**REASONS, REASONING, AND LEGAL STORY-TELLING**

**I.**

Let us begin with a sad story.

> Nobody knows where my Johnny has gone
> Judy left the same time
> Why was he holding her hand
> When he's supposed to be mine?
>
> It's my party, and I'll cry if I want to
> Cry if I want to, cry if I want to
> You would cry too if it happened to you.
>
> Play all my records, keep dancing all night
> Leave me alone for a while
> 'Till Johnny's dancing with me
> I've got no reason to smile.
>
> It's my party, and I'll cry if I want to,
> Cry if I want to, cry if I want to.
> You would cry too if it happened to you.
>
> Judy and Johnny just walked thru' the door
> Like a queen with her king
> Oh what a birthday surprise
> Judy's wearing' his ring
>
> It's my party, and I'll cry if I want to
> Cry if I want to, cry if I want to
> You would cry too if it happened to you
>
> Lesley Gore[i]

Leslie is in tears, and she assures us we would be too if something similar happened to us. So what the heck happened? She doesn't spell it out, but she knows, and so do we. Johnny is no longer hers and has taken up with Judy. Leslie doesn't reason this through with quasi-mathematical deductive or analytic certainty. Nevertheless, she has strong evidence.

Here's a schematic representation of Leslie's evidence.

$e_1$. Johnny has gone missing at Leslie's birthday party.

$e_2$. Judy left the same time.

$e_3$. Johnny was holding Judy's hand.

$e_4$. Johnny and Judy have reappeared together.

$e_5$. Judy exhibits a disturbing expression and carriage – "like a queen with her king."

$e_6$. Judy is wearing a (man's) ring (that appears to be Johnny's).

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$t_0$. Johnny has taken up with Judy.

In the influential jargon of Gilbert Harman, Leslie's reasoning is an inference to the best explanation.

> In making this inference one infers, from the fact that a certain hypothesis would explain the evidence, to the truth of that hypothesis. In general, there will be several hypotheses which might explain the evidence, so one must be able to reject all such alternative hypotheses before one is warranted in making the inference. Thus one infers, from the premise that a given hypothesis would provide a "better" explanation for the evidence than would any other hypothesis, to the conclusion that the given hypothesis is true.[ii]

Johnny's having abandoned Leslie and taken up with Judy beautifully explains the mutual absence from the party, the hand holding, the reemergence together, the look and carriage, and the ring on Judy's finger.

As Harman notes, however, other rival hypotheses would also explain the relevant evidence. Suppose Judy told Johnny she was feeling lightheaded and asked him to take her hand and accompany her so that she could compose herself. The source of here wooziness was pure giddy joy – the captain of the football team had asked her to go steady and given her his ring.

Johnny calmed her down and they came back to the party. Judy was still enthralled by the new relationship, and her look and carriage showed it. Let's label this rival explanation $t_1$.

Or Judy may be truly devious and almost dangerous. She has resented Leslie for a long time. She grabbed Johnny's hand and told him she wanted to show him something in the other room. When they got there she threw herself at him, but he remained true to Leslie. When he told her they must get back to the party she then put on a class ring that she had swiped from her brother, and reemerged with Johnny, smugly knowing what Leslie would think. We'll call this rival $t_2$.

**II.**

Here's another sad story.

> Mary Anne and Wanda were the best of friends
> All through their high school days
> Both members of the 4H club, both active in the FFA
> After graduation Mary Anne went out lookin' for a bright new world
> Wanda looked all around this town and all she found was Earl
>
> Well, it wasn't two weeks after she got married that
> Wanda started gettin' abused
> She'd put on dark glasses or long sleeved blouses
> Or make-up to cover a bruise
> Well she finally got the nerve to file for divorce
> And she let the law take it from there
> But Earl walked right through that restraining order
> And put her in intensive care
>
> Right away Mary Anne flew in from Atlanta
> On a red eye midnight flight
> She held Wanda's hand as they worked out a plan
> And it didn't take 'em long to decide
>
> That Earl had to die, goodbye Earl
> Those black-eyed peas, they tasted alright to me, Earl
> You're feelin' weak? Why don't you lay down and sleep, Earl
> Ain't it dark wrapped up in that tarp, Earl

