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Abstract: Sometimes recurring stories are hidden from view and remain beyond the reach of law until they are brought to light because of a change in social or legal context. And sometimes recurring stories are readily available to serve as analogies to a present controversy. My paper suggests both types of stories can be categorized as “exemplary” narratives—that is, narratives that are capable of moving the law or legal decisions. To show how and why certain narratives attain exemplary status, I trace a series of self-defense cases involving women as defendants and the development of a closing argument in a famous trial. I conclude with a meditation on what “exemplarity” in law means and consider whether this is an aspect of the use of models in the social and life sciences.

Keywords: exemplary / narratives / stories / models / exemplarity / discourse / genre / self-defense / closing argument

INTRODUCTION: EXEMPLARITY AS A NARRATIVE MODE

Although we can find multiple definitions of the word “exemplary” in any ordinary dictionary, these definitions tend to orbit around (or perhaps collapse into) one of two senses: something that is noteworthy or worthy of imitation, or something that serves as a model, pattern, or specimen. In the discussion that follows, I hope to show that both senses of the word are critical to an understanding of the relationship between law and narrative. First, a narrative must be exemplary (in the specimen sense) if it is to sustain a claim or defense under a legal rule. Second, and even more important,
a narrative that is exemplary (in the noteworthy sense) can actually reshape a legal rule that forms the basis of a claim or defense. It is through this dance of narratives that the law develops. But first, some background.¹

It is now received wisdom that narratives are fundamental to law. Some are so compelling that they become exemplary in one or both of the two senses that I just mentioned. First, there are recurring stories that are hidden from public view and thus remain beyond the law. But sometimes one of those stories breaks from its subterranean tomb and becomes institutionalized as a new rule of law. Second, there are stories that become representatives of certain classes of cases—that is, they offer baseline conditions for analogical reasoning. This is to say that they serve as the second operand in the formulaic question, “Is present case X like or unlike historical case Y”? To show these (related) processes at work, I’ll discuss a diachronically ordered set of female-centered murder cases in which self-defense is the ultimate question of fact and law, and follow each of them from incident, through trial, and on into institutionalization as evolutionary drivers of the legal rule of self-defense. Then, I’ll demonstrate the synchronic deployment of a stock, exemplary narrative as a heuristic and rhetorical device for provoking a jury into making a particular fact-decision or a judge into making a particular rule-decision. My hope is that by pursuing both of these paths, we will see—if only off in the distance—a convergence of both the diachronic and synchronic dimensions of narrative. Finally, I conclude by positing exemplary narratives in a role vis-à-vis the law that is similar to that of rituals or model organisms in the social and life sciences.

Narratologists often make a distinction between “stories” and “discourse,” which is to say between “what happened and the presentation of what happened.”² Think about the famous O.J. Simpson murder trial. There is an ordered series of events that led to the murder of Nicole Brown Simpson and her friend Ronald Goldman. Let’s call this the “real story”—that is, what really happened. We will never know all the particulars of this story, but we know that the prosecution in the Simpson case had a story in mind, as did the defense—we’ll call them the “prosecution story” and the “defense story.” In the prosecution story, Simpson had beaten his wife in the past, taken their divorce hard, stalked her for months, and then finally killed her and her companion in a blind rage. In the defense story, the police found the bodies at the crime scene, leapt to the conclusion that
Simpson was guilty, and then manufactured evidence to bolster this story. (Notice how each story covers a different temporal scope.)

At trial, the Simpson jury did not, of course, directly receive either version of the story; rather, it heard months of disjointed discourse, from which it had to construct a narrative that would justify its verdict (to itself, at least, for the purpose of reaching a decision). So at the interpretive level that took place at trial and in the jury room, the Simpson jurors had to reconstruct the evidence they heard in a way that not only hung together as a story but also seemed plausible to them because it squared with other stories that were familiar to them. As many observers have noted, the “downtown” jury that heard the case was predisposed to doubt the bona fides of the Los Angeles Police Department because they or their friends, family, or neighbors had had first-hand experience with the bad acts of the LAPD. What remains for us to consider is the process through which discourse becomes narrative in this and other story-building contexts.

A baseline difficulty arises because, as Anthony Amsterdam and Jerome Bruner have observed, disagreement abounds amongst theorists about what narrative is. But the competing claims more or less sort into two categories: endogenous theories and plight-modeling theories. Endogenous theories posit that narrative is a fixture of the human mind—either directly as a result of how the brain works or indirectly as a result of a deep structure common to all languages. Plight-modeling theories, which owe a debt to Roland Barthes’ work, suggest that cultures contain and transmit their plights and aspirations in common narrative forms. And although both types of theory bear on legal narratives, the second has the most obvious connection:

In litigation, the plaintiff’s lawyer is required to tell a story in which there has been trouble in the world that has affected the plaintiff adversely and is attributable to the acts of the defendant. The defendant must counter with a story in which it is claimed that nothing wrong happened to the plaintiff (or that the plaintiff’s conception of wrong does not fit the law’s definition), or, if there has been a legally cognizable wrong, then it is not the defendant’s fault. Those are the obligatory plots of the law’s adversarial process. At common law, moreover, the plaintiff’s story-argument is classically shaped to fit a particular writ, which . . . is a kind of plot précis of what is at issue—trespass, indebitatus assumpsit, or whatever. And the defendant typically counters the plaintiff’s writ-informed narrative with one known or believed to have been used successfully to that end.
What is important to note here is that recurring legal narratives over time harden into genres. Once that happens, members of what genre theorists call a “community” (sometimes a “discourse community”) have models against which to measure new incidents and decide questions like “Did the defendant agree to sell Blackacre?,” “Did the plaintiff release her claims?,” “Did the defendant act in self-defense?,” and so on. And these models (i.e., exemplary narratives) contain not only a recounting of facts but also an indication of how those facts should be resolved as a legal matter. Put in Neil MacCormick’s well-known analytical framework, an exemplary narrative sets forth Operative Facts and their attendant Normative Consequences (if OF, then NC). In this way, an exemplary narrative can be seen as a mediator between an abstract, universal rule of law and a particular, concrete matter in need of a legal decision. And just because a story becomes canonical does not mean that it won’t be displaced or modified in the face of changing circumstances or social evolution (it inevitably will). Amy Devitt makes this point with respect to genres generally; Amsterdam and Bruner show this to be the case with respect to legal narratives in particular.

