Accusation in a Mirror*, 43 LOY. U. CHI. L.J. 357, 357–59 (2012) (pointing to the discovery in the Butare prefecture in Rwanda of a note advising Hutus to accuse Tutsis of planning massacres as a means of facilitating the planned genocide).

²⁴ In its simplest sense, an enthymeme is a “portion[] of an argument [that is] . . . not expressed at all.” Stephen M. Rice, *Indispensable Logic: Using the Logical Fallacy of the Undistributed Middle as a Litigation Tool*, 43 AKRON L.R. 79, 90 n.36 (2010) (citing RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING 61 (3rd ed. 1997)).

²⁵ See Arthur B. Miller & John D. Bee, *Enthymemes: Body and Soul*, 5 PHIL. & RHETORIC 201, 201–11 (1972).

²⁶ See Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 984 (1996) (enthymematic rhetoric is strategically incomplete, that is, “any argument—valid or invalid, deductive or nondeductive—the logical form of which is not perspicuous from its original manner of presentation”).

²⁷ James H. McBurney, *The Place of the Enthymeme in Rhetorical Theory*, 3 SPEECH MONOGRAPHS, 49, 67–68 (1936) (The enthymeme “may be phrased in language designed to affect the emotional state of the listener, to develop in the audience a confidence in the speaker, or to establish a conclusion as being a probable truth.”); James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773, 814 (1995).

the era, however, Mugesera's address was recorded, copied, and later published in a Rwandan newspaper.²⁸

2. *Guy Bertrand's Speech*

The second speech, Guy Bertrand's conspiratorial yarn, was framed by the convention of a legal pleading, but it too recalled a deep and abiding tale, the pernicious myth of Jewish influence in a secular state.²⁹ Mugesera's motion seized on the presence of the Canadian Jewish Congress (CJC) as an intervener in the deportation appeal to make two claims. The first accused Canada's Minister of Justice, the Hon. Irwin Cotler, of orchestrating Mugesera's removal as the product of a 1999 human rights conference held at McGill Law School (convened by then-professor Cotler) to discuss genocide in comparative perspective. Bertrand's second claim was that the entire Canadian Supreme Court suffered from an apprehension of bias owing to the presence on the Court of Madame Justice Rosalie Abella.³⁰ Prior to Bertrand's submission, Justice Abella recused herself from considering the appeal because Justice Abella's husband once chaired the CJC.³¹ Bertrand's motion treated Justice Abella's decision as an admission of wrongdoing and included an affidavit submitted in support of the motion by James Kafieh, the former Chair of the Canadian Arab Federation, which declared that Justice Abella was a self-confessed member of the worldwide "Jew-diciary."³²

Bertrand's reference to Canadian Jewish organizations was intentionally opaque.³³ The submission juxtaposed an image of Mugesera and

²⁸ DES FORGES, *supra* note 4, at 84–86.

²⁹ This paper refers to the abuse of process motion as belonging to Bertrand. The Rwanda speech was Mugesera's alone; although in some sense Mugesera is responsible for both expressions. I distinguish the two stories by attributing responsibility for the Canadian pleading to Bertrand, the lawyer and immediate author of the motion.

³⁰ *Mugesera v. Canada*, [2005] 2 S.C.R. 91, 96 (Can.). Justice Abella's parents were Holocaust survivors and she is married to Professor Irving Abella, a historian of the Holocaust and the co-author of *NONE IS TOO MANY*, a chronicle of Canada's immigration policy toward European Jews in the period 1933–1948. See IRVING ABELLA & HAROLD TROPER, *NONE IS TOO MANY: CANADA AND THE JEWS OF EUROPE, 1933–1948* (1983).

³¹ *Mugesera*, [2005] 2 S.C.R. at 95. The CJC has a lengthy history of involvement in Canadian immigration proceedings involving accused Nazis. See, e.g., *Canada v. Tobias*, [1996] 2 F.C. 729, 736–37 (Can. Ott. T.D.).

³² Affidavit of M. James Kafieh, Citizenship and Immigration (Canada) v. Mugesera (Numéro de dossier 30025) (Nov. 19, 2004)

³³ The centerpiece of Bertrand's motion was a graphic that purported to detail a system of parallel justice. The exhibit presented an illustrated schema containing two flow-charts separated by a bright line. At the top of the chart, literally above-board, is a portrait of a well-dressed and smiling Mugesera family, as well as an organizational description of formal legal proceedings leading up to the Supreme Court hearing. The bottom half of the chart contains a second flow-chart asserting that prominent Canadian lawyers and others—virtually all of whom are Jewish—had engaged in a system of parallel justice. The alleged conspirators were connected to one another by their public and volunteer positions, as well as their attendance at the 1999 McGill conference. The line separating the two alleged systems of justice is captioned with

his children with the members of a supposedly vast conspiracy, a classic illustration of antilocution in practice.³⁴

In so doing, Bertrand engaged in a well-traveled form of hate speech, recycling the canard of the Jew as plotting outsider intent on using governmental power for nefarious purposes. Consciously or not, Bertrand's charge that a Jewish cabal intended to send the respondent's children to certain torture and death contained more than a hint of the infamous blood libel,³⁵ the false and enduring charge that Jews use the blood of Christians in religious ritual.³⁶ But that story is largely devoid of meaning in present day Canada since the audience for that message is generally not prepared to receive it. Unlike Mugesera's speech which enjoyed abiding significance before a crowd primed to see Tutsis as a threat, Bertrand's story had no moral to share and no enabling context.³⁷ Absent logos, ethos, or pathos, Bertrand's abuse of process motion confounded the justices because it failed to follow the outlines of a location-specific script.³⁸

the underlined, all caps warning, "*EXPULSION = TORTUES ET MORT*" (deportation = torture and death). A thick arrow with the words "*puissante influence . . . un processus obscur et politique*" (powerful influence . . . a dark and political process) points to the participants on the bottom half of the page to the Supreme Court hearing. Diagram purporting to illustrate the "Detrimental Influence to the Integrity of the Judicial Process, Intimate Human Rights, and the Reputation of the Canadian Justice System," Mugesera (Numéro de dossier 30025) (on file with author).

³⁴ GORDON ALLPORT, *THE NATURE OF PREJUDICE* 49–51 (1979) (defining "antilocution" to cover remarks against a person, group or community that are not addressed directly to the target).

³⁵ Bertrand's assertion echoed Louis-Ferdinand Céline's *Bagatelles Pour Un Massacre*, France's Dreyfus Affair and that strand of 1930s Québécois anti-Semitic expression better associated with Abbé Groulx. See generally ESTHER DELISLE, *THE TRAITOR AND THE JEW: ANTI-SEMITISM AND EXTREMIST RIGHT-WING NATIONALISM IN FRENCH CANADA FROM 1929–1939* (Madeline Hébert trans., 2d prtg., rev., 1993); GÉRARD BOUCHARD, *LES DEUX CHANOINES* (2003).

³⁶ Any echo of the blood libel, itself a story wrapped in law, is pregnant with meaning, for that form of vilification can "illustrate[] not only the complex sources of narrative plausibility but also the terrible power of imaginary, deeply ingrained narratives to drive human action." William H. Page, *Ideology and the Structures of Legal Narrative*, 68 *TUL. L. REV.* 1029, 1031 (1994) (reviewing RONNIE PO-CHIA HSIA, *TRENT 1475: STORIES OF A RITUAL MURDER TRIAL* (1992)); see also GEORGE L. MOSSE, *TOWARD THE FINAL SOLUTION: A HISTORY OF EUROPEAN RACISM* 87 (1978) (describing the persistent force of Ernst Haeckel's claim of Aryan racial supremacy in *Riddles of the Universe* on Nazi thought).

³⁷ Malcolm Gladwell cites psychologist Robert Sternberg's conception of "practical intelligence" for the notion that convincing orators know what to say to whom, when to say it, and how to express their thoughts for maximum effect. MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS* 101 (2008); see also, ROBERT J. STERNBERG, *WISDOM, INTELLIGENCE, AND CREATIVITY SYNTHESIZED* (Cambridge Univ. Press 2003).

³⁸ See MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* 10 (2d ed. 2008) (noting that persuasive writing employs elements of logos, pathos, and ethos, the ability to persuade by establishing credibility in the eyes of one's audience).

B. *The Logic of Stories*

1. *Individual Stories*

A growing body of interdisciplinary literature attests to the cultural significance of stories, a term perhaps best defined as a character-based telling of efforts, over time, to reach a goal.³⁹ “At the very least, a story needs a protagonist, an antagonist, and a difficult challenge to overcome.”⁴⁰ It is through stories that myths and parables are told and retold, that meaning is communicated and epistemic communities founded. Stories, according to Kendall Haven, are more effective and powerful than any other narrative structure; stories always have a message and readily conjure understanding in a reader, viewer, or listener’s mind. “[H]uman minds . . . rely on stories and on story architecture as the primary roadmap for understanding, making sense of, remembering, and planning our lives—as well as the countless experiences and narratives we encounter along the way.”⁴¹ The best stories have

an initial state or setting (“Once upon a time . . .”), protagonists, a problem that sets up what will be the central plot or story line, obstacles that stand in the way, often a clash between the protagonists trying to solve the problem and those who stand in their way or fail to help, and a denouement, in which the problem is ultimately resolved⁴²

Through this narrative structure, Haven claims, human beings perceive, think, and learn.⁴³

Stories animate human life in a way that bare facts cannot.⁴⁴ But even as stories promote personal vindication and potential reappropriation for the disempowered, there is nothing sacred to the form. False stories are difficult to repudiate, particularly when they are decontextualized or appear without immediate explanation. Daniel Farber and Suzanna Sherry have recognized that the rhetorical form of stories

can “tak[e] the other in, deflecting her on unacknowledged, perhaps deliberately hidden grounds.” . . . Thus, the accounts may be mistaken or distorted. Stories tend to “favor those who are near at hand,” ignoring more distant voices. Sometimes the deception,

³⁹ KENDALL HAVEN, *STORY PROOF: THE SCIENCE BEHIND THE STARTLING POWER OF STORY* 79 (2007).

⁴⁰ Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 886 (2010) (using creation stories and rescue stories to illustrate how legal arguments are informed by myths, parables, and other culturally pervasive stories); see also, THOMAS KING, *THE TRUTH ABOUT STORIES* (2005) (describing the interplay between stories and personal identity).

⁴¹ HAVEN, *supra* note 39, at vii.

⁴² DREW WESTEN, *THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION* 146 (2007).

⁴³ HAVEN, *supra* note 39, at vii.

⁴⁴ JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 281 (2012) (“The human mind is a story processor, not a logic processor.”).

whether intentional or not, is the result of treating complex human dramas as morality plays. Occasionally, it stems from willful ignorance.⁴⁵

In Peter Brooks' elegant formulation, "storytelling is [therefore] a moral chameleon, capable of promoting the worse as well as the better cause every bit as much as legal sophistry. It can make no superior ethical claim. It is not, to be sure, morally neutral, for it always seeks to induce a point of view."⁴⁶

Whether just or not, a well-told story makes a claim on the audience. "When you share a story, you will spark a story," communications expert Thaler Pekar writes, "it is an emergent form of communication, possessing the ability to tap into the experiences of your listener. You can connect seemingly abstract, new information to your listener's existing web of knowledge."⁴⁷ Story sharing is therefore a transactional process since listeners affect tellers and tellers affect listeners, and the impact of stories can be judged by how stories are received and the degree of audience participation.⁴⁸ Effective stories encourage empathy, working their way into the psyche of listeners.⁴⁹ Close readers are implicated by the scaffolding of stories and find that it is difficult to escape or forget what they have read. Stories also convey individual wisdom through means that permit the author or speaker to honor particular perspectives and to weave roles, emotion, and connections into the telling.⁵⁰ Toni Massaro suggests a typology of stories that includes:

⁴⁵ Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 852–53 (1993) (arguing against the liberatory nature of the form) (footnotes omitted).

⁴⁶ Peter Brooks, *The Law as Narrative and Rhetoric*, in LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW, *supra* note 14, at 14, 16.

⁴⁷ Thaler Pekar, *Why Story Matters*, STAN. SOC. INNOVATION REV. BLOG (Dec. 28, 2011), http://www.ssireview.org/blog/entry/why_story_matters.

⁴⁸ Paul Gewirtz, *Victims and Voyeurs: Two Narrative Problems at the Criminal Trial*, in LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW, *supra* note 14, at 135, 144.

⁴⁹ Harlon L. Dalton, *Storytelling on Its Own Terms*, in LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW, *supra* note 14, at 57, 57–58 (describing the suspension of judgment when listening to a good story).

⁵⁰ Narrative functions as a synonym for story but a more accurate definition for the term is the way in which events are organized or how a story is told. Narrative embodies description, repetition, and passion, all infused with the author's or speaker's perspective and editorial choices. The creation of any narrative involves the mediation, muting, or amplification of details. Seymour Chatman, *What Novels Can Do that Films Can't (and Vice Versa)*, in FILM THEORY AND CRITICISM: INTRODUCTORY READINGS 435, 435–36 (Leo Braudy & Marshall Cohen eds., 5th ed. 1999) ("[A]ll narratives, in whatever medium, combine the time sequence of plot events, the time of the *histoire* ('story-time') with the time of the presentation of those events in the text, which we call 'discourse-time.' What is fundamental to narrative, regardless of medium, is that these two time orders are independent."). In the thick description of narrative, words "evok[e] histories, giving expression to social and cultural influences, arising from and expressing a specific politics, and fusing a normative vision with the materiality of the real world." Muneer I. Ahmad, *Resisting Guantánamo*:

stories that bridge, providing connections between people of different experience, stories that explode (like grenades) certain ways of thinking, stories that mask, devalue, or suppress other stories, stories that consolidate, validate, heal, and fortify (like therapy), and even stories that maim or “spirit murder” and so should not be told at all.⁵¹

Words and phrases, particularly performative utterances, can haunt listeners. And as psychologist Timothy Jay argues, not all words are equal. Like some stories, taboo words are “internalize[d] . . . at a personal level. Indeed we learn not to use them when we are punished by caregivers.”⁵² Yet unlike forceful words or collections thereof, stories are important because they are remembered whereas other forms of narrative ordering are not. Indeed, the growing consensus among cognitive researchers is that stories “are our earliest sciences” and that we crave the packaging of information more than the specifics.⁵³

2. *Group Stories*

In the same way that stories contain and present our beliefs and knowledge about the world, the act of storytelling is central to memory and the perpetuation of culture.⁵⁴ Stories trigger prior knowledge as they serve to create involvement and a sense of community. Within groups, many stories are borrowed, elaborated upon, and reconfigured to reflect new struggles.⁵⁵ Stories also build solidarity among group members, providing psychological support and strengthening the bonds of identity.

Rights at the Brink of Dehumanization, 103 Nw. U. L. REV. 1683, 1694 (2009); see also Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2228 (1989) (“[Through] 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. . . .”).

⁵¹ Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2104 (1989) (footnotes omitted).

⁵² Timothy Jay, *The Utility and Ubiquity of Taboo Words*, 4 PERSP. ON PSYCHOL. SCI. 153, 153 (2009).

⁵³ Jag Bhalla, *It Is in Our Nature to Need Stories*, SCI. AM. (May 8, 2013), <http://blogs.scientificamerican.com/guest-blog/2013/05/08/it-is-in-our-nature-to-need-stories/>.

⁵⁴ See STEVEN PINKER, *THE LANGUAGE INSTINCT* 363–64 (1995); Julie Cruikshank, *Oral Tradition and Oral History: Reviewing Some Issues*, 75 CAN. HIST. REV. 404, 405 (1994) (describing the significance of oral narratives to indigenous traditions).

⁵⁵ Linguistic borrowing can also produce profound resentment. See Emily Apter, *Balkan Babel: Translation Zones, Military Zones*, 13 PUB. CULTURE 65, 73 (2001) (“In that great and strange struggle, which had been waged in Bosnia for centuries between two faiths, for land and power and their own conception of life and order, the adversaries had taken from each other not only women, horses and arms but also songs. Many a verse passed from one to the other as the most precious of booty.”) (quoting IVO ANDRIĆ, *THE BRIDGE ON THE DRINA* 132 (Lovett F. Edwards trans., Dereta 2011) (1945)).

Aboriginal stories, told and retold by elders, encode norms and communicate lessons by reference to collectivity-forming myths.⁵⁶

As an act of resistance, a story or parable can subvert the received wisdom and shared understandings in which legal and political discourse occurs.⁵⁷ Many communities define their identity in opposition to dominant stories and the attendant parables of resistance can be forceful markers of collective consciousness. Alternative “interpretive communities”—insular religious groups, marginalized peoples, and societal newcomers—promote narratives that are critical to the identity of members.⁵⁸ Richard Delgado calls this habit “counter-hegemonic” storytelling and suggests that it can be part of a cure for oppressive mentalities.⁵⁹ The most famous of these oppositional stories have been reduced to text and have developed iconic status: Dr. Martin Luther King Jr.’s *Letter from Birmingham Jail*⁶⁰ and the Passover Haggadah both represent ritualized stories of principled defiance and transcendence.⁶¹

Certain stories are central to the formation and perpetuation of communal identity. As Fernand Dumont argued, people are brought together by common symbolic references, expressed in shared narratives. Utilizing narrative-identity knowledge, many communities “assess[] and react[] to contemporary socio-political events” through stories that speak to some groups but not to others.⁶² When deployed in this fashion, storytelling is a survival strategy and an exercise in myth-making. In Angela Harris’s persuasive analysis, such stories create “a new collective subject

⁵⁶ See Karl-Erik Sveiby, *Collective Leadership with Power Symmetry: Lessons from Aboriginal Prehistory*, 7 LEADERSHIP 385, 387 (2011) (describing how the First Peoples of Australia inscribed their law through short, orally delivered stories); M. Alexander Pearl, *Of ‘Texans’ and ‘Custers’: Maximizing Welfare and Efficiency Through Informal Norms*, 19 ROGER WILLIAMS U. L. REV. 32 (2014).

⁵⁷ Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1989).

⁵⁸ Cover, *supra* note 14, at 42. Cover referred to the use of counternarratives as a “hermeneutics of resistance or of withdrawal.” *Id.* at 53.

