1991

Shadowboxing: An Essay on Power

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ESSAYS

SHADOWBOXING: AN ESSAY ON POWER

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INTRODUCTION

It is important to know when we are being gulled, manipulated, and duped.[1] It is even more important to know when we are unwittingly doing this to ourselves—when we are using shopworn legal scripts and counterscripts, going around endlessly in circles, getting nowhere.[2] Understanding how we use predictable arguments to rebut other predictable arguments in a predictable sequence—"The plaintiff should have the freedom to do X," "No—the defendant should have the security not to have X done to her"; "The law should be flexible, permitting us to do justice in particular cases," "No—the law must be determinate; only bright-line rules are administrable and safe"[3]—frees us to focus on real-world questions that do matter. We can begin to see how the actions we take as lawyers, law students, and legal scholars advance or retard principles we hold dear.[4] We can see where the scripts come from and, perhaps, how to write new and better ones.[5]

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1 *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) [hereinafter *Oppositionists*]; Pierre Schlag, *Normative and Nowhere To Go*, 43 STAN. L. REV. 167 (1990); Stephen L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881 (1991). *See also* MAURICE MERLEAU-PONTY, SENSE AND NON-SENSE (Hubert L. Dreyfus & Patricia Allen Dreyfus trans., 1964).

2 *See* Schlag, *supra* note 1; *see generally* Symposium, *The Critique of Normativity*, 139 U. PA. L. REV. 801 (1991) (discussing ways in which the dominant forms of legal discourse mystify and misdirect our efforts). *See also* Richard Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872 (1990) (noting that the structures and metaphors of legal discourse mislead).

3 For an amusing treatment of these standoffs of legal and popular proverbs, see Jeremy Paul, *The Politics of Legal Semiotics*, 69 TEX. L. REV. 1779, 1786, 1816 (1991).

4 *See Oppositionists*, *supra* note 1; Winter, *supra* note 1, at 1919-26.

5 *Supra* note 1. *See* Richard Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923 (1988) [hereinafter *Will We Ever Be Saved?*]. On the role of script-writing, see PAUL RICOEUR, TIME AND NARRATIVE (1988); Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). Will the new scripts be less banal than the old ones? For a discussion of reasons that counsel caution, see *Oppositionists*, *supra* note 1; *infra* note 31.

I
AN EXAMPLE—"SUBJECTIVE" VERSUS "OBJECTIVE" STANDARDS

Everyone knows that in many areas the law prefers "objective" over "subjective" standards for judging conduct. Tort law uses the reasonable person doctrine,[6] contract law applies objective rules to determine when a contract has been formed and what its terms mean,[7] and so forth. Where does this preference come from, and what does it say about ourselves and our legal culture? Does the objective-subjective distinction hold up under analysis? When we rehearse the familiar arguments in favor of one approach or the other,[8] what are we doing, and what is at stake?

I address these questions by analyzing the standards used in three areas: cigarette warnings, informed consent to medical treatment, and date rape.[9] Tobacco companies defend their marketing of a product known to cause cancer, heart disease, and a host of other illnesses by invoking the narratives of *freedom* and *consent*.[10] The warnings they place on cigarette packages are visible and easy to read. Purchasers who smoke despite these warnings must be deemed to consent to the risks of that activity;[11] any more effective measure would unacceptably impair freedom of action. To the objections that some consumers are addicted, will iguore the warnings, or will bow to social pressure,[12] the manufacturers reply that the warnings are what an ordinary consumer living in our society would expect when purchasing a somewhat hazardous product, and that no further effort on their part is necessary.[13]

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6 WILLIAM L. PROSSER, LAW OF TORTS 149-50 (4th ed. 1971).

7 JOHN P. CALAMARI & JOSEPH M. PERILLO, CONTRACTS 23-25, 118-23, 328-29 (1st ed. 1970).

8 For example, consider the following arguments in favor of an objective approach: It is easily ascertained and administered; it encourages freedom of action; and it fosters social interaction and the development of consensus. *See infra* notes 38-40 and accompanying text.

9 I introduce a fourth example, drawn from legal scholarship, in my conclusion. *Infra* notes 71-77 and accompanying text.

