

Stories We Tell:
Diary of a Law Student

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“Everything is in question, according to me. One has to forge a new language to deal with it.”
– James Baldwin, 1984

I.

I sit down to help a caged kid write out a statement that he’ll read to his judge at disposition, which is really sentencing, which is really punishment, which is really the legal infliction of more pain. The kid doesn’t want to start. A Youth Development Representative, who is really a correctional officer, who is really a prison guard, sits on the other side of the glass pane that reads ‘Office of the Public Defender’ and watches the clock. To the kid, his whole life depends on this statement – and it may very well. Plus, he’s having a miserable day. It takes some coaxing, then: *I want to do better*, he scrawls on the yellow legal pad, *and this ain’t—*

He stops.

“That’s good!”

“Man, can you write this? I don’t want the judge to think...”

“You got it. It should be in your words. We can go back and edit.”

“I don’t want to be using this type of language.” He throws the pencil down.

The kid is frustrated, defeated. And I know why, though I don’t know the feeling. Once, at a caged man’s adult sentencing in DC Superior Court, room 210, I heard said man read out a statement and then heard Judge O’Keefe, presiding in a bowtie, titter and tut “is that all?” before reading out a lengthy list of priors, like he was providing a social service, concluding that “I don’t think you *do* care about your family, you’ve been given so many chances...” He doled out the maximum sentence, for the man’s own good. The kid here, only 16, already knows that he doesn’t want to be this man, knows that his own language is constantly turned against him in the most final and unappealable of ways.

“I used to be an English teacher in the Bronx,” I tell the kid.

“What grade?” This piques his interest.

“High school.”

“The kids talk like us in the Bronx?”

“Yeah?”

Us, I think. Of the roughly 50 kids who cycle through the D.C. Youth Services Center, i.e., juvenile detention center, i.e., juvie, an average of 50 are Black. Scalia preferred the American Heritage Dictionary, and his father was a professor of romance languages, an adherent of the formalist New Criticism. I look down at my own pale skin.

“What words do they use in the Bronx?” he asks. He’s curious, smiling.

I can’t remember. The prison guard taps on the glass. Time’s running out.

II.

This ain’t it, the kid might’ve been telling me, in the disembodied voice of spokesman Cardozo, for “the spokesman of the court is cautious, timid, fearful of the vivid word, the heightened phrase.”¹ *This ain’t it*, he was explaining, in the voice of professor Gabel, “since whiteness creates only an imaginary sense of *with-ness*, since it is haunted by absence... it must constantly prop itself up by creating for itself the threat of ‘blackness,’ which threat it must continually ward off”² (but “just imagine,” the kid might add, in saint Baldwin’s voice, “people in the South would be terrified if the Negroes left”³). *It just ain’t it*, the kid was saying, *when one ain’t’s one too many*.

One ‘Ain’t’ was one too many in bail hearings in Harris County, Texas (Houston), recently – until the Civil Rights Corp (CRC) rode into town, rendering the Ain’t intelligible to the court. A 2017 CRC lawsuit shook up Harris County’s money bail system, where ‘Yeah,’ along with any number of other common utterances, mannerisms, and ways-of-being exhibited by predominantly Black and poor arrestees, sent bail through the roof and their bodies to the cage.⁴ These expressions were the markers of lived realities, but the county’s five misdemeanor hearing officers were not listening.⁵ It may as well have been D.C. Superior Court, where, at one sentencing, defender Carrington recalls that

Everyone... missing the point, except... defendant... he knew... precisely what he was doing [giving noncommittal answers about the book his sentencing judge told him to read]. He was... honest... dragging the rest of us along... *who he truly was, where he’d been, where he was going*... none of us... listening very well... a certain kind of mastery... ability to tell us... absolute clarity and economy... word and gesture... *his story*... ours in relation to it... his young life.⁶

¹ Benjamin Cardozo, “Law and Literature.”

² Peter Gabel, *The Desire for Mutual Recognition*.

³ James Baldwin, 1961 interview.

⁴ *ODonnell v. Harris Cnty., Texas*, 251 F. Supp. 3d 1052 (S.D. Tex. 2017)

⁵ *Id.*

⁶ Tucker Carrington on a day of sentencing at the DC Superior Court (in Abbe Smith’s *How Can You Represent Those People?*, 2013, pg. 39) (emphasis added). [Note on the technique: I use redaction throughout this piece as a tool of (de)emphasis, particularly with language coming from lawyers and those whose voices are already over-privileged.]

At pretrial detention hearings in Houston, the story was not heard. ‘Yeah’ was not the language of the Harris County courts, it was the language of the indigent, so the courts set bail impossibly high and punished people for their language. More than the initial crime, it was an “indiscipline of language,” “an incorrect grammar of tone and reply,” that constituted, in Harris County as in nineteenth-century France, the “violent split between the accused and society, which, through the judge, addresses [the accused] in correct terms.”⁷ The judge, who secretly envies the disorder, attempts to discipline the vital and immediate liberty of the ‘vagabond’ who stands outside of and beyond:

Judge: One must sleep at home.

Vagabond: Have I got a home?

Judge: You live in perpetual vagabondage... What is your station in life?

Vagabond: To begin with, I’m thirty-six at least; I don’t work for anybody. I’ve worked for myself for a long time now... I hand out leaflets free of charge to all passers-by... carry luggage for the stagecoach passengers... turn cart-wheels on the avenue de Neuilly... I’ve plenty to do.

Judge: It would be better... good house... learn a trade.

Vagabond: Oh, it’s too much trouble. And anyway the bourgeois... always grumbling, no freedom.

Judge: ... father...?

Vagabond: Haven’t got no father

Judge: ... mother?

Vagabond: No mother neither, no parents, no friends...

Hearing his sentence of two years in a reformatory, [the vagabond] “pulled an ugly face, then, recovering his good humor, remarked: ‘Two years, that’s never more than twenty-four months. Let’s be off, then.’”⁸

In twenty-first century Texas, most dispositions look like this –

IN... HOUSTON... MOTIONS TO DISMISS... Plaintiffs seek to abolish... bail... to challenge... Texas... Plaintiffs allege... unconstitutional... Eighth Amendment... ignore... These claims should be dismissed... Plaintiffs core complaint... is nothing... Plaintiffs seek to invent... eighteenth century... she is a fugitive... 400 years ago... Plaintiffs propose a radical jurisprudence... instrument of oppression... prejudice... extremely effective... jail provides... shelter multiple meals per day... medical services... immune from damages... claims are really excessive... should be dismissed.⁹

– but the civil adversarial system’s modest capacity for substantive justice shone through when a federal court found that the disproportionate bail set for indigent-misdemeanor-arrestees-in-Houston-who-said-‘Yeah’ violated the gospels of Fourteenth Amendment equal protection and due process. Not, however, without a considerable degree of difficulty:

⁷ Michel Foucault, *Discipline & Punish: The Birth of the Prison* (1975), trans. Sheridan (Random House, 1977) (pg. 291) (emphasis added) (internal quotes from *La Phalange*, 1840).

⁸ *Id.* (internal quotes from *La Phalange*, 1840)

⁹ Reginal Dwayne Betts, *Felon*, “In Houston” (Norton 2019). Betts note on redaction: “These poems use redaction, not as a tool to obfuscate, bus as a technique that reveals the tragedy, drama, and injustice of a system that makes people simply a reflection of their bank accounts.”

