

A Twice-Told Tale:

Plausibility and Narrative Coherence in Judicial Storytelling

J. Christopher Rideout*

“[T]he plausibility of stories has little to do with . . . their actual truth status . . .” —Bernard Jackson¹

“To be human is to seek coherence . . .” —Steven Winter²

“Who do you believe, me or your own eyes?” —Justice Stephen Breyer (paraphrasing Chico Marx)³

Introduction

In *Scott v. Harris*,⁴ an opinion issued by the United States Supreme Court in 2007, the Court offers a tale told twice. In one version of the tale, eight members of the Court agree that the case involves a story of “a Hollywood-style car chase of the most frightening sort.”⁵ In this telling, the chase, by police of a reckless speeder, so endangers public safety as to justify the use of deadly force to bring the chase to an end. A ninth member of the Court dissents to tell the tale differently, however, and in doing so agrees with the telling by the lower Court of Appeals.⁶ In his

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* © J. Christopher Rideout 2013. Professor of Lawyering Skills and Associate Director of Legal Writing, Seattle University School of Law. Portions of this article were first presented at the 2009 Applied Legal Storytelling Conference held at Lewis and Clark Law School and, in 2012, to the University of Denver law faculty. The author wishes to thank those who made comments at those two presentations and, in addition, to thank Marilyn Walter and Sara Benson for their helpful comments on the manuscript of this article.

¹ Bernard S. Jackson, *Law, Fact, and Narrative Coherence* 63 (1988).

² Steven L. Winter, *The Cognitive Dimension of the Agony Between Legal Power and Narrative Meaning*, 87 Mich. L. Rev. 2225, 2230 (1989).

³ Dan M. Kahan, David A. Hoffman, and Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 Harv. L. Rev. 837, 840 (2009).

⁴ 550 U.S. 372 (2007).

⁵ *Id.* at 380.

⁶ *Id.* at 389.

dissent Justice Stevens vehemently disagrees with the majority, describing the case instead as a story about a motorist fleeing a needless police pursuit, at high speeds but in an orderly manner.⁷ Justice Stevens sees—and tells—the story so differently that he must protest, “This is hardly the stuff of Hollywood.”⁸

Legally, the case involves questions about the use of deadly force and qualified immunity.⁹ But more broadly, the case also offers insights into story construction and the relative plausibility of the multiple, competing narratives that can emerge in court.¹⁰ In *Scott*, where even the judges disagree about what the facts reveal, different members of the court have to construct their respective versions of the story. This story construction is common at the trial level, where the trial judge must construct the court’s story out of the competing stories offered during trial,¹¹ but it is more unusual at the level of the Supreme Court. Or, at least, it is unusual to see the Court so openly and visibly disagree about story structures.

Scott contains an additional twist in that a videotape exists of the car chase, thus enabling the respective members of the Court to “see for [themselves.]”¹² They did just that, interpreting the facts, framing those interpretations narratively, and telling their stories of what happened. Justice Scalia told the story for the majority.

For him and seven of his fellow justices, the story—as constructed from their viewing of the videotape—is self-evident, and the alternate story told by the Court of Appeals and Justice Stevens is “blatantly contradicted by the record.”¹³ Justice Scalia writes, “Respondent’s version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.”¹⁴ Justice Breyer, concurring, regards the story as equally self-evident, commenting that “[b]ecause watching the video footage of the car chase made a difference to my own view of the case, I suggest that the interested reader take advantage of the link in the Court’s opinion . . . and watch it.”¹⁵ Justices Scalia and Breyer both confidently refer to the videotape as bolstering their version of the story, without the need even

7 *Id.* at 390–94.

8 *Id.* at 392.

9 Kahan, *supra* n. 3, at 845.

10 See e.g. Robert P. Burns, *A Theory of the Trial* 164 (1999).

11 James Boyd White, *Heracles’ Bow: Essays on the Rhetoric and Poetics of the Law* 174 (1985).

12 Kahan, *supra* n. 3, at 843. The Court originally posted the videotape on its web page, available at <http://www.supre->

[mecourt.gov/media/media.aspx](http://www.mecourt.gov/media/media.aspx); select *Scott v. Harris—VIDEO* (April 30, 2007). At the time of this writing, it is available at <http://www.youtube.com/watch?v=IdZn4LvsLHQ> (accessed March 4, 2013).

13 550 U.S. at 380.

14 *Id.* at 380–81.

15 *Id.* at 387.

for much elaboration. The facts, entered into the record in the form of a videotape, tell the story in and of themselves.

Or do they? The story told by Justice Stevens may belong to a minority of one on the Supreme Court, but it matches the story constructed by the lower appellate court. Were the facts so self-evident, they would not have resulted in two versions of the tale. Indeed, the facts in a legal contest are seldom self-evident, for they are viewed not in a vacuum, but rather within interpretive frameworks. Those interpretive frameworks, in turn, provide opportunities to build a story that coheres and is plausible. Facts become meaningful within a story structure, a structure that guides their interpretation. As Bennett and Feldman wrote some years ago, “the structure of stories becomes crucial to judgment in cases in which a collection of facts or evidence is subject to competing interpretations. In such cases, it may not be the evidence that sways final judgment; judgment hinges on the structure of interpretation that provides the best fit for the evidence.”¹⁶ That interpretive structure, they suggest, is narrative.

In *Scott*, Justice Stevens and the lower court told a different tale from the majority because, viewing the same set of facts as presented in the videotape, he and they employed a somewhat different interpretive framework, one that, in turn, resulted in their constructing a different narrative. The meaning of events depends not on the raw facts, but rather on the interpretive framework and the accompanying narrative into which they can be plausibly fit. And to be plausible, that narrative must be coherent.