10 For an example of litigation concerning cigarette manufacturers, see Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987); Cipollone v. Liggett Group, Inc., 893 F.2d 541 (3d Cir. 1990), *cert. granted*, 111 S. Ct. 1386 (1991). For a discussion of such litigation, see Richard C. Ausness, *Compensation for Smoking-Related Injuries: An Alternative to Strict Liability in Tort*, 36 WAYNE L. REV. 1085 (1990); Donald W. Garner, *Cigarettes and Welfare Reform*, 26 EMORY L.J. 269 (1977).

11 *See Cipollone*, 789 F.2d at 184-87; Donald W. Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423 (1980).

12 *See infra* notes 60-61 and accompanying text. Social pressure, of course, is a special problem for youth.

13 *See* authorities cited *supra* note 11.

One aspect of the debate on cigarette warnings is currently before the Supreme Court. In *Cipollone v. Liggett Group, Inc.*, a widow whose husband died of smoking-induced lung disease sued a large cigarette manufacturer for damages.[14] The issue on appeal is whether federal law, which requires only the current labeling, supersedes state tort law, under which a stricter standard of liability might be applied to cases like the Cipollones'. Not surprisingly, the defendant advocates application of the more formal, and more easily satisfied, federal standard; the plaintiff, the more flexible state-law tort approach.

The law of informed consent to medical treatment[15] operates in a similar fashion. Before performing medical operations or other invasive procedures, doctors must communicate to the patient what a reasonable person would want to know about the material risks and benefits of the procedure, and must obtain the patient's consent.[16] It is immaterial whether the patient has an undisclosed or highly personalized fear or preference that, if known, would have called for further information or a different course of action. The law requires only the doctor's initial disclosure of "objective" information.

Some physicians, to be sure, may go further, asking, "Is there anything else you are concerned about?" But it is the rare doctor who asks the patient about her specific feelings and attitudes toward pain, incapacity, dependency, death, risk aversiveness, reproductive faculties, and religion—a few of the matters that could bear significantly on a medical decision. Answers to these questions might suggest to the doctor the necessity of further discussions with the patient, further disclosures, or a different course of treatment.

The case law of informed consent makes clear, however, that the physician's duty to disclose is simpler and more easily satisfied. The leading case in this area, *Cobbs v. Grant*, requires that the doctor disclose to the patient the reasonable risks and complications of the contemplated procedure and, beyond this, what a competent mem-

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14 111 S. Ct. 1386. *See also Court Urged to Lift Shield Against Suits by Smokers*, WASH. POST, Oct. 9, 1991, at A16 (reporting oral argument in *Cipollone*).

15 *See* Richard Delgado & Helen Leskovac, *Informed Consent in Human Experimentation: Bridging the Gap Between Ethical Thought and Current Practice*, 34 UCLA L. REV. 67 (1986). *See generally* JAY KATZ, M.D., THE SILENT WORLD OF DOCTOR AND PATIENT (1984) (discussing the doctor-patient relationship).

16 If the doctor does not make the disclosure, and the risk eventuates, the doctor will be liable for damages if the patient can show the nondisclosure was material—i.e., affected her claim. For discussions of informed consent, see Delgado & Leskovac, *supra* note 15, at 67 n.1; Cobbs v. Grant, 502 P.2d 1, 7 (Cal. 1972) (en banc).

ber of the medical community would disclose.[17] Although more exacting standards have been proposed,[18] they are not yet the law.

The debate on date rape is similarly structured:[19] men generally prefer an objective standard, women a more broad-based, subjective one. If a man can truthfully report that a woman accompanied him without protest, did not resist his advances, and began disrobing when he did, the man wants those actions to be deemed consent.[20] For many date-rape activists, however, that conduct is only the beginning of the story. Under a subjective standard, other factors are relevant to the issue of consent. We also need to know whether the woman felt coerced or intimidated.[21] Perhaps they were at a party where they drank too much liquor. Perhaps the woman felt social pressure to pair off. Perhaps she was afraid to say no, afraid of ostracism or of having to go home alone in the dark if the man grew disgusted and left. Perhaps the atmosphere was such that a woman could not easily say no.[22]

Men generally find this type of response infuriating: in their view, women just want to be able to change their minds, depending on what happens later—how he behaves (does he send flowers?), how she feels in the morning, whether or not she becomes pregnant.[23] Men want the woman's outward behavior at the time of the incident to be conclusive: if a reasonable observer would interpret her actions to signal willinguess to have sex, that should end the inquiry. A more individualized approach would chill legitimate courtship behavior, encourage bogns claims, and be impossible to

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17 502 P.2d at 11.

