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Articles

THE NAME IS THE SAME, BUT THE FACTS HAVE BEEN CHANGED TO PROTECT THE ATTORNEYS: *STRICKLAND*, JUDICIAL DISCRETION, AND APPELLATE DECISION- MAKING

Gregory J. O'Meara, S.J.*

"In my end is my beginning." T.S. Eliot¹

I. INTRODUCTION

The Supreme Court has changed the law on ineffective assistance of counsel, and few commentators seem to have noticed.² In *Wiggins v. Smith*³ and *Rompilla v. Beard*,⁴ the Court found representation provided by criminal defense counsel to have been ineffective. Yet, counsel in both *Wiggins* and *Rompilla* did far more than trial counsel in *Strickland v. Washington*, where the Court found counsel's representation to be effective under the Constitution.⁵ The Court's shift in the standard for

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¹ T.S. ELIOT, *Four Quartets*, in THE COMPLETE POEMS AND PLAYS 129 (1952).

² Most criminal procedure textbooks either ignore cases after *Strickland v. Washington* or treat them as mere glosses on minor points that do not affect the substance of the *Strickland* ruling. Compare MARK E. CAMMACK & NORMAN GARLAND, ADVANCED CRIMINAL PROCEDURE IN A NUTSHELL (2d ed., West 2006) (providing an example of authors who ignore later cases), and PHILLIP E. JOHNSON & MORGAN CLOUD, CONSTITUTIONAL CRIMINAL PROCEDURE FROM INVESTIGATION TO TRIAL (4th ed., West 2005) (same), with MARC MILLER & RONALD WRIGHT, CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION, CASES STATUTES AND EXECUTIVE MATERIALS 53 (2d ed., Aspen 2005) (providing an example of authors who treat the later cases as glosses), and JOSHUA DRESSLER & GEORGE C. THOMAS, 2005 SUPPLEMENT TO CRIMINAL PROCEDURE: PRINCIPLES, POLICIES, AND PERSPECTIVES 87-91 (2d ed. 2006) (same). See also RUSSELL L. WEAVER ET AL., 2005 SUPPLEMENT TO CRIMINAL PROCEDURE: CASES PROBLEMS AND EXERCISES 29 (2005) (raising the possibility that the law has changed by asking, in a note following the edited version of *Rompilla*: "Did the majority revise the *Strickland* analysis *sub silentio* . . . ?").

³ *Wiggins v. Smith*, 539 U.S. 510 (2003).

⁴ *Rompilla v. Beard*, 545 U.S. 374 (2005).

⁵ *Strickland v. Washington*, 466 U.S. 668 (1984).

ineffectiveness has remained under the radar because federal statutes designed to limit *habeas* appeals prevent courts from announcing new legal rules in criminal cases that arise in *habeas* proceedings. Therefore, the Court has changed the law in a subtle way. This Article explores the mechanism through which the Court has changed the law in addition to mapping out what that change is. Specifically, although the Court continues to claim adherence to the *Strickland* holding, its later cases focus on sorts of facts explicitly ignored in the *Strickland* case, even though these facts were the bases for the state and federal court decisions in that case. By changing which facts “count” in ineffective assistance cases, the Court has quietly changed the law.

Discounting or changing facts is not a practice limited to Supreme Court Justices. Lawyers, judges, and legal academics operate under a widely-shared fiction that legal facts are found and fixed solely by jury determinations or by a judge in a jury’s absence. Thus, legal analysis draws our attention almost uniformly to the differences among rules or norms generated by a given case. The *Strickland* line of cases demonstrates that the failure to attend to the density and shading of facts recounted by appellate courts obfuscates how the law develops and changes. By ignoring, subordinating, or over-emphasizing facts found by lower courts, appellate courts change the legal landscape for a given rule; they change the law. In Part II, this Article introduces the idea of relevant legal categories: combinations of facts and law that together constitute the holding of a case. Despite widespread agreement on this point, legal commentators rarely consider how courts change facts in arriving at the holding of appellate decisions.⁶ Part III of this Article explores judicial discretion and Congress’ attempt to limit that discretion in *habeas* proceedings.⁷ Part IV of this Article considers the work of Paul Ricoeur, the leading narrative theorist of the past century. Ricoeur maintained that all non-fiction narratives are constructed entities, and findings of fact in appellate decisions are nothing more than non-fiction narratives.⁸ Therefore, Ricoeur’s observations subvert the received wisdom that appellate courts adopt the findings of lower courts without alteration. This Part describes in some detail how authors change supposedly “fixed” histories of past events.⁹ Finally, in Part V, this Article returns to *Strickland* and its progeny to demonstrate just how the Court has exercised judicial discretion and changed the law following

⁶ See *infra* Part II.

⁷ See *infra* Part III.

⁸ See *infra* Part IV.

⁹ See *infra* Part IV.

Strickland by changing the level of density whereby it recounts the facts in later cases.¹⁰ The Article concludes that, for the Supreme Court, facts found by lower courts are not an end, but a beginning.¹¹

II. LEGAL CATEGORIES EMERGE OUT OF THE INTERPLAY BETWEEN FACTS AND NORMS

A. *Legal Categories: Facts Combined with Legal Norms or Rules*

The way lawyers think goes back to Sesame Street; ultimately, attorneys put people, places, and situations into categories.¹² Life, for the lawyer, is a game of “[o]ne of these things is not like the others.”¹³ As a childhood game, such a practice is relatively harmless. Children begin with simple classifications such as even versus odd numbers, fruits versus vegetables, animals versus plants. Legal categories are less clearly defined, and their consequences may be less benign. Who is a member of a class able to sue? Where do the geographical boundaries of the United States end, permitting the government to ignore constitutional guarantees? When does the statute of limitations expire? The answers to these questions determine a person’s ability to claim redress in courts and determine when and if the government may be held accountable for its actions. Categories do not simply separate zebras from palm trees; they also decide the fate of human beings.

Relevant legal categories are determined by the interplay among constitutions, statutes, administrative rules, and case precedent on the one hand, and the facts that ground a particular dispute on the other.¹⁴

¹⁰ See *infra* Part V.

¹¹ See *infra* Part VI.

¹² ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000). “Categories are ubiquitous and inescapable in the use of mind. Nobody can do without them—not lawyers or judges . . . Categories are the badges of our sociopolitical allegiances, the tools of our mental life, the organizers of our perception.” *Id.* at 19.

¹³ *Id.* at 54-55.

¹⁴ See, e.g., AHARON BARAK, *JUDICIAL DISCRETION* 17 (Yadin Kaufmann trans., 1989).

The distinction among the three objects of judicial discretion is blurred. The difficulty is inherent in the fact that we do not have accurate instruments for determining what constitutes a fact and what a norm, and where the border between them lies. Moreover, the judge cannot decide the facts before he formulates for himself, if only at first glance, a view of the law, since the number of facts is infinite and he must focus only on those that are relevant, which is determined by the law. Yet the judge cannot determine the law before he takes, again if only as a first impression, a stand regarding the facts, since the number of laws is great and he must concentrate on the law that applies, which is

The interaction of these sources is subtle and nuanced, the precise working of which is dimly understood at best.¹⁵ The French philosopher Paul Ricoeur describes how difficult the application of legal rules to facts can be:

The application of a rule is in fact a very complex operation where the interpretation of the facts and the interpretation of the norm mutually condition each other, before ending in the qualification by which it is said that some allegedly criminal behavior falls under such and such a norm which is said to have been violated. If we begin with the interpretation of the facts, we cannot overemphasize the multitude of ways a set of interconnected facts can be considered and, let us say, recounted . . . We never finish untangling the lines of the personal story of an accused with certainty, and even reading it in such a way is already oriented by the presumption that such an interconnectedness places the case under some rule. To say that *a* is a case of *B* is already to decide that the juridical syllogism holds for it.¹⁶

Indeed, it can be perplexing to determine if disagreement in appellate decisions arises from a conflict over the meaning of law or confusion about underlying facts in the case.¹⁷ By announcing the

determined by the nature of the facts. There exists, then, an intimate link between norm and fact.

Id. (citations omitted).

¹⁵ PAUL RICOEUR, *THE JUST* 121 (David Pellauer trans., 2000).

¹⁶ *Id.* Ricoeur held appointments at the University of Strasbourg and the University of Paris. Most recently, he was the John Nuveen Professor Emeritus at the Divinity School, the Department of Philosophy, and the Committee on Social Thought at the University of Chicago until his death in 2005. He is widely considered one of the seminal thinkers of the twentieth century.

¹⁷ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 80-81 (1921) (stating "Courts have often been led into error in passing upon the validity of a statute, not from misunderstanding of the law, but from misunderstanding of the facts."); *accord*, RICOEUR, *supra* note 15, at 123 (stating that "The 'facts' in a case, not just their evaluation but their very description, are the object of multiple legal disputes where, once again, the interpretation of the norm and that of these facts overlap."). *See also* JEROME N. FRANK, *IF MEN WERE ANGELS, SOME ASPECTS OF GOVERNMENT IN A DEMOCRACY* 78 (1942). Frank states:

Even the most conscientious judges, trained in fact finding, often do not agree with one another about the facts of a case. "In my experience in the conference room of the Supreme Court of the United States, which consists of nine judges," said Mr. Justice Miller, "I have been

applicable legal categories in its decision, the court designates acts which are relevant and those which are not in a given situation.¹⁸ Moving to the precedential power of a decided case, perhaps lawyers too easily claim that all like cases are treated similarly under law. Facts are slippery things, and changing circumstances can undermine and unseat the most elegantly-reasoned precedent.¹⁹

Although commentators uniformly proclaim that legal categories emerge out of the interplay of facts and norms, academics usually confine their analysis to the development of norms alone. For example, Duncan Kennedy's brilliant synthesis, *A Critique of Adjudication (fin de siècle)*,²⁰ focuses solely on the development of legal rules; the word "facts" does not appear in the index to his book. Similarly, Jurgen Habermas' *Between Facts and Norms* uses the word "facts" in an idiosyncratic way. His translator, William Rehg, observes that Habermas understands the word "facts" as "facticity,"²¹ the "factual generation, administration, and enforcement in social institutions" that lie beneath law, such as the processes whereby governments negotiate internal differences among various governmental actors.²² Habermas' focus on the structural limitations of political process differs markedly from the recounting of historical events in trial courts and appellate decisions.

surprised to find how readily those judges came to an agreement upon questions of law, and how often they disagree in regard to questions of facts."

Id.

¹⁸ See JURGEN HABERMAS, *BETWEEN FACTS AND NORMS, CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 217-18 (William Rehg trans., 1996). He states:

Because each norm selects only specific features of an individual case . . . , the . . . [rules for determining how the law is to be followed] must determine which descriptions of the facts are significant and exhaustive for interpreting the situation in a disputed case; it must also determine which of the prima facie valid norms is the appropriate one once all the significant features of the situation have been apprehended as fully as possible.

Id.

¹⁹ See H.L.A. Hart, *Problems in the Philosophy of Law*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 88, 106 (1983). Hart states, "Rules cannot claim their own instances, and fact situations do not await the judge neatly labelled with the rule applicable to them. Rules cannot provide for their own application, and even in the clearest case a human being must apply them." *Id.*

²⁰ DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE)* (1997).

²¹ HABERMAS, *supra* note 18, at xi.

²² *Id.* at xii.

Legal theorists prefer to explore the generation and development of norms, which are understood as manipulated and developed as a matter of course, because facts are seen largely as inert substances, necessary ingredients that add little to the dynamic process wherein legal categories are forged. This view of facts could stem from two sorts of approaches. In the first approach, facts are considered as background or stage sets. They do not enter into legal reasoning themselves but lie behind it. Here, facts take on the role of the supporting cast in a play. They offer human interest, but they are mere stage props; they may assist the actor, but they are never of central importance. In the second sort of approach, brute facts dictate what the law must become. Because they are not subject to change or whim, the law is built around the facts found in a case; facts cannot be analyzed because they consist of matters beyond the courts' control. A close study of narrative theory undermines seeing facts in a case as either bit players or insurmountable forces of nature.

B. Destabilizing Legal Categories: Frank, Pound, & Goodhart; Historical Events Differ from Legal Facts

Jerome Frank initially seemed to favor the second approach outlined previously, because he maintained that facts alone were decisive in forging legal opinions. Frank largely ignored legal rules or norms because he thought they had no real claim on ensuing legal decisions.²³ Although he conceded that court decisions or even statutes might contain words labeled as "legal rules," such rules were merely summaries of judicial decisions determined by facts. As such, they aid in predicting future judicial determinations, but this assistance is merely a prediction of likely outcomes rather than a weight to be factored into

²³ ANDREW ALTMAN, CRITICAL LEGAL STUDIES, A LIBERAL CRITIQUE 152 (1990). Jerome Frank took over the Securities and Exchange Commission when Justice William O. Douglas went to the Supreme Court. *Id.* Frank wrote about law and jurisprudence, though he never held a formal academic appointment. *Id.* His position with regard to legal rules is usually characterized as rule skepticism. *Id.* There are two varieties of this outlook. *Id.* Professor Karl Llewellyn of Columbia Law School exemplified the moderate view. *Id.* Andrew Altman characterizes Llewellyn's moderate brand of rule skepticism as follows: "[L]egal officials often do not behave in the way called for by the rules inscribed in the authoritative legal texts." *Id.* Law, in Llewellyn's view, is a more open proposition than positivists would like us to believe. *Id.* Although it is sometimes governed by reference to precedent, law also has recourse to matters beyond the text of the law. *Id.* "Rules guide, although they do not control, decision." *Id.* By contrast, Frank's approach was more radical. *Id.* at 153. Indeed, Frank challenged the very existence of legal rules insofar as they affect the behavior of judges or others who were presumably bound by them. *Id.* Frank stated that, "[legal rules] were 'merely words' that aided in the prediction of decisions but were incapable of exercising any constraint over them." *Id.*

legal calculation.²⁴ Because he denied operative effect to constitutions, statutes, and precedent in determining legal categories, Frank asserted that what courts really do is determine historical facts.²⁵ To explain his position, he described a hypothetical encounter between a client and her attorney.²⁶ Ordinary people, perhaps relying upon a model suggested by medical consultations, assume that an authoritative legal opinion can be rendered by any attorney who hears the facts of a possible suit recounted in her office.²⁷ Frank observed that the attorney must be guarded in assessing the merits of a case, not because the attorney has an inadequate apprehension of the law, but because she cannot determine which facts the court will find at trial.²⁸

Frank departs from reliance on “brute facts” as previously described because he thought that the human sources of the “facts” in a lawsuit were so beset by psychological distortions that the information they imparted could not be uncritically trusted:

The actual facts which provoke the litigation do not themselves walk into court. They do not happen in the courtroom. When the lawsuit is tried, those facts are past events. They occurred months or years earlier. What comes into court is evidence concerning those past happenings. And what is “evidence”? It consists of the testimony of witnesses—what the witnesses say about those past actual occurrences.²⁹

For Frank, legal fact-finding is necessarily flawed because any transfer of information faces psychological barriers rooted in human frailty. For this reason, he doubted the assumed correspondence between historical events and a witness’s testimony in court, stating:

Witnesses are not infallible. They are, often, poor observers of the events, forgetful or biased recollectors. They may make mistakes in (1) the way they originally *heard or saw* what happened or (2) the way they *remember* what they heard or saw, or (3) the way they *tell*, in the courtroom, what they remember. That testimony, at

²⁴ *Id.* at 153.

²⁵ FRANK, *supra* note 17, at 111-12.

²⁶ *Id.* at 66-101.

²⁷ *Id.* at 67.

²⁸ *Id.* at 67-68.

²⁹ *Id.* at 68 (italics and footnote omitted).

each of these three stages, is affected by the individual experiences, temperaments and characters of witnesses has often been observed.³⁰

Frank applied a hermeneutic of suspicion to the presumed link between “what really happened” in history—the event—and what the witness says occurred. He noted that mistakes in testimony arise from reasons as nefarious as prejudice and perjury³¹ and as benign as an “unconscious partisanship” that emerges from attitudes and psychological motivations the witness may not fully understand.³²

Frank likewise destabilized the presumed connection between historical events themselves and the facts found in trial court, because witnesses’ testimony was itself interpreted by finders of fact who were affected by the same human distortions which infected those testifying. Specifically, Frank stated:

[T]he judge or the jury must reach a conclusion as to which witnesses are to be believed. The “facts” of such a “contested” case consist of that belief of the judge or jury—consist of their guess as to the actual facts. And that guess, we repeat, is fallible—because judges and juries are themselves human beings, and are therefore fallible witnesses of what the fallible witnesses testify.³³

Additionally, Frank described the finders of fact as “second-order witnesses” who have a distinctively more important role to play than testifying witnesses, because jurors or the judge determine the version of facts which will be authoritative and, thus, have legal importance:

A court’s decision turns on the “facts” of the case. But the “facts,” when there is a clash of testimony, are in truth nothing but a subjective reaction of the judge or jury to the testimony, a guess by the judge or jury as to what actually occurred months or years before the lawsuit began. For court purposes, the real conduct of the parties to the lawsuit does not count. All that counts is the judge’s or jury’s guess as to that conduct.³⁴

³⁰ *Id.* (italics in original).

³¹ *Id.* at 70.

³² *Id.* at 69.

³³ *Id.* at 71.

³⁴ *Id.* at 74-75 (footnote omitted).