The cops came by to bring Earl in
They searched the house high and low
Then they tipped their hats and said, thank you ladies
If you hear from him let us know
Well, the weeks went by and spring turned to summer
And summer faded into fall
And it turns out he was a missing person who nobody missed at all

So the girls bought some land and a roadside stand
Out on highway 109
They sell Tennessee ham and strawberry jam
And they don't lose any sleep at night, 'cause

Earl had to die, goodbye Earl
We need a break, let's go out to the lake, Earl
We'll pack a lunch, and stuff you in the trunk, Earl
Is that alright? Good! Let's go for a ride, Earl, hey!
Ooh hey hey hey, ummm hey hey hey, hey hey hey

The Dixie Chicks

There's a lot going on in this story, of course – the pattern of abuse, the restraining order, the divorce, the assault, the murder, the cursory police investigation, and the ladies' life after Earl. My focus, however, is the plan that Mary Anne and Wanda cooked up in intensive care. Earl had to die! What were their reasons for thinking this? It's easy to schematize some of their central reasons.

$R_1$. It wasn't two weeks after she got married that Wanda started gettin' abused.
$R_2$. She finally got the nerve to file for divorce.
$R_3$. Earl walked right through that restraining order and put her in intensive care.
==========
$T_0$. Earl had to die.

In this little argument the ladies' reasons seem to function something like the reasons for Leslie's suspicion did. They seem to provide evidence in support of their theory about what had to done.

But there are important differences, as well. Leslie's theory was about what had happened. Her method was akin to a police detective's, or an historian's, or a scientist's. Mary Anne and Wanda's theory is not about what happened, but about the right course of action in the circumstances.

There is a crucial difference between the two arguments that any devotee of inference to the best explanation will note. The second bit of reasoning is not explanatory in the same way the first is. The Judy and Johnnie hypothesis explains the mutual absence, the hand holding, and the ring on Judy's finger. The Earl has to die hypothesis doesn't even attempt to explain the pattern of abuse, the divorce, the restraining order, or the assault. This would seem to indicate that inference to the best explanation will be of little use in deciding whether Mary Anne and Wanda's reasons were strong enough to justify the murder. And that is indeed the case. But there are important similarities in the two stories, nevertheless. Leslie's story offers an explanation of what happened. We deem her diagnosis reasonable because we judge her story as superior to alternative stories about what happened – the football captain story, or the resentment and brother's ring narrative. Although the normative recommendation regarding Earl is not an explanation of any of the facts the whole story does offer an account of what the ladies did, and why they think they were normatively justified. So it seems relevant to ask whether the Earl has to die story superior to other stories that friends, loved ones, counselors, lawyers, and the like would have no doubt spun had the ladies given them a chance.

**III.**

I concur with Ronald Dworkin's sweeping characterization of law – "[l]egal practice, unlike many other social phenomena, is *argumentative*."[iii] We see this feature of legal narratives is clearest in the case of litigation.

> The goal of storytelling in law is to persuade an official decision maker that one's story is true, to win the case, and thus invoke the coercive force of the state on one's behalf.[iv]

I propose to broaden the audience for legal narratives to include stories intended to persuade, not just judges and juries in trials, but lawyers, judges, and scholars considering legal opinions and legal scholarship. Some forms of persuasion use all the tools of theater, deception, and anything else that might work for a given audience. The standard for persuasion I intend to hold legal narrative to, however, is logic. Inference to the best explanation provides a promising test for the logical quality of many legal narratives. I have previously argued that two classic kinds of legal argument – those presented in trials (consider the O.J. Simpson murder trial)[v] and those presented by Supreme Court Justices in their constitutional opinions (consider the constitutional stories told by Justices Kennedy, Scalia, and Roberts in the recent gay marriage case)[vi] – can usefully be treated as inferences to the best explanation.[vii] I now believe that the argument can be extended in several directions. My first extension is to include the evidence that legal scholars present for analyses of legal concepts (consider the different theories of constitutional and legal privacy)[viii], general theories of law (consider the different accounts of tort law offered by the law and economics and the corrective justice schools[ix], or even more globally, the different theories of law offered by legal realists, legal positivists, and natural law theorists[x]). More significantly,

however, I intend to try and accommodate legal arguments intended not to explain facts, but to justify courses of action.

Consider stories told in emerging fields like critical race and gender theory? Here's a story all of my readers will find appalling.

