

Great Expectations:
Popular Culture and the Narration of Conflict
in Litigation and Mediation

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We tell ourselves stories in order to live . . . We look for the sermon in the suicide, for the social or moral lesson in the murder of five. We interpret what we see, select the most workable of the multiple choices. We live entirely, especially if we are writers, by the imposition of a narrative line upon disparate images, by the “ideas” with which we have learned the freeze the shifting phantasmagoria which is our actual experience.

– Joan Didion, “The White Album”¹

Introduction

Both traditional litigation and alternative forms of dispute resolution concern the telling of stories, and the imposition of narrative lines on the disparate images of our lives. In fact, the inherent nature of the litigation process tends to organize our experiences with conflict into a particular “story.” From the first meeting on, lawyers begin to narrow a client’s problem by focusing only on what is legally relevant, and “translating” it into legal terms. They shape and fit the facts into elements of “stock stories” – an easily-recognizable cause of action that will result in a predictable relief – so that the adjudicator, judge, or jury, can easily follow along.² Lost in this process is the client’s own interpretation of the problem, their own selected meaning that they have told themselves in order to deal with the conflict.

It has become cliché to point out that trials are like stories – the inherent similarities between dramatic storytelling and the adjudicative process are perhaps most vividly

¹ Joan Didion, “The White Album,” in *The White Album* (New York: Simon and Schuster, 1979) at 11.

² Discussed in Carrie Menkel-Meadow, “The Transformation of Disputes by Lawyers” (1985), *Missouri Journal of Dispute Resolution* 25 at 31.

illustrated by the dozens of films and television programs about the law that are produced every year. Recently, the use of stories in alternative dispute resolution processes such as mediation has also become increasingly scrutinized. Advocates of Narrative Mediation such as Winslade and Monk have discussed at length the ways in which people “story” their lives, both by “acting out of and into” these stories, and how these determine the realities of their conflicts.³

Yet while many writers have compared the inherent similarities and contrasts between literature and the law,⁴ fewer have examined *how* legal storytelling operates on a deeper level of dramatic structure, or how popular concepts of storytelling are generated in contemporary society – often *not* from literature, but from television and film.⁵ Fewer still, if any, have considered how storytelling in ADR processes such as mediation functions.⁶

This is significant for several reasons. ADR processes such as mediation are increasingly being mandated in a variety of contexts, resulting in more people using ADR, often without much intrinsic knowledge of the process. But whereas people involved with traditional legal processes can generally understand the translation process that lawyers

³ John Winslade and Gerald Monk, *Narrative Mediation: A New Approach to Conflict Resolution* (San Francisco: Jossey-Bass, 2000).

⁴ See *e.g.* the recent anthology edited by Peter Brooks and Paul Gewitz, *Law's Stories: Narrative and Rhetoric in the Law* (New Haven: Yale UP, 1996).

⁵ A notable exception to this is Richard K. Sherwin's recent book, *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture* (Chicago: U of Chicago Press, 2000), which I will discuss.

⁶ To the best of my knowledge and research, no studies have specifically addressed the issue of how stories are told in a mediation context other than Winslade and Monk, *supra* note 3.

undertake in converting their problems into legal stories,⁷ they do not bring the same inherent understanding to mediation. Those becoming involved in mediation not only bring in strong preconceptions of how conflict should be resolved, but also an intuitive sense of a storytelling process that is very different than that in mediation. Everyone has expectations – right or wrong – from popular culture concerning traditional litigation, and these expectations may conflict with and impair the mediation process.

This paper will examine how these expectations are not just associated with legal processes, but generated by the prevailing culture of storytelling that exists today, in particular, the structure and form of cinematic storytelling.⁸ In the first part of this paper, I will explore the influence and effect of popular culture on the legal narrative, focusing on the ways in which traditional legal storytelling has reflected our expectations created in part by film and television drama. In the second part, I will contrast this with the inherent differences in mediation storytelling, and consider how some of these differences might be characterized as literary, or even novelistic in nature. Finally, I will examine some of the consequences of these narrative expectations on the use and acceptance of mediation in North American society at a time when ADR is being increasingly employed in a variety of contexts without being understood by, or represented in, popular culture.

⁷ *i.e.* although a client may not know the necessary legal elements of negligence, they intuitively know the term itself, and what to expect from such a cause of action.

⁸ I will be using the term “cinematic” storytelling to refer not only to film, but to television as well.