Frank's prodding compelled other scholars to address the distortions inherent in factual determinations, particularly the gap noted between historical events and facts found in court. Notably, both Roscoe Pound, Dean of Harvard Law School, and Professor Arthur Goodhart of Oxford left unchallenged Frank's skepticism in this regard. For example, Pound observed that, even if facts elicited in a trial court do not match up with historical events, the law that issues from such situations is unproblematic, stating:

At common law, the chief reliance for individualizing the application of law is the power of juries to render general verdicts, the power to *find the facts in such a way as to compel a result different from that which the legal rule strictly applied would require*. In appearance, there has been no individualization. The judgment follows necessarily and mechanically from the facts upon the record. *But the facts found were found in order to reach the result and are by no means necessarily the facts of the particular case.*³⁵

Pound's skepticism is more pronounced than Frank's. Frank saw fact-finders as hampered in the recovery of historical events because of largely unconscious conditions of human psychology, which rendered inaccurate both the transmission and reception of information.³⁶ By contrast, Pound implies a willful motive to shape facts in the record. Pound indicated that the "*facts found were found in order to reach the result and are by no means necessarily the facts of the particular case.*"³⁷ A fair reading of Pound implies that the fact-finder decides first what the decision should be and then assembles facts (whether consciously or not) to compel the result desired. For Pound, findings of facts are plainly constructed and they need not match historical events in the case at hand.³⁸ Thus, Pound suggests that legal norms can be based on fictional events.

In contrast, Professor Goodhart's answer to the destabilizing moves noted by Frank and Pound simply ignores the existence of any difficulty. Rather than address the correspondence between a given historical event and the facts in the record, Goodhart defined the issue out of existence by stating:

³⁵ *Id.* at 85 (italics omitted).

³⁶ *See, e.g., id.* at 69-70.

³⁷ *Id.* at 85 (italics omitted).

³⁸ *Id.*

If we are bound by the facts as seen by the judge, may not this enable him deliberately or by inadvertence to decide a case which was not before him by basing his decision upon facts stated by him as real and material but actually non-existent? . . . Can a judge, by making a mistake give himself authority to decide what is in effect a hypothetical case? The answer to this interesting question is that the whole doctrine of precedent is based on the theory that as a general rule judges do not make mistakes either of fact or of law. In an exceptional case a judge may in error base his conclusion on a non-existent fact, but it is better to suffer this mistake, . . . than to throw doubt on every precedent on which our law is based.³⁹

As his explanation makes clear, Goodhart recognized fully the tensions indicated by both Frank and Pound.⁴⁰ Goodhart's quotation above reveals that he simply removed the issue by fiat, as if to say, "I declare that these issues are unimportant because, as a matter of law, courts do not make these mistakes, and if they do make them, we must ignore them for the greater good." Goodhart's failure to address Frank's objections leaves the possibility that legal norms can be based on essentially fictitious constructs.

C. *Destabilizing Legal Categories: Strickland v. Washington; Different Courts Find Different Facts in the Same Case*

Contemporary law has not resolved the gap Frank identified between historical facts and the facts as found by a court; to demonstrate this thesis, one need only consider how different courts describe the same historical facts. For example, Justice O'Connor's opinion in *Strickland v. Washington*, when compared with the cases leading up to it in the lower courts, illustrates how malleable descriptions of the same event can be.⁴¹

To depart from standard practice, it is necessary to ignore the legal rule and consider simply the facts in *Strickland* as recounted by the reviewing courts. The differences between the findings of fact are best revealed if one focuses on the two interwoven strands of narrative that

³⁹ Arthur Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 181-82 (1930).

⁴⁰ *Id.*

⁴¹ *Strickland v. Washington*, 466 U.S. 668 (1984).

appear in all the cases. In narrative one (the crime story), the opinions describe both the underlying offense and the biography of the defendant. In narrative two (the representation story), the opinions set out the actions of the defendant's attorney.

The crime story set out by the Supreme Court is a crisp and tightly organized paragraph:

During a 10-day period in September 1976, . . . [David Washington] planned and committed three groups of crimes, which included three brutal stabbing murders, torture, kidnaping, severe assaults, attempted murders, attempted extortion, and theft. After his two accomplices were arrested, . . . [Washington] surrendered to police and voluntarily gave a lengthy statement confessing to the third of the criminal episodes. The State of Florida indicted . . . [him] for kidnapping and murder and appointed an experienced criminal lawyer to represent him.⁴²

After this description of the offenses charged (with no reference to the defendant's biography), the Court focused its attention on the representation story which described the actions of trial counsel, who was named nowhere in the opinion. Overall, the Court presented Washington's attorney as engaged and energetic, yet obstructed by a recalcitrant client. The narrative began by observing that the lawyer "actively pursued pretrial motions and discovery."⁴³ The Court continued:

[The attorney] cut his efforts short, however, and he experienced a sense of hopelessness about the case, when he learned that, against his specific advice, . . . [Washington] had also confessed to the first two murders. . . . [Washington] waived his right to a jury trial, again acting against counsel's advice, and pleaded guilty to all charges, including the three capital murder charges.⁴⁴

Although counsel advised the defendant of his right to have an advisory jury on the capital charges, Washington rejected that advice and decided

⁴² *Id.* at 671-72.

⁴³ *Id.* at 672.

⁴⁴ *Id.*

to waive his right to a jury on the matter, leaving sentencing in the hands of the judge.⁴⁵

Moreover, in preparation for sentencing, counsel spoke with the defendant about his background.⁴⁶ Although he never met Washington's wife or mother, counsel did have one phone conference with them.⁴⁷ He did not seek other character witnesses to bolster David Washington's case, nor did he request a psychiatric examination "since his conversations with his client gave no indication that . . . [Washington] had psychological problems."⁴⁸ Because of counsel's own sense of hopelessness about overcoming the confession to these crimes, counsel decided not to put on further evidence about Washington's character and emotional state.⁴⁹ Counsel thought it best to rely on the plea colloquy to draw these matters out rather than on an evidentiary hearing which would subject Washington to cross-examination; this strategy likewise prevented the State from putting on psychiatric evidence of its own.⁵⁰ Counsel excluded the defendant's rap sheet and chose not to request a presentence investigation because such a document would have shown the defendant's prior criminal history.⁵¹

At sentencing, counsel advised the defendant to own up to his wrong-doing and take responsibility for his own actions because the judge liked that approach.⁵² Counsel argued to the trial court that the defendant had no history of criminal activity and that his client committed these offenses under the influence of a statutory mitigating factor: "extreme mental or emotional disturbance."⁵³ Counsel said that the defendant should be spared the death penalty because he had confessed, offered to testify against a co-defendant, and because he was fundamentally a good person who had "briefly gone badly wrong in extremely stressful circumstances."⁵⁴ After the prosecution put on witnesses who described "details of the crimes,"⁵⁵ the trial court found that aggravating factors outweighed mitigating factors and sentenced

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 672-73.

⁴⁸ *Id.* at 673.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 673-74.

⁵⁴ *Id.* at 674.

⁵⁵ *Id.*

David Washington to death on each of the three counts of murder and to prison terms for the other crimes.⁵⁶

The majority decision considered two additional factors bearing on the attorney's competence: his failure to investigate the defendant's mental condition and his failure to call character witnesses. The defendant's mental state emerged as an issue immediately after the defendant appeared in the trial court.⁵⁷ Washington was subject to a mental examination soon after his arraignment by order of the trial court.⁵⁸ The Supreme Court opinion does not explicitly identify this examination as ordered to determine competency, but lower court decisions indicate this was the case.⁵⁹ Justice O'Connor found the defendant's evidence of mental disturbance unpersuasive, stating:

[A] psychiatric examination of . . . [the defendant] was conducted by state order soon after . . . [Washington's] initial arraignment. That report states that there was no indication of major mental illness at the time of the crimes. Moreover, both the reports submitted in the collateral proceeding state that, although respondent was "chronically frustrated and depressed because of his economic dilemma," he was not under the influence of extreme mental or emotional disturbance. All three

⁵⁶ *Id.* at 675.

⁵⁷ *Id.* at 675-76.

⁵⁸ *Id.* at 676.

⁵⁹ See *Washington v. Strickland*, 673 F.2d 879, 888 (5th Cir. 1982). The Fifth Circuit panel quotes Doctor Sanford Jacobsen's report that tracks the standard for competency review: "It is my opinion that presently the defendant is able to assist counsel in his defense and understand the nature of the charges against him. It is felt that the defendant possesses both a rational and factual understanding of the charges." *Id.* Jacobsen's report also considers the ALI standards for the statutory defense of not guilty by reason of mental disease or defect: "It is further felt that the defendant at the time of the alleged offense had the substantial capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law." *Id.* It is not clear from the record if this second determination was ordered by the trial court or if Dr. Jacobsen acted sua sponte in giving his opinion on the matter. See also MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962), providing:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.

(2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

Id.

reports thus directly undermine the contention made at the sentencing hearing that respondent was suffering from extreme mental or emotional disturbance during his crime spree.⁶⁰

The Court relied on this fact to counter criticism that the defense attorney failed to hire his own psychiatric or psychological expert.⁶¹ Furthermore, Justice O'Connor observed, "the aggravating circumstances were so overwhelming that no substantial prejudice resulted from the absence at sentencing of the psychiatric evidence offered in the collateral attack."⁶²

Second, fourteen persons later submitted affidavits attesting to the defendant's good character, his financial worries, and that the acts charged were not representative of the sort of person he was, which could be used as part of a mitigation argument.⁶³ Justice O'Connor also rejected this evidence as either cumulative or flawed.⁶⁴ The defendant testified "along those lines at the plea colloquy."⁶⁵ Justice O'Connor continued, "[m]oreover, respondent's admission [during the plea colloquy] of a course of stealing rebutted many of the factual allegations [claiming the defendant had no prior record] in the affidavits."⁶⁶

In light of these facts recounted by the Court, the explanation for David Washington's death sentence seems clear. The crime story narrative strand portrays an ordinary and hopeless case which Clarence Darrow could not have rescued. The representation narrative strand depicts a hard-working defense attorney facing overwhelming odds and an uncooperative defendant. Although the experienced attorney made strong efforts, he could not undo the missteps David Washington had made. The defendant is portrayed as a generic client with no remarkable biography who had a felony record and could not be expected to act differently. In large measure, the death warrant was signed and sealed before David Washington entered the courtroom.

Justice O'Connor observes that "[t]here are no conflicts between the state and federal courts over findings of fact[;]"⁶⁷ however, the more

⁶⁰ *Strickland*, 466 U.S. at 676-77.

⁶¹ *Id.*

⁶² *Id.* at 677.

⁶³ *Id.* at 675, 677.

⁶⁴ *Id.* at 677.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 698.

detailed facts recounted in the crime story by the lower courts contrast vividly with the brief and monochromatic recitation of the *Strickland* majority. Initially, the murders at issue are extraordinarily bloody and sexually coded, described by the government as “three (3) of the most brutal murders in Florida’s history.”⁶⁸ The description offered by the Supreme Court of Florida bears out that characterization:

These appeals arise out of a series of murders committed by appellant during a twelve-day period. On September 20, 1976, appellant and an accomplice formulated a plan to rob and kill Daniel Pridgen. The purported motive for the killing was the fact that Pridgen, a minister, was a homosexual and in appellant’s opinion a man of the cloth violated religious and moral precepts by engaging in homosexual activities. According to the plan, appellant’s accomplice was to induce Pridgen to engage in homosexual activities. When Pridgen was undressed and in bed, the accomplice was to cough two times as a sign for appellant to enter the home and kill Pridgen. . . . [W]hile the accomplice covered Pridgen’s face with a pillow and held him helpless, appellant stabbed the victim to death.⁶⁹

During the evening of September 23, 1976, appellant proceeded to the residence of Katrina Birk pursuant to a plan for robbery. Mr. Birk allegedly had previously acted as a “fence” for property stolen by appellant. . . . Appellant waited until he was relatively certain that the occupants of the home, Mrs. Birk and her three sisters-in-law, were together in one room. . . . Appellant instructed the four occupants to lie on the floor. Two of the women complied with appellant’s demand, and appellant permitted one woman to seat herself in a chair. Mrs. Birk went into the kitchen and obtained a box containing money, which she offered to appellant. [Appellant then tied up the four women.] . . . As appellant was completing this task, he observed Mrs. Birk inching her way into the kitchen. An argument ensued between the two, and appellant shot

⁶⁸ Brief for Petitioner at 5, *Strickland v. Washington*, 466 U.S. 668 (1984) (No. 82-1554), in 146 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 218 (Philip B. Kurland & Gerhard Casper eds., 1985).

⁶⁹ *Washington v. Florida*, 362 So. 2d 658, 660 (Fla. 1978).

Mrs. Birk in the head and repeatedly stabbed her with his knife, causing her death. Appellant thereafter approached his bound victims, shooting each in the head and inflicting several stab wounds. . . . Each of the sisters-in-law survived the assault. However, one woman became blind in one eye, one suffers breathing difficulties due to the knife wounds to her lungs, and one remains in a comatose, vegetable state.⁷⁰

On approximately September 27, 1976, appellant contacted his third victim, Frank Meli, [to arrange a test-drive and purchase of a car Meli had advertised in the local paper.] . . . Following the test drive, appellant persuaded Meli to go to appellant's home to obtain the money to conclude the sale. Upon Meli's entry into appellant's home, appellant brandished a knife and forcibly bound his victim to a bed. Two of appellant's companions assisted appellant in guarding Meli to prevent an escape. Appellant succeeded in selling Meli's automobile and then forced Meli to telephone his family and request a ransom.

On the morning of September 29, 1976, appellant paid his companions part of the proceeds from the sale of the automobile for their assistance in holding Meli captive. Appellant's friends left the residence and appellant entered the bedroom where Meli had been tied spread-eagled to a bed. The testimony at this point is conflicting. Appellant stated in his subsequent written confession to police that Meli had untied one of the four straps securing him to a bed and a struggle ensued. It is uncontested, however, that appellant stabbed Meli eleven times. During the stabbing, appellant's companion entered the bedroom and covered Meli's face with a pillow to prevent others from hearing the victim's screams. When appellant and his companion left the room a few minutes later, Meli was fatally wounded but still alive. Before leaving, appellant secured Meli's bonds and gagged him. [After unsuccessfully attempting to secure the ransom payment, Washington

⁷⁰ *Id.* at 660-61; see also *Washington v. Strickland*, 693 F.2d 1243, 1247 n.1 (5th Cir. 1982) (noting that the comatose victim later died).

returned home and found Meli dead.] . . . Appellant then dug a shallow grave in his backyard and buried his victim's body.⁷¹

The gruesomeness of these offenses, which occurred in a ten-day period by someone having no history of violent behavior, subverts the flat assertion that the defendant had no serious psychiatric or psychological disturbance at the time of the crimes.

There is an initial similarity between Justice O'Connor's observations of the early stages of defense counsel's representation and the findings in the lower courts. Lower courts describe attorney William Tunkey as "eminently qualified and experienced," although there is nothing in the record to indicate that he had ever handled a murder case.⁷² Courts note Tunkey's original "lengthy interviews" with his client and his beginning pre-trial discovery and preparation of pre-trial motions.⁷³ After learning that Washington had confessed not only to the Meli case but also to two prior murders, Tunkey testified he was "shocked" and "overcome with a 'hopeless' feeling"⁷⁴ and did "very little" in the weeks preceding the sentencing hearing.⁷⁵ He made no attempt to meet Washington's mother and wife after they had failed to keep one appointment.⁷⁶

Where lower courts differ markedly from the Supreme Court is in their evaluation of Tunkey's failure to investigate. Tunkey claimed "minimal" attempts to contact other prospective witnesses to testify on Washington's behalf; nothing in the record indicates that he contacted anyone in this regard.⁷⁷ The district court found "that this failure to investigate constituted an 'error in judgment.'"⁷⁸ There is conflicting

⁷¹ *Washington*, 362 So. 2d at 661.

⁷² *Strickland*, 693 F.2d at 1284 n.16 (Johnson and Anderson, JJ., concurring in part and dissenting in part). Judge Johnson stated that:

In the case of Mr. Tunkey, the record makes clear that, as a criminal attorney, he is eminently qualified and experienced. In this particular case, however, the district court notes that he was simply overwhelmed by the unique circumstances of his client's decision to plead guilty. . . . The issue before this Court is not the competence of Mr Tunkey; it is only whether on this particular occasion counsel was effective.

Id. (citations omitted).

⁷³ *Strickland*, 673 F.2d at 886.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Strickland*, 693 F.2d at 1281 (Johnson and Anderson, JJ., concurring in part and dissenting in part). Although the majority opinion found that such error did not constitute

evidence in the record describing Tunkey's failure to request a psychiatric evaluation for a man whose actions Tunkey described as "inexplicable" given his impression of Washington as a "person who expressed very capably human emotions, who express[ed] grave concerns about the welfare of his family, of his wife, of his child."⁷⁹ Originally, Tunkey testified that he did not think psychiatric testimony would be helpful in explaining Washington's behavior.⁸⁰ Later, Tunkey stated under oath: "I did not think at the time to go ahead and utilize psychiatric or psychological experts to somehow demonstrate the overriding nature of the mitigating circumstances, I did not think of that."⁸¹ Rather than obtain psychiatric testimony to establish claimed statutory mitigating circumstance of "extreme mental or emotional disturbance," Tunkey testified that the defendant's own testimony at the guilty plea colloquy adequately covered this issue.⁸² This explanation is undercut by the trial record wherein the court denied Washington's attempt to explain his behavior at the guilty plea. The court stated it would consider that issue only at sentencing.⁸³ Despite the court's explicit invitation to do so, Tunkey introduced no mitigating evidence at sentencing.⁸⁴ Again, the record undermines the later claim that this choice was "strategic."⁸⁵

The lower court opinions further subvert every claim that Tunkey made "tactical choices[;]" rather, they find repeated instances of incompetence. It is not clear that Tunkey even read the court-ordered psychiatric examination of the defendant on file in the case. During the *habeas* proceeding, Tunkey testified that he could not recall if he had seen the report at the time of the sentencing hearing.⁸⁶ This failure is underscored by the wealth of support Tunkey could have found for mitigation with comparatively little effort. Two later affidavits from psychiatrists indicate that David Washington came from a "broken and violent home, one marked by extensive child abuse and incest."⁸⁷ They note his "panic, frustration, and depression at his economic

ineffective assistance of counsel, Judges Johnson and Anderson declined to agree with this conclusion. *See id.* at 1281 n.4.