18 Delgado & Leskovoc, *supra* note 15 (proposing an interactive standard which would require physicians to prohe more deeply the patient's need for information, and to do so at different stages of treatment and consultation.); N. Jan Almquist, Comment, *When the Truth Can Hurt: Patient-Mediated Informed Consent in Cancer Therapy*, 9 UCLA-ALASKA L. REV. 143 (1980) (suggesting an iterative, multistage approach to informed consent). *See also* ROBERT A. BURT, TAKING CARE OF STRANGERS: THE RULE OF LAW IN DOCTOR-PATIENT RELATIONS (1979) (proposing dialogic or partnership approach to doctor-patient interaction); KATZ, *supra* note 15 (proposing radical reform in way we think about the potential physician relationship).

19 Nancy Gibbs, *When Is It Rape?*, TIME, June 3, 1991, at 48; Philip Weiss, *The Second Revolution—Sexual Politics on Campus: A Case Study*, HARPERS' MAG., Apr. 1991, at 58.

20 Weiss, *supra* note 19, at 58-61, 72.

21 *Id.* at 59-62, 66-67. *See also* Ellen Goodman, *He Says Date, She Says Rape*, BOULDER DAILY CAMERA (Colorado), May 3, 1991, at 10-A.

22 For a discussion of how such factors affect an analysis of a rape incident, see Gibbs, *supra* note 19, at 50.

23 *See* Gibbs, *supra* note 19, at 52 (discussing a rape charge as a second thought, brought the morning after, or even a month after, the incident); Goodman, *supra* note 21; Weiss, *supra* note 19, at 59-62, 66-67.

adjudicate.[24] Additionally, it might patronize, encouraging women to see themselves as weak, easily led, and in need of protection.

II
WHAT THE SUBJECTIVE-OBJECTIVE DEBATE SHOWS—AND CONCEALS

Underlying these stylized debates about subjective versus objective standards is a well-hidden issue of cultural *power*, one neatly concealed by elaborate arguments that predictably invoke predictable "principle."[25] These arguments invite us to take sides for or against abstract values that lie on either side of a well-worn analytical divide, having remarkably little to do with what is at stake. The arguments mystify and sidetrack, rendering us helpless in the face of powerful repeat players like corporations, human experimenters, action-loving surgeons, and sexually aggressive men.[26]

How does this happen? Notice that in many cases it is the stronger party—the tobacco company, surgeon, or male date—that wants to apply an objective standard to a key event.[27] The doctor wants the law to require disclosure only of the risks and benefits the average patient would find material.[28] The male partygoer wants the law to iguore the woman's subjective thoughts in favor of her outward manifestations.[29] The tobacco company wants the warning on the package to be a stopper. Generally, the law complies.

What explains the stronger party's preference for an objective approach, and the other's demand for a more personalized one? It is not that one approach is more principled, more just, or even more

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24 These are the standard arguments used to justify objective liability rules in general. *See supra* notes 6-8 and accompanying text; *infra* notes 44-45. *See also* Alice Kahn, *'Date Rape' Studies Called Exaggerated*, S.F. CHRON., May 31, 1991, at A1 (activists "trivialize" rape by broadening its definition beyond reason, equating "sweet talk" with coercion, pressure with force, and a drink with intoxication).

25 For a discussion of the way in which elaborate scripts or arguments over "principle" often conceal something else, see Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933 (1991) [hereinafter *Normal Science*]; Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991).

26 *Normal Science*, *supra* note 25, at 955-65; *see also* Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

27 *Cf. infra* notes 41-69 and accompanying text (weaker parties often prefer more contextualized standard). For a discussion of the connection between rules and power, see MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15-63 (1987). *See also* the storm of criticism that followed the release of Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) ("reasonable woman" case); Lisa Stansky, *The Reasonable Trust*, THE RECORDER, Nov. 11, 1917 at 1.