> Hey, look, folks, the white kid on that bus in Belleville, Illinois, he deserved to be beat up. You don't know about this story? Oh, there's video of this. The school bus filled with mostly black students beat up a white student a couple of times with all the black students cheering. Of course the white student on the bus deserved the beating. He was born a racist. That's what Newsweek magazine told us in its most recent cover. It's Obama's America, is it not? Obama's America, white kids getting beat up on school buses now. You put your kids on a school bus, you expect safety but in Obama's America the white kids now get beat up with the black kids cheering, "Yay, right on, right on, right on, right on," and, of course, everybody says the white kid deserved it, he was born a racist, he's white.[xi]

I can almost hear the chorus – "What bullshit!" I believe we evaluate the merits of this story through the same kind of comparative method we've seen above. The story, offensive as it is, does attempt to make sense of what happened on the bus, but we finally reject it because we think there's a much better story to be told about what happened on the bus, the *Newsweek* cover story, and ultimately the whole political narrative of white victimhood.

**IV.**

One advantage of treating the institution of law, "not as rules and policies but as stories, explanations, performances, linguistic exchanges—as narratives and rhetoric,"[xii] is that it provides new analytic tools for understanding law as a social phenomenon. Sociology, history, and psychology have long provided insights regarding legal practice and theory. Rhetoric, literary criticism, narrative theory, and even cognitive science, promise something equally enlightening.

As much as I admire the storytelling movement in the law, many its most strident champions endorse a view of legal narrative that I find deeply problematic. Consider the following very useful summary paragraph by two thoughtful and sympathetic critics.

> Many advocates of storytelling explicitly contrast rational argument and the more directly emotive power of stories. As Gerald Lopez tells us, "Stories and storytelling de-emphasize the logical and resurrect the emotive and intuitive." The "epistemological claim" of feminist narratives, according to Kathryn Abrams, is that there are ways of knowing other than "scientific rationality." Radical feminist scholars—especially those using narrative as a methodology—thus reject the linearity, abstraction, and scientific objectivity of rational argument. Mari Matsuda similarly recommends noncognitive ways to know the good.[xiii]

I contend that these views are fundamentally mistaken. Now I certainly concede that stories can, and often do, reach intended audiences in ways that cold, structured syllogisms may not. I also grant that human emotion plays a significant role in our ability to understand and successfully navigate the physical and social world. But none of this shows that there is not an underlying logic to successful storytelling. Indeed, I will be arguing that this logic has remarkably close connections to "scientific rationality," and rather than being "noncognitive," it is (while not exactly demonstrating "linearity, abstraction, and scientific objectivity") highly structured and promises in many cases, if not objectivity, at least reliable inter-subjectivity.

## V.

Candidly, indeed shamelessly, borrowing from Harman and inference to the best explanation, I want to propose a test for the logical quality of legal stories that we might call inference to the best legal narrative. The central premise of my argument is that there is a close connection between what philosophers of science label as explanations, and what academic

lawyers call legal narratives. Explanations in their most general sense are answers to why-questions.[xiv] Why did the substance turn blue? Why did the dinosaurs become extinct? Why have all ten of the warmest years since the late 1800s occurred in the last twelve years? The precise logical structure of scientific explanations remains a huge subject of controversy in the philosophy of science. The literature has veered off course, in my opinion, because of a fixation with scientific laws, and methodological commitments to deductive and statistical reasoning. Emerging from all this analytical chaos, however, is a clear consensus that the root concept that allows explanations to succeed as answers to why-questions is causation. What is the cause of the color change, or the extinction, or the clustering of high temperatures?

I think we can profitably treat many legal narratives as answers to (legal) why-questions. Why did police discover a bloody glove at O.J.'s home? Why does the Constitution, though never mentioning gay marriage, confer the right to enter into it for gay couples? Why does the history of American tort law show a progression in the direction of improved economic efficiency? Legal narratives make sense of relevant detail, like facts at trial, constitutional text and precedent, and scholarly observations and insight, in ways remarkably similar to the way scientific explanations make sense of laboratory and field results. Furthermore, I think we can see the same fundamental dependence on causal reasoning. What is the cause of the blood stains and the glove's being at O.J.'s home? What is the causal (i.e., intentional) story behind the language in the Due Process Clause? What is the cause of the trend toward increased efficiency?