⁷⁹ *Strickland*, 673 F.2d at 886.

⁸⁰ *Id.* at 887.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Strickland*, 693 F.2d at 1266 (Tjoflat, J., concurring).

⁸⁴ *Id.*

⁸⁵ *Id.* at 1284 n.17.

⁸⁶ *Strickland*, 673 F.2d at 888-89.

⁸⁷ *Strickland*, 693 F.2d at 1266.

circumstances; and his remorse for his crimes.”⁸⁸ A later psychiatric report finds that Washington did meet the statutory defense of being “under the influence of extreme mental or emotional disturbance or that he was unable to conform his conduct to the requirements of law” at the time of these offenses.⁸⁹ This report further revealed that Washington reported a previous homosexual incident with Pridgen, the first murder victim.⁹⁰

According to the lower courts, Tunkey’s failure to exert himself on his client’s behalf continued through the sentencing hearing.⁹¹ At the hearing, Tunkey waived his opening statement, relying instead on his sentencing memorandum.⁹² The state produced “nine witnesses who testified about the aggravated nature of the offenses.”⁹³ It also introduced fifteen exhibits detailing the gruesome crimes.⁹⁴ Tunkey offered no testimony or evidence at the sentencing hearing; rather, he relied solely on the statement of the defendant during the guilty plea colloquy which the trial court cut short. Tunkey’s argument at the close of the hearing “covers only three transcript pages.”⁹⁵ Tunkey later testified he made the tactical choice to avoid placing David Washington on the stand to avoid cross examination during sentencing for fear his record would be revealed.⁹⁶ This “tactical choice” is undermined by the record which shows that Washington admitted his prior offenses in the guilty plea colloquy weeks before, as Justice O’Connor noted in her opinion.⁹⁷ Tunkey’s claim that there was a “benefit” to keeping his client off the stand was illusory. The district court’s order further noted that Tunkey “couldn’t say that [his failure to request a presentence

⁸⁸ *Id.*

⁸⁹ *Strickland*, 673 F.2d at 890.

⁹⁰ *Id.* at 891. The court discounted this later report because it was based on statements “only recently made by Washington” and claimed that “a similar evaluation conducted in 1976 would not have revealed this information.” *Id.* The basis for this conclusion is unclear. *Id.*

⁹¹ *See Strickland*, 693 F.2d at 1265.

⁹² *Strickland*, 693 F.2d at 1265 (Tjoflat, J., concurring).

⁹³ *Id.* at 1265.

⁹⁴ *Id.*

⁹⁵ Brief for Respondent at 9, *Strickland v. Washington*, 466 U.S. 668 (1984) (No. 82-1554), in 146 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 436 (Philip B. Kurland & Gerhard Casper eds., 1985).

⁹⁶ *Strickland*, 693 F.2d at 1265 (Tjoflat, J., concurring).

⁹⁷ *See Strickland v. Washington*, 466 U.S. 668, 677 (1984). The Court stated that, “[m]oreover, respondent’s admission [during the guilty plea colloquy] of a course of stealing rebutted many of the factual allegations in the affidavits [describing him as law-abiding and as having a good character].” *Id.*

investigation] was a trial strategy.”⁹⁸ Thus, the district court found Tunkey’s testimony that a presentence investigation could be more “detrimental than helpful,” to be unsupported by the record.⁹⁹

Tunkey’s failures in representation are highlighted by the lower courts’ specific findings of fact regarding both the crime itself and the defendant’s biography. In contrast to Justice O’Connor’s minimalist draft of the crime narrative, lower-court opinions describe in detail both the defendant’s horrendous childhood and his excessively bloody offenses. Washington came from a home marked by violence, abuse, and incest. His murders were extraordinarily grisly and sexual. All involve stabbings or shootings at point blank range that would have covered the defendant in copious amounts of blood. Two stabbings occur while the victims are in bed. In the first, Pridgen is presumably unclothed. In the third killing, the defendant stabs Melli (who is bound to the bed and gagged throughout) so that Melli bleeds to death on the defendant’s own mattress. The defendant engages in this behavior in the course of ten days with no previous indication of sexually violent tendencies. By covering over these facts, Justice O’Connor’s decision obscures evidence of Washington’s psychological disturbance that the lower courts thought relevant to their holding that Tunkey’s representation was constitutionally defective.

The lower courts found that Tunkey did almost nothing by way of preparation for “three (3) of the most brutal murders in Florida’s history.”¹⁰⁰ What emerges from these facts is an attorney of meager imagination, who lacked rudimentary knowledge of psychology, and who did little by way of actually defending a young man who appeared mentally or emotionally impaired.

III. JUDICIAL DISCRETION AND AEDPA, AN ATTEMPT TO LIMIT JUDICIAL DISCRETION

A. *Judicial Discretion*

If one case engenders such divergent recountings of the same facts, if a gap exists between “historical events” and facts laid out by different reviewing courts, then the drafting of facts in these cases, and I submit in all cases, must be recognized as a locus for the exercise of judicial

⁹⁸ *Strickland*, 693 F.2d at 1282 (Johnson and Anderson, JJ., concurring in part and dissenting in part) (footnote omitted).

⁹⁹ *Id.* (footnote omitted).

¹⁰⁰ Brief for Petitioner, *supra* note 68, at 5.

discretion. Judicial discretion occurs whenever a court has the authority to choose between at least two permissible alternatives.¹⁰¹ Professor Aharon Barak of Hebrew University notes that a judge exercising her discretion “will not act mechanically, but will weigh, reflect, gain impressions, test, and study.”¹⁰² He describes the process of applying norms to particular fact situations as more a matter of art than of logical deduction; there are necessary gaps in the law wherein a court must act, stating:

[I]t is as though the law were saying, “I have determined the contents of the legal norm up to this point. From here on, it is for you, the judge, to determine the contents of the legal norm, for I, the legal system, am not able to tell you which solution to choose.” It is as though the path of the law came to a junction, and the judge must decide—with no clear and precise standard to guide him—which road to take.¹⁰³

Professor Barak identifies three objects of possible judicial discretion: determining the facts, application of a norm previously determined, and determining a new norm.¹⁰⁴

In criminal law, the exercise of discretion is seen as a mixed blessing. Professor Frank Remington saw discretion as necessary in the criminal justice system because the problems addressed are complex and multifaceted, and actors in the system need to employ “varied, individualized responses” to make the criminal justice system work.¹⁰⁵ Remington noted further that, although research supports the wise use of discretion at different places in the criminal justice system, much decision-making in the criminal sphere now rests more on ideological reaction than social science.¹⁰⁶ Thus, Professor Michael Tonry observes that “official

¹⁰¹ BARAK, *supra* note 8, at 7.

¹⁰² *Id.* (footnote omitted).

¹⁰³ *Id.* at 8.

¹⁰⁴ *Id.* at 12-16.

¹⁰⁵ Frank J. Remington, *The Decision to Charge, The Decision to Convict on a Plea of Guilty, and the Impact of Sentence Structure on Prosecution Practices*, in *DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND UNIFORMITY* (Lloyd E. Ohlin & Frank J. Remington eds., 1993).

¹⁰⁶ *Id.*; accord, DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 13 (2001). He stated:

In another significant break with past practice, crime policy has ceased to be a bipartisan matter that can be devolved to professional experts and has become a prominent issue in electoral competition. A highly charged political discourse now surrounds all crime control issues, so

discretion is widely distrusted—from the right, from concern for the chimera of ‘undue leniency’; from the left, from concern that discretion will be exercised invidiously or capriciously.”¹⁰⁷ Attacks on discretion are found at every level of the criminal justice system. For instance, Professor Lloyd Ohlin observes:

It should not be assumed that the attack on the allocation and use of discretion is confined to sentencing decisions alone. Parole boards are being eliminated or their discretion curtailed by legislated mandatory sentences or judicial use of split sentence provisions in which part of the sentence must be served in confinement and part under community supervision. Attempts have also been made to limit the freedom of prosecutors to engage in charge or plea bargaining.¹⁰⁸

Similarly, Professor Samuel Walker maintains that, almost uniformly, the present goal of the criminal justice system seems to be to control discretion, or at least challenge it wherever it occurs.¹⁰⁹

Although there is some disagreement on this point, legal theorists maintain that discretion shifts its locus of operation, rather than disappears, when it is subject to controls. Professor Remington notes that efforts to limit discretion in one area do not eliminate discretion; they merely shift it to another process or player in the system.¹¹⁰ For example, Remington’s research demonstrates that “efforts to limit discretion at other stages, such as sentencing, have greatly increased the

that every decision is taken in the glare of publicity and political contention and every mistake becomes a scandal. . . . Policy measures are constructed in ways that appear to value political advantage and public opinion over the views of experts and the evidence of research. . . .

There is now a distinctly populist current in penal politics that denigrates expert and professional elites and claims the authority of ‘the people’, of common sense, of ‘getting back to basics’. The dominant voice of crime policy is no longer the expert or even the practitioner but that of the long-suffering, ill-served people—especially of ‘the victim’ and the fearful, anxious members of the public.

Id.

¹⁰⁷ Michael Tonry, *Foreword*, in *DISCRETION*, *supra* note 105, at xiv.

¹⁰⁸ Lloyd E. Ohlin, *Surveying Discretion by Criminal Justice Decision Makers*, in *DISCRETION*, *supra* note 103, at 3.

¹⁰⁹ SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950-1990* (1993).

¹¹⁰ *DISCRETION*, *supra* note 105, at 99.

power of the prosecutor and the importance of the charging decision.”¹¹¹ For Remington, discretion never disappears; it simply moves. Professor Walker disagrees and believes that discretion is not necessarily “displaced upstream or downstream.”¹¹² Still, Walker admits that the weight of research indicates that the shifting of discretion does occur.¹¹³

B. AEDPA: An Attempt to Limit Judicial Discretion

Cases dealing with ineffective assistance of counsel following *Strickland* are often constrained by legislation designed to limit *habeas* proceedings. If the case arises under anything but a direct appeal from the federal district court, it reaches federal review through the mechanism of a *habeas* claim which determines if a prisoner is held in violation of the United States Constitution. The Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”) restricts the ability of federal courts to announce new law in *habeas* cases.¹¹⁴ Senator Hatch claimed the bill was attempting to “reform[]” federal *habeas corpus* in such a way as to lessen “frivolous appeals.”¹¹⁵ This provision was also seen as reducing the perceived welter of state convictions overturned by *habeas* proceedings.¹¹⁶ Section 2254(d) limits *habeas* review solely to lower-court decisions that are (1) “an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court” and (2) to decisions “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”¹¹⁷ The

¹¹¹ *Id.*

¹¹² WALKER, *supra* note 109, at 150. Although Walker admits that some shifting will occur, he believes that such displacement does not interfere with efforts to control discretion. *Id.*

¹¹³ *Id.*

¹¹⁴ 28 U.S.C § 2254(d) (2000). The statute provides as follows:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id.

¹¹⁵ 141 CONG. REC. S7479 (daily ed. May 25, 1995) (statement of Sen. Hatch); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 398, n.52 (1996).

¹¹⁶ See, e.g., Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. sec. 2254*, 110 HARV. L. REV. 1868, 1876-77 (1997).

¹¹⁷ 28 U.S.C § 2254(d)(2).

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statute circumscribes the ability to apply later precedent to state convictions retroactively because new decisions are not “clearly established Federal law” at the time of the state conviction.¹¹⁸

Since the legislation took effect, access to *habeas* relief has been further narrowed by Supreme Court cases that tighten the understanding of the phrase “clearly established Federal law.”¹¹⁹ The Court defines “clearly established Federal law” as “the holdings . . . of . . . [the Supreme] Court’s decisions as of the time of the relevant state-court decision.”¹²⁰ Although there is some disagreement, even within the Court, about how the phrase “‘clearly established’ at the time” should be parsed,¹²¹ none of the Justices disagree with the idea that this added requirement was intended to further restrict access to reviewing courts. Generally, courts indicate that *habeas* courts cannot expand the law beyond published decisions of the Supreme Court.

Thus, federal courts affected by AEDPA are denied the usual way of proceeding in legal cases marked by the interplay between facts and law. Justice Scalia has observed that the law cannot change in this situation.¹²² The reviewing court (including the Supreme Court) must apply the law as it has been previously determined by the Supreme Court.¹²³ If change in law cannot be countenanced by a reviewing court, it seems that AEDPA places all *habeas* review in a structural position that bears strong resemblance to the role of courts described by Jerome Frank.¹²⁴ The law is held constant, and it cannot change; all that matters is how lower courts apply settled law to the facts presented. The facts, of course, can and do change, but the assumption underlying section 2254(d) is that facts do not and cannot change the law.

A model helps explain how settled law operates under this view of section 2254(d). Imagine a stainless steel delivery system. Facts are fed into the shiny legal apparatus which routes them (perhaps by means of

¹¹⁸ *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (O’Connor, J., concurring).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Wiggins v. Smith*, 539 U.S. 510, 543 (2003) (Scalia, J., dissenting). Justice Scalia defines the legal requirement as limiting precedent that can be cited to that which is “‘clearly established’ at the time of the [lower court] decision.” *Id.* By contrast, Justice O’Connor maintains in the majority opinion that it is sufficient that the prior case merely be before the Court on *habeas* review. *Id.* at 522. “Contrary to the dissent’s contention, . . . we therefore made no new law in resolving Williams’ ineffectiveness claim.” *Id.*

¹²² *Id.* at 543.

¹²³ See *Williams*, 529 U.S. at 412.

¹²⁴ See *supra* notes 23-34 and accompanying text (describing Professor Frank’s position on the role of courts).

pneumatic tubes) through the already-established legal calculus and deposits them into two groups. In group one, relief can be granted. In group two, no relief can be granted. The law itself has an impenetrable and impermeable quality. The legal norms adopted in earlier cases determine which facts matter and which do not. These norms are unvarying and relatively easily identified; therefore, courts can apply these rules to facts presented without ambiguity.

Adoption of the model presented above should cause federal courts to dispose of *habeas* cases quickly. The provision would give finality to lower-court judgments; it would limit unwarranted expansion of the law, and it would severely restrict the grounds for any reviewing court's decision. Similar factual situations would necessarily result in similar dispositions. To see if the law works as proposed, it is fair to ask: Is judicial discretion curtailed by limiting the legal norms that are applied or do courts circumvent this restriction?

Any enunciated legal rule is vague in the absence of a factual basis that thickens its description and provides a context for comparison. Without the context of the crime and representation narratives described above, the rule announced in *Strickland* is unclear. Once the underlying facts are taken into account, legal interpretation acts as a dynamic process and norms and facts "condition" each other as noted by Paul Ricoeur, who posits:

[T]he interpretation of the facts and the interpretation of the norm mutually condition each other[. . .]. . . If we begin with the interpretation of the facts, we cannot overemphasize the multitude of ways a set of interconnected facts can be considered and, let us say, recounted. . . . We never finish untangling the lines of the personal story of an accused with certainty, and even reading it in such a way is already oriented by the presumption that such an interconnectedness places the case under some rule. To say that *a* is a case of *B* is already to decide that the juridical syllogism holds for it.¹²⁵

Thus, the facts in the decision define the reach of the holding and permit the lawyer to make educated guesses concerning into which category ensuing cases will fall.

¹²⁵ RICOEUR, *supra* note 15, at 121.

IV. PAUL RICOEUR AND THE CONSTRUCTION OF NON-FICTION NARRATIVES

To analyze narrative, one must consider the work of philosopher Paul Ricoeur, whose ground-breaking study of non-fiction narratives provides a tool for understanding judicial discretion in the construction of facts.¹²⁶ Ricoeur's explanation of non-fiction writing explains how courts can uphold section 2254 and still exercise discretion by: (1) selecting facts considered relevant; (2) adjusting the scale of abstraction when describing historical events; and, (3) retrieving actors and events from the refuse heap of the immaterial and casting their role as crucial to the narrative. In short, by changing the description of facts, courts change the law significantly.

A. *Language Limits How Written Texts Are Understood*

Although Ricoeur never wrote a systematic jurisprudence, his work provides a foundation for lawyers wrestling with historical description and limitations imposed by any use of language. Ricoeur sees the rendering of non-fiction narratives as a complicated, multi-layered, and constructive process that undermines any naive apprehension that it is possible to record the past unproblematically. He maintains that there are a "multitude of ways a set of interconnected facts can be considered and . . . recounted."¹²⁷ This understanding shuns the idea that the facts in a case are simply "given."¹²⁸ After describing aspects of language that underlie any discussion of how texts convey meaning, I will turn to Ricoeur's work that specifically addresses the writing of history. His description of how non-fiction narratives are written explains what judges do when they draft facts in appellate decisions. I will then apply the categories developed by Ricoeur to show how the law has changed in cases dealing with ineffective assistance of counsel.

Initially, gaps arise between historical events and facts later found by a court because understanding a text is as much a matter of "who is the reader?" as it is a matter of "what is written down?" Social sciences have

¹²⁶ See, e.g., PAUL RICOEUR, TIME AND NARRATIVE, vol. 3 99-274 (K. Blamey & D. Pellauer trans., 1985) [hereinafter RICOEUR, TIME]; PAUL RICOEUR, HERMENEUTICS AND THE HUMAN SCIENCES, ESSAYS ON LANGUAGE, ACTION, AND INTERPRETATION (John B. Thomson trans. & ed., 1981) [hereinafter RICOEUR, HERMENEUTICS]; PAUL RICOEUR, MEMORY, HISTORY, FORGETTING 133-411 (K. Blamey & D. Pellauer trans., 2004) [hereinafter RICOEUR, MEMORY].