This case is difficult and complex. The Harris County Jail... third largest... United States... Bail... longstanding presence... Anglo-American common law tradition... not a personal criticism of... Hearing Officers... their job is difficult... sheer numbers... confront on a daily basis... individual consideration extraordinarily difficult... absence of counsel... difficulty... work steadily and hard... a difficult population... misdemeanor and felony defendants—every day... all day.¹⁰

Holding for CRC’s plaintiffs is ‘not personal’ (for the ‘sheer numbers’ of this ‘difficult population’ ...), but the evidence, the facts, the video footage of the staged but nevertheless human interactions inside these courtrooms, render argument moot. Even the Honorable Lee H. Rosenthal (Bush Sr. appointee) of the U.S. District Court for the Southern District of Texas succumbs, if only to the numbers:

... one recording... Hearing Officer doubled... bail amount... “yeah” instead of “yes”... unrelated to... risk of nonappearance or of new criminal activity... raises bond from \$5,000 to \$25,000... misdemeanor charge... “yeah” instead of “yes”... 121 recordings... evenly distributed... five Hearing Officers.¹¹

The strange story that CRC is telling – of the apparatus of discipline, the uncertain and surveilled ground – emerges already in Rosenthal’s “Findings of Fact”:

Hearing Officers... 24 hours a day, 7 days a week... Defendants... Inmate Processing Center... videolink... County Jail... forty-five arrestees... single probable cause hearing... marked square in the center of the room... a screen... recorded... one to two minutes per arrestee... brief period... discretion... geographical restrictions... never have counsel... hearing Officers... notes on the Pretrial Services forms... “Criminal History”; “Safety of Community”; or “Safety.”

The war is continually fought over language and the state determines the rules of engagement. Language and ideology become mutually reproducing catch-22s: a defendant on trial for crime is denied bail pre-trial for his “criminality.”¹² Innocent unless proven guilty is really innocent until proven guilty. And institutions govern by the strength of their hold on language, i.e., ideology. It is Chimamanda Ngozi Adichie’s “single story,”¹³ Richard Delgado’s “stock story,”¹⁴ and George Orwell’s Newspeak; Audre Lorde’s “When language becomes most

¹⁰ *ODonnell v. Harris Cnty., Texas*, 251 F. Supp. 3d 1052 (S.D. Tex. 2017)

¹¹ *Id.*

¹² Richard Delgado (“Storytelling for Oppositionists and Others: A Plea for Narrative”): “[T]he main cause of Black and brown subordination is not so much poorly crafted or enforced laws or judicial decisions. Rather, it is the prevailing *mindset through which members of the majority race justify the world as it is*, that is with whites on top and Blacks at the bottom. Ideology makes current social arrangements seem natural and fair,” and, “The stories or narratives told by the ingroup remind it of its identity in relation to outgroups, and provide it with a form of shared reality in which its own *superior position is seen as natural.*”

¹³ “The Danger of a Single Story,” TED Talk (2009).

https://www.ted.com/talks/chimamanda_ngozi_adichie_the_danger_of_a_single_story/comments

¹⁴ Richard Delgado, “Storytelling for Oppositionists and Others: A Plea for Narrative” (1989).

similar, it becomes most dangerous”¹⁵ and Thomas Aquinas’ “Beware the man of one book.”¹⁶ It becomes the one acceptable truth and way of seeing the world, and the state exerts the “power of *normalization*” over the extra-legal: the vagabond, the criminal, the poor, the Black.¹⁷ Here is Morgan Freeman’s character, Red, in *Shawshank Redemption*:

Parole Hearing Officer: Your files say you’ve served 40 years of a life sentence. Do you feel you’ve been *rehabilitated*?

Red: Rehabilitated? You know I don’t have any idea what that means. To me it’s just a made-up word. A politician’s word, so young fellas like yourself can wear a suit and tie, and have a job.

PHO: Well, are you?

Red: There’s not a day goes by I don’t feel regret... Rehabilitated? It’s just a bullshit word. So you go on and stamp your form, sonny, and stop wasting my time. Because to tell you the truth, I don’t give a shit.

The legal system – that “vast and dispersed network of government officials (judges, legislators, sheriffs, bailiffs, court reporters), imposing law books now digitized, hallowed buildings (“halls of justice”), law schools festooned by quotes of the founding fathers, law-focused television shows and the like, all of which are devoted in part to re-creating the legitimacy of and, through reification, the necessity of the existing social and cultural institutions”¹⁸ – this legal system seeks to brand Red. Does Red acquiesce to the branding, which acquiescence itself shows that he is normal enough, reformed enough, to return to society? No, he’s wised up after forty years on the inside. He knows that rehabilitation is one of those magic words, those chameleon fictions, that is eternally palatable and seems to have a million meanings – yet none at all. Sometimes it takes forty years in the belly of the beast to understand.

The ‘convict’ who comes down to us in the pages of his oppressors is a social and political *construction*: he exists as a reflection of a body of rules, as a personification of transgression, *a figure of speech* necessary to the ruling class’s self-justification and the perpetuation of its power. To let the convicts speak for themselves would have been to entertain the unthinkable: mutiny, another history.¹⁹

And, even once released, Red will be trailed by twenty hounds baying *Once a convict, always...*

“The wind goes toward the south, and turns around to the north; the wind whirls about continually, and comes again on its circuit.”²⁰ Washington D.C. rebranded its youth caging apparatus from the Youth Services Administration to the Department of Youth Rehabilitation Services in 2004. And in 2023, anyone within these facilities still responds amiably to any

¹⁵ *A Burst of Light* (1988).

¹⁶ https://en.wikipedia.org/wiki/Homo_unius_libri

¹⁷ Foucault, *The Birth of Prison*.

¹⁸ Gabel, *Desire*.

¹⁹ On imprisoned Australians shipped to Botany Bay: Paul Carter, *The Road to Botany Bay: An Exploration of Landscape and History* (emphasis added).

²⁰ *The Book of Ecclesiastes* 1:6

suggestion of “rehabilitation.” In 2007 Ruth Wilson Gilmore wrote of the most “liberal” state California’s belt of “nine hundred miles of prisons: an archipelago of concrete and steel cages, thirty-three major prisons plus fifty-seven smaller prisons and camps, forty-three of the total built since 1984.” And the legal academy still lists “rehabilitation” as one of the “four justifications of punishment,” along with “deterrence,” “incapacitation,” and “retribution.” “Rehabilitation” being a utilitarian justification for the absolute deprivation of liberty... aimed at “reforming,” altering, and fixing the individual... essential being is transposed onto the “case” ... bounded and eminently solvable thing... armies of experts... peering... instruments... Thus... translation... reduction... omission... erasure...

III.

Now all the criminals in their coats and their ties
Are free to drink martinis and watch the sun rise
While Rubin sits like Buddha in a ten-foot cell
An innocent man in a living hell.

— Bob Dylan²¹

New York City is burning. Downtown Manhattan. SoHo, Chelsea, Midtown. Sirens wail through the night, helicopters whir overhead, anarchy and chaos reign in the street. Around every corner, *criminals* tumble out of jagged, designer store windows, bags of merchandise in hand, glass twinkling on cement. Police cruisers rev blaring down avenues, giving the impression, almost, that the chase satisfies some latent desire for play. For every block the cops descend upon, there is another block nearby, where a few assemble first, then more, then a hammer, until finally the safety deposit box, which they take turns hurling at the ground. People hop about in excitement, livestreaming or recording on phones, shouting to their comrades. Hip hop and Spanish music blasts into the night from souped-up sound systems on motorcycles and cars. Flames lick the insides of metal-grate trash cans.

It is the summer of 2020, five days after another strangulation of another Black man, George Floyd, and I walk the city streets, taking it in, as always, from a withdrawn “di-stance.”²² The offices, with their coats, ties, and martinis, look down on the carnage from above; the handsome Pollack townhouses too. Apple, Nike, Banana Republic, RadioShack lie ruined at the seat of their power, here at the cultural and economic epicenter of the world – these emblems of vast and accumulated capital, symbols of the temple that simultaneously demands and bars entry.²³ To their stakeholders, an alien and forgotten class paces these perfect streets in

²¹ “Hurricane,” *Desire* (1976) (based on the caging of innocent boxer Rubin “Hurricane” Boxer).