⁵⁹ Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systematic Social Ills?*, 77 CORNELL L. REV. 1258, 1276 n.143 (1992).

⁶⁰ See David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2187 (1989).

⁶¹ Jonathan Safran Foer, *Why a Haggadah?*, N.Y. TIMES, Apr. 1, 2012, at SR10 (“Though it means ‘the telling,’ the Haggadah does not merely tell a story: it is our book of living memory. It is not enough to retell the story: we must make the most radical leap of empathy into it. ‘In every generation a person is obligated to view himself as if he were the one who went out of Egypt,’ the Haggadah tells us.”).

⁶² See Jean-Francois Gaudreault-DesBiens, *The Quebec Secession Reference and the Judicial Arbitration of Conflicting Narratives about Law, Democracy and Identity*, 23 VT. L. REV. 793, 798 (1999) (citing FERNAND DUMONT, GENÈSE DE LA SOCIÉTÉ QUÉBÉCOISE 16 (1993)); see also Jean-François Gaudreault-DesBiens, *The Fetishism of Formal Law and the Fate of Constitutional Patriotism in Communities of Comfort: A Canadian Perspective*, in THE TIES THAT BIND: ACCOMMODATING DIVERSITY IN CANADA AND THE EUROPEAN UNION 301, 301–30 (John-Erik Fossum et al. eds., 2009).

with a history from which individuals can draw to shape their own identities.”⁶³

Just as individual storytelling sometimes proceeds from false premises, however, the narratives that bind groups together can be catastrophic. Mugesera’s speech represents the tragic denouement of collective storytelling precisely because of the subject matter of his address, his use of history and the way he fostered fear and resentment in his audience.⁶⁴

As journalist Linda Melvern describes the Rwandan colonial endeavor,

In 1933 the Belgian administration [of the Great Lakes region] organised a census. Teams of Belgian bureaucrats arbitrarily classified the whole population as Hutu, Tutsi or Twa, giving everyone an identity card with the ethnic grouping clearly marked. Every Rwandan was counted and measured: the height, the length of their noses, the shape of their eyes.⁶⁵

Belgian colonists solidified the minority Tutsis as a ruling administrative class, a process that marginalized persons identified as Hutu. Enshrined in the 1926 Morthan Law, the Tutsis’ hierarchical position vis-à-vis Hutus meant that by the time Belgium formally withdrew from Rwanda in 1959, 43 chiefs out of 45 were Tutsi, as well as 549 sub-chiefs out of 559.⁶⁶ Belgian administrators, like the German colonists before them, embraced myths related to the source of the Nile and supposed non-native character of certain populations in the area. In this story, Josias Semujanga observes, Rwandan Tutsis “were not indigenous, but rather descendants of Ham, the son of Noah who went south to bring civilization to the ‘inferior races’ of the black continent.”⁶⁷ Little wonder that in 1957 a group of Rwandan intellectuals published the “Bahutu Manifesto” decrying the humiliation and socioeconomic subordination of the Hutu community.⁶⁸ In 1962, following three transition years marked by reciprocal ethnic massacres that displaced large numbers of Tutsis, deep-seated Hutu grievances propelled Grégoire Kayibanda to the Presidency of newly independent Rwanda. Many of the one-time Tutsi elites dispersed to Uganda, Burundi, Tanzania and Zaire where they organized as political parties in exile.⁶⁹

⁶³ Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 764 (1994); see also William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 608 (1994) (arguing that stories of what it means to be gay and lesbian help individual gay and lesbian people locate themselves within a community and give the gay and lesbian community a collective sense of identity).

⁶⁴ See TESIS, *supra* note 18, at 99–101 (examining the danger posed by the undifferentiated blame of an entire ethnic group and the tactic of employing degrading slurs to amplify blame and vilification).

⁶⁵ LINDA MELVERN, *CONSPIRACY TO MURDER: THE RWANDAN GENOCIDE* 5–6 (2004).

⁶⁶ GÉRARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 27 (1995).

⁶⁷ JOSIAS SEMUJANGA, *ORIGINS OF RWANDAN GENOCIDE* 139 (2003).

⁶⁸ *Id.* at 151.

⁶⁹ *Id.* at 16.

By recalling the expulsion of Tutsis, Mugesera retold the myth of national origin that forms the basis for both real and imagined Hutu communities.⁷⁰ Mugesera declared that it had been a terrible mistake for his audience to allow remaining Tutsis to survive in a Rwanda governed by majority Hutu rule, and in so doing, he triggered the communal memory of his audience.⁷¹ The speech alternated between selective historic references and vivid detail in a style that provided context for past grievances and granted verbal permission to engage in future killing.⁷² “Do not be afraid, know that anyone whose neck you do not cut is the one who will cut your neck,” Mugesera thundered, “Let me tell you, these people should begin leaving while there is still time”⁷³

Powerful speakers have long engaged in these kinds of collective story-based assaults; in both Nazi Germany and the former Yugoslavia, the consequences of storytelling and story-consumption were deadly.⁷⁴ At Nuremberg, Julius Streicher, the notorious publisher of *Der Stürmer*, was convicted of inciting hatred and discrimination. The Tribunal held that Streicher used the newspaper to dehumanize Jews while simultaneously desensitizing the German public to increasingly vitriolic condemnation. “The aim of *Der Stürmer* was to attack, denounce, and promote discrimination against Jews in every way possible,” the Tribunal found before sentencing Streicher to die for his crimes.⁷⁵

Fifty years later, Slobodan Milosevic was indicted and tried for the commission of crimes against humanity and war crimes at the International Criminal Tribunal for the former Yugoslavia (ICTY).⁷⁶ The ICTY indictment accused Milosevic of encouraging, enabling and failing to prevent his forces from committing atrocities in Kosovo, all acts which relied critically on a story of glorified Serbian identity and the alien Muslim. Long before the violent dissolution of Yugoslavia, Milosevic paid a visit to Kosovo in which he began to develop his mythic tale of an exclusively Serbian “people.” In a speech outlining the Serbian claim to Koso-

⁷⁰ See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 37–39 (1991) (theorizing that the rise of vernacular and print capitalism tied the people of early modern Europe together such that nationalism could become possible).

⁷¹ GOUREVITCH, *supra* note 1, at 97.

⁷² See JAMES WALLER, *BECOMING EVIL: HOW ORDINARY PEOPLE COMMIT GENOCIDE AND MASS KILLING* 238–71 (2002).

⁷³ *Mugesera v. Canada*, [2005] 2 S.C.R. 100, 186 (app. III) (Can.).

⁷⁴ See DES FORGES, *supra* note 4, at 84; Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT’L L. 485, 503 (2008) (noting Slobodan Milosevic’s reference to Bosnian Muslims as “black crows” and the Nazi propaganda that called Jews “germs, pests and parasites”).

⁷⁵ Martin Imbleau, *Der Stürmer*, in 1 *ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY* 247–49 (Dinah L. Shelton ed., 2005); Audrey Golden, *Monkey Read, Monkey Do: Why the First Amendment Should Not Protect the Printed Speech of an International Genocide Inciter*, 43 WAKE FOREST L. REV. 1149, 1162 (2008).

⁷⁶ *Prosecutor v. Milosevic*, Case No. IT-01-51-I, Indictment, ¶ 1 (Int’l Crim. Trib. for the former Yugoslavia Nov. 22, 2001).

vo, Milosevic made use of the suppressed enthymematic premise by appealing to the ‘topos’ (a place, metaphorically, shared in the collective consciousness of the audience) of his followers.⁷⁷ According to Christina Morus, “Speaking near Kosovo Polje, Milosevic invoked the Serbian mythology that portrayed Kosovo as the historic homeland of the Serbs that was taken from them by the Turks in the ultimate mytho-historic tragedy.”⁷⁸ Milosevic placed the legendary 1389 Battle of Kosovo Polje—a Turkish victory over Serbian “martyrs”—at the center of his rhetorical strategy.⁷⁹ Milosevic soon developed an applause-line about Serbian resistance and a claim to contested lands, a story he sold successfully to a receptive Serbian media.⁸⁰ The ethnonationalist identity created by Milosevic’s speech was not formed from scratch but was “based on existent subjectivities that ha[d] in some way lost their force,” characters in a nearly forgotten tale.⁸¹ Indeed, Milosevic’s story-formation was so powerful that when Michael Ignatieff asked Serbs and Croats in the former Yugoslavia to explain their grievances, he was uncertain whether their answers related to present-day problems or stories rooted in the fourteenth century.⁸²

Like Streicher and Milosevic, Mugesera told a story that operated on the ethnic fault lines of society. Through repetition, demonization, and the use of specific references to a contested history, Mugesera summoned the invented Tutsi/Hutu differences that have defined Rwandan culture since the colonial era.⁸³ Drawing on this past, Mugesera’s 1992 warning of a looming Tutsi invasion both revisited prior subjugation and anticipated a future reckoning.⁸⁴ Mugesera’s narrative, like all effective stories, occurred against the backdrop of established knowledge structures, including folktales, metaphors, and allegory that create the environment in which events and ideas are interpreted.⁸⁵ This is the force of collective

⁷⁷ Ted Dyck, *Topos and Enthymeme*, 20 RHETORICA 105, 106 (2002).

⁷⁸ Christina M. Morus, *Slobo the Redeemer: The Rhetoric of Slobodan Milosevic and the Construction of the Serbian “People”*, 72 S. COMM. J. 1, 9 (2007).

⁷⁹ *Id.* at 3–10.

⁸⁰ Agneza Bozic-Roberson, *Words Before the War: Milosevic’s Use of Mass Media and Rhetoric to Provoke Ethnopolitical Conflict in Former Yugoslavia*, 38 E. EUR. Q. 395, 396–97 (2004).

⁸¹ Morus, *supra* note 78, at 7.

⁸² See MICHAEL IGNATIEFF, *BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM* 19–56 (1993).

⁸³ See generally GERALD CAPLAN, *THE BETRAYAL OF AFRICA* (2008).

⁸⁴ Mugesera’s speech recalled historic resentments of the Hutu community, despite the fact that Hutus controlled virtually every facet of Rwandan society under both Presidents Kayibanda and Juvénal Habyarimana, who ruled from 1973 until his assassination in April 1994. *Broadcasting Genocide: Censorship, Propaganda & State-sponsored Violence in Rwanda 1990–1994*, ARTICLE 19, at 5–19 (Oct. 15, 1996), available at <http://www.article19.org/pdfs/publications/rwanda-broadcasting-genocide.pdf>.

⁸⁵ For example, see Michael Polanyi’s notion of “tacit knowledge.” MICHAEL POLANYI, *THE TACIT DIMENSION* 4 (1967); Mark K. Smith, *Michael Polanyi and Tacit*

memory in which a community's remembrance of selective incidents influences the manner in which it perceives itself.⁸⁶ As Linda Berger observes,

once a story is embedded in tradition and culture, the die is cast and you no longer have to tell the tale, you can simply use the name of the character or the title of the story as a metaphor, and the plot, characters, and moral will follow, appearing to be logical entailments.⁸⁷

In this vein, Mugesera's story of exile, return, and domination fit comfortably within a template known to audience and speaker alike.

3. *National Storytelling*

Nations tell stories too. The process of telling sacred and quasi-sacred histories produces stories about law and law about stories. The foundational stories of states embody communal norms that are the product of hard experience and particular traditions. Robert Cover taught that what is said and unsaid in the public arena is intimately connected to the myths and texts that form the ideology of the modern state.⁸⁸ In this respect, laws governing speech and silence reflect the exercise of power and socially constructed meaning.⁸⁹

Referring to the United States, Cover declared, "Many of our necessarily uncanonical historical narratives treat the Constitution as foundational—a beginning—and generative of all that comes after . . . it is a center about which many communities teach, learn, and tell stories."⁹⁰ The creation of legally dominant stories places alternative understandings in opposition to both the law and the state. When written, Constitutions cement collective understandings. In this universe, there can be no plurality of official narratives, no multiplicity of jurisgenerative activity, and no genuine dispute between meanings.

Knowledge, INFED.ORG (2003), <http://infed.org/mobi/michael-polanyi-and-tacit-knowledge/>.

⁸⁶ Gaudreault-DesBiens, *supra* note 62, at 797 (describing memory as the subjective interpretation of past events, elaborated over time, and which sheds light on current events).

⁸⁷ Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 269 (2009).

⁸⁸ Robert Cover wrote three articles that involved some element of story: *Nomos and Narrative*, *The Folktales of Justice: Tales of Jurisdiction*, and *Violence and the Word*. See Michael Ryan, *Meaning and Alternity*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 267, 268 (Martha Minow et al. eds., 1993) ("For every constitution, there is an epic, Cover writes, yet we are taught to think of such imposed stories as ideology, the deployment in culture of ideals of submission and obedience that make power more economical by making expenditures of violence less necessary.").

⁸⁹ Cover famously argued that as specific communities and movements develop challenges to the unity of legal meanings, law becomes "jurispathic," destroying alternate understandings. Cover, *supra* note 14, at 40.

⁹⁰ *Id.* at 25.

National epics are constitutive and explain the practice of story regulation, a sphere in which law has chased language for centuries. Speech controls thus confer legitimacy on some narratives at the expense of others. The subject matter and level of protection afforded free speech nationally differs considerably across sovereign states, even among democracies with similar legal traditions.⁹¹ In support of this observation, Vicki Jackson's comprehensive study demonstrates that "national legal cultures . . . 'express' themselves in the contours of what 'expression' they protect and what they do not, in ways that may confound conceptual or functional comparisons."⁹² While some commonalities exist, exhortation to immediate violence is almost universally prohibited whereas conversations of a private nature are usually unregulated, globally there is no harmonization of speech standards.⁹³ In many states, particular forms of storytelling, either generally or as related to specific historical events, are illegal. This practice extends to the expression of identifiable words or the depiction of certain images that fall far short of incitement to genocide. Even where the operation of a governing constitution or legislation purports to respect freedom of expression, the suppression or criminalization of local speech by municipal or domestic authorities is commonplace.

However, since the stories subject to control vary dramatically from state to state, and relatively few instances of communication are in fact forbidden, the question arises why some forms of expression provoke legal sanctions where others do not. Across cultures, master stories provide an explanation for a society's choice to police language. I use the term "master story" consciously; it describes the way in which certain tales and semantic constructions serve as a touchstone for political communities.⁹⁴

⁹¹ See Kevin Boyle, *Hate Speech—The United States Versus the Rest of the World?*, 53 ME. L. REV. 487 (2001).

⁹² VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 187 (2010); see also DEBORAH E. LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY (1994) (asserting that Holocaust denial laws have a particular resonance for Germany and Austria that does not exist elsewhere).

⁹³ See Friedrich Kübler, *How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights*, 27 HOFSTRA L. REV. 335, 369 (1998). The disagreement of what to regulate stems from radically different conceptions of what hate speech is and what its effects are; see also THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES (Michael Herz & Peter Molnar eds., 2012).

⁹⁴ My use of the term 'master story' is informed by the notion of a master image. See JOSEPH MCBRIDE, STEVEN SPIELBERG: A BIOGRAPHY 17 (2010) (defining a master image as a single snapshot that encompasses the essence of the film). See also Drew Westen's construct of a 'master narrative' necessary to communicate coherent political messages. WESTEN, *supra* note 42, at 301–02. The phrase 'master story' is also used by Michael Goldberg. Michael Goldberg, *Against Acting 'Humanely'*, 58 MERCER L. REV. 899, 905 (2007); see also Berger, *supra* note 87, at 268 ("Michael Goldberg uses the phrase 'master story' to identify a narrative that embodies the history and traditions of a people."). For an illustration of how a head of state can promote the adoption of an expanded master story, see, President Barack H. Obama, 2013 Presidential Inaugural Address, Washington, D.C. (Jan. 21, 2013) ("We, the people,

Master stories define national cultures and situate individuals within rich social constructs. They are the product of founding bargains, consistent interpretations and/or violence that has ruptured the nation's historic frame.⁹⁵

Master stories derive their dominant character through the interaction of public tellings and legal institutions. The use of governmental power invests selective stories, memories, and experiences with the authority of the state.⁹⁶ Without discounting the importance of oral traditions or the strength of fables that are passed from generation to generation, only the force of law, sometimes exercising coercive power to solidify unstable narratives, can convert select discussions and silences, but not others, into master stories. In the absence of legal codification, founding fictions and other cultural texts are subject to a broad range of interpretation.⁹⁷ And when every story is treated equally, as in an anti-discrimination regime that reduces all forms of oppression and resistance to a common framework, there is no way of distinguishing one from another.⁹⁸ Master stories therefore do more than create individual and collective consciousness—they wed law and narrative to institutionalize social meaning.

Master stories also require a believable narrative that resonates for the nation as a whole (they cannot be too geographically-specific or selectively meaningful). The contrast “between those whose self-believed stories are officially approved, accepted, transformed into fact, and those whose self-believed stories are officially distrusted, rejected, found to be untrue, or perhaps not heard at all,” in Kim Lane Scheppele's analysis,

declare today that the most evident of truths—that all of us are created equal—is the star that guides us still; just as it guided our forebears through Seneca Falls and Selma and Stonewall; just as it guided all those men and women, sung and unsung, who left footprints along this great Mall, to hear a preacher say that we cannot walk alone; to hear a King proclaim that our individual freedom is inextricably bound to the freedom of every soul on earth.”).

⁹⁵ Sociologist Fernand Dumont employed the term “reference identity” (*reference identitaire*) to connote the set of identity-centered discourses as “ideology, historical memory [and] literary imagination” that inform a political community's self-definition. FERNAND DUMONT, *GEN SE DEL LA SOCIETE QUEBECOISE* 16 (1993).

⁹⁶ This observation builds on the work of critical race theorists who have long identified the importance of “subject position,” storytelling and the relationship of voice to power. See *THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY* (Laura J. Lederer & Richard Delgado eds., 1995); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 1–11 (1991) (exposing the way dominant narratives create seemingly objective “facts”); Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Critics?*, 93 *Geo. L.J.* 575, 586–87 (2005); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 *HARV. C.R.-C.L. L. REV.* 133, 135–36 (1982).

⁹⁷ See, e.g., Patrick Hanafin, *Constitutive Fiction: Postcolonial Constitutionalism in Ireland*, 20 *PENN. ST. INT'L L. REV.* 339 (2002).