28 *See, e.g.*, Cobbs v. Grant, 502 P.2d 1, 8 (Cal. 1972) (adopting lay standard of disclosure under which physician must disclose those risks a reasonable patient would find material).

29 *Supra* notes 20-22 and accompanying text.

likely to produce a certain result than the other. Rather, in my opinion, the answer lies in issues of power and culture. It is now almost a commonplace that we construct the social world.[30] We do this through stories, narratives, myths, and symbols—by using tools that create images, categories, and pictures.[31] Over time, through repetition, the dominant stories seem to become true and natural, and are accepted as "the way things are."[32] Recently, outsider jurisprudence[33] has been developing means, principally "counterstorytelling," to displace or overturn these comfortable majoritarian myths and narratives.[34] A well-told counterstory can jar or displace the dominant account.[35]

The debate on objective and subjective standards touches on these issues of world-making and the social construction of reality. Powerful actors, such as tobacco companies and male dates, want objective standards applied to them simply because these standards always, and already, reflect them and their culture. These actors have been in power; their subjectivity long ago was deemed "objective" and imposed on the world.[36] Now their ideas about meaning, action, and fairness are built into our culture, into our view of male-female, doctor-patient, and manufacturer-consumer relations.[37]

It is no surprise, then, that judgment under an "objective" (or reasonable person) standard generally will favor the stronger party. This, however, is not always the case: Rules that too predictably and reliably favored the strong would be declared unprincipled.[38] The stronger actor must be able to see his favorite principles as fair and

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30 *See* PETER L. BERGER & THOMAS LUCKMAN, THE SOCIAL CONSTRUCTION OF REALITY (1967); NELSON GOODMAN, WAYS OF WORLDMAKING (1978); RICOEUR, *supra* note 5.

31 *Supra* note 29. For a discussion of the difficulty in escaping the bonds of preexisting categories and thought-structures, see Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories? Law Reform, Critical Librarianship and the Triple Helix Dilemma*, 42 STAN. L. REV. 207 (1989) [hereinafter *Same Stories*]; Schlag, *supra* note 1.

32 *Will We Ever Be Saved?*, *supra* note 5, at 929-46.

33 *See* Jean Stefancic & Richard Delgado, *Outsider Jurisprudence and the Electronic Revolution: Will Technology Help or Hinder the Cause of Law Reform?*, 52 OHIO ST. L.J. 847 (1991) (explaining the term "outsider jurisprudence" as applied to the oppositional writing of gays, lesbians, and persons of color, among others). On outsider jurisprudence, see generally Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

34 For a discussion of the legal storytelling movement, see *Oppositionists*, *supra* note 1; Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989) [hereinafter *Legal Storytelling*].

35 *Oppositionists*, *supra* note 1, at 2413-15, 2431-38.

36 *Supra* notes 30-32 and accompanying text; *see also* MICHEL FOUCAULT, POWER/KNOWLEDGE (1972).

37 *Supra* note 30. *See also* JACQUES DERRIDA, OF GRAMMATOLOGY (1976); ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS (Quintin Hoare & Geoffrey N. Smith trans. & eds., 1971).

38 *See Will We Ever Be Saved?*, *supra* note 5, at 931 (discussing the role of sincerity in the liberal's justification of the world as it is).

just—ones that a reasonable society would rely upon in contested situations.[39] He must be able to depict the current standards as integral to justice, freedom, fairness, and administrability—to everything short of the American Way itself (and maybe even that, since societies that regulate these relationships more closely are paternalistic, and verge on (shhh!) socialism).[40]

III
How Objectivity Does Its Work

We have cleverly built power's view of the appropriate standard of conduct into the very term *fair*.[41] Thus, the stronger party is able to have his way and see himself as principled at the same time.[42]

Imagine, for example, a man's likely reaction to the suggestion that subjective considerations—a woman's mood, her sense of pressure or intimidation, how she felt about the man, her unexpressed fear of reprisals if she did not go ahead[43]—ought to play a part in determining whether the man is guilty of rape. Most men find this suggestion offensive; it requires them to do something they are not accustomed to doing. "Why," they say, "I'd have to be a mind reader before I could have sex with anybody!"[44] "Who knows, anyway, what internal inhibitions the woman might have been harboring?" And "what if the woman simply changed her mind later and charged me with rape?"[45]

What we never notice is that women can "read" men's minds perfectly well. The male perspective is right out there in the world, plain as day, inscribed in culture, song, and myth—in all the prevailing narratives.[46] These narratives tell us that men want and are enti-

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39 *Id.* Note, however, that this principle is not always carried out consistently. When a subjective test would *strengthen* the hand of a powerful actor or institution, the law will often oblige—as is illustrated by the "intent" tests used in antidiscrimination law. *See infra* notes 71-72 and accompanying text.