²² Gabel, *Desire* (25).

²³ Compare with Richard Wright’s depiction of Chicago in 1940 essay “How ‘Bigger’ Was Born”: “It was not that Chicago segregated Negroes more than the South, but that Chicago had more to offer, that Chicago’s physical

sneakers and hoodies. Capital's enforcer flails about in pursuit of a youthful, illusive foe. Black boys are rounded up, but the people are everywhere and stronger. The order falls apart before my very eyes – its arbitrariness, its contingency, its unreality. The image of any existing, peaceful, united states is shattered, any possibility of a society ruled by one law, any possibility, even, of a valid and universal tort, contract, or property law. The sight of the false, violated idols cracks the looking glass, and sparkling possibility is refracted in a million directions.

I see the counter-narrative of the underdog itself complicated in real time. For all the justice, catharsis, and glory in the uprising, there is pain, present and enduring: people are tackled to the ground and shoved into cruisers, and people are burning from generational suffering. No Black American exists, said saint Baldwin, “who does not have his private Bigger Thomas living in the skull.”²⁴ Bigger Thomas, the hero of Richard Wright's *Native Son* (1940), is described by father Wright as a type:

a product of a dislocated society; he is a dispossessed and disinherited man... and he lives amid the greatest possible plenty on earth... [G]ranting the emotional state, the tensivity, the fear, the hate, the impatience, the sense of exclusion, the ache for violent action, the emotional and cultural hunger, Bigger Thomas... will not become an ardent, or even a lukewarm, supporter of the *status quo*.²⁵

The counter-counter-narrative being that the material conditions of this country still produce Bigger Thomas'. From Appalachia to the Sierras, you can already see the status quo headlines proclaim the looting, disorder, mayhem, lawlessness, destruction of property, mob violence, and danger. Word-images flicker and fret across countless screens of media America, all in its “extraordinary endeavor to avoid [Bigger Thomas].”²⁶ The police car tails Bigger, the boy with the green hoodie and the hammer, the wrong way down the one-way street, officers leap from the car at the subway entrance and drag him fighting back to the car as a crowd assembles, videoing the exchange. Later, a deli owner sweeps up glass in front of his shattered storefront. Then it's past curfew and another store is being broken into and a woman turns to me and asks what I'm doing there.

The sight that night is of “the melancholy underside of a glittering accumulation... whole stripes of the population” moved to collective action.²⁷ It is the “difficult population” of Harris County, Texas. It is a population that is not the dominant sight on the streets of day- or

aspect - noisy, crowded, filled with the sense of power and fulfillment - did so much more to dazzle the mind with a taunting sense of possible achievement.”

²⁴ Baldwin, *Notes of a Native Son*, “Many Thousands Gone” (1955).

²⁵ Richard Wright, “How ‘Bigger’ Was Born” (1940).

²⁶ James Baldwin, 1961 interview.

²⁷ “... the catastrophic maintenance of a specious urban peace. That peace is paid for, dearly, in the daily lives of the black poor. For decades every slice of the political class has told a little fable about why this is: absent fathers, the ‘culture of poverty,’ a lack of ‘opportunity,’ the startling attitudes trumpeted by certain genres of popular music. The right wields these clichés as the weapons they in fact are, while the Democratic center opts to mawkishly rephrase them.” Tobi Haslett, “Magic Actions,” *n+1* (Issue 40, 2021).

nighttime lower Manhattan. And it is rising. “Alienated from society and knowing that this society cherishes property above people,” the King says, “[the Black man] is shocking it by abusing property rights.”²⁸ In New York City, the color line is all the starker for scale. For example, the oft-noted complexion of subway lines above and below 110th street:

On a field trip down to Manhattan in a packed D train car, one of my students from the Bronx asks: “Mister, why do people down here look at us funny?”

“What do you mean?”

Elizabeth chimes in: “Yeah, whenever I come to Manhattan these white people be looking at me weird.”

Keisha’s words belie the not-like-I-care tone: “Yeah, it’s like they can’t see us.”

I nod, unsure of what to say. I could say that saint Baldwin has said it well: “To be a Negro in this country is really – Ralph Ellison has said it very well – never to be *looked at*. What white people see when they look at you is not visible. What they *do* see... invested you with... agony... pain... danger... passion... torment...” But I don’t say that.

My students already knew that. They already knew that across the immense moat of the Harlem River and south of the marble colonnades of Columbia, their language wasn’t being heard or spoken. And they sensed the danger of speaking falsely, they bit their Ain’t, they heard like a distant memory the judge’s voice: *Bond goes from \$5,000 to \$25,000*. Or so I imagined. And then they crouched down by the ear of a sleeping, sickly Manhattan and roared it into wakefulness, made it listen.

In the midst of this narrative assertion, act of memory, challenge to the stock story, I felt my di-stance, briefly, become a stance. A deep and undeniable sense of satisfaction and justice... Not just windows and store fronts... also quarantine... curfew... status quo... the very fabric... It was a war of sight and sound, literally of being seen and heard, the stakes of which were, are, the (dis)continuance of the story of whiteness.

A shout that echoed for just a brief moment and then was forgotten, turned down.²⁹ Glossed over. Co-opted by capital. And remembered.

IV.

Whichever story the [Supreme] Court chooses, alternative stories still provide normative bases for the growth of distinct constitutional worlds.

— Robert Cover³⁰

²⁸ A speech at the American Psychology Associations’ annual convention in Washington, DC, in September 1967.

²⁹ Tobi Haslett, reflecting on his own experience in and of the movement, reminds us of how quickly gains were lost: “One outcome of the uprising has been the expansion of a zealous antiracist discourse that remains silent about the street battles that gave it marvelous topicality.”²⁹

³⁰ *Narrative, Violence, and the Law*, “Nomos and Narrative” (1983).

Stories are the method colonized people use to assert their own identity and the existence of their own history. The main battle in imperialism is over land, of course; but when it came to who owned the land, who had the right to settle and work on it, who kept it going, who won it back, and who now plans its future – these issues were reflected, contested, and even for a time, decided in narrative.

— Edward Said

Stories must be told and retold and told in new ways and recorded and heard again.

Everyone says: Stories are in.³¹ Hannah Arendt points to a methodological commitment to narrative, post-World War II – where social scientific methods can explain away anything and normalize it. “The storyteller,” Arendt says, “uses bits of the past to unsettle the present and deprive it of peace of mind.”³² Even in American jurisprudence, in recent decades, the story as methodology has emerged from the shadows cast by Langdell’s formalism and mid-century legal process theory, appearing in Critical Legal Theory and its offshoots, the “Law and Literature” movement.

The story... “plurality of... viewpoints... any given event,” empress Arendt says.³³ It is this plural mode, per Patricia Williams, “ambi-valent, multi-valent way of seeing... at the heart of... critical theory, feminist theory... fluid positioning... back and forth across boundary... certain circumstances... black and good and black and bad, and... black and white, male and female, yin and yang, love and hate...” Feminists prefer “a particularity of description... ‘from the inside’... the perspective of a person going through them... unique vividness of detail...”³⁴ For indeed, per Schepelle, “law has always been concerned with narratives, with the individual plaintiff and the individual defendant in the individual case.”³⁵

And maybe it’s about shoes. “You can’t tell people what to think. You *can* show them something by saying, ‘Put these shoes on, walk in these shoes’” (Bruce Springsteen). N.W.A.,³⁶ too: “[A] niggaz wit’ nothin’ to lose / One of the few who’s been accused and abused / Of the crime of poisonin’ young minds / But you don’t know shit ‘til you’ve been in my shoes.” Indeed, “rappers were compared, almost from the beginning, to African griots, who also communicated wisdom (or, in the hip-hop lexicon, ‘dropped science’) with drum beats and words.”³⁷ Author Zadie Smith takes Springsteen and N.W.A.’s advise when she reads fiction: “feeling with these imaginary strangers... alongside them and through them, extrapolating... my own

³¹ Thinkers, critics, artists, and the people have been telling subversive stories around the law for as long as language has existed. But such storytelling, by some contemporary accounts, is becoming increasingly acceptable across disciplines and institutions: “*Storytelling has also had a resurgence in medicine, history, religion, and political theory, biography and autobiography, television and entertainment*” (*Telling Stories to Change the World*, pg. 259).