⁹⁸ See, e.g., Anna Chapman & Kathleen Kelly, *Australian Anti-Vilification Law: A Discussion of the Public/Private Divide and the Work Relations Context*, 27 *SYDNEY L. REV.* 203, 203–04 (2005).

differentiates master stories from tales that resonate for some groups, but not others.⁹⁹

Lastly, master stories need a heuristic vitality that extends beyond mythology. They must be retold over time in order to work their way into institutional form as well as a society's collective consciousness. Literary critic Homi Bhabha has argued that "nations, like narratives, lose their origins in the myths of time and only fully realize their horizons in the mind's eye."¹⁰⁰ Those horizons, the contours of what constitutes a state, are shaped by living stories and crystallized in the form of statutes and other legal reminders. At the level of constitution drafting and the creation of institutional meaning, Frederic Schauer is surely right that the legalization of certain stories is "dependent on a cultural categorization of particular events that varies with cultural experience and cultural history."¹⁰¹ The passage of time acts to fix master stories in the state's collective identity.

C. *Master Stories in Comparative Perspective*

For the many European states once subjected to Nazi occupation and eliminationist policies, much of the public discourse surrounding the Holocaust is now governed by law. The Nazi Party has been outlawed in Germany and Austria.¹⁰² In France, the sale of Nazi paraphernalia is banned, a prohibition that extends to flags, swastikas, images of Adolph Hitler, and copies of *Mein Kampf*.¹⁰³ Dutch and German legislation forbids

⁹⁹ Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2079 (1989).

¹⁰⁰ Homi K. Bhabha, *Introduction: Narrating the Nation*, in NATION AND NARRATION I (Homi K. Bhabha ed., 1990).

¹⁰¹ Frederic Schauer, *Free Speech and the Cultural Contingency of Constitutional Categories*, 14 CARDOZO L. REV. 865, 877 (1993). Concretely, the operation of Indonesia's criminal blasphemy law, in effect since 1965 in a country of more than 200 million Muslims and enshrined in Article 156(A) of the Penal Code, tells a different story than the legal response to the 2002 Bali bombings, however significant the attack may have been. Article 156(A) of Indonesia's Penal Code is based on Law No. 1/PNPS/1965; it assigns up to five years in prison for anyone who "deliberately in public gives expression to feelings or commits an act: a) which principally ha[s] the character of being at enmity with, abusing or staining a religion, adhered to in Indonesia; or b) with the intention to prevent a person to adhere to any religion based on the belief of the almighty God." Penal Code of Indonesia (Directorate General of Law and Legislation ed., 1999) Chapter V, Article 156 (a), available at <http://www.humanrights.asia/countries/indonesia/laws/legislation/PenalCode.pdf/view>.

¹⁰² Strafgesetzbuch [StGB] [Penal Code], Nov. 13, 1998, Bundesgesetzblatt, [BGBl. I] 3322, amend., § 130, para. 3, (Ger.) (criminalizing the Nazi party and other activities); Österreich, STAATSGESETZBLATT [StGBL] Nr. 13/1945, amended version BUNDESGESETZBLATT [BGBl] Nr. 148/1992, (Mar. 19, 1992) (Austria), available at www.ris.bka.gv.at/Dokumente/BgblPdf/1992_148_0/1992_148_0.pdf (criminalizing the National-Socialist German Workers' Party, which forms the legal basis for prosecution of racist actions and incitements of the Nazi ideology).

¹⁰³ BENJAMIN N. CARDOZO SCHOOL OF LAW, HEALING THE WOUNDS: SPEECH, IDENTITY & RECONCILIATION IN RWANDA AND BEYOND (2010), <http://migs.concordia.ca/links/documents/RwandaFinalHealingtheWoundspdf.pdf>; see

dissemination of racist and anti-Semitic pamphlets, laws which have withstood scrutiny from domestic courts and the now-defunct European Human Rights Commission.¹⁰⁴

Likewise, in South Africa, the legacy of apartheid and its subsequent repudiation represents a master story, now reflected in the multiple equality guarantees of the nation's legal framework and the authoritative account of statist oppression provided by the six volumes of the country's Truth and Reconciliation Commission.¹⁰⁵ That story is told repeatedly in the 1996 Constitution which begins in the Preamble with, "We, the people of South Africa, Recognise the injustices of our past . . ." ¹⁰⁶ To educate the next generation of South Africans about the horrors of apartheid, the country's new Constitutional Court was built with bricks of the adjacent Old Fort Prison Complex in Johannesburg. Tour guides there recount the story of Mahatma Gandhi's and Nelson Mandela's unjust incarceration at the notorious facility.¹⁰⁷ South Africa's equality narrative is strong enough that Julius Malema, the popular and influential one-time head of the African National Congress youth wing, was recently convicted of hate speech for singing a song called "Shoot the Boer."¹⁰⁸

In Algeria, Pakistan, Saudi Arabia, Sudan, and Nigeria, master stories criminalize insults to Allah and other forms of "blasphemy" directed to holy personages, religious artifacts, and other expressions and customs of the Muslim faith.¹⁰⁹ To enforce the law of the Kingdom, Saudi Arabia recently requested that Malaysia arrest and deport Saudi journalist Hamza Kashgari for his writing about an imaginary meeting with the Prophet Muhammad in a series of posts on Twitter.¹¹⁰

Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisemitisme, 379 F.3d 1120, 1122 (9th Cir. 2004) *rev'd on reh'g en banc*, 433 F.3d 1199 (9th Cir. 2006).

¹⁰⁴ See *X v. Federal Rep. of Germany*, App. No. 9235/81, 29 Eur. Comm'n H.R. Dec. & Rep. 194, 198 (1982); *Glimmerveen v. Netherlands*, App. No. 8348/78, 18 Eur. Comm'n H.R. Dec. & Rep. 187, 188-97 (1979); see also *Witzsch v. Germany*, App. No. 7485/03, Eur. Ct. H.R. (2005).

¹⁰⁵ 6 TRUTH AND RECONCILIATION COMM'N OF SOUTH AFRICA REPORT (2003), produced pursuant to the Promotion of National Unity and Reconciliation Act, No. 34 of 1995.

¹⁰⁶ S. AFR. CONST., 1996, pmbli; see also Albie Sachs, *Post-Apartheid South Africa: A Constitutional Framework*, 6 WORLD POL'Y J. 589, 592-600 (1989).

¹⁰⁷ *About the Court*, CONSTITUTIONAL COURT OF SOUTH AFRICA, <http://www.constitutionalcourt.org.za/site/thecourt/thebuilding.htm>.

¹⁰⁸ Alan Cowell, *ANC Official Convicted of Hate Speech*, N.Y. TIMES, Sept. 13, 2011, at A8.

¹⁰⁹ Article 144 bis 2 of the Algerian Penal Code provides an example of the prohibition on insults against Islam or the Prophet Muhammad: "[M]ost blasphemy cases are brought under this provision, usually against nonpracticing Muslims or those failing to adhere to the state-sanctioned interpretation of Islam." FREEDOM HOUSE, POLICING BELIEF: THE IMPACT OF BLASPHEMY LAWS ON HUMAN RIGHTS 13 (2010).

¹¹⁰ See Liz Gooch, *Saudi Writer Is Deported Over Posts on Prophet*, N.Y. TIMES, Feb. 13, 2012, at A4.

Thailand, for its part, provides a secular analog by banning overt criticism of the King in its 2007 Constitution, a master story in the form of a person.¹¹¹ Spain too passed a 2007 law recognizing and enlarging the rights of victims of the Spanish civil war and dictatorship and establishing measures in their favor, a law that appears to legitimate the suffering of victims in a highly contested history (*Ley de Memoria Histórica*).¹¹² Japan's Constitution, written by lawyers for the victorious Allied forces, makes explicit reference to the nation's history of aggressive militarism by prohibiting the use of force to wage war against other states.¹¹³

Canada's master story involves language and the ongoing relationship between the use, promotion or subjugation of French and English.¹¹⁴ Language has been the defining characteristic of the Canadian experiment; it is linguistic accommodation that is enshrined in the Canadian Charter of Rights and Freedoms above all else, and the special status of language rights distinguishes Canada's anti-discrimination framework.¹¹⁵ Even before Canada had achieved independence, ministers from English-speaking Upper Canada rebuked French-Canadians from Quebec for speaking French in the Colonial Assembly.¹¹⁶ The British North America Act of 1867 enshrined Quebec's right to a civil code but failed to dispel Quebecois suspicions of second-class citizenship, notwithstanding the Section 93 guarantee of free, public Catholic education.¹¹⁷ So deep are resentments that the province's first sovereigntist Premier, René Lé-

¹¹¹ Section 8 of the 2007 Constitution of Thailand provides, "The King shall be enthroned in a position of revered worship and shall not be violated. No person shall expose the King to any sort of accusation or action." CONST. [BE] (2007), sec. 8 (Thai).

¹¹² Emanuela Fronza, *The Criminal Protection of Memory: Some Observations About the Offence of Holocaust Denial*, in GENOCIDE DENIALS AND THE LAW 155, 157 (Ludovic Hennebel & Thomas Hochmann eds., 2011).

¹¹³ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] (1946), art. 9 (Japan); Robert Johnson, *Japan Closes the Nuclear Umbrella: An Examination of Nonviolent Pacifism and Japan's Vision for a Nuclear Weapon-Free World*, 13 ASIAN-PAC. L. & POL'Y J. 81, 90 (2012); see also, Craig Martin, *Binding the Dogs of War: Japan and the Constitutionalizing of Jus Ad Bellum*, 30 U. PA. J. INT'L L. 267 (2008).

¹¹⁴ See, e.g., Charter of the French Language, 1977, ch. 5, § 1 (Quebec) (defining French as the official language of the province of Quebec and framing fundamental language rights).

¹¹⁵ Section 23 of the Canadian Charter guarantees minority language education rights. Denise Réaume & Leslie Green, *Education and Linguistic Security in the Charter*, 34 MCGILL L.J. 777, 777-78 (1989). Many other Canadian stories need to be told, first among them the systematic subjugation and forced assimilation of aboriginal people, but the legal treatment of indigenous rights has historically paled in comparison to questions of language. See JEREMY WEBBER, REIMAGINING CANADA: LANGUAGE, CULTURE, COMMUNITY, AND THE CANADIAN CONSTITUTION (1994); John Borrows, *Indigenous Legal Traditions in Canada*, 19 WASH. U. J.L. & POL'Y 167 (2005).

¹¹⁶ See SHEILA McLEOD ARNOPOULOS & DOMINIQUE CLIFT, THE ENGLISH FACT IN QUEBEC 56 (2d ed. 1984).

¹¹⁷ Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.), reprinted in R.S.C. 1985, app. II, no. 5 (Can.) § 93; see also MICHAEL IGNATIEFF, THE RIGHTS REVOLUTION 65, 135 (2000).

vesque, famously referred to the history of Quebec as a history of conquest.¹¹⁸ In response, Canada's 1982 Charter devotes fully seven of the first 23 sections to language rights and today Quebec's unique linguistic status is protected by the requirement that three judges of the Supreme Court of Canada come from the province.¹¹⁹ As former Supreme Court Justice Michel Bastarache concludes, "In Canada, language is regarded as a fundamental element of cultural identity. The linguistic right is in essence the right to resist assimilation," where to do so would result in the dominance of English language and culture.¹²⁰

In the United States, the transcendent narrative concerns race, a truth so central that it has become infused in the birth story of the republic.¹²¹ Race and law, intertwined in the infamous Three-Fifths Constitutional compromise, function as recurrent storylines in a country founded on the persistent tension inherent between free and slave states, liberty and subjugation.¹²² Both Milner Ball and Garry Wills portray Lincoln's 1863 Gettysburg Address as a self-conscious story with unified nation-building ramifications. Ball suggests that "Lincoln's opening, 'Fourscore and seven years ago'—[a fairy tale-like construction]—was a reference not to 1789 and the adoption of the Constitution [which enshrined slavery], but to 1776 and the Declaration of Independence. In that beginning the nation had been dedicated to the 'proposition' about equality."¹²³ Wills further deconstructs the Address to draw substantive and formal parallels between Lincoln's speech and another famous sermon, Pericles' Funeral Oration during the Peloponnesian War.¹²⁴ Just as Pericles utilized the epideictic form to contrast the mortality of the fallen Athenian soldiers with the immortal uniqueness of Athens, so did Lincoln, in praise of those who gave their lives that a nation might live, jux-

¹¹⁸ GRAHAM FRASER, RENÉ LÉVESQUE AND THE PARTI QUÉBÉCOIS IN POWER 88 (Ivon Owen ed., 2nd ed., 2001). *But see* Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 220–21 (Can.) (holding that under international law Quebec is not guaranteed the right to self-determination and secession from Canada).

¹¹⁹ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Schedule B to the Canada Act, 1982, c. 11 (U.K.) § 16–22; Supreme Court Act, R.S.C. 1985, C. S-26, § 6 (Can.) (later constitutionalized as § 41(d) of the 1982 Constitution Act).

¹²⁰ Michel Bastarache, *Bilingual Interpretation Rules as a Component of Language Rights in Canada*, in THE OXFORD HANDBOOK OF LANGUAGE AND LAW 159, 161 (Peter M. Tiersma & Lawrence M. Solan eds., 2012).

¹²¹ ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 246 (2000).

¹²² U.S. CONST. art. I, § 2, cl. 3.

¹²³ Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2285 (1989) (footnotes omitted); *see also* JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 89 (2000) ("If the Bible were a somewhat contradictory source when it came to the question of slavery, the Declaration of Independence, the secular version of American scripture, was an unambiguous tract for abolition.").

¹²⁴ GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 41 (1992).

tapose the dead with the timelessness of their cause, the master story of a nation founded upon equality.¹²⁵ In Wills' account, the story-based retelling of an America at war over race was necessary to imagine a nation liberated from its past. On the heels of the Dred Scott decision,¹²⁶ Lincoln's story was a narrative bridge to the Thirteenth and Fourteenth Amendments, and much later, to *Brown v. Board of Education*¹²⁷ and the Civil Rights Act of 1964.¹²⁸

In the U.S., as in many other states, law has been joined with story to create an overarching national narrative. Without stories, laws are the sterile signifiers of the administrative state. Without law, stories are personal or communal property, subject to infinite reinvention and appropriation. But the act of inscribing stories in law commits the state to a normative vision.

D. *Resisting Alternative Stories*

Political communities organized around master stories do more than reflect national values in law; they actively guard against the communication of unofficial histories. At the apex of global story regulation are those laws explicitly barring Holocaust denial. Today, 15 European states prohibit denialism, a linguistic offense deemed to deflect responsibility and mitigate the enormity of the Holocaust.¹²⁹ Section 3(h) of Austria's Prohibition Act is illustrative of statutes restricting the expression of denial:

A person shall . . . be liable to a penalty . . . if, in print or in broadcast or in some other medium, or otherwise publicly in any manner accessible to a large number of people, he denies the National Socialist Genocide or other National Socialist crimes against humanity, or seeks to minimize them in a coarse manner or consents thereto or to justify them.¹³⁰

Troubled by the "false contestation of genocide," France introduced the Gayssot Law of 1990 to remove the issue from a judicial system that had become a forum for debate on the realities of the Holocaust.¹³¹ The

¹²⁵ *Id.* at 56–59.

¹²⁶ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 406–27 (1857).

¹²⁷ U.S. CONST. amends. XIII & XIV; *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹²⁸ Race is responsible for modern American antidiscrimination standards. See *Korematsu v. United States*, 323 U.S. 214 (1944) (establishing strict scrutiny as the standard of review for racial classifications); Sora Y. Han, *The Conditional Logic of Strict Scrutiny: Race and Sexuality in Constitutional Law*, 4 STAN. J. C.R. & C.L. 77 (2008).

¹²⁹ Michael Whine, *Expanding Holocaust Denial and Legislation Against It*, 20 JEWISH POL. STUDS. REV. 57, 57 (2008).

¹³⁰ Verbotgesetz 1945 [Prohibition Act of 1945] no. 13/1945, § 3h (Austria).

¹³¹ Law No. 90-615 of July 13, 1990, to Repress All Racist, Anti-Semitic or Xenophobic Acts, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] July 14, 1990, p. 8333 (Fra.); BENJAMIN, *supra* note 103, at 32; Martin Imbleau, *Denial of the Holocaust, Genocide, and Crimes Against Humanity: A Comparative Overview of Ad Hoc Statutes*, in GENOCIDE DENIALS AND THE LAW, *supra* note 112, at 235, 257–58.

law criminalizes public questioning of the Holocaust and curtails the judiciary's authority to entertain arguments challenging the historic validity of Nazi atrocities.¹³²

The effect of such regulation is to insert the power of the state into discursive exchanges that may be wholly disconnected from acts in furtherance of the ideas communicated. Despite the concern of critics that prohibitory laws elevate an historical event to dogma, legislation concerning Holocaust denial has flourished.¹³³ The traditional rationale for the prohibition of Holocaust denialism in Germany, Israel, the Czech Republic, Hungary, and elsewhere is that preventing false historicity protects the dignity of survivors and reduces the potential exposure of ideas aimed at attracting support for extremist positions.¹³⁴ To this argument, Lawrence Douglas offers another trenchant reason for denial laws: refusing to honor the perpetrators' attempt at obfuscation.¹³⁵ Douglas quotes Primo Levi's account of an SS officer's warning—"And even if some proof should remain and some of you survive, people will say that the events you describe are too monstrous to be believed: they will say that they are the exaggerations of Allied propaganda and will believe us, who deny everything, and not you"—for the view that Holocaust denial is a two-part process—the obvious attempt to paper over past crimes but also an action, "fully consonant with the original methods of the perpetrators."¹³⁶ In literary terms, denial is both an intentional fabrication and an effort to diminish the authority of the new national narrative.

¹³² BENJAMIN, *supra* note 103, at 32; *see also*, BERNARD LEWIS, NOTES ON A CENTURY: REFLECTIONS OF A MIDDLE EAST HISTORIAN 288–97 (2012) (providing a first-person account of prosecution under French law for Armenian genocide denial following a 1993 *Le Monde* article).