As conceptually convenient as it would be to treat all legal narratives as explanatory, and to marshal the techniques of inference to the best explanation to assess the quality of the arguments they present, I think we have to acknowledge that many of the legal arguments we

recognize are more like the case that Mary Jane and Wanda present, than the one Leslie offered. Justice Kennedy appeals to our sense of justice and fairness in his gay marriage opinion, and Ronald Dworkin uses Hercules as much as a normative super intellect as a legal one. This is hardly surprising. Jurisprudence is as much about what the law should be as it is an empirical chronical of how it is.

**VI.**

Harman candidly acknowledged one of the chief problems for IBE. Exactly the same problem infects inference to the best legal narrative; all we need to is to substitute "legal narrative" for "hypothesis" in the quote below.

> There is, of course, a problem about how one is to judge that one hypothesis is sufficiently better than another hypothesis. Presumably such a judgment will be based on considerations such as which hypothesis is simpler, which is more plausible, which explains more, which is less ad hoc, and so forth. I do not wish to deny that there is a problem about explaining the exact nature of these considerations.[xv]

One might ask why is this is a problem – Harman seems to answer his own question about explanatory (or narrative) virtue. The best explanation (or legal narrative) must be determined by the standards of simplicity, plausibility, explanatory completeness, and not being ad hoc. The concern, of course, is that this list of explanatory virtues is incomplete ("and so forth"), each one is vague and overly general, and there are cases where they seem at odds with one another – the simplest account is not always the most complete. There is a deeper problem, however; most of the defenders and critics of inference to the best explanation seem to seek something that I believe is unattainable. They appear to be searching for a kind of mechanical algorithm that validates an objective determination of one explanation being superior to another explanation.

Perhaps the biggest temptation for insisting on a list of necessary and sufficient conditions for being the best explanation (or a better explanation) is the persistent illusion that all things we are skilled at can be articulated in clear, concise recipes or formulae. We should know that is a mistake. Consider how remarkable it is that major league hitters can hit 95 mile an hour fastballs.

> A typical major league fastball travels about 10 feet in just the 75 milliseconds that it takes for sensory cells in the retina to confirm that a baseball is in view and for information about the flight path and velocity of the ball to be relayed to the brain. The entire flight of the baseball from the pitcher's hand to the plate takes just 400 milliseconds. And because it takes half that time merely to initiate muscular action, a major league batter has to know where he is swinging shortly after the ball leaves the pitcher's hand -- well before it's even halfway to the plate. … A batter could just as well close his eyes once the ball is halfway to home plate. Given the speed of the pitch and the limitations of our physiology, it seems to be a miracle that anybody hits the ball at all.[xvi]

So how do they do it? There are the clichés – "keep your eye on the ball," "don't open up too soon," and the like. But these don't tell you how it's done; they are mnemonics to help skilled hitters get back on track when they are in slumps. No one has yet, and I insist never will, articulate the logical criteria for hitting major league fastballs. This emphatically does not mean, however, that it (the hitting, not the describing) can't be done. This skill, like many others, seems a kind of "tacit knowledge."

**VII.**

All of this will ring hollow, however, unless we can offer some account of our skill at judging explanatory and narrative superiority. Why are human beings, not just accomplished storytellers, but fairly reliable evaluators of which stories make the most sense? David H. Glass frames a question that is in its own way more serious than Harman's question about how "to judge that one hypothesis is sufficiently better than another hypothesis."

> [W]hat is the connection between explanation and truth? Is there any reason for thinking that the best explanation is likely to be true? Or to put it another way, does IBE track truth? Of course, no approach should be expected to lead to the truth in every instance, but if IBE is to be accepted as a rational mode of inference, there must be some reason for thinking that it provides a good strategy for determining the truth.[xvii]

I think we know how to answer the truth-tracking question, and its answer will help us appreciate why Harman's query must be deflected by an appeal to tacit knowledge.

Vision seems to track-truth pretty well.

> The human visual system sends ten million signals per second to the brain, where billions of neurons strip off random fluctuations and irrelevant, ambiguous information to reveal shape, color, texture, shading, surface reflections, roughness, and other features. As a result, human beings can look at a blurry, distorted, noisy pattern and instantly recognize a tomato plant, a car, or a sheep.[xviii]

A few things should be noticed at the outset. No one would suggest for an instant that the detail about signals per second, neural structure and function, and the like help us see any better. And directly relevant to the preceding discussion, no one questions our skill at recognizing and distinguishing tomato plants, cars, or sheep. Why are we able to do all of this amazing stuff so effortlessly?

