Judging Stories

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ABSTRACT

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

Previous commentators have recognized that law is infused with stories, from the narratives of litigants, to the rhetoric of lawyers, to the tales that judges interpret and create in the form of written opinions. This Article builds on those insights to address the problems posed by transnational speech and the question of which norms apply to inflammatory publications transmitted across borders. This piece introduces the term “master story” to make three related claims. First, states produce and rely upon constitutive legal narratives that define political culture and shape the contours of permitted and forbidden speech. Second, judges play a unique role in constructing master stories. Increasingly, however, geographically and temporally removed tribunals are called upon to adjudicate hateful expression from outside the master story, a process that invites a reappraisal of the balance between free speech and the threat of dignitary harms. Third, courts and tribunals are beginning to use incitement to genocide – but not hate speech – to write a new master story. Channeling international human rights law and norms, judges are supplanting exhortations of hatred with the language of reason in an effort to develop a body of transnational legal rules, a new nomos for an interconnected world.

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INTRODUCTION

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

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1 PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES*: *STORIES FROM RWANDA* (1998).
language has been a central element of the “crime of crimes.”

In Rwanda, no one knew this better than Leon Mugesera, a one-time politician practiced in the use of coded double-speak. In November 1992, at a time of heightened tensions between the largely Hutu Mouvement Républicain National pour la Démocratie et le Développement, (MRND) and the mainly Tutsi Rwandan Patriotic Front (RPF), Mugesera delivered an incendiary speech to a crowd of more than a thousand supporters. In the course of his address, Mugesera posed the now infamous question: “Why do we not exterminate all of them [meaning Tutsis]? Are we really waiting until they come to exterminate us?”

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

In April 1994, Hutu extremists committed genocide over a 100-day period, killing almost a million Tutsis and moderate Hutus. At approximately the same time, Mugesera was discovered living in Quebec where he had taken a job as a professor of linguistics at Laval University, the same institution where he had studied as a graduate student. Alerted to his presence by Rwandan émigrés, Canadian officials initiated proceedings

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5 Rikhof, Hate Speech and International Criminal Law, 3 J. INT’L CRIM. JUST. at 1122; Mugesera v. Canada (Minister of Citizenship and Immigration) (2003), [2004] 1 F.C. 325 (at ¶ 227)(ordering the deportation of Mugesera).


to deport him on the ground that his 1992 speech constituted a criminal act which rendered him inadmissible to the country. The court of first instance, as well as two subsequent tribunals, found Mugesera deportable on the basis of the Kabaya speech but in 2004, a three-judge panel of Canada’s Federal Court of Appeal held that the lower courts had accepted a biased translation of the address and were “patently unreasonable” in their finding that he had incited violence.

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

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

The study of stories holds the potential to reframe the debate surrounding allowable speech. Instead of a content-centric analysis that

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9 Section 19 of Canada’s Immigration Act excludes persons “who there are reasonable grounds to believe have committed an act or omission outside of Canada that constituted a war crime or a crime against humanity within the meaning of subsection 7(3.76) of the Criminal Code . . .”


looks solely at what is or may be said, a focus on narrative calls attention to the diverse inputs – history, the activation of context, the form and structure of argument and the role of the speaker – that influence the receipt of speech. A narrative-based approach also makes clear that law is more than rules and policies – it is itself a collection of outputs – lessons, performances, and linguistic exchanges. Nearly thirty years after Robert Cover’s Nomos and Narrative and sixteen years after Paul Gewirtz’s and Peter Brooks’ publication of Law’s Stories, the trials of Leon Mugesera demonstrate that the study of language and rhetoric remains an essential component of the construction, evaluation and expression of law.¹³

This article offers a three-part analysis of the multidirectional relationship between dominant tales and the operation of law. Part I uses the anti-Tutsi polemic at the heart of the Mugesera drama to introduce the concept of ‘master stories,’ legally-supported narratives that are intimately connected to national myths and historical experience.¹⁴ Master stories are so powerful that they contribute to the definition of political cultures, the domestic interpretation of hateful expression and the absorption of contradictory legal sources. Equal parts legal history and communal fable, master stories offer nuanced explanations for the interstices of permitted and forbidden speech.

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


Part III explores the phenomenon through which an expanding universe of legal authorities is beginning to contribute to a worldwide judicial narrative. Channeling international human rights law and norms, courts and tribunals are using incitement cases to develop a new regulatory language for an increasingly globalized audience. The jurisprudential displacement of incitement – but not hate speech – in the name of universal values is an expressive enterprise, a conscious attempt to use judicial language to transform local hatred into a body of transnational legal rules, a new nomos for an interconnected world.

I. THE MAKING OF MASTER STORIES

There are two intertwined stories at work in this saga, Leon Mugesera’s anti-Tutsi rant and Guy Bertrand’s paranoid tale of Jewish influence on the Canadian judiciary. Each represents a particular form of threat, each emerges in a specific context for a particular audience, and each receives a distinct juridical treatment. Rather than asking whether a common hatred animates anti-Tutsi and anti-Semitic thought, this article addresses the ways that stories make demands upon diverse listeners and the socio-legal consequences of receiving those messages. Speech occurs through many channels – verbal utterances, written publications and electronic messaging are all carried through multiple media, ever more frequently in memorialized, searchable and transmittable forms. But the core notion of conveying ideas through language does not change; story and narrative are central to meaning.

A. Two Tales

i. The Rwandan Speech

Mugesera delivered his November 1992 speech in person before a large crowd at a party meeting in the town of Kabaya, in the Rwandan prefecture of Gisenyi. By all accounts, Mugesera was impassioned, commanding and effective in his use of stories. Read in its entirety, Mugesera’s address represents a compilation of personal and political grievances designed to demonize Rwanda’s Tutsi minority. Mugesera refers to Tutsis exclusively as inyenzis (cockroaches), a term freighted with historic and interethnic invective.15 In Alexander Tsesis’ parlance, Mugesera succinctly

15 Mugesera’s resort to the language of ‘verminization’ exemplifies Mikhail Bakhtin’s notion of genre memory – in which an anti-Tutsi diatribe draws on the register of anti-Semitism, complete with the same degrading referents. MIKHAIL BAKHTIN, PROBLEMS OF
“synthesize[d] a semantic designation to create ideologies easily understandable to the audience because they appeal to their emotional impulse to find a vulnerable target on whom to vent frustrations.”

The speech combined specific warnings, “Beware of kicks by the dying M.D.R.,” with disparaging comments about individuals, “the thief Twagiramungu,” and heavy use of accessible homilies “Hyenas eat others, but when you go to eat them they are bitter!” and “When you allow a serpent biting you to remain attached to you with your agreement, you are the one who will suffer!” Insofar as Mugesera’s speech combined strident moralism, slang, and advocacy of awakening and action to protest perceived corruption, it followed the conventions of the rhetorical form of a diatribe. Mugesera then shifted focus and directed part of his remarks to the absent Tutsi population. “Your home is in Ethiopia,” Mugesera thundered, “we will send you by the Nyaborongo so you can get there quickly.” For Hutus in attendance, the invocation of the Nyaborongo river was a well-understood storytelling reference to the site of previous massacres, a vocal reminder to the crowd that Rwandan history is littered with the corpses of ethnic violence.

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


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


20 ALAIN DESTEHE, RWANDA AND GENOCIDE IN THE TWENTIETH CENTURY 49 (1995)(acknowledging that during the 1994 genocide, Tutsi corpses were in fact thrown into the Nyaborongo river).

21 See e.g., RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 1081 (1961); Kenneth Marcus, ACCUSATION IN A MIRROR, 43 LOY. U. CHI. L.J. 357 (2012)(pointing to the
Mugesera’s speech made liberal use of the enthymeme, a deliberately incomplete syllogism. Aristotle defined an enthymeme as a device through which speakers capitalize on semantic familiarity to tell persuasive stories. Because the audience knows something about the context in which the storyteller’s claim is referenced (but not completely spelled out), the listeners take an inferential leap and fill in the missing conclusion. The success of enthymes depends on the speaker’s ability to predict that audiences will insert premises or conclusions derived from a shared understanding of community stories.

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

ii. Guy Bertrand’s Speech

The second speech, Guy Bertrand’s conspiratorial yarn, was framed by the convention of a legal pleading, but it too recalled a deep and abiding story, the pernicious myth of Jewish influence in a secular state.

discovery in the Butare prefecture in Rwanda of a note advising Hutus to accuse Tutsis of planning massacres as a means of facilitating the planned genocide.

22 In its simplest sense, an enthymeme is a “portion[] of an argument [that is] …not expressed at all. RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING 61 (3rd ed. 1997).


24 See Scott Brewer, Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy, 109 HARV. L. REV. 925, 984 (1996)(enthymematic rhetoric is strategically incomplete, that is, “any argument - valid or invalid, deductive or nondeductive - the logical form of which is not perspicuous from its original manner of presentation.”)

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

26 DES FORGES, “LEAVE NONE TO TELL THE STORY”: GENOCIDE IN RWANDA” supra note at .

27 This paper refers to the abuse of process motion as belonging to Bertrand. The Rwanda speech was Mugesera’s alone; although in some sense Mugesera is responsible for
Mugesera’s motion seized on the presence of the Canadian Jewish Congress (CJC) and Human Rights Watch (HRW) as interveners in the deportation appeal to make two claims. The first accused Canada’s Minister of Justice, the Hon. Irwin Cotler, of orchestrating his client’s removal as the product of a 1999 human rights conference held at McGill Law School (convened by then-professor Cotler) to discuss genocide in comparative perspective. Bertrand’s second claim was that the entire Canadian Supreme Court suffered from an apprehension of bias owing to the presence on the Court of Madame Justice Rosalie Abella. Prior to Bertrand’s submission, Justice Abella recused herself from considering the appeal because Justice Abella’s husband is a past chair of the CJC. Bertrand’s motion treated Justice Abella’s decision as an admission of wrongdoing and included an affidavit submitted in support of the motion by James Kafieh, the Chair of the Canadian Arab Federation, which declared that Justice Abella was a self-confessed member of the worldwide “Jew-diciary.”

Bertrand’s treatment of Canadian Jewish organizations was intentionally opaque. The submission juxtaposed an image of Mugesera and his children with the members of a supposedly vast conspiracy, a classic illustration of antilocution in practice. In so doing, Bertrand engaged in a

both expressions, I distinguish the two stories by attributing responsibility for the Canadian pleading to Bertrand, the lawyer and immediate author of the motion.

28 Justice Abella’s parents were Holocaust survivors and she is married to Professor Irving Abella, an historian of the Holocaust and the co-author of NONE IS TOO MANY, a chronicle of Canada’s immigration policy toward European Jews in the period 1933-1948.

29 The CJC has a lengthy history of involvement in Canadian immigration proceedings involving accused Nazis. See e.g., Canada (Minister of Citizenship and Immigration) v. Tobiass (T.D.), [1996] 2 F.C. 729.

30 Affidavit of M. James Kafieh, 19 November 2004, filed in Citizenship and Immigration (Canada) v. Mugesera, Numéro de dossier 30025.

31 The centerpiece of Bertrand’s motion was a graphic that purported to detail a system of parallel justice. The exhibit presented an illustrated schema containing two flow-charts separated by a bright line. At the top of the chart, literally above-board, is a portrait of a well-dressed and smiling Mugesera family as well as an organizational description of formal legal proceedings leading up to the Supreme Court hearing. The bottom half of the chart contains a second flow-chart asserting that prominent Canadian lawyers and others – virtually all of whom are Jewish – had engaged in a system of parallel justice. The alleged conspirators were connected to one another by their public and volunteer positions, as well as their attendance at the 1999 McGill conference. The line separating the two alleged systems of justice is captioned with the underlined, all caps warning, “EXPULSION = TORTUES ET MORT” (deportation = torture and death). A thick arrow with the words “puissante influence … un processus obscur et politique” points to the participants on the bottom half of the page to the Supreme Court hearing. Note to editors: I have a copy of the one-page exhibit which you may want to reproduce.

32 GORDON ALLPORT, THE NATURE OF PREJUDICE (1954)(defining antilocution to
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well-traveled form of hate speech, recycling the canard of the Jew as plotting outsider intent on using state power for nefarious purposes.