During the oral arguments in *Scott v. Harris*, several justices questioned the lawyer for the respondent about the story he relies on. They challenged both his version of events and the version presented by the lower court, and they also confronted those versions with what these justices had seen in the videotape.¹⁷ At one point Justice Breyer, apparently with some exasperation, remarked, “I look at the tape and I end up with Chico Marx’s old question with respect to the Court of Appeals: ‘Who do you believe, me or your own eyes?’”¹⁸ Chico’s question is apt, but the question of belief goes deeper than the eyes. The question of whom you believe, of whose version of the story is more plausible, also depends in part on the underlying narrative framework that you use, one that is inti-

16 W. Lance Bennett & Martha S. Feldman, *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture* 89–90 (1981).

17 See Kahan, *supra* n. 3, at 839–40.

18 Transcr., *Scott v. Harris*, 2007 WL 601927 at *54 (Feb. 26, 2007) (127 S. Ct. 468 (2007)).

mately involved with the story you then tell. As I hope to show below, a key factor in the plausibility of the underlying narrative is its coherence.

I. Narrative Structures and Plausibility

In an earlier article, I used the question, “what is it about narratives that makes them persuasive in the law?”¹⁹ as a way of addressing both the narrative frameworks that underlie legal arguments and the dynamics of those frameworks. In the course of examining that question, I also stepped back to look at the broader prior question—what role do narratives play in persuasion generally? The answer, I argued, is that models for argumentation and persuasion are incomplete unless they account for the role of narrative, and of “narrative rationality.”²⁰ The term narrative rationality is one I adopted from the speech communications theorist Walter Fisher, who proposed the term and who himself claimed that models of argumentation that derive from “logical” models only—whether formal or informal—were incomplete.²¹ Persuasion depends not only on logical structures, but also on narrative structures. Fisher further categorized narrative rationality into “narrative fidelity” and “narrative probability,” or what could be called respectively the thematic and the structural properties of narrative.²² In that earlier article, I focused on the first, narrative fidelity—a category that Fisher described as “substantive” (thematic), in contrast with narrative probability, which he described as “formal” (structural).²³ Narrative fidelity is the property that makes a narrative “ring true,” that thematically matches a narrative to what we aspire to in our lives.²⁴ It is also an important part of how individual narratives contribute to what could be called our cultural narrative.

19 J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 Leg. Writing 53, 55 (2008).

20 *Id.* at 56–57.

21 Walter R. Fisher, *Human Communication as Narrative: Toward a Philosophy of Reason, Value, and Action* 47–48 (1989).

22 See Rideout, *supra* n. 19, at 63. Jackson similarly offers “thematic” and “structural” as the two categories, or levels, at which narratives construct meaning, his thematic level corresponding to Fisher’s category of narrative fidelity and his structural level corresponding to Fisher’s category of narrative probability. Jackson adds a third level, the socio-linguistic level, which he describes as belonging to the “surface” level of the text (as opposed to the other two, which belong to the “deep” level). See Jackson, *supra* n. 1, at 79.

23 Rideout, *supra* n. 19, at 69.

24 Fisher, *supra* n. 21, at 64. Fisher’s discussion of the concept reaches beyond social psychology into rhetoric and, more specifically, Chaim Perelman’s notion of audience adherence. Thus, Fisher’s notion of “narrative fidelity” offers an audience-based approach to what could be called correspondence theories of truth, as opposed to coherence theories of truth. Fisher, however, would substitute “good reasons” for the word “truth” in the notion of correspondence theory. See Rideout, *supra* n. 19, at 69–70. For a more extended discussion of the contrast between correspondence and coherence theories of truth, see Jackson, *supra* n. 1, at 37–60, 84–88.

In this article, I want to focus on narrative probability, the overriding formal, or structural, feature of narrative rationality. Narrative probability is the feature of narratives that lends them much of their plausibility, that makes them structurally convincing. In the way in which Fisher uses the term, a good synonym for narrative probability would be “narrative coherence,” and that is the term that I will use for the rest of this article.²⁵ Narrative coherence can be a powerful component of legal persuasion, strong enough to increase the likelihood that a judge or jury will accept one party’s underlying story, independent of the quality of the evidence presented as information or facts.²⁶ Those facts become persuasive when woven coherently into a story.

The discussion below further breaks down narrative coherence into two parts, external coherence and internal coherence.²⁷ Both forms of narrative coherence are, essentially, a matter of unity and connection,²⁸ a matter of creating a sense that the narrative presents an action that is complete both in its larger meaning and in its parts. External coherence refers to the match of a specific given narrative with other stories that exist in the “stock of social knowledge”²⁹ and that lend meaning to that specific narrative, providing it with broader cultural content.³⁰ External coherence is thus a matter of the story’s connection, but not connection with an external social reality—a literal reality check. Rather, external coherence is a matter of the story’s structural connection to other culturally based stories that we use to make sense of social reality.³¹ Internal coherence refers to the parts of the narrative and a sense that they fit with each other—that they are consistent and that they form a complete “sequential arrangement.”³²

Both forms of narrative coherence, external and internal, contribute to a story’s plausibility, to its “making sense.” They do so not because the story necessarily corresponds in a direct way to “what really happened,”

25 In the earlier article, I stayed with Fisher’s term but noted its synonymy with “coherence.” See Rideout, *supra* n. 19, at 64. In discussing the formal property of narratives—narrative probability—Fisher also notes that “[i]n epistemological terms, the question would be whether or not a narrative satisfied the demands of a coherence theory of truth.” Fisher, *supra* n. 21, at 75–76.

26 See Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 Cardozo L. Rev. 559, 562 (1991).

27 As noted above, I discuss these two terms in the earlier article under the general heading of “narrative probability” (following Fisher), breaking them down into Fisher’s slightly different terminology of “coherence” (internal coherence) and “correspondence” (external coherence). See Rideout, *supra* n. 19, at 63–67.

28 See Jonathan Yovel, *Running Backs, Wolves, and Other Fatalities*, 16 L. & Lit. 127, 129 (2004).

29 Jackson, *supra* n. 1, at 59.

30 Yovel, *supra* n. 28, at 131.

31 Rideout, *supra* n. 19, at 67; Yovel, *supra* n. 29, at 131.

32 Yovel, *supra* n. 28, at 130–31.

but rather because the story seems whole, complete, and consistent in its meaning. This is why narrative coherence is a structural matter.