Any biologist or cognitive psychologist will answer immediately. The ability is innate, biological, and its history is evolutionary.

> One advantage of involving evolution is that it provides psychology with explanatory adequacy. It helps account for *why* we have the specializations we do: why children learn spoken language instinctively but written language only with instruction and effort, why the system for recalling memories satisfies many of the specifications of an optimal information-retrieval system, why our preferred sexual partners are non siblings who show signs of health and fertility. More generally, it explains why the human psyche has

> specific features that could not be predicted from the mere proposition that the brain engages in computation.[xix]

Sensory perception tracks the truth because this ability is precisely what was being selected for through millions of years of evolutionary history. This, of course, doesn't mean that perception is perfect, or that we see the external environment from a God's-eye point of view. But who can question that having reliable information about the world external to the perceiving organism would have great survival value for that organism? The details of vision remain complicated and much work remains to be done. But the origins and reliability of vision are pretty much settled in the natural and behavioral sciences.

**VIII.**

I believe a similar evolutionary story can be told for explanatory and narrative skills. Evolutionary humanists, or literary Darwinists, have made a strong case for storytelling being hardwired in human thought and behavior.

> Storytelling is one of the few human traits that are truly universal across culture and through all of known history. Anthropologists find evidence of folktales everywhere in ancient cultures, written in Sanskrit, Latin, Greek, Chinese, Egyptian and Sumerian. People in societies of all types weave narratives, from oral storytellers in hunter-gatherer tribes to the millions of writers churning out books, television shows and movies. And when a characteristic behavior shows up in so many different societies, researchers pay attention: its roots may tell us something about our evolutionary past.[xx]

The very language of storytelling implies something communal. Writers, folklorists, and singers write, tell tales, and sing for audiences. Many evolutionary accounts of storytelling rely centrally on this public aspect.

> Some thinkers, following Darwin, argue that the evolutionary, source of story is sexual selection … [m]aybe stories … are ways of

> *getting* sex by making gaudy, peacocklike displays of our skill, intelligence, and creativity—the quality of our minds. … [M]aybe stories are low-cost sources of information and vicarious experience … Or maybe story is a form of social glue that brings about common values.[xxi]

But we also tell stories to ourselves. A lone child at play tells himself a story about mayhem and battle as he plays with his toy soldiers. We all tell ourselves stories at night as we dream. And Leslie, Sherlock Holmes, and countless natural scientists, have constructed private narratives to help them make sense of the world around them.

The philosopher, Larry Wright, tells an important story.

> Virtually everyone who has survived past infancy has a more or less well developed set of perceptual skills. These skills may be generally described as the ability to *tell what's going on* (sometimes) simply by seeing it … This ability to tell what's going on—or what's gone on—even when we are not confronting it directly. We can often tell what has happened from the traces it leaves. We can tell there was a frost by the damaged trees; we know it rained because the mountains are green; we can tell John had some trouble on the way home from the store by the rumpled fender and the broken headlight. We reconstruct the event from its telltale consequences. It is this diagnostic skill we exploit in the most basic sort of inductive arguments; it is the foundation of our ability to evaluate evidence.[xxii]

This quasi-perceptual skill is what allowed Leslie to see her sad fate, the Simpson jurors in the civil trial to know what happened, and I believe, our recognition of why Rush Limbaugh's story about the bus counts as bullshit.

**IX.**

But wait a second you may well counter. The jurors in the first Simpson trial found him not guilty, and many, disturbingly many, FOX news listeners agree with Rush's account. In my own example, above, I think Mary Ann and Wanda's story, leaves out a crucial bit of data

regarding the dangers of vigilante justice and self-protection, and for this reason I think there is a better, though not as emotionally satisfying, narrative to be told in which the ladies have to place their trust in an imperfect criminal justice system. Intellectual disagreement seems to count heavily against my claims for explanatory and narrative skill. How can Justice Kennedy and Justice Scalia be skilled constitutional explainers and story judgers when they see things so dramatically differently in the recent gay marriage case?[xxiii] These worries are legitimate and require attention and potential solutions.