¹³³ *See* Letter from Dr. Agnès Callamard, Exec. Dir., Article 19: Global Campaign for Free Expression, to Brigitte Zypries, Ger. Fed. Justice Minister (Feb. 12, 2007) (on file with Article 19), cited in Robert A. Kahn, *Holocaust Denial and Hate Speech*, in GENOCIDE DENIALS AND THE LAW, *supra* note 112, at 77, 77.

¹³⁴ Credence Fogo-Schensul, Comment, *More Than a River in Egypt: Holocaust Denial, the Internet, and International Freedom of Expression Norms*, 33 GONZ. L. REV. 241 (1998); *see also* Kahn, *supra* note 133, at 94 (suggesting that "the purpose of genocide denial laws is not to impose an 'official history'" but to serve as state-sponsored remembrance); Julie C. Suk, *Denying Experience: Holocaust Denial and the Free-Speech Theory of the State*, in THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 93, at 144, 145 (contrasting the United States and French regimes governing racist speech).

¹³⁵ Lawrence Douglas, *From Trying the Perpetrator to Trying the Denier and Back Again: Some Reflections*, in GENOCIDE DENIALS AND THE LAW, *supra* note 112, at 49, 56. Douglas cites Himmler's speech before an audience of generals of the SS, delivered in Poznan in 1943, in which the Himmler describes the destruction of European Jewry as "*ein niemals genanntes und niemals zu nennendes Ruhmesblatt*" of German history—"an unnamed and never to be named page of glory." *Id.*

¹³⁶ *Id.* (citing PRIMO LEVI, THE DROWNED AND THE SAVED 11–12 (Raymond Rosenthal trans., 1986)) ("[T]he tactics of denial used by the perpetrators were not simply designed to cover their tracks from the Allies or to hide their actions from the German population [but] . . . a means of performing genocide.").

The Holocaust is not the only historic truth subject to denialism, obfuscationism, and revisionism. In Rwanda, some critics of the RPF government have begun to speak of the genocide as something less than the Convention's definition of the crime.¹³⁷ To this group of opponents of the current regime, the Rwandan genocide was a civil war or the exaggerated death toll of a regional conflict spurred on by imperialist ambitions.¹³⁸ Unsurprisingly, post-genocide Rwanda has become one of the world's most speech-restrictive states. Even prior to the genocide, the indictment of Mugesera indicates the country was prepared to police hate speech designed to magnify racial and ethnic differences. Since the RPF came to power in 1994, however, the Rwandan government has gone to ever greater lengths to name its experience as genocide and to outlaw expressions of revisionist history that aim to minimize the slaughter or which equate the genocide with the post-genocidal atrocities committed by the RPF.¹³⁹

In furtherance of this mission, Rwanda has enacted a controversial Genocide Ideology Law that encompasses the government's belief that forbidding the expression of racialized differences will preempt a return to ethnocentric thinking.¹⁴⁰ The Rwandan Senate has defined genocidal ideology as "a set of ideas or representations whose major role is to stir up hatred and create a pernicious atmosphere favouring the implementation and legitimisation of the persecution and elimination of a category of the population."¹⁴¹ Article 2 of the Act characterizes the offending ideological mindset as "an aggregate of thoughts characterized by conduct, speeches . . ." and Article 4 provides for up to 25 years in prison for first

¹³⁷ See Gregory H. Stanton, *The 8 Stages of Genocide* 4 (1998) available at <http://www.genocidewatch.org/images/8StagesBriefingpaper.pdf> (arguing that denial always follows genocide); Schabas, *supra* note 10, at 530 ("The history of genocide shows that those who incite the crime speak in euphemisms.").

¹³⁸ See, e.g., EDWARD S. HERMAN & DAVID PETERSON, *THE POLITICS OF GENOCIDE* 51–52 (2010). For a powerful exposé of the authors' revisionist history, see Gerald Caplan, *The Politics of Denialism: The Strange Case of Rwanda*, PAMBAZUKA NEWS (June 17, 2010) (book review), <http://www.pambazuka.org/en/category/features/65265>.

¹³⁹ The preamble to Rwanda's 2003 Constitution states "[i]n the wake of a genocide against the Tutsi that was organized and supervised by unworthy leaders and other perpetrators and that decimated more than a million sons and daughters of Rwanda," and resolves "to fight the ideology of genocide and all its manifestations and to eradicate ethnic, regional and any other form of divisions." CONSTITUTION OF THE REPUBLIC OF RWANDA, June 4, 2003, pmb. §§ 1–2; see also Imbleau, *supra* note 131, at 274 (noting that "the difference between the concepts of genocide and killings—or even slaughter—is not only etymological" since failing to distinguish these concepts is tantamount to diminishing the importance of the crime and its intent and attempting to destigmatize *genocidaires*).

¹⁴⁰ Law N°18/2008 of 23/07/2008 Relating to the Punishment of the Crime of Genocide Ideology (Rwanda). The logical corollary of the law is the belief that the 1994 genocide was the result of widespread Hutu indoctrination of hatred against Tutsis.

¹⁴¹ Rwandan Senate proceedings 2006, cited by Beth Lewis Samuelson & Sarah Warshauer Freedman, *Language Policy, Multilingual Education, and Power in Rwanda*, 9 LANG. POL'Y 191, 198 (2010).

time offenders.¹⁴² Rwanda has also passed laws on divisionism and a statute criminalizing negationism.¹⁴³ Today, Rwanda bans the speech of “any person who will have publicly shown, by his or her words, writings, images, or by any other means, that he or she has negated the genocide committed, rudely minimised it or attempted to justify or approve its grounds, or any person who will have hidden or destroyed its evidence.”¹⁴⁴ Like European Holocaust denial laws, Rwanda flatly refuses to allow alternative stories to circulate in the public domain.

In addition to overt prohibitions, certain statutory schemes function to cement master stories in ways that impact speech indirectly. Turkey, for example, deploys diplomatic and financial resources to dispute the characterization of the massacres and widespread deportations of Armenians from the Ottoman Empire during the First World War as genocide. To buttress the contention that the killings were neither deliberate nor orchestrated by the government, Turkey sponsors research to discredit the claims of historians and politicians who refer publicly to the Armenian genocide or who employ the term “Mets Yeghern.”¹⁴⁵

Australia and New Zealand celebrate Anzac Day which commemorates the start of the campaign in which more than 120,000 men died at Gallipoli during World War I. One year after the April 25, 1915, slaughter, Anzac Day was officially gazetted as a public holiday in New Zealand.¹⁴⁶ Almost immediately, state officials set in motion a process of formal and informal enforcement of the sanctity of the day, an illustration of governmental orchestration of the creation and enforcement of nationally significant public rituals.¹⁴⁷ War diaries of surviving veterans demonstrate that the official ceremonies began with a dawn requiem mass, followed by a compulsory mid-morning commemorative service.¹⁴⁸ Rather than sanction personal grieving or critical reflection on the folly of trench warfare, state authorities scripted the expression of official

¹⁴² LAW N°18/2008, *supra* note 140, art. 2, 4.

¹⁴³ See Zachary Pall, *Light Shining Darkly: Comparing Post-Conflict Constitutional Structures Concerning Speech and Association in Germany and Rwanda*, 42 COLUM. HUM. RTS. L. REV. 5, 5–6 (2010).

¹⁴⁴ Law No. 33 bis/2003 of 6 Sept. 2003, *Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes*, art. 4 (Rwanda); Jennifer M. Allen & George H. Norris, *Is Genocide Different? Dealing with Hate Speech in a Post-Genocide Society*, 7 J. INT’L L. & INT’L REL. 146, 156 (2011).

¹⁴⁵ David Holthouse, *State of Denial: Turkey Entices U.S. Scholars, Lawmakers to Cover Up Armenian Genocide*, SOUTHERN POVERTY LAW CENTER INTELLIGENCE REPORT, Summer 2008, at 48, 50–57.

¹⁴⁶ *The Making of Anzac Day*, NEW ZEALAND HISTORY ONLINE: NGA KORERO A IPURANGI O AOTEAROA, Ministry for Cultural Heritage (Aug. 20, 2007), <http://www.nzhistory.net.nz/war/first-anzac-days>.

¹⁴⁷ See Jonah S. Rubin, *Rituals of Mourning in the Public Sphere*, CULTURAL ANTHROPOLOGY ONLINE (Dec. 27, 2012), <http://production.culanth.org/fieldsights/41-rituals-of-mourning-in-the-public-sphere>.

¹⁴⁸ *The Making of Anzac Day*, *supra* note 146.

memory to turn Anzac Day and the battle of Gallipoli into a metonymy for sacrifice, a practice that continues to this day.¹⁴⁹

II. JUDICIAL READING

However appropriate a label, the existence of master stories tells us little about how such tales are applied to particular controversies. Enter the judge. Whereas legislators, lawmakers, historians, and commissioners all play a role in the construction of master stories, judges are uniquely positioned to construe those tales. The vision of judges as arbiters of story and language facilitates an appreciation of courts as interpreters of doctrines (speech-based threats), as well as formal and informal rules (the judge as the guardian of readerly traditions).¹⁵⁰ Judges aim to provide interpretive stability and guidance through consistent readings of contested histories. In the process, courts shape the content of stories themselves and the ways in which societal actors challenge the boundaries of dominant narratives. But a close look at judicial reading reveals that, domestically, judges tend to reinforce or augment master stories. To the extent that courts critically challenge master stories, they are far more likely to do so in transnational or cross-cultural contexts.

A. *Interpreting Stories*

The judicial interpretation of text has much in common with other forms of reading, including the understanding of literature. Interpreting any narrative precipitates questions regarding the writer's point of view, the subject position of the reader, learned assumptions, and the cultural indicia of meaning. Both the reading of law and the reading of literature are shaped through language; the two practices employ similar analyses and methods and they generate shared questions—the original intent of the author, the reconciliation of the particular with the universal, and the way in which understandings change over time. Literary and legal interpretations are constructive/creative habits, different from conversational interpretation that characterizes ordinary attempts to understand

¹⁴⁹ In Britain, anti-war campaigner Sylvia Pankhurst and her supporters organized a rally in Trafalgar Square, but were beaten by rowdy Australian and New Zealand soldiers. Critics of the war were later jailed en masse, including Bertrand Russell, the prominent British philosopher and writer. Britain's security services subsequently took to dismantling the printing presses of oppositional pamphleteers, instead of tarnishing the country's speech-tolerant image by banning the papers outright. See ADAM HOCHSCHILD, *TO END ALL WARS 186–87* (2011) (describing how William Holliday, an outspoken critic of the war, was tried, convicted and sentenced to hard labor for the seemingly innocuous assertion that "Freedom's battle has not to be fought on the blood-drenched soil of France but nearer home—our enemy is within the gates.").

¹⁵⁰ See generally, JAMES BOYD WHITE, *LIVING SPEECH: RESISTING THE EMPIRE OF FORCE* 94 (2006) ("In this sense the principle of separation of powers, central to . . . [constitutions], is built into the idea of law itself, for the tasks of writing law and reading it are put permanently in different hands.").

what speakers are saying.¹⁵¹ In each discipline, narrative-driven truths may be kaleidoscopic; multiple truths can exist within a single reality with different ways of assigning motives and responsibility to the actors involved in the drama.¹⁵²

Yet there are important differences between legal interpretation and other forms of reading. Judges are readers with the institutional power to attach defined outcomes to their understanding. Legal interpretive acts can occasion the imposition of sanctioned violence upon others. “A judge articulates her understanding of a text,” Robert Cover wrote, “and as a result, somebody loses his freedom, his property, his children, even his life.”¹⁵³ Interpretation in law is a justification for state action, a way of bringing the story to life by giving it judicial legitimacy and the material force with which to back up the court’s interpretation.

Reading with consequences, as judges do, entails the codification of meaning. Cover realized that “[t]he creation of legal meaning cannot take place in silence. But neither can it take place without the committed action that distinguishes law from literature.”¹⁵⁴ Legal interpretation implies the power to embed an understanding of political text in authoritative modes of action that the interpretation of literature, political philosophy, and constitutional criticism cannot.¹⁵⁵ Judicial interpretation therefore denotes a form of respected reading, a decisional pathway that transcends other meanings gleaned from text.

At the same time, legal reading is freighted with linguistic connotations that drive the way stories are received. The interpretive project is never a disinterested reading of sociological data. What is deemed admissible and credible, the very shape of the story, is culturally contingent; all interpretations begin with a viewpoint or pre-understanding that takes place in a historical and social context.¹⁵⁶

A task as seemingly simple as assigning meaning to a word or idiom can be influenced by socio-linguistic traditions since many of the acts law regulates do not exist apart from the language that defines them. Conspiracy, solicitation, bribery, the issuance of threats, perjury, defamation, slander, and libel require only the utterance of spoken or published

¹⁵¹ RONALD DWORKIN, *LAW’S EMPIRE* 49–53 (1986).

¹⁵² THOMAS MORAWETZ, *LITERATURE AND THE LAW* 477–80 (2007); *see also* Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 *CLINICAL L. REV.* 33, 70–72 (2001) (discussing parallel universes that individuals inhabit across cultures).

¹⁵³ Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1601 (1986).

¹⁵⁴ Cover, *supra* note 14, at 49.

¹⁵⁵ Cover, *supra* note 153, at 1606.

¹⁵⁶ *See* Kent GREENAWALT, *LEGAL INTERPRETATION: PERSPECTIVES FROM OTHER DISCIPLINES AND PRIVATE TEXTS* 151 (2010); Naomi R. Cahn, *Inconsistent Stories*, 81 *GEO. L.J.* 2475, 2514 (1993); Gerald Torres, *Translation and Stories*, 115 *HARV. L. REV.* 1362, 1370 (2002) (“How a story ‘works’ depends on the reader or listener. The social position of the reader matters because it affects his interpretation.”).

words.¹⁵⁷ Curiously, the ultimate verbal crime, incitement to genocide, is an inchoate offense, since the crime is in the utterance and does not require the subsequent commission of genocide to be charged.¹⁵⁸

But even as judges attempt to divine the ordinary meaning of language, there is no neutral way of evaluating words. Consider a standard constitutional clause guaranteeing freedom of expression. Frederick Schauer argues that “it is inconceivable that linguistic meaning alone can do much of the work of delineating the contours of the category the existence of which triggers the application of the constitutional constraint.”¹⁵⁹ Legal interpretation would appear to be the process of accumulated knowledge applied to problems of law. Such knowledge generates fore-meanings that determine understanding. Rather than approaching language as a blank slate, interpreters read words with expectations that are projected onto the text as a whole. In turn, those readerly customs exert an unspoken authority that, according to Hans-Georg Gadamer, “lies beyond rational grounding and in large measure determines our institutions and attitudes.”¹⁶⁰

Legal interpretation requires attention to a community of meaning, especially when the issue is the hermeneutics of speech. To do it right, in Stanley Fish’s words, is to read from “‘deeply inside’ a context [that] is to be already and always thinking (and perceiving) with and within the norms, standards, definitions, routines, and understood goals that both define and are defined by that context.”¹⁶¹ From this perspective, the adjudication of hate speech and incitement turns on the interpretation of language and a contextual understanding of symbols. The result is an institutionalized form of reading in which the judge is called upon to determine meaning and intent in any given controversy.

B. *The Influence of Master Stories*

Judicial engagement with master stories occurs in at least four forms. There is first the use of law to attempt to control public conversations. In 2005, Nobel Laureate Orhan Pamuk declared that the Ottoman Empire had killed a million Armenians, adding that in modern Turkey, the mass killings of Armenians and Kurds is generally unmentionable. As if to

¹⁵⁷ J. L. Austin defined performative utterances as “speech acts,” which the expression forms part of the doing of an action. J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 6 (1962); Peter M. Tiersma & Lawrence M. Solan, *The Language of Crime*, in *THE OXFORD HANDBOOK OF LANGUAGE AND LAW* 340, 340 (1980).

¹⁵⁸ Gregory S. Gordon, *Music and Genocide: Harmonizing Coherence, Freedom and Nonviolence in Incitement Law*, 50 SANTA CLARA L. REV. 607, 624 (2010) (quoting *Prosecutor v. Bikindi*, Case No. ICTR-01-72-T, Judgment, ¶ 419 (Dec. 2, 2008)).

¹⁵⁹ Schauer, *supra* note 101, at 868 (recognizing that the prelegal instantiations of free speech vary dramatically from culture to culture).

¹⁶⁰ HANS-GEORG GADAMER, *TRUTH AND METHOD* 281 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 1989).

¹⁶¹ Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325, 1332 (1984).

prove Pamuk's point, ultra-nationalist lawyer Kemal Kerincsiz subsequently filed a criminal case against Pamuk. Although the charges were dropped in 2006, the Supreme Court of Appeal subsequently ordered the lower court to re-open the case. On March 27, 2011, a Turkish judge found Pamuk guilty and compelled him to pay 6,000 liras in total compensation to five people for, among other things, having insulted their honor.¹⁶² Neither Pamuk's celebrated international status nor the many sites of definitional contestation concerning the Armenian genocide influenced the court's interpretation.

Rwanda too has used criminal law as the enforcer of a master story by prosecuting individuals for statements that might be construed as increasing the pain of genocide victims and for referencing crimes committed by the RPF during the conflict that brought an end to the slaughter.¹⁶³ Judicial interpretation in such cases is the straightforward application of criminal sanctions to challenged speech.

The second way that judges use master stories is as historic markers capable of influencing questions of law. In the Canadian Supreme Court case of *Adler v. Ontario*, for example, petitioners argued that the lack of government funding for Jewish and certain Christian parochial schools violated the Charter's equality provisions since Catholic schools receive government funding.¹⁶⁴ The Supreme Court squarely rejected this claim by insisting that free Catholic education in Quebec is a defining feature of Canada's linguistic and religious accommodation. Justice Iacobucci explained that the peculiarity of Catholic public funding "is the product of a historical compromise crucial to [Canadian] Confederation."¹⁶⁵

During the Israeli trial of Ivan Demjanjuk, in which the defendant was accused of being a sadistic guard nicknamed Ivan the Terrible at a Nazi extermination camp, the Court invited survivor witnesses to tell riveting, but legally dubious, stories of the Holocaust. One of the principal objectives of the Demjanjuk trial was to lend judicial recognition to the historic fact of the Holocaust, while simultaneously discrediting denial-

¹⁶² Jeffrey Simpson, *For Turkey's Sake, Stop Snowing Orhan Pamuk*, GLOBE & MAIL (Canada), 2006 WLNR 1143171 (Jan. 21, 2006); see also AMNESTY INT'L, *Turkey: Article 301: How the Law on "Denigrating Turkishness" Is an Insult to Free Expression* (2006), available at <http://www.amnesty.org/en/library/info/EUR44/003/2006>; Nanore Barsoumian, *Nobel Laureate Fined for Mentioning Armenian, Kurdish Deaths*, ARMENIAN WEEKLY (Mar. 28, 2011), <http://www.armenianweekly.com/2011/03/28/nobel-laureate-fined/print>.