A. Narrative coherence: external correspondence and thematic framing

As mentioned above, external coherence is a matter of how well a narrative corresponds structurally with background social knowledge, and with cultural presuppositions that lend the narrative meaning—with what “typically” happens in the world.³³ External coherence is sufficiently important to the plausibility of the narrative that Burns terms it “external factual plausibility,” a sense that the story “could . . . have happened that way.”³⁴ Once the events of a trial are framed within an underlying narrative, that narrative—through the social background and cultural expectations that attach to it—provides a framework with which the events of the trial can cohere. Jackson notes that “[a] story will appear plausible to the extent that it manifests similarity with some model of narrative which exists within the stock of social knowledge”³⁵

Importantly, this framework is not only structural, but also thematic.³⁶ In cohering externally with shared social and cultural knowledge, that shared knowledge lends meaning to the narrative. The key to external coherence lies in understanding that its thematic framework derives not from the content of the narrative as an empirical description of social reality, but rather from the social and cultural presuppositions that it conjures and with which it coheres, structurally. Burns, in summarizing how narrative works in a trial, notes that this thematic framework is unavoidable: “The story told . . . *inevitably* assigns a meaning to the human action”³⁷ The thematic framework is a powerful part of the coherence—and hence the plausibility—of narrative because, as a given narrative links to our shared expectations, that narrative is also contextualized in a way that guides its meaning.

This contextualization is often discussed by narrative scholars in terms of “narrative scripts,” or “stock stories.”³⁸ A narrative script is a cognitive structure that offers, in story form, a standard model for human

33 Rideout, *supra* n. 19, at 66. Remember that thematic, as opposed to structural, correspondence is a matter of narrative fidelity.

34 Burns, *supra* n. 10, at 168; Jackson calls it “external narrative coherence,” *supra* n. 1, at 58–59.

35 Jackson, *supra* n. 1, at 59.

36 Again, external coherence overall functions structurally, eliciting a thematic framework through its structural correspondence. See Rideout, *supra* n. 20, at 67, 69–70.

37 Burns, *supra* n. 10, at 163 (emphasis added).

38 See Rideout, *supra* n. 20, at 67–68; see also Anthony G. Amsterdam & Jerome Bruner, *Minding the Law*, 45–48, 121–22, 186–87 (2000); Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing*

action.³⁹ When we encounter a story—or a telling of events—we frame that telling within a scripted narrative arc, one that establishes a certain set of relationships between the events.⁴⁰ Sherwin calls the narrative script the “latent” story, as opposed to the surface ordering of events (the “manifest,” or “surface” story).⁴¹ Because narrative scripts, or latent stories, are culturally based, they also allow for generalizations about the meaning of the relationships between events⁴²—hence, the thematic framework that inevitably accompanies a narrative script.

When my wife and I were travelling abroad recently, we encountered two police officers and a group of young adults in the center of a southern French city. The youths, like us, did not seem to be fluent in spoken French, so the communication between them and the police was strained, with hand gestures and quizzical looks. Before long, the police drove off with one of the youths. My wife, a charitable person, wondered if that youth had been lost and needed help getting to a bus or train station. I countered that he may have been a pickpocket. We put the events into differing narrative scripts, accompanied by very different thematic frameworks.⁴³ Both of our stories, different as they were, however, were plausible by virtue of their external coherence.

Narrative scripts and their thematic frameworks in turn rely upon even deeper cognitive structures, usually referred to generally as schemata.⁴⁴ As Winter points out, we construct meaning “from the ground up,” deriving the meaning of a narrative from the underlying schemata.⁴⁵ Sherwin points out that these schemata, in turn, help to fill in the meaning of our narrative scripts.⁴⁶ This “filling in” is an important part of the interpretive role of narrative scripts and their thematic frameworks.

Techniques to Write Persuasive Facts Sections, 32 Rutgers L.J. 459 (2001); Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. Rev. 1 (1984); Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 Seattle U. L. Rev. 767, 773–78 (2006) .

³⁹ Rideout, *supra* n. 19, at 68. The classic article on the cognitive function of scripts in general is Roger C. Schank & Robert P. Abelson, *Scripts, Plans, Goals, and Understanding: An Inquiry into Human Knowledge Structures* 42–46 (1977); see also Bennett & Feldman, *supra* n. 16, at 53.

⁴⁰ Linda L. Berger, *The Lady or the Tiger? A Field Guide to Metaphor and Narrative*, 50 Washburn L.J. 275, 278 (2011).

⁴¹ Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 6 J. ALWD 88, 106 (2009).

⁴² Rideout, *supra* n. 19, at 68. Berger notes that they carry with them values, beliefs, and ideologies, Berger, *supra* n. 40, at 278.

⁴³ I would like to think that I, too, am a charitable person, but I had also read in our travel guide to beware of foreign youths in this city who commonly picked pockets. Because both my wife and I were foreigners—that is, cultural outsiders—we were to some extent choosing, or constructing, our respective stories of what we had seen.

⁴⁴ For an early article on narratives and their underlying schemata, see Winter, *supra* n. 2, at 2230–41; see also Sherwin, *supra* n. 41, at. 104–06, and Berger, *supra* n. 40, at 277–78, 280–83.

⁴⁵ Winter, *supra* n. 2, at 2230–31.

⁴⁶ Sherwin, *supra* n. 41, at 106.

Although I will not attempt to explicitly trace it back here, my pick-pocketing script—prompted by a travel guide—was no doubt partly filled in by meaning-making schemata associated with “police,” “groups of youths,” and “foreigners/outsideers.” And had the events, characters, and setting that I witnessed not been coherent with this narrative script and its underlying schemata, I would have had to choose a different narrative script, one with a different thematic framework.

Bennett and Feldman also see the filling in as a key step in the construction of narrative meaning. Initially, they note, the events of the trial must be located within the central action of a story, a narrative script.⁴⁷ But once that takes place, the narrative script supplies “inferences about the relationships among the surrounding elements in the story that impinge on the central action.”⁴⁸ These inferences make the events of the trial externally coherent by linking them to a thematic frame. Berger also notes how inferences contribute to the interpretive power of the narrative script: “[I]f the story you are telling is one that already is embedded in tradition and culture, you need not fill in all the details; you can simply name the characters, and the plot will spring to life in the listener’s mind.”⁴⁹

External coherence, then, relies on a narrative script with a central action, on inferences made possible by that script—including inferences that can fill in some of the gaps, and on a thematic framework that lends meaning to it all. And just as the interpretive function of the thematic framework is important to the connections and inferences that constitute external coherence, so does the thematic frame set the stage for internal coherence as well.