A big part of the story to be told here is one of simple intellectual modesty. One can be very skilled at something and at the same time fail spectacularly at exercising the skill. We are all skilled at recognizing tomato plants, cars, and sheep. But we still misperceive all the time – "Hi Joanie! Oh, sorry, you look just like my mother-in-law." Major league hitters perform the minor miracle of hitting 95 mile-an-hour fast balls, but they also swing wildly, miss, and look foolish, and lest we forget, they fail to get base hits between two-thirds and three-quarters of the time. Furthermore, the skills that I am basing my argument upon were developed, honed, and tested in hunter-gatherer times. They can only be applied to science and the law by extension.

> [H]umans *do not* readily engage in [the highly abstract reasoning required in modern science, philosophy, government, commerce, and law]. In most times, places, and stages of development consists of quantities "one," "two," and "many" … Their political philosophy is based on kin, clan, tribe and vendetta, not on the social contract. … And their morality is a mixture of intuitions of purity, authority, loyalty, conformity, and reciprocity, not generalized notions of fairness and justice … Nevertheless, some humans were able to invent the different components of modern knowledge, and all are capable of learning them.[xxiv]

Please don't misread my meaning, here. I'm really good at spotting my mother-in-law, I'm in awe of the hitting prowess of the guys on my fantasy team, and as a teacher, I know firsthand that students, even the mediocre ones, and cast aside kin, clan and vendetta, and learn to embrace the social contract, and justice and fairness.

Even back in hunter-gather times our human ancestors were very skilled social explainers. Contemporary cognitive science provides a very plausible account of the origins of this skill.

> [Mind reading] is used by cognitive scientists, interchangeably with "Theory of Mind," to describe our ability to explain people's behavior in terms of their thoughts, feelings, beliefs, and desires. … [T]his adaption must have developed during the "massive neurocognitive evolution" which took place during the Pleistocene (1.8 million to 10,000 years ago). The emergence of a Theory of Mind "module" was evolution's answer to the "staggeringly complex challenge faced by our ancestors, who needed to make sense of the behavior of other people in their group, which could include up to 200 individuals.[xxv]

If this is right, and I certainly think it is, it suggests a somewhat surprising inversion in our thinking about explanation. Rather than extrapolating from the more "basic" notion of a causal explanation to account for our narrative skills, it might actually be that our ability to construct narratives about the behavior and motives of those in our social groups is what leads to the wider ability to construct scientific or causal narratives in situations where agents are conspicuously absent.

Ronald Dworkin introduced the notion of hard cases over forty years ago.[xxvi] He argued – following, but also critiquing, Hart – that the general language of statutes and constitutional provisions, as well as the ambiguity of precedent, inevitably creates a system where, "a particular lawsuit cannot be brought under a clear rule of law, laid down by some institution in advance."[xxvii] Legal positivists had said that judges in hard cases were then forced to exercise discretion and

decide the case on some other extra-legal criterion. Dworkin demurred. His infamous rights thesis said that "when no settled rule of law disposes of the case, one party may nevertheless have a right to win."[xxviii]

Inference to the best legal narrative endorses the rights thesis, and expands it to include not just lawsuits, but a host of legal and conceptual controversies, as well. I contend that even in hard legal, moral, and scholarly cases one story can emerge as the best – the simplest, most complete, least *ad hoc* – the most plausible story. It is of course true that decent, reasonable, and highly intelligent lawyers, judges, and scholars, may disagree about which story is best. But as Dworkin anticipates:

> Some readers may object that, if no procedure exists, even in principle, for demonstrating what legal rights the parties have in hard cases, it follows that they have none. That objection presupposes a controversial thesis of general philosophy, which is that no proposition can be true unless it can, at least in principle, be demonstrated to be true. There is no reason to accept that thesis as a general theory of truth, and good reason to reject its specific application to propositions about legal rights.[xxix]

Since we have no Hercules to adjudicate between Justice Kennedy and Justice Scalia regarding a constitutional right to gay marriage, nor to take sides between Jules Coleman,[xxx] and William Landes and Richard Posner,[xxxi] about the "true" nature of tort law, we can feel pretty sure that each will go to his grave believing that his narrative was vastly superior, and much more than a simple personal and intellectual preference.