¹²⁷ RICOEUR, *supra* note 15, at 121.

¹²⁸ See, e.g., SUSAN SONTAG: REGARDING THE PAIN OF OTHERS 26 (2003). Sontag describes Virginia Woolf's ideas about photography which correspond to this notion of facts as "simply" given. *Id.*

rejected the “strict separation of objectivity and subjectivity.”¹²⁹ The act of reading implies a constant give and take between the reader and the text, and any meaning that emerges must take into account not only what is written on the page but also what the interpreter brings to the act of reading.¹³⁰ Meaning is conveyed not only by what the author means but also by what the reader understands.

This understanding of how meaning arises from the page bears on legal analysis, because law is itself a product of language, laden with traps for the unwary. Lawyers often ignore law’s irreducibly linguistic basis. In so doing, attorneys unwittingly accept assumptions about the ability to use language in an unambiguous way. Thus, facts are seen as mere “givens,” an assumption which ignores the toil necessary to translate historical events into words on a printed page. As professional writers know, simplicity in expression, if it is to be had at all, is not the result of a starting position that assumes the ease of accurate description; rather, only by working through the difficulties inherent in any use of language can one arrive at any level of clarity. To use language is necessarily to be selective; to say something precisely is to be sensitive both to the multiple ways words can be used and the contexts in which words are uttered.¹³¹ Accurate transmission of meaning, saying exactly what one means, is difficult to attain.¹³²

¹²⁹ ROBERT F. BERKHOFFER, JR., *BEYOND THE GREAT STORY: HISTORY AS TEXT AND DISCOURSE 1* (1998). Berkhofer states:

Although the linguistic, interpretive, and rhetorical turns differed from one another, all questioned the received viewpoint grounding the social sciences: an ideal of scientific positivism and its corollary, the strict separation of objectivity and subjectivity, whether as fact versus value or as empiricism versus political and moral advocacy. Each of the three turns stressed language, meaning, and interpretation as central to human understanding and therefore to understanding humans.

Id.

¹³⁰ HANS GEORG GADAMER, *TRUTH AND METHOD* 236 (J. Weinsheimer & D.G. Marshall trans., 2d ed. 2003). Gadamer states:

[I]t is necessary to keep one’s gaze fixed on the thing throughout all the distractions that originate in the interpreter himself. A person who is trying to understand a text is always projecting. He projects a meaning for the text as a whole as soon as some initial meaning emerges in the text. Again, the initial meaning emerges only because he is reading the text with particular expectations in regard to a certain meaning. Working out this fore-projection, which is constantly revised in terms of what emerges as he penetrates into the meaning, is understanding what is there.

Id.

¹³¹ RICOEUR, *HERMENEUTICS*, *supra* note 126, at 44. Ricoeur explains:

1. Ambiguity is Rooted in the Predicate Rather Than in the Subject of a Sentence

Ricoeur notes that even the simplest structure for conveying meaning—the sentence—can mask layers of ambiguity.¹³³ Sentences are made up of two components: a subject and a predicate. A subject has the task of selecting out something singular; it needs to identify the agent that acts or the object which is acted upon by the predicate.¹³⁴ By

[The multiple meanings that can be attached to any given word (polysemy) has] as its counterpart the selective role of contexts for determining the current value which words assume in a determinate message, addressed by a definite speaker to a hearer placed in a particular situation. Sensitivity to context is the necessary complement and ineluctable counterpart of polysemy. But the use of contexts involves, in turn, an activity of discernment which is exercised in the concrete exchange of messages between interlocutors, and which is modelled on the interplay of question and answer. This activity of discernment is properly called interpretation; it consists in recognising which relatively univocal [one voice—one meaning] message the speaker has constructed on the polysemic basis of the common lexicon. To produce a relatively univocal discourse with polysemic words, and to identify this intention of univocity in the reception of messages: such is the first and most elementary work of interpretation.

Id.

¹³² PAUL RICOEUR, INTERPRETATION THEORY: DISCOURSE AND THE SURPLUS OF MEANING 15-16 (1976). He states:

[W]hat is experienced by one person cannot be transferred whole as such and such experience to someone else. My experience cannot directly become your experience. An event belonging to one stream of consciousness cannot be transferred as such into another stream of consciousness. Yet, nevertheless, something passes from me to you. Something is transferred from one sphere of life to another. This something is not the experience as experienced, but its meaning. Here is the miracle. The experience as experienced, as lived, remains private, but its sense, its meaning, becomes public.

Id.

¹³³ See, e.g., RICOEUR, *supra* note 132, at 11. For Ricoeur, meaning is conveyed only in sentences; words by themselves are necessarily polysemic and unable to convey meaning clearly in the absence of a broader context. *Id.* See also RICOEUR, HERMENEUTICS, *supra* note 126, at 169. He explains:

[T]he semantics of the word [discourse] demonstrates very clearly that words acquire an actual meaning only in a sentence and that lexical entities – the words of the dictionary – have merely potential meanings in virtue of their potential uses in typical contexts. . . . At the lexical level, words . . . have more than one meaning; it is only by a specific contextual action of sifting that they realise, in a given sentence, a part of their potential semantics and acquire what we call a determinate meaning.

Id.

¹³⁴ RICOEUR, *supra* note 132, at 10-11. The author says:

contrast, the predicate is ineluctably plural. It describes and designates “a kind of quality . . . a type of relation, or a type of action.”¹³⁵ Why is this distinction important? For Ricoeur, ambiguity, generality, and unclear antecedents can arise in the subject, but such confusion presents a comparatively obvious difficulty. First year law students are relatively adept at sorting out subjects of statutes that seem over or under-inclusive. Ricoeur draws attention to the predicate as a source of confusion. Unless predication is crisply distinguished, and unless the level of abstraction is carefully monitored and controlled, the same predicate can and will describe a number of different actions. For example, to say that an attorney “argued for a position” encompasses both a dismissive two minute disagreement with opposing counsel and a painstaking and elegant elaboration of how years of precedent compel the court to only one conclusion.

Ricoeur’s work suggests that trivial legal ambiguities are those which arise from defining the subject of an action; by contrast, ambiguities which require greater attention will be those which arise from broad predication. For example, the *Strickland* majority describes Tunkey as arguing five separate points at sentencing.¹³⁶ A casual reader would believe that counsel did a great deal here. Yet, the opinion fails to mention that his whole argument took up less than three pages of the

Subject and predicate do not do the same job in the proposition. The subject picks out something singular – Peter, London, this table . . . – by means of several grammatical devices which serve this logical function: proper names, pronouns, demonstratives, (this and that . . .) and “definite descriptions” (the so and so). What they all have in common is that they all identify one and only one item.

Id.

¹³⁵ *Id.*

¹³⁶ *Strickland v. Washington*, 466 U.S. 668, 673-74 (1984). The Court explains:

At the sentencing hearing, counsel’s strategy was based primarily on the trial judge’s remarks at the plea colloquy as well as on his reputation as a sentencing judge who thought it important for a convicted defendant to own up to his crime. Counsel argued that respondent’s remorse and acceptance of responsibility justified sparing him from the death penalty. Counsel also argued that respondent had no history of criminal activity and that respondent committed the crimes under extreme mental or emotional disturbance, thus coming within the statutory list of mitigating circumstances. He further argued that respondent should be spared death because he had surrendered, confessed, and offered to testify against a codefendant and because respondent was fundamentally a good person who had briefly gone badly wrong in extremely stressful circumstances.

Id. (citation omitted).

transcript and likely lasted less than four or five minutes.¹³⁷ This fact, once realized, undermines the image of jealousy projected by the majority opinion.

2. Texts Convey Meaning through Propositional Content

Another difficulty in moving from the historical event of dialogue to the written page emerges from the gap between what Paul Grice calls the “utterer’s meaning” and the “utterance meaning.”¹³⁸ Ordinarily, people give pride of interpretive place to the psychological intent of the author or speaker. This attribution stems from the way of resolving misunderstandings in the dialogical situation. When a statement is misunderstood in conversation, the speaker employs a number of strategies for clarification. First she attempts to clear up a misunderstanding by using other words. If this attempt is insufficient to remove the difficulty in understanding the statement, the speaker points to some reality outside of the conversation itself.¹³⁹ The force of this approach lies not with the propositional content of spoken statements but emphasizes rather the correspondence with external reality which is either physically indicated or suggested by reference to unspoken

¹³⁷ Brief for Respondent, *supra* note 95, at 9.

¹³⁸ RICOEUR, *supra* note 132, at 12-13. Ricoeur says:

To mean is both what the speaker means, i.e., what he intends to say, and what the sentence means, i.e., what the conjunction between the identification function and the predicative function yields. . . . We may connect the reference of discourse to its speaker with the event side of the dialectic. The event is somebody speaking. In this sense, the system or code is anonymous to the extent that it is merely virtual. Languages do not speak, people do. But the propositional side of the self-reference of discourse must not be overlooked if the utterer’s meaning, to use a term of Paul Grice’s, is not to be reduced to a mere psychological intention. The mental meaning can be found nowhere else than in discourse itself. The utterer’s meaning has its mark in the utterance meaning.

Id.

¹³⁹ RICOEUR, HERMENEUTICS, *supra* note 126, at 141. Ricoeur explains:

In oral discourse, the problem is ultimately resolved by the ostensive function of discourse; in other words, reference is determined by the ability to point to a reality common to the interlocutors. If we cannot point to the thing about which we speak, at least we can situate it in relation to the unique spatio-temporal network which is shared by the interlocutors. It is the ‘here’ and ‘now’, determined by the situation of discourse, which provides the ultimate reference of all discourse.

Id.

common sense notions, what Habermas would call an appeal to the "lifeworld."¹⁴⁰

B. The Author is Erased: Three Phases of Distanciation

As one moves from spoken to written language, the key for understanding is not "what is said" and "who says it," but "what is written" and "who reads it." Ricoeur observes:

What happens to discourse when it passes from speaking to writing? At first sight, writing seems only to introduce a purely external and material factor: fixation, which shelters the event of discourse from destruction. In fact, fixation is only the external appearance of a problem which is much more important, and which affects all the properties of discourse. . . . [W]riting renders the text autonomous with respect to the intention of the author. What the text signifies no longer coincides with what the author meant; henceforth, textual meaning and psychological meaning have different destinies.¹⁴¹

Writing not only takes the moment of speech and commits it to paper; it also unhinges the words in the text from the restrictions of persons,

¹⁴⁰ Gregory O'Meara, *Habermas, Violence, and the Ultimate Reality and Meaning of Law*, 26 J. ULTIMATE REALITY & MEANING 180, 184-85 (2003). The article specifies:

'Lifeworld' refers to the social, intellectual, and even instinctive context from which all of us act. From the beginning of our lives, communicative acts occur within a horizon, a background, of shared beliefs, experiences, actions and thoughts. This background knowledge is not consciously perceived; we are, by definition, as unaware of the lifeworld as we are of the air we breathe. Nevertheless, we make use of the lifeworld's horizon in arriving at decisions daily. For example, most persons in first world countries assume that all water that comes out of a faucet is potable. Our daily actions, decisions, and expectations, individually and collectively, depend upon this shared knowledge, even though we rarely consciously apprehend that fact. More generally, because we are unaware of the contents of the lifeworld, these contents may also be the source for minor dissent; however, when these contents are consciously recognized, persons are able either to set dissent rooted in misunderstanding aside and enter into consensus with others, or they recognize better the area of disagreement and enter into further discussion.

Id. (citations omitted).

¹⁴¹ RICOEUR, *HERMENEUTICS*, *supra* note 126, at 139.

space, and time.¹⁴² What matters to the reader is not what the author intended to say but what words are written on the paper in front of her. The dialogical situation no longer exists between the speaker and the hearer; it now occurs between the reader and the words of the printed text. The reader cares not what the “utterer” meant; she is concerned rather with how to decode the “utterance.”

1. Dialogue is with the Text and Not with the Author

Reliance upon the written word necessarily entails the three-part phenomenon Ricoeur calls “distanciation.” The first stage of distanciation maintains that the author is cut from the understanding of the text itself.¹⁴³ Ricoeur insists that readers approach the text as a free-standing object.¹⁴⁴ The absence of the author as a dialogue partner compels the reader to enter into a dialogue with the propositional content of the text itself.¹⁴⁵ A written text, by its very nature, limits the

¹⁴² See generally PAUL RICOEUR, *supra* note 132, at 25-44. Ricoeur identifies three important changes which occur when a text is written down. *Id.* First, the text is separated from the person of the author. *Id.* Second, the text is separated from its original audience, and third, it is separated from its original situation or context. *Id.* Each of these points of distanciation can be the locus for misunderstanding which is ineluctably tied up in the nature of written discourse. *Id.*

¹⁴³ *Id.* at 29-30. Ricoeur states:

With written discourse, however, the author’s intention and the meaning of the text cease to coincide. This dissociation of the verbal meaning of the text and the mental intention of the author gives to the concept of inscription its decisive significance, beyond the mere fixation of previous oral discourse. Inscription becomes synonymous with the semantic autonomy of the text, which results from the disconnection of the mental intention of the author from the verbal meaning of the text, of what the author meant and what the text means. . . . What the text means now matters more than what the author meant when he wrote it.

Id.

¹⁴⁴ *Id.* at 26. In describing how readers approach the text Ricoeur states:

This inscription, substituted for the immediate vocal, physiognomic, or gestural expression, is in itself a tremendous cultural achievement. The human fact disappears. Now material “marks” convey the message. This cultural achievement concerns the event character of discourse first and subsequently the meaning as well. It is because discourse only exists in a temporal and present instance of discourse that it may flee as speech or be fixed as writing.

Id.

¹⁴⁵ RICOEUR, *HERMENEUTICS*, *supra* note 126, at 146-47. He explains:

It does not suffice to say that reading is a dialogue with the author through his work, for the relation of the reader to the book is of a completely different nature. Dialogue is an exchange of questions and answers; there is no exchange of this sort between the writer and the

author's ability to control how the reader interprets her words. In oral communication, the author controls the message insofar as she can clarify disagreements and ambiguities. Where the sole source for avoiding ambiguity is the written word, the logic revealed by the propositional content is the only path readers can use to clear up difficulties with the meaning.¹⁴⁶

2. The Reader Provides Her Own Context

Ricoeur describes the second stage of *distanciation*, which explains how meaning rests largely in the reader's individual life experience:

[W]ritten discourse creates an audience which extends in principle to anyone who can read. The freeing of the written material with respect to the dialogical condition of discourse is the most significant effect of writing. It implies that the relation between writing and reading is no longer a particular case of the relation between speaking and hearing.¹⁴⁷

The locus of meaning in interpretation of written texts shifts from the pen of the writer to the eye of the reader. Unlike a speech event which is addressed to a particular hearer, "a written text is addressed to an unknown reader and potentially to whoever knows how to read."¹⁴⁸ One must also consider the reader's biography and what the reader

reader. The writer does not respond to the reader. Rather, the book divides the act of writing and the act of reading into two sides, between which there is no communication. The reader is absent from the act of writing; the writer is absent from the act of reading. The text thus produces a double eclipse of the reader and the writer. It thereby replaces the relation of dialogue, which directly connects the voice of one to the hearing of the other.

Id.

¹⁴⁶ *Id.* at 141. In particular, Ricoeur states:

[W]hat happens to reference when discourse becomes a text? Here we find that writing, and above all the structure of the work, modify reference to the point of rendering it entirely problematic. In oral discourse, the problem is ultimately resolved by the ostensive function of discourse; in other words, reference is determined by the ability to point to a reality common to the interlocutors. If we cannot point to the thing about which we speak, at least we can situate it in relation to the unique spatio-temporal network which is shared by the interlocutors. It is the 'here' and 'now', determined by the situation of discourse, which provides the ultimate reference of all discourse.

Id.

¹⁴⁷ *Id.* at 139.

¹⁴⁸ RICOEUR, *supra* note 132, at 31.

herself brings to a particular text.¹⁴⁹ What a reader brings to a text will color her interpretation, and these interpretations have an undeniable validity from Ricoeur's perspective. "It is part of the meaning of a text to be open to an indefinite number of readers and, therefore, of interpretations."¹⁵⁰ To understand what a text means is, in part, to understand how the reader processes the information.

3. The Author's Context is Erased

The third mode of distancing occurs because the text is wrested from the original situation of the author. The reader does not share the same space and time coordinates as the author. Ricoeur describes the common context as "shattered by writing."¹⁵¹ Because gaps between what an author intends and what a reader perceives cannot be addressed at the time of perceived ambiguity, these difficulties can infect all later understanding (or lack thereof) between the author and the reader. The reader's understanding will, therefore, be grounded not only in the written text but also by the reader's own situation, which may differ vastly from that of the writer.

These three phases of distancing lead to a central paradox: the meaning of a text can differ from the stated purpose of an author. Ricoeur states:

The autonomy of the text already contains the possibility that what Gadamer calls the "matter" of the text may escape from the finite intentional horizon of its author; in other words, thanks to writing, the "world" of the *text* may explode the world of the *author*. [Emphasis in original].¹⁵²

¹⁴⁹ GADAMER, *supra* note 130, at 267. Gadamer states:

[I]t is necessary to keep one's gaze fixed on the thing throughout all the distractions that originate in the interpreter himself. A person who is trying to understand a text is always projecting. He projects a meaning for the text as a whole as soon as some initial meaning emerges in the text. Again, the initial meaning emerges only because he is reading the text with particular expectations in regard to a certain meaning. Working out this fore-projection, which is constantly revised in terms of what emerges as he penetrates into the meaning, is understanding what is there.