40 For a discussion of the use of normative discourse by large institutions to lull and paralyze the rest of us, see *Normal Science*, *supra* note 25, at 947-53, 957-62.

41 *See* Winter, *supra* note 1, at 1884, 1890-1918 (normative premise comes built into cultural premise).

42 *Will We Ever Be Saved?*, *supra* note 5 (role of legitimation in the development of antidiscrimination law); *see also* Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049 (1978).

43 *See* sources cited *supra* notes 19, 21.

44 This is a classic but—because it obscures the role of power—poor argument against subjective rules. *See infra* notes 50-66 and accompanying text.

45 This is the modern form of the age-old (and now discredited) argument that "[r]ape is a charge easily made and hard to defend against." *See* Gibbs, *supra* note 19, at 51; Weiss, *supra* note 19, at 67-68. For a discussion of the evolution of rape law, see Susan Estrich, Real Rape 27-79 (1987).

46 *See, e.g.*, *Will We Ever Be Saved?*, *supra* note 5; *Oppositionists*, *supra* note 1; Winter, *supra* note 1. *See also* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Vic-*

tled to sex, that it is a prime function of women to give it to them,[47] and that unless something unusual happens, the act of sex is ordinary and blameless.[48] We believe these things because that is the way we have constructed women, men, and "normal" sexual intercourse.[49]

Notice what the objective standard renders irrelevant: a downcast look;[50] ambivalence;[51] the question, "Do you really think we should?"; slowness in following the man's lead;[52] a reputation for sexual selectivity;[53] virginity; youth; and innocence.[54] Indeed, only a loud firm "no" counts, and probably only if it is repeated several times, overheard by others, and accompanied by forceful body language such as pushing the man and walking away briskly.[55]

Yet society and law accept only this latter message (or something like it), and not the former, more nuanced ones, to mean refusal. Why? The "objective" approach is not inherently better or more fair. Rather, it is accepted because it embodies the sense of the stronger party, who centuries ago found himself in a position to dictate what permission meant.[56] Allowing ourselves to be drawn into reflexive, predictable arguments about administrability, fairness, stability, and ease of determination points us away from what

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tim's Story, 87 MICH. L. REV. 2320 (1989) (society validates "story" of the dominant members, devalidates those of outsiders).

47 After a suitable period of courtship, of course.

48 For a discussion of the view that men construct women and women's role to suit their own interests, see CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987).

49 *Id.*; *see also* ANDREA DWORKIN, INTERCOURSE (1987); Gibbs, *supra* note 19, at 51.

50 Our culture could easily cause us to interpret this conduct in a man to mean resistance, sadness, or reluctance; in a woman, it is interpreted as modesty or delicate anticipation.

51 Men believe women mean yes both when they say no *and* when they say maybe. *See* Gibbs, *supra* note 19, at 49-50; Weiss, *supra* note 19, at 64, 67.

52 Modesty is a double standard, teaching men that the woman is supposed to be slow, and that the antidote is for *him* to be forceful.

53 In our society, this reputation makes the woman even more of a prize.

54 That is, the greatest prize of all. Broadening the range of factors a court may consider when addressing consent arguably invites a return to the old approach, now largely repudiated, allowing inquiry into a woman's sexual history during a rape prosecution. However, a woman's sexual experience bears little on whether or not she agreed to have sex on tbis occasion. Her downcast look, reluctance, and history of sexual selectivity, by contrast, do bear highly on whether she voluntarily agreed to have sex on this occasion.

55 Weiss, *supra* note 19, at 72 (quoting Dartmouth women); Goodman, *supra* note 21 (survey found that women often considered degree of force "severe," while men believed it to be consistent with seduction).