B. The Logic of Stories

i. Individual stories

A growing body of interdisciplinary literature attests to the cultural significance of stories, a term perhaps best defined as a character-based telling of efforts, over time, to reach a goal.33 “At the very least, a story needs a protagonist, an antagonist, and a difficult challenge to overcome.”34 It is through stories that myths and parables are told and retold, that meaning is communicated and epistemic communities founded. Stories, according to Kendall Haven, are more effective and powerful than any other narrative structure; stories always have a message and readily conjure understanding in a reader, viewer or listener’s mind. “Human minds … rely on stories and on story architecture as the primary roadmap for understanding, making sense of, remembering, and planning our lives – as well as the countless experiences and narratives we encounter along the way.”35 The best stories have “an initial state or setting (“Once upon a time…”), protagonists, a problem that sets up what will be the central plot or story line, obstacles, often a clash between the protagonists trying to solve the problem and those who stand in their way or fail to help, and a denouement, in which the problem is ultimately resolved.”36 Through this narrative structure, Haven claims, human beings perceive, think and learn.

Stories animate human life in a way that bare facts cannot. But even as stories promote personal vindication and potential reappropriation for the disempowered, there is nothing sacred to the form. False stories are difficult to repudiate, particularly when they are decontextualized or appear without immediate explanation. Daniel Farber and Suzanna Sherry have recognized that the rhetorical form of “stories can ‘tak[e] the other in, deflecting her on unacknowledged, perhaps deliberately hidden grounds.’ …Thus, the accounts may be mistaken or distorted. Stories tend to “favor

34 Linda H. Edwards, Once Upon a Time in Law: Myth, Metaphor, and Authority, 77 Tenn. L. Rev. 883, 886 (2010)(using creation stories and rescue stories to illustrate how legal arguments are informed by myths, parables and other culturally pervasive stories).
35 Id. at vii.
those who are near at hand,” ignoring more distant voices. Sometimes the deception, whether intentional or not, is the result of treating complex human dramas as morality plays. Occasionally, it stems from willful ignorance.”  

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

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

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42 Narrative functions as a synonym for story but a more accurate definition for the term is the way in which events are organized or how a story is told. Narrative embodies description, repetition and passion, all infused with the author or speaker’s perspective and editorial choices. The creation of any narrative involves the mediation, muting or amplification of details. Seymour Chatman, *What Novels Can Do That Films Can’t (And Vice Versa)* in *FILM THEORY AND CRITICISM* 435-36 (Leo Braudy and Marshall Cohen eds. 1999)(“[A]ll narratives, in whatever medium, combine the time sequence of plot events, the time of the *histoire* (“story-time”) with the time presentation of those events in the text, which we call “discourse-time.” What is fundamental to narrative, regardless of medium, is
typology of stories that includes “stories that bridge, providing connections between people of different experience, stories that explode (like grenades) certain ways of thinking, stories that mask, devalue or suppress other stories, stories that consolidate, validate, heal, and fortify (like therapy), and even stories that maim or ‘spirit murder’ and so should not be told at all.”

Stories are important because they are remembered whereas other forms of narrative ordering are not.

ii. Group stories

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

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

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

As journalist Linda Melvern describes the Rwandan colonial endeavor, “[i]n 1933, the Belgian administration of the Great Lakes region organized a census. Teams of Belgian bureaucrats arbitrarily classified the whole population as Hutu, Tutsi or Twa, giving everyone an identity card with the ethnic grouping clearly marked. Every Rwandan was counted and measured: the height, the length of their noses, the shape of their eyes.” Belgian colonists solidified the minority Tutsis as a ruling administrative class, a process that marginalized persons identified as Hutu. Enshrined in the 1926 Mortehan Law, the Tutsis’ hierarchical position vis-à-vis Hutus meant that by the time Belgium formally withdrew from Rwanda in 1959, forty-three chiefs out of forty-five were Tutsi as well as 549 sub-chiefs out

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47 Cover referred to the use of counternarratives as a “hermeneutic of resistance or of withdrawal.” Robert M. Cover, *Nomos and Narrative*, 97 Harv. L. Rev. at 53.


50 Jonathan Safran Foer, *Why a Haggadah?* The New York Times, March 31, 2012 (“Though it means “the telling,” the Haggadah does not merely tell a story: it is our book of living memory. It is not enough to retell the story: we must make the most radical leap of empathy into it. “In every generation a person is obligated to view himself as if he were the one who went out of Egypt,” the Haggadah tells us.”)

51 ALEXANDER TSESIS, *DESTRUCTIVE MESSAGES: HOW HATEFUL SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS* 100 (2002)(examining the danger posed by the undifferentiated blame of an entire ethnic group and the tactic of employing degrading slurs to amplify blame and vilification).

Belgian administrators, like the German colonists before them, embraced myths related to the source of the Nile and supposed non-native character of certain populations in the area. In this story, Josias Semujanga observes, Rwandan Tutsis “were not indigenous, but rather descendents of Ham, the son of Noah who went south to bring civilization to the “inferior races” of the black continent.” Little wonder that in 1957 a group of Rwandan intellectuals published the “Bahutu Manifesto” decrying the humiliation and socioeconomic subordination of the Hutu community. In 1962, following three transition years marked by reciprocal ethnic massacres that displaced large numbers of Tutsis, deep-seated Hutu grievances propelled Grégoire Kayibanda to the Presidency of newly independent Rwanda. Many of the one-time Tutsi elites dispersed to Uganda, Burundi, Tanzania and Zaire where they organized as political parties in exile.

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

Powerful speakers have long engaged in these kinds of linguistic assaults; in both Nazi Germany and the former Yugoslavia, the consequences of storytelling and story-consumption were deadly. At

55 See BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 1983 (theorizing that the rise of vernacular and print capitalism tied the people of early modern Europe together such that nationalism could become possible).
56 PHILIP GOUREVITCH, WE WISH TO INFORM YOU at 97.
59 ALISON DES FORGES, “LEAVE NONE TO TELL THE STORY”: GENOCIDE IN RWANDA 84 (1999); see also Susan Benesch, Vile Crime or Inalienable Right: Defining Incitement to Genocide, 48 VA. J. INT’L L. 485, 503 (2008)(noting Slobadan Milosevic’s reference to
Nuremberg, Julius Streicher, the notorious publisher of Der Stürmer, was convicted of inciting hatred and discrimination. The Tribunal held that Streicher used the newspaper to dehumanize Jews while simultaneously desensitizing the German public to increasingly vitriolic condemnation. “The aim of Der Stürmer was to attack, denounce, and promote discrimination against Jews in every way possible,” the Tribunal found before sentencing Streicher to be hanged for his crimes.\(^60\)

Fifty years later, Slobodan Milosevic was indicted and tried for the commission of crimes against humanity and war crimes at the International Criminal Tribunal for the former Yugoslavia.\(^61\) The ICTY accused Milosevic of encouraging, enabling and failing to prevent his forces from committing atrocities in Kosovo, all acts which relied critically on a story of glorified Serbian identity and the alien Muslim. Long before the violent dissolution of Yugoslavia, Milosevic paid a visit to Kosovo in which he began to develop his mythic tale of an exclusively Serbian “people.” In a speech outlining the Serbian claim to Kosovo, Milosevic made use of the suppressed enthymematic premise by appealing to the ‘topos’ (a place, metaphorically, shared in the collective consciousness of the audience) found in his followers.\(^62\) According to Christina Morus, “Speaking near Kosovo Polje, Milosevic invoked the Serbian mythology that portrayed Kosovo as the historic homeland of the Serbs that was taken from them by the Turks in the ultimate mytho-historic tragedy.”\(^63\) Milosevic placed the legendary 1389 Battle of Kosovo Polje – a Turkish victory over Serbian ‘martyrs’ – at the center of his rhetorical strategy. Milosevic soon developed an applause-line about Serbian resistance and a claim to contested lands, a story he sold successfully to a receptive Serbian media.\(^64\) The ethnonationalist identity created by Milosevic’s speech was not formed from scratch but was “based on existential subjectivities that ha[d] in some way lost their force,” characters in a nearly forgotten tale.\(^65\) Indeed,

Bosnian Muslims as “black crows” and the Nazi propaganda that called Jews “germs, pests and parasites)


\(^62\) Ed Dyck, Topos and Enthymeme, 20 RHETORICA 105, 106 (2002).


\(^64\) Agneza Bozic-Roberson, Words Before the War: Milosevic’s Use of Mass Media and Rhetoric to Provoke Ethnopolitical Conflict in Former Yugoslavia. 38 EAST EURO Q. 395 (2004).

\(^65\) Morus, Slobo the Redeemer, 72 SOUTHERN COMM. J. at 7.
Milosevic’s story-formation was so powerful that when Michael Ignatieff asked Serbs and Croats in the former Yugoslavia to explain their grievances, he was uncertain whether their answers related to present-day problems or stories rooted in the 14th Century.66

Like Streicher and Milosevic, Mugesera told a story that operated on the ethnic fault lines of society. Through repetition, demonization and the use of specific references to a contested history, Mugesera summoned invented Tutsi/Hutu differences, a divide that has defined Rwandan culture since the colonial era.67 Drawing on this history, Mugesera’s 1992 warning of a looming Tutsi invasion both revisited past subjugation and anticipated a future reckoning.68 Mugesera’s narrative, like all effective stories, occurred against the backdrop of established knowledge structures including folktales, metaphors and allegory that create the environment in which events and ideas are interpreted. As Linda Berger observes, “once a story is embedded in tradition and culture, the die is cast and you no longer have to tell the tale, you can simply use the name of the character or the title of the story as a metaphor, and the plot, characters, and moral will follow, appearing to be logical entailments.”69 In this vein, Mugesera’s story of exile, return and domination fit comfortably within a template known to audience and speaker alike.

iii. National storytelling

Nations tell stories too. The process of telling and retelling sacred and quasi-sacred histories produces stories about law and law about stories. The foundational stories of states embody communal norms that are the product of hard experience and particular traditions. Robert Cover taught that what is said and unsaid in the public arena is intimately connected to the myths and texts that form the ideology of the modern state.70 In this respect, laws

70 Robert Cover wrote three articles that involved some element of story: Nomos and Narrative, The Folktales of Justice: Tales of Jurisdiction, and Violence and the Word. See Michael Ryan, Meaning and Alternity in Narrative, Violence and the Law: The
governing speech and silence reflect the exercise of power and socially-constructed meaning.\textsuperscript{71}

Referring to the United States, Cover declared, “Many of our necessarily uncanonical historical narratives treat the Constitution as foundational – a beginning – and generative of all that comes after…it is a center about which many communities teach, learn and tell stories.”\textsuperscript{72} The creation of legally dominant stories places alternative understandings in opposition to both the law and the state. In this universe, there can be no plurality of official narratives, no multiplicity of jurisgenerative activity, and no genuine dispute between meanings.

National epics are constitutive and explain the practice of story regulation, a sphere in which law has chased language for centuries. In short, speech regulation confers legitimacy on some narratives at the expense of others. Comparative legal scholars agree that the subject matter and level of protection afforded free speech nationally differs considerably across sovereign states, even among democracies with similar legal traditions.\textsuperscript{73} As Vicki Jackson concludes, “[n]ational legal cultures … express themselves in the contours of what communication they protect and what they do not, in ways that may confound conceptual or functional comparisons.”\textsuperscript{74} While some commonalities exist, for example exhortation to immediate violence is almost universally prohibited whereas conversations of a private nature are usually unregulated, globally there is no harmonization of speech standards.\textsuperscript{75} In many states, particular forms of

\textsuperscript{71} Cover famously argued that as specific communities and movements develop challenges to the unity of legal meanings, law becomes “jurispathic,” destroying alternate understandings. \textit{Cover, Nomos and Narrative}, 97 \textsc{Harv. L. Rev.} at 40.

\textsuperscript{72} \textit{Id.} at 25.

\textsuperscript{73} Kevin Boyle, \textit{Hate Speech – The United States Versus the Rest of the World?} 53 \textsc{Me. L. Rev.} 487 (2001).

\textsuperscript{74} VICKI JACKSON, \textsc{Constitutional Engagement in a Transnational Era} 186-87 (2010). See also DEBORAH E. LIPSTADT, \textsc{Denying the Holocaust: The Growing Assault on Truth and Memory} 2 (1994)(asserting that Holocaust denial laws have a particular resonance for Germany and Austria that do not exist elsewhere).

storytelling, either generally or as related to specific historical events, are illegal. This practice extends to the utterance of identifiable words or the depiction of certain images that fall far short of incitement to genocide. Even where the operation of a governing Constitution or legislation that purports to respect freedom of expression exists, the suppression or criminalization of local speech by municipal or domestic authorities is commonplace.