B. Narrative coherence: internal consistency

The second form narrative coherence takes is that of internal coherence. Most theorists who write about narrative structures in the law define internal coherence in the same way: as a matter of internal consistency. Pennington and Hastie note that a story has internal coherence when it lacks “internal contradictions.”⁵⁰ Jackson writes that “[i]nternal narrative coherence can be conceived primarily in quasi-logical terms. Are the various parts of the story consistent with one another, or do they manifest contradiction?”⁵¹ Bennett and Feldman cite internal

47 Bennett & Feldman, *supra* n. 16, at 41.

48 *Id.*

49 Berger, *supra* n. 40, at 278.

50 Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 Cardozo L. Rev. 519, 528 (1991).

51 Jackson, *supra* n. 1, at 58.

consistency as one of the features that lend stories their interpretive value, further explaining that the various inferences that accompany any narrative understanding must be “mutually compatible.”⁵²

Bennett and Feldman also tie the importance of internal consistency to plot, to “the central action in a story.”⁵³ Yovel agrees, pointing out that internal coherence relies on “culturally-entrenched notions of sequentiality, causation, and action,” highlighting in particular the internal sequentiality of the narrative.⁵⁴ When we think of a set of events as a story, as something more than just a collection of discrete actions, then internal narrative coherence is a part of our thinking. The actions must fit together in a sequential arrangement that accords with our sense of causation and that is internally consistent.

At the level of the text, the consistency of the actions manifests itself through the identifiable parts of the narrative. As noted above, first the actions must connect together to form a plot. Although the usage of the term “plot” has become somewhat ambiguous in the narratology literature, I am using it here to mean a chain of “causally connected events in a story.”⁵⁵ The key phrase in terms of internal coherence is “causally connected”;⁵⁶ to be internally consistent, the events must bear a relationship to one another, not just be adjacent to each other or be randomly ordered. That relationship, for our purposes, depends on sequence and causation.⁵⁷ Sequence implies an ordering to events, so that they are connected in a meaningful way, not just randomly.⁵⁸ Sequence also relies upon causation. In a famous example, “the king died and then the queen died of grief,” the sequence invokes causation (the queen’s grief at the king’s death).⁵⁹ Even if the causation is not spelled out, we assume it from the sequence. Thus, even in the version without explicit causation, “the king died and soon after the queen died,” we still typically assume that the

⁵² Bennett & Feldman, *supra* n. 16, at 41. Although they do not use the term “internal coherence,” Bennett and Feldman essentially describe it as the third key element of narrative structures and their interpretive function—after the steps mentioned above—of identifying the central action and then drawing inferences from those actions. *See id.*

⁵³ *Id.*

⁵⁴ Yovel, *supra* n. 28, at 131.

⁵⁵ H. Porter Abbott, *The Cambridge Introduction to Narrative* 194 (2002) (emphasis omitted). I use this definition of plot as opposed to a simple synonym for “story,” or to a collection of events not necessarily connected, or to a collection of events that is only episodically connected. *See id.* at 16–17. (2002).

⁵⁶ *Id.* at 194.

⁵⁷ Yovel, *supra* n. 28, at 131.

⁵⁸ Because sequence is a meaning-making ordering of events, we can and do, for example, tell stories that are out of chronological order, so as to make a different kind of meaning with our choice of sequencing. *See* Mieke Bal, *Narratology: Introduction to the Theory of Narrative* 80–82 (1997).

⁵⁹ E.M. Forster, *Aspects of the Novel* 130 (1954).

queen's death has something to do with the king's death. Our minds look for the consistency and connection that characterize internal coherence.⁶⁰

Next to plot, a second key aspect of any narrative structure is character.⁶¹ Character is often seen as the counterpart to plot. Henry James famously noted the interdependence: "What is character but the determination of incident? What is incident but the illustration of character?"⁶² James made this link because characters have agency and, thus, cause things to happen.⁶³ Agency translates motive into action. To be internally coherent, this translation must be consistent: from character, through motive, to action, to plot.

Internal coherence requires consistency among other aspects of a narrative as well, for example setting and point of view. The details of some of these aspects, such as setting, are often partially inferred, or filled in, through the scripting function of the underlying narrative structure. This brings us back to the thematic framework of the narrative structure, mentioned above.⁶⁴ The thematic framework itself may be external to the internal sequentiality of the narrative, but it serves not only to structure the internal actions, but also to allow for consistency among the elements of plot, character, setting, etc. The thematic framework, in a sense, provides an overriding organizing principle for the internal elements of the narrative, and their consistency relies in part on their connection to it. Once I scripted my European encounter as a pickpocketing narrative, the actions of the police (apprehension and arrest) were consistent with the action of the youth (acquiescence). The characters were also consistent with this thematic framework (the police were not apprehending American tourists like me, who may have been equally lost). And the setting was consistent as well (the inner, walled area of the city, pointed out by my travel guide as an *habitué* for pickpockets).

In my own view, one other aspect remains especially for legal storytelling—the highlighting of key pieces of evidence. Legal storytelling, after all, is not imagined fiction, but rather is constructed from the evidence presented at trial. A fiction writer has the luxury of inventing elements of the story and so can ensure that those elements are mutually consistent and complete. The storytelling done at trial falls well short of this imaginative freedom, however, and thus in some ways makes the task of telling

60 See Seymour Chatman, *Story and Discourse: Narrative Structure in Fiction and Film* 45–46 (1978).

61 Berger mentions character and plot as key aspects of the "argument-shaping" function of storytelling. See Berger, *supra* n. 42, at 278.

62 Abbott, *supra* n. 55, 124 n. 3 (quoting Henry James, *The Art of Fiction*, in *The Future of the Novel* 15–16 (1956)).

63 *Id.* at 124.