Id.

¹⁵⁰ RICOEUR, *supra* note 132, at 31-32.

¹⁵¹ *Id.* at 35.

¹⁵² RICOEUR, HERMENEUTICS, *supra* note 126, at 139.

The words used by the author may in fact bear more weight and convey “more meaning” than the author intended. By using language, a writer constantly refers back to a tradition, a history of texts laden with references and allusions of which he is ignorant. These references and allusions may subvert textual coherence by introducing meanings far different from the author’s intent.¹⁵³ We cannot and do not control all that a reader may take from our words.

Despite the destabilization that emerges from moving from the spoken to the written word, Ricoeur maintains that truth exists and is attainable in written work, but such attainment is the result of more than words inscribed on paper.¹⁵⁴ Even in spoken discourse, the limitations of language do not guarantee that ideas will be received without ambiguity and distortion:

[W]hat is experienced by one person cannot be transferred whole as such and such experience to someone else. My experience cannot directly become your experience. An event belonging to one stream of consciousness cannot be transferred as such into another stream of consciousness.¹⁵⁵

Truth is not unproblematically conveyed through the force of one author’s words. Rather, truth emerges out of the recorded confluence of many lives. It is the result of inductive and empirical study and indicated by the weight of experience; it is not a conclusion that can be deduced through sheer force of will or the careful manipulation of verbal formulae. Ricoeur maintains that the whole truth can never be fully known.¹⁵⁶ There is always more that can be said.

¹⁵³ See *id.* at 174 (arguing, “the text is an autonomous space of meaning which is no longer animated by the intention of its author; the autonomy of the text, deprived of this essential support, hands writing over to the sole interpretation of the reader.”).

¹⁵⁴ See, e.g., RICOEUR, MEMORY, *supra* note 126, at 498. Ricoeur writes that:
[E]vents like the Holocaust and the great crimes of the twentieth century, situated at the limits of representation, stand in the name of all the events that have left their traumatic imprint on hearts and bodies: they protest that they were and as such they demand being said, recounted, understood. This protestation, which nourishes attestation, is part of belief: it can be contested but not refuted.

Id.

¹⁵⁵ RICOEUR, *supra* note 132, at 15-16.

¹⁵⁶ RICOEUR, MEMORY, *supra* note 126, at 498.

C. *Writing History as a Three Step Process*

These limitations besetting every written text are, of course, true for every statement of fact recounted in appellate decisions. Appellate legal decisions are almost uniformly reduced to writing. Law, like history, is inseparable from its written roots.¹⁵⁷ To describe a historical event using words is to recognize that words are not the same as the event itself. There will be slippage in the transmission of meaning because the hearer or reader's imaginative reconstruction of the event will not convey the same immediacy experienced by the original witnesses.¹⁵⁸ Details will be ignored or misconstrued; emotions will be dampened. Further, the move from trial to transcript to appellate decision results in even greater distance from the historical event. To reduce the oral and aural performance of a trial into a silent transcript that is later distilled down into an appellate opinion is to further narrow the ability of the reader to apprehend the original event in its complexity and ambiguity.¹⁵⁹

Ricoeur divides the writing of non-fiction into three phases: (1) the documentary or archival phase, which deals with the collection of information; (2) the explanatory phase, which consists of a chain of "because" answers to "why" questions emerging from the information collected; and, (3) the narrative phase, where information is put into written form for future readers.¹⁶⁰ These elements distinguish the writing of non-fiction from the writing of fiction.¹⁶¹ He notes, "[u]nlike

¹⁵⁷ See *id.* at 138. "Writing, in effect, is the threshold of language that historical knowing has already crossed, in distancing itself from memory to undertake the three-fold adventure of archival research, explanation, and representation. History is writing from one end to another." *Id.*

¹⁵⁸ RICOEUR, *supra* note 132, at 15-16.

¹⁵⁹ I thank Professor Daniel Blinka for highlighting this distinction for me.

¹⁶⁰ RICOEUR, *MEMORY*, *supra* note 126, at 136. Ricoeur notes that this triadic structure is taken largely from the work of Michel de Certeau. *Id.* Ricoeur states: "I have also adopted the broader lines of the triadic structure of Certeau's essay, although I give them different contents on some important points." *Id.*; see also MICHEL DE CERTEAU, *THE WRITING OF HISTORY* (T. Conley trans., 1988).

¹⁶¹ RICOEUR, *MEMORY*, *supra* note 126, at 136-37. Ricoeur describes the documentary phase as follows:

I shall call the "documentary phase" the one that runs from the declaration of eyewitnesses to the constituting of archives, which takes as its epistemological program the establishing of documentary proof Next I shall call the explanation/understanding . . . phase the one that has to do with the multiple uses of the connective "because" responding to the question "why?" . . . Finally, I shall call the "representative phase" the putting into literary or written form of discourse offered to the readers of history. . . . [I]t is the phase of writing that plainly states the historian's intention, which is to

novels, historians' constructions do aim at being *reconstructions* of the past."¹⁶² Because the statement of facts in any appellate decision aims at being "reconstructions" or representations of the past, Ricoeur's phenomenology of a historian's work explains what judges do.

These three phases of non-fiction writing are "methodological moments" rather than "distinct chronological stages" that necessarily follow one after the other.¹⁶³ For example, the introduction of unexpected facts may require recasting the proposed explanation to account for their occurrence. Similarly, the adoption of a particular narrative strategy often sends the author back to the archive to look for further evidence of her thesis. The recounting of history is a dynamic, and not a static, phenomenon, and these phases of historical drafting are continually interwoven and repeated as non-fiction writing continues.¹⁶⁴ Ricoeur notes: "Each of the three operations of the historiographical operation stands as a base for the other two, inasmuch as they serve successively as referents for the other two."¹⁶⁵ Although the following analysis will treat each phase as relatively autonomous, the three are inseparable in operation.

1. The Documentary Phase

Initially, Ricoeur's description of the documentary phase, i.e., the collection of information, draws explicit parallels between the work of an historian and the operation of a court system.¹⁶⁶ As at trial, the documentary phase is defined by the use of witnesses, both human and textual.¹⁶⁷ The question to be determined at this phase is one of credibility: "Whom or what should we believe and why?"¹⁶⁸ To address

represent the past just as it happened—whatever meaning may be assigned to this "just as." It is also at this third phase that the major aporias of memory return in force to the foreground, the aporia of the representation of an absent thing that occurred previously and that of a practice devoted to the active recalling of the past, which history elevates to the level of a reconstruction.

Id.

¹⁶² RICOEUR, *TIME*, *supra* note 126, at 142.

¹⁶³ RICOEUR, *MEMORY*, *supra* note 126, at 137.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 162-69.

¹⁶⁷ *Id.* at 162. "It is within the everyday use of testimony that the common core of its juridical and historical use is most easily discerned." *Id.*

¹⁶⁸ *Id.* Ricoeur discusses witness credibility, positing:

[T]o what point is testimony trustworthy? This question balances both confidence and suspicion. Thus it is by bringing to light the conditions

that question, Ricoeur proposes a dialectic between the introduction and the reception of evidence.¹⁶⁹ As in dialogue, the question and answer format is the vehicle that moves the gathering of information along.

Ricoeur focuses particularly on the reception of evidence by describing the historian sifting through archived facts as the finder of fact at trial.¹⁷⁰ Because Ricoeur understands history according to a judicial model, a hermeneutic of suspicion is unavoidably woven into the fabric of recording past events.¹⁷¹ Beginning with the immediate perception of historical events, every description, every recounting received by a listener, is considered in a context alert to flaws in perception or transmission of information. Witnesses are scrutinized for distortions in their abilities to perceive, reasons to doubt their sincerity, and impediments to their memory.¹⁷² Every connection between different pieces of evidence is scrutinized as the historian tries to bring order to the disconnected documents scattered before her. The attitude of suspicion has no ending point so long as historians draw breath. Indeed, Ricoeur observes that one difference between history and judicial findings of fact is the necessary cessation of inquiry at some

in which suspicion is fomented that we have a chance of approaching the core meaning of testimony.

Id. Of course, trials need not be about issues of credibility. Often there is no disagreement about the facts themselves. Rather, the parties dispute what inferences should be drawn from the facts as established. For simplicity's sake, it seems best to focus on issues of credibility for the purposes of this paper, but understand that this limitation leaves a host of issues unexplored.

¹⁶⁹ *Id.* at 163. Proposing a dialectic between the introduction and the reception of evidence, Ricoeur states:

Two sides are initially distinguished and articulated in terms of one another: on the one side, the assertion of the factual reality of the reported event; on the other, the certification or authentication of the declaration on the basis of its author's experience, what we can call his presumed trustworthiness.

Id.

¹⁷⁰ *Id.* at 161-66.

¹⁷¹ *Id.* at 162. Ricoeur explains:

In effect, suspicion unfolds itself all along the chain of operations that begin at the level of the perception of an experienced scene, continuing on to that of the retention of its memory, to come to focus in the declarative and narrative phase of the restitution of the features of the event.

Id.

¹⁷² See, e.g., FED. R. EVID. 601-603. These attributes are among those regularly probed by cross-examiners in a trial court and underlie policies in the Federal Rules of Evidence, such as the rules defining the competency of witnesses. *Id.*

point in judicial proceedings.¹⁷³ While history is constantly re-interrogated and revised, legal descriptions of events are relatively more stable because of the principle of finality of judgment.¹⁷⁴

Ricoeur sees a witness' presence at the described historical event and reputation for trustworthiness as strategies for addressing this pervasive suspicion. Although he alludes to the substance of the evidence to be introduced, his approach emphasizes more the qualities of the witness rather than the content of the witness' testimony.¹⁷⁵ In this vein, Ricoeur suggests that the witness' spatio-temporal location and ability to narrate a coherent story carries more weight than does factual correspondence with the historical events described.¹⁷⁶ The act of testifying combines both the historical event to be recounted and the biography of the testifying witness.¹⁷⁷ Insofar as the witness has lived a life of comparative virtue, her personal ethos or trustworthiness imbues her testimony with a *prima facie* believability. Similarly, insofar as a witness' life has failed to be marked by truthfulness, her testimony will correspondingly be received with disbelief.¹⁷⁸

¹⁷³ RICOEUR, MEMORY, *supra* note 126, at 319-20. Commenting on the difference between history and judicial proceedings, Ricoeur states:

It remains that the definitive character of the verdict marks the most obvious difference between the juridical approach and the historiographical approach to the same events: what has been judged can be challenged by popular opinion, but not retried; *non bis idem*; as for the review of the decision, it "cuts only one way."

Id.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 163-64.

¹⁷⁶ *Id.* In discussing the relationship between the witness and her testimony, Ricoeur argues:

The specificity of testimony consists in the fact that the assertion of reality is inseparable from its being paired with the self-designation of the testifying subject. The typical formulation of testimony proceeds from this pairing: I was there. What is attested to is indivisibly the reality of the past thing and the presence of the narrator at the place of its occurrence. And it is the witness who first declares himself to be a witness. . . . These . . . assertions link point-like testimony to the whole history of a life. At the same time, the self-designation brings to the surface the inextricable opacity of a personal history that itself has been "enmeshed in stories."

Id. (footnote omitted).

¹⁷⁷ *Id.*

¹⁷⁸ See FED. R. EVID. 609(a)(1), 404-05. Again, Ricoeur's approach finds an echo in the Federal Rules of Evidence. *Id.* Rules 404 and 405 set forth a general rule that litigants may not use a witness' character or character trait to establish circumstantial proof of the historical events of a case. *Id.* Nevertheless, courts do permit relying on a witness'

The reputation or character of a witness is likewise seen as relevant under current evidence law. Although trials shun introduction of collateral matters as a general rule, under certain conditions the Federal Rules of Evidence permit the jury to learn about the reputation and character of a witness, including specific instances of conduct displaying truthfulness or untruthfulness in the past.¹⁷⁹ At least in this regard, trial courts do connect historical events and the lives of those who recount them.¹⁸⁰ Trial attorneys seem to understand this matter better than others. The litigator constantly asks not only “what is the content of the testimony?” but also “who is saying it?” This factor is noted in Ricoeur’s

character trait for untruthfulness to support an assertion that a witness lied on direct examination. *Id.*

¹⁷⁹ See, e.g., FED. R. EVID. 608-609.

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character.

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

(1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct.

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness’ character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused’s or the witness’ privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule.

For the purpose of attacking the character for truthfulness of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment

Id.

¹⁸⁰ See, e.g., RICOEUR, MEMORY, *supra* note 126, at 244.

comments on narrativity.¹⁸¹ Lives of actors are emplotted along with particular events in a story, and the finder of fact may be as convinced by the life of an actor as by what she or he says.¹⁸²

Turning from the reception of evidence by the finder of fact to the introduction of evidence, the witness' role at the historical event shapes her perceptions and affects the record in a case.¹⁸³ When a witness testifies in court, she is a third-person observer, trying to convey to a jury what occurred at a particular time and place.¹⁸⁴ This third-person role may correspond with the witness' experienced role at the time of the event. It may also differ. Witnesses understand events giving rise to testimony from a particular perspective, a story which explains how different events or observations fit together.¹⁸⁵ If the witness is a co-defendant or a victim, there may be an emotional valence conferred by that role that impedes the witness' ability to apprehend and transmit the occurrences in question.¹⁸⁶

¹⁸¹ *Id.*

¹⁸² *Id.* Discussing the roles of actors in a narrative, Ricoeur states:

[I]nasmuch as the actors in a narrative—the characters—are emplotted along with the story, the notion of narrative identification, correlative to that of narrative coherence, too is open to noteworthy transpositions on the historical plane. The notion of a character constitutes a narrative operator of the same amplitude as that of an event. The characters perform and suffer from the action recounted.

Id.

¹⁸³ See, e.g., GADAMER, *supra* note 130, at 276-77. Commenting on human perceptions, Gadamer explains:

In fact history does not belong to us; we belong to it. Long before we understand ourselves through the process of self-examination, we understand ourselves in a self-evident way in the family, society, and state in which we live. The focus of subjectivity is a distorting mirror. The self-awareness of the individual is only a flickering in the closed circuits of historical life.

Id.

¹⁸⁴ RICOEUR, MEMORY, *supra* note 126, at 164. Ricoeur argues:

Self-designation gets inscribed in an exchange that sets up a dialogical situation. It is before someone that the witness testifies to the reality of some scene of which he was part of the audience, perhaps as actor or victim, yet, in the moment of testifying, he is in the position of a third-person observer with regard to all the protagonists of the action.

Id. (footnote omitted).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* See also JEROME S. BRUNER, ACTS OF MEANING 58-59 (1990). Bruner states: In the actual effort to remember something, [Bartlett] notes, what most often comes first to mind is an affect or a charged "attitude" – that "it" was something unpleasant, something that led to embarrassment, something that was exciting. The affect is rather like a general

The act of translating a witness' act of testifying to the written record affects emotionally-charged content, because something is lost in the transition from live to written testimony; in part, those reading the record cannot experience its affective imprint, the emotional content that underlies the words spoken.¹⁸⁷ The text can only record the propositional content of the testimony, i.e., the words the witness says, not the quality of her demeanor nor the manner of her delivery. In addition to difficulties associated with transmitting emotional valences in a written record, the very act of putting certain experiences into words creates certain lacunae. As Professor Elaine Scarry has observed, physical pain is often essentially inexpressible.¹⁸⁸ Similarly, mental suffering is often impossible to verbalize.¹⁸⁹ Witnesses who have undergone traumatic experiences are often reduced to incoherent and ill-defined attempts to express what they cannot articulate. Courts traditionally defer to the trier of fact who has the immediate ability to apprehend the demeanor of witnesses and assess their credibility, even if such understanding is obscured by emotionally laden memories. Nevertheless, the difficulty associated with expressing emotionally and physically scarring events lessens the impact of such testimony in the written record.

Ricoeur maintains that those testifying are in a dialogical relationship not only with the examining attorney but also with the finder of fact in court. Surely, witnesses engage in the question and answer format that characterizes all dialogue when they are being examined on the witness stand.¹⁹⁰ Ricoeur maintains that the question

thumbprint of the schema to be reconstructed. "The recall is then a construction made largely on the basis of this attitude, and its general effect is that of a justification of the attitude." Remembering serves, on this view, to justify an affect, an attitude. The act of recall is "loaded," then, fulfilling a "rhetorical" function in the process of reconstructing the past. It is a reconstruction designed to justify. The rhetoric, as it were, even determines the form of "invention" we slip into in reconstructing the past: "The confident subject justifies himself—attains a rationalization, so to speak—by setting down more detail than was actually present; while the cautious, hesitating subject reacts in the opposite manner, and finds his justification by diminishing rather than increasing the details presented [in the experiment]."

Id. (footnote omitted).

¹⁸⁷ RICOEUR, MEMORY, *supra* note 126, at 164. "[T]he affective imprint of an event capable of striking the witness like a blow does not necessarily coincide with the importance his audience may attach to his testimony." *Id.*

¹⁸⁸ See ELAINE SCARRY, RESISTING REPRESENTATION 3 (1994).

¹⁸⁹ See, e.g., JEROME A. MILLER, THE WAY OF SUFFERING: A GEOGRAPHY OF CRISIS 46 (1988).

¹⁹⁰ RICOEUR, *supra* note 132, at 14-15.

and answer structure extends further. Witnesses make assertions, and every assertion necessarily implies the question: "And you agree, don't you?"¹⁹¹ Similarly, every witness' testimony contains the plea, "believe me."¹⁹² To be a witness is to subject one's self to challenge not only by the cross-examiner but also by the finder of fact. "The witness is thus the one who accepts being questioned and expected to answer what may turn out to be a criticism of what he says."¹⁹³ There is a tension, a fear of being contradicted or proven wrong, built into every statement made at trial and in every assertion in documents upon which a historian relies.