However, since the stories subject to control vary dramatically from state to state, and relatively few instances of communication are in fact forbidden, the question arises why some forms of expression provoke legal sanctions where others do not. Across cultures, master stories provide an explanation for a society’s choice to police language. I use the term “master story” consciously; it describes the way in which certain tales and semantic constructions serve as a touchstone for political communities. Master stories define national cultures and situate individuals within rich social constructs. They are the product of founding bargains, consistent interpretations and/or violence that has ruptured the nation’s historic frame.

Master stories derive their dominant character through the interaction of public expressions and legal institutions. The use of governmental power invests selective stories, memories and experiences with the authority of the state. Without discounting the importance of oral traditions or the strength of fables that are passed from generation to generation, only the force of law, sometimes exercising coercive power to solidify unstable narratives, can convert some discussions and silences but not others into

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76 My use of the term ‘master story’ is informed by the notion of a master image, see JOSPEH McBRIDE, STEVEN SPIELBERG: A BIOGRAPHY 17 (2010)(defining a master image as a single snapshot that encompasses the essence of the film) and Drew Westen’s construct of a ‘master narrative’ necessary to communicate coherent political messages. See DREW WESTEN, THE POLITICAL BRAIN, supra note ____. The phrase ‘master story’ is also used by Michael Goldberg in his article Against Acting ‘Humanely’, 58 MERCER L. REV. 899 (2007) and Linda L. Berger, How Embedded Knowledge Structures Affect Judicial Decision Making, 18 S. CAL. INTERDISC. L.J. at 268, to identify a narrative that embodies the history and traditions of a people.

master stories. In the absence of legal codification, founding fictions and other cultural texts are subject to a broad range of interpretation.\(^ {78}\) And when every story is treated equally, as in an anti-discrimination regime that reduces all forms of oppression and resistance to a common framework, there is no way of distinguishing one from another.\(^ {79}\) Master stories therefore do more than create individual and collective consciousness – they wed law and narrative to institutionalize social meaning.

Master stories also require a believable narrative that resonates for the nation as a whole (they cannot be too geographically-specific or selectively meaningful). The contrast “between those whose self-believed stories are officially approved, accepted and transformed into fact, and those whose self-believed stories are officially distrusted, rejected, found to be untrue, or perhaps not heard at all,” in Kim Lane Scheppel’s analysis, differentiates master stories from tales that resonate for some groups but not others.\(^ {80}\)

Lastly, master stories need a heuristic vitality that extends beyond mythology. They must be retold over time in order to work their way into institutional form as well as a nation’s collective consciousness. Literary critic Homi Bhabha has argued that “Nations, like narratives, lose their origins in the myths of time and only fully realize their horizons in the mind’s eye.”\(^ {81}\) Those horizons, the contours of what constitutes a state, are shaped by living stories and crystallized in the form of statutes and other legal reminders. At the level of Constitution-drafting and the creation of institutional meaning, Frederic Schauer is surely right that the legalization of certain stories is “dependent on a cultural categorization of particular events that varies with cultural experience and cultural history.”\(^ {82}\) Concretely, the operation of Indonesia’s criminal blasphemy law, in effect since 1965 in a country of more than 200 million Muslims and enshrined in Article 156(A) of the Penal Code, tells a different story than the legal response to the 2002 Bali bombings, however significant the attack may have been.\(^ {83}\) The passage of time thus fixes master stories in the state’s

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\(^ {81}\) HOMI K. Bhabha, *NATION AND NARRATION* 1 (1990)


\(^ {83}\) Article 156(A) of Indonesia’s Penal Code is based on Law No. 1/PNPS/1965; it assigns up to five years in prison for anyone who “deliberately in public gives expression
collective identity.

C. Master Stories in Comparative Perspective

In South Africa, the legacy of apartheid and its subsequent repudiation represents a master story, now reflected in the multiple equality guarantees of the nation’s legal framework and the authoritative account of statist oppression provided by the six volumes of the country’s Truth and Reconciliation Commission.\(^{84}\) That story is told repeatedly in the 1996 Constitution which begins in the Preamble with, “We, the people of South Africa, recognize the injustices of our past…”\(^{85}\) To educate the next generation of South Africans about the horrors of apartheid, the country’s new Constitutional Court was built with bricks of the adjacent Old Fort Prison Complex in Johannesburg. Tour guides there recount the story of Mahatma Gandhi’s and Nelson Mandela’s unjust incarceration at the notorious facility. South Africa’s equality narrative is strong enough that Julius Malema, the popular and influential head of the African National Congress youth wing, was recently convicted of hate speech for singing a song called “Shoot the Boer.”\(^{86}\)

Likewise, for the many European states subjected to Nazi occupation and eliminationist policies, public discussion and teaching of the Holocaust is governed by law. The Nazi Party has been outlawed in Germany and Austria.\(^\text{87}\) In France, the sale of Nazi paraphernalia is banned, a prohibition that extends to flags, swastikas, images of Adolph Hitler and copies of *Mein Kampf*.\(^\text{88}\) Dutch and German legislation forbids dissemination of racist and anti-Semitic pamphlets, a ban which has withstood scrutiny from domestic to feelings or commits an act: a) which principally has the character of being at enmity with, abusing or staining a religion, adhered to in Indonesia; or b) with the intention to prevent a person to adhere to any religion based on the belief of the almighty God.”

\(^{84}\) Truth and Reconciliation Commission of South Africa Report (2003), produced pursuant to the Promotion of National Unity and Reconciliation Act, No. 34 of 1995.


\(^{87}\) Strafgesetzbuch [Stgb] [Penal Code], Nov. 13, 1998, Bundesgesetzblatt, [BGBl. I] 3322, amended, §130(3), (Ger.) (criminalizing the Nazi party and other activities); Österreich, StGB 13/1945, amended version BGB1 148/1992, (Feb. 19, 1992) (Austria) (criminalizing the National-Socialist German Workers’ Party, which forms the legal basis for prosecution of racist actions and incitements of the Nazi ideology).

\(^{88}\) Healing the Wounds: Speech, Identity & Reconciliation in Rwanda and Beyond Conference (Mar. 30, 2009) at 32 (report on file with the author).
courts and the now-defunct European Human Rights Commission.  

In Algeria, Pakistan, Saudi Arabia, Sudan and Nigeria, master stories criminalize insults to Allah and other forms of “blasphemy” directed to holy personages, religious artifacts, and other expressions and customs of the Muslim faith.  

To enforce the law of the Kingdom, Saudi Arabia recently requested that Malaysia arrest and deport Saudi journalist Hamza Kashgari for his writing about an imaginary meeting with the Prophet Muhammad in a series of posts on Twitter.

Thailand, for its part, provides a secular analog by banning overt criticism of the King in its 2007 Constitution, a master story in the form of a person.  

Spain too passed a 2007 law recognizing and enlarging the rights of victims of the Spanish civil war and dictatorship and establishing measures in their favor, a law that appears to legitimate the suffering of victims in a highly contested history (Ley de Memoria Histórica).

Canada’s master story involves language and the ongoing relationship between the use, promotion or subjugation of French and English.  

Language has been the defining characteristic of the Canadian experiment, it is linguistic accommodation that is enshrined in the Canadian Charter of Rights and Freedoms above all else, and the special status of language rights distinguishes Canada’s anti-discrimination framework.

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90 Article 144 bis 2 of the Algerian Penal Code provides an example of the prohibition on insults against Islam or the prophet Muhammad; “most blasphemy cases are brought under this provision, usually against nonpracticing Muslims or those failing to adhere to the state-sanctioned interpretation of Islam.” POLICING BELIEF: THE IMPACT OF BLASPHEMY LAWS ON HUMAN RIGHTS, A FREEDOM HOUSE SPECIAL REPORT 13 (2010).


92 Section 8 of the 2007 Constitution of Thailand provides that, “The King shall be enthroned in a position of revered worship and shall not be violated. No person shall expose the King to any sort of accusation or action.” CONSTITUTION OF THAILAND, [BE] 1997, sec. 8 (Thail.).


94 See e.g., Quebec’s Charte de la langue francaise, Bill 101 (1977) (defining French as the official language of the province of Quebec and framing fundamental language rights).

95 Section 23 of the Canadian Charter guarantees minority language education rights; Denise Reasume & Leslie Green, Education and Linguistic Security in the Charter, 34 McGill L.J. 778 (1989). Many other Canadian stories need to be told, first among them
Canada had achieved independence, ministers from English-speaking Upper Canada rebuked French-Canadians from Quebec for speaking French in the Colonial Assembly. The British North America Act of 1867 enshrined Quebec’s right to a civil code but failed to dispel Quebecois suspicions of second-class citizenship, notwithstanding the Section 93 guarantee of free, public Catholic education. So deep are resentments that the province’s first sovereigntist Premier, Rene Levesque, famously referred to the history of Quebec as a history of conquest. In response, Canada’s 1982 Charter devotes fully seven of the first 23 sections to language rights and today Quebec’s unique linguistic status is protected by the requirement that three judges of the Supreme Court of Canada come from the province.

As former Supreme Court Justice Michael Bastarache concludes, “In Canada, language is regarded as a fundamental element of cultural identity. The linguistic right is in essence the right to resist assimilation” where to do so would result in the dominance of English language and culture.

In the United States the transcendent narrative concerns race, a “truth” so central that it has become infused in the birth story of the republic. Both Milner Ball and Garry Wills portray Lincoln’s 1863 Gettysburg Address as a self-conscious story with nation-building ramifications. Ball suggests that Lincoln’s opening, “Fourscore and seven years ago” – a fairy tale-like construction – was a reference not to 1789 and the adoption of the Constitution [which enshrined slavery], but to 1776 and the Declaration of Independence. “In that beginning the nation had been dedicated to the systematic subjugation and forced assimilation of aboriginal people, but the legal treatment of indigenous rights has historically paled in comparison to questions of language. See John Borrows, Contemporary and Comparative Perspectives on the Rights of Indigenous Peoples: Indigenous Legal Traditions in Canada, 19 WASH. U. J.L. & POL’Y 167 (2005); JEREMY WEBBER, REIMAGINING CANADA: LANGUAGE CULTURE, COMMUNITY, AND THE CANADIAN CONSTITUTION (1994).

See also, JOSPEH J. ELLIS, FOUNDING BROTHERS 89 (2000) (“If the Bible were a
“proposition” about equality.”103 Wills further deconstructs the Address to draw substantive and formal parallels between Lincoln’s speech and another famous sermon, Pericles’ Funeral Oration during the Peloponnesian war.104 Just as Pericles utilized the epideictic form to contrast the mortality of the fallen Athenian soldiers with the immortal uniqueness of Athens, so did Lincoln, in praise of those who gave their lives that a nation might live, juxtapose the dead with the timelessness of their cause, the master story of a nation founded upon equality.105 In Wills’ account, the story-based retelling of an America at war over race was necessary to imagine a nation liberated from its past. On the heels of the Dred Scott decision,106 Lincoln’s story was a narrative bridge to the 13th and 14th Amendments, and much later, to Brown v. Board of Education107 and the Civil Rights Act of 1964.108

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

D. Resisting Alternative Stories

Political communities organized around master stories do more than reflect national values in law; they actively guard against the communication of unofficial histories. Thus for nearly a century Turkey has disputed the characterization of the systemic massacres and widespread deportations of Armenians from the Ottoman Empire during the First World War as genocide. To buttress the contention that the killings were neither deliberate nor orchestrated by the government, Turkey sponsors research to discredit the claims of historians and politicians who refer publicly to the somewhat contradictory source when it came to the question of slavery, the Declaration of Independence, the secular version of American scripture, was an unambiguous tract for abolition.”

104 GARRY WILLS, LINCOLN AT GETTYSBURG ___ (1992).
105 Id. at 56, 58-59.
Armenian genocide or who employ the term “Mets Yeghern.”

In addition to overt prohibitions, certain statutory schemes function to cement master stories in ways that impact speech indirectly. Consider the law of Australia and New Zealand where Anzac Day commemorates the start of the campaign in which more than 120,000 men died at Gallipoli during World War I. One year after the April 25, 1915, slaughter, Anzac Day was officially gazetted as a public holiday in New Zealand. Almost immediately, state officials set in motion a process of formal and informal enforcement of the sanctity of the day, an illustration of governmental orchestration of the creation and enforcement of nationally-significant public rituals. War diaries of surviving veterans demonstrate that the official ceremonies began with a dawn requiem mass, followed by a compulsory mid-morning commemorative service. Rather than sanction personal grieving or critical reflection on the folly of trench warfare, state authorities scripted the expression of official memory to turn Anzac Day and the battle of Gallipoli into a metonymy for sacrifice.