None of what I’ve just said is at odds with endogenous descriptions based on cognitive science. For as Patrick Hogan explains (drawing on insights of narratologists David Bordwell and Richard Gerrig), we transmute discourse into narrative through the agency of a cognitive feature that he calls “procedural schemas.” These schemas are “cognitive structures of action,” by which he refers to the way in which the mind works and is structured. “In the case of narrative, they allow us to construct the story from the discourse.” Most important for us, these structures are at least partially subjective, idiosyncratic, and experience-based. So we must bear in mind that interpretive narratives (narratives constructed to make sense of raw data or competing narratives) are always partially a function of the interpreter’s experience:

[Narrative] construction involves, first of all, the application of a vast wealth of information—prominently including an array of representational schemas—from our experience in the real world. Speaking of literary narrative, Gerrig points out that “readers... must construct... situation models, which integrate information from the text with broader real-world knowledge.” Indeed, we evidently follow “a principle of minimal departure,” according to
which we assume maximum continuity between the real world and the world
of fiction. In other words, we basically assume that the world of the story is
identical with the world of our lived experience except in those specific cases
where there is a direct contradiction from the narrative.¹²

To put all this in the context of the Simpson case, the jury members were
required to draw upon the world of their “lived experience”—and the
exemplary narratives familiar to them—to determine, for instance, whether
the infamous bloody gloves fit better within a narrative in which (a) Simp-
son dropped the gloves in his haste to flee the crime scene and surrepti-
tiously reenter his estate without detection or (b) overzealous and racist
LAPD officers planted the gloves to enhance the possibility of convicting
the suspect that they had already deemed guilty.¹³ So, to invoke Penning-
ton and Hastie’s Story Model of decision making, each juror would con-
struct a story that covered the most evidence with the greatest coherence,
constrained by each juror’s “differences in experiences and beliefs about
the social world.”¹⁴ Now, of course, not everyone has the same experiences
and beliefs, which explains much of the public outcry that erupted once the
Simpson not-guilty verdict was announced.

As a further, yet related, complication, Bernard Jackson reminds us that
“[w]e have in the trial not simply a single story, but a set of stories. The act
of testifying of each individual witness is a story in itself, but other po-
lemics are also going on concurrently, albeit manifested in different (and
less immediately perceptible) ways.”¹⁵ What Jackson is getting at is that
the mini-stories being told from the witness stand are not self-contained
because, for example, they are punctuated with questions and objections,
and they take place within a space brimming with semiotic significance. In
short, “[w]e have, then, a plurality of narrative discourses at work in the
trial.”¹⁶ Each of the litigants tries to massage these discourses into an
overall narrative of guilt or non-guilt, and the jury must decide “which
of the rival stories is more plausible.” Moreover, he makes the compelling
structuralist point that this is inevitable:

People carry around with them a stock of socially-constructed narratives,
acquired through the whole range of their social experience (including their
education). A significant factor affecting the plausibility of a newly-
communicated story is the degree to which it fits a narrative which already
exists within this stock of social knowledge.¹⁷
EXEMPLARY NARRATIVE AS LAW

To make this more concrete, let’s look at the law of provocation. Here’s Robin West’s narrative take on the subject, which will serve quite well as a launching pad for the discussion:

The criminal law of justified self-defense is... squarely based on a stock story, this time of the nature of violence: a stranger is accosted in a public place, such as a bar or street, and if possible, retreats, but if retreat is impossible, he justifiably defends himself. The intricate rules in criminal law governing the justified use of force to defend oneself are tailored to this story. They do not fit well—or at all—violent encounters that depart from it. They do not fit well, for example, the violent encounters between intimates that occur in a home: there is nowhere to “retreat” when one’s attacker is an intimate and when the “safe haven” to which retreat is required is where the violence occurs. Whatever might be the case with respect to the now much battered “battered wife syndrome” defense to criminal homicide, at least this much is clear: the rules of self-defense, the inadequacy of which prompted creation of the battered spouse defense in the first place, would look very different if those rules had been crafted around the stock story of domestic violence between intimates rather than the stock story of barroom or playground violence between strangers. Some number of those “syndrome”-induced acts of violence—at best, under current law, excused as acts of a nonresponsible actor—might be better viewed as fully justified acts of self-defense. The injustice occasioned by unthinking reliance on unrepresentative stock stories of this sort is rampant.18

Boiled to a rule, the stock story to which West refers has long been institutionalized. According to Blackstone: “self-defense... is that whereby a man may protect himself from an assault, or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him.”19 To advance our discussion of this rule and its inherent narrative limits, I would like to return to a consideration of what makes a narrative of domestic self-defense “exemplary,” in both of the senses that we have been discussing. To illuminate and contextualize these points, we can refer to a few cases that are representative in key respects and trace the development of self-defense in the context of gender relationships. To start, let’s look at the facts of a representative, older case to see how they square with West’s
“classic” narrative. As Justice Holmes told the tale in *Brown v. United States*, \(^{20}\)

There had been trouble between Hermes and the defendant for a long time. There was evidence that Hermes had twice assaulted the defendant with a knife and had made threats communicated to the defendant that the next time, one of them would go off in a black box. On the day in question the defendant was at the place above mentioned superintending excavation work for a postoffice. In view of Hermes’s threats, he had taken a pistol with him and had laid it in his coat upon a dump. Hermes was driven up by a witness, in a cart to be loaded, and the defendant said that certain earth was not to be removed, whereupon Hermes came towards him, defendant says, with a knife. \(^{21}\)

At this point in the narrative, Holmes has sketched out facts corresponding to the first scene in a self-defense drama—*vizi*, a man has been violently assaulted. He then proceeds to the second expected scene in the stock drama—the man kills his assailant without recourse to other options (like flight):

The defendant retreated some twenty or twenty-five feet to where his coat was and got his pistol. Hermes was striking at him and the defendant fired four shots and killed him. \(^{22}\)

Here, Holmes condenses the facts in a way that makes Hermes’ death seem inevitable and justified in two ways. First, Hermes was unrelenting in the assault. Second, and perhaps more telling, Holmes frames the defendant’s retaliatory act in the language of legal justification—“the defendant retreated”—as a rhetorical device. That is, the defendant did not “retreat” in a legally significant sense because the “retreat” consisted of nothing more than running to get a gun out of his coat and then shooting Hermes multiple times (once after Hermes was down).

What Holmes is concerned with is the traditional demand that a common-law judge consider whether an assault victim could have escaped or taken acts short of homicide before killing the assailant. Although Holmes nowhere makes the point directly, one can detect at least hints of the belief that to retreat from an affray is unmanly. As one commentator put it over a century ago, “In the West and South . . . it is abhorrent to the courts to require one who is assailed to seek dishonor in flight. The ideal of these
courts is found in the ethics of the duelist, the German officer, and the buccaneer.”23 This, I think, may animate Holmes’ belief that a “man” (especially a man living in Texas, where the case arose) should be able to “stand his ground,” and therefore, that—in an oft-quoted fillip—“Detached reflection cannot be demanded in the presence of an uplifted knife.” And thus he concludes that “it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or disable his assailant rather than to kill him.”24

So what Holmes has done is expand the classic self-defense narrative by resituating it in his own present: “It is useless to go into the developments of the law from the time when a man who had killed another no matter how innocently had to get his pardon, whether of grace or of course.”25 He takes this position because, in his view, “concrete cases or illustrations stated in the early law” (i.e., received exemplary narratives) arose “in conditions very different from the present…. ”26 “The law has grown,” he tells us, and if it is to continue along that path, it must adapt to new social realities, including those of the American frontier (he cites Texas law as “very strongly” supporting the position he sets forth).27 In the end, then, Brown is an instantiation of the paradigmatic self-defense narrative that West describes for us above (two hot-headed men fighting, one of which must, as Holmes says, “go off in a black box”), but it also stands at the mouth of a newer line of cases that will become “exemplary” in their own way because (perhaps unconsciously on the part of their authors) they take into account “the hip-pocket ethics of the Southwest.”28