64 See nn. 34–50 and accompanying text, *supra*.

a coherent story more difficult. I mentioned earlier that the task of being externally coherent in part relies on the “filling in” function of inferences, between the evidence and the thematic framework of the narrative script. For internal coherence, there is a counterpart: the highlighting of key pieces of evidence, not inferred but rather presented or even emphasized, that serve to link together other pieces of evidence into a narrative whose parts are mutually consistent and complete—that is, internally coherent. These key linking pieces of evidence are central to the plausibility of the story. And when they are highlighted strategically, they can even reinforce the inferences drawn about other pieces of the story that have not been presented as evidence.

II. Narrative Coherence in *Scott v. Harris*

As I mentioned at the beginning of this article, the Court in *Scott v. Harris* told two very different tales, each tale derived from the same set of facts and each tale equally plausible to those who adhered to it. This is simply a way of saying that different members of the Court placed the facts into different narrative structures. Once they did so, however, those narratives provided powerful interpretive frameworks for the way in which respective members of the Court understood the case—so powerful that neither side of the Court could see how the record would in any way support the other side’s version of events. The opposing side’s version of events was simply not plausible, even though for its adherents it was the *only* plausible story. Both sides agreed that the central action of the tale is that of a car chase, but in framing that chase within such different narrative structures, their stories lead to very different conclusions. The difference between the two sides—and the two stories—is, as I hope to show now, in part a difference in the way in which their stories achieved coherence.

I have already laid out above a structure for looking at narrative coherence. Externally, it works by means of a narrative script; the thematic framework underlying that script; and the inferences that the script allows. Internally, it works through a consistency among key parts of the story—the initiating causation, the action, the characters, and the setting—with the additional highlighting of key pieces of evidence.

Before I turn to analyzing the coherence of these two versions of the tale, it seems only fair that I let you know more fully what actually happened in the case. By now, however, you must appreciate my hesitation—my reluctance to engage in the seemingly impossible task of giving you the “actual” account of events. Fortunately, a trio of scholars has

already attempted that task, fully aware of the controversy surrounding the telling of different tales in this case.⁶⁵ I offer their version of the tale and let it stand on its own.

Just before 11:00 p.m. on March 29, 2001, on a two-lane highway in the Atlanta suburbs, the police detected Victor Harris speeding. But when the officers attempted to make a traffic stop, Harris hit the gas pedal, fleeing at high speed. Soon a car driven by Officer Timothy Scott joined the chase. Knowing little of the inciting situation, Scott had decided on his own initiative to help apprehend Harris. Following a slow-speed interlude that included a side swiping in an empty shopping mall parking lot, the chase returned to the road, reaching speeds in excess of eighty-five miles per hour. The pursuit ended some six minutes and nine miles after it began, when Scott decided to strike Harris's rear bumper with his car, causing Harris, as intended, to spin out of control and crash. Scott recognized that this maneuver involved a significant risk of serious injury or death to Harris, who in fact suffered a broken neck that left him a quadriplegic.⁶⁶

Now to the Court's tellings of the tale.

A. "A Hollywood-style car chase": the tale told by the majority

Writing for the majority, Justice Scalia describes the facts in *Scott* as "a Hollywood-style car chase of the most frightening sort."⁶⁷ In doing so, he lays out a powerful narrative script in a mere ten words. He identifies the central action as a car chase, but one that is reckless, out of control, and dangerous. The thematic framework of this script is clear: the chase goes beyond the boundaries of an ordinary car chase ("Hollywood-style" and "frightening"), and it puts other members of the public at risk. And the chief protagonist—the primary agent in this tale of recklessness and danger—is Victor Harris, the driver of the car that the police are pursuing.

Scalia introduces his version in two paragraphs, as a chronology.⁶⁸ Within this chronology, the central action of the car chase is scripted as a police pursuit of a speeding vehicle.⁶⁹ Police pursuit becomes an important part of his narrative script, drawing upon a story that is repeated on television shows and in movies regularly. In this script, there are bad guys and good guys—the fleeing lawbreaker and the police trying to stop him (or her). We are presented, then, not only with a chronology,

⁶⁵ See Kahan, *supra* n. 3, at 842–43.

⁶⁸ *Id.* at 374–75.

⁶⁶ *Id.* at 843–44.

⁶⁹ *Id.*

⁶⁷ 550 U.S. at 380.

but also a narrative script and a strong thematic framework to which the facts can externally cohere.⁷⁰

In March 2001, a Georgia county deputy clocked respondent's vehicle traveling at 73 miles per hour on a road with a 55-mile-per-hour speed limit. The deputy activated his blue flashing lights indicating that respondent should pull over. Instead, respondent sped away, initiating a chase down what is in most portions a two-lane road, at speeds exceeding 85 miles per hour. The deputy radioed his dispatch to report that he was pursuing a fleeing vehicle, and broadcast its license plate number. Petitioner, Deputy Timothy Scott, heard the radio communication and joined the pursuit along with other officers. In the midst of the chase, respondent pulled into the parking lot of a shopping center and was nearly boxed in by the various police vehicles. Respondent evaded the trap by making a sharp turn, colliding with Scott's police car, exiting the parking lot, and speeding off once again down a two-lane highway.

Following respondent's shopping center maneuvering, which resulted in slight damage to Scott's police car, Scott took over as the lead pursuit vehicle. Six minutes and nearly 10 miles after the chase had begun, Scott decided to attempt to terminate the episode by employing a "Precision Intervention Technique ('PIT') maneuver, which causes the fleeing vehicle to spin to a stop." Having radioed his supervisor for permission, Scott was told to "[g]o ahead and take him out." Instead, Scott applied his push bumper to the rear of respondent's vehicle. As a result, respondent lost control of his vehicle, which left the roadway, ran down an embankment, overturned, and crashed. Respondent was badly injured and was rendered a quadriplegic.⁷¹

Within this seemingly chronological account, the story begins with the respondent, Mr. Harris, speeding and then, in response to an officer's effort to pull him over, "initiating a chase."⁷² In Scalia's telling, then, the initiating cause of the story is the respondent, choosing to flee a police officer and to drive recklessly and at inordinately high speeds. The respondent's actions embody this recklessness: he "sped away," "pulled into the parking lot," but "evaded the trap."⁷³ His evasion involved "making a sharp turn, colliding with Scott's police car, exiting the parking lot, and speeding off once again down a two-lane highway."⁷⁴ Even after his car is struck from the rear by Officer Scott, the respondent remains the one

⁷⁰ I do not mean to imply here that Justice Scalia is deliberately manipulating the facts in order to tell a distorted story, but rather that he is telling the story in terms of a narrative script that he has already formed in his own mind about what happened in the case.