56 For a discussion of cultural hegemony and the role of dominant narratives in structuring what we see and what we feel permitted to do, see, e.g., *Oppositionists*, *supra* note 1; *Same Stories*, *supra* note 31 (age-old categories embedded in legal classification systems confine thought to safe, well-trodden paths, making reform difficult even to imagine); *Legal Storytelling*, *supra* note 34; GRAMSCI, *supra* note 37; Matsuda, *supra* note 46.

really counts: the way in which stronger parties have managed to inscribe their views and interests into "external" culture, so that we are now enamored with that way of judging action.[57] First, we read our values and preferences into the culture;[58] then we pretend to consult that culture meekly and humbly in order to judge our own acts.[59] A nice trick if you can get away with it.

IV
WHY NOT A SUBJECTIVE STANDARD? ON BEING "UNPRINCIPLED" ON PRINCIPLE

"But it wouldn't be *fair* to require more. A man would virtually have to carry out a half-hour cross-examination before going to bed with a woman." (Men, of course, have no difficulty quizzing women—or each other, for that matter—at length when deciding whether to enter into a business partnership or deal, looking for ambivalence, doubt, or strength of motivation.) A cigarette manufacturer would have to place a blinking neon sign on every pack of cigarettes.[60] (Fine—cigarette manufacturers do just that when they install billboards aimed at creating demand and convincing new consumers that placing a burning carcinogenic object in their mouths is desirable and a path to social acceptance.) To get their message *into* your minds, stronger parties are perfectly willing to go to great effort and expense.[61] But to find out whether you are *willing* to do what they want, we must rely on simple, easily ascertained "objective" factors.[62]

The subordinate party, naturally, prefers the subjective standard. No matter how limited one's resources or range of options, no matter how unequal one's bargaining position, at least one's thoughts are free.[63] Small wonder that the recent legal-storytelling

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57 *See supra* notes 1-5, 25-26, 32-40 and accompanying text. Cigarette manufacturers believe that they discharge their obligations to the consumer by printing "objective" and highly visible warnings. Yet it is obvious that the adequacy of the warnings requires an interpretive judgment, one that arguably ought to be made in light of the multiple factors inherent in the setting in which they are used. *See supra* notes 10-14 and accompanying text.

58 *See Normal Science*, *supra* note 25, at 942-44.

59 *Id.* (noting that we often fail even to notice the self-deception).

60 *See* Garner, *supra* note 10.

61 The tobacco industry spends untold dollars on advertising and lobbying—some of which is intended to persuade us and our elected representatives that the manufacturers have a *right* to do what they are doing. *Cf. Normal Science*, *supra* note 25, at 938 (right *to* smoke counterbalanced by right *against* second-hand smoke).

62 *See supra* notes 36-38 and accompanying text (this purported "superiority" of the standard comes prepacked by history and usage; it is now part of the *meaning* of "fairness").

63 In the words of the German folk song, "*Meine Gedanken sind frei*" (my thoughts are free).

movement has had such appeal to people of color, women, gays and lesbians.[64] Stories inject a new narrative into our society.[65] They demand attention; if aptly told, they win acceptance or, at a minimum, respect.[66] This is why women demand to tell their account of forced sex,[67] why cancer victims insist that their smoking was a redressable harm despite the tobacco companies' pathetic warnings,[68] and why patient advocates demand a fundamental restructuring of the doctor-patient relationship.[69]

V

A Final Example and Conclusion

I began by observing that law-talk can lull and gull us, tricking us into thinking that categories like objective and subjective, and the stylized debates that swirl about them, really count when in fact they either collapse or appear trivial when viewed from the perspective of cultural power. If we allow ourselves to believe that these categories do matter, we can easily expend too much energy replicating predictable, scripted arguments—and in this way, the law turns once-progressive people into harmless technocrats.[70]

But this happens in a second way as well, when we borrow *their* tools for *our* projects without sensing the danger in that use. For example, a recent article by a Critical Race scholar proposes a novel approach to the impact-intent dichotomy in antidiscrimination law.[71] Most persons of majority race, including judges, are not pre-

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64 *See Oppositionists*, *supra* note 1, at 2412-14; Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (1987) (telling series of "Chronicles" aimed at exposing mean or self-serving nature of majoritarian law and heliefs regarding civil rights and racial justice); Patricia Williams, The Alchemy of Race and Rights (1991) (discourse of law perpetuates white-over-black injustice).

