Chapter Fifteen

EVIDENCE, EXPLANATION AND NARRATIVES

> 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.
>
> Paul Gewirtz[1]

WHAT IS AN EXPLANATION?

Perhaps the most obvious question in this entire book is what exactly is an explanation in the first place? Science has long struck philosophers as a kind of paradigm of good reasoning. IBE comes directly from the philosophy of science and has been treated not only as a model of scientific evidence, but scientific discovery as well. Likewise, some of the most significant models of explanation come from the natural sciences, and philosophers seeking to model scientific thinking.

We need to begin by noting that explanations are the result of things we ***do***. We explain things. Little Johnny is an

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inquisitive kid. He asks a lot of questions. "Why do I have to go to bed now?" "Why was Aunt Jane so mad?" "Why do stars 'twinkle'?" Sometimes we decline to really answer his questions. "Because I said so!" "That's grownup stuff, you wouldn't understand." "Gee, that's a good question – I don't know." Other times, however, we do him the courtesy of responding in as truthful and informative way as we can. "You have to get up early tomorrow, and besides, I need the rest now." "Well, I think you hurt her feelings." "It's complicated, but it has to do with light being refracted in the atmosphere." So, what exactly is involved when we respond to Johnny in these latter, more helpful, ways?

Here's a model of scientific explanation that was still very influential when I was a student. It has a very intimidating name, the deductive-nomological model, but is actually not that hard to understand. It's starts by seeing one of the primary goals of natural science as the discovery of scientific "laws" – absolute generalizations about how the world works (the Greek word for law is *nomos*). An explanation of some phenomenon can be seen as a kind of logical (deductive) argument.

Say we want to explain why that famous apple fell on Newton's head.[2] According to Newton's theory of gravity there is a precise, law-like relationship that he stated as follows.

> Every particle of matter in the universe attracts every other particle with a force that is directly proportional to the product of the masses of the particles and inversely proportional to the square of the distance between them.[3]

Or, mathematically as: $F_G = Gm_1m_2/r^2$. The apple has a mass, and Earth has a mass. When the stem of that apple broke, the force of attraction between these two bodies swamped the force of attraction between the apple and any

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other physical body (say the moon, or that house over there) and so the apple was attracted to Earth. Unfortunately for Newton his head was in the way as the apple's mass-center moved toward the mass-center of Earth. Thus, we get a very elegant little deductive argument.

1. $F_G = Gm_1m_2/r^2$
2. The exact details of the apple's breaking off the tree.
3. The exact details of where Newton was sitting.

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4. Newton gets hit on the head by the apple.

All of this is an idealization, of course. The "exact details" would be next to impossible to state, and even the "law of gravity" turns out to be a real-world approximation of relationship that can only be expressed in relativity theory. But the logical positivist philosophers who proposed the deductive-nomological model of explanation were aware of all of this. What intrigued them was the idea that when we understood all of the ***causal regularities*** in the world, or at least partially understood them, explanations of puzzling events would be understood as the working out of things "exactly as they had to have been."

Besides being a very abstract model of things that are rarely known in the real world, the D-N model faces two related, but insurmountable, problems. One goes to the heart of modern science. Many things that contemporary natural science seeks to understand can be stated only in terms of probability.

> [L]ittle Jim's getting the measles might be explained by saying that he caught the disease from his brother, who had a bad case of the measles days earlier. This account

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> again links the explicandum event to an earlier occurrence, Jim's exposure to the measles; the latter is said to provide an explanation because there is a connection between exposure to the measles and contracting the disease. That connection cannot be expressed by a law of form, however, for not every case of exposure to the measles produces contagion. What can be claimed is only that persons exposed to the measles will contract the disease with high probability, i.e., in a high percentage of all cases.[4]

These kinds of cases can also be represented as arguments, but no longer deductive arguments

5. The probability of persons exposed to the measles to catch the disease is high.
6. Jim was exposed to the measles.

==========[makes highly probable]

7. Jim caught the measles.[5]

Once again our explanation appeals to causal regularities, just not universal ones.

But what are the "law-like" relationships that link identical midterms and plagiarism? Or lipstick stains and inappropriate smooching? Something causal still seems to be at work, but statements of laws, and deductive or probabilistic arguments seem to miss the point of what's going on. Some of the earlier advocates of the "covering law" model of explanation dug in their heels here, and insisted that genuine, complete, explanations of human behavior would only be possible when we had more all-inclusive scientific understanding of the "laws" that underlie history, sociology, and psychology. And that as of now, all we had are very incomplete sketches of what the true explanations will ultimately look like.