A case of about the same vintage as Brown, People v. Giacalone,29 shows how uneasily cases of domestic violence fit within the framework of the classic self-defense narrative. In that case, it was undisputed that the defendant had shot and killed her husband in their home. As the court told it, The shooting occurred toward midnight. Near 7 o’clock of that evening deceased became violently enraged, without just cause, and choked defendant, leaving bruises on her throat. He struck her and otherwise bruised and injured her. He threatened to kill her. She was crying. He had a pistol and two shotguns with shells for them in the room where they slept. He cleaned and loaded the pistol. He held it close to her, saying “I got to kill you.” He said he would kill her before morning. He hung the loaded pistol in a holder on a nail near his bed. A shotgun and shells were also near. He went to bed near
9 o’clock. Their children were in bed in the same room. After defendant had lain in bed about two or three hours, not sleeping, as she testified, there being no light in the room, and believing deceased to be asleep, she arose, went around his bed, took the pistol from the holder and started to leave the room to go to the home of a neighbor. But the defendant’s escape did not go off as planned: she testified that “as she was leaving deceased made a noise and the bed squeaked and she thought him awakened and getting up.” This scenario raises two questions under the exemplary self-defense narrative. First, was the defendant under “imminent” threat of death or great bodily harm, and second, could she have safely retreated? The evidence that the court identifies seems inconclusive on either count. As to the first question, the court simply noted that “there is evidence by the autopsy tending to support, it seems, her belief that deceased was getting up when she shot.” As to the second question, the evidence was equally thin:

Q. Did you think he was going to kill you as he said he was?
A. Sure.

Q. That is what made you shoot, because you were afraid he would kill you if you did not?
A. Yes.

Q. This was right after he had told you, that is, the same night he told you he would kill you before morning?
A. Sure he would do, because he started in the morning pretty near kill me every morning before he go to work. . . . I cannot run because I got my house locked, fire, he come on me, kill me, because he got another gun in bedroom, you see he got this gun, see? He kill me.

In light of all the evidence, the court was persuaded that the husband was “brutal and violent,” that her testimony was credible, and that she had never before shown a tendency to violence or other misconduct. At bottom, the court seems to have evaluated her conduct in light of the then-dominant stereotype of woman-as-helpless victim: “Tears and sorrow seem to have been her portion.” But even so, the court did not choose to recognize her situation as a different type of narrative. Instead, it trimmed the facts to fit the Procrustean bed of the classic narrative and found, “Viewed from her standpoint of the time, or from any standpoint, it
cannot be said as a matter of law that he had abandoned his declared purpose to kill her, nor that the circumstances were not sufficient to induce in defendant an honest and reasonable belief that she was in danger of great bodily harm or loss of life.”

Over the next fifty-plus years, courts began to acknowledge that the classic self-defense narrative and its associated rules were inadequate to comprehend situations of violence toward women. One way to think about this is in terms of the law slowly phasing with an evolving public narrative that included women as full social partners rather than as dependents.

The steps were tentative, though, and courts first had to recognize that women were unlikely to find themselves in self-defense situations involving bar fights with men. *State v. Wanrow* exemplifies an important initial swerve outside the classic narrative.

Yvonne Wanrow was convicted of second-degree murder and first-degree assault arising out of an incident in which her two children were staying at the home of one of her friends, Ms. Hooper. Wanrow’s son had been playing in the neighborhood and reported to Hooper that a man tried to pull him off his bicycle and drag him into a house. Some months earlier, Hooper’s 7-year-old daughter had been molested, but it was not until the night of the shooting that she discovered it was William Wesler (the decedent) who had assaulted the child. A few minutes after Wanrow’s son told his story, Wesler appeared on the porch and yelled through the door, “I didn’t touch the kid, I didn’t touch the kid.” Upon seeing Wesler at the door, Hooper’s daughter identified him to her mother as the man who had molested her. As Wesler was leaving, Joseph Fah, Ms. Hooper’s landlord, saw him and told Hooper that Wesler had tried to molest another young boy and that Wesler had previously been committed to a mental hospital. Alarmed at this revelation, Hooper called the police who, for some reason not clearly revealed in the case opinion, stated that they couldn’t immediately arrest Wesler, although it would be okay for Hooper to “conk him over the head” if he came back, so long as she “wait[s] until he gets in the house.”

Later that day, Hooper called Wanrow and, after recounting the day’s events, asked her to spend the night. Wanrow agreed and arrived at Hooper’s house in the early evening. Even though Wanrow had brought a pistol with her, the two women were afraid to stay alone, and so they asked Wanrow’s sister and brother-in-law, Angie and Chuck Michel, to
come over. While the eight young children with them slept, the four adults stayed up all night talking and watching for prowlers. Then,

At around 5 a.m., Chuck Michel, without the knowledge of the women in the house, went to Wesler’s house, carrying a baseball bat. Upon arriving at the Wesler residence, Mr. Michel accused Wesler of molesting little children. Mr. Wesler then suggested that they go over to the Hooper residence and get the whole thing straightened out. Another man, one David Kelly, was also present, and together the three men went over to the Hooper house. Mr. Michel and Mr. Kelly remained outside while Wesler entered the residence. The testimony as to what next took place is considerably less precise. It appears that Wesler, a large man who was visibly intoxicated, entered the home and when told to leave declined to do so. A good deal of shouting and confusion then arose, and a young child, asleep on the couch, awoke crying. The testimony indicates that Wesler then approached this child, stating, “My what a cute little boy,” or words to that effect, and that the child’s mother, Ms. Michel, stepped between Wesler and the child. By this time Hooper was screaming for Wesler to get out. Ms. Wanrow, a 5-foot 4-inch woman who at the time had a broken leg and was using a crutch, testified that she then went to the front door to enlist the aid of Chuck Michel. She stated that she shouted for him and, upon turning around to reenter the living room, found Wesler standing directly behind her. She testified to being gravely startled by this situation and to having then shot Wesler in what amounted to a reflex action.39

On appeal, Wanrow argued that she had been unfairly convicted because the trial court’s instruction on self-defense “incorrectly limited the jury’s consideration of acts and circumstances pertinent to respondent’s perception of the alleged threat to her person.”40 The appellate court identified two types of flaws in the trial court’s self-defense instruction. First, the instruction directed the jury “to consider only those acts and circumstances occurring ‘at or immediately before the killing. . . .’”41 The court held that this was an erroneous statement of the law because “justification of self-defense is to be evaluated in light of all the facts and circumstances known to the defendant, including those known substantially before the killing.”42

But that was not all. The court went on to identify a systemic defect in the instruction that is more important to our discussion:

The second paragraph of instruction No. 10 contains an equally erroneous and prejudicial statement of the law. That portion of the instruction reads:
However, when there is no reasonable ground for the person attacked to believe that his person is in imminent danger of death or great bodily harm, and it appears to him that only an ordinary battery is all that is intended, and all that he has reasonable grounds to fear from his assailant, he has a right to stand his ground and repel such threatened assault, yet he has no right to repel a threatened assault with naked hands, by these of a deadly weapon in a deadly manner, unless he believes, and has reasonable grounds to believe, that he is in imminent danger of death or great bodily harm. (Italics ours.)