¹⁶³ See LEGISLATING AGAINST DISCRIMINATION: AN INTERNATIONAL SURVEY OF ANTI-DISCRIMINATION NORMS 689–92 (Nina Osin & Dina Porat eds., 2005); Pall, *supra* note 143, at 5.

¹⁶⁴ *Adler v. Ontario*, [1996] 3 S.C.R. 609, 611 (Can.).

¹⁶⁵ *Id.* Three years later, in *Waldman v. Canada*, the author brought a complaint to the Human Rights Committee alleging that Canada's school funding violated the prohibition on discrimination contained in Article 26 of the International Covenant on Civil and Political Rights (ICCPR). The Committee sided with Waldman, but Canada has ignored the Committee's recommendation. U.N. Human Rights Comm., 85th Sess., *Concluding Observations of the Human Rights Comm.: Canada*, ¶ 21, U.N. Doc. CCPR/C/CAN/CO/5 (Apr. 20, 2006).

ism. In support of this goal, the Court subsumed questions surrounding erroneous identification—questions that ultimately led the Israeli Supreme Court to vacate the conviction on the basis of new evidence—to the judicialization of a master story. “We must ask,” the Israeli Court posited rhetorically, “is it at all possible to forget? Can people who were in the vale of slaughter and experienced its horrors . . . who saw, day after day, the killing, the humiliation, the brutality, the abuse by German oppressors and their Ukrainian vassals in the Treblinka camp, forget all this?”¹⁶⁶

Likewise, Justice Brennan’s opinion in the affirmative action case *Regents of the University of California v. Bakke* turns on the use of history to reaffirm the centrality of race in the American master story.

Our nation was founded on the principle that “all Men are created equal.” Yet candor requires acknowledgement that the Framers of our Constitution, to forge the 13 Colonies into one Nation, openly compromised this principle of equality with its antithesis: slavery. . . . [I]t is well to recount how recent the time has been, if it has yet come, when the promise of our principles has flowered into the actuality of equal opportunity for all regardless of race or color.¹⁶⁷

Bakke recalled *Beauharnais v. Illinois*, in which the history of American racism informed the Court’s decision.¹⁶⁸ *Beauharnais*, the head of the self-declared “White Circle League,” published racist pamphlets and was convicted under an Illinois statute allowing the punishment of group libel. The Supreme Court affirmed *Beauharnais*’ conviction by recounting the history of racial conflict in the state. “From the murder of the abolitionist Lovejoy in 1837 to the Cicero riots of 1951, Illinois has been the scene of exacerbated tension between races, often flaring into violence and destruction.”¹⁶⁹ The majority concluded that it “would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups.”¹⁷⁰ In the same way that Justice Brennan’s opinion in *Bakke* acknowledged the failure to fully manifest the principle of equality, the Court in *Beauharnais* incorporated Illinois’ history in order to provide a cogent conclusion to its narrative of racial justice.

Third, master stories act as filters for the receipt of new information. When judges evaluate controversies from within the master story, usually in a context involving parties from their own community, they do so through readily accessible legal and cultural signposts in a comfortable linguistic environment. A judge’s reading and retelling of the stories pre-

¹⁶⁶ THE DEMJANJUK TRIAL 10 (Asher Felix Landau et al. eds., Hever Translators Pool trans., 1991).

¹⁶⁷ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 326 (1978) (Brennan, J., concurring in part and dissenting in part).

¹⁶⁸ *Beauharnais v. Illinois*, 343 U.S. 250, 259 (1952).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 261; see also JEREMY WALDRON, THE HARM IN HATE SPEECH 51 (2012) (arguing that hate speech should be considered group libel in some circumstances).

sented will inevitably be interwoven into an already established framework. Many judicial opinions begin by telling the reader something about how the judge has understood the instant story. It is not unusual for a judge to paint the tableau as a way of contextualizing the interpretive enterprise. By restating the parties' positions, the question presented, and the *dramatis personae*, judicial orders provide insight into the reading of text.¹⁷¹

Because legal argument occurs within a culture of stories, effective storytelling must resonate with the audience.¹⁷² First year law students learn that stories must be marshaled strategically to fit into a knowable template (e.g., a claim of self-defense demands a background threat). "[A]rguments are as worthy as the audience that would adhere to them . . . facts, truths, presumptions and values, hierarchies, and lines of argument—are those held in common by arguers and audiences."¹⁷³

Bertrand's conduct stands out in *Mugesera* because he refused to follow this fundamental rule. The anti-Semitism inherent in Bertrand's motion was striking not only for its absence of logic but also for its reliance on a story that is not intuitive to most Canadian judges.¹⁷⁴ Despite having won at the court below, Bertrand sought to divert the judges' attention, away from a careful reading of Mugesera's speech and toward an inquiry into the motives of his invented accusers. The device is familiar to students of Shakespeare, for Bertrand's narrative contained echoes of Portia's admonition to Shylock in *The Merchant of Venice*, "Thou shalt have justice more than thou desirest."¹⁷⁵ As Kenji Yoshino notes, by attempting to collect the pound of flesh owed to him, "Shylock shifts from being the plaintiff in a civil action to being the defendant in a related criminal one."¹⁷⁶ Ultimately the difference in narrative outcomes is stark: while Portia's ploy succeeded, Bertrand's attempt to introduce a new story was so disconnected from the underlying tale that it confused where it sought to persuade.

¹⁷¹ See, e.g., *Cohen v. California*, 403 U.S. 15, 19 (1971).

¹⁷² See, e.g., Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. ASS'N L. WRITING DIRS. 1, 3 (2010) (providing evidence that appellate judges are demonstrably influenced by the stories of the litigants who appear before them); Brian J. Foley, *Applied Legal Storytelling, Politics, and Factual Realism*, 14 J. LEGAL WRITING INST. 17, 40 (2008) (showing that stories are the most effective means of persuading judges and juries).

¹⁷³ Walter R. Fisher, *Judging the Quality of Audiences and Narrative Rationality*, in PRACTICAL REASONING IN HUMAN AFFAIRS: STUDIES IN HONOR OF CHAIM PERELMAN 86 (James L. Golden & Joseph J. Pilotta eds., 1986).

¹⁷⁴ The most bizarre element of Bertrand's gambit is that it was almost certain to offend the Court, although because his contentions were made in a legal submission rather than op-ed, he enjoyed a form of immunity that protects him from claims of libel, slander, or defamation. See Robert D. Kligman, *Judicial Immunity*, 38 ADVOC.' Q. 251, 267–68 (2011).

¹⁷⁵ WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1.

¹⁷⁶ KENJI YOSHINO, *A THOUSAND TIMES MORE FAIR: WHAT SHAKESPEARE'S PLAYS TEACH US ABOUT JUSTICE* 45 (2011).

In short, Bertrand's epistemic failure was his inability to translate his client's story into terms likely to succeed before the Court. A good lawyer, Peter Brooks writes, "must at once elicit and construct a story, and the distinction between the elicited and the constructed is by no means clear."¹⁷⁷ That process necessarily combines the multiple meanings of "representation"—to act for another and to paint a picture. But rather than cast Mugesera in the most favorable possible light, Bertrand argued continuing persecution, a strategy that was wholly unmoored from governing narratives. Like Mugesera's Kabaya speech, Bertrand's motion drew heavily on the political unconscious of ethnic markers, constructed as it is in opposition to a manufactured outsider.¹⁷⁸ Unlike that speech, however, Bertrand was unable to relate his tale to a master story.

The fourth use of master stories by judges is to expand and revise the governing tale, particularly when the original story is actively contested. This is the process through which judges lend credence to elements of the national history by producing new readings of patterns and experience. Argentina, for example, has only recently settled on an authoritative account of the nation's 1976–1983 military rule. Although a handful of post-dictatorship prosecutions shed light on the abuses of the military regime, a violent backlash led to the 1986 Full Stop Law and the 1987 Due Obedience Law, which together blocked the initiation of new cases and granted automatic immunity to members of the military.¹⁷⁹ Notwithstanding the widespread dissemination of the 1985 *Nunca Mas* Report and the public confessions of junta members to mass crimes, the enforced amnesia of the amnesty laws remained in place for more than two decades. In 2001, however, Federal Judge Gabriel Cavallo declared the amnesty laws to be unconstitutional.¹⁸⁰ Cavallo's ruling unleashed a torrent of truth-telling, including a government-sanctioned project to me-

¹⁷⁷ Brooks, *supra* note 46, at 17.

¹⁷⁸ FREDRIC JAMESON, *THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT* 9–10 (1982) (arguing that the text itself, the social order, and collective human history all converge to create narrative meaning and that narrative form is the regulator of meaning). Guy Bertrand describes himself as *pur et dur*, a reference to Quebec's original francophone inhabitants and a phrase used to describe French resistance to English domination. GUY BERTRAND, *ENOUGH IS ENOUGH: AN ATTORNEY'S STRUGGLE FOR DEMOCRACY IN QUEBEC* 36–37 (Marie Thérèse Blanc trans., 1996).

¹⁷⁹ Ley de Punto Final [Full Stop Law] No. 23.492, BOLETÍN OFICIAL [BO], Dec. 29, 1986 (Arg.), available at www.infojus.gov.ar. (implementing a 60-day period after which no additional indictments could be brought); Ley de Obediencia Debida [Law of Due Obedience] No. 23.521, BOLETÍN OFICIAL [BO], June 9, 1987 (Arg.), available at www.infojus.gov.ar. (granting immunity to all officers and subordinates who committed crimes during the dictatorship if they were obeying superior orders).

¹⁸⁰ Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/10/2003, "Simón, Julio y del Cerro, Juan Antonio s/ sustracción de menores de 10 años," Fallos (2003-S-2746) (Arg.). Judge Cavallo's decision was affirmed in the 2005 Supreme Court case of *Simon y otros*, which struck down the amnesty laws and the pardons of the generals accused of atrocities during the dirty war. 14/06/2005 "Simon, Julio H. y otros s/ privación ilegítima de la libertad, etc." *Semanarios de Jurisprudencia Argentina* [SJA] (2005-S-1767) (Arg.).

morialize persons disappeared during the dirty war, and to make public the location of clandestine military facilities where torture and interrogation took place.¹⁸¹ Four years later, the Argentine Supreme Court upheld Cavallo's ruling in the landmark case of *Simon y otros*.¹⁸²

Argentina's new official story has paved the way for the prosecution of dozens of former military and police officers, but it has also created space for a meta-narrative, in this case, a nationwide conversation concerning the theft of babies born to mothers who had "disappeared" during the Dirty War.¹⁸³ That story, the unending drama surrounding the identities of the children, has become a microcosm of Argentina's master story.¹⁸⁴

In the United States, the gradual strengthening of the First Amendment is a clear example of judicial augmentation of the master story. The First Amendment to the United States Constitution wasn't always interpreted as the textual guardian of free speech protection.¹⁸⁵ Through the 1919 criticism and anti-conscription decision (frequently referred to as "the World War I cases"), government restrictions on speech based on disapproval of the speaker's message were commonplace.¹⁸⁶ Even the Supreme Court's 1942 decision in *Chaplinsky v. New Hampshire* upheld a criminal conviction for nothing more than expression of "fighting words."¹⁸⁷ But in 1969, *Brandenburg v. Ohio* granted protection to all forms of expressive activity, including political dissent and odious and dehumanizing speech, unless the utterance includes an element of "imminent lawless action."¹⁸⁸

¹⁸¹ CENTRO DE ESTUDIOS LEGALES Y SOCIALES, DERECHOS HUMANOS EN ARGENTINA INFORME 2005, 37 (2005).

¹⁸² Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/6/2005, "Simón, Julio Hector y otros s/ privación ilegítima de la libertad, etc. / recurso de hecho," Fallos (2005-S-1767) (Arg.). Writing for the majority, Judge Lorenzetti echoed the *Demjanuk* court that in his declaration that "there are certain acts that simply cannot be forgotten."

¹⁸³ Cavallo's decision was prefigured by an exception to the Due Obedience Law for kidnapping, an exception to the general amnesty laws. See Francisco Goldman, *Children of the Dirty War: Finding Argentina's Stolen Orphans*, THE NEW YORKER, Mar. 19, 2012, at 54.

¹⁸⁴ See Elizabeth B. Ludwin King, *A Conflict of Interests: Privacy, Truth, and Compulsory DNA Testing for Argentina's Children of the Disappeared*, 44 CORNELL INT'L L.J. 535, 537-40 (2011).

¹⁸⁵ The First Amendment famously provides that "Congress shall make no law" abridging free speech. U.S. CONST. amend. I.

¹⁸⁶ *Debs v. United States*, 249 U.S. 211, 212-17 (1919); *Frohwerk v. United States*, 249 U.S. 204, 205-10 (1919); *Schenck v. United States*, 249 U.S. 47, 47-52 (1919).

¹⁸⁷ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 904-05 (1986) (utilizing literary critic Harold Bloom's theory of hostile agonistic struggle to conclude that "legal doctrine cannot be accounted for solely by rules of precedent," but by the interplay of dissent, concurrence, and "antithetical analysis").

¹⁸⁸ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (speech is protected by the First Amendment unless it incites or produces imminent lawless action).

Robert Tsai calls this trend a First Amendment “faith tradition,” complete with its own creation story.

As lawyers learn, the civic myth that recounts the birth of the right to speak one’s mind in America begins with the missed opportunities of the World War I decisions, and the “end of the story” is [] *Brandenburg v. Ohio*, in which the promise of expressive liberty is ultimately realized.¹⁸⁹

In this conception, free speech has become America’s second master story. Notwithstanding limited restrictions on obscenity, falsehoods, and “fighting words,” the First Amendment tradition promotes tolerance of an array of offensive speech, a linguistic article of faith bolstered by legal interpretation and around which political communities have coalesced.¹⁹⁰ Today, *Brandenburg* stands for the proposition that no subject is forbidden *per se* in the United States. State and federal statutes that aim to ban white supremacist marches, for example the American Nazi Party’s march in the predominantly Jewish community of Skokie, Illinois, or to outlaw videos that show graphic violence against animals, as in *United States v. Stevens*, fall at the mantle of America’s second master story.¹⁹¹ The United States Supreme Court’s 2011 decision in *Snyder v. Phelps*, which shields the Westboro Baptist Church from tort liability for the picketing of military funerals and the dissemination of homophobic insults, confirms that even revered institutions and people may be targeted by purely expressive activity.¹⁹²

¹⁸⁹ ROBERT L. TSAI, *ELOQUENCE & REASON: CREATING A FIRST AMENDMENT CULTURE* 49 (2008).

¹⁹⁰ STEPHEN M. FELDMAN, *FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY* 409 (2008); Harold Hongju Koh, *Foreword: On American Exceptionalism*, 55 *STAN. L. REV.* 1479, 1483 (2003) (recognizing that the U.S. First Amendment is far more protective than other countries’ laws of hate speech, libel, commercial speech, and the publication of national security information).

¹⁹¹ *United States v. Stevens*, 559 U.S.460, 482; *Collin v. Smith*, 578 F.2d 1197, 1207–08 (7th Cir. 1978) (holding that the First Amendment prevents a local ordinance from prohibiting the pro-Nazi march, even in a community of Holocaust survivors).

¹⁹² *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) (“As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”); *see also* *United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012) (striking down the Stolen Valor Act and finding that false statements, even those concerning the awarding of medals or decorations for armed service, are encompassed by the First Amendment’s general speech protections). *But see* *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2726 (2010) (criminalizing U.S. citizens’ peaceful political speech when it is “coordinated” with organizations that have been designated as “foreign terrorist organizations” by the U.S. State Department) and the proliferation of anti-terrorist legislation post-September 11, 2001. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (codified at 18 U.S.C. § 1961 (2006)); David Cole, *39 Ways to Limit Free Speech*, *NEW YORK REVIEW OF BOOKS BLOG* (Apr. 19, 2012, 3:15 PM), <http://www.nybooks.com/blogs/nyrblog/2012/apr/19/39->

Predictably, stories of speech and stories of race have competed for primacy in the American legal imagination in recent years. The Supreme Court's 1992 decision in *R.A.V. v. City of St. Paul* held that a St. Paul, Minnesota, ordinance designed to counter cross-burning was an unconstitutional content-based regulation of speech.¹⁹³ In the 2003 case of *Virginia v. Black*, however, the Court appeared to restore the equilibrium between America's stories.¹⁹⁴ In *Black*, the Court found that the prohibition on burning crosses *with the purpose of intimidation*—unique among speech restrictions—may be outlawed in a manner consistent with the First Amendment.¹⁹⁵

Judges, it is apparent, can willingly and capably contribute to one or more master stories, particularly when that reading facilitates incremental change. The extension of speech rights to corporations or the granting of equality guarantees to new classes of people is thus built on tested doctrines from within recognizable plot lines.¹⁹⁶ In this way, the South African Constitutional Court's abolition of the death penalty or the adoption of heightened scrutiny in gender discrimination cases in U.S. federal court reflects the application of entrenched principles within the language, standards, and methodology of the hegemonic discourse.¹⁹⁷

ways-limit-free-speech; Glenn Greenwald, *Obama's New Free Speech Threat*, SALON (May 16, 2012), http://www.salon.com/2012/05/16/obamas_new_free_speech_threat/.