³² Quoted in *Telling Stories to Change the World*

³³ *Id.*

³⁴ Kathryn Abrams in “Hearing the Call of Stories”

³⁵ “Foreword: Telling Stories”

³⁶ Niggaz Wit Attitudes

³⁷ Paul Butler, “Much Respect: Toward A Hip-Hop Theory of Punishment,” 56 *Stan. L. Rev.* 983 (2004)

emotions...relation to them, as all human feelings... voices of characters joined the ranks of all the other voices inside me."³⁸

These shoes are, must be, full of thorns, roses and thorns. We, the readers, says professor Delgado, must "deepen and humanize ourselves, we must seek out storytellers different from ourselves and afford them the audience they deserve. The benefit will be reciprocal."³⁹ Foucault knew that "[w]hen the prisoners began to speak, they possessed an individual theory of prisons, the penal system, and justice. It is this form of discourse which ultimately matters, a discourse against power, the counter-discourse of prisoners and those we call delinquents."⁴⁰ Speaking of today's richest theoreticians of prisons, Tricia Rose explains how "rappers act out inversions of status hierarchies... and draw portraits of contact with dominant groups in which the hidden transcript inverts/subverts the public, dominant transcript."⁴¹ Indeed, "virtually every hip-hop artist renamed himself or herself; 'slave' or 'government' names were seldom used to describe the artists. Many hip-hop artists named themselves thinking of the criminal law. A short list includes rappers and groups such as Big Punisher, Bone Thugs-N-Harmony, Canibus, Missy 'Misdemeanor' Elliot, Mobb Deep, Naughty by Nature, OutKast, and Public Enemy."⁴²

Professor West says, for women as for the African American:

We must insist loudly upon the normative significance of our hedonic lives... Martin Luther King argued again and again that the essence—the dominant fact—of the Negro's life is *pain*, that that fact would not change until the white liberal would come to *share* it, that he would not share it until he *felt* it, that he would not be able to feel it until he understood it, and that he would not understand it until the *Negro* succeeded in bringing the pain to the surface—until he could make its content palpable. Only then would the pain be mitigated. I believe that the same is true of women: the fundamental fact of women's lives is pain, that fact will not change until men share it, which will not in turn occur until its meaning and content is communicated... But we will not even attempt to [make the pain palpable] as long as we embrace models of legal criticism that deny the relevance of subjective pain and pleasure, happiness and suffering, joy and sorrow, to the critical evaluation of law... [these models of legal criticism] virtually insure the irrelevance of rich descriptions of felt pain and pleasure to a feminist criticism of law...⁴³

Simone de Beauvoir's words echo: "It is in the recognition of the genuine conditions of our lives that we gain the strength to act and our motivation for change..."⁴⁴

³⁸ Zadie Smith, "Fascinated to Presume: In Defense of Fiction," *The New York Review of Books* (Oct. 24, 2019 issue).

³⁹ Richard Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative" (1989).

⁴⁰ *Intellectuals and Power in Language, Counter-Memory, and Practice* (1977).

⁴¹ Tricia Rose, *Black Noise: Rap Music and Black Culture in Contemporary America* (1994) ("... a large and significant element in rap's discursive territory is engaged in symbolic and ideological warfare with institutions and groups that symbolically, ideologically, and materially oppress African Americans").

⁴² Paul Butler, "Much Respect: Toward A Hip-Hop Theory of Punishment," 56 *Stan. L. Rev.* 983 (2004)

⁴³ Robin West, "Conclusion: Women's Difference, and an Alternative Standard for a Feminist Critique of Law" (2000).

⁴⁴ Quoted in Audre Lorde, *A Burst of Light* (1988).

Still, before some avenues of change sit the suit, the robe, the uniform: deaf, blind, and, most of all, full of “the *terror* of being described by those they’ve been describing for so long.”⁴⁵ Lucky for them, there are tools for absorption, dilution, and decontextualization. “Ideology actually works,” says professor Gabel, “by [the] assimilation of the transcendent into the anti-transcendent.”⁴⁶ The wide-screen spectacle subsumes the brimming detail and overawes the audience.⁴⁷ But even the child grows bored. And those other, fiery stories are still being told deep inside abandoned, graffiti-lined tunnels.

Fiery stories contain that “contact with mystery” (Flannery O’Connor) where it is “nothing more than a gesture, [a gesture] that transcends any neat allegory or moral lesson, that forces us out of the comfort of our own self-satisfied logic.”⁴⁸ Stories are specific, not clubs to the head or wide-screen Newspeak. See e.g., queen Hartman’s *Scenes of Subjection*, her critical exploration of American chattel slavery, in which she “hope[s] to illuminate the terror of the mundane and quotidian rather than exploit the shocking spectacle”:

At issue here is the precariousness of empathy... how does one give expression to these outrages without exacerbating the indifference to suffering that is the consequence to the benumbing spectacle or contend with the narcissistic identification that obliterates the other or the prurience that too often is the response to such displays? This was the challenge faced by [Frederick] Douglass and other foes of slavery.

Even today, “[a]ttention is drawn to the ‘spectacular event’ rather than to the point of origin or the mundane” (Mariame Kaba).⁴⁹ The brimming detail is a way toward a painful understanding, not the detachment of reading numbers on a headline.⁵⁰ And the brimming detail is seldom more evident than in the “the minor, everyday epic of illegalities.”⁵¹

V.

Come in come in, the Judge decides,
All liveried in black,
You must learn to dance for me

⁴⁵ James Baldwin, 1984 interview.

⁴⁶ *Desire*.

⁴⁷ For more on the brimming detail, see Hugo von Hofmannsthal’s *The Letter of Lord Chandos* (1902).

⁴⁸ Tucker Carrington in Abbe Smith’s *How Can You Represent Those People?* (2013).

⁴⁹ *We Do This ‘Til We Free Us: Abolitionist Organizing and Transforming Justice* (2021)

⁵⁰ *Id.* (“... Circulated are the spectacles—dead Black bodies lying in the streets... Along these dramatic images, numbers and statistics are the main metric for soliciting empathy and galvanizing people into action... size and power of gun... number of cops at the scene... forty-one bullets... four hour his body lay... The mind-numbing images and numbers keep coming... Both the pictures and statistics become the stuff of headlines, reports, social commentaries, and “teachable moments.” Sadly, their circulation seems to demonstrate... that ‘taxonomy can itemize atrocities but cannot bear witness to suffering... To circulate the spectacular in hopes that people will consider the everyday”).

⁵¹ Foucault, *The Birth of the Prison* (pg. 68).

Before you ever shall come back.
Isaiah he comes in once more,
Stares dread D.A. in face.
Fuck this, he says, Callooh, Callay!
I pray, Judge says, desist.
That's some prayer, the cop does grin
Aside to blighted pen,
Come on down another day
We shall begin again.
You got two choices, kid, Robe says:
A rock star or a felon.
And I don't make the rules,
And appeals attach in heaven.