The court’s emphasis on the gendered nature of this instruction is, I think, to invoke the classic exemplary narrative and show how it represents only a narrow subset of all possible scenarios, and that, therefore, it is inadequate—as a measuring device—to assure that justice is done in all cases in which an attacker becomes a homicide victim. For as the court noted, “In our society women suffer from conspicuous lack of access to training in and the means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons,” and nothing in the instructions made it “clear that the defendant’s actions are to be judged against her own subjective impressions and not those which a detached jury might determine to be objectively reasonable.” The instruction given thus failed because it “not only establishes an objective standard, but through the persistent use of the masculine gender leaves the jury with the impression the objective standard to be applied is that applicable to an altercation between two men.” That impression—namely, “that a 5-foot-4-inch woman with a cast on her leg and using a crutch must, under the law, somehow repel an assault by a 6-foot 2-inch intoxicated man without employing weapons in her defense, unless the jury finds her determination of the degree of danger to be objectively reasonable”—was itself a misstatement of the law. And if the court’s contextual position were not clear enough, it went on to state that Wanrow “was entitled to have the jury consider her actions in the light of her own perceptions of the situation, including those perceptions which were the product of our nation’s ‘long and unfortunate history of sex discrimination.’” As a consequence, “Until such time as the effects of that history are eradicated, care must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination. To fail to do so is to deny the right of the individual woman involved to trial by the same rules which
are applicable to male defendants.”

What remains to be done here is for courts to transfer this sort of gender enlightenment beyond a case in which both of the parties could have been men to domestic violence cases, like Giacalone, in which almost always the abused party is a woman and the attacker a man. We now turn to just such a case.

In State v. Hundley, the Kansas Supreme Court was presented with a homicide conviction involving a defendant who had failed in her effort to mount a defense based on proof that she suffered from what is now generally referred to as the genderless “battered person syndrome.”

There was no factual dispute that the married life of Carl and Betty Hundley had been tumultuous. Throughout their ten-year marriage, Carl regularly abused Betty. As the Court reported, “He had knocked out several of her teeth, broken her nose at least five times, and threatened to cut her eyeballs out and her head off. Carl had kicked Betty down the stairs on numerous occasions and had repeatedly broken her ribs.”

Betty, finally having had enough, moved into a motel in Topeka, Kansas. This did not, however, break Carl’s pattern of harassment, which culminated in the incident giving rise to his death:

On January 13, 1983, the day of the shooting, Betty had seen Carl early in the day, at which time Carl told Betty he was going to come over and kill her. That night she heard a thumping on her motel door while she was in the bathroom. By the time Betty got out of the bathroom Carl had broken the door lock and entered the room. His entry was followed by violence [which the Court recounts in graphic detail]. . . . Even after that, Carl continued to threaten Betty. She was sobbing and afraid. He pounded a beer bottle on the night stand and threw a dollar bill toward the window, demanding she get him some cigarettes. Betty testified Carl had hit her with beer bottles many times in the past. Therefore, feeling threatened by the beer bottle, she went to her purse, pulled out the gun and demanded Carl leave. When he saw the gun, Carl laughed tauntingly and said, “You are dead, bitch, now!” As he reached for the beer bottle, Betty shut her eyes and fired her gun. She fired it again and again. There were five spent shells in the gun when it was seized. At the time of the shooting the deceased had his back to Betty and was paying attention to the beer bottle. She was not physically blocked from going to the door.

The Court emphasized that none of the facts were in dispute; the only issue on appeal was whether the trial court improperly instructed the jury as to
the elements of self-defense. Here, the question was not whether Betty’s conduct matched the elements of some type of homicide (i.e., whether the story was an example of homicide); rather, the issue was whether all the facts and circumstances matched the rule allowing exceptions for self-defense (i.e., whether the story was an example of self-defense), and more important, whether the rule—as embodied in the jury instruction—required modification to incorporate Betty Hundley’s situation, her narrative, if you will.

In Betty’s case, the trial court had used the then-standard pattern instruction on self-defense, which held that the use of force is justified if “such conduct is necessary to defend . . . against [an] aggressor’s immediate use of unlawful force.” On appeal, Betty’s counsel argued that the use of the word “immediate” in the pattern instruction (rather than “imminent,” as stated in the statute) prevented the jury from considering (even though it had been copiously presented at trial) the evidence concerning the long-term violence that Carl visited on Betty. For the Court, then, the question became “what instruction should accompany this evidence in order to charge the jury with the proper manner in which such evidence should be considered?” In other words, the Court wanted to ensure that Betty’s status as a battered woman figured into the self-defense equation—that is, that her story constituted a cognizable example of self-defense. And to do so, it undertook a somewhat strained, dictionary-based analysis of the difference between “immediate” and “imminent.”

Despite the appeal to semantics, the Court quickly showed its hand: Betty’s personal narrative coincided with a dark narrative that had remained hidden beneath social convention for centuries:

The issue is dramatized by the nature of this case. This is a textbook case of the battered wife, which is psychologically similar to hostage and prisoner of war cases. Betty Hundley had survived her husband’s brutal beatings for ten years. Her bones had been broken, her teeth knocked out and repeated bruises inflicted, but she did not leave him. She called the police occasionally but would continue to stay with Carl Hundley. The mystery, as in all battered wife cases, is why she remained after the beatings. The answer to that question can only be gleaned from the compiled case histories of this malady. It is not a new phenomenon, having been recognized and justified since Old Testament times. It goes largely unreported, but is well documented. It is extremely widespread, estimated to affect between four and forty million women.
From this historical synopsis, the Court generally concluded, “Battered women are terror-stricken people whose mental state is distorted and bears a marked resemblance to that of a hostage or a prisoner of war. . . . They become disturbed persons from the torture.” And from this general conclusion, coupled with the specific facts of the case, the Court reasoned (1) that the objective component of the self-defense instruction should comprehend “how a reasonably prudent battered wife would perceive Carl’s demeanor,” and (2) that “‘immediate’ in the instruction on self-defense places undue emphasis on the immediate action of the deceased, and obliterates the nature of the buildup of terror and fear which had been systematically created over a long period of time.” This latter point remains something of a non sequitur (and freights a single word with a weighty narrative), but that simply underscores how generative the alignment of an evolved judicial sensibility and an exemplary narrative proved to be in the case. And it’s easy to see how Betty’s narrative is exemplary in both senses of the word that we have been discussing. First, it qualified as an instance of self-defense. Second, because the rule of self-defense had to be rewritten to comprehend it (the case is now summarized in the comments to the self-defense instruction), it is a measuring stick against which other self-defense cases can be assessed. In short, Betty’s story is institutionalized as law.