The back and forth of a dialogical relationship that characterizes trial transcripts drops out of judicial opinions reduced to writing, because, almost uniformly, judges adopt a third-person omniscient perspective for their published work. Thus, the written decision seems more a pronouncement of self-evident truths than the product of ineluctably provisional dialogue. In this regard, well-crafted opinions and histories have an aura of inevitability about them. The reader is lulled into letting down her hermeneutic guard and accepting a coherent account as "true" without interrogating suspicions either discarded or consciously avoided by the author.

Ricoeur's description of the documentary phase undermines any claim that there is an easy and accurate transition from historical events to testimony presented in a courtroom. Recognition of the dynamics underlying the presentation of evidence at trial highlights the significance of the findings of fact by the trial court. In the absence of

One important aspect of discourse is that it is addressed to someone. There is another speaker who is the addressee of the discourse. The presence of the pair, speaker and hearer, constitutes language as communication. . . . Questioning and answering sustain the movement and the dynamic of speaking, and in one sense they do not constitute one mode of discourse among others. Each illocutionary act is a kind of question. To assert something is to expect agreement, just as to give an order is to expect obedience.

Id.

¹⁹¹ *Id.*

¹⁹² RICOEUR, *MEMORY*, *supra* note 126, at 164. Commenting on the trust involved in witness testimony, Ricoeur states:

This dialogical structure immediately makes clear the dimension of trust involved: the witness asks to be believed. He does not limit himself to saying "I was there," he adds "believe me." Certification of the testimony then is not complete except through the echo response of the one who receives the testimony and accepts it. Then the testimony is not just certified, it is accredited.

Id.

¹⁹³ *Id.* at 165.

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specific findings at trial, the appellate court must craft a coherent narrative from a transcript that is stripped of emotional valances and observations of witness demeanor. The collection of raw materials for legal facts is the first locus of judicial discretion in determining the facts in a case.

2. The Explanatory Phase

a. *Selection of Facts Determines the Theory*

Moving from the documentary to the explanatory phase, the initial consideration is the selection of “salient” facts recovered in the archival stage. Historian Tzvetan Todorov observes:

“The work of the historian, like every work on the past, never consists solely in establishing the facts but also in choosing certain among them as being more salient and more significant than others, then placing them in relation to one another. . . .”¹⁹⁴

Facts are necessarily theory-laden. Matters are not seen as significant, save in reference to a backdrop, a context which will either subordinate or emphasize the fact in question. Amsterdam and Bruner observe that certain stories fail to capture our attention because they conform to societal expectations.¹⁹⁵ They call such stories “scripts” that involve “familiar characters taking appropriate actions in typical settings.”¹⁹⁶ Insofar as what arises in the archives or court record appears to be part of a script, it will not lead to questions to be answered in the explanatory phase. Specifically, Ricoeur states:

[T]he document sleeping in the archives is not just silent, it is an orphan. The testimonies it contains are detached from the authors who “gave birth” to them. They are handed over to the care of those who are competent to question them and hence to defend them, by giving them aid and assistance.¹⁹⁷

Only facts which subvert or undermine expectations appear to have explanatory force; other facts are ignored as part of the normal

¹⁹⁴ TZVETAN TODOROV, *LES ABUS DE LA MEMOIRE* 50 (1995), in *RICOEUR, MEMORY*, *supra* note 126, at 86.

¹⁹⁵ AMSTERDAM & BRUNER, *supra* note 12, at 45.

¹⁹⁶ *Id.*

¹⁹⁷ *RICOEUR, MEMORY*, *supra* note 126, at 169.

background of life.¹⁹⁸ The author releases these “subversive facts” from the “orphanage” of an archive or the appellate record. But to recognize a fact as having explanatory force, one must already possess at least an inchoate theory of explanation.

Judges must be selective to do their job properly. The record in complex litigation can run to hundreds and even thousands of volumes. Even a relatively simple murder transcript can take up many banker’s boxes. As the judge and her clerk sift through volumes of testimony, they will, consciously or not, recognize particular facts as more important than others, and this recognition filters out certain explanations. Insofar as particular facts are left dormant in the archive or record, they cannot become the basis for a decision, and the reader of the final opinion will never know that this “orphaned” fact was established in the trial court. The selection of facts as relevant determines what explanations are possible, what reasons the court can adopt.

b. Theoretical versus Practical Reasoning

On a more abstract level, there are two different styles of reasoning employed in the explanatory phase.¹⁹⁹ One approach is called theoretical reasoning, and the other is called practical reasoning.²⁰⁰ Theoretical

¹⁹⁸ BRUNER, *supra* note 186, at 47-50. Jerome Bruner notes elsewhere that a crucial feature of narrative is “that it specializes in the forging of links between the exceptional and the ordinary.” *Id.* at 47. Part of what a narrative must do is give reasons or “make sense” of any “encountered exception.” *Id.* at 49. Deviations from the expected must be justified in a way that the ordinary need not be. *Id.* at 47-50. “It is this achievement that gives a story verisimilitude.” *Id.* at 50.

¹⁹⁹ RICOEUR, *MEMORY*, *supra* note 126, at 182. Commenting on the explanatory phase, Ricoeur states:

To explain, generally speaking, is to answer the question “Why?” through a variety of uses of the connector “because.” . . . If the intellect, however, is to remain within the domain of history, and not slip over into that of fiction, this use of the imagination [which carries our minds] . . . far beyond the sphere of private and public memory into the range of the possible . . . must submit itself to a specific discipline, namely, an appropriate dividing up of its objects of reference.”

Id. (footnote omitted).

²⁰⁰ See ALBERT R. JONSEN & STEPHEN EDELSTON TOULMIN, *THE ABUSE OF CASUISTRY, A HISTORY OF MORAL REASONING* 22-46 (1988). These two approaches are distinguished and discussed at great length. *Id.* See, e.g., LUDWIG WITTGENSTEIN, *ON CERTAINTY* (1969). Of course, there are more refined explanatory methods that can be relied upon at this stage. *Id.* Wittgenstein, among others, warned against the idea that only one set of methods yielded certainty. *Id.* Instead, he noted that there are many different sorts of uncertainty, and we have different ways of approaching them. *Id.* See also RICOEUR, *MEMORY*, *supra* note 126, at 184-85. Ricoeur agrees with Wittgenstein’s observation:

reasoning describes the elegant and precise calculus displayed in geometric proofs.²⁰¹ It begins with unquestioned general principles from which all other conclusions can be derived. Theoretical reasoning is attractive because its conclusions must be accepted if one concedes the premises. Unfortunately, theoretical reasoning is of limited applicability because it deals only with the idealized, the atemporal, and the necessary.²⁰² Theoretical reasoning is informative and helpful when

[T]here is no one privileged mode of explanation in history. This is a feature that history shares with the theory of action to the degree that the penultimate referent of historical discourse is those interactions capable of engendering the social bond. It is not surprising therefore that history unfolds the full range of modes of explanation likely to make human interaction intelligible. On the one side, the series of repeatable facts of quantitative history lend themselves to a causal analysis and to the establishing of regularities that draw the idea of a cause, in the sense of efficacy, toward that of lawfulness, toward the model of the "if... then" relation.

Id. (footnote omitted). *But see* JONSEN & TOULMIN, *supra*, at 23. Still, as Jonsen and Toulmin observe, from all these possible methods there are really two broad approaches to reasoning in practical fields such as law or ethics, stating:

We inherit two distinct ways of discussing ethical issues: One of these frames these issues in terms of principles, rules, and other general ideas; the other focuses on the specific features of particular kinds of moral cases. In the first way general ethical rules relate to specific moral cases in a *theoretical* manner, with universal rules serving as 'axioms' from which particular moral judgments are deduced as theorems. In the second, this relation is frankly *practical*, with general moral rules serving as 'maxims,' which can be fully understood only in terms of the paradigmatic cases that define their meaning and force.

Id.

²⁰¹ JONSEN & TOULMIN, *supra* note 200, at 25. Discussing the importance of geometry's general principles, Jonsen and Toulmin state:

The rigor of geometry was so appealing, indeed, that for many Greek philosophers formal deduction became the ideal of *all* rational argument. . . . In due course, too (the hope was), other sciences would find their own unquestioned general principles to serve as their starting points, in explaining, for example, the natures of animals, plants, and the other permanent features of the world.

Id. (footnote omitted).

²⁰² *Id.* at 26-27. Johnson and Toulmin explain:

In theoretical fields such as geometry, statements or arguments were *idealized, atemporal, and necessary*:

1. They were "idealized" in the following sense. Concrete physical objects, cut out of metal in the shapes of triangles or circles, can never be made with perfect precision. . . . The idealized "straight lines" and "circles" of geometry, by contrast, exemplify such truths with perfect exactness.

2. They were "atemporal" in the following sense. Any geometrical theorem that is true at one time or on one occasion will be true at any time and on any occasion. . . .

talking about mathematical entities, but its usefulness diminishes outside that rarefied sphere. Aristotle observed, “[n]ot all of our knowledge . . . is of this sort; nor do we have this theoretical kind of certainty in every field.”²⁰³

c. Law Uses Practical Reasoning

Although lawyers frame arguments as though they rest on theoretical reasons as a matter of style, they actually rely on practical reasoning.²⁰⁴ Theoretical reasoning is rhetorically preferred because of the potency associated with results that are logically necessary. Insofar as an argument rests on unquestioned principles, it cannot be supplanted by positions that emanate from shakier foundations. However, when these supposedly unassailable principles are interrogated, they are usually found to lack the underpinnings of geometric certainty. Jonsen and Toulmin make the distinction in this way:

In the realm of Practice, certitude no longer requires a prior grasp of definitions, general principles, and axioms, as in the realm of Theory. Rather, it depends on accumulated experience of particular situations; and this practical experience gives one a kind of wisdom—*phronesis*—different from the abstract grasp of any theoretical science—*episteme*. . . . The realm of the

3. Finally, theoretical arguments were “necessary” in a twofold sense. The arguments of Euclidean geometry depended for their validity both on the correctness of the initial axioms and definitions and on the inner consistency of the subsequent deductions. Granted Euclid’s axioms, all of his later theorems were “necessary consequences” of those initial truths. If any of the theorems were questioned, conversely, this implied either that their starting point was incorrect or else that the steps taken in passing to the theorems were formally fallacious.

Id.

²⁰³ *Id.* at 25 (citing ARISTOTLE, NICHOMACHEAN ETHICS VI, iii-vii).

²⁰⁴ JONSEN & TOULMIN, *supra* note 200, at 31. Jonsen and Toulmin state:

[P]ractical fields such as law, medicine, and public administration deal with concrete actual cases, not with abstract idealized situations. They are directly concerned with immediate facts about specific situations and individuals: general ideas concern them only indirectly, as they bear on the problems of those particular individuals. Unlike natural scientists, who are free to decide in advance which types of situations, cases, or individuals they may (or need not) pay attention to, physicians, lawyers, and social service workers face myriad professional problems the moment any client walks through the door. . . . [T]hey cannot choose to ignore them or their problems.

Id.

practical included, for Aristotle, the entire realm of *ethics*: in his eyes the subject matter of moral reflection lay within the sphere of practical wisdom rather than theoretical comprehension.²⁰⁵

Rather than addressing ideal constructs which are based on truths always valid at all times and places, legal reasoning, like moral reflection, works with categories that are “*concrete, temporal, and presumptive.*”²⁰⁶ Practical reasoning underscores the importance of fact determinations because it is precisely the recounting of historical events which provides the concrete component of legal analysis.

Ricoeur’s discussion of practical reasoning contains the central argument of this Article. For Ricoeur, practical reasoning serves as the vehicle for agreement among opposed parties. To reach agreement, interlocutors adjust their descriptions of historical events until (1) there is an agreed upon recounting of the past and (2) each party perceives his or her respective position as honored and accepted. Attorneys and judges arrive at agreement by adjusting factual descriptions as well. This conclusion is illustrated by Ricoeur’s example of map-making.

d. Practical Reasoning is Distorted When Narratives Change Descriptive Scale

Ricoeur draws our attention to scales of reference used in cartography, optics, and architecture.²⁰⁷ The idea of scale is relatively

²⁰⁵ *Id.* at 26.

²⁰⁶ *Id.* at 27. Toulmin and Jonsen make the distinction by comparing the sorts of discussion one can have about triangles with the sort of discussion one has about chickens:

In all three respects, practical statements and arguments differed from theoretical ones by being *concrete, temporal, and presumptive.*

1. They were “concrete” in the following sense. Chickens are never idealized entities, and the things we say about cooking make no pretense to geometrical perfection. . . .

2. They were “temporal” in this sense. The same experience that teaches what is normally the case *at any time* also teaches what is the case *only sometimes* . . . Truths of practical experience thus do not hold good “universally” or “at any time”: rather, they hold “on occasion” or “at this or that moment” – that is, usually, often, at most always.

3. Finally, practical arguments were “presumptive” in this sense. Chicken is normally good to eat, so a particular chicken just brought from the store is “presumably” good to eat. In unusual cases that conclusion may be open to rebuttal

Id.

²⁰⁷ RICOEUR, MEMORY, *supra* note 126, at 210-11. Commenting on scale, Ricoeur explains: The notion of scale is borrowed from cartography, architecture, and optics. In cartography, there is an external referent, the territory that

straightforward. To define the scale of a map is to identify the units of comparative measurement. The distance graphically represented in a map corresponds in direct proportion with real distances in the geographical area shown. The level of detail, i.e., what is shown on a map, is a function of the scale chosen. When the scale on a map is altered, certain features appear and disappear.²⁰⁸ By selecting the scale used, the cartographer selects what is revealed and concealed.

Because of external referents involved, changing the scale of a map depicting a geographic location is relatively unproblematic. One can locate physical realities represented on the map. Assume the situation where the map-reader is accustomed to a map employing the scale of one inch to a mile. Assume further that this same map-reader must later rely on a map depicting the same area that uses a scale of one inch to five miles. Even if familiar features are missing from the second map because of the difference in scale, the map-reader can still use the map with fewer streets or geographic references by focusing on the main thoroughfares depicted. Once the reader locates a major landmark, the second map becomes helpful.

By contrast, changing the scale of reference where there is no corresponding physical referent presents a more perplexing difficulty. Ricoeur considers questions of scale in the context of architecture and urban planning.²⁰⁹ The complexity arises from the lack of clear physical signposts to orient the observer's understanding. Ricoeur observes:

[U]nlike the relationship between map and territory, the architect's or urban planner's plan has as its referent a building, a town, yet to be constructed. What is more, the building or the town have varying relations with their contexts scaled in terms of nature, the landscape,

the map represents. What is more, the distances measured by maps of different scales are commensurable according to homothetic relations, which authorizes us to speak of the reduction of a terrain to a given scale. However, from one scale to another we observe a change in the level of information as a function of the level of organization.

Id.

²⁰⁸ *Id.* at 210. Ricoeur states, "[t]he key idea attached to the idea of a variation in scale is that, when we change scale, what becomes visible are not the same interconnections but rather connections that remained unperceived at the macrohistorical scale." *Id.*

²⁰⁹ *Id.* at 211. Ricoeur explains, "[t]he role of the idea of scale in architecture and in urban planning is also relevant to our discussion. Proportional relations comparable to those in cartography are posited along with the balance between gain and loss of information depending on the scale chosen." *Id.*

communication networks, the already constructed parts of the town, and so on.²¹⁰

Because the proposed building needs to fit into already-existing frameworks of buildings, geography, and infra-structure, there are limitations on how expansive a planned structure can be. Nevertheless, even within these limitations, it can be difficult to visualize the final product without careful attention to scale of the plans. The ability to apprehend what a new town or subdivision will look like requires an act of imagination and projection. Constant movement occurs between what is concretely present and known, and what is planned.²¹¹ It is by holding to this dialectic between the real and the intended that plans conform to spatial demands and are able to be given solid expression.

Ricoeur describes the profession of the historian (and by analogy that of the judge) as in some sense architectural.²¹² Just as the architect has set coordinates and limitations into which she must fit her proposed design, so too historians have limitations with which they must contend while drafting history. They are constrained by the facts in the archive, and their constructions of historical events cannot differ dramatically from previous work in the area without significant justification for such a deviation.²¹³ Likewise, judges are similarly constrained by the traditions of which they are a part. Their decisions need to fit into categories that will be sensible to other professionals working in the field.²¹⁴ Like architects and historians, judges must survey the land and determine where and how a new structure will be integrated into the already-existing body of law.²¹⁵

²¹⁰ *Id.*

²¹¹ GADAMER, *supra* note 130, at 291. Gadamer explains:

[T]he movement of understanding is constantly from the whole to the part and back to the whole. Our task is to expand the unity of the understood meaning centrifugally. The harmony of all the details with the whole is the criterion of correct understanding. The failure to achieve this harmony means that understanding has failed.

Id.

²¹² RICOEUR, MEMORY, *supra* note 126, at 211.