⁷¹ *Id.* at 374–75.

⁷² *Id.* at 374.

⁷³ *Id.* at 374–75.

⁷⁴ *Id.* at 375.

responsible: “[R]espondent lost control of his vehicle.”⁷⁵ The facts, as written, do not say that Officer Scott pushed the respondent off the road or knocked him out of control. The telling achieves internal consistency through the actions of the respondent, and those actions are also consistent with his role as the agent of the initiating cause.

In contrast, the actions of the police officers are more benign, but again internally consistent in that benignity. The first officer “clocked” the respondent’s car, “activated” his flashing lights, and “radioed” a report of what he was doing.⁷⁶ These actions sound routine. Officer Scott’s actions sound equally routine: he “heard the radio communication,” “joined the pursuit,” and “took over as the lead pursuit vehicle.”⁷⁷ His real actions are buried inside the less dramatic word “pursuit,” not spelled out for the reader. After he “decided to attempt to terminate the episode” (a highly abstract account of the action), he “applied his push bumper”—again, the real action buried in the relatively actionless verb, “applied.”⁷⁸ As mentioned above, the respondent is the one who “lost control.” Nowhere in these two paragraphs are the officers speeding or colliding; the closest they come to engaging in any equally dangerous actions is in the verb phrase “pursuing a fleeing vehicle,” but in that phrase “pursuing” is again reasonably benign.⁷⁹

This account of the officers’ actions, routine and abstract as it sounds, is not only internally consistent but also coheres with one of the larger implications of the narrative script: that the officers are simply doing their job. Furthermore, that narrative script allows other inferences, not wholly spelled out—or without requiring that they even be spelled out: for example, that the respondent was a lawbreaker who deserved apprehension; that the police, who had chosen to pursue the respondent at high speeds, did not bear responsibility for the chase; and that the chase had to come to an end for the sake of public safety.

Shortly after this account, Justice Scalia acknowledges that the Court of Appeals told a very different version of the story, but he attempts to dismiss it as following a laughably unsuitable narrative script: “[R]eading the lower court’s opinion, one gets the impression that respondent, rather than fleeing from police, was attempting to pass his driving test.”⁸⁰ He then turns to the videotape for key pieces of evidence that would bolster his own version.

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.*

79 *Id.*

80 *Id.* at 378–79.

The videotape tells quite a different story. There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up.⁸¹

The videotape, of course, only “tells” this story in the context of Justice Scalia’s interpretive frame. And the key pieces of evidence that he highlights are consistent with his own narrative script, but may or may not be consistent with what actually happened.⁸² The agent this time—in the “telling” of the videotape—is the respondent’s car (a figurative extension of the respondent), which races at “shockingly fast” speeds,⁸³ swerves, crosses the center line, forces other cars to the shoulder, and runs lights. Again, the actions are internally consistent with the actions of a dangerous and reckless vehicle. The setting further supports this: “narrow, two-lane roads in the dead of night.”⁸⁴ In case the reader wonders about the agency of the pursuing officers in this action, he states that they are “forced to engage in the same hazardous maneuvers just to keep up” (emphasis added).⁸⁵

I mentioned earlier that one challenge in constructing a legal story from pieces of evidence is that the legal storyteller lacks the imaginative freedom that a fiction writer would have. This challenge also includes dealing with pieces of evidence that do not quite fit the narrative script. Scalia indeed must do this, although he chooses to do so in a footnote: “This is not to say that each and every factual statement made by the Court of Appeals is inaccurate. For example, the videotape validates the court’s statement that when Scott rammed respondent’s vehicle it was not threatening any other vehicles or pedestrians. (Undoubtedly Scott waited for the road to be clear before executing his maneuver.)”⁸⁶ Justice Scalia cannot help but add his own interpretation to these facts in the parenthetical comment at the end, however, heightening the plausibility of his interpretation with the adverbial embellish “undoubtedly.”⁸⁷

⁸¹ *Id.* at 379–80.

⁸² Ironically, this is all the more true because Justice Scalia, in turning to the videotape as being self-evident to any viewer and proving the veracity of his story, must of course then interpret and narrate what he sees in the videotape in order to demonstrate how it “tells” a story that supports his own story.

⁸³ *Id.* at 379.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 380 n. 7 (citations omitted).

⁸⁷ *Id.*

At other times, rather than acknowledging the existence of certain counter-facts, he disputes their meaning.

Justice Stevens hypothesizes that these cars “had already pulled to the side of the road or were driving along the shoulder because they heard the police sirens or saw the flashing lights,” so that “[a] jury could certainly conclude that those motorists were exposed to no greater risk than persons who take the same action in response to a speeding ambulance.” It is not our experience that ambulances and fire engines careen down two-lane roads at 85-plus miles per hour, with an unmarked scout car out in front of them. The risk they pose to the public is vastly less than what respondent created here. But even if that were not so, it would in no way lead to the conclusion that it was unreasonable to eliminate the threat to life that respondent posed. Society accepts the risk of speeding ambulances and fire engines in order to save life and property; it need not (and assuredly does not) accept a similar risk posed by a reckless motorist fleeing the police.⁸⁸

Again, these comments are in a footnote. This time, Scalia appeals externally to the reader’s sense of what typically happens in a narrative script like the one he is promoting: “It is not our experience” that emergency vehicles commonly race down roads like this or that they create this level of risk.⁸⁹

Finally, having established his tale of what actually happened, supported by the story that the videotape “tells,” Justice Scalia can arrive at his legal conclusion: “The car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others; no reasonable jury could conclude otherwise. Scott’s attempt to terminate the chase by forcing respondent off the road was reasonable, and Scott is entitled to summary judgment. The Court of Appeals’ decision to the contrary is reversed.”⁹⁰

B. “Hardly the stuff of Hollywood”: the tale told by the dissent and the lower court

Justice Stevens also identifies the central action of the story as a car chase, but one of a very different kind. For Stevens, the car chase is not dangerous or reckless, nor does it put citizens at risk. Rather, it is largely a matter of high-speed driving on a rural, lightly travelled road,⁹¹ with the sirens and flashing lights giving other drivers ample warning to pull over.⁹²

⁸⁸ *Id.* at 380 n. 6.