Before leaving Hundley, it’s worth noting that the transition from an old exemplary narrative to a new one isn’t necessarily smooth. In dissent, Justice McFarland, the only woman on the Court, conceded that there is a “fine” distinction between “imminent” and “immediate,” and that there are situations in which that distinction might control. But she did not believe that Betty Hundley’s story constituted such a case because Betty was in neither imminent nor immediate danger. To demonstrate this, she invoked the classic self-defense narrative and argued that it was sufficient to cover Betty’s situation:

In a factual situation involving matters of seconds the distinction [between imminent and immediate] could be significant and the use of “immediate” could constitute reversible error. An example of such situation would be two men arguing in the middle of a parking lot. One man sees the other reach for the door of his automobile while stating he is going to kill him and he knows the man has a gun or a knife therein. The danger in such circumstances may be imminent but not immediate. But the facts before us do not show imminent or immediate danger of harm.
There were only two persons in the motel room. One admits killing the other. The only version of what transpired is that of the defendant herein. Taking this as true, the deceased told the defendant to leave the premises, giving her money to buy cigarettes. The deceased then sat on the bed in his shorts, not even looking in defendant’s direction. The defendant reached for her purse by the door, took a gun therefrom and fired five shots at the deceased. The parties were in a motel room in a busy part of the city of Topeka in the early evening hours. They were not in some remote area where help would be difficult to obtain. At the very least, defendant would have had a five minute head start on the defendant [sic, “deceased”] had she failed to return with the cigarettes. I fail to see how, in this factual situation, it could be reversible error to use “immediate” rather than “imminent” in the self-defense instruction as it would not have altered the outcome.59

EXEMPLARY NARRATIVE AS RHETORICAL INSTRUMENT

Now we turn back to Jackson’s observation that a trial is a storm of competing narratives and examine the way that lawyers use exemplary narratives to persuade both judges and juries that their version of the facts is the more plausible one. As an example, I would offer *Silkwood v. Kerr-McGee*.60 The case is important for a number of reasons; for example, it continues to impact nuclear and environmental policy, as well as whistleblower-protection laws, but it also formed the leading edge of the modern wave of tort cases in which juries awarded huge punitive damages.61

In the Supreme Court opinion, Karen Silkwood plays a minor role. We learn only that she

was a laboratory analyst for Kerr-McGee at its Cimarron plant near Crescent, Okla. The plant fabricated plutonium fuel pins for use as reactor fuel in nuclear powerplants. . . . During a 3-day period of November, 1974, Silkwood was contaminated by plutonium from the Cimarron plant. . . . On the third day, November 7, Silkwood was monitored upon her arrival at the plant. High levels of contamination were detected. . . . Suspecting that the contamination had spread to areas outside the plant, the company directed a decontamination squad to accompany Silkwood to her apartment. . . . The squad . . . monitored the apartment, finding contamination in several rooms, with especially high levels in the bathroom, the kitchen, and
Silkwood’s bedroom. Silkwood . . . was sent to the Los Alamos Scientific Laboratory to determine the extent of contamination in her vital body organs. She returned to work on November 13. That night, she was killed in an unrelated automobile accident.  

Silkwood’s personal narrative is thus reduced to these few lines and then silted over with page upon page of the history of and intent behind the Atomic Energy Act of 1954 and its subsequent amendments, all to show whether or to what extent federal law preempted the basis of the punitive damages awarded to Silkwood’s estate.  

So why did an Oklahoma City jury whack Kerr-McGee with the then-astonishing sum of $10,000,000 in punitive damages (on top of $500,000 in personal injury damages)? After all, Silkwood could not have suffered for long, given that she died—in an “unrelated” automobile accident—within a month of her exposure to plutonium. It’s impossible to say exactly what actuated the trial judge and jury in the case, but we know that Silkwood’s story is much more complicated than the Supreme Court makes it out to be. And there is a good case to be made that an exemplary narrative lies at the root.  

Flamboyant trial lawyer Gerry Spence—best known these days as a basso-voiced television legal pundit and for his fringed leather jacket and huge, decorated cowboy hat (both of which were part of his get-up for the Silkwood trial)—led the Silkwood estate’s trial team. William “Bill” Paul, a courtly Oklahoma City trial attorney and later President of the American Bar Association, led Kerr-McGee’s defense. The trial lasted ten weeks, longer than any trial in Oklahoma history. By all accounts, the trial was hard (even bitterly) fought, with each side by turns attempting to direct then redirect the in-court reconstruction of Karen Silkwood’s personal narrative through introduction of evidence not directly relevant to the ultimate issue of the trial (i.e., whether Kerr-McGee was strictly liable for the escaped plutonium). For its part, the company sought to impugn Silkwood’s character through introduction of “evidence on numerous matters regarding Silkwood’s sexual involvements, use of drugs, and purported suicide attempts.” The trial court largely stymied this effort, though, by excluding the evidence. The Silkwood lawyers took a tack that proved more successful. They introduced evidence that Silkwood was an effective union agitator and worker-safety whistleblower, thus sowing the
seed that the company had reason to dislike her (although it requires
a significant leap to conclude that this dislike would translate into the
affirmative acts of contaminating her with plutonium and planting it in
her apartment). And it certainly poisoned the atmosphere when Spence
introduced testimony suggesting that Silkwood had obtained documents
showing that Kerr-McGee had falsified records, and that she was on her
way to turn over documentary proof of that fact to a union official and
a reporter from the New York Times at the time of her fatal car crash.\textsuperscript{67}
From this testimony, the jury might have inferred that Kerr-McGee had
some hand in Silkwood’s death.

With respect to the central issue, Spence’s challenge was, as he stated it
in closing argument, to make intelligible “a case full of number-crunching
statistics, and scientific data, and conflicting evidence.”\textsuperscript{68} To do so, he
invoked “common sense” as the key:

[I]f there’s one thing that I’ve tried to do through this trial—and I hope
you’ve seen it with me—is that we are dealing with the most complex issue
maybe in the world. But I am bringing to you—I have hoped—common
sense, and that’s how it will be decided, and I have seen it done successfully,
beautifully, almost like magic, case after case, and, it’s because jurors can do
that. Because they can cut through all the garbage that experts, and lawyers,
and legalists like to lay down—they can cut through it all with their
common sense, [this] has permitted mankind to survive, and what has
permitted the judicial system to survive to this day. And, so I want you to
know that you are beautifully suited, I think,—forgive me for saying it, but
I think hand-chosen, specially chosen, for the joint combination talent and
experience that you have that makes you a composite body.\textsuperscript{69}

Against this background appeal to shared values, sense of history, civic
responsibility, and simplicity, Spence summoned his most powerful
instrument: an exemplary narrative to explain the most critical legal con-
cept in the case, strict liability. Spence used the exemplary narrative to
bridge the gap between the abstract statement of the rule of strict liability
embedded in the yet-to-come jury instructions (which he tells the jury he’s
already read\textsuperscript{70}) and evidence presented over the course of the trial. And,
because Spence used the narrative in his opening statement and reduced it
to a memorable slogan, it frames the entire case in an easy-to-remember
way:
Well, we talked about “strict liability” at the outset, and you’ll hear the Court tell you about “strict liability,” and it simply means: “If the lion got away, Kerr-McGee has to pay.” It’s that simple—that’s the law. “If the lion got away, Kerr-McGee has to pay.” You remember what I told you in the opening statement about strict liability? It came out of the Old English Common Law. Some guy brought an old lion on his grounds, and he put it in a cage—and lions are dangerous—and through no negligence of his own—through no fault of his own—the lion got away. Nobody knew how—like in this case, “nobody knew how.” And, the lion went out and he ate some people—and they sued the man. And they said, you know: “Pay. It was your lion, and he got away.” And, the man says: “But I did everything in my power—I had a good cage—had a good lock on the door—I did everything that I could—I had security—I had trained people watching the lion—and it isn’t my fault he got away.” Why should you punish him? They said: “We have to punish him—we have to punish you—you have to pay.” You have to pay because it was your lion—unless the person who was hurt let the lion out himself. That’s the only defense in this case: Unless in this case Karen Silkwood was the one who intentionally took the plutonium out, and “let the lion out,” that is the only defense, and that is why we’ve heard so much about it.71