(The Bill of Rights is fixed to canyon walls with big metal brackets. Even here?! a child cries. *Don't look now, don't even close your eyes.* Snippets of laughter sputter in the static, the hand clasps the steel, foam becomes general...)

VI.

[I]t is forbidden to kill; therefore all murderers are punished, unless they kill in large numbers, and to the sound of trumpets...
— Voltaire

Trumpets echo off canyon walls as the local theater troupe literally enacts Texan settler history for the summer series on a red dirt stage. The law clerk sees cowboy hats incline toward the spectacle in the sweltering dusk...

He is made to think of these trumpets again Monday, sitting in West Texas court with his fellow clerks in the hushed, high-ceilinged room. All rise. The robed former District Attorney, up for reelection, enters from chambers in boots, raises a genial hand, all settle. The current District Attorney begins conducting his train of witnesses. Experts take turns sitting and deferring. The Jury is solemnly empaneled, Court Reporter competently poised, Bailiff established... Not too long ago, men rode into town with scalps hanging from their saddles, outlined against "the red demise of that day... the evening lands and the distant pandemonium of the sun."⁵² Today, they wait for the jury to get instructions on the latest in democracy's

⁵² Cormac McCarthy, *Blood Meridian* (1985)... and the Mexican-American War, generally.

codification of cage-able offenses.⁵³ The would-be Murderer and would-be Defender face across the aisle like ideologues on some Olympian forum – or, at the very least, bedraggled and repentant servants of the Law.

A gesture of the Bailiff “releases all sounds and initiates the new harmony.”⁵⁴ Every instrument knows its part. He sees, for the first time, the client he’s been hearing about, whose files he’s been reading in the office. She enters in orange from the side door, flanked by heavy-holstered handguns. She doesn’t look from behind a veil of unwashed hair to the right side of the gallery, where the Victim’s family and public sympathizers sit – because she is the Victim’s family. Nor to the left: where her Team and two Reporters sit, clutching pencils, all, cases on clipboards. She does not even look to her Defender. She does not speak, is not spoken to, and is central. She sits in the stillness and waits, like a child for a show to begin.

The clerk sits on the wooden bench and hears trumpet fire. The stone courthouse sits at the center of a dusty town square... across the street, a general store, a sandwich shop where jurors take their lunch breaks. He sees this and wonders, behind the rail. The courtroom holds a captive audience. It takes in the scene, pays obeisance to the opaque, holy symbology upon the stage, the sacrificial lamb. Gallery, or galilee, is a chapel, or the porch at a church’s entrance.⁵⁵ This show is a suppression hearing for evidence acquired in her prosecution for capital murder.

Sitting in the audience, taking notes on juror micro-expressions, the clerk sees the power of his client’s silence, an answer to the manifest senselessness of the ritual, her ritual. She couldn’t be explaining more clearly, that, before the trial even begins, the courtroom sealed the legitimacy of its own processes and *all* outcomes. Whatever the law says, the law says, must be done. She was saying besides, historically, the law had an easier job. Public executions were a “magisterial spectacle” and “mystery” [which] transmitted the terror of the law symbolically and materially.⁵⁶ And always “the main character was the people... required for the performance... scene of terror... summoned as spectators... corpses of the executed... must see...”⁵⁷ Me, she says, that’s me.

The courtroom is the new gallows, we no longer stone people or use the pillory, we hide unprecedented numbers of them away in dark recesses for years at a time and tell them to think about how they can make better choices. Guidelines replace guillotines. The legitimizing scene transfers from the administration of punishment, the execution, to its *adjudication*, whose sentence is then served in private. The public’s last sighting of the convict is an

⁵³ A game of roulette, he’s found, between: (a) growing a plant that’s on a list of plants that you can’t grow, (b) passing some imaginary line in the ground between two imaginary nation-states when you were arbitrarily born on one side of it, or (c) having, for instance, a 15-year-old plant-growing conviction and then being in possession of a gun (when the morally right, necessary thing to do could often be owning the gun – and the cop owns about 15)

⁵⁴ Rimbaud, *Illuminations*, “To a Reason” (1886).

⁵⁵ “Definition of Gallery,” *Google*.

⁵⁶ Douglas Hay et al., *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England* (1975).

⁵⁷ *The Birth of Prison* (pg. 57).

execution.⁵⁸ Trumpets blare across the stage, ricochet off the judge's elevated bench, the curve of the jury box, the back of the defendant's head... Against her silence sound the formal, deadened dicta of the law. They must sound to her, as they did to him, as Latin must have sounded to a medieval French peasant... maybe all were in attendance for the music.

VII.

No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.

— Robert Cover⁵⁹

Scalia preferred the American Heritage Dictionary, and the power of judicial review was conjured in Marshall's "magisterial, imperial mode."⁶⁰ "Upon a certain wild and uninhabited... waste land,"⁶¹ groups of robes huddle around sagebrush fires and speak back and forth in urgent, hushed tones. Snippets of phrases drift on the wind. "[N]oxious beasts..."⁶² "reasonable man..."⁶³ "history and tradition..." "proceed with all deliberate speed..."⁶⁵ "in the interest of justice..." "average men..." "bearded Negro..."⁶⁶ "light choking..."⁶⁷ Suddenly, John Hart Ely raises his head and issues a haiku: "substantive due process is a contradiction in terms—sort of like 'green pastel redness.'" A shudder passes through the assembled; they sense the "substance and meaning of their ancient staging" fading.⁶⁸ Someone is lobbying for a code and commission to replace judicial discretion in sentencing decisions. But "only a person can pass

⁵⁸ E.g., if L.W.O.P. is on the table as it often is in capital cases.

⁵⁹ *Narrative, Violence, and the Law*, "Nomos and Narrative" (1983).

⁶⁰ Benjamin Cardozo, "Law and Literature"

⁶¹ Declaration in *Pierson v. Post* (1805).

⁶² Declaration in *Pierson v. Post* (1805).

⁶³ A legal fiction that "presupposes what is essentially a mythical being: a legal subject who is coherent, rational, and freely choosing." Shana Weiss, "How We Constructed The Jury: A Look at Narrative Storytelling," 12 *Berkeley Women's L.J.* 73 (1997).

⁶⁴ 'Reasonable man' literature featuring lines like these: (Baron Bramwell re the sufficiency of a wall in containing pigs of "average vigour and obstinacy") "Nor do we lay down that there must be a fence so close and strong that no pig could push through it, or so high that no horse or bullock could leap it. One could scarcely tell the limits of such a requirement, for the strength of swine is such that they would break through almost any fence, if there were a sufficient inducement on the other side. But the company are bound to put up such a fence that a pig not of a peculiarly wandering disposition, nor under any excessive temptation, will not get through it," and "Although we might take judicial notice of the increasing tendency of children to question and challenge their parents, surely even the most 'liberated' five-year-old cannot reasonably be expected to reject a father's invitation to play with him in the 'adult' swimming pool." *Haft v. Lone Palm Hotel*, 3 Cal. 3d 756 (1970).