This seems extreme. Not only can Johnny understand the sharp tone in his aunt's voice, and her frown, without even a

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glimmer of some "law of hurt feelings," he, just like us, can understand why the short circuit caused the fire without any detailed knowledge of physics, chemistry, electricity, or combustion temperatures. This has led many philosophers to deemphasize the importance of covering laws in explanation, and to highlight the importance of causation. According to these models explanations are ***causal accounts*** – they tell us why the event we are curious about occurred. I think this gets closer to the real guts of explanations, at least the explanations of which we most often confront in science. For most of what was considered in this book, the causal model of an explanation will suffice. But not quite for all of it, and so I want to also consider a model of explanation that is "causal" only in the most general sense.

STORIES THAT MAKE SENSE OF THINGS

Johnny asked questions about what was going on – his bedtime, Aunt Jane's anger, and the twinkling stars. Connie implicitly asked a big question too – how'd that lipstick stain get there? We considered similar implicit questions about the car outside Joe's bar, the observed red shifting, the identical exams and law journal portions, and those last two songs I heard traveling back from Portland.

Might this suggest that explanations have to do with asking and answering questions? I believe this is the real key to understanding what an explanation is, and many philosophers agree with me.

> An explanation is not the same as a proposition, or an argument, or a list of propositions; it is an *answer*. (Analogously, a son is not the same as a man, even if all sons are men, and every man is a son.) An explanation is an answer to a why-question. So, a theory of explanation must be a theory of why-questions.[6]

Here's a sad story that screams out ***why?***

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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

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> 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.

e_1. It wasn't two weeks after she got married that Wanda started gettin' abused.
e_2. She finally got the nerve to file for divorce.
e_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 Connie's suspicion did. They seem to provide evidence in support of their theory about what had to be done. But there are important differences, as well. Connie'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 smooching hypothesis explains the lipstick stain, the extended absence from the record hop,

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and the boyfriend's lame excuse. 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.

For many years, I would have completely agreed with this sentiment. I would have insisted that IBE was useful to the police in investigating what happened to Earl, or even in understanding the origins of the ladies' beliefs about what had to be done, but that a different kind of argument was needed to attempt to justify their action. Now, I'm not so sure. There are important similarities in the two stories. Connie'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 laundry detergent story, or the revenge 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.

I am much taken these days with a trend in legal scholarship that sees the arguments that lawyers and judges use as stories or narratives. Now, no one would ever claim that all stories are used to present arguments – some are to put the kids to sleep, others to make us cry. But some stories that lawyers present are clearly designed to convince a jury what happened, and thereby incline them to decide the case in their favor. Judges also tell stories about the Constitution and relevant precedent, and they tell these

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stories to justify their decisions. I want to expand this notion and see explanations, generally, as stories or narratives. This leads, then, to a natural extension of inference to the best explanation that we might call ***inference to the best narrative***. On this model an argument will be successful, it will present convincing evidence, if the story told ***makes the most sense*** of everything we know. I believe that Connie's story satisfies this requirement, and I believe that Justice Blackmun's story about the Constitution and the death penalty does as well (an argument that we will consider in much greater detail in later chapters). I'm also convinced that Mary Jane and Wanda's story is not nearly as successful, because it leaves out what we know about the dangers of vigilante justice. It would, therefore, be incumbent on me to produce a rival narrative about why Earl didn't have to die (though he sure as hell had to go to jail) that makes better sense of what we know.

INFERENCE TO THE BEST (LEGAL) NARRATIVE

One advantage of treating the institution of law, "not as rules and policies but as stories, explanations, performances, linguistic exchanges—as narratives and rhetoric,"[7] 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, and narrative theory promise something equally enlightening. Some story tellers are talented yarn spinners; some lawyers are skilled litigators. Some readers are particularly open or closed to certain stories, good lawyers try to craft their juries by *voir dire* and sophisticated jury consultants. Some narratives are works of literary art, others not so much, some appellate decisions are widely admired, while others strike us as embarrassments. Some stories widen our horizons and teach us new things about life and the world, some legal narratives do the same within the narrower confines of the

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"legal" world. Understanding stories and storytelling, therefore, has much to inform the legal practitioner, the academic lawyer, and the philosopher of law.

Many of the most strident champions of storytelling in the law, however, endorse a view of legal narrative that seems, at least initially, at odds with Dworkin's claim that law is inherently argumentative. Consider the following very useful summary paragraph by two thoughtful and sympathetic critics of the "storytelling movement."