²¹³ *Id.* Ricoeur states, “[h]istorical discourse has to be built up in the form of a set of works. Each work gets inserted into an already existing environment. Rereadings of the past are in this way reconstructions, at the price sometimes of costly demolitions: construct, deconstruct, reconstruct are familiar gestures to the historian.” *Id.*

²¹⁴ *See, e.g.*, RONALD DWORKIN, LAW’S EMPIRE 228-30 (1986) (Dworkin’s notion of “fit” from the idea of law as integrity in his model of the chain novel). *Id.*

²¹⁵ RICOEUR, MEMORY, *supra* note 126, at 320-21. Ricoeur explains:

[T]he fit that the judgment establishes between the presumed truth of the narrative sequence and the imputability by reason of which the

This analogy of law with architecture limps because verbal constructions lack the solidity of structures made of steel and stone. How buildings fit into a landscape has clearer boundaries and clearer criteria for comparing different projects than does defining limits of verbal formulae. The slippage that occurs in transmitting thoughts from one person to another comes to the fore when trying to determine how a proposed fact description compares with other descriptions of the same facts found by the lower court (to say nothing of how a given description can be compared to fact patterns set forth in completely different cases).²¹⁶ Ricoeur believes that the locus of this distortion is “the absence of commensurability of the dimensions.”²¹⁷ More simply put, people use different words to describe the same thing or the same words to describe different things. This lack of precision leads to confusion, because there is no external referent against which to compare the expressions employed.²¹⁸ Ricoeur explains how the change in scale changes the explanation:

In changing scale, one does not see the same things as larger or smaller. . . . One sees different things. One can no longer speak of a reduction of scale. There are different concatenations of configuration and causality. The balance between gains and losses of information applies to the modeling operations that bring into play different heuristic imaginary forms. In this regard, what we can reproach in macrohistory is its failure to notice its dependence on a choice of scale with its macroscopic optical point of view that it borrowed from a more cartographical than historical model.²¹⁹

Just as historians are “subject to reproach” for failing to note how their verbal constructions are dependent on scale, so too are attorneys and judges. As indicated by Dean Pound and Professor Goodhart, the very malleability of factual description permits legal decisions to rest on bases that none of the parties to a lawsuit would recognize as emerging

accused is held accountable—this good fit in which explanation and interpretation come together at the moment the verdict is pronounced—operates only within the limits traced out by the prior selection of the protagonists and of the acts alleged.

Id.

²¹⁶ RICOEUR, *supra* note 132, at 15-16.

²¹⁷ RICOEUR, MEMORY, *supra* note 126, at 211.

²¹⁸ *Id.*

²¹⁹ *Id.* at 211-12.

out of their dispute.²²⁰ Because the change in scale alters which explanatory chains are visible or operative, any relatively adequate understanding of the stakes in a given case requires careful attention to the scale the court employs when viewing the evidence in the record. Failure to address problems of scale in an appellate brief may well result in a failure before the court. Nevertheless, despite one's best efforts, difficulty may occur because language lacks the solidity of bricks and mortar.

Moving from the abstract to the concrete, the different versions of the crime story in *Strickland* and their implications for the ensuing representation stories highlight how the change in scale changes the reasoning. By truncating facts presented in the lower courts in her version of the crime story, Justice O'Connor suggested there was nothing remarkable about Washington's crimes or life history. Thus, the chains of reasoning which indicated error to the lower courts where Tunkey failed to hire a psychologist or investigate the defendant's background fell by the wayside. This maneuver could not be accomplished if the scale of the facts, the density of description, held constant in both the Supreme Court and lower court opinions.

3. The Narrative Phase

The third stage in non-fiction writing is called the narrative phase, which designates composition, putting words on paper. Here the author takes materials gathered in the documentary phase and weaves them together with "because" explanations developed in the explanatory phase. As previously indicated, all descriptions of historical events, all understandings, are rooted in narratives explaining them.²²¹ For this reason, it is difficult to separate key features of the narrative process from the other phases which are already bound and defined by narratives. Authors such as Bruner, Amsterdam, Austin Sarat, and Thomas R. Kearns have explored some implications of narrative and law;²²² their work is indebted in some measure to the masterful

²²⁰ See, e.g., *supra* notes 35-39 and accompanying text (describing the opinions of Dean Pound and Professor Goodhart).

²²¹ RICOEUR, *MEMORY*, *supra* note 126, at 239. Ricoeur argues, "no one ignores the fact that before becoming an object of historical knowledge, the event is the object of some narrative. In particular, the narratives left by contemporaries occupy a prime place among documentary sources." *Id.*

²²² See, e.g., AMSTERDAM & BRUNER, *supra* note 12; see also JEROME BRUNER, *MAKING STORIES: LAW, LITERATURE, LIFE* (2002) (resting upon the foundation developed in Bruner's earlier works); JEROME BRUNER, *supra* note 186; JEROME BRUNER, *ACTUAL MINDS, POSSIBLE WORLDS* (1986); *THE RHETORIC OF LAW* (A. Sarat and T. R. Kearns eds., 1994).

scholarship of the late Robert Cover, who wrote persuasively about law and narrative.²²³ Cover offers a concise introduction to the interaction between law and narrative, stating:

We inhabit a *nomos* - a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. . . . 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.²²⁴

In a profound way, we are made up of the stories that shape and define our lives. As Professor Cover indicates, these stories, these narratives, ground our laws and legal institutions.

Despite some overlap, the explanatory and narrative phases are distinct steps in the operation of writing.²²⁵ The explanatory phase consists of "because" explanations to a chain of "why" questions taken from facts elicited in the documentary/archival phase.²²⁶ These "because" statements are linked by the judge attempting to understand if and why one series of events occurred rather than another. By contrast, the narrative phase does not add any new causal linkages to answer

²²³ Robert Cover, *Foreword: Nomos and Narrative, The Supreme Court, 1982 Term*, 97 HARV. L. REV. 4 (1983).

²²⁴ *Id.* at 4-5.

²²⁵ RICOEUR, *MEMORY*, *supra* note 126, at 238. Drawing a distinction between the explanatory and narrative phases, Ricoeur states:

On the one hand, it is taken for granted that narrativity does not constitute an alternative solution to explanation/understanding, despite what the adversaries and advocates of a thesis that, to be brief, I have proposed calling narrativist curiously agree on in saying. On the other, it is affirmed that emplotment nevertheless constitutes a genuine component of the historiographical operation, but on another plane than the one concerned with explanation/understanding, where it does not enter into competition with uses of "because" in the causal or even the teleological sense. . . . [R]epresentation in its narrative aspect. . . does not add something coming from the outside to the documentary and explanatory phases, but rather accompanies and supports them.

Id.

²²⁶ *Id.* at 182.

these initial “why” questions.²²⁷ Rather, narrative provides a rhetorical structure that supports and accompanies this second phase.²²⁸

Because historical events are recounted through the particular lens offered by witnesses, appellate legal narratives “normalize” actions and situations that otherwise appear quite strange. For most people, what structures our identity and self image is less the result of “grand textures of cause and effect” and more those explanations occurring within “local frames of awareness,” what Clifford Geertz calls “local knowledge.”²²⁹ These individual stories arise out of everyday experience and provide us with a site from which we can view and evaluate what goes on in the world outside us.²³⁰ Insofar as legal narratives consist largely of stories describing “local frames of awareness[,]” the reader cannot easily determine if the author is adjusting the scale of description in a given situation. Thus, the author can select facts which make the extraordinary seem unimportant. This normalization process emerges in a dialectic of highlighting and subordinating facts recounted.

The narrative phase highlights or subordinates causal explanation through the device of plot. As Ricoeur puts it:

What is a plot? . . . [A] story[] describes a sequence of actions and experiences of a certain number of characters, whether real or imaginary. These characters are represented in situations which change or to the changes of which they react. These changes, in turn,

²²⁷ *Id.* at 238.

²²⁸ *Id.*

²²⁹ CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 6 (1983).

²³⁰ See, e.g., RICOEUR, HERMENEUTICS, *supra* note 126, at 278. Describing narrative, Ricoeur states:

[I]t must be said that any narrative combines, in varying proportions, two dimensions: a chronological dimension and a non-chronological dimension. The first may be called the ‘episodic dimension’ of the narrative. Within the art of following a story, this dimension is expressed in the expectation of contingencies which affect the story’s development; hence it gives rise to questions such as: and so? and then? what happened next? . . . But the activity of narrating does not consist simply in adding episodes to one another; it also constructs meaningful totalities out of scattered events. This aspect of the art of narrating is reflected, on the side of following a story, in the attempt to ‘grasp together’ successive events. The art of narrating, as well as the corresponding art of following a story, therefore require that we are able to extract a configuration from a succession.

Id. (italics in original).

reveal hidden aspects of the situation and the characters, giving rise to a new predicament which calls for thought or action or both. The response to this predicament brings the story to its conclusion.²³¹

The narrative phase works with the facts selected and explanations forged in previous phases by framing them to underscore some arguments and to obscure others.²³² For example, in *Strickland*, Justice O'Connor emphasizes the uncooperative client rather than focusing on the attorney who did little. The representation story paints the defense attorney as the victim of circumstances caused by his client. In contrast, the lower court decisions develop the crime story suggesting a disturbed defendant whose attorney abrogated his responsibility. By emphasizing certain facts, the *Strickland* majority developed a plotline in which Tunkey's actions were vindicated because he had no other practicable choices.

This role reversal depicted in the competing storylines of the *Strickland* opinions emphasizes how fundamental the selection of characters and events is in telling a story. These two aspects of narrative define a story and move it along. They are linked because they have a similar point of emergence, i.e., they each stand in contrast to what counts as background or the status quo.²³³ The explanatory phase selects problematic facts and chooses to explain why they are problems. To identify a matter as problematic, the explanation rests on a series of assumptions about when the story begins and what counts as "normal."²³⁴ At the level of structure, historical change occurs when what was once seen as normal, unimportant, mere background, is suddenly seen as upsetting expectations, as a discordant note.²³⁵ When

²³¹ *Id.* at 277.

²³² See, e.g., GEORGE LAKOFF, MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK 372 (2d Ed. 2002). The concept of framing is largely self-explanatory. *Id.* Lakoff argues that it refers to the point of view in which a position or argument is couched, stating:

Alternative framing possibilities also provide for forms of everyday variation in meaning. . . . Suppose you have a friend named Harry who doesn't like to spend much money. You could conceptualize him and describe him in two different ways. You could say either "He's thrifty" or "He's stingy." Both sentences indicate that he doesn't spend much money, but the first frames the issue in terms of resource preservation (thrift), while the second frames the issue in terms of generosity (stinginess).

Id.

²³³ AMSTERDAM & BRUNER, *supra* note 12, at 44.

²³⁴ RICOEUR, MEMORY, *supra* note 126, at 243-44.

²³⁵ *Id.* at 243.

an occurrence that was once seen as trivial becomes an integral part of the plot, that episode is called an event.²³⁶

Who counts as an actor in drafting a narrative is no less important than what counts as an event.²³⁷ This observation highlights the notion of who is portrayed as having choices and the opportunity to act on them. Mere stock characters who act in wholly predictable ways are essentially freed from responsibility vis-à-vis anything important that occurs in the narrative. Their actions seem more on the level of stimulus response and, as such, blend into the background. By contrast, if a character is capable of making choices, if the character has suffered or agonized over a decision, then this character can perform actions that move the plot forward.²³⁸

Because the crime story and the representation story interlock in *Strickland*, the treatment of character and event in the crime story determines what appears normal or expected in the representation story. The extensive and detailed description of the defendant's background and offenses in the lower courts contrast with Justice O'Connor's brief rendering of these facts. By underplaying the defendant's brutal childhood and his blood-drenched crimes, the Court makes the defendant's actions seem less horrifying and thus less indicative of mental disturbance; as a result, Tunkey's failure to act seems less culpable. Insofar as Washington's background and crimes are rendered "normal," part of a script, Tunkey's lack of action seems an appropriate response, and is all that could reasonably be required when facing this ordinary case.

4. Legal Lessons Learned from Ricoeur

In summary, what emerges from Ricoeur's three-part process are a number of themes to bear in mind when addressing the facts in appellate opinions. First, the statement of facts in appellate opinions is a linguistic construction rather than an unerring representation of historical

²³⁶ *Id.*

²³⁷ *Id.* at 244. Ricoeur describes narrative, stating:

[I]nasmuch as the actors in a narrative—the characters—are emplotted along with the story, the notion of narrative identification, correlative to that of narrative coherence, too is open to noteworthy transpositions on the historical plane. The notion of a character constitutes a narrative operator of the same amplitude as that of an event. The characters perform and suffer from the action recounted.

Id.

²³⁸ *Id.*

events.²³⁹ Judges write different versions of the facts just as historians construct different and opposed narratives about the same events.²⁴⁰ It is difficult to describe precisely any historical event, and good judges are subject to the same limitations the best historians are.

Second, the way the facts are rendered by a court becomes more important than “what actually happened,” just as the recounting of history in a written text suppresses and surpasses the historical event described.²⁴¹ The reader has no access to the historical event; her only access is to the words that are written down.²⁴² What constitutes a “fact” for the purposes of law is not the transitory and evanescent historical event itself, but rather the description of it reduced to words either by the witnesses on the record, attorneys in their briefs, or the judge in writing the appellate decision.²⁴³ Historical events are fleeting moments

²³⁹ *Id.* at 179. In particular, Ricoeur states:

What is one talking about when one says that something happened? . . . [I]t is to preserve this status of the reference of historical discourse that I distinguish the fact as “something said,” the “what” of historical discourse, from the event as “what one talks about,” the “subject of . . .” that makes up historical discourse. In this regard, that assertion of a historical fact indicates the distance between the said (the thing said) and the intended reference, which according to one of Benveniste’s expressions turns discourse back toward the world. The world, in history, is past human life as it happened. . . . To get there, we need to leave underdetermined the question of the actual relation between fact and event, and tolerate a certain indiscrimination in the employment by the best historians of these terms as standing for each other.

Id.

²⁴⁰ *Id.* at 241-42. Discussing the manner in which historians interpret facts, Ricoeur argues:

The problem is posed that will be the torment of any literary philosophy of history: what difference separates history from fiction, if both narrate? The classic answer that history alone retraces what actually happened does not seem to be contained in the idea that the narrative form has within itself a cognitive function. This aporia, which we can call that of the truth of history, becomes apparent through the fact that historians frequently construct different and opposed narratives about the same events. Should we say that some omit events and considerations that others focus on and vice versa? The aporia would be warded off if we could add rival versions to one another, allowing for submitting the proposed narratives to the appropriate corrections.

Id.

²⁴¹ *Id.* at 241.

²⁴² *Id.* at 242.

²⁴³ *Id.* at 178-79. Ricoeur states:

A vigilant epistemology will guard here against the illusion of believing that what we call a fact coincides with what really happened,

that occupy a definite set of space and time coordinates. These events are observed by different people from various vantage points, and each witness has individual biases and virtues. Naturally, testimony about a given event may diverge. This starting point for all information to be transmitted illustrates the difficulty of determining how a given rendition of the facts corresponds with particular historical events. Once a history is established, once a text is written down, it develops a life of its own.²⁴⁴ When an historical event is enshrined in written record, it endures. The text itself shapes memory of what occurred; its very longevity will eventually “eclipse” the historical event.²⁴⁵

Third, the text’s eclipsing of the historical event makes the drafting of facts particularly susceptible to authorial manipulation, such as the exercise of judicial discretion. Ricoeur’s explanation indicates that there are many ways history or the statement of facts in a case can be constructed.²⁴⁶ As Barak observes, the choice among such narratives is

or with the living memory of eyewitnesses, as if the facts lay sleeping in the documents until the historians extracted them. This illusion . . . for a long time underlay the conviction that the historical fact does not differ fundamentally from the empirical fact in the experimental natural sciences. . . . [W]e need to resist this initial confusion between a historical fact and a really remembered event. The fact is not the event, itself given to the conscious life of a witness, but the contents of a statement meant to represent it.

Id.

²⁴⁴ RICOEUR, HERMENEUTICS, *supra* note 126, at 134 (“The surpassing of the event by the meaning is characteristic of discourse as such.”).

²⁴⁵ *Id.* at 149. Ricoeur argues:

The eclipse of the circumstantial world by the quasi-world of texts can be so complete that, in a civilisation of writing, the world itself is no longer what can be shown in speaking but is reduced to a kind of ‘aura’ which written works unfold. Thus we speak of the Greek world or the Byzantine world. This world can be called ‘imaginary’ in the sense that it is *represented* by writing in lieu of the world *presented* by speech; but this imaginary world is itself a creation of literature.

Id. (italics in original).

²⁴⁶ RICOEUR, MEMORY, *supra* note 126, at 339-40. Ricoeur discusses narrative, stating:

Concerning the narrative, no one is unaware that one can always recount in another way, considering the selective nature of all emplotment; and one can play with different types of plot and other rhetorical strategies, just as one can choose to show rather than to recount. All this is well known. The uninterrupted series of rewritings, in particular on the level of narratives of great scope, testify to the untamable dynamics of the work of writing in which the genius of the writer and the talent of the artisan are expressed together. However, by identifying interpretation and representation without qualification, we deprive ourselves of the distinct instrument of

legal and therefore a proper locus for the exercise of judicial discretion.²⁴⁷ Remington would see the construction of facts as a likely place for the exercise of discretion because it takes place largely out of the public eye, in the judge's chambers; thus, this behavior is unlikely to be regulated and leaves the actor free to make choices he might not otherwise make.²⁴⁸ Remington would also predict the exercise of discretion in drafting facts where the legislature and courts have prevented changing the law in post-AEDPA *habeas* challenges. By restricting the ability to address possible qualms about existing law in these cases, it seems likely that discretion will not disappear but rather shift, not to a different actor in this case, but to a different function performed by the same actor, i.e., the drafting of the facts.²⁴⁹

Before moving from theory to application, one must bear in mind that the choice of factual narratives is a moral one; courts act in ethically important ways when they describe events. Cover addressed the consequences of applying what may seem an abstract legal framework by actors applying the law.

"Law" is never just a mental or spiritual act. A legal world is built only to the extent that there are commitments that place bodies on the line. . . . [T]he interpretive commitments of officials are realized, indeed, in the flesh. As long as that is so, the interpretive commitments of a community which resists official law must also be realized in the flesh, even if it be the flesh of its own adherents.²⁵⁰

As Michel Foucault continually pointed out, discourses of knowledge create that which they describe. Rather than presupposing "the enigmatic treasure of 'things'" before discourse, Foucault reminds us that our speech and our stories have consequences in the real world. The careful interpreter sees "the regular formation of objects that emerge only in discourse."²⁵¹ If our description of a phenomenon acts to create that phenomenon, as description must in a legal system rooted in

analysis, interpretation already functioning at the other stages of historiographical activity.