I. Popular Culture and the Legal Narrative

Visual Culture and the Law

We live in an age where film, TV and visually-oriented dramatic narratives clearly play a more dominant role in our culture than other, non-visual based media. Technological advances have led to a flood of cable and satellite television channels offering more viewing choice, the development of the internet and computer technology has resulted in more media accessible on-line, and other advances (DVDs and the popularity of “home theatres” for instance) have led to a bombardment of media that increasingly defines our culture. Combined with longer working hours, less time for reflective, in-depth analysis of information, and the convergence of many forms of media and media companies, these advances have not only led to a shortened attention span but also a more visually-oriented culture.

In such a culture, dramatic and visual representations of conflict have become privileged. Visual storytelling is easily-understood by anyone, transcending all socioeconomic differences and even educational levels. As James Monaco has described, infants can understand television images before spoken language, and anyone of minimum intelligence can grasp the basic content of film or television without education because of its mimicking of reality.⁹

The obvious problem with this is that film and other dramatic narratives are *not* reality, but highly simplified and constructed for particular purposes. In a postmodern, irony-saturated culture, often film and television reflect *other* media representations rather than

create actual representations of dramatic conflict. As American essayist David Foster Wallace has observed, “Television, even the mundane little business of its production, has become my – our – interior.”¹⁰ Recently, the success of so-called “Reality TV” has illustrated this perhaps more vividly than ever – programs such as *Survivor*, *Temptation Island*, and *The Mole* are predicated on an audience’s desire to see “real” conflict in an artificial context that in turn becomes “drama” when packaged as television. Products of a distinctly visual-based culture, these programs showcase the ongoing fascination with representations of “real life,” in addition to the consistent appeal of more traditional dramatic narratives, such as work-oriented dramas like *E.R.*, *The West Wing*, and *Law & Order*, which often incorporate real events into their story lines. We remain as fascinated as ever by real life conflict, no matter how real it actually is.

If the proliferation of visual media has impacted on every aspect of popular culture, it would seem natural that this influence would also be significant on legal culture, especially given popular interest in legal events.¹¹ As Richard Sherwin argues in his recent book *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture*, the enormous influence of popular culture on law has led to what he terms the “jurisprudence of appearances.”¹² As he writes in his introduction, this influence poses distinct dangers to the public understanding of the legal system:

The legal stories we hear and see today, both in court and out, confront law and the legal process with new challenges. An

⁹ James Monaco, *How to Read A Film* (New York: Oxford UP, 1981) at 121.

¹⁰ David Foster Wallace, “E Unibus Pluram: Television and U.S. Fiction” in *A Supposedly Fun Thing I’ll Never Do Again* (New York: Little, Brown and Co., 1997) at 32.

¹¹ On the day I’m writing this, roughly a dozen stories in the first ten pages of a weekday edition of *The Globe and Mail* could be characterized as “legal” in nature.

¹² Richard Sherwin, *supra* note 5 at 4-5.

unprecedented convergence is now under way among powerful cultural and economic forces. Constructivist (“post-modern”) theory, communication technology, and the needs of the marketplace are coming together with tremendous synergistic impact. As a consequence of this impact we are seeing a marked destabilization in our sense of sense, and in our social and legal reality. Legal meanings are flattening out as they yield to the compelling visual logic of film and TV images and the market forces that fuel their production. In consequence, the customary balance within the legal system among disparate forms of knowledge, discourse and power is under great strain, and is at risk of breaking down.¹³

Sherwin argues that this intermingling between popular culture and the law, wherein law is a “co-producer of popular culture,” has led to a more “generalized erosion of law’s legitimacy.”¹⁴ Therefore according to Sherwin, it has become imperative that we study how narrative conveys meaning in our postmodern world, especially as it affects our understanding of the law. While much of Sherwin’s detailed analysis of the relationship between culture and law is illuminating and important, his own remedy is more philosophical than useful:

We must begin to reconceptualize law in a way that is consonant with current lived realities, which is to say, with the cultural constructs and anxieties actually circulating in society . . . That effort will lead us from hyper-catharsis to real catharsis – in the face of tragic suffering and the affirmative potential of legal enchantment.¹⁵

Sherwin fails to see that alternative dispute resolution processes such as mediation may be one of the possible ways to “reconceptualize” law. After all, the possibility of using other processes – never addressed in his book – is a viable alternative that may provide ways of resolving problems in accordance with how people live