¹⁹³ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381–82 (1992); see also FREDERICK M. LAWRENCE, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* 6 (1999) (observing that although current First Amendment jurisprudence permits the criminalization of “conduct that is motivated by the race or similar characteristic of the victim and deserves enhanced punishment . . . ‘racist speech,’ [the] articulation of racist views . . . no matter how unpleasant, is protected.”). *R.A.V.* engendered an immediate backlash from race-conscious scholars who refused to accept cross-burning as the instantiation of free speech absolutism and personal liberty. See, e.g., Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 151–59 (1992) (faulting the Court for ignoring the Civil War amendments to the Constitution); Owen M. Fiss, *The Right Kind of Neutrality*, in *FREEDOM OF EXPRESSION* 79, 79 (David S. Allen & Robert Jensen eds., 1995); Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787, 790 (1992) (“[I]t is the utter disregard for the silenced voice of the victims that is most frightening. . . . Nowhere are we told of the history of the Ku Klux Klan or of its use of the burning cross as a tool for the suppression of speech.”).

¹⁹⁴ *Virginia v. Black*, 538 U.S. 343, 381–88 (2003).

¹⁹⁵ *Id.* To explain the different approaches, Guy-Uriel E. Charles identifies Justice Thomas' questioning at oral argument as a dispositive factor. For Charles, the personal history of an African-American jurist constitutes epistemic authority; the Court adopted Thomas' story as a national narrative. Charles, *supra* note 96, at 608–11.

¹⁹⁶ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (the First Amendment prohibits the government from restricting independent political expenditures by corporations or unions); *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating criminal statute that prohibited same-sex sexual activity of consenting adults).

¹⁹⁷ *State v. Makwanyane & Mchunu*, 1995 (3) SA 391 (CC) (S. Afr.) (abolishing the death penalty in South Africa as inconsistent with the Constitution); *Craig v.*

Courts also appropriate master stories for the purpose of declaring certain practices to fall outside the dominant discourse.¹⁹⁸ Judge Lois Forer's refusal to sentence a first-time offender to a mandatory five-year term or Justice Richard Goldstone's deliberately narrow reading of apartheid-era South Africa's notorious Group Areas Act were each informed by the belief that manifestly unjust laws contradict the true spirit of the Constitution or society.¹⁹⁹

It is the rare court, however, that explicitly reads *against* a master story from inside the dominant narrative. On the infrequent occasions when judicial authorities do not conform to the master story—think of the lower court in *Snyder* permitting a jury to award damages for offensive speech, instructions encouraging jury nullification in racially charged cases, or the Israeli Central Elections Committee's decision to bar a Jewish party from standing for election on the grounds that it was too racist—they are quickly repudiated by appellate judges or legislative forces acting in a corrective fashion.²⁰⁰

At the level of outcomes, judicial support for master stories is to be expected because of the ways that national discourses render alternative interpretations foreign and unnatural, and the fact that, at least in the Anglo-American tradition, *stare decisis* reinforces interpretive consistency.²⁰¹ Whether or not this is a good thing depends on the story in question. And while there is little in this analysis to indicate what the consequences for judging *should* be, courts and scholars alike can only benefit from an appreciation of the reflexive interpretations generated by dominant narratives.

Boren, 429 U.S. 190, 197 (1976) (adopting an intermediate level of scrutiny to assess differential treatment on the basis of sex).

¹⁹⁸ See Nicholas Calcina Howson, *Corporate Law in the Shanghai People's Court, 1992–2008: Judicial Autonomy in a Contemporary Authoritarian State*, 5 E. ASIA L. REV. 303 (2010) (demonstrating the exemplary performance of specialized courts that decide cases on corporate fiduciary duties, corporate veil piercing, and shareholder resolutions free of the interference that plagues most Chinese courts); James Zagel & Adam Winkler, *The Independence of Judges*, 46 MERCER L. REV. 795 (1995).

¹⁹⁹ See *State v Govender*, 1986 (3) SA 969 (T) (S. Afr.). The 1982 decision was not reported until 1986. BARRY SCHWARTZ & KENNETH SHARPE, *PRACTICAL WISDOM: THE RIGHT WAY TO DO THE RIGHT THING* 113–14 (2010).

²⁰⁰ *Snyder v. Phelps*, 533 F. Supp. 2d 567 (D. Md. 2008); E.A. 2/84 Neiman v. Central Elections Committee 39(2) PD 225 [1985] (Isr); Paul Butler, *The Evil of American Criminal Justice: A Reply*, 44 UCLA L. REV. 143, 143–44 (1996) (positing that nullification on the part of minority jurors may be based on the epistemology of African-American preachers); Simon Stern, Note, *Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After Bushell's Case*, 111 YALE L. J. 1815 (2002); see also Adam Liptak, *Foreword: Hate Speech and Common Sense, in THE CONTENT AND CONTEXT OF HATE SPEECH*, *supra* note 93, at xix, xix.

²⁰¹ Steven D. Smith, *Stare Decisis in a Classical and Constitutional Setting: A Comment on the Symposium*, 5 AVE MARIA L. REV. 153, 154 (2007).

C. *Reading Outside of Master Stories*

Reading from beyond a master story is an altogether different exercise. Unencumbered by governing law or cultural expectations, judges may weigh values, meanings and even philosophical approaches in a less politicized environment. When a judge situated within one society's master story reads material from another society, he or she reads across national stories and is just as likely to challenge as preserve any given narrative. The interpretive exercise of external reading allows a decision-maker to consider factors that may be impossible from within the confines of purely domestic stories. In this space, reading is open to diverse sources of information and the political consequences for many meanings are less knowable.

Judicial readings that do not implicate master stories invite an expansive interpretation of first principles. In Canada, for example, the Supreme Court has repeatedly weighed freedom of expression against messages of "hate propaganda [that] undermine[] the dignity and self-worth of target group members"²⁰² in cases that do not involve language rights or the grand bargain that joined French and English Canada.²⁰³

The Canadian balance arose most poignantly in two cases evaluating the anti-Semitic speech of non-politicians. In the first case, a sharply divided Court confirmed the conviction of an Alberta high school teacher, James Keegstra, who described Jews as: "treacherous," "subversive," "sardistic," "money-loving," "power-hungry," and "child killers."²⁰⁴ Keegstra was prosecuted under Section 319(2) of the Canadian Criminal Code, which prohibits the promotion of hatred based on color, race, religion, or ethnic origin. While Keegstra maintained that Section 319(2) violated his right to free speech, the Court held that it was legitimate to criminalize this type of speech since it harms both individual victims and society as a whole. Less than two years later, the Court reached a different conclusion in *Zundel v. Regina*. In *Zundel*, the Court vacated the conviction of a Holocaust denier on the grounds that the controlling statute was insufficiently protective of expression and because of the thin line between fact and opinion.²⁰⁵ The inconsistent results are telling; in the absence of

²⁰² Taylor v. Can. Human Rights Comm'n, [1990] 3 S.C.R. 892, 894 (Can.).

²⁰³ Canada's Charter of Rights and Freedoms provides textual support for both free expression and the regulation of speech-based harms to groups and individuals. Section 2(b) guarantees freedom of expression in the following terms: "Everyone has the following fundamental freedoms: . . . (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) § 2.

²⁰⁴ R. v. Keegstra, [1990] 3 R.C.S. 697, 714 (Can.); *see also* Lorraine Eisenstat Weinrib, *Hate Promotion in a Free and Democratic Society*: R. v. Keegstra, 36 MCGILL L.J. 1416, 1416-17 (1991).

²⁰⁵ R. v. Zundel, [1992] 2 R.C.S. 731, 743-44 (Can.). As Kent Greenawalt characterizes the case: "Even assuming [that the statute in question promoted] some appropriate objective of social harmony and a rational link . . . Justice McLachlin

a master story, the Court engaged in a considered debate regarding the costs and benefits of the government's attempted restriction of odious expression.²⁰⁶ Ultimately, the Court found both positions supportable. A similar dynamic exists in the Netherlands where conservative politician Geert Wilders was recently prosecuted for incitement to hatred and discrimination for his expressly anti-Islamic speeches and films.²⁰⁷ The Amsterdam Court acquitted Wilders of these charges, finding his speech to be a form of legitimate, albeit uncivil, political expression.²⁰⁸

D. *The Challenge of Translation*

Neither the Canadian cases nor the Wilders matter required the relevant courts to evaluate speech emanating from a distant locale or in a foreign language. Across borders and languages, however, judges are increasingly required to read without reference to familiar landmarks and grapple with material produced in a wholly alien context. Transnational interpretation demands reference to standards originating well beyond the source of communication. Here reading is partially voyeuristic, an expression of cultural curiosity, infused with sympathy perhaps, but not empathy. Conversely, when readers feel threatened, offended, or unanchored, they may discount foreign ideas or legal precepts.²⁰⁹ The tension inherent in Azar Nafisi's provocative title, *Reading Lolita in Tehran*, suggests not only that geography renders some narratives taboo, but that the act of digesting text in certain locales can subject readers to a form of moral peril.²¹⁰ To read in an unfamiliar environment is to enter a semiotic netherworld where generalities substitute for nuance, authorial intent may be perverted, and meaning is dependent on translation.

When conflict or choice-of-law questions arise, the way in which text is read (or a speech is heard) is shaped by the interpretive process, in-

declared that the statute was much broader than necessary to achieve that aim." KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES AND LIBERTIES OF SPEECH* 70 (1995).

²⁰⁶ See *Saskatchewan Human Rights Comm'n v. Whatcott*, 2013 SCC 11 (Can.) (upholding hate speech laws as a constitutionally valid limit on freedom of expression).

²⁰⁷ Rb. Amsterdam 23 Juni 2011, NJ 2012, 370 m.nt. P.M (Wilders). According to Article 71 of the Dutch Constitution, as an MP, Wilders has immunity in the Dutch parliament with regards to communication, either in speech or in writing. Constitution of the Kingdom of the Netherlands, art. 71.

²⁰⁸ Rb. Amsterdam 23 Juni 2011, NJ 2012, 370 m.nt. P.M (Wilders).

²⁰⁹ See Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 263 (1994) ("Background assumptions determine, in great measure, whether a particular account will be heard as a persuasive or believable story."); Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845, 1856 (1994) ("Faced with a conflict between deep-seated beliefs and a contradicting story, some people may adjust their beliefs, but others are likely to reject the story as untrue.").

²¹⁰ AZAR NAFISI, *READING LOLITA IN TEHRAN: A MEMOIR IN BOOKS* (2003); see also ERIC NAIMAN, *NABOKOV, PERVERSELY 2* (2010) (recognizing that Nabokov's fiction is notorious for the interpretive panic it occasions in its readers).

formed as it is by unavoidable cognitive and cultural limitations. An Australian judge presiding over a global securities fraud case views the landscape differently than she does an extradition request from China concerning dissident speech. Nonetheless, this intuitive observation only begs the question of how familiar a judge must be with a foreign environment to rule in a principled fashion.

As the global reach of new media and the worldwide web expands, speech transmitted from one state where it is unregulated may be streamed into countries where access to or dissemination of such speech is prohibited. The September 2012 protests and rioting surrounding the uploading to YouTube of *Innocence of Muslims*, a video that mocks the Prophet Mohammed, reflects the controversy associated with cross-story communication. *Innocence of Muslims* may well constitute blasphemy, but there is nothing illegal about producing and disseminating that message in the United States.²¹¹ Despite protests from many Islamic countries where governments have blocked YouTube for not removing the video (or where YouTube has voluntarily blocked the film), the material is still readily accessible in the United States.²¹²

Similarly, in *Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, the United States Court of Appeals for the Ninth Circuit refused to interrupt the operation of an online auction site selling Nazi memorabilia in France, based on a server in California.²¹³ *Yahoo!* represents a clash of cultures and governing stories; France's Gayssot Law renders the downloading of a single communication a criminal offense whereas the uploading of the material to the California site is perfectly legal. In *Bachchan v. India Abroad Publications*, a New York court adopted similar reasoning in its refusal to enforce a British libel award since doing so would contravene the fundamental public policy of U.S. free speech.²¹⁴ *Yahoo!* and *Bachchan* contrast sharply with the North Rhine-Westphalia court which recently upheld the right of German federal authorities to block foreign web pages containing extremist content.²¹⁵

²¹¹ Robert C. Post, *Free Speech in the Age of YouTube*, FOREIGN POLICY (Sept. 17, 2012), available at http://www.foreignpolicy.com/articles/2012/09/17/free_speech_in_the_age_of_youube (citing *Cantwell v. Connecticut*, 310 U.S. 296, 308–11 (1940), for the view that the First Amendment protects provocative religious speech).

²¹² Post, *supra* note 211.

²¹³ *Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006) (en banc).

²¹⁴ *Bachchan v. India Abroad Publ'ns, Inc.*, 585 N.Y.S.2d 661, 664–65 (N.Y. Sup. Ct. 1992).

²¹⁵ CTR. FOR DEMOCRACY AND TECHNOLOGY, *Exercise of Jurisdiction by Foreign Courts Seen in Other Cases*, CDT Policy Post 7.06 (3) (July 11, 2011), http://old.cdt.org/publications/pp_7.06.shtml#3. In the German context, the fact that the expression is private, not public—a dispositive factor in other states—has no bearing on the regulation of speech.

If the final arbiter sits in a state dominated by a different master story, the outcome is susceptible to a range of interpretations.²¹⁶ Even where the judges speak the same language, cross-cultural communication can produce a type of verbal fissure. In *Hagan v. Australia*, the U.N. Committee monitoring compliance with the Convention on the Elimination of Racial Discrimination (CERD) held that the word “nigger” displayed on an Australian sports stadium sign was offensive based on “circumstances of contemporary society,” notwithstanding the Australian court’s finding that the phrase was allowable pursuant to local law.²¹⁷

E. *Recasting Mugesera’s Speech*

In deportation and extradition proceedings, as well as the jurisprudence of international tribunals, growing numbers of foreign judges are being called upon to rule on non-local expressions. That work relies on expert testimony, translators, and an understanding of context. The interpretive challenge of evaluating hate speech or incitement to mass violence is only magnified when the adjudicative body is removed from the source of expression and the contested communication originates in a foreign language.

Mugesera illustrates the difficulties of translating speech and the resulting legal narrative. Leon Mugesera’s speech was tape-recorded at the time of delivery. From that recording, the authenticity of which was never questioned, the Kinyarwanda speech was transcribed. The court of first instance chose one of two translations proffered by competing experts. Years later, the Court of Appeal questioned the version selected by the lower court and ultimately stayed Mugesera’s deportation on the grounds that his speech had been subject to a biased translation.²¹⁸ The Federal Court of Appeal insisted that if the court below had used a different translation it would have seen that Mugesera was simply calling on his political supporters to resist foreign invaders and act in self-defense. “This speaker was a fervent supporter of democracy,” the Court of Appeal declared, “The themes of his speeches were elections, courage and love . . . there is nothing in the evidence to indicate that Mr. Mugesera [was guilty of a crime].”²¹⁹ Justice Letourneau’s concurrence, the last words of the decision, states that:

²¹⁶ See Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 516 (2002) (observing that whether norms articulated by a court in one country will be recognized or adopted by another depends on the logic of the jurisdictional assertion).

²¹⁷ *Hagan v. Australia*, U.N. GAOR, Elim. of Racial Discrim. Comm., 62d Sess., U.N. Doc. CERD/C/62/D/26/2002 (2003).

²¹⁸ *Mugesera v. Canada*, [2004] 1 F.C.R. 3, 24 (Can. F.C.A.).

²¹⁹ *Id.* at 115; Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT’L L. 485, 519–28 (establishing a six-prong test to determine whether there was a reasonable possibility that “a particular speech will lead to genocide.” The test focuses on the environment in which the speech was given and how the audience received the speech).

[C]onclusions[,] sometimes erroneous, sometimes hasty and speculative, sometimes doubtful, with a weak foundation, often reasserted and reiterated by others without discrimination and any other attempt at authentication, have generated a belief in a non-existent reality. These words of Hughes Mearns in *The Psychoed*, cited in Bartlett's *Familiar Quotations*, 16th ed., Little, Brown and Company, 1992, page 630, aptly summarize the result of this phenomenon: As I was going up the stair, I met a man who wasn't there.²²⁰

In this reading, a speech so vile that it resulted in Mugesera's criminal indictment in MRND-led Rwanda was recast as harmless noise and erased through a writerly passage evoking nothingness. By the time Mugesera's speech reached the Supreme Court of Canada, differing translations of a single speech had produced radically different interpretations.

Translation, as *Mugesera* aptly demonstrates, is fraught with difficulties. Since meaning is a function of text *and* context, fidelity in translation must account for both. Yet "because narrative is a process that is constructed relative to such pregiven understandings, meaning and communication are vulnerable to cross-cultural distortion."²²¹ On this subject, Peter Schroth stresses that, "there can be no perfect translation. . . . the differences between languages are such that something is always lost in translation, but for most purposes, most of the time, a good translator can arrange to make what is lost the part that doesn't matter to the particular audience."²²² The very attempt to translate fully is a declaration of loyalty—to the court, to the parties, and to the demands of language.²²³

Translation can also be profoundly political.²²⁴ The field of translation studies, once defined by concerns about linguistic and textual fidelity to the original, has recently been dominated by the controversies attendant to non-translation, mistranslation, and disputed translation. Beginning with Walter Benjamin's *The Task of the Translator*, modern theorists now view language as the medium of symbolic logic and digital literacy.²²⁵ Emily Apter posits that translation can be an act of disruption and "a means of repositioning the subject in the world and in history; a

²²⁰ *Mugesera*, [2004] 1 F.C.R. 3, 119.

²²¹ Winter, *supra* note 50, at 2254–55.

²²² Peter W. Schroth, *Legal Translation*, 34 AM. J. COMP. L. (SUPP.) 47, 48 (1986).

²²³ Irus Braverman, *The Place of Translation in Jerusalem's Criminal Trial Court*, 10 NEW CRIM. L. REV. 239, 243 (2007).

²²⁴ See Sol Salbe, *In Israel, the Language in Which You Read Dictates What You Know*, +972 MAGAZINE (July 17, 2012), www.972mag.com/in-israel-the-language-in-which-you-read-determines-what-you-know/51256/ (explaining that English-language versions of Hebrew newspapers often contain different emphases and versions than the original text).

²²⁵ WALTER BENJAMIN, *The Task of the Translator: An Introduction to the Translation of Baudelaire's "Tableaux Parisiens"*, in ILLUMINATIONS 69 (Hannah Arendt ed., Harry Zohn trans., 1955).

means of rendering self-knowledge foreign to itself.”²²⁶ No longer seen as a science, direct translation is increasingly the site of political and linguistic contestation.