⁶⁵ *Brown II* proposing a doctrine of gradualism and reform

⁶⁶ Rehnquist majority opinion in *Arizona v. Youngblood*

⁶⁷ A case we read in Criminal Law that I've forgotten

⁶⁸ Kate Stith and Jose Cabrenes, "Fear of Judging" (1998).

moral judgment,” someone shouts, “and only a person can be morally judged!”⁶⁹ “The opinion will need persuasive force,” Cardozo suggests, “or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the terseness and tang of the proverb and the maxim.”⁷⁰ But no one hears. A beggar is preaching on the courthouse steps: “The scientific rationality that prevails in our society—and in our legal argumentation—privileges universality, statistical significance, and logical deduction...”⁷¹ Her sister continues, speaking at length on Anglo-American jurisprudence’s exclusive reliance on “categories and definitional polarities... that purport to make life simpler in the face of life's complication: rights/needs, moral/immoral, public/private, white/black...”⁷² Nowadays, says a boy

Punishment is... bereft... “pity,” “hope”... technical language... “base levels,” “categories,” “points,” “scores” ... jargon... tax accountants... parlor game... human... a string of letters and numbers... vertical axis... offense level... horizontal axis... criminal history... no depth... no shading or perspective...⁷³

In a breakout room, professor Ogletree says the proposed sentencing commission fails to consider “the offender's personal characteristics [and] places... too little emphasis on circumstances that would serve to mitigate the punishment.”⁷⁴ “The Commission,” Paul Butler adds, “should [realize] that it is a person who stands before the bar to accept the punishment imposed by the court.”⁷⁵ Don’t be under any illusions, raps Mos Def:

Yo, it's one universal law but two sides to every story / Three strikes and you be in for life, mandatory / And even if you get out of prison still livin' / Join the other five million under state supervision / This is business, no faces just lines and statistics.⁷⁶

“We do not want to know or understand these people,” Abbe Smith says again and again, “or consider the circumstances of their crimes.”⁷⁷

The law clerk looks up and realizes that court has adjourned for the day. He’s being ushered by a supervising attorney through a side door and he follows and finds his team assembled around their client. She asks each one of them something special, about them, and laughs

⁶⁹ *Id.*

⁷⁰ Benjamin Cardozo, “Law and Literature”

⁷¹ Kathryn Abrams on feminist narrative in “Hearing the Call of Stories”

⁷² Patricia J. Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (1991)

⁷³ Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing* (2005); from Dressler et al., *Criminal Procedure*, pg. 1384.

⁷⁴ Charles J. Ogletree, Jr., “The Death of Discretion? Reflections on the Federal Sentencing Guidelines,” 101 *Harv. L. Rev.* 1938, 1953 (1988); in Paul Butler, “Much Respect: Toward A Hip-Hop Theory of Punishment,” 56 *Stan. L. Rev.* 983 (2004).

⁷⁵ *Id.* (Paul Butler).

⁷⁶ *Id.*

⁷⁷ Abbe Smith, “The Dignity and Humanity of Bruce Springsteen's Criminals,” 14 *Widener L.J.* 787 (2005).

easily. He drives home thinking. Pulls out a Reginald Dwayne Betts book he's been meaning to read and finds:

I won't tell you how it ended, &
his mother won't, either, but beside
me she stood & some things neither

of us could know, & now, all is lost;
lost is all in what came after—the kid,
& we should call him kid, call him a

child, his face smooth & without history
of a razor, he shuffled – ghostly – into
court, & let's just call it a cauldron, &

admit his nappy head made him blacker
than whatever pistol he'd held,
whatever solitary awaited; the prosecutor's

bald head was black or brown (but
when has brown not been akin to Black
here? to abyss?) & does it matter,

Black lives, when all he said of Black
boys was that they kill? – the child beside
his mother & his mother beside me &

I am not his father, just a public
defender, near starving, here, where the
state turns men, women, children into

numbers, seeking something more useful
than a guilty plea & this boy beside
me's withering, on the brink of life &

broken, & it's all possible, because the
judge spoke & the kid says
—*I did it I mean I did it I mean Jesus—*

someone wailed & the boy's mother yells:
*This ain't justice. You can't throw my son
into that fucking ocean.* She meant jail.

& we was powerless to stop it.
& too damn tired to be beautiful.

Poet, felon, and lawyer – always, Betts says, “trying to find ways to connect my identity as a lawyer with my identity as a poet.”⁷⁸

IN THE... MIDDLE... OF ALABAMA... v THE CITY OF MONTGOMERY... The plaintiffs... impoverished... jailed by the city... unable to pay... traffic tickets... told... they could... work off debts... scrubbing feces and blood from jail floors... jailing people if they... poor... fundamental rights... suffered... It is the policy... of the City... to jail people... It is the policy... It is the policy... It is the policy... a 23-year-old... mother of two... owed the City... took... away... two children... too poor to pay... desperate to get back... labored to clean... jail bars... 58-year-old disabled... asked... for mercy... 44 days... agreed to clean... blood and feces from the jail floors... lost his job... WHEREFORE... relief... equal protection... judgment... constitutional and statutory rights... Fourteenth Amendment... due process... equal protection... rights... Respectfully submitted.⁷⁹

⁷⁸ Interview in *The Paris Review* (2019). <https://www.theparisreview.org/blog/2019/11/07/the-reckoning-an-interview-with-reginald-dwayne-betts/>

⁷⁹ Reginald Dwayne Betts, *Felon*, “In Alabama” (Norton 2019) (redactions here replaced by ellipses). [Betts note on redaction: “These poems use redaction, not as a tool to obfuscate, bus as a technique that reveals the tragedy, drama, and injustice of a system that makes people simply a reflection of their bank accounts.” And “But nobody can understand these court documents. I mean, you get sixty to seventy pages. It's like reading a novella, and you don't want to really read a novella that's talking about things like jurisdiction. But what I thought about was this poetry-ness, and if we can find the poetry. Instead of thinking that redaction is a tool to get rid of and hide what is

VIII.

To live outside the law you must be honest.

— Bob Dylan⁸⁰

He dreamed a righteous dream.

First, the narrative took over the airwaves that it was her child and that it was in cold blood, that he was here illegally and that it was a cop, that she was a meth addict... But then he imagined a street paper that covered the defendant, written by the defendant herself.⁸¹ He imagined that, “[a]gainst the law, against the rich, the powerful, the magistrates, the constabulary or the watch, against taxed and their collectors, [the condemned] appeared to have waged a struggle with which one all too easily identified. The proclamation of these crimes [would blow] up to epic proportions the tiny struggle that passed unperceived in everyday life.”⁸² He saw their client as a saint, smiling around up at her team. Then Rachel Kaadzi Ghansah of all people entered and began speaking of Trayvon Martin’s friend Rachel Jeantel (the last person who spoke to him), who, when she was called to testify at Zimmerman’s trial, was herself put on trial:

[W]e battle for existence in real life as well on the page. We must defend our dreams and our daily lives. Rachel Jeantel’s playfulness, her slang, her exasperation are now important parts of the record of the Martin trial, and expose not just who she was but who Trayvon Martin was as well. Whether she reads well or not, *Rachel Jeantel authored for the court a narrative, scribbled in the margins, one of the few that will express how nonsensical the proceedings were for so many of us who watched.* Words like Jeantel’s — often expressed in *far-out forms like graffiti and slang* — trace the sense of feeling X-filed; they are the ways to acknowledge *life in the bush of ghosts*, and give names and sounds to the consciousness of radical world-building that the descendants of the African Diaspora have engaged in all around the world. This is the tradition Rachel Jeantel was practicing up on the stand: the art of being young, black, and incomprehensible.⁸³

Suddenly Kodak Black was headlining a show on the secure side:

Guess all the pain that I went through had to be the recipe
I stood tall through it all and brought out the best of me

most sensitive, what if we thought about it as a tool to remove the superfluous? What if I tried to find the rhythm, the poetry, the character, the story, the person? If I allowed the document to actually be a voice of the person writing it? That’s what I attempted to do.”]

⁸⁰ “Absolutely Sweet Marie,” *Blonde on Blonde* (1966).

⁸¹ Inspiration from *Street Sense Media*

⁸² *The Birth of Prison* (pg. 60).

⁸³ Rachel Kaadzi Ghansah, “Her Eyes Were Watching the Stars: How Missy Elliott Became an Icon,” *Elle* (May 15, 2017).