Individuals invested with symbols of the nation and the interpretive decisions of state agents can likewise contribute to dominant narratives. Thus when British anti-war campaigner Sylvia Pankhurst and her supporters organized a rally in Trafalgar Square they were beaten by rowdy Australian and New Zealand soldiers, an early example of “the heckler’s veto.” As arrests of war critics mounted, including that of Bertrand Russell, the prominent British philosopher and writer, Britain’s security services took to dismantling the printing presses of oppositional pamphleteers instead of tarnishing the country’s speech-tolerant image by banning the papers outright.

109 David Holthouse, State of Denial: Turkey Spends Millions to Cover Up Armenian Genocide, SOUTHERN POVERTY LAW CENTER 130 INTELLIGENCE REPORT (Summer 2008).


112 ADAM HOCHSCHILD, TO END ALL WARS 187 (2011).

113 See Owen M. Fiss, Free Speech and Social Structure, 71 IOWA L. REV. 1405, 1416–17 (1986) (explaining that when a mod is angered by a speaker and jeopardizes the public order by threatening the speaker, the policeman must act to preserve the opportunity of an individual to speak.”).

114 ADAM HOCHSCHILD, TO END ALL WARS, 187, 323–24 (2011)(describing how William Holliday, an outspoken critic of the war, was tried, convicted and sentenced to hard labor for the seemingly innocuous assertion that “Freedom’s battle has not to be
At the apex of global story regulation are those laws explicitly barring Holocaust denial. Today, thirteen European states prohibit denialism, a linguistic offense deemed to deflect responsibility and mitigate the enormity of the Holocaust. Section 3(h) of Austria’s Prohibition Act is illustrative of statutes restricting the expression of denial: “A person shall be liable to a penalty if, in print or in broadcast or in some other medium, or otherwise publicly in any manner accessible to a large number of people, if he denies the National Socialist Genocide or other National Socialist crimes against humanity, or seeks to minimize them in a coarse manner or consents thereto or to justify them.” Troubled by the ‘false contestation of genocide,’ France introduced the Gayssot Law of 1990 to remove the issue from a judicial system that had become a forum for debate on the realities of the Holocaust. The law criminalizes public questioning of the Holocaust and curtails the judiciary’s ability to entertain arguments challenging the historic validity of Nazi atrocities.

The effect of such laws is to insert the power of the state into discursive exchanges that may be wholly disconnected from acts in furtherance of the ideas communicated. Despite the concern of critics that prohibitory laws elevate an historical event to dogma, legislation concerning Holocaust denial has flourished. The traditional rationale for the prohibition of Holocaust denialism in Germany, Israel, the Czech Republic, Hungary and elsewhere is that preventing false historiosity protects the dignity of survivors and reduces the potential exposure of ideas aimed at attracting support for extremist positions. Lawrence Douglas offers another reason fought on the blood-drenched soil of France but nearer home – our enemy is within the gates.”

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116 Law No. 90-615 of July 13, 1990, to repress all racist, anti-Semitic, or xenophobic acts, J.O. July 14, 1990, p. 8333 (Fra.)
117 ___, HEALING THE WOUNDS: SPEECH, IDENTITY & RECONCILIATION IN RWANDA AND BEYOND at 32; see also, BERNARD LEWIS, NOTES ON A CENTURY, REFLECTIONS OF A MIDDLE EAST HISTORIAN 288-97 (2012)(providing a first-person account of prosecution under French law for Armenian genocide denial following a 1993 Le Monde article).
118 See Letter from Dr. Agnès Callamard, Executive Director of Article 19, to German Minister of Justice re: Proposed EU Ban on Genocide Trivialization (Feb. 12, 2007), cited in Robert A. Kahn, Holocaust Denial and Hate Speech, in GENOCIDE DENIALS AND THE LAW 77 (Ludovic Hennebel & Thomas Hochmann eds. 2011).
for denial laws by positioning efforts to negate the Holocaust as a continued story insofar as obfuscation was the design of the perpetrators themselves. Douglas quotes Primo Levi’s account of an SS officer’s infamous warning: “And even if some proof should remain and some of you survive, people will say that the events you describe are too monstrous to be believed: they will say that they are the exaggerations of Allied propaganda and will believe us, who deny everything, and not you.”

For Douglas, Holocaust denial must be understood as a two-part process – the obvious attempt to paper over past crimes but also an action, “fully consonant with the original methods of the perpetrators.” In literary terms, denial is both an intentional fabrication and an attempt to diminish the authority of the new national narrative.

The Holocaust is not the only historic truth subject to denialism, obfuscationism and revisionism. In Rwanda, critics of the RPF government have begun to speak of the genocide as something less than the Convention definition of the crime. For opponents of the current regime, the Rwandan genocide was a civil war or the exaggerated death toll of a regional conflict spurred on by imperialist ambitions. In response, post-genocide Rwanda has become one of the world’s most restrictive states regarding expression of its master story. Even prior to the genocide, the indictment of Mugesera indicates the country was prepared to police hate speech designed to magnify racial and ethnic differences. But since the RPF came to power in 1994, the Rwandan government has gone to great

Molar eds. 2012)(contrasting the United States and French regimes governing racist speech). See also, Robert A. Kahn, Holocaust Denial and Hate Speech ____, supra note ___(suggesting that the purpose of genocide denial laws is not to impose an “official history” but to serve as state-sponsored remembrance).

Primo Levi, The Drowned and the Saved 11–12 (1988); On the same theme, Douglas cites Himmler’s speech before an audience of generals of the SS, delivered in Poznan in 1943, in which the Himmler describes the destruction of European Jewry as “ein niemals genanntes und niemals zu nehmendes Ruhmesblatt” of German history – “an unnamed and never to be named page of glory.” Lawrence Douglas, From Trying the Perpetrator to Trying the Denier and Back Again, in Genocide Denials and the Law __ (Ludovic Hennebel & Thomas Hochmann eds. 2011).

Id. at 56 (“the tactics of denial used by the perpetrators were not simply designed to cover their tracks from the Allies or to hide their actions from the German population [but]… a means of performing genocide.”)

See Gregory Stanton, The Eight Stages of Genocide (1998)(arguing that denial always follows genocide); William Schabas, 93 AM. J. INT’L L. at 530 (“the history of genocide shows that those who incite the crime speak in euphemisms.”)

lengths to name its experience as genocide and to outlaw expressions of revisionist history that aim to minimize the slaughter.\textsuperscript{124} Drawing on the scale of the atrocities committed against Jews and Tutsis and the purposeful nature of the annihilation, Rwanda has analogized its national history to the Holocaust and cast the extermination of its minority population as a paradigmatic example of the international crime of genocide.\textsuperscript{125} The current government also guards against statements that equate the genocide with the post-genocidal atrocities committed by the RPF.\textsuperscript{126}

In furtherance of this mission, Rwanda has enacted a controversial Genocide Ideology Law that encompasses the government’s belief that forbidding the expression of racialized differences will preempt a return to ethnocentric thinking.\textsuperscript{127} The Rwandan Senate has defined genocidal ideology as “a set of ideas or representations whose major role is to stir up hatred and create a pernicious atmosphere favouring the implementation and legitimization of the persecution and elimination of a category of the population.”\textsuperscript{128} Article 2 of the Act characterizes the offending ideological mindset as “an aggregate of thoughts characterized by conduct, speeches…” and provides for up to 25 years in prison for first time offenders.\textsuperscript{129} In addition, Rwanda has passed laws on divisionism and a statute criminalizing negationism.\textsuperscript{130} The Rwandan legislation bans the speech of

\textsuperscript{124}The preamble to the Rwanda’s 2003 Constitution states that “[i]n the wake of a genocide that was organized and supervised by unworthy leaders and other perpetrators and that decimated more than a million sons and daughters of Rwanda,” and resolves “to fight the ideology of genocide and all its manifestations and to eradicate ethnic, regional and any other form of divisions.” Const. of the Republic of Rwanda, 2003, pmbl. paras. 1 & 2.

\textsuperscript{125}See e.g., Mark Levene, Connecting Threads: Rwanda, the Holocaust and the Pattern of Contemporary Genocide: in GENOCIDE: ESSAYS TOWARD UNDERSTANDING, EARLY WARNING AND PREVENTION (Roger W. Smith ed., 1999); But see, Rene Lemarchand, Disconnecting the Threads: Rwanda and the Holocaust Reconsidered, 7 IDEAS 1 (2002).

\textsuperscript{126}Martin Imblau, Denial of the Holocaust, Genocide, and Crimes Against Humanity: A Comparative Overview of Ad Hoc Statutes in Genocide Denials and the Law (“The difference between the concepts of genocide and killings – or even slaughter – is not only etymological…[since] failing to distinguish these concepts is tantamount to diminishing the importance of the crime and its intent and attempting to destigmatize genocidaires.”)

\textsuperscript{127}LAW N°18/2008 OF 23/07/2008 RELATING TO THE PUNISHMENT OF THE CRIME OF GENOCIDE IDEOLOGY. The logical corollary of the law is the belief that the 1994 genocide was the result of widespread Hutu indoctrination of hatred against Tutsis.


\textsuperscript{129}Law N°18/2008, supra note ____.

\textsuperscript{130}Zachary Pall, Light Shining Darkly: Comparing Post-Conflict Constitutional Structures Concerning Speech and Association in Germany and Rwanda, 42 COLUM. HUM. RIGHTS L. REV. 5 (2010).
“any person who will have publicly shown, by his or her words, writings, images, or by any other means, that he or she has negated the genocide committed, rudely minimized it or attempted to justify or approve its grounds, or any person who will have hidden or destroyed its evidence.”

Like European Holocaust denial laws, Rwanda refuses to allow alternative stories to circulate in the public domain.

II. Judicial Reading

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

A. Interpreting Stories

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

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132 See generally, JAMES BOYD WHITE, LIVING SPEECH 94 (2006) (“In this sense the principle of separation of powers, central to…Constitution[s], is built into the idea of law itself, for the tasks of writing law and reading it are put permanently in different hands.”
characterizes ordinary attempts to understand what speakers are saying. In each discipline, narrative-driven truths may be kaleidoscopic; multiple truths may exist within a single reality with different ways of assigning motives and responsibility to the actors involved in the drama.

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

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

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

133 RONALD DWORKIN, LAW’S EMPIRE 49-53 (1986).
136 Cover, Nomos and Narrative, 97 HARV. L. REV. at 49.
137 See Cover, Violence and the Word, 95 YALE L. J. at 1606.
138 KENT GREENAWALT, LEGAL INTERPRETATION 151 (2010); Naomi R. Cahn, Inconsistent Stories, 81 GEO. L.J. 2475, 2515 (1993); Gerald Torres, Translation and Stories, 115 HARV. L. REV. 1362, 1370 (2002)(“How a story “works” depends on the reader or listener. The social position of the reader matters because it affects his
A task as seemingly simple as assigning meaning to a word can be influenced by readerly traditions since many of the acts law regulates do not exist apart from the language that defines them. Conspiracy, solicitation, bribery, the issuance of threats, perjury, defamation, slander and libel require only the utterance of spoken or published words. Curiously, the ultimate verbal crime, incitement to genocide, is an inchoate offense since the crime is in the utterance and does not require the subsequent commission of genocide to be charged.

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

Legal interpretation requires attention to a community of meaning, especially when the issue is the hermeneutics of speech. To do it right, in Stanley Fish’s words, is to read from ‘deeply inside’ a context, that is “to be already and always thinking (and perceiving) with and within the norms, standards, definitions, routines, and understood goals that both define and

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139 J.L. Austin defined performative utterances as “speech acts” which the expression forms part of the doing of an action. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962); Peter M. Tiersma & Larence M. Solan, The Language of Crime, in THE OXFORD HANDBOOK OF LANGUAGE AND LAW at 340.
141 Frederick Schauer, Free Speech and the Cultural Contingency of Constitutional Categories, 14 CARDOZO L. REV. 865 (1993)(recognizing that the prelegal instantiations of free speech vary dramatically from culture to culture).
142 HANS-GERORG GADAMER, TRUTH AND METHOD 281 (1989)
are defined by that context.” From this perspective, the adjudication of hate speech and incitement turns on the interpretation of language and a contextual understanding of symbols.

B. The influence of master stories

Judicial engagement with master stories occurs in at least four forms. There is first the deployment of law to control public conversations. In 2005, Nobel Laureate Orhan Pamuk declared that the Ottoman Empire had killed a million Armenians, adding that in modern Turkey, the mass killings of Armenians and Kurds is generally unmentionable. As if to prove Pamuk’s point, ultra-nationalist lawyer Kemal Kerincsiz subsequently filed a criminal case against Pamuk. Although the charges were dropped in 2006, the Supreme Court of Appeal subsequently ordered the lower court to re-open the case. On March 27, 2011, a Turkish judge found Pamuk guilty and ordered him to pay 6,000 liras in total compensation to five people for, among other things, having insulted their honor. Neither Pamuk’s celebrated international status nor the many sites of definitional contestation concerning the Armenian genocide influenced the court’s interpretation.