> 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.[8]

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 (while not exactly demonstrating "linearity, abstraction, and scientific objectivity") is highly structured and promises in many cases, if not objectivity, at least reliable inter-subjectivity.

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TWO STORIES ABOUT THE CHALLENGER DISASTER

> On January 28, 1986, the American shuttle orbiter Challenger broke up 73 seconds after liftoff, bringing a devastating end to the spacecraft's 10th mission. The disaster claimed the lives of all seven astronauts aboard, including Christa McAuliffe, a teacher from New Hampshire who had been selected to join the mission and teach lessons from space to schoolchildren around the country. It was later determined that two rubber O-rings, which had been designed to separate the sections of the rocket booster, had failed due to cold temperatures on the morning of the launch.[9]

The above sad little story has a dramatic beginning with the challenger explosion. A touching middle highlighting the death of the seven astronauts, with particular attention to the teacher, Christa McCaliffe. And a stunning conclusion announcing the cause of disaster. The report of the Presidential Commission actually tells two stories about the cause. One focuses of the mechanical causes, and basically assumes known regularities in physics and chemistry.

> Story 1:
> The consensus of the Commission and participating investigative agencies is that the loss of the Space Shuttle Challenger was caused by a failure in the joint between the two lower segments of the right Solid Rocket Motor. The specific failure was the destruction of the seals that are intended to prevent hot gases from leaking through the joint during the propellant burn of the rocket motor. The evidence assembled by the Commission indicates that no other element of the Space Shuttle system contributed to this failure.[10]

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The other story is much more candidly human; its background includes talk of, failed engineering, sloppy maintenance and prelaunch procedures, unrealistic estimates of danger, the pressures of institutional prestige, and even downright professional negligence.

> Story 2:
>
> Let us make recommendations to ensure that NASA officials deal in a world of reality in understanding technological weaknesses and imperfections well enough to be actively trying to eliminate them. They must live in reality in comparing the costs and utility of the Shuttle to other methods of entering space. And they must be realistic in making contracts, in estimating costs, and the difficulty of the projects. Only realistic flight schedules should be proposed, schedules that have a reasonable chance of being met. If in this way the government would not support them, then so be it. NASA owes it to the citizens from whom it asks support to be frank, honest, and informative, so that these citizens can make the wisest decisions for the use of their limited resources.
>
> For a successful technology, reality must take precedence over public relations, for nature cannot be fooled.

Story 1 is a straightforward causal explanation. We had a correlation between observed gas leakage as the Challenger took off, and the terrible explosion. Lots of other data was then best explained by the compromised "O rings" being the cause of the disaster. It's the kind of story that fits the deductive-nomological model so well. Story 2 also offers a causal account of what happened to the Challenger, but of a very different sort. Where would we even begin to articulate the psychological and cultural regularities that cover every relevant NASA manager, maintenance worker, military advisor, and so forth? Even for those actors we know are central to the Challenger story, can we even claim to have scientifically reliable models that describe the relevant causal

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connections between thoughts, dispositions, personal history, etc., and behavior relevant to the explosion?

ABE AND HIS DAUGHTER

> The case involved a businessman named Hamilton who had taken out a life insurance policy on his partner ten days before the partner ten days was gunned down by a professional hit man. The DA was finding it easy to persuade the jury that the timing could not possibly be coincidental, and Abe had been racking his brain for an answer. Emma [Abe's seventeen year-old daughter], finding that she simply couldn't get his attention, had decided to try and help him figure out a common-sense rebuttal to the DA's circumstantial case.
>
> And she had.
>
> "Daddy," she said, popping into his office late one night, "the answer is Chekhov."
>
> "Why Chekhov?" Abe asked, his head still buried in the books.
>
> "Because Chekov once told an aspiring dramatist that if you hang a gun on the wall in the first act, you had better use it by the third act. We read it in lit class.[11]

Alan Dershowitz is a first-class storyteller. His little anecdote about Abe and Emma is used to remind readers that narrative devices and expectations can have undesirable legal consequences. It is easy to read his essay as a subtle indictment of the legal narrative project. I think, however, that Abe and Emma teach us not to eschew law as narrative, but to keep in mind that the best narratives will sometimes be messy, unexpected, and even defy simple narrative rules like Chekhov's. The DA told a plausible enough story about Hamilton. We are not privy to all the details in story, but we can guess that they involved facts about Hamilton's relationship to his partner, and perhaps information about Hamilton's finances. The key dramatic element, though, is the weird timing. A (large?) life insurance policy is taken out on the partner, ten days later the partner is gunned down.