Ayo, dismiss all them charges, that ain't my destiny
Everything I said, I stood on it, I got integrity
G.A., I put my hood on it, I bring the 'jects with me
You need security by your grave so you can rest in peace
[Outro: voice of Malcolm X] *Charge of violence against us actually stems from the guilt complex that exists in the conscious and subconscious minds of most white people in this country. They know that they've been violent in their brutality against Negroes and they feel that some day the Negro is going to wake up and try and do unto as them as they have done—do unto the whites as the whites have done unto us.*⁸⁴

Dostoevsky entered in rags and produced a splotchy manuscript: a pitch for the new prisoner quarterly. The page read, in pertinent part:

When they announce the sentence, you know, and prepare the criminal and tie his hands, and cart him off to the scaffold—that's the fearful part of the business. The people all crowd round—even women—though they don't at all approve of women looking on... The criminal was a fine intelligent fearless man; Le Gros was his name; and I may tell you—believe it or not, as you like—that when that man stepped upon the scaffold he *cried*, he did indeed,—he was as white as a bit of paper. Isn't it a dreadful idea that he should have cried—cried! Whoever heard of a grown man crying from fear—not a child, but a man who never had cried before—a grown man of forty-five years. Imagine what must have been going on in that man's mind at such a moment; what dreadful convulsions his whole spirit must have endured; it is an outrage on the soul that's what it is. Because it is said 'thou shalt not kill,' is he to be killed because he murdered someone else? No, it is not right, it's an impossible theory. I assure you, I saw the sight a month ago and it's dancing before my eyes to this moment. I dream of it, often.⁸⁵

Then 1968, the Chicago 7 trial, and the smoke thick. Defendant Hoffman came “cartwheeling into the courtroom... giving alt-answers to standard questions.” Where did he live? “I live in Woodstock Nation. It is a nation of alienated young people. We carry it around with us as a state of mind in the same way as the Sioux Indians carried the Sioux nation around with them.”⁸⁶ The judge looked stunned. Rachel strode down the aisle. Kodak leapt onto the stage. Dostoevsky sank onto his knees and sobbed. And our client got up and walked out.

Things were just coming together when the alarm went off.

IX.

We are living at a moment like that moment when Constantine became a Christian. All of the standards for which the Western world has lived so long are in the process of breakdown and revision; and a kind of passion, and beauty, and joy, which was in the world before and has been buried so long, has got to come back.

— James Baldwin⁸⁷

⁸⁴ Kodak Black, *Dying to Live*, “Malcolm X.X.X.” (2018).

⁸⁵ Fyodor Dostoevsky, *The Idiot* (1869).

⁸⁶ Peter Gabel, *Desire* (pg. 157).

⁸⁷ 1961 interview.

On staff retreat at a lakeside hotel on the Texas-Oklahoma border, a group of Defenders sit down after lunch to listen to the paid speaker's presentation. She is presenting on storytelling and mitigation in capital cases, and she is a good storyteller; the Defenders thank God that time seems to at least be passing. The office is covering the first drink at happy hour.

She is talking about how *we* can tell *their* story, talking about how mitigation, openings, and closings – and representation, generally, of capital clients – can and should involve storytelling. Narrative persuasion, she says, is also at the core of post-conviction relief practice; *it is, perhaps*, “[t]he central task of postconviction counsel for a condemned inmate... to change a story that has been certified as The Truth.”⁸⁸ The rules of trial themselves, she says, tend to “reject facts which help explain the legal actor's point of view. [But] injecting narrative ‘fills the gaps’ of traditional legal discourse with images that cause us to confront our identity more fully.”⁸⁹ She goes through all the MFA tenets, like showing not telling, making the theme implicit, complicating established narratives (in this case, of race, language, criminality, etc.), getting at the human particulars, playing on emotions...

The stock story mode of legal story-telling, she says, “looks to when ‘the trouble’ began, and fans out in the direction of legally relevant facts.”⁹⁰ But she urges her audience to dig further and deeper into a client's backstory, to find the suffering, the human, the brimming detail. To realize that “[w]e are all poor, blind creatures bound hand and foot by the invisible chains of hereditary and environment, doing pretty much what we have to do in a barbarous and cruel world. That's about all there is to any court case.”⁹¹ Bruce Springsteen set mitigation narratives to music.

[Springsteen's criminals are] vivid, lifelike characters, not readily reduced to type, and not easy to dismiss no matter what they have done. They are people who may have broken the law, but their lives are much more than their crimes. Springsteen tells the stories behind the crimes: unemployed because of a plant closing, unable to find another job, and facing foreclosure on his house, a man snaps, shoots a clerk, and is charged with murder; lonely and in a dead-end job, a shoe salesman takes up with a woman he barely knows and robs a bank, killing the teller; in a fog of drugs, fear, and rage, a man commits a heinous crime that lands him on death row; for seemingly no reason, but reflecting the “meanness in the world,” a man takes up with a girl and together they commit a series of random killings.⁹²

⁸⁸ Philip N. Meyer, “Characters in a Death Penalty Brief,” *Vermont Law Review* (Vol. 32:877)

⁸⁹ Shana Weiss, “How We Constructed The Jury: A Look at Narrative Storytelling,” 12 *Berkeley Women's L.J.* 73 (1997).

⁹⁰ Kim L. Schepple, “Foreword: Telling Stories,” 87 *Mich. L. Rev.* 2073 (1989).

⁹¹ Clarence Darrow. See, alternatively: “If a criminal knocks you over the head on your way home from work, he will be out of jail before you're out of the hospital and the policeman who arrested him will be on trial. But some psychologist will say, well, he's not to blame, society's to blame. His father didn't take him to see the Pittsburgh Pirates when he was a boy” (George Wallace).

⁹² Abbe Smith, “The Dignity and Humanity of Bruce Springsteen's Criminals,” 14 *Widener L.J.* 787 (2005).

Ditto Johnny Cash, Kendrick Lamar.⁹³ For in criminal law, “you are dealing with flesh, blood, reputations, shame, disgrace, and honor... wives, fathers, mothers, and children.”⁹⁴

Someone raises their hand and says this is all well and good but how...? and proceeds to disburden themselves. They call the prosecutor’s death-stance a sort of “failure of moral imagination.”⁹⁵ They say he’s a recovering high school sports star.

The speaker replies with Procedure. She explains the idea of the bifurcated capital trial to the weary troops. A separate sentencing trial. For Texas capital defendants, this means one of two things: death or life in prison without the possibility of parole (LWOP). She calls it a Constitutional vessel for storytelling and empathy-building.⁹⁶ And even more significantly, the jury right in the Sixth Amendment, the right to address and be judged by a group of one’s peers. The trial was to be speedy, public, and local, and the local jurors impartial:

[The] understanding of ‘impartial jury’ goes back to the thirteenth century when the defendant had to choose to ‘put himself upon the country’ and receive a verdict that was the voice of the community... It was, in a real sense, designed to determine whether the defendant remained part of the community or became an ‘outlaw’ – literally found to be outside the law that protected those in the community. (Crim II pp 930

But it’s also a little something more:

There is an almost mystical element to this contention about the [jury as] ‘conscience of the community’: before anyone is imprisoned, that person is entitled to *more* than a fair trial... He is entitled to the benefit of the wisdom and compassion of his peers, entitled to the right to have them conclude that he is guilty beyond any doubt, but that he shall be acquitted and go free because of some irrational, inarticulable instinct, some belief, some observation, some value, or some other notion of that jury.⁹⁷

As criminal defense lawyers, she tells us, it is our job to make the most of these procedural rights gifted to us by the system. The assumption is that “they” are monsters. She said that “[t]he criminal defense lawyer must uncover and present the client’s humanity, and in that way demonstrate to a skeptical jury that there is no ‘them,’ there us only ‘us.’ That is the defense lawyer’s creed.”⁹⁸ She gives the example of the eleven-year-old boy whose new foster father’s uncomfortable touching is explained away by his new step-brother as “normal.” So are the

⁹³ See Rachel Kaadzi Ghansah’s “When the Lights Shut Off: Kendrick Lamar and the Decline of the Black Blues Narrative,” *Los Angeles Review of Books* (Jan. 31, 2013); Johnny Cash, “This Side of the Law,” *I Walk the Line* (1970).