Id.

²⁴⁷ BARAK, *supra* note 14, at 7, 8.

²⁴⁸ Remington, *supra* note 105, at 75.

²⁴⁹ *Id.* at 99.

²⁵⁰ Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1605 (1986).

²⁵¹ MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE* 47 (A.M. Sheridan Smith trans., 1972).

precedent, then our act of describing is itself subject to moral constraints. How we describe the facts in a case affects not only the immediate litigants before the court but also those whose cases will be affected by the precedent set. The consequences of a dishonest or careless description will be “realized in the flesh” of human beings.²⁵²

V. APPLICATION: HOW CHANGING FACTS CHANGES THE LAW - *STRICKLAND* AND ITS UNEXPECTED PROGENY

To clarify, I would like to resurrect the model of the post-AEDPA stainless steel fact-sorter to determine which facts would permit relief from a *habeas* court on the basis of the crime and representation narratives described by the *Strickland* majority. An honest reading of the facts in Justice O'Connor's opinion reveals that the following combined actions should not result in relief if the *Strickland* rule is unchanged: (1) an attorney's failure to investigate a defendant's family history; (2) an attorney's failure to talk with a defendant's employers; (3) an attorney's failure to consult a defendant's neighbors; (4) an attorney's failure to request psychological experts; and, (5) an attorney's failure to request a presentence report. Furthermore, if one considers facts in the record unmentioned by the Court: (1) the attorney's failure to read a competency report ordered in the instant case; and, (2) his failure to argue at sentencing for even five minutes on these three brutal cases, were not held to support an ineffective assistance claim.

A. *The Rule in Strickland*

Having dealt with the facts, let us now consider the rules or norms at work in these cases. The Sixth Amendment guarantees the accused the right to an attorney.²⁵³ Not until the Supreme Court case of *Strickland v. Washington* did the Supreme Court flesh out important contours of this constitutional right. Although earlier cases stated that such counsel must be “effective,” the Court's pre-*Strickland* decisions considered only affirmative governmental interference with representation rather than

²⁵² Cover, *supra* note 250, at 1605.

²⁵³ U.S. CONST. amend. VI. The text of the Sixth Amendment reads as follows:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.

addressing the substance of the defense attorney's actions or failures to act.²⁵⁴ Justice O'Connor's majority opinion in *Strickland* observed, "[t]he Court has not elaborated on the meaning of the constitutional requirement of effective assistance in . . . those [cases] presenting claims of 'actual ineffectiveness.'"²⁵⁵

Justice O'Connor announced the *Strickland* rule as follows: "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."²⁵⁶ The Court found that this standard also held for a capital sentencing hearing because this proceeding "is sufficiently like a trial in its adversarial format and in the existence of standards for decision."²⁵⁷ This decision has been commonly expressed as a two-part test.²⁵⁸ The first prong requires that the defendant must show that trial counsel's performance was deficient.²⁵⁹ Second, the defendant must prove that this deficient performance prejudiced the defense.²⁶⁰ The test for the deficient performance prong is whether counsel's representation fell below "objective standard of reasonableness."²⁶¹ In applying this test, trial counsel is "strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment."²⁶² The performance prong should be analyzed in light of performance at the time of trial or capital sentencing; by contrast, the prejudice prong is analyzed under existing law at the time of the ineffectiveness challenge.²⁶³

²⁵⁴ *Strickland*, 466 U.S. at 686. "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Id.* See, e. g., *Geders v. United States*, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); *Herring v. New York*, 422 U.S. 853 (1975) (bar on summation at bench trial); *Brooks v. Tennessee*, 406 U.S. 605, 612-13 (1972) (requirement that defendant be first defense witness); *Ferguson v. Georgia*, 365 U.S. 570, 593-96 (1961) (bar on direct examination of defendant). *But see Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance." *Id.* An actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective. *Id.* at 345-50.

²⁵⁵ *Strickland*, 466 U.S. at 686.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 668, 686-87 (footnotes omitted).

²⁵⁸ *Wiggins v. Smith*, 539 U.S. 510, 521 (2003).

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 534; *accord*, *Lockhart v. Fretwell*, 506 U.S. 364, 369-70 (1993).

²⁶¹ *Strickland*, 466 U.S. at 688.

²⁶² *Id.* at 690.

²⁶³ *Lockhart*, 506 U.S. at 369.

B. *While Claiming Adherence to Strickland, Facts Change the Rule in Later Cases*

Initially, the Court expanded the class of relevant facts in the ineffective assistance case of *Williams v. Taylor*.²⁶⁴ The *Williams* Court held that *Strickland*'s deficient performance prong was met by the defendant when counsel "either failed to discover or failed to offer" evidence of mitigation in a capital sentencing proceeding.²⁶⁵ The Court, in reaching its decision, observed, *inter alia*, that counsel did not begin to prepare for the sentencing phase until a week before trial.²⁶⁶ Counsel failed to conduct an investigation that would have uncovered extensive records of the defendant's "nightmarish childhood[.]" including mistreatment, abuse, and neglect in early childhood, as well as testimony that he was "borderline mentally retarded," had suffered numerous head injuries, and might have had "mental impairments organic in origin."²⁶⁷ This failure to investigate was found not to be based on any strategic calculation, but caused by counsels' incorrect belief that the state barred access to these records.²⁶⁸ Even Justice Rehnquist's dissent "assume[d] without deciding that counsel's performance fell below an objective standard of reasonableness."²⁶⁹

That these facts are found relevant in *Williams*, based on a strict application of *Strickland*, is surprising.²⁷⁰ The Court underscores its commitment to the *Strickland* test, maintaining that neither the "clarity of the rule nor the extent to which the rule must be seen as 'established' by this Court" is in any way minimized or "obviate[d]" by the decision.²⁷¹ Nevertheless, the facts cited by the *Williams* Court differ markedly from those considered relevant by the majority in *Strickland*. In *Williams*, the failure to investigate becomes the lodestar of the decision while it was simply a peripheral matter in *Strickland*. The extreme facts in *Williams* permit the Court to base its deviation from *Strickland* on the language of evaluating the facts on a case-by-case basis, but later cases demonstrate a continued willingness to broaden the scope of facts considered.²⁷²

²⁶⁴ *Williams v. Taylor*, 529 U.S. 362 (2000).

²⁶⁵ *Id.* at 393.

²⁶⁶ *Id.* at 395.

²⁶⁷ *Id.* at 370, 395-96.

²⁶⁸ *Id.* at 395.

²⁶⁹ *Id.* at 418 (Rehnquist, C.J., dissenting).

²⁷⁰ *Id.* at 391.

²⁷¹ *Id.*

²⁷² *Id.*

Although the Court in both *Wiggins* and *Rompilla* repeats the holding of *Strickland* as the governing law, and although the governing law in both was subject to the restrictions of AEDPA, the way the Court describes the facts in these cases raises the bar for attorney performance from the position mapped out by the *Strickland* majority.²⁷³ In *Wiggins*, the defendant argued that his attorneys' failure to investigate his background and present mitigating evidence of his unfortunate life history at his capital sentencing hearing violated his Sixth Amendment right to counsel.²⁷⁴ The defendant was found guilty of first degree murder, robbery, and two counts of theft.²⁷⁵ He elected to be sentenced by a jury because he faced the death penalty.²⁷⁶ Before sentencing, his attorneys filed a motion to bifurcate the sentencing hearing in hopes of presenting his defense in two phases.²⁷⁷ Phase one was to prove that *Wiggins* was not a "principal in the first degree," i.e., he did not kill the victim with his own hand.²⁷⁸ If the jury failed to accept this approach, phase two of his defense would have been to present a mitigation case.²⁷⁹

The trial court denied the bifurcation motion and immediately proceeded to the sentencing hearing.²⁸⁰ Despite the defense attorney's promise to the jury that they would hear that *Wiggins* had had a difficult life, counsel introduced no evidence of *Wiggins*' life history.²⁸¹ Before closing, *Wiggins*' other attorney made a proffer to the trial court, outside

²⁷³ See, e.g., *Wiggins v. Smith*, 529 U.S. 510, 521 (2003) (citations omitted). "We established the legal principles that govern claims of ineffective assistance of counsel in *Strickland v. Washington* . . ." *Id.* "Contrary to the dissent's contention, we made no new law in resolving *Williams*' ineffectiveness claim . . . [and the Court noted] that the merits of *Williams*' claim 'are squarely governed by our holding in *Strickland*.'" *Id.* at 522 (citations omitted.) See also *Rompilla v. Beard*, 125 S. Ct 2456, 2462 (2005).

Rompilla's entitlement to federal habeas relief turns on showing that the state court's resolution of his claim of ineffective assistance of counsel under *Strickland* . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . . Ineffective assistance under *Strickland* is deficient performance by counsel resulting in prejudice . . . with performance being measured against an objective standard of reasonableness . . . under prevailing norms.

Id. (citing *Washington*, 466 U.S. at 687-88).

²⁷⁴ *Wiggins*, 539 U.S. at 514.

²⁷⁵ *Id.* at 515.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

of the jury's presence, to preserve the bifurcation motion for appeal.²⁸² In this offer of proof, he detailed the mitigation case counsel would have presented had court granted their bifurcation motion, including psychological records and expert testimony demonstrating Wiggins' limited intellectual capacities and childlike emotional state, the absence of aggressive patterns in his behavior, his capacity for sympathy, and his desire to function in the world.²⁸³ At no point was any of this evidence placed before the jury.²⁸⁴ The jury returned a verdict for the death penalty.²⁸⁵

To support his post-conviction claim, Wiggins introduced testimony of a social worker describing an elaborate social history presentation, including evidence of the severe physical and sexual abuse Wiggins had suffered at the hands of his mother and while in the care of a number of foster homes.²⁸⁶ This report relied upon state social service records, medical and school records, as well as interviews with Wiggins and numerous family members.²⁸⁷ It revealed that Wiggins' mother was an alcoholic who would leave her children alone for days without food, forcing them to beg, eat paint chips, or salvage food from garbage cans.²⁸⁸ She beat the children for breaking into the kitchen, which she kept locked, and had sex with men while her children slept in the same bed.²⁸⁹ On one occasion, she forced Wiggins' hand against a hot stove burner which led to his hospitalization.²⁹⁰ At age six, Wiggins was placed in foster care where he was physically abused by his foster parents, and his second foster father repeatedly sexually molested him and raped him.²⁹¹ At age sixteen, he ran away from foster care and lived on the streets; he returned to foster homes intermittently thereafter, including one where the gang of his foster mother's son raped him on more than one occasion.²⁹²

Despite failing to raise these matters in mitigation, counsel did a great deal of work in this case; however, representation was found to be

²⁸² *Id.* at 515-16.

²⁸³ *Id.* at 516.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 516-17.

²⁸⁷ *Id.* at 516.

²⁸⁸ *Id.* at 516-17.

²⁸⁹ *Id.* at 517.

²⁹⁰ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

ineffective. Counsel represented Wiggins during a four-day trial before the court.²⁹³ Counsel knew of Wiggins' unfortunate childhood because they had available to them the written presentence investigation report prepared by the Maryland Division of Parole and Probation.²⁹⁴ Additionally, counsel "tracked down" records kept by the Baltimore City Department of Social Services "documenting petitioner's various placements in the State's foster care system."²⁹⁵ Counsel also arranged for a psychologist to conduct a number of tests on Wiggins, including an IQ test, and, presumably, the Minnesota Multiphasic Inventory, but "[t]hese reports revealed nothing, however, of [Wiggins'] life history."²⁹⁶ Although these facts do not of themselves prove that the defendant's representation was effective, it does appear that Wiggins' counsel did far more than did Strickland's. Indeed, in comparison to Tunkey's lack of investigation, Wiggins' counsel seem diligent; thus, it is ironic that their representation is found ineffective based on the standard set in *Strickland*.

Similar results emerge in *Rompilla v. Beard*. Rompilla was found guilty of murder and related offenses; the jury found three aggravating factors that weighed in favor of assigning the death penalty.²⁹⁷ Rompilla's evidence in mitigation presented at sentencing included testimony from five family members who argued in favor of "residual doubt, and beseeched the jury for mercy, saying that they believed Rompilla was innocent and a good man."²⁹⁸ Despite the two mitigating factors that rehabilitation was possible and that his "son had testified on his behalf," the jury gave greater weight to the aggravating factors and sentenced Rompilla to death.²⁹⁹

The district court in a later *habeas* proceeding found that the state court had erroneously applied *Strickland* to counsel's performance in the

²⁹³ *Id.* at 515.

²⁹⁴ *Id.* at 523.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Rompilla v. Beard*, 125 S. Ct. 2456, 2460. Specifically, the Court reasoned:

[D]uring the ensuing penalty phase, the prosecutor sought to prove three aggravating factors to justify a death sentence: that the murder was committed in the course of another felony; that the murder was committed by torture; and that Rompilla had a significant history of felony convictions indicating the use or threat of violence. . . . The Commonwealth presented evidence on all three aggravators, and the jury found all proven.

Id.

²⁹⁸ *Id.* at 2460.

²⁹⁹ *Id.* at 2461.

penalty phase, finding that counsel had ignored “‘pretty obvious signs’ that Rompilla had a troubled childhood and suffered from mental illness and alcoholism, and instead had relied unjustifiably on Rompilla’s own description of an unexceptional background.”³⁰⁰ The circuit court overturned the district court’s finding, pointing out counsel’s efforts to discover evidence in mitigation, including:

interviewing Rompilla and certain family members, as well as consultation with three mental health experts. Although the majority noted that the lawyers did not unearth the “useful information” to be found in Rompilla’s “school, medical, police, and prison records,” it thought the lawyers were justified in failing to hunt through these records when their other efforts gave no reason to believe the search would yield anything helpful.³⁰¹

The Supreme Court reversed the Third Circuit opinion on the grounds that counsel’s representation failed to meet the standards set forth in *Strickland*.³⁰² The decision rests on a detailed fact description of errors by trial counsel. Rather than focusing merely on what counsel did or did not do, Justice Souter’s opinion stresses “a number of likely avenues the trial lawyers could fruitfully have followed in building a mitigation case.”³⁰³ Further, counsel should have considered implications from known facts, such as extrapolating the defendant’s long-standing drinking problem from the note in the police reports indicating that he had been drinking at the time of the instant offense.³⁰⁴ The Court found dispositive that counsel failed to examine the court file

³⁰⁰ *Id.* (citation omitted).

³⁰¹ *Id.* (citation omitted). Indeed, the Circuit court noted specifically that Rompilla did far more than did Wiggins’ counsel. *Id.* Justice Souter observed:

The panel thus distinguished Rompilla’s case from *Wiggins v. Smith* . . . Whereas Wiggins’s counsel failed to investigate adequately, to the point even of ignoring the leads their limited enquiry yielded, the Court of Appeals saw the Rompilla investigation as going far enough to leave counsel with reason for thinking further efforts would not be a wise use of the limited resources they had. But Judge Sloviter’s dissent stressed that trial counsel’s failure to obtain relevant records on Rompilla’s background was owing to the lawyers’ unreasonable reliance on family members and medical experts to tell them what records might be useful.

Id.

³⁰² *Id.* at 2467-69.

³⁰³ *Id.* at 2463.

³⁰⁴ *Id.*

on Rompilla's prior conviction, knowing that the prosecution would rely on it in part to make its aggravation case.³⁰⁵ This duty stands in stark contrast to Tunkey's admission that he was not sure he looked at the psychologist's report filed in the case before Strickland was sentenced.³⁰⁶ Similarly, Tunkey apparently did no investigation save talking with the defendant.³⁰⁷

VI. CONCLUSION

The first conclusion to emerge from the foregoing analysis is that facts change the law. The *Strickland* line of cases underscores that, even though the verbal formula used to describe the applicable rule does not change, the legal standard changes. Evidence of this change is that the scope of facts considered as relevant expands greatly in the later cases. Indeed, matters once deemed by the Court as unimportant and irrelevant are now the basis for finding that counsel's representation failed to meet constitutional requirements of effectiveness. Ricoeur's framework explains that judges exercise discretion in these cases by changing the level of abstraction or scale used to describe the historical events underlying the *habeas* proceeding. As judges progressively increase the density of their descriptions, counsel is effectively held to a standard more rigorous than would be required by a fair reading of the original *Strickland* decision. The way the judges describe the relevant facts has changed the law.

A more tentative conclusion also suggests itself. Insofar as Ricoeur unsettles a too-easy reliance on the correspondence between historical events and the facts as found in appellate decisions, his analysis likewise unsettles assumptions made in legal scholarship that the drafting of facts need not be interrogated so robustly as other components of case holdings. Ricoeur's work argues that the forging of legal categories may be as much a matter of scaling and adjusting the density of facts as it is of expanding or contracting proposed legal norms. If this assertion is true, then scholars have here a tool for examining precedent whose reasoning cannot be satisfactorily explained by recourse to the development of norm-driven categories. Facts in appellate opinions are rarely pure and never simple. The legal academy needs to look more closely at the exercise of judicial discretion that characterizes any recounting of historical events in court opinions. In so doing, we may profitably

³⁰⁵ *Id.* at 2463-64.

³⁰⁶ *Washington v. Strickland*, 673 F.2d 879, 888-89 (5th Cir. 1982).

³⁰⁷ *Strickland v. Washington*, 466 U.S. 668, 672-73 (1984).

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recognize that it is a fictional Detective Joe Friday who insists on one's ability to state "just the facts."