Spence—in what plainly proved to be a very effective rhetorical strategy—went on to blend the exemplary narrative even more thoroughly with the facts of his case. This tack proved effective because (1) it took advantage of the court’s earlier product-liability rulings that essentially held that Kerr-McGee could only win if it proved that Silkwood contaminated herself with plutonium that was stipulated to have been Kerr-McGee’s, and thereby (2) it painted the defense into a corner from which it would be difficult to respond.72 And through constant repetition of this theme, Spence extends it into a motif—in the same way that a gifted Metaphysical poet like Donne can extend a simple metaphor into a dominant conceit—that becomes the most powerful and persuasive element of his closing.

Strict liability: “If the lion gets away, Kerr-McGee has to pay,” unless Karen Silkwood let the lion loose. What do we have to prove? Strict liability. Now, can you see what that is? The lion gets away. We have to do that. It’s already admitted. It’s admitted in the evidence. They admit it was their plutonium. They admit it’s in Karen Silkwood’s apartment. It got away. And, we have to prove that Karen Silkwood was damaged. That’s all we
have to prove. Our case has been proved long ago. . . . [Spence then dis-
cusses the burden of proof and the Court’s coming instructions.] So, the
question is: “Who has to prove how the lion got away?” “They have to
prove it.” They have to prove that Karen Silkwood carried it out. If they
can’t prove that by a preponderance of the evidence, they’ve lost. Kerr-
McGee has to prove that. Why? Well, it’s obvious. It’s their lion—not
Karen Silkwood’s lion. It’s the law. It’s that simple.73

In response to Spence’s initial summation, Paul conceded, “How plu-
tonium came to be in Karen Silkwood’s apartment” was “the central issue
in this case.”74 To resolve it, he laid out a lengthy, chronological chain of
circumstantial evidence from which one could conclude that Karen Silk-
wood had purposefully contaminated her apartment in the process of
spiking urine samples. But this evidence was laden with medical and other
scientific jargon like “logarithmic scale,” “gamma rays,” “nasal smear,”
and “[d]ecimal point zero, zero, zero, three, 3 ten thousands of a gram.”
Even more important, the evidence didn’t “fit” into Spence’s exemplary
narrative in an easily comprehensible way: for if the jury were to accept
Paul’s version of the facts, it would have to believe that Karen Silkwood let
the lion out of the cage knowing full well that it would eat her. And absent
any direct evidence of that scenario—and unaided by a counter-exemplary
narrative—Paul’s task was made doubly difficult.

In rebuttal, Spence again warmed to his central theme:

The issue that seems to be the one that everyone wants to talk about is not
really an issue—it is the only possible defense that Kerr-McGee has, and it
is one that they have talked about. We are right back where we started from:
“If the lion gets away, Kerr-McGee has to pay.” You remember Mr. Paul
was critical of me for not trying to explain to you how the lion got away. Do
you remember his criticalness, his sort of accusation that somehow we had
failed in our obligation? It is like this—listen to the story: “My lion got
away. Why is my lion on your property?” That is the question he asked
me. . . . And, he says: “It wasn’t there two hours ago. It wasn’t there last
night.” And, he says: “Wait a minute. Your kids don’t get along with my
kids. That is why my lion is on your property.” And, then he says: “Why
did you let my lion eat you? You let my lion on your property,” he says.
“I accuse you—I accuse you—I blame you, and why don’t you explain it?”
And I say: “But it isn’t my lion—it is your lion—it is your lion that got
away.” . . . Now, Mr. Paul, that is why we haven’t explained how your lion
got on our property. The Court says that is not our obligation—it is your lion, Mr. Paul—you must explain it. . . . [T]hat’s the law, the law of strict liability, and it is that simple.  

For at least the second time, Spence says that the law to be applied is “simple.” But is that really so? Is the law of strict liability, at least under the cover of the exemplary narrative in which Spence wraps it, as settled and simple as he would have it? The answer, as we’ll see in a minute, is plainly “no.”

Even the Court of Appeals—which otherwise showed hostility to the jury verdict—had no trouble finding that the case called for application of strict liability: “It is surely foreseeable and within the scope of the abnormal risk that radiation contamination will occur from contact with plutonium that escapes a nuclear fuel plant. Just as the risk incident to dynamite is accidental explosion, a risk incident to plutonium is accidental contamination.” The logic here is suspect because it robs the strict-liability rule of contextual nuance (using dynamite and possessing dynamite are not analyzed the same way in tort law). It also elides a central precept of all tort law—causation—which surely should be an issue in a case in which somebody stole the plutonium that contaminated Silkwood’s apartment and spiked her urine samples. In any event, that type of issue bedevils cases like the “lion got away” exemplary narrative around which Spence built his case.

In his closing, Spence never directly identified the exact source of his man-eating-lion story other than an offhand reference or two to the “Old English Common Law.” It’s unlikely that Spence was relying on the facts of a particular case (in his version people who have been eaten are suing), but the general scenario underlying his story should be familiar to all first-year law students, although the leading English case, May v. Burdett, involved a monkey, not a lion. A quick summary of a couple of these cases should be enough to round out our discussion.

In May v. Burdett, Burdett was alleged to have kept a monkey “well knowing that the said monkey was of a mischievous and ferocious nature and was used to attack and bite mankind.” At some point, the monkey, which was kept “at large and unconfined . . . did attack, bite, wound, lacerate, and injure” May’s wife, Sophia, “whereby the said Sophia became and was greatly terrified and alarmed, and became and was sick, sore, lame
and disordered, and so remained and continued for a long time. . . .” The “only question” in the case was whether it was necessary to show that “the defendant kept the animal negligently.” The plaintiff set forth an exposition of cases establishing a standard under which a defendant will liable if he knowingly keeps a vicious animal that causes injury. The defense offered a consequentialist argument demonstrating that plaintiff’s bright-line rule would make it illegal even to keep a destructive animal, as it is done at the gardens of the Zoological Society and other menageries, and that, however carefully such animal may be kept, yet, if it escapes, without ant fault on the owner’s part and does damage, or even if an incautious person be hurt, or an excessively timid person terrified, by the animal while under proper restraint, the owner is answerable.

The Court largely sided with the plaintiff, holding that the allegations made out a “prima facia” case of liability under a rule “that a person keeping a mischievous animal with knowledge of its propensities is bound to keep it at his peril and that, if it does mischief, negligence is presumed, without express averment.” The Court did allow that “it may be that, if the injury was solely occasioned by the willfulness of the plaintiff after warning, that may be a ground of defense. . . .”