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Obviously, Hamilton hired the hit man so that he could collect on the policy. Abe, however, tells a very different story. Life is complicated and filled with coincidences.

> He'd convinced the jury not to look at the Hamilton case as if it were a made-for-TV-movie, but rather as a slice of real life, full of irrelevant actions and coincidences. He'd asked the jurors how many of them had taken out life insurance on a loved one and what their neighbors would have thought if the loved one died shortly thereafter.[12]

Both the DA and Abe were not just telling stories, they were arguing a case before a jury. Let us assume that the facts were not in dispute and looked something like the following.

e_1. Hamilton and his partner had a strained personal and professional relationship.
e_2. Hamilton had recently encountered severe financial problems.
e_3. Hamilton had recently taken out a sizable life insurance policy on his partner.[13]
e_4. Ten days later his partner was gunned down by a professional hit man.

From the inference to the best explanation paradigm, the DA and Abe offer competing explanations.

t_0. Hamilton hired the hit man to gun down his partner so that he could collect on the life insurance.
t_1. Hamilton had nothing to do with his partner's murder. It was pure coincidence that the murder occurred so closely to the newly acquired life insurance policy.

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Perhaps you're like me, and are not quite sure which of these explanatory stories is the best. I think that if I were the D.A. I'd have asked the police for more investigation before bringing the case to trial. The standard in a murder trial like this is that the evidence must show that the defendant is guilty ***beyond a reasonable doubt***. That means that t_0 must not only be a better explanation than t_1, but that it must be much, much, much better. We do know, however, which legal narrative prevailed in the actual trial – "after he'd won, several jurors told him that his TV argument turned them around."

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. 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? Why did the Challenger explode? As we have seen, the precise logical structure of scientific explanations remains a huge subject of controversy in the philosophy of science. But as we have also seen, many things that scientists, lawyers, and heartbroken teenagers can explain, completely eschew any understanding of absolutely general regularities. 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 legal narratives as answers to (legal) why-questions. Why did police discover a bloody

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glove at O.J.'s home? Why was Abe's partner gunned down so shortly after the insurance policy was taken out? 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? No one would seriously suggest that the answers to these important questions can be answered in terms of scientific laws and strict deductive reasoning. 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 was the cause of the professional hit? 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? Furthermore, narratives make sense of things, even when there's no causal story to be told. Mary Ann and Wanda's story allows us to understand why they believed that Earl had to die.

LESIONS FROM BABIES

> Babies may have little control over their bodies, but they can willingly move their heads and eyes. And what a baby looks at can tell you something about how it sees the world. This is because babies are like adults in some regards. If they see the same thing over and over again, they get bored and look away. If they see something new or unexpected, they look longer. Thus, analyzing looking time can tell what babies think of as being "the same thing," and what they see as "new or unexpected."[14]

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The above inference to the best explanation – differential gaze times being explained as boredom or surprise, and then as same or new – is the methodological presupposition for a host of fascinating experiments in the study of infant cognitive development. Paul Bloom provides a nice summary of some of these results.

> 1. Cohesion: If a hand pulls at an object, babies expect the entire object to go with the hand; if it comes off in pieces, they are surprised, showing an expectation that objects are cohesive.
> 2. Continuity: Imagine a stage with two vertical barriers separated in space. A small object, like a box, goes behind the barrier on the left, continues between the barriers, goes behind the barrier on the right, and comes out the other side. Adults see this is a single object, and so do babies. Now imagine that a box goes behind the barrier on the left, there is a pause, and then the box emerges for the screen on the right, never appearing in the gap. Adults assume there are two boxes here, not one. Babies make the same assumption; they expect continuity.[15]

Why do we find differential gaze times for the hand pulling the object and it remaining whole, and the hand pulling the object and it coming off in pieces? Babies expect objects to be cohesive. Why the perception of a single box in the first experimental scenario with the box and the barriers, but the perception of two boxes in the second scenario? Babies expect continuity. But where do these expectations come from? Bloom's answer is a blend of nature and nurture

> These results show that although babies enter the world with a foundational understanding of what objects are and how they act, it is incomplete, and this foundation grows. Some of the improvement might be due to maturation of the brain—like the rest of the body, the brain changes rapidly in the early years of life, and this might cause corresponding increases in knowledge. But some of the improvement is plainly due to experience.[16]

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And finally, what explains this foundational understanding of objects and how they act? This knowledge is clearly innate. Natural selection has hard-wired infant brains to expect cohesion and continuity. It is easy to see the adaptive value for human infants having rudimentary understanding, not just of objects and "folk physics," but of agency, and social relationships, as well. Certainly shared understanding of folk physics, agency, and social relationships are the cornerstones of the sort of practical explanation that would have been of value in hunter-gather times.