The act of bridging contextual gaps through translation is central to law’s purpose. It is, in language theorist James Boyd White’s words, the “art of recognition and response, both to another person and to another language.”²²⁷ Categorizing law as a conversation marked by incomplete meaning is unconventional, but conceiving of translation as a way of bringing two readings together to create a third fits comfortably in the legal tradition. As specialized readers, it is the task of judges to glean what can be easily grasped, what requires expert assistance, and what is beyond the realm of direct translation but must nonetheless be interpreted for an outsider audience.

Each of these tasks is performed in the act of judging inflammatory stories across cultures. Reading is freighted with foreknowledge and the challenge of applying legal standards to speech originating in a foreign language and context. The fact-finding enterprise is further complicated by the act of translation and the loss of meaning attendant to ascertaining the speaker’s intent. In a world where criminal responsibility or physical removal attaches to linguistic understandings, whether *inyenzi* is translated as ‘cockroach’ or ‘outsider’ matters. It follows that cross-cultural judicial reading requires command of diverse interpretive elements—attention to word choice, meaning, context, and the enduring stories that shape distant societies. For judges used to the reified narratives of domestic law, a cross-cultural reading may mean questioning some of the core assumptions and habits of adjudication. Should former Iranian leader Mahmoud Ahmedinejad’s calls for the “elimination” of Israel ever be met with criminal indictments, the reading of his speech may well reflect the values and threat determination of distant judicial authorities evaluating trans-border communication in an era of instantaneous and memorialized communication.²²⁸

III. JUDICIAL STORYTELLING

Judges are not just consumers of argument and narrative—they are also the authors of ongoing stories. This fact assumes added importance after the cataclysm of genocide. The exercise of judicial speech following incitement to mass violence is an occasion for courts to lend their interpretive gloss to speech-based threats. It may also be restorative, an oppor-

²²⁶ EMILY APTER, *THE TRANSLATION ZONE: A NEW COMPARATIVE LITERATURE* 6 (2006).

²²⁷ JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* 230 (1990).

²²⁸ Irwin Cotler, *State-Sanctioned Incitement to Genocide: The Responsibility to Prevent*, in *THE CONTENT AND CONTEXT OF HATE SPEECH*, *supra* note 93, at 430, 445–46.

tunity for judges to synthesize and apply universal values to the question at hand—to rebuild the rule of law through the written word.²²⁹

A. *Obligated to Write*

Law is itself a story, and the work of legislators, treaty-drafters, and judges resembles overlapping scripts. By employing language and narrative, Cover observed, “Law is a resource in signification that enables us to submit, rejoice, struggle, pervert, mock, disgrace, humiliate, or dignify [It] is predominantly a system of meaning rather than an imposition of force.”²³⁰ The words of law reflect a system of signification rather than a determinate corpus of self-defining rules. Law and narrative are inseparably related and the language-based act of judging and issuing orders is a means of contributing to a bigger story. Alexander Hamilton recognized as much in Federalist 78, his comment on a federal judiciary which would have “no influence over either the sword or the purse It may truly be said to have neither FORCE nor WILL but merely judgment”²³¹

Nevertheless, judges have a particular storytelling role to play. The *métier* of judges is words and judicial speech is required to clarify law, to articulate rationales, and to decide matters for litigants. Even as a court compels or interrupts action through the issuance of an order or a stay of execution, the connection between thought and deed is linguistic. Social cooperation and the rule of law are achieved largely through written and verbal communication. The more judges say, interpreting and expounding the law, “the more nearly do they approximate a ‘least dangerous branch,’” claiming and defining a largely rhetorical terrain.²³²

Judges frequently speak through the judicial opinion, a form that constitutes a quasi-sacred text in many legal systems. Like other forms of discourse, an opinion employs well-tested rhetorical forms. It states what a court believes to be the facts of the case before it and sets forth justifications for the legal conclusion. In Commonwealth nations, the judicial opinion situates a given dispute within a rich tradition and shapes facts and law to create dispositive patterns; a new, official story to guide future controversies.

On one level, the opinion or order is decisional—the litigants require a neutral intermediary to choose an internal winner, to credit one argument over another, and to produce finality. On another level, how-

²²⁹ See Mark A. Drumbl, *Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law*, 75 GEO. WASH. L. REV. 1165 (2006-07) (adding that international jurisprudence also holds expressivism as a goal in order to craft “historical narratives, their authentication as truths, and their pedagogical dissemination to the public”).

²³⁰ Cover, *supra* note 14, at 8, 12 (footnotes omitted); see also Delgado, *supra* note 57, at 2440–41.

²³¹ THE FEDERALIST NO. 78, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

²³² Cover, *supra* note 14, at 57–58.

ever, the judicial opinion is persuasive, and this is where it develops educational and narratological qualities. “The heart of [the judicial] achievement,” James Boyd White instructs, “lies in the recognition that [the judges’] authority must be created rhetorically, in the opinion itself; that it depends upon the informed understanding of the reader and upon his acquiescence, not in the ‘result’ or even the ‘reasoning’ by which the result is reached.”²³³ Judicial opinions exert authority through the written word and the social meaning that attaches to the use of language.

To think about law as authoritative narrative creates the possibility that a primary role for judges is providing explanations for multiple audiences. Judge Pierre Leval has remarked that judicial “opinions can be important events in public political debate. Furthermore, because courts do not command armies to enforce their decrees, persuading the people of the justice of their decisions is important to the preservation of the courts’ role in government.”²³⁴ Articulated legal commitments therefore structure fundamental aspects of our social experience. This is the power of a recognized authority concluding a deliberative process with an expressed justification for the outcome.

“I distrust the incommunicable; it is the source of all violence,” Sartre proclaimed, and so it is that one of the principal judicial purposes is to communicate.²³⁵ When Iranian or Chinese officials announce the execution of a prisoner without explanation or by reference to a rote phrase, (“he fell down the stairs, hit his head and died”) outside observers are horrified for many reasons, one of which is the refusal of the court to perform the expressive function of providing reasons for action or inaction.²³⁶ The Canadian Supreme Court confirmed as much in *Baker v. Canada*, in which the majority held that there is a common law right to know the reasons for a judicial decision—a judicial duty of explanation—in some circumstances.²³⁷

The compelled judicial narrative is critical because it connects the weight of law to very human controversies. The more judges use their declarative capacity to refute negationist efforts, the more closely do they fulfill their educational role and the more fully do they become authors and guardians of an official story. As judges project their interpretive acts into the public domain in writing, they define a space for reasoned discourse separate from the violence and coercion of other organs of the

²³³ WHITE, *supra* note 227, at 217.

²³⁴ Pierre N. Leval, *Judicial Opinions As Literature*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW*, *supra* note 14, at 206, 208.

²³⁵ JEAN-PAUL SARTRE, *WHAT IS LITERATURE?* 279 (Bernard Frechtman trans., 1965).

²³⁶ See Peter Haidu, *The Dialectics of Unspeakability: Language, Silence, and the Narratives of Desubjectification*, in *PROBING THE LIMITS OF REPRESENTATION: NAZISM AND THE “FINAL SOLUTION”* 277, 278 (Saul Friedlander ed., 1992) (recognizing that silence can be the product of many forces, including “the instrument of the bureaucrat, the demagogue, and the dictator” committed to the negation of speech).

²³⁷ *Baker v. Canada* (Minister of Citizenship & Immigration), [1999] 2 S.C.R. 817, 846–47, 864 (Can.).

state.²³⁸ Judicial narratives thus use language to stamp controlling viewpoints on legal problems and legal stories become part experience, part argument, and part precedent. Through the written opinion, courts enunciate norms, provide guidance to other courts, and serve as a repository of fact-based decisions.²³⁹

Writing in this fashion represents a particular kind of storytelling that rejects the conception of judge as stoic umpire, a literary counterweight to Cass Sunstein's notion of constitutional minimalism. Minimalist judges "decide no more than they have to decide. They leave things open. They make deliberate decisions about what should be left unsaid. . . . [They] do[] and say[] as little as necessary to justify an outcome."²⁴⁰ By contrast, storytelling judges may reveal or conceal, but they do so in language, embracing the expository possibilities inherent in written decisions.

B. *Confronting the Silence*

Judicial speech is particularly appropriate after the commission of mass crimes when it can function as the antithesis of state-sponsored silence. Conversations about justice and the role of law after genocide are often juxtaposed with the lack of speech that permeates the offense. In the tradition of Raphael Lemkin, who sought to name a previously nameless crime, judicial writing subjects the indescribable quality of mass atrocities to the certainty and acknowledgement of law.²⁴¹ A judicial voice constitutes a finding, legal acknowledgment of historic realities, and an answer to Primo Levi's fear that even if some people should survive the Holocaust, no one will believe their experience. As Payam Akhavan suggests, one of the signal achievements of Nuremburg was the reduction of the Holocaust "to a manageable narrative through the attribution of liability within the confines of legal process."²⁴²

Like the Holocaust, the Rwandan genocide is characterized by unspoken truths. Journalist Allan Thompson has noted that "in the autumn of 1994, French journalist Edgar Roskis, wrote in *Le Monde Diplomatique* of

²³⁸ See Paul Horwitz, *Law's Expression: The Promise and Perils of Judicial Opinion Writing in Canadian Constitutional Law*, 38 OSGOODE HALL L.J. 101, 107 (2000) ("[W]hatever their personal values and motives, judges are required to provide a set of acceptable formal reasons.").

²³⁹ *Id.* at 107–08; see generally Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455 (1995).

²⁴⁰ Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6 (1996).

²⁴¹ See RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* (1944); David Luban, *Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report*, 7 CHI. J. INT'L L. 303 (2006).

²⁴² PAYAM AKHAVAN, *REDUCING GENOCIDE TO LAW: DEFINITION, MEANING, AND THE ULTIMATE CRIME* 103 (2012).

‘un genocide sans images,’ a genocide without images.”²⁴³ The deadening effect of killing is reflected in the *Interahamwe*’s desire to leave none to tell the story,²⁴⁴ the Clinton Administration’s refusal to call the atrocities genocide, and the United Nations’ failure to support General Romeo Dallaire’s request for additional troops.²⁴⁵ Although some forms of carefully managed conversations have taken root in post-genocide Rwanda, the country continues to be marked by conspicuous silences, from the absence of a truth commission tasked with creating an authoritative national history, to the paucity of domestic judgments explaining the origins of the atrocities (the *gacaca* courts are generally unrecorded), to Rwanda’s refusal to tolerate dissent and the reticence of some international organizations to criticize Rwanda on that basis.²⁴⁶ Indeed, much of the critical reflection on the international community’s response to the incitement that fed the Rwandan genocide reproduces this theme with its focus on technology-based prevention, specifically the unactivated potential for radio jamming, air strikes against RTLM radio, and other forms of enforced silence.²⁴⁷

Against this backdrop, encompassing the Rwandan experience in legal language necessitates a specific kind of judicial storytelling. The challenge is most acute with respect to the production of an authoritative narrative capable of labeling and reckoning with incitement to genocide. The legalization of a singular catastrophe within a universal discourse is always complex since translating the systematic misuse of language in a historically contingent moment into a legal concept applicable in other contexts involves two potentially incompatible goals: the rational categorization of speech-based activity as a violation of abstract norms and the recognition of human suffering in language appropriate for the magnitude of the crime. Yet the assertion of “jurisdiction,” the power to say the law, directs judges to tell this story.

C. *The Entanglement of Law and Narrative*

The adjudication of incitement to genocide from outside a national master story involves the triple joinder of law and narrative. In the first instance, judges apply legal doctrine to the spoken or written word to de-

²⁴³ Allan Thompson, *Introduction to THE MEDIA AND THE RWANDA GENOCIDE* 4 (Allan Thompson ed., 2007) available at <http://www.internews.org/sites/default/files/resources/TheMedia&TheRwandaGenocide.pdf> (observing that because most foreign journalists fled the country, the genocide was largely unrecorded).

²⁴⁴ DES FORGES *supra* note 4, at 10.

²⁴⁵ SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE 361, 366–71 (2002).

²⁴⁶ See Susanne Buckley-Zistel, *Remembering to Forget: Chosen Amnesia As a Strategy for Local Coexistence in Post-Genocide Rwanda*, 76 J. INT’L AFR. INST. 131, 131–32 (2006) (discussing how the state has sought to erase discourses of ethnic difference).

²⁴⁷ See Jamie Frederic Metz, *Rwandan Genocide and the International Law of Radio Jamming*, 91 AM. J. INT’L L. 628 (1997).

termine whether the inflammatory speech poses a danger or ought to be permitted. Here, in Moshe Halbertal's phrase, "the narrative [itself] provides a basis for the law," and the legal outcome is determined by the underlying story.²⁴⁸

Accordingly, in *Mugesera*, the Canadian Supreme Court does more than rule on the legality of the respondent's entry into the country; it delves into the content of Mugesera's speech, embracing the adjudication of language despite the original utterance in an entirely foreign context. To ascertain if Mugesera's speech represented a call to genocide, the Court subjected it to the Genocide Convention inquiry of whether it constituted direct, public, and intentional incitement while assiduously avoiding the question of whether hate speech leads to incitement to genocide.²⁴⁹ The opinion is organized in chapters beginning with a history of Rwanda and an in-depth study of the ethnic tensions that predominated in Gisenyi at the time of Mugesera's address.²⁵⁰

The Court explicitly relies on story as a sign of authenticity by noting that "[i]t is common lore in Rwanda that the Tutsi originated in Ethiopia."²⁵¹ The decision also established a demonstrable link between the use of language and the independent commission of an international crime, namely the utterance of an explicit call to exterminate Tutsis. Mugesera's reference to the Nyabarongo River plainly spoke to the Court, which held that since the Nyabarongo is unnavigable, Mugesera must have been urging his followers to kill.²⁵²

The second overlap of law and story draws courts into discussion with other judicial bodies because the adjudication of incitement to genocide demonstrates that neither the commission of the crime nor the interpretation of the speech is a local phenomenon. Genocide and its incendiary predicate are now firmly established as jus cogens violations.²⁵³ Reckoning with this kind of expressive activity necessarily implicates judges in a global enterprise that creates engagement with foreign and international law.²⁵⁴

The project of defining incitement to genocide began at Nuremburg with *Streicher* and the finding that the defendant vilified whole segments

²⁴⁸ Moshe Halbertal, *At the Threshold of Forgiveness: A Study of Law and Narrative in the Talmud*, 2 JEWISH REV. BOOKS 33, 34 (2011).

²⁴⁹ For a discussion of the effects of accumulated and targeted hate speech in Rwanda, see Yared Legesse Mengistu, *Shielding Marginalized Groups from Verbal Assaults Without Abusing Hate Speech Laws*, in THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 93, at 352, 360.

²⁵⁰ *Mugesera v. Canada*, [2005] 2 S.C.R. 100, 111–15 (Can.).

²⁵¹ *Id.* at 138.

²⁵² *Id.*

²⁵³ Jordan J. Paust, *Genocide in Rwanda, State Responsibility to Prosecute or Extradite, and Nonimmunity for Heads of State and Other Public Officials*, 34 HOUS. J. INT'L L. 57, 63 (2011).

²⁵⁴ See Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029, 2080–82 (2004) (predicting that a dialectical relationship will form between domestic and international tribunals).

of the population.²⁵⁵ With the creation of the International Criminal Tribunal for Rwanda (ICTR), the question of whether inflammatory speech led to mass violence shifted to the adjudication of accused Rwandan war criminals. In the first of these cases, the ICTR found Jean-Paul Akayesu guilty of incitement to genocide, among other crimes.²⁵⁶ “The Tribunal determined that Akayesu committed [direct and public incitement to genocide] by leading and addressing a public gathering . . . during which he urged the population to unite in order to eliminate what he referred to as the sole enemy: the accomplices of the ‘Inkotanyi.’”²⁵⁷ The Tribunal defined the crime of incitement as directly provoking another to commit genocide and found a nexus between Akayesu’s speech and subsequent massacres.²⁵⁸ Similarly, Georges Ruggiu pled guilty to one count of direct and public incitement to genocide for provoking ethnic hatred and violence as a broadcaster for the RTLM radio station. “In his broadcasts at the RTLM,” the Tribunal held, “he encouraged setting up roadblocks and congratulated perpetrators of massacres of the Tutsis at these roadblocks.”²⁵⁹

In the so-called “media” trial, the ICTR convicted Hassan Ngeze, the Editor-in-Chief of *Kangura* magazine, Ferdinand Nahimana, a founder of RTLM, and Jean-Bosco Baragwiza, a lawyer and RTLM executive. Through *Kangura*, the Tribunal found that Ngeze

explicitly and repeatedly, in fact relentlessly, targeted the Tutsi population for destruction. Demonizing the Tutsi as having inherently evil qualities, equating the ethnic group with “the enemy” . . . the media called for the extermination of the Tutsi ethnic group as a response to the political threat that [the Hutu] associated with the Tutsi ethnicity.²⁶⁰

The Trial Chamber found that *Kangura* published ethnic hatred and threats from 1990 through 1994 that “had the effect of poison” in spread-

²⁵⁵ See Golden, *supra* note 75, at 1165. The most damning evidence of incitement at Nuremberg was Der Stürmer’s publication of “a special issue devoted to ‘racial pollution’ [that] demand[ed] the death penalty for Jews . . . which was captioned in huge red letters.” *Id.* (quoting *Another Stuermer Is Seized in Germany*, N.Y. TIMES, Jan. 22, 1938, at 2).

²⁵⁶ Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, Count 4 (Int’l Crim. Trib. for Rwanda Sept. 2, 1998).

²⁵⁷ Gregory S. Gordon, “A War of Media, Words, Newspapers, and Radio Stations”: *The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech*, 45 VA. J. INT’L L. 139, 150 (2004).

²⁵⁸ *Akayesu*, Case No. ICTR-96-4-T ¶¶ 559, 673–74. The *Akayesu* Trial Chamber also noted that colonial administrators converted once fluid ethnic, class, and tribal identities in Rwanda into fixed understandings of population. *Id.* ¶ 172. Mugesera’s speech is mentioned by the ICTR in Prosecutor v. Bizimingu, Case No. ICTR-2000-56-I, Indictment ¶ 4.11 (Int’l Crim. Trib. for Rwanda Aug. 23, 2004).