65 *Oppositionists*, *supra* note 1, at 2412-18.

66 *Id.* at 2412-18, 2431-35, 2439-41, 2441 n.89 (discussing the use of an anonymous leaflet and how counterstories may become effective).

67 Robin West is the prime advocate of the view tbat women must tell and retell their stories of patriarchy and sexual oppression. *See* Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 Harv. L. Rev. 384 (1985). *See also* Patricia Meisol, *A New Genre of Legal Scholarship: Storytelling Feminist Takes on the Fundamentals of Law*, L.A. Times, Oct. 7, 1988, pt. V, at 8 ("We need to flood the market with our stories until we get one simple point across").

68 Viz, "[This] may be dangerous to your health."

69 *See Legal Storytelling*, *supra* note 34 (containing articles by Ball, Bell, Delgado, Luban, Williams, Winter, and otbers); Richard Delgado, *Mindset and Metaphor*, 103 Harv. L. Rev. 1872, 1874 (1990); Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 Va. L. Rev. 95, 100-02 (1990); Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 St. Louis L.J. 425 (1990).

70 *See supra* notes 1-4 and accompanying text.

71 Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987).

pared to see subtle forms of "institutional" or "latter-day" racism in the absence of vicious intent. That is, "impact" alone is not enough.[72] To bridge the gap between currently unredressable, unintentional discrimination and the redressable, intentional kind, Charles Lawrence proposes that the law recognize a third, *unconscious* form of redressable discrimination.[73] So far, so good. But his article goes on to propose a "cultural test" for this sort of unconscious racism.[74] Under Lawrence's test, unconscious racism is redressable if, in light of prevailing cultural meanings and understandings, the action is racist.[75] It is no defense that the actor did not *intend* racial harm; if persons in the culture would reasonably interpret his act as racially offensive, the court will as well.

Although Lawrence's article has won an enthusiastic reception from moderate, liberal writers, the cultural-meaning test takes the teeth out of his proposal. Majority society has *defined* racial reality in such a way that relatively few acts are seen as racist.[76] "Racism" is limited to those rare individual (not institutional) acts of a vicious, indefensible, shocking sort. It tends to be associated with persons of another class, who have little political influence and lack the ability to structure society in such a way that your and my forms of racism are condemned.[77] Lawrence would have done better to couple his suggestion with proposals to change the legal culture, as the storytelling movement sets out to do. Instead, he proposes small doctrinal adjustments within that culture which will prove ineffective because they do not consider the systems of power and knowledge within which all interpretive acts take place.

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Sometimes a gestalt switch is necessary.[78] As in a drawing by Escher, a figure will stand out only if we focus on the background and ignore the foreground at which we have been staring. If we constantly skirmish with the legal foreground when it is the background that has causal efficacy, we are unlikely to get anywhere. I propose that in many cases it will behoove us to examine the legal background—the bundle of assumptions, baselines, presupposi-

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72 *Id.* at 317-31 (discussing Washington v. Davis, 426 U.S. 229 (1976), and other intent-impact cases).

73 *Id.* at 317-39.

74 *Id.* at 351-74.

75 *Id.*

76 *See* Darryl Brown, Note, *Racism and Race Relations in the University*, 76 VA. L. REV. 295 (1990); Richard Delgado, *Recasting the American Race Problem*, 79 CAL. L. REV. 1389 (1991); sources cited *supra* notes 26-32.

77 *See* sources cited *supra* note 76. For a discussion of the implications of constructing antidiscrimination law in this fashion, see BELL, *supra* note 64, at 26-75; DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 1-51 (2d ed. 1980).

78 I am grateful to Steven Winter for this metaphor.

tions, and received wisdoms—against which the familiar interpretive work of courts and legislatures takes place.[79] Sometimes, all the rest is shadowboxing.[80]

79 *Oppositionists*, *supra* note 1, at 2412-13.

80 Winter, *supra* note 1. *See also* Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929 (1991) (because legal and popular culture determine both literary narratives and legal forms of thought, the hope that one can transform or "save" the other is probably vain).