**X.**

Inference to the best legal narrative is unapologetic about a close connection between narrative superiority and "legal" truth. The best story does not guarantee truth, but it does constitute evidence for what the truth is. Perhaps there is a better yet story that no one has yet

thought to tell it – that's certainly been the case at specific points in the history of science. Perhaps, as I believe is often the case with many legal narratives, the best story is one that actually combines elements and insights from the competing narratives. But this is the nature of evidence, generally. Even the strongest evidence can point in the wrong direction – evidence is not logical proof. But none of this implies that we should disregard evidence. Indeed, what choice do we really have but to base all of our considered judgments, not just in law and scholarship, but in every aspect of our lives, on what the best available evidence tells us is likely true?

Legal, constitutional, and scholarly truth, just like truth in science and teenage romance, remains philosophically problematic. I agree with Peter Kosso that the most intuitive sense of truth is the correspondence theory, but that correspondence must be inferred from coherence.

> Though truth *is* correspondence with the facts it cannot be *recognized* by its correspondence. We cannot rely on the facts to guide proofs of scientific theories since the facts are irretrievably at the outer end of the correspondence relation. … So any indicators of truth must be internal. … The process of justifying, then, is a process of comparing aspects of the system, and the accomplishment of justification is the demonstration of coherence among the aspects.[xxxii]

Such a model captures our intuitions about what really happened between Judy and Johnny, or between O.J., Nichole, and Ronald Goldman. There aren't just stories to be told about these happenings, but clearly some stories that better than others – stories that point us to the truth. We believe that there's a world out there, though we will never see it from the God's eye perspective, and in this world things happened involving Judy, O.J., and the rest. These external happenings play a significant role in what counts as true.

Things get much trickier, however, when we consider the best narrative concerning legal privacy, or the constitutional right to gay marriage. We are still confident that there is a best story, or at least, stories that are significantly better than others. But where does narrative superiority now point? If we treat legal and political theoretical analysis as something like conceptual ethnography, maybe the correspondence theory can be partially salvaged. Perhaps one theory is a more accurate account of how the notion of privacy is actually used in the law, or perhaps one of the classical theories of the nature of law paints a truer picture of the abstract structure of any modern legal system. But what of the standard jurisprudential questions of how to interpret a statute, a line of precedent, or a constitutional text? Or even how to interpret the sad events on the bus? To reiterate the above argument, I claim that in these cases we tell stories that try to make sense of the relevant texts and precedent, as well as the bus and the *Newsweek* story. When we tell these stories, we tell them with passion and conviction. We are convinced that our story is the best, or at least a heck of a lot better than the other stories that are out there. But if we are honest, I fear we must admit in these cases that inference to the best legal narrative is only partially discovering the truth, and in many ways actually creating the truth.

[i] "Lesley Gore." - *It's My Party Lyrics*. N.p., n.d. Web. 16 May 2015
[ii] Gilbert Harman, "The Inference to the Best Explanation," *The Philosophical Review* 74:1 (1965), p. 89.
[iii] Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), p. 13.
[iv] Gewirtz, *op. cit*, p. 5.
[v] Jeffery L. Johnson, "Evidence, Explanation and the Pursuit of Truth in Literature and Law," forthcoming in *Law, Culture and the Humanities*.
[vi] *Obergefell v. Hodges* 576 U.S. ____ (2015).
[vii] Johnson, forcoming, *op. cit.*
[viii] See Jeffery L. Johnson "Immunity from the Focused Attention of Others: A Conceptual and Normative Model of Personal and Legal Privacy," *Florida A&M University Law Review*, Vol. 2, No.1, 2007, pp. 131-83, and Jeffery L. Johnson, "Constitutional Privacy," *Law and Philosophy*, Vol. 13, 1994, pp. 161-93.
[ix] See, Jeffery L. Johnson, ""Explanation, Human Nature, and Tort Theory," *Georgetown Journal of Law and Public Policy*, Vol. 4, Summer 2006, pp. 333-60.
[x] See, Jeffery L. Johnson, "Evidence, Mischaracterized Insights, and the Nature of Law," *The Journal Jurisprudence*, Vol. 25, April 2015, pp. 41-58.
[xi] http://prospect.org/article/conservative-media-and-white-victimization-narrative
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