²⁵⁹ Prosecutor v. Ruggiu, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 50 (Int’l Crim. Trib. for Rwanda June 1, 2000).

²⁶⁰ Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 963 (Int’l Crim. Trib. for Rwanda Dec. 3, 2003).

ing “fear-mongering and hate propaganda . . . [to pave] the way for genocide in Rwanda, whipping the Hutu population into a killing frenzy.”²⁶¹ Nahimana caused the deaths of thousands of innocent civilians without so much as a “firearm, machete or any physical weapon,” the tribunal held.²⁶² All told, the Court decided, the entities controlled by the defendants formed “a common media front” that labeled Tutsis as the enemy, normalized ethnic hatred as political ideology, and orchestrated killings.²⁶³

Insofar as each of these speakers’ words precipitated, instigated, or formed a causal relationship with acts of violence, international criminal tribunals operating through translations have had little difficulty attaching criminal sanctions to inciting speech. Like Streicher’s speech of an earlier era, *RTL* and *Kangura* were closely connected to the operation of state power and their message inflamed and desensitized myriad actors.²⁶⁴ International criminal tribunals have recognized that in the employ of monopolistic power, stories can be used to maintain dangerous mythologies or violent fantasies, to justify disparities, and to create a culture of permissive violence. But where the consequences of vitriolic rhetoric are less direct or abhorrent, however, courts and tribunals have refused to sanction speech alone. The International Military Tribunal at Nuremberg acquitted Hans Fritzsche, chief of the radio section of the Nazi Propaganda Ministry, because he had not exercised control over propaganda policies and it could not connect his weekly broadcasts to specific instances of directed violence.²⁶⁵ In the “media” case at the ICTR, the Appeals Chamber dismissed some of the charges against Ngeze, Nahimana, and Baragwiza related to speech that could be subject to more than one interpretation. And Rwandan musician Simon Bikindi, who was indicted for composing, singing, and broadcasting songs that called for the slaughter of Tutsis, was acquitted by the ICTR Trial Chamber on the

²⁶¹ *Id.* ¶¶ 243, 950.

²⁶² *Id.* ¶ 1099.

²⁶³ *Id.* ¶ 62.

²⁶⁴ In both Nazi Germany and the Federal Republic of Yugoslavia, propagandists maintained a drumbeat of violent discourse designed to drown out alternative voices, to collapse the marketplace of ideas, and to ensure that their voices would be the only ones heard. See MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG* 28 (1997); Carol Pauli, *Killing the Microphone: When Broadcast Freedom Should Yield to Genocide Prevention*, 61 ALA. L. REV. 665, 666–68 (2010) (developing a legal framework based on communication research to identify the conditions that create incitement to genocide and justify intervention).

²⁶⁵ XXII TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 582–85 (1948); see also Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later*, 8 TEMP. INT’L & COMP. L.J. 1, 45 (1994) (The *Fritzsche* case “clarified that a conviction for incitement requires the use of provocative language as well as a specific intent to provoke others to act.”).

charge of incitement through the composition or dissemination of his songs because the prosecution was unable to show causation.²⁶⁶

Mugesera offers another installment in the global judicial enterprise of adjudicating incitement to genocide. “In the face of certain unspeakable tragedies,” Chief Justice McLachlin writes, “the community of nations must provide a unified response. Crimes against humanity fall within this category.”²⁶⁷ Notwithstanding the contention that some crimes exist beyond language, the Court regards the speech in this case to be the progenitor of international offenses that warrant legal sanction. By defining incitement through the stories of other tribunals and incorporating into domestic jurisprudence the interpretation of diverse adjudicative bodies, the *Mugesera* court gives and takes of comparative law.²⁶⁸

The meaning of the modern human rights lexicon is a shared and developing enterprise and the judge is, in René Provost’s analysis, “the midwife of customary norms, assisting in the process of its emergence as a binding standard; and at most, in line with the development of the common law, the judge plays a truly creative role.”²⁶⁹ This, of course, is a venerable tradition and a well-established practice in Commonwealth states and among imperial powers and their colonies.²⁷⁰ Customary international law is the product of repetitive storytelling capable of generating a sense of legal obligation.²⁷¹ By speaking to other judiciaries through facts and a method of inquiry that can be reproduced as an analogous tale—the “diction” of jurisdiction—*Mugesera* reflects a growing judicial habit.

The third combination of law and narrative is the conscious development of a global language of international human rights law for a broader audience than the litigants or other judges. The judicial elaboration of incitement to genocide suggests that there are times when the law

²⁶⁶ Bikindi was nonetheless convicted of incitement to commit genocide on the basis that he had travelled on a main road as part of a convoy of Interahamwe, in a vehicle outfitted with a public address system, and had used this system to call on the Hutu to rise up to exterminate the Tutsi. *Prosecutor v. Bikindi*, Case No. ICTR-01-72-T, Judgment, ¶¶ 422–26 (Dec. 2, 2008); see also Gordon, *supra* note 158, at 607–08, 620.

²⁶⁷ *Mugesera v. Canada*, [2005] 2 S.C.R. 100, 167 (Can.).

²⁶⁸ See JACKSON, *supra* note 92, at 99 (observing that judging can be “an activity with ‘supranational’ elements”); Claire L’Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 16 (1998) (“More and more courts, particularly within the common law world, are looking to the judgments of other jurisdictions, particularly when making decisions on human rights issues.”).

²⁶⁹ René Provost, *Judging in Splendid Isolation*, 56 AM. J. COMP. L. 125, 139 (2008) (identifying the Canadian approach as dialogic).

²⁷⁰ Anne-Marie Slaughter, *A Brave New Judicial World*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 277, 287 (Michael Ignatieff ed., 2005).

²⁷¹ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (“Customary international law results from a general and consistent practice of states [performed out of] a sense of legal obligation.”); see also U.N. Charter art. 38, para. (1)(b); Timothy Meyer, *Codifying Custom*, 160 U. PA. L. REV. 995, 1034 (2012).

becomes the narrative. This is the story of human dignity and universal norms that allows a Canadian court to opine on the Kabaya speech.

Judging speech across time and space requires sufficient knowledge of the underlying context to announce that some stories violate the rights of targeted persons or humanity as a whole. At this level, the articulation of human rights narratives is exemplary and the judicial righting of human rights wrongs represents law in its expressive capacity. The language of the incitement case law begins to mediate our understanding of social relationships and the dangers inherent in some forms of expression. The growing collection of stories establishing incitement to genocide as a violation of international human rights law clarifies the norm and contributes to the corpus of international law. In Cover's parlance, judicial storytelling in human rights cases gradually produces the *nomos*, a world-building articulation of interpretive commitments in law.²⁷²

Mugesera is predicated on the finding that the respondent incited violence through exterminationist rhetoric that warrants deportation from Canada. The call to eliminate a group, coming from an authority figure, invoking a master story, is enough for the Court to act. Turning back on itself and speaking of Canada, the Court holds that "our nation's deeply held commitment to individual human dignity, freedom and fundamental rights requires nothing less."²⁷³ The use of the term "human dignity" is not accidental. Although the precise meaning of dignity changes across jurisdictions, the concept undergirds the Universal Declaration of Human Rights, the equality guarantees of South Africa's Constitution, the United States Supreme Court's antidiscrimination law, and the U.K. House of Lords's decision to order the provision of AIDS medications to HIV-positive asylum seekers.²⁷⁴ Human dignity is increasingly the centerpiece of the secular language of international rights discourse and a means of evaluating abusive expression.²⁷⁵ Law, as reflected in *Mugesera*, fashions and defends a narrative of human dignity and universal values in incitement to genocide cases.

The grammar of human dignity in *Mugesera* may have the additional benefit of immunizing it from a countervailing rights-based attack. The exercise of free speech is a fundamental right and without carefully labeling *Mugesera*'s expression as a verbal assault and a precursor of monstrous action, the opinion might be susceptible to claims of moral equiva-

²⁷² Robert C. Post, *Who's Afraid of Jurispathic Courts?: Violence and Public Reason in Nomos and Narrative*, 17 *YALE J.L. & HUMAN.* 9, 11 (2005).

²⁷³ *Mugesera v. Canada*, [2005] 2 S.C.R. 100, 167 (Can.).

²⁷⁴ See Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 *EUR. J. INT'L L.* 655, 659, 662–67 (2008) (cataloging the many uses of dignity and recognizing that the term is a source from which new rights may be derived and existing rights extended).

²⁷⁵ See STEVEN J. HEYMAN, *FREE SPEECH AND HUMAN DIGNITY* 2 (2008) (proposing a personal autonomy and dignity-based approach to conflicts between competing rights values); MICHAEL IGNATIEFF ET AL., *HUMAN RIGHTS AS POLITICS AND IDOLATRY* 163–65 (Amy Gutmann ed., 2001).

lency.²⁷⁶ Likewise, during Mugesera's last days in Canada, his lawyers invoked the *non-refoulement* principle to assert that he would be subjected to torture if he were returned to Rwanda.²⁷⁷ The implication of Mugesera's claim was that the rights-protective position weighed in his favor. The Court's story-salient description of the dehumanizing effects of a speech in *Mugesera* insulates against adoption of this view while defining incitement to genocide as a grave international human rights violation. In sum, the adjudication of this crime in a transnational setting makes clear that the dignity-based threat posed by incitement to genocide trumps countervailing concerns.

D. Distinguishing Hate Speech from Incitement to Genocide

The protection and the promotion of human dignity takes many forms and it is axiomatic that both hate speech and incitement to genocide offend the dignity of others through the structure and appeal of story. But hate speech is a broader category than incitement since it encompasses a wider range of expression with less directed goals. International law muddies the waters by providing support for both freedom of expression and the protection of human dignity in the face of linguistic violence. Article 19 of the Universal Declaration of Human Rights proclaims that "[e]veryone shall have the right to hold opinions without interference. . . . to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers . . . or through any media." The same article of the International Covenant on Civil and Political Rights (ICCPR) requires states to protect freedom of expression although it does not define protected communication.²⁷⁸ Conversely, international human rights law evinces concern for the damage wrought by certain forms of speech, specifically expressions of racial animus. Article 20 of the ICCPR expressly prescribes legal restrictions of hateful incitement, and Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that State Parties "Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."²⁷⁹

²⁷⁶ Benesch, *supra* note 74, at 492.

²⁷⁷ Mugesera's legal team filed an Article 22 individual petition before the Committee Against Torture, seeking to forestall the deportation, and the Committee duly requested that Canada refrain from deporting Mugesera until it would consider the petition. In response, a Quebec Superior Court temporarily stayed Mugesera's deportation but ruled a week later that the Committee lacked the authority to constrain the action of States Parties. *Mugesera v. Kenney*, 2012 Q.C.C.S. 116 (Can. Que. Sup. Ct.).

²⁷⁸ International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, S. Exec. Doc. E, 95-2, 999 U.N.T.S.171.

²⁷⁹ *Id.* art. 20; International Convention on the Elimination of All Forms of Racial Discrimination art. 4(c), Mar. 7, 1966, 660 U.N.T.S. 195, 220; *see also* African [Banjul] Charter on Human and Peoples' Rights arts. 9, 28, June 27, 1981, OAU Doc.

Absent global institutions capable of defining uniform speech standards, the principles of free expression and the obligation of states to curtail incitement have been upheld independently.²⁸⁰ In *Lehideux and Isorni v. France*, the European Court of Human Rights determined that a French prosecution for contesting the legitimacy of the conviction of Marshal Pétain violated the European Convention's guarantee of free expression.²⁸¹ But the Human Rights Committee has ruled otherwise in a series of cases that have been decided against individual rights of expression and in favor of state protections against degrading speech. In *Faurisson v. France*, the Committee found no breach of the Covenant where a conviction under France's Holocaust denial legislation was held not to encroach upon Faurisson's right to hold and express an opinion in general.²⁸² Likewise, in *M.A. v. Italy*, the Human Rights Committee ruled inadmissible a complaint that a conviction for reorganizing the dissolved Fascist Party in violation of Italian law violated speech and associational rights under the ICCPR.²⁸³ The divergence of views on the subject is so great that some commentators have concluded that "it would be both impossible and undesirable to develop universal standards on speech, and the attempted imposition of such norms would be viewed as illegitimate."²⁸⁴ It is plain that viewed alongside the diversity of national standards and speech-restrictive subjects, there is no global consensus on the content and context of hate speech.

To conflate incitement to genocide with hate speech is legally problematic because the former is a crime under international law and the latter is not.²⁸⁵ Susan Benesch's cogent analysis observes that the *Mugesera* opinion neither situates hate speech and incitement to genocide along a spectrum of expression nor provides a clear test for use in future cases.²⁸⁶

CAB/LEG/67/3/ rev. 5, 21 I.L.M. 58 (1982) (including the right to free expression as well as the duty "to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance").

²⁸⁰ Contrast the Human Rights Committee's new draft General Comment on Art. 19(1) on speech guarantees with the United Nations Human Rights Council 2009 passage of a resolution condemning "defamation of religions" as a fundamental human rights violation. Human Rights Council Draft Res. 10/. . ., HRC, 9th Sess., A/HRC/10/L2 (Mar. 11, 2009); see also Molly Beutz Land, *Protecting Rights Online*, 34 YALE J. INT'L L. 1, 29 (2009).

²⁸¹ *Lehideux & Isorni v. France*, 1998-VII Eur. Ct. H.R. 6 (noting the passage of time as a consideration in evaluating a law prohibiting denial of a crime against humanity).

²⁸² *Faurisson v. France*, CCPR/C/58/D/550/1993 (H.R. Comm. 1993).

²⁸³ Rep. of the Human Rights Comm., Commc'n No. 117/1981, at 33, U.N. Doc. CCPR/C/OP/2; GAOR, 39th Sess., Supp. No. 40 (1984).

²⁸⁴ Land, *supra* note 280, at 31 (citing, among others, JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD (2006)).

²⁸⁵ See Benesch, *supra* note 74, at 515–16.

²⁸⁶ *Id.* at 520 (proposing a test focused on audience understanding, speaker influence, recent violence, absence of alternative voices, dehumanizing rhetoric, and prior messaging); see also Gordon, *supra* note 158, at 627 (proposing temporality and

And while the *Mugesera* Court gestures toward the force of stories and lore in pre-genocidal Rwanda, it fails to identify which elements of incitement constitute crimes against humanity or when hate speech might grow into an exhortation to commit mass murder.

In a separate decision drafted in response to Bertrand's abuse of process motion, however, the Court implicitly distinguished Mugesera's speech from that of his lawyer. Instead of unpacking the commonalities and differences in the two types of speech or applying the critical lens it used in the international context to a domestic reading, the Court bifurcated its resolution of the questions presented. The outcome is a structural split in the treatment of hate speech and incitement to genocide. The Court's second Mugesera decision confirms that:

[T]he content of the motion . . . constitutes an unqualified and abusive attack on the integrity of the Judges of this Court. In an attempt to establish the alleged Jewish conspiracy and abuse of process against the Mugeseras, the pleading systematically referred to irresponsible innuendo. . . . The only abuse of process from this motion lies at the feet of the respondent Mugesera and Mr. Bertrand.²⁸⁷

If nothing else, the written rebuke of Bertrand suggests that the lawyer's speech was less threatening than his client's and can be addressed and exposed by nothing more than judicial language. This type of narrative—admonishing, condemnatory, situational—is one that judicial factfinders are uniquely positioned to generate. By naming Bertrand's storytelling as anti-Semitic, the Court uses the language of law and the reasoned reference to civic values to displace the illogic of racism and discrimination. Significantly, the denial of Bertrand's motion carried with it no legal sanction or censure, save referral to the bar association.²⁸⁸

Despite the vastly different consequences for Mugesera and Bertrand, the Court's shared focus in the twined opinions is on the spoken word. Having determined that the context of Bertrand's motion precluded incitement to serious crimes, the abuse of process decision offers proof that the best response to hateful expression that is disconnected to action or that fails to trigger a master story may simply be more speech.

CONCLUSION

Leon Mugesera was deported from Canada to Rwanda on January 23, 2012, where he was promptly incarcerated and held pending trial on

instrumentality as additional factors for identifying incitement); Pauli, *supra* note 264, at 671–75 (offering a test based on “communications research”).

²⁸⁷ *Mugesera v. Canada*, [2005] 2 S.C.R. 91, 98 (Can.).

²⁸⁸ *Décision sur Culpabilité et Sanction, Guimont c. Bertrand*, 2005 CanLII 57406 (Barreau du Québec Comité de Discipline); John M. Evans, *Questions of Law and the Standard of Review: A Crisis of Confidence?*, 18 CAN. J. L. & ADMIN. PRAC. 297, 299 n.6 (2005).

incitement to genocide charges.²⁸⁹ Less than three months later, Mugesera demanded a trial in French, not Kinyarwanda, the *lingua franca* of his infamous speech.²⁹⁰ Should his Rwandan trial prove to be the final act of a decades-long morality play, Mugesera will have demonstrated once more that language and story are inextricably bound to the social life that law negotiates and constructs.

The first and last lesson of this story is that not all stories are equal and none matters more than the master story. Evaluating incitement to genocide and hate speech from this perspective exposes the importance of language in the creation of meaning and the ways in which law employs narrative to redefine the tension between the promotion and regulation of stories. How appropriate that the *Mugesera* Court should use the Kabaya speech as grist for the iterative development of international human rights law and norms. In the final analysis, law thrives in a culture of stories, particularly when it succeeds in creating a tale imbued with pathos and reason and which lends itself to retelling again and again.

²⁸⁹ See *Deported Mugesera Now Bound for Rwanda*, CBC NEWS (Jan. 23, 2012), <http://www.cbc.ca/news/canada/montreal/story/2012/01/22/leon-mugesera-deportation-legal-decision.html>.

²⁹⁰ Steve Terrill, *Accused in Rwandan Genocide Demands Trial in French*, THE GLOBE & MAIL (Apr. 2, 2012), <http://theglobeandmail.com/news/world/accused-in-rwandan-genocide-demands-trial-in-french/article4097319>.