⁹⁰ *Id.* at 386.

⁸⁹ *Id.*

⁹¹ *Id.* at 389.

⁹² *Id.* at 391.

“This is hardly the stuff of Hollywood,”⁹³ he protests, noting that “[a] high speed chase in a desert in Nevada is, after all, quite different from one that travels through the heart of Las Vegas.”⁹⁴ Because Stevens offers his tale after Scalia has presented the majority story, he largely takes that original story and reframes it into a different script, one that contains an alternative thematic framework.

In part, because he is reframing the story rather than telling his own story *de novo*, Stevens can employ a strategy of pointing out key pieces of evidence that Scalia had omitted from his own telling. In doing so, Stevens implicitly calls into question the internal consistency of the former story and demonstrates the need for a different narrative script, one that accommodates these additional facts.⁹⁵

Omitted from the Court’s description of the initial speeding violation is the fact that respondent was on a four-lane portion of Highway 34 when the officer clocked his speed at 73 miles per hour and initiated the chase. More significant—and contrary to the Court’s assumption that respondent’s vehicle ‘force[d] cars traveling in both directions to their respective shoulders to avoid being hit’—a fact unmentioned in the text of the opinion explains why those cars pulled over prior to being passed by respondent. The sirens and flashing lights on the police cars following respondent gave the same warning that a speeding ambulance or fire engine would have provided. The 13 cars that respondent passed on his side of the road before entering the shopping center, and both of the cars that he passed on the right after leaving the center, no doubt had already pulled to the side of the road or were driving along the shoulder because they heard the police sirens or saw the flashing lights before respondent or the police cruisers approached.⁹⁶

Here, Stevens reframes the initiating cause as belonging to the police officer, who “initiated the chase.”⁹⁷ He also challenges an inference made in the original story, that other cars were forced to the shoulder of the road by the speeding respondent. Rather, he points out, the sirens and flashing lights on the police cars gave other motorists notice to pull over,⁹⁸ just as the sirens and lights on other emergency vehicles would. These additional facts add internal consistency to Stevens’ version of the story and are also consistent with his thematic framework—that the chase was not

93 *Id.* at 392.

94 *Id.* at 389.

95 In a sense, Justice Scalia seems interested in trying to tell the “true” story. Justice Stevens, on the other hand, need only challenge the plausibility of that “true” story—given

that key facts were omitted—and suggest a different, but more plausible, story.

96 *Id.* at 390–91.

97 *Id.* at 390.

98 *Id.* at 391.

dangerous.⁹⁹ Like Scalia, however, he cannot resist drawing his own inferences once he has established some coherence to his tale: motorists at the shopping center had “*no doubt* already pulled to the side of the road” once they heard the sirens and saw the lights (emphasis added).

In two footnotes, Stevens adds two other omitted facts that enhance the consistency of his own tale. First, the officer who began the chase turned on his dashboard video camera only after he had already turned on his flashing blue lights and siren and begun the chase; that is, the initiating cause is missing from the videotape (the police officer beginning the chase), and we do not see how the respondent was driving before the pursuit began.¹⁰⁰ And second, when the respondent was initially clocked at 73 miles per hour, he was driving on a four-lane highway, with a grass divider separating the oncoming lanes of traffic.¹⁰¹ That is, at the beginning of this tale, the respondent was not driving in a dangerous or reckless manner, nor could his action be characterized that way on this type of highway.

Stevens must also deal with the videotape and Scalia’s use of it. Again, he points out the ways in which details in the tape are not consistent with Scalia’s story, but are consistent with his own:¹⁰² “[T]he tape actually confirms, rather than contradicts, the lower courts’ appraisal of the factual questions at issue”¹⁰³ and “the video does not reveal any incidents that could be even remotely characterized as ‘close calls.’”¹⁰⁴ He returns again to the sirens and flashing lights, this time using them to point out that they would make the intersections less dangerous.

The police sirens also minimized any risk that may have arisen from running “multiple red lights.” In fact, respondent and his pursuers went through only two intersections with stop lights and in both cases all other vehicles in sight were stationary, presumably because they had been warned of the approaching speeders. Incidentally, the videos do show that the lights were red when the police cars passed through them but, because the cameras were farther away when respondent did so and it is difficult to discern the color of the signal at that point, it is not entirely clear that he ran either or both of the red lights. In any event, the

⁹⁹ “New pieces of evidence can be fit within the structural categories within an incident. Evidence gains coherence through categorical connections to story elements such as the time frames, the characters, the motives, the settings, and the means.” Bennett & Feldman, *supra* n. 16, at 8.

¹⁰⁰ *Scott*, 550 U.S. at 391 n. 3.

¹⁰¹ *Id.* at 390 n. 2.

¹⁰² Again, Justice Stevens seems to be making an argument that relies on plausibility.

¹⁰³ *Id.* at 390.

¹⁰⁴ *Id.* at 392.

risk of harm to the stationary vehicles was minimized by the sirens, and there is no reason to believe that respondent would have disobeyed the signals if he were not being pursued.¹⁰⁵

He also addresses the swerving of the respondent's car, noting that this could be consistent with a method of passing on a two-lane road.