Rwanda too has used criminal law as the enforcer of a master story by prosecuting individuals for statements that might be construed as increasing the pain of genocide victims and for referencing crimes committed by the RPF during the conflict that brought an end to the slaughter. When judicial interpretation occurs in such cases, the process is dominated by the interplay between the prohibited statement and the codified story, not the balancing test normally associated with free speech and the dignity of the intended target.

The second way that judges use master stories is as historic markers capable of influencing questions of law. In the Canadian Supreme Court case of Adler v. Ontario, for example, petitioners argued that the lack of government funding for Jewish and certain Christian parochial schools violated the Charter’s equality provisions since Catholic schools receive

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145 See LEGISLATING AGAINST DISCRIMINATION: AN INTERNATIONAL SURVEY OF ANTI-DISCRIMINATION NORMS 87 Nina Osin & Dina Porat eds. (2005); Zachary Pall, Light Shining Darkly, supra note ___ at 5.
government funding. The Supreme Court squarely rejected this claim by insisting that free Catholic education in Quebec is a defining feature of Canada’s linguistic accommodation. Justice Iacobucci explained that the peculiarity of Catholic public funding is the product of an historical compromise crucial to Canadian Confederation.

During the Israeli trial of Ivan Demjanjuk, in which the defendant was accused of being a sadistic guard nicknamed Ivan the Terrible at a Nazi extermination camp, the Court invited survivor witnesses to tell riveting, but legally irrelevant, stories of the Holocaust. One of the principal objectives of the Demjanjuk trial was to lend judicial recognition to the historic fact of the Holocaust while simultaneously discrediting denialism. In support of this goal, the Court subsumed questions surrounding erroneous identification – questions that ultimately led the Israeli Supreme Court to vacate the conviction on the basis of new evidence – to the judicialization of a master story. “We must ask,” the Israeli Court posited rhetorically, “is it at all possible to forget? Can people who were in the vale of slaughter and experienced its horrors, … who saw, day after day, the killing, the humiliation, the brutality, the abuse by German oppressors and their Ukrainian vassals in the Treblinka camp, forget all this?”

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

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

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147 Three years later, in Waldman v. Canada, the author brought a complaint to the Human Rights Committee alleging that Canada’s school funding violated the prohibition on discrimination contained in Article 26 of the International Covenant on Civil and Political Rights (ICCPR). The Committee sided with Waldman but Canada has ignored the Committee’s recommendation. UN Human Rights Committee (HRC). UN Human Rights Committee: Concluding Observations, Canada, 85th Sess., CCPR/C/CAN/CO/5, ¶ 21 (Apr. 20, 2006).
equal opportunity for all regardless of race or color.  

_Bakke_ recalled _Beauharnais v. Illinois_, in which the history of American racism informed the Court’s decision.  

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

Third, master stories act as filters for the receipt of new information. When judges consider the law from within the master story, usually in a context involving parties from their own community, they do so through readily accessible legal and cultural signposts in a comfortable linguistic environment. Many judicial opinions begin by telling the reader something about how the judge has understood the instant story. It is not unusual for a judge to paint the tableau as a way of contextualizing the interpretive enterprise. By restating the parties’ positions, the question presented and the _dramatis personae_, judicial orders provide insight into the reading of text.

Because legal argument occurs within a culture of stories, effective storytelling must resonate with the audience. First year law students learn

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151 Id. at 259.
152 Id. at 259; see also, Jeremy Waldron, The Harm in Hate Speech 49 (2012)(arguing that hate speech should be considered group libel in some circumstances).
154 See, e.g., Brian J. Foley, Applied Legal Storytelling, Politics, and Factual Realism, 14 J. OF THE LEGAL WRITING INSTITUTE 17, 40 (2008)(showing that stories are the most effective means of persuading judges and juries); Kenneth D. Chestek, Judging by the Numbers: An Empirical Study of the Power of Story, 7 J. ASS’N. OF L. WRITING DIRECTORS 1 (2010)(providing evidence that appellate judges are demonstrably influenced by the
that stories should be marshaled strategically to fit into a knowable template (ie. a claim of self-defense demands a background threat). Bertrand did not follow this basic instruction in Mugesera. The anti-Semitism inherent in Bertrand’s motion was striking not only for its absence of logic but also for its reliance on a story that is not intuitive to most Canadian judges. Despite having won at the court below, Bertrand sought to divert the judges’ attention, away from a careful reading of Mugesera’s speech and toward an inquiry into the motives of his invented accusers. The device is familiar to students of Shakespeare for Bertrand’s narrative recalled Portia’s admonition to Shylock in The Merchant of Venice that “Thou shalt have justice more than thou desir’st.” As Kenji Yoshino notes, by attempting to collect the pound of flesh owed to him, “Shylock shifts from being the plaintiff in a civil action to being the defendant in a related criminal one.” Unlike Portia’s successful ploy, Bertrand’s attempt to introduce a new story was so disconnected from the underlying controversy that it confused where it sought to persuade. Moreover, Bertrand failed to translate his client’s story into terms likely to succeed before the Court. A good lawyer, Peter Brooks writes, “must at once elicit and construct a story, and the distinction between the elicited and the constructed is by no means clear.” That process necessarily combines the multiple meanings of ‘re-presentation’ – to act for another and to paint a picture. But rather than cast Mugesera in the most favorable possible light, Bertrand argued continuing persecution, a strategy that was wholly unmoored from governing narratives. Like Mugesera’s Kabaya speech, Bertrand’s motion drew heavily on the political unconscious of ethnic markers, constructed as it is in opposition to a manufactured outsider.

stories of the litigants who appear before them).

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

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


159 FREDERIC JAMESON, THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT (1982)(arguing that the text itself, the social order and collective human history all converge to create narrative meaning and that narrative form is the regulator of meaning). Guy Bertrand describes himself as pur et dur, a reference to Quebec’s original francophone inhabitants and a phrase used to describe French resistance to English domination. GUY BERTRAND, ENOUGH IS ENOUGH: AN ATTORNEY’S STRUGGLE FOR
Unlike that speech, however, Bertrand failed to relate his tale to a master story.

To be certain, the idiom of French anti-Semitism has a history and like his predecessors, Bertrand’s appeal to latent prejudice is incomprehensible without referencing the infamous blood libel. Consciously or not, Bertrand’s charge that a Jewish cabal intended to send the respondent’s children to certain torture and death contained more than a hint of the false and enduring charge that Jews use the blood of Christians in religious ritual. But that story is largely devoid of meaning in present day Canada since the audience for that message is generally not prepared to fill in the suppressed premise of the enthymeme. Whereas Mugesera’s speech enjoyed abiding significance before a crowd primed to see Tutsis as a threat, Bertrand’s story had no moral to share and no enabling context, even as he offered a protagonist and an invented collection of antagonists. Absent logos, ethos or pathos, Bertrand’s abuse of process motion fell on deaf ears because it failed to follow the outlines of a location-specific script.

The fourth use of master stories by judges is to expand the governing tale, particularly when the original story is actively contested. This is the process through which judges lend credence to elements of the national history by producing new readings of patterns and experience. Argentina, for example, has only recently settled on an authoritative account of the

Bertrand’s assertion echoed Louis-Ferdinand Céline’s Bagatelles Pour Un Massacre, France’s Dreyfus Affair and that strand of 1930s Québécois anti-Semitic expression better associated with Abbé Groulx. See MORDECAI RICHLER, OH CANADA! OH QUEBEC! 82 (1992)(reciting Abbé Groulx’s virulent anti-Semitism in Quebec and the development of the racialized Québécois conception of a pure laine people).

Any echo of the blood libel, itself a story wrapped in law, is pregnant with meaning for that form of vilification can “illustrate[] not only the complex sources of narrative plausibility but also the terrible power of imagery, deeply ingrained narratives to drive human action.” William H. Page, Ideology and the Strictures of Legal Narrative, 68 TUL. L. REV. 1029, 1031 (1994); see also, GEORGE L. MOSSE, TOWARD THE FINAL SOLUTION: A HISTORY OF EUROPEAN RACISM ___(1978)(describing the persistent force of Ernst Haeckel’s claim of Aryan racial supremacy in Riddles of the Universe on Nazi thought).

Malcolm Gladwell cites psychologist Robert Sternberg’s conception of ‘practical intelligence’ for the notion that convincing orators know what to say to who, when to say it, and how to express their thoughts for maximum effect. MALCOLM GLADWELL, OUTLIERS: THE STORY OF SUCCESS 101 (2008).

See MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 10 (2008)(noting that persuasive writing employs elements of logos, pathos and ethos, the ability to persuade by establishing credibility in the eyes of one’s audience).
nation’s 1976-1983 military rule. Although a handful of post-dictatorship prosecutions shed light on the abuses of the military regime, a violent backlash led to the 1986 Full Stop law and the 1987 Due Obedience Law, which together blocked the initiation of new cases and granted automatic immunity to members of the military. Notwithstanding the widespread dissemination of the 1985 Nunca Mas Report and the public confessions of junta members to mass crimes, the enforced amnesia of the amnesty laws remained in place for more than two decades. In 2001, however, Federal Judge Gabriel Cavallo declared the amnesty laws to be unconstitutional. Cavallo’s ruling unleashed a torrent of truth-telling including a government-sanctioned project to memorialize persons disappeared during the dirty war and to make public the location of clandestine military facilities where torture and interrogation took place. Four years later, the Argentine Supreme Court’s upheld Cavallo’s ruling in the landmark case of Simon y otros.

Argentina’s new official story has paved the war for the prosecution of dozens of former military and police officers, but it has also created space for a meta-narrative, in this case, a nationwide conversation concerning the theft of babies born to mothers who had “disappeared” during the Dirty War. That story, the unending drama surrounding the identities of the children, has become a microcosm of Argentina’s master story.
In the United States, the gradual strengthening of the First Amendment is a clear example of judicial augmentation of the master story. The First Amendment to the United States Constitution wasn’t always interpreted as the textual guardian of free speech protection. Through the 1919 criticism and anti-conscription decision (frequently referred to as “the World War I cases”), government restrictions on speech based on disapproval of the speaker’s message were commonplace. Even the Supreme Court’s 1942 decision in Chaplinsky v. New Hampshire upheld a criminal conviction for nothing more than expression of “fighting words.” But in 1969, Brandenburg v. Ohio granted protection to all forms of expressive activity including political dissent and odious and dehumanizing speech unless the utterance includes an element of “imminent lawless action.”

Robert Tsai calls this trend a ‘First Amendment faith tradition,’ complete with its own creation story. “As lawyers learn, the civic myth that recounts the birth of the right to speak one’s mind in America begins with the missed opportunities of the World War I decisions, and the “end of the story” is [] Brandenburg v. Ohio, in which the promise of expressive liberty is ultimately realized.” In this conception, free speech has become America’s second master story. Notwithstanding limited restrictions on obscenity, falsehoods and “fighting words,” the First Amendment tradition promotes tolerance of an array of offensive speech, a linguistic article of faith bolstered by legal interpretation and around which political communities have coalesced. Today, Brandenburg stands for the (2011).

170 The First Amendment famously provides that “Congress shall make no law” abridging free speech. U.S. Const. amend. I.


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


175 STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 409 (2008); Harold Hongju Koh, Foreword: On American Exceptionalism, 55 Stan. L. Rev. 1479, 1483 (2003)(recognizing that the U.S. First Amendment is far more protective than other countries’ laws of hate speech, libel, commercial speech and the publication of national security information).
proposition that no subject is forbidden *per se* in the United States. State and federal statutes that aim to ban white supremacist marches, for example the American Nazi Party’s march in the predominantly Jewish community of Skokie, Illinois, or to outlaw videos that show graphic violence against animals, as in *United States v. Stevens*, fall at the mantle of America’s second master story.\(^{176}\) The Supreme Court’s 2011 decision in *Snyder v. Phelps*, which shields the Westboro Baptist Church from tort liability for the picketing of military funerals and the dissemination of homophobic insults, confirms that even revered institutions and people may be targeted by purely expressive activity.\(^{177}\)

Predictably, stories of speech and stories of race have competed for primacy in the American legal imagination in recent years. The U.S. Supreme Court’s 1992 decision in *R.A.V. v. City of St. Paul* held that a St. Paul, Minnesota ordinance designed to counter cross-burning was an unconstitutional content-based regulation of speech.\(^{178}\) *R.A.V.* engendered an immediate backlash from race-conscious scholars who refused to accept cross-burning as the instantiation of free speech absolutism and personal liberty.\(^{179}\) Their criticism was premised on the belief that the story of cross-burning is not about the insult to African-Americans (or for that matter the

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176 *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978)(holding that the First Amendment prevents a local ordinance from prohibiting the march, even in a community of Holocaust survivors); *United States v. Stevens*, 130 S. Ct. 1577 (2010).