STORYTELLING

> 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.[17]

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. 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 …

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> [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.[18]

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 Connie, Sherlock Holmes, and countless natural scientists, have constructed private narratives to help them make sense of the world around them.

As far back as 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.[19]

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

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conspicuously absent. Story 2 about the Challenger, though even more complicated and resistant to a deductive-nomological idealization, may actually be more intuitive than story 1. And indeed, if my students are even close to a representative sample, it is easier for them to see the explanatory and narrative virtues of story 2.

NARRATIVE TRUTH?

> 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.[20]

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

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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. Such a model captures our intuitions about what really happened with that lipstick stain, the Challenger, and 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 Connie, the O-rings, 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 was included in the statute about jury service, or what the Constitution says about the death penalty. 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? What do we make of the standard jurisprudential questions of how to interpret a statute, a line of precedent, or a constitutional text? Or Mary Ann and Wanda quandary? To reiterate the above argument, I claim that in these cases we tell explanatory stories that try to make sense of the relevant texts and precedent, as well as Wanda's sad history with Earl. 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 not so much discovering the truth, but actually creating the truth.

But, perhaps it's not so surprising after all that we see two very different sorts of truth at work in different compartments of our intellectual lives. The basic explanatory

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skill that underlies naïve metaphysical realism and the correspondence theory of truth must have developed much earlier in evolutionary history. Our human and pre-human ancestors merely needed to explain the world as it "really" was well enough to survive and reproduce. As we progressed as a species and began to produce complicated texts, and indeed whole cultural practices within which these texts were embedded, these closely related explanatory skills had much more abstract and intellectual applications to these very texts and cultural practices. Appeals to evidence in the complicated worlds of teenage romance, NASA disasters, criminal law, legal scholarship, and constitutional law all nicely fit the structure and evaluative methodology of inference to the best legal narrative. But only the diagnoses of lipstick and smooching, murder victims and bloody gloves, and the like can be held to the standards of correspondence and metaphysical realism. The events in Mary Ann and Wanda's story, constitutional language, and the like can be explained, and can be better or worse explained – that is to say better stories can be told about them – but the truth or falsity of these interpretations is firmly in the realm of the coherence theory.

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ENDNOTES

[1] Paul Gewirtz, "Narrative and Rhetoric in the Law," in Peter Brooks and Paul Gewirtz, editors, *Law's Stories* (New Haven: Yale University Press, 1996), p. 5.

[2] Almost all historians of science agree that this story is apocryphal. But he may well have watched an apple fall and this led to his discovery of the law of gravitation.

[3] https://www.thoughtco.com/newtons-law-of-gravity-2698878

[4] Carl G. Hempel, *Philosophy of Natural Science* (Englewood Cliffs: Prentice Hall, 1966), p. 58.
[5] *Ibid*, p. 59.
[6] Bas van Fraassen, *The Scientific Image* (Oxford: Oxford University Press, 1980), p. 134.
[7] Paul Gewirtz, "Narrative and Rhetoric in the Law," in Peter Brooks and Paul Gewirtz, editors, Law's Stories (New Haven: Yale University Press, 1996), p. 2.
[8] Daniel A. Farber and Suzanna Sherry, "Legal Storytelling and Constitutional Law: The Medium and the Message," in Brooks and Gewirtz, op. cit.
[9] http://www.history.com/topics/challenger-disaster
[10] http://history.nasa.gov/rogersrep/v1ch4.htm
[11] Alan M. Dershowitz, "Life Is Not a Dramatic Narrative," Brooks and Gerwitz, op. cit., p. 99.
[12] Ibid, p. 100.
[13] I am dying to know if this was reciprocal, and if the partner had a newly acquired life insurance policy on Hamilton.
[14] Paul Bloom, Descartes' Baby (New York: Basic Books, 2004), pp. 9-10.
[15] Ibid, pp. 11-2.
[16] Ibid, pp. 13-4.
[17] Ibid, pp. 13-4.
[18] Jonathan Gottschall, The Storytelling Animal (New York: Mariner Books, 2012), pp. 28-9.
[19] Lisa Zunshine, Why We Read Fiction: Theory of Mind and the Novel (Columbus: The Ohio State University Press, 2012).
[20] Peter Kosso, Reading the Book of Nature (Cambridge: Cambridge University Press**, 1992), p. 136.**

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