My colleagues on the jury saw respondent "swerve around more than a dozen other cars," and "force cars traveling in both directions to their respective shoulders," but they apparently discounted the possibility that those cars were already out of the pursuit's path as a result of hearing the sirens. Even if that were not so, passing a slower vehicle on a two-lane road always involves some degree of swerving and is not especially dangerous if there are no cars coming from the opposite direction. At no point during the chase did respondent pull into the opposite lane other than to pass a car in front of him; he did the latter no more than five times and, on most of those occasions, used his turn signal. On none of these occasions was there a car traveling in the opposite direction. In fact, at one point, when respondent found himself behind a car in his own lane and there were cars traveling in the other direction, he slowed and waited for the cars traveling in the other direction to pass before overtaking the car in front of him while using his turn signal to do so.¹⁰⁶

Stevens offers an alternative narrative interpretation of the swerving, one consistent with his own narrative script. He also points out additional facts ignored by the majority story: the petitioner pulled out only to pass, slowed to wait for oncoming cars to pass, and used his turn signal.¹⁰⁷ All these actions are internally consistent with a car chase that is not reckless or dangerous.

Stevens also offers an alternative interpretation of the bright lights in the videotape, again challenging a piece of the majority's story. In doing so, he cites his own age and experience to rebuke their presumption about what typically happens on a two-lane country road at night.

I can only conclude that my colleagues were unduly frightened by two or three images on the tape that looked like bursts of lightning or explosions, but were in fact merely the headlights of vehicles zooming by in the opposite lane. Had they learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways—when split-second judgments about the risk of passing a slow-poke in the

105 *Id.* at 391–92 (citations omitted).

107 *Id.*

106 *Id.* at 392 (citations omitted).

face of oncoming traffic were routine—they might well have reacted to the videotape more dispassionately.¹⁰⁸

And finally, Stevens attacks not only other facts omitted by the majority, but also their “uninformed”¹⁰⁹ inference-making from those facts.

Relying on a *de novo* review of a videotape of a portion of a nighttime chase on a lightly traveled road in Georgia where no pedestrians or other “bystanders” were present, buttressed by uninformed speculation about the possible consequences of discontinuing the chase, eight of the jurors on this Court reach a verdict that differs from the views of the judges on both the District Court and the Court of Appeals who are surely more familiar with the hazards of driving on Georgia roads than we are.¹¹⁰

He also points out in the last sentence, as he does in the quote in the previous paragraph, that the members of the Supreme Court are unqualified to make judgments about what typically happens on the rural roads of Georgia, or at least are less qualified than judges from Georgia and the Court of Appeals.¹¹¹

Stevens tells a tale that is as plausible to him as it is unlikely in the view of the majority. He does so in large part by framing his tale within a different narrative script, then identifying pieces of evidence, omitted or misinterpreted by the majority, that either cohere with his narrative script or challenge the coherence of the majority’s narrative script. He also points out that his telling and that of the lower court agree: “In sum, the factual statements by the Court of Appeals quoted by the Court were entirely accurate. That court did not describe respondent as a ‘cautious’ driver as my colleagues imply, but it did correctly conclude that there is no evidence that he ever lost control of his vehicle.”¹¹² At the end of his dissent, he steps away from his strong belief in his and the lower court’s story to note the disturbing fact that two stories, equally plausible to two different groups, can exist. For Stevens, this fact demonstrates the need for a jury to hear the case. “If two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court’s characterization of events.”¹¹³ For us, as I hope to have

108 *Id.* at 390 n. 1.

109 *Id.* at 389.

110 *Id.*

111 *Id.*

112 *Id.* at 392 (citations omitted).

113 *Id.* at 396.

shown, this engaging example of dual tales offers an inside look at legal story construction and the role of narrative coherence in the plausibility of stories.

III. Conclusion

In their own article on *Scott v. Harris*, Professors Kahan, Hoffman, and Braman describe the case as one in which the majority of the Court sincerely believes that the facts in the case unambiguously speak for themselves.¹¹⁴ But as these authors point out, the facts in the case do not. And the Court—in its effort to offer the facts as it saw them—presented a partisan reading of them, the very thing it claimed it was avoiding.¹¹⁵ In doing so, the Court was influenced by “value-motivated cognition,” which Kahan and his coauthors define as “the tendency of people to resolve factual ambiguities in a manner that generates conclusions congenial to self-defining values.”¹¹⁶ This tendency can result in what they call “cognitive illiberalism.”¹¹⁷

I agree that the case is unusual in its invitation to members of the public to see the facts for themselves,¹¹⁸ but I do not view as unusual the manner in which the Court—both the majority and the dissent—arrived at its versions of the facts. Both sides of the Court put the same facts into the interpretive frameworks provided by narrative structures, structures that offer seemingly “natural” accounts of the facts.¹¹⁹ And an important part of what makes those narrative structures seem natural, and hence plausible, is their coherence: externally, with narrative scripts and the accompanying thematic frameworks; and internally, consistent among their parts. Once the members of the Court did this, the facts—in either telling of them—seemed obvious. In framing the facts narratively and then relying upon the resulting plausibility of those narratives, the *Scott* Court performed the most human of acts: it sought coherence.¹²⁰ It also did something that happens in courtrooms every day. *Scott v. Harris* is unusual primarily in the inside glimpse that it offers into this act, not for the act itself.

The construction of narrative coherence, as a cognitive act, indisputably contains an ideological component.¹²¹ Kahan and his coauthors see this as part of the “naïve realism” of the Court in *Scott v. Harris*, which

114 Kahan, *supra* n. 3, at 904.

115 *Id.*

116 *Id.* at 903.

117 *Id.* at 904.

118 *Id.* at 903.

119 Burns, *supra* n. 10, at 159.

120 Winter, *supra* n. 2, at 2230.

121 Yovel, *supra* n. 28, at 148.

exemplifies the dynamic of seeing bias in the readings of others, but not in its own readings.¹²² I like their term “naïve realism,” although I would use it a little differently. I agree that it is a human tendency to view the world in our own way and to regard that viewing as “real.” Insofar as we are less likely to look inside our own viewing, to examine how it works and what it comprises, our viewing is also “naïve.” But the inner workings of that viewing are not beyond our understanding, and we can be less naïve about how we construct meaning. Furthermore, in legal storytelling, we should be less naïve, at least insofar as we are able to understand how legal storytelling works. Narrative structures, narrative plausibility, and narrative coherence are an important part of a fuller understanding of how we make meaning, not only in life but in the law.

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¹²² Kahan, *supra* n. 3, at 895–96.