178 *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); See also FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 6 (1999)(observing that although current First Amendment jurisprudence permits the criminalization of “conduct that is motivated by the race or similar characteristic of the victim and deserves enhanced punishment,...‘racist speech,’ the articulation of racist views, which, no matter how unpleasant, is protected.”)

interference with the enjoyment of property and sense of belonging in some communities) but the very real threat, intimidation and silencing effect communicated by a practice. Proponents of a capacious understanding of racial equality were therefore relieved and gratified by the Court’s 2003 decision in Virginia v. Black, a case that appeared to restore the equilibrium between America’s stories. In Black, the Court found that the prohibition on burning crosses with the purpose of intimidation – unique among speech restrictions – may be outlawed in a manner consistent with the First Amendment.

Courts, it is apparent, can willingly and capably contribute to one or more master stories, particularly when that reading facilitates incremental change. The extension of speech rights to corporations or the granting of equality guarantees to new classes of people is thus built on tested doctrines from within recognizable plot lines. Just as President Obama’s Second Inaugural Address linked the trinity of freedom stories with the phrase “Seneca Falls, Selma, and Stonewall,” judges look to supplement and enhance familiar narratives. In this way, the South African Constitutional Court’s abolition of the death penalty or the adoption of heightened scrutiny in gender discrimination cases in U.S. federal court reflects the application of entrenched principles within the language, standards and methodology of

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180 See Charles R. Lawrence, Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment, 37 VILL. L. REV. 787, __ (1992) (“It is the utter disregard for the silenced voice of the victims that is most frightening. Nowhere are we told of the history of the Ku Klux Klan or of its use of the burning cross as a tool for the suppression of speech.”); See also Owen M. Fiss, The Right Kind of Neutrality, FREEING THE FIRST AMENDMENT: CRITICAL PERSPECTIVES ON FREEDOM OF EXPRESSION ___ (David S. Allen & Robert Jensen eds., 1995).


the hegemonic discourse.\footnote{S. v. Makwanyane and Another (CCT 3/94)(S. Afr. 1995)(abolishing the death penalty in South Africa as inconsistent with the Constitution); Craig v. Boren, 429 U.S. 190 (1976)(adopting an intermediate level of scrutiny to assess differential treatment on the basis of sex).} Judges also appropriate master stories for the purpose of declaring certain practices to fall outside the dominant discourse.\footnote{See Nicholas Calcina Howson, Corporate Law in the Shanghai People’s Courts, 1992-2008: Judicial Autonomy in a Contemporary Authoritarian State, 5 E. ASIA L. REV. 303 (2010)(demonstrating the exemplary performance of specialized courts that decide cases on corporate fiduciary duties, corporate veil piercing and shareholder resolutions free of the interference that plagues most Chinese courts); James Zagel & Adam Winkler, The Independence of Judges, 46 MERCER L. REV. 795 (1995).} Judge Lois Forer’s refusal to sentence a first-time offender to a mandatory five-year term or Justice Richard Goldstone’s deliberately narrow reading of apartheid-era South Africa’s notorious Group Areas Act were each informed by the belief that manifestly unjust laws contradict the true spirit of the Constitution or society.\footnote{See BARRY SCHWARTZ & KENNETH SHARPE, PRACTICAL WISDOM: THE RIGHT WAY TO DO THE RIGHT THING __ (2010); S v. Govender, 1986 (3) SA 969 (T). The 1982 decision was not reported until 1986.}

It is the rare court, however, that explicitly reads against a master story from inside the dominant narrative. On the infrequent occasions when judicial authorities do not conform to the master story – think of the lower court in Snyder permitting a jury to award damages for offensive speech, instructions encouraging jury nullification in racially charged cases, or the Israeli Central Elections Committee’s decision to bar a Jewish party from standing for election on the grounds that it was too racist – they are quickly repudiated by appellate judges or legislative forces acting in a corrective fashion.\footnote{Snyder v. Phelps, 533 F.Supp.2d 567 (D.Md. 2008); Simon Stern, Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification after Bushell’s Case, 111 YALE L. J. 1815 (2002); Paul Butler, The Evil of American Criminal Justice: A Reply, 44 UCLA L. REV. 143, 143-44 (1996)(positing that nullification on the part of minority jurors may be based on the epistemology of African-American preachers); See Adam Liptak, Foreword: Hate Speech and Common Sense, in THE CONTENT AND CONTEXT OF HATE SPEECH at xix and E.A. 2/84 Neiman v. Central Elections Committee 39(2) P.D. 225 (1985) (Isr.).}

At the level of outcomes, judicial support for master stories is to be expected because of the ways that national discourses render alternative interpretations foreign and unnatural, and the fact that, at least in the Anglo-American tradition, \textit{stare decisis} reinforces interpretive consistency.\footnote{Steven D. Smith, \textit{Stare Decisis in a Classical and Constitutional Setting: A Comment on the Symposium}, 5 AVE MARIA L. REV. 153, 154 (2007).}
Whether or not this is a good thing depends on the story in question. And while there is little in this analysis to indicate what the consequences for judging should be, courts and scholars alike can only benefit from an appreciation of the power of narratives to generate reflexive interpretations.

C. Reading outside of master stories

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

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

The Canadian balance arose most poignantly in two cases evaluating anti-Semitic speech. In the first case, a sharply divided Court confirmed the conviction of an Alberta high school teacher, James Keegstra, who described Jews as: “treacherous,” “subversive,” “sadistic,” “money-loving,” “power-hungry,” and “child killers.” Keegstra was prosecuted under Section 319(2) of the Canadian Criminal Code, which prohibits the promotion of hatred based on color, race, religion or ethnic origin. While Keegstra maintained that §319(2) violated his right to free speech, the Court held that it was legitimate to criminalize this type of speech since it harms

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191 Canada’s Charter of Rights and Freedoms provides textual support for both free expression and the regulation of speech-based harms to groups and individuals. Section 2(b) guarantees freedom of expression in the following terms: Everyone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.
both individual victims and society as a whole. Less than two years later, the Court reached a different conclusion in *Zundel v. Regina*. In *Zundel*, the Court vacated the conviction of a Holocaust denier on the grounds that the controlling statute was insufficiently protective of expression and because of the thin line between fact and opinion.\textsuperscript{193} The inconsistent results are telling; in the absence of a master story, the Court engaged in a considered debate regarding the costs and benefits of the government’s attempted restriction of odious expression.\textsuperscript{194} Ultimately, the Court found both positions supportable. A nearly identical dynamic exists in the Netherlands where conservative politician Geert Wilders was recently prosecuted for “incitement to hatred and discrimination” for his expressly anti-Islamic speeches and films.\textsuperscript{195} The Amsterdam Court acquitted Wilders of these charges, finding his speech to be a form of legitimate, albeit uncivil, political expression.\textsuperscript{196}

**D. The Challenge of Translation**

Neither the Canadian cases nor the Wilders matter required the relevant courts to evaluate speech emanating from a distant locale or in a foreign language. But across borders and languages, judges are increasingly required to read without reference to familiar landmarks and to grapple with material produced in a wholly alien context. Transnational interpretation demands reference to standards originating well beyond the source of communication. Here reading is partially voyeuristic, an expression of cultural curiosity infused with sympathy perhaps, but not empathy. Conversely, when readers feel threatened, offended or unanchored, they may discount foreign ideas or legal precepts.\textsuperscript{197}

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\begin{enumerate}
\item \textsuperscript{193} R. v. Zundel, [1992] 2 S.C.R. 731. As Kent Greenawalt characterizes the case: “Even assuming [that the statute in question promoted] some appropriate objective of social harmony and a rational link...Justice McLachlin declared that the statute was much broader than necessary to achieve that aim.” KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES AND LIBERTIES OF SPEECH 70 (1995).
\item \textsuperscript{194} See Saskatchewan (Human Rights Commission) v. Whatcott, [2013] SCC 11, Case No. 33676 (upholding hate speech laws as a constitutionally valid limit on freedom of expression).
\item \textsuperscript{195} According to Article 71 of the Dutch Constitution, as an MP, Wilders has immunity in the Dutch parliament with regards to communication, either in speech or in writing.
\item \textsuperscript{196} Case 13/435046-09.
\item \textsuperscript{197} See Marc A. Fajer, Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship, 82 GEO. L.J. 1845, 1856 (1994)(“Faced with a conflict between deep-seated beliefs and a contradicting story, some people may adjust their beliefs, but others are likely to reject the story as untrue.”); Jane E. Baron, Resistance to Stories, 67 S. CAL. L. REV. 255, 256 (1994)(“Background assumptions determine, in great measure, whether a particular account will be heard as a ... persuasive or believable...”)\end{enumerate}
Azar Nafisi’s provocative title, *Reading Lolita in Tehran*, suggests not only that geography renders some narratives taboo but that the act of digesting text in certain locales can subject readers to a form of moral peril. To read in an unfamiliar environment is to enter a semiotic netherworld where generalities substitute for nuance, authorial intent may be perverted, and meaning is dependent on translation.

When conflict or choice of law questions arise, the way in which text is read (or a speech is heard) is shaped by the interpretive process, informed as it is by unavoidable cognitive and cultural limitations. An Australian judge presiding over a global securities fraud case views the landscape differently than she does an extradition request from China concerning dissident speech. Nonetheless, this intuitive observation only begs the question of how familiar a judge must be with a foreign environment to rule in a principled fashion.

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

Similarly, in *Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, the United States 9th Circuit Court of Appeals refused to interrupt the operation of an online auction site selling Nazi memorabilia in France but based on a server in California. *Yahoo!* represents a clash of cultures and governing stories; France’s Gayssot law renders the

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


200 *Yahoo!, Inc. v. La Ligue Contre le Racisme et l’Antisemitisme*, 379 F.3d 1120 (9th Cir. 2004).
downloading of a single communication a criminal offense whereas the uploading of the material to the California site is perfectly legal. In \textit{Bachchan v. India Abroad Publications}, a New York court adopted similar reasoning in its refusal to enforce a British libel award since doing so would contravene the fundamental public policy of U.S. free speech.\footnote{\textit{Bachchan v. India Abroad Publications}, Inc., 585 N.Y.S.2d 661, 662 (1992).} \textit{Yahoo!} and \textit{Bachchan} contrast sharply with the North Rhine-Westphalia court which recently upheld the right of German authorities to block foreign web pages containing extremist content.\footnote{Center for Democracy and Technology, \textit{Exercise of Jurisdiction by Foreign Courts Seen in Other Cases}, CDT Policy Post 7.06 (3) (July 11, 2011) available at \url{http://old.cdt.org/publications/pp_7.06.shtml#3}. In the German context, the fact that the expression is private, not public – a dispositive factor in other states – has no bearing on the regulation of speech.}

If the final arbiter sits in a state dominated by a different master story, the outcome is susceptible to a range of interpretations.\footnote{See Paul Schiff Berman, \textit{The Globalization of Jurisdiction}, 151 U. Pa. L. Rev. 311, 516 (2002)(observing that whether norms articulated by a court in one country will be recognized or adopted by another depends on the logic of the jurisdictional assertion).} Even where the judges speak the same language, cross-cultural communication can produce a type of verbal fissure. In \textit{Hagan v. Australia}, the U.N. Committee monitoring compliance with the Convention on the Elimination of Racial Discrimination (CERD) held that the word “nigger” displayed on an Australian sports stadium sign was offensive based on “circumstances of contemporary society” notwithstanding the Australian court’s finding that the phrase was allowable pursuant to local law.\footnote{\textit{Hagan v. Australia}, U.N. GAOR, Elim. Of Racial Discrim. Comm., 62d Sess., U.N. Doc. CERD/C/62/D/26/2002 (2003).}

\textbf{E. Recasting Mugesera’s speech}

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

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

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

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

Translation is fraught with difficulties. Since meaning is a function of text and context, fidelity in translation must account for both. Yet “[t]he use of what is a process that is constructed relative to such pre-given understandings,” Steven Winter notes, “meaning and communication are vulnerable to cross-cultural distortion.” On this subject, Peter Schroth stresses that “…there can be no perfect translation… the differences

206 Id. at ¶ 55.
207 Id. at ¶256.
between languages are such that something is always lost in translation, but for most purposes, most of the time, a good translator can arrange to make what is lost the part that doesn’t matter to the particular audience.”