This case largely anticipates Spence’s version of the exemplary narrative, but it is threaded with a latent ambiguity that we should register before moving on. That is, the case can be read as (1) making the keeper of a wild animal an insurer against any injury inflicted by the animal, or (2) stating a pleading standard under which negligence need not be specifically averred. Spence, of course, bases his narrative on the first option, as does the American lion-attack case, Stamp v. Eighty-Sixth Street Amusement Co., to which we now turn.

In that case, it was undisputed that “the plaintiff’s wife was a spectator at a vaudeville performance in the defendant’s theatre” and that “[a]mong the acts on the program was a performance by trained lions.” The lions’ performance apparently went off without incident, but after their performance and while “another act was in progress, three of the lions escaped from their cages and entered the orchestra.” Panic ensued and the plaintiff’s wife was injured in the rush to escape. Setting aside whether the theater owner could be as liable as the owner of the lions (the Court found
that it was), the central issue was whether a rule of absolute liability should attach:

“The gravamen of the action in such cases, is the keeping of the animal with knowledge of its propensities, and, if it does some mischief, negligence is not, strictly speaking, an element of the owner’s liability. There is, perhaps a presumption juris et de jure of negligence, based upon the keeping, and in that sense only an action would rest upon negligence. The liability of an owner is absolute, and he is bound to keep the animal secure, or he must suffer the penalty for his failure to do so, in making compensation for the mischief done.” There is no doubt that a lion is a wild animal presumed to be vicious and every one is presumed to have knowledge of its vicious propensities. . . . The defendant is, therefore, within the letter and spirit of the rule which fixes upon one who harbors a wild animal an absolute liability for injuries suffered as a direct result of his own acts.89

Although the Court anchors its holding in a rule of absolute liability, it’s interesting that its reasoning is couched in terms of multiple, layered “presumptions,” which—after all—are generally rebuttable (unless they are stated to be “conclusive”). So the issue is cloudier than it might appear at first glance. And, indeed, long before Spence invoked the legendary “lion that got away,” many American courts had migrated to the position that “[t]he idea is no longer indulged that it is prima facie negligent to keep or exhibit wild animals. . . . [T]he gist of modern actions against exhibitors cannot be the mere keeping of savage animals, but must be neglect to restrain them.”90 So we should see Spence’s use of the exemplary narrative in two rhetorical lights: one guiding the trial judge to the legal standard of strict liability articulated in the instructions, the other focusing the jury on a narrow fact-finding mission (and serving as an omnipresent aide mem- oire). In these respects, then, we see the narrative working both diachronically (as it adds to and modifies the long common law chain of strict liability decisions) and synchronically (within the Silkwood case itself).91

**CONCLUSION: EXEMPLARY NARRATIVES AS A FEATURE OF LAW (AND LIFE)**

Law is not the only domain in which models and exemplars are used to analyze widely observed features of life. For example, in the coda to
a fascinating collection of essays arising out of the sciences that operate without universal laws, Mary Morgan shows how an exemplary narrative can “constitute an experimental unit” that is useful to an economist or anthropologist in the same way that a lab mouse or worm is useful to a research physician or biologist.92 Going further, she notes how, to cite three of her examples, ritual is the “cultural Drosophila” of anthropology, and its study is a key to understanding social identity; the Prisoner’s Dilemma “operates as an exemplary instance of a general result in economic theorizing about strategic situations . . .”; and Athenian democracy, which “holds the status of exemplary event for Western democracies,” offers an avenue for informing “both historical understanding and modern [political] theorizing.”93

In a like manner, the idea of a flexible exemplarity is one upon which the growth of the common law depends.94 This is to say that the ability to extend legal claims to new situations by “analogy” or “similarity” is baked into the system. For example, soon after the early Norman period, the jurisdiction of the English kings’ courts over time extended to violent crimes and then gradually to what we would think of as violent torts. But this jurisdiction was sharply limited in favor of local authorities by the requirement that the kings’ courts could only entertain certain “forms of action” or “writs” and that they were not to entertain new forms of action or writs. There was one rule-swallowing exception though: the courts could hear cases “similar” to those covered by existing writ. Thus, not only could a king’s court hear an action in “trespass” (i.e., one in which a defendant had physically applied direct force to a person or property),95 but it could also hear an action in “trespass on the case” (i.e., one in which a defendant caused indirect or non-physically-caused harm).96 This meant, then, that simply by permitting the original exemplary narrative to throw out an amoeba-like foot, it could absorb new material and thereby change its own shape and content.

It is this flexibility that allows exemplary narratives continuously to refresh themselves. Without this characteristic, an exemplary narrative would forfeit its utility, which is to say its exemplarity, because it would become ossified and specific to a certain place and time. To return to the riff about “the lion that got away,” Spence was able to deploy it to such great effect because it wasn’t really—or only—about a lion breaking out of its cage and eating hapless villagers. It is about someone exposing civil society
to peril by introducing and attempting to contain an agent as dangerous as a lion and the normative consequences that obtain when that agent escapes from its container. Were it otherwise—that is, were the narrative to prove inflexible—it would be like biblical stories about the divine destruction of whole cities and civilizations, which no longer carry analogical normative force in the law because they did not evolve along with social notions of proportionality and the possibility of redemption. In short, they lost their exemplarity in law’s domain.

All told, a narrative that gains exemplary status does so because it not only tells its own story—it speaks across a range of cases broader than the exact situation from which it sprung. In law, this broad relevance, as with Morgan’s social science models, indicates a flexible autonomy that permits a particular packet of ordered discourse to function as a standard against which to consider other discourse that is claimed to be similarly arranged. In this way, an exemplary narrative functions both as and of law and thereby gives the legal system stability across sharp cultural shifts and wide swaths of time. But its autonomy is, as I just noted, flexible and thus ready to bend or give way when circumstances demand.

* This paper has its genesis in a paper presented at a seminar on “Exemplary Narratives” at the IVR 2011 World Congress. Thanks to the participants of the seminar for helping me put my initial thoughts into a larger context. Special thanks to Maks Del Mar and Simon Stern for very helpful comments on the penultimate draft of this article, and to Zenon Bańkowski and the late Neil MacCormick for suggesting approaches to the subject of legal narratives more generally.