⁹⁴ Clarence Darrow quoted by Monroe Freedman in Abbe Smith’s *How Can You Represent Those People?* (pg. 77).

⁹⁵ Abbe Smith, “The Dignity and Humanity of Bruce Springsteen’s Criminals,” 14 *Widener L.J.* 787 (2005).

⁹⁶ Marshall dissent in *Strickland*: “judges and juries in cases involving behavior as egregious have shown mercy, particularly when afforded an opportunity to see other facets of the defendant’s personality and life.”

⁹⁷ *State v. Ragland*, 105 N.J. 189 (1986)

⁹⁸ Margulies in Abbe Smith *How Can You Represent Those People?*

rapes. And how it is still better than the last foster home where he'd ended up with a broken wrist and alcohol poisoning, which all leads to a history of self-loathing and addiction.⁹⁹

We take this, she says, and present it to the jurors. They, like the reader, have a mystical function. The jury is a residue of the older, community-oriented administration of justice. It is idealistic and democratic. The chorus looks on, exercising its "normative judgment" over the "morality play" that is the trial.¹⁰⁰ And "the jury are [*sic*] entitled to stand as nearly as practicable in the shoes of the defendant, and from this point of view determine the character of the act."¹⁰¹ The jury is entitled to do whatever it would like – even nullify. It re-evaluates values, "redeem[s], refine[s], and announce[s] justice and reaffirm[s] the human commitment to it."¹⁰² A jury may even "afford a *higher* justice by refusing to enforce harsh laws."¹⁰³

Someone raises their hand and notes that it's 5 o'clock somewhere. She lets them go a half hour early.

X.

I'm so uninterested in *narratives*. That word that gets used often. Narrative-building. People that want to be all about narrative-shifting, narrative-building. I believe that when we are in relationship with each other, we influence each other. What matters to me, as the unit of interest, is relationships.

— Mariame Kaba¹⁰⁴

I sit down to write a letter of support for a caged kid, which is really a mitigation narrative, which is really why there should be less legal infliction of pain. I can't help but think of his smile, so eventually I write about it: *Anyone who has the good fortune to see [him] smile knows...* and so on. He tells me later that his lawyer read it to the judge at sentencing and thanks me and it brings a good feeling inside although I know it's still not his story, it's a translation.

My version of his story is just one more finger pointing the reader/juror/judge to his moon: there are many fingers and just one moon. The experience is scarcely knowable. The moment of breakthrough... mutual recognition... moats overcome... for, if "the capacity for experience... dictates the depth of one's acceptance of other people... [and] burns out fear... [if] it's a terror of flesh... really a terror of being able to be touched,"¹⁰⁵ then the solution presents itself in all its stunning simplicity: Touch, taste, experience, recognition, love. "We are caught in an

⁹⁹ Facts from Monstross Jr. & Shapiro in Abbe Smith's *How Can You Represent Those People?*

¹⁰⁰ Akhil Reed Amar

¹⁰¹ *State v. Ellis*, 30 Wash. 369, 70 P. 963 (1902)

¹⁰² Abbe Smith *How Can You Represent Those People?*

¹⁰³ Emphasis added. Harlan dissent in *Duncan v. Louisiana*.

¹⁰⁴ *We Do This 'Til We Free Us: Abolitionist Organizing and Transforming Justice* (2021)

¹⁰⁵ Baldwin, 1984 interview.

inescapable network of mutuality,” the King says, “tied in a single garment of destiny.”¹⁰⁶ And when we recognize it and when we recognize each other,

And when we allow freedom ring, when we let it ring from every village and every hamlet, from every state and every city, we will be able to speed up that day when all of God's children, Black men and white men, Jews and Gentiles, Protestants and Catholics, will be able to join hands and sing in the words of the old Negro spiritual: Free at last. Free at last. Thank God almighty, we are free at last.¹⁰⁷

Another world is possible, a beloved community, accessed via the underground river.¹⁰⁸ In a tradition that runs parallel to currents of liberation, abolition, and critical studies, Emerson and Whitman, not too long ago, “saw something wild and new afoot,” a New Jerusalem just ahead and shimmering; and then, in the 20th century, the Beatniks, visionaries, and radicals, too.¹⁰⁹ Something fulfilling “the fundamental social desire of all human beings... for mutual recognition.”¹¹⁰ The Dust Bowl Troubadour worries and hopes in equal measure:

There was a big high wall there that tried to stop me. / The sign was painted, said ‘Private Property.’ / But on the backside, it didn’t say nothing. / This land was made for you and me. / One bright sunny morning in the shadow of the steeple, / by the relief office I saw my people. / As they stood hungry, / I stood there wondering if this land / Was made for you and me.¹¹¹

The Pueblo poet Leslie Marmon Silko sings of a different ontological relation to the world, a non-critical oneness:

Pueblo potters, the creators of petroglyphs and oral narratives, never conceived of removing themselves from the earth and sky. So long as the human consciousness remains *within* the hills, canyons, cliffs, and the plants, clouds, and sky, the term *landscape*, as it has entered the English language is misleading: “A portion of territory the eye can comprehend in a single view” does not correctly describe the relationship between the human being and his or her surroundings. This assumes the viewer is somehow outside or separate from the territory he or she surveys... Ancient Pueblos took the modest view that the thing itself (the landscape) could not be improved upon.¹¹²

Perhaps we must learn to say the same of the person.

XI.

¹⁰⁶ “Letter from Birmingham Jail”

¹⁰⁷ Martin Luther King, Jr., “I Have a Dream” (1963).

¹⁰⁸ For more on the underground river, see Christopher Hill, *Into the Mystic: the Visionary and Ecstatic Roots of 1960s Rock and Roll* (2017).

¹⁰⁹ Christopher Hill, *Into the Mystic: the Visionary and Ecstatic Roots of 1960s Rock and Roll* (2017).

¹¹⁰ Professor Gabel, *Desire* (“... forward toward the realization of a fully loving world that will be the full realization of ourselves as loving beings”).

¹¹¹ Woody Guthrie, “This Land is Your Land,” original 1940 version.

¹¹² “Landscape, History, and the Pueblo Imagination” (1986)

On my last day I go to say bye to kids during school hours when there normally isn't much movement. The Youth Development Representative, who is really a correctional officer, who is really a prison guard gives me a once over when I come on the unit and says, "Who do you want."

I tell her.

"He just had his floortime. We're on strict one-in, one-out right now after the incident."

"When's he coming out next?"

"He won't be coming out again today."

It's 3 p.m. I see him looking at me through his cell window and wave. He beckons me over.

"Oh, alright," she relents.

Now we're outside in the rec yard and I fumble my words when I'm telling him it's my last day. I'm bound by policy to no future contact with clients. He's heading to a "residential," where he'll finish out the remainder of his yearlong juvenile sentence. He's excited – it's the one he wanted. After months of waiting around, of hearing adults tell him to be patient and just wait a little longer, he is out of one cage and into a slightly larger one, with a light at the end of it. He notices my awkwardness and smiles.

"Appreciate you."

"Appreciate you."

XII.

I sit down to write an essay for an independent study in law school.