The very attempt to translate fully is a declaration of loyalty – to the court, to the parties and to the demands of language. Translation can also be profoundly political. The field of translation studies, once defined by concerns about linguistic and textual truthfulness to the original, has come to be dominated by the controversies attendant to nontranslation, mistranslation and disputed translation. Beginning with Walter Benjamin’s “The Task of the Translator,” modern theorists now view language as the medium of symbolic logic and digital literacy. Emily Apter posits that translation can be an act of disruption and “a means of repositioning the subject in the world and in history; a means of rendering self-knowledge foreign to itself...” No longer seen as a science, direct translation is increasingly the site of political and linguistic contestation.

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

Each of these tasks is performed in the act of judging inflammatory stories across cultures. Suddenly reading is freighted with foreknowledge and the challenge of applying legal standards to speech originating in a

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209 Peter Schroth, Legal Translation, 34 AM. J. COMP. L. SUPP. 47, 48 (1986)
210 See generally, Iris Braverman, The Place of Translation in Jerusalem’s Trial Court, 10 NEW CRIM. L. REV. 239, ___ (2007).
211 See Sol Salbe, In Israel, the language in which you read dictates what you know, www.972mag.com, July 17, 2012 (explaining that English-language versions of Hebrew newspapers often contain different emphases and versions than the original text).
foreign language and context. The fact-finding enterprise is further complicated by the act of translation and the loss of meaning attendant to ascertaining the speaker’s intent. In a world where criminal responsibility or physical removal attaches to linguistic understandings, whether inyenzi is translated as ‘cockroach’ or ‘outsider’ matters. It follows that cross-cultural judicial reading requires command of diverse interpretive elements – attention to word choice, meaning, context and the enduring stories that shape distant societies. For judges used to the reified narratives of domestic law, reading in this fashion means questioning some of the core assumptions and habits of adjudication. Should Iranian leader Mahmoud Ahmadinejad’s calls for the “elimination” of Israel ever be met with criminal indictments, the reading of his speech may well reflect the values and threat determination of distant judicial authorities evaluating cross-border communication in an era of instantaneous and memorialized communication.215

III. JUDICIAL STORYTELLING

Judges are not just consumers of argument and narrative – they are also the authors of ongoing stories. This fact assumes added importance after the cataclysm of genocide. The exercise of judicial speech following incitement to mass violence is an occasion for courts to lend their interpretive gloss to speech-based threats. It may also be restorative, an opportunity for judges to synthesize and apply universal values to the question at hand – to rebuild the rule of law through the written word.

A. Obliged to Write

Law is itself a story and the work of legislators, treaty-drafters and judges is essentially linguistic. By employing language and narrative, Cover observed, “law is a resource in signification that enables us to submit, rejoice, struggle, pervert, mock, disgrace, humiliate or dignify...[it] is predominantly a system of meaning rather than the imposition of force.”216 The words of law reflect a system of signification rather than a determinate corpus of self-defining rules. Law and narrative are inseparably related and the language-based act of judging and issuing orders is a means of contributing to a bigger story. Alexander Hamilton recognized as much in Federalist 78, his comment on a federal judiciary which would have "no influence over either the sword or the purse, ...It may

215 Cotler, ______.
truly be said to have neither FORCE nor WILL, but merely judgment."  

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

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

On one level, the opinion or order is decisional – the litigants require a neutral intermediary to choose an internal winner, to credit one argument over another and to produce finality. On another level, however, the judicial opinion is persuasive and this is where it develops educational and narratological qualities. “The heart of [the judicial] achievement,” James Boyd White instructs, “lies in the recognition that [the judges’] authority must be created rhetorically, in the opinion itself; that it depends upon the informed understanding of the reader and upon his acquiescence, not in the “result” or even the “reasoning” by which the result in reached.”  

Judicial opinions exert authority through the written word and the social meaning that attaches to the use of language.  

To think about law as authoritative narrative creates the possibility that a primary role for judges is providing explanations for multiple audiences. Judge Pierre Leval has remarked that “[j]udicial opinions can be important events in public political debates. Furthermore, courts alone do not command armies to enforce their decrees, persuading the people of the

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218 Cover, supra note ___ at 57-58  
justice of their decisions is important to the preservation of the courts’ role in government.”

Articulated legal commitments structure fundamental aspects of our social experience. This is the power of a recognized authority concluding a deliberative process with an expressed justification for the outcome.

“I distrust the incommunicable, it is the source of all violence,” Sartre proclaimed, and so it is that one of the principle judicial purposes is to communicate. When Iranian or Chinese officials announce the execution of a prisoner without explanation or by reference to a route phrase, outside observers are horrified for many reasons, one of which is the refusal of a court to perform the expressive function of providing reasons for action or inaction. The Canadian Supreme Court confirmed as much in Baker v. Canada in which the majority held that there is a common law right to know the reasons for a judicial decision, a judicial duty of explanation in some circumstances.

The compelled judicial narrative is critical because it connects the weight of law to very human controversies. The more judges use their declarative capacity to refute negationist efforts, the more closely do they fulfill their educational role and the more fully do they become authors and guardians of an official story. As judges project their interpretive acts into the public domain in writing, they define a space for reasoned discourse separate from the violence and coercion of other organs of the state. Judicial narratives use language to stamp controlling viewpoints on legal problems; legal stories are thus part experience, part argument, part precedent. Through the written opinion, courts enunciate norms, provide guidance to other courts and serve as a repository of fact-based decisions.

Writing in this fashion represents a particular kind of storytelling that

220 Pierre N. Leval, Judicial Opinions as Literature 208 in LAW’S STORIES, supra note.
221 JEAN-PAUL SARTRE, WHAT IS LITERATURE 228-29 (1949).
222 See Peter Haidu, The Dialectics of Unspeakability: Language, Silence, and the Narratives of Desubjectification, in PROBING THE LIMITS OF REPRESENTATION: NAZISM AND THE FINAL SOLUTION 278 (Saul Friedlander ed. 1992)(recognizing that silence can be the product of many forces, including the “instrument of the bureaucrat, the demagogue, and the dictator” committed to the negation of speech).
224 Frederick Schauer, Opinions as Rules, 62 U. CHI. L. REV. 1455, 1472 (1995)(“[W]hatever their personal values and motives, judges are required to provide a set of acceptable formal reasons.”).
rejects the conception of judge as stoic umpire, a literary counterweight to Cass Sunstein’s notion of constitutional minimalism. Minimalist judges “decide no more than they have to decide. They leave things open. They make deliberative decisions about what should be left unsaid…doing and saying as little as necessary to justify an outcome.”\textsuperscript{226} In contrast, storytelling judges may reveal or conceal but they do so in language, embracing the expository possibilities inherent in written decisions.

B. Confronting the Silence

Judicial speech is particularly appropriate after the commission of mass crimes when it can function as the antithesis of state-sponsored silence. Conversations about justice and the role of law after genocide are often juxtaposed with the lack of speech that permeates the offense. In the tradition of Raphael Lemkin, who sought to name a previously nameless crime, judicial writing subjects the indescribable quality of mass atrocities to the certainty and acknowledgement of law.\textsuperscript{227} A judicial voice constitutes a finding, legal acknowledgment of historic realities and an answer to Primo Levi’s fear that even if some people should survive the Holocaust, no one will believe their experience. As Payam Akhavan suggests, one of the signal achievements of Nuremburg was the reduction of the Holocaust “to a manageable narrative through the attribution of liability within the confines of legal process…”\textsuperscript{228}

Like the Holocaust, the Rwandan genocide is characterized by unspoken truths. Journalist Allan Thompson has noted that “In the autumn of 1994, French journalist Edgar Roskis, wrote in \textit{Le Monde Diplomatique} of “un genocide sans images,” a genocide without images.”\textsuperscript{229} The deadening effect of silence is reflected in the \textit{interhamwe}’s desire to leave none to tell the story,\textsuperscript{230} the Clinton Administration’s refusal to call the killing genocide, and the United Nations’ failure to support General Romeo

\textsuperscript{228} PAYAM AKHAVAN, \textit{REDUCING GENOCIDE TO LAW: DEFINITION, MEANING AND THE ULTIMATE CRIME} 103 (2012).
\textsuperscript{229} ALLAN THOMPSON, \textit{THE MEDIA AND THE RWANDA GENOCIDE} 4 (2007)(observing that because most foreign journalists fled the country, the genocide was largely unrecorded).
\textsuperscript{230} ALISON DES FORGES, \textit{LEAVE NONE}, supra note ___.
Dallaire’s request for additional troops. Although some forms of carefully managed conversations have taken root in post-genocide Rwanda, the country continues to be marked by conspicuous silences, from the absence of a truth commission tasked with creating an authoritative national history, to the paucity of domestic judgments explaining the origins of the atrocities (the gacaca courts are generally unrecorded), to Rwanda’s refusal to broach dissent and the reticence of international organizations to criticize Rwanda on that basis. Indeed, much of the critical reflection on the international community’s response to the incitement that fed the Rwandan genocide reproduces this theme with its focus on technology-based prevention, specifically the unactivated potential for radio jamming, air strikes against RTLM radio and other forms of enforced silence.

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

C. The Entanglement of Law and Narrative

The adjudication of incitement to genocide from outside a national master story involves the triple joinder of law and narrative. In the first instance, judges apply legal doctrine to the spoken or written word to determine whether the inflammatory speech poses a danger or ought to be permitted. Here, in Moshe Halbertal’s phrase, “the narrative itself provides a basis for the law” and the legal outcome is determined by the underlying story. In the exercise of judgment in Mugesera, the Canadian Supreme

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234 Moshe Halbertal, At the Threshold of Forgiveness: Law and Narrative in the
Court does more than rule on the legality of the respondent’s entry into the country; it delves into the content of Mugesera’s speech, embracing the adjudication of language despite the utterance in an entirely foreign context. To ascertain if Mugesera’s speech represented a call to genocide, the Court subjects it to the Genocide Convention inquiry of whether it constituted direct, public and intentional incitement while assiduously avoiding the question of whether hate speech leads to incitement to genocide. The opinion is organized in chapters beginning with a history of Rwanda and an in-depth study of the ethnic tensions that predominated in Gisenyi at the time of Mugesera’s address.

The Court explicitly relies on story as a sign of authenticity by noting that, “It is common lore in Rwanda that the Tutsi originated in Ethiopia.” The decision also establishes a demonstrable link between the use of language and the independent commission of an international crime, namely the utterance of an explicit call to exterminate Tutsis. Mugesera’s reference to the Nyabarongo river spoke to the Court which held that since the Nyabarongo is unnavigable, Mugesera must have been urging his followers to kill.

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

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

_Talmud, 7 JEWISH REV. OF BOOKS ___(2011).

For a discussion of the effects of accumulated and targeted hate speech in Rwanda, see Mengistu, Shielding Marginalized, supra note ___ at 360.

Mugesera at ¶ ___.

Id. at ¶ 91.

Id. at ¶ 92.


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

In the so-called “media” trial, the ICTR convicted Hassan Ngeze, the editor-in-chief of Kangura magazine, Ferdinand Nahimana, a founder of RTLM, and Jean-Bosco Baragwiza, a lawyer and RTLM executive. Through Kangura, the Tribunal found that Ngeze “explicitly and repeatedly, in fact relentlessly, targeted the Tutsi population for destruction by ‘[d]emonizing the Tutsi as having inherently evil qualities, equating the ethnic group with the ‘enemy’ and by calling for the extermination of the Tutsi ethnic group as a response to the political threat that [the Hutu] associated with the Tutsi ethnicity.’” The Trial Chamber found that Kangura published ethnic hatred and threats from 1990 through 1994 that “had the effect of poison” in spreading “fear-mongering and hate propaganda…[to pave] the way for genocide in Rwanda, whipping the Hutu

241 See Audrey Golden, *Monkey Read, Monkey Do*, 43 WAKE FOREST L. REV. at 1165 (the most damning evidence of incitement at Nuremberg was Der Stürmer’s publication of “a special issue devoted to ‘racial pollution’ [that] demand[ed] the death penalty for Jews…[which was] captioned in huge red letters.”)

242 Prosecutor v. Jean-Paul Akayesu, ICTR Case No. 96-4-T (Sept. 2, 1998).


244 The Akayesu Trial Chamber also noted that colonial administrators converted once fluid ethnic, class and tribal identities in Rwanda into fixed understandings of population. Mugesera’s speech is mentioned by the ICTR in the Indictment of Bizimungu and others, Case No. ICTR-2000-56-I at 4.11

245 Ruggiu Judgment, ICTR Case No. 97-32-I P 50.

population into a killing frenzy.\textsuperscript{247} Nahimana caused the deaths of thousands of innocent civilians without so much as a “firearm, machete or any physical weapon,” the tribunal held. All told, the Court decided, these entities formed “a common media front” that labeled Tutsis as the enemy, normalized ethnic hatred as political ideology, and orchestrated killings.

Insofar as each of these speaker’s words precipitated, instigated or formed a causal relationship with acts of violence, international criminal tribunals operating through translations have had little difficulty attaching criminal sanctions to inciting speech. Like Streicher’s and Milosevic’s speech of earlier eras, RTLM and Kangura were closely connected to the operation of state power and their messages inflamed and desensitized myriad actors.\textsuperscript{248} International criminal tribunals have recognized that in the employ of monopolistic power, stories can be used to maintain dangerous mythologies or violent fantasies, to justify disparities, and to create a culture of permissive violence. But where the consequences of vitriolic rhetoric are less direct or abhorrent, however, courts have refused to sanction speech alone. The International Military Tribunal at Nuremburg acquitted Hans Fritzche, chief of the radio section of the Nazi Propaganda Ministry, because he had not exercised control over propaganda policies and it could not connect his weekly broadcasts to specific instances of directed violence.\textsuperscript{249} In the ‘media’ case at the ICTR, the Appeals Chamber dismissed some of the charges against Ngeze, Nahimana and Baragwiza related to speech that could be subject to more than one interpretation. And Rwandan musician Simon Bikindi, who was indicted for composing, singing and broadcasting songs that called for the slaughter of Tutsis, was acquitted by the ICTR Trial Chamber on the charge of incitement through the composition or dissemination of his songs because that the prosecution was unable to show causation.\textsuperscript{250}

\textsuperscript{247} Id. at para. 950.

\textsuperscript{248} In both Nazi Germany and the Federal Republic of Yugoslavia, propagandists maintained a drumbeat of violent discourse designed to drown out alternative voices, to collapse the marketplace of ideas, and to ensure that their voices would be the only ones heard. See Carol Pauli, \textit{Killing the Microphone: When Broadcast Freedom Should Yield to Genocide Prevention}, 61 Ala. L. Rev. 665 (2010)(developing a legal framework based on communication research to identify the conditions that create incitement to genocide and justify intervention); \textsc{Michael P. Scharf}, \textsc{Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg} 29-30 (1997).

\textsuperscript{249} XXII Trials of the Major War Criminals Before the International Military Tribunal 491-96 (1948) at 582; see also Matthew Lippman, \textit{The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later}, 8 Temp. Int’l & Comp. L.J. 1, 45 (1994) (The Fritzche case “clarified that a conviction for incitement requires the use of provocative language as well as a specific intent to provoke others to act”).

\textsuperscript{250} Bikindi was nonetheless convicted of incitement to commit genocide on the basis
Mugesera offers another installment in the global judicial enterprise of adjudicating incitement to genocide. “In the face of certain unspeakable tragedies,” Chief Justice McLaughlin writes, “the community of nations must provide a unified response. Crimes against humanity fall within this category.”251 Notwithstanding the contention that certain crimes exist beyond language, the Court regards the speech in this case to be the progenitor of international offenses that warrant legal sanction. By defining incitement through the stories of other tribunals and incorporating into domestic jurisprudence the interpretation of diverse adjudicative bodies, the Mugesera court gives and takes of comparative law.252

The meaning of the modern human rights lexicon is a shared and developing enterprise. In Rene Provost’s analysis, the judge is at the very least “the midwife of customary norms, assisting in the process of its emergence as a binding standard; and at most, in line with the development of common law, the judge plays a truly creative role.”253 This, of course, is a venerable tradition and a well-established practice in Commonwealth states and among imperial powers and their colonies.254 Customary international law is the product of repetitive storytelling capable of generating a sense of legal obligation.255 By speaking to other judiciaries through facts and a method of inquiry that can be reproduced as an analogous tale – the ‘diction’ of jurisdiction – Mugesera reflects a growing judicial habit.

251 Id. at ¶ 178.

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


The third combination of law and narrative is the conscious development of a global language of international human rights law for a broader audience than the litigants or other judges. The judicial elaboration of incitement to genocide suggests that are times when the law becomes the narrative. This is the story of human dignity and universal norms that allows a Canadian court to opine on the Kabaya speech.

Judging speech across time and space requires sufficient knowledge of the underlying context to announce that some stories violate the rights of targeted persons or humanity as a whole. At this level, the articulation of human rights narratives is exemplary and the judicial writing of human rights wrongs represents law in its expressive capacity. The language of the incitement case law begins to mediate our understanding of social relationships and the dangers inherent in some forms of expression. The growing collection of stories establishing incitement to genocide as a violation of international human rights law clarifies the norm and contributes to the corpus of international law. In Cover’s parlance, judicial storytelling in human rights cases gradually produces the nomos, a world-building articulation of interpretive commitments in law.\footnote{Mugesera is predicated on the finding that the respondent incited violence through exterminationist rhetoric that warrants deportation from Canada. The Court holds that, “Our nation’s deeply held commitment to individual human dignity, freedom and fundamental rights requires nothing less.”\footnote{Mugesera ¶ 178.} The use of the term “human dignity” is not accidental. Although the precise meaning of dignity changes across jurisdictions, the concept undergirds the Universal Declaration of Human Rights, the equality guarantees of South Africa’s Constitution, the United States Supreme Court’s antidiscrimination law and the UK House of Lords’ decision to order the provision of AIDS medications to HIV-positive asylum seekers.\footnote{See MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY ___ (2001); STEVEN J. HEYMAN, FREE SPEECH & HUMAN DIGNITY (2008)(proposing a personal autonomy and dignity-based approach to conflicts between competing rights values).} Human dignity is increasingly the centerpiece of the secular language of international rights discourse and a means of evaluating abusive expression.\footnote{Law, as reflected in Mugesera, fashions and defends a}

\footnote{\begin{itemize}
  \item Mugesera ¶ 178.
  \item Christopher McCrudden, Human Dignity and Judicial Interpretation of Human Rights, 19 EUR. J. INT’L L. 655, ___ (2008)(cataloging the many uses of dignity and recognizing that the term is a source from which new rights may be derived and existing rights extended).
\end{itemize}}
narrative of human dignity and universal values in incitement to genocide cases.

The grammar of human dignity in Mugesera may have the additional benefit of immunizing it from a countervailing rights-based attack. The exercise of free speech is a fundamental right and without carefully labeling Mugesera’s expression as a verbal assault and a precursor of monstrous action, the opinion is susceptible to claims of moral equivalency. Likewise, during Mugesera’s last days in Canada, his lawyers invoked the non-refoulement principle to assert that he would be subjected to torture if he were returned to Rwanda. The implication of Mugesera’s claim was that the rights-protective position weighed in his favor. The Court’s story-salient description of the dehumanizing effects of a speech in Mugesera insulates against adoption of this view while defining incitement to genocide as a grave international human rights violation. In short, the adjudication of this crime in a transnational setting makes clear that the dignity-based threat posed by incitement to genocide trumps countervailing concerns.

D. Distinguishing Hate Speech From Incitement to Genocide

The protection and promotion of human dignity takes many forms and it is axiomatic that both hate speech and incitement to genocide offend the dignity of others through the structure and appeal of story. But hate speech is a broader category than incitement since it encompasses a wider range of expression with less directed goals. International law muddies the waters by providing support for both freedom of expression and the protection of human dignity in the face of linguistic violence. Article 19 of the Universal Declaration of Human Rights proclaims that “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” The same article of the ICCPR requires states to protect freedom of expression although it does not define protected expression. Conversely, international human rights law evinces concern for the damage wrought by certain forms of

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260 Benesch, Inciting Genocide, Pleading Free Speech, supra note ___ at ___.
261 Mugesera’s legal team filed an Article 22 individual petition before the Committee Against Torture, seeking to forestall the deportation and the Committee duly requested that Canada refrain from deporting Mugesera until it would consider the petition. In response, a Quebec Superior Court temporarily stayed Mugesera’s deportation but ruled a week later that the Committee lacked the authority to constrain the action of States Parties.
speech, specifically expressions of racial animus. Article 20 of the ICCPR expressly prescribes legal restrictions of hateful incitement and Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that State Parties “Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”

Absent global institutions capable of defining uniform speech standards, the principles of free expression and the obligation of states to curtail incitement have been upheld independently. In *Lehideux and Isorni v. France*, the European Court of Human Rights determined that a French prosecution for contesting the legitimacy of the conviction of Marshal Pétain violated the European Convention’s guarantee of free expression. But the Human Rights Committee has ruled otherwise in a series of cases that have been decided against individual rights of expression and in favor of state protections against degrading speech. In *Faurisson v. France*, the Committee found no breach of the Covenant where a conviction under France’s Holocaust denial legislation was held not to encroach upon Faurisson’s right to hold and express an opinion in general. Likewise, in *M.A. v. Italy*, the Human Rights Committee ruled inadmissible a complaint that a conviction for reorganizing the dissolved Fascist Party in violation of Italian law violated speech and associational rights under the ICCPR. In sum, the divergence of views on the subject is so great that some commentators have concluded that “it would be both impossible and

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undesirable to develop universal standards on speech, and the attempted imposition of such norms would be viewed as illegitimate.\textsuperscript{268} It is plain that viewed alongside the diversity of national standards and speech-restrictive subjects, there is no global consensus on the content and context of hate speech.

To conflate incitement to genocide with hate speech is legally problematic because the former is a crime under international law and the latter is not.\textsuperscript{269} Susan Benesch’s cogent analysis observes that the Mugesera opinion neither situates hate speech and incitement to genocide along a spectrum of expression nor provides a clear test for use in future cases.\textsuperscript{270} And while the Mugesera Court gestures toward the force of stories and lore in pre-genocidal Rwanda, it fails to identify which elements of incitement constitute crimes against humanity or when hate speech might grow into an exhortation to commit mass murder.

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

[T]he content of the motion…constitutes an unqualified and abusive attack on the integrity of the Judges of this Court. In an attempt to establish the alleged Jewish conspiracy and abuse of process against the Mugeseras, the pleading systematically referred to irresponsible innuendo….The only abuse of process from this motion lies at the feet of the respondent Mugesera and Mr. Bertrand.\textsuperscript{271}

\textsuperscript{269} See Benesch Vile Crime, 48 VA. J. INT’L L. at 519.
\textsuperscript{270} Id. at 520 (proposing a test focused on audience understanding, speaker influence, recent violence, absence of alternative voices, dehumanizing rhetoric and prior messaging), Pauli, Killing the Microphone, supra note __ at 674-75 (offering a four-part test based on “communications research”), and Gordon Music and Genocide, supra note__ at 625 (proposing temporality and instrumentality as additional factors for identifying incitement).
\textsuperscript{271} Mugesera v Canada (Minister of Citizenship and Immigration) [2005] SCC 39 ¶16.
If nothing else, the written rebuke of Bertrand suggests that the lawyer’s speech was less threatening than his client’s and can be addressed and exposed by nothing more than judicial language. This type of narrative – admonishing, condemnatory, situational – is one that judicial fact-finders are uniquely positioned to generate. By naming Bertrand’s storytelling as anti-Semitic, the Court uses the language of law and the reasoned application of civic values to displace the illogic of racism and discrimination. Significantly, the denial of Bertrand’s motion carried with it no legal sanction or censure, save referral to the bar association.  

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

CONCLUSION

Leon Mugesera was deported from Canada to Rwanda on January 23, 2012, where he was promptly incarcerated and held pending trial on incitement to genocide charges. Less than three months later, Mugesera demanded a trial in French, not Kinyarwanda, the lingua franca of his infamous speech. Should his Rwandan trial prove to be the final act of a decades-long morality play, Mugesera will have demonstrated once more that language and story are inextricably bound to the social life that law negotiates and constructs.

The first and last lesson of this story is that not all stories are equal and none matters more than the master story. Evaluating incitement to genocide and hate speech from this perspective exposes the importance of language in the creation of meaning and the ways in which law employs narrative to redefine the tension between the promotion and regulation of stories. How appropriate that the Mugesera Court should use the Kabaya speech as grist for the iterative development of international human rights law and norms.


In the final analysis, law thrives in a culture of stories, particularly when it succeeds in creating a tale imbued with pathos and reason and which lends itself to retelling again and again.