1. For a discussion of some of the concepts and cases developed here in the context of a theory of personal and public narratives, see Randy D. Gordon, Rehumanizing Law: A Theory of Law and Democracy (Toronto: University of Toronto Press, 2011).
3. Jewelle Taylor Gibbs, Race and Justice: Rodney King and O.J. Simpson in a House Divided (San Francisco: Jossey-Bass, 1996), 227: “[T]here is a famous principle in psychology that governs the way all human beings process new information—the principle of cognitive dissonance. This principle states that people more easily assimilate information that fits in with or is consistent with their prior knowledge, beliefs, and experiences and will tend to reject information that is not consistent with their prior understanding of the world. Thus . . . the jurors in the Simpson case were inclined to disbelieve the testimony of the police because of their prior experiences and beliefs about police misconduct. . . . [T]hese jurors viewed the evidence, processed it, and evaluated it in terms of their own worldview and personal experiences.”
6. Id. at 117–18. Amsterdam and Bruner go further and suggest that exemplary narratives are embedded in the law itself. For instance, each category of common law writ is essentially a *plot précis*: “the very writs that defined causes of action at common law (quare clausum fregit and so forth) were rather like plot summaries of the founding narratives of various myth-like genres.” Id. at 112; see also Guyora Binder & Robert Weisberg, *Literary Criticisms of Law* (Princeton NJ: Princeton University Press, 2000), 499–500 (observing, in a discussion of William Ian Miller’s study of Icelandic law, that “Icelandic law looks as if it were ‘abstracted from specific cases rather than deduced from disembodied principle.’”).
16. Id.
17. Id. at 62.
21. Id.
22. Id. at 341.
25. Id.
26. Id.
27. Id. at 343. I’ve elsewhere illustrated how particular legal cases can bring the law into phase with public narratives, including the public narrative that described (as did, for example, Frederick Jackson Turner in *The Significance of the Frontier in American History* (1893)) the American frontier as a place teeming with lawlessness and vigilante justice. See Gordon, *supra* note 1, at 54–58.
30. Id. at 18–20.
31. Id. at 20.
32. Id.
33. Id.
34. Id. at 22 (emphasis added).
35. For a representative statement of the traditional chauvinistic view, see Muller v. Oregon, 208 U.S. 412, 421 (1908): “[H]istory discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. . . .”

37. Id. at 225.
38. Id.
39. Id. at 226.
40. Id. at 233.
41. Id. at 234.
42. Id.
43. Id. at 239 (italics in original).
44. Id.
45. Id. at 240.
46. Id.
47. Id.
48. Id. at 240–41.
50. Id. at 475.
51. Id. at 476.
52. Id. at 477. The statutory source of the instruction was Kan. Stat. Ann. § 21-3211, which stated: “A person is justified in the use of force against an aggressor when and to the extent it appears to him and he reasonably believes that such conduct is necessary to defend himself or another against such aggressor’s imminent use of unlawful force.”
53. Id.
54. The Court specifically located the underlying problem as one rooted in historical prejudice: “Wife beating is steeped in the concept of marital privacy, and the belief wives are the personal property of the husband. In Blackstone’s Commentaries the theory of coverture was advanced, making punishment for mistreatment of a wife impossible since husband and wife were considered one.” Blackstone, Commentaries on the Laws of England, 3rd. ed. (1884), 432, 442–44. Id. at 479.
55. Id.
56. Id.
57. Id.
58. Of course even an expansive exemplary narrative has limits. A few years after Hundley was decided, another battered spouse, Peggy Stewart, killed her husband while he was sleeping. State v. Stewart, 763 P.2d 572 (1988). Stewart’s story thus became exemplary of an exception to Hundley’s story.
59. Id. at 470 (McFarlin, J., dissenting).
62. Silkwood, 464 U.S. at 241–42. I should note that I practiced for a few years with the firm Crowe & Dunlevy that defended Kerr-McGee in Silkwood. The case had settled well before my arrival at the firm, so I had no involvement with any stage of the litigation. I do, of course, know and admire many of the lawyers involved, but I have based my discussion on the public record, not any particular insight I got from the firm.
The statement that Silkwood’s death was “unrelated” also appears in opinions of the Tenth Circuit, both before and after the Supreme Court opinion. Silkwood v. Kerr-McGee Corp., 667 F.2d 908, 912 (10th Cir. 1981) and 769 F.2d 1451, 1453 (10th Cir. 1985). It may well be, of course, that the jury accepted the plaintiff’s tacit invitation to assume that Kerr-McGee was responsible.

In focusing on Karen Silkwood’s personal story, I don’t want to minimize the possibility that the jury was influenced generally by the growing public skepticism about nuclear energy or specifically by evidence allegedly suggesting that Kerr-McGee’s plant was unsafely maintained and operated.


Rashke, supra note 65, at 344–46 (quoting testimony of union leader Steve Wodka and Silkwood’s friend, Wanda Jean Jung); see also 769 F.2d at 1464 (Doyle, J., dissenting).


Id. at 369.

Id.

Id. at 370.

In the court’s instructions, Kerr-McGee’s defense that Silkwood contaminated herself was contained in a set of interrogatories. See Silkwood, 485 F. Supp. at 595–609 (Appendix of all instructions). According to Instruction No. 20,

The first question you must decide represents the affirmative defense of the Kerr-McGee defendants.

You must determine whether the defendants have proved by a preponderance of the evidence that Karen Silkwood intentionally removed from work to her apartment the plutonium that caused her contamination on November 5th, 6th and 7th, 1974, for which this lawsuit is brought. The defendants have the burden of proof on this issue. . . . A “no” answer to the first question results in the imposition of liability of Kerr-McGee Nuclear Corporation because of the legal doctrine of strict liability that controls this case. If you cannot find that Silkwood intentionally carried from work to her apartment the plutonium that caused her contamination, it is unnecessary for you to decide how plutonium escaped from the plant, how it entered her apartment, or how it caused her contamination, since it is a stipulated fact that the plutonium in Silkwood’s apartment was from a defendant’s plant. Id. at 604.

Plainly, the court adopted Spence’s view of strict liability in adopting this difficult-to-meet instruction. In dissenting from the Supreme Court majority opinion, Justice Powell criticized the jury instructions as “repetitive, arguably conflicting, and would have confused a panel of experienced lawyers. It is unlikely that any lay juror had any idea what law he or she was called upon to apply.” Silkwood, 464 U.S. at 238, n.14.

Spence closing, in Lagarias, supra note 68, at 371.

Lagarias, supra note 68, at 391, and 386–412 passim.

Spence closing, in Lagarias, supra note 68, at 431–32.

Silkwood, 667 F.2d 908, 921.


No direct evidence was presented at trial that established exactly how plutonium made its way into Silkwood’s apartment or spiked urine samples. Silkwood, 464 U.S. at 286, n.4.


Id. at 1214.

Id.

Id.

Id. at 1215.

Id. at 1217.
Stamp v. Eighty-Sixth Street Amusement Co., 95 Misc. 599 (1st Dept. 1916).

Id. at 600.

Id. at 600–1.

Vaughn v. Miller Bros. “101” Ranch Wild West Show, 153 S.E. 289, 290 (W. Va. 1930). The Reporter of the ALR Annotation concluded that May v. Burdett should be read as establishing a rule of pleading and that it should otherwise be repudiated in favor of negligence standards. Id. at 516–17.

But cf. MacCormick, supra note 8, at 233–36 (suggesting a convergence of narrative and normative coherence).


Id. at 266, 269, 271


This would cover things as various as what we could now think of as intentional torts like assault, false imprisonment, or trespass to land.

In practice, this extended the concept of trespass to include what we would think of as negligent acts. For example, where a court could initially hear only a case in which a defendant assaulted a plaintiff with a stick, over time, it was permitted to hear a case in which the defendant left a stick in a darkened stairwell and the plaintiff later tripped over it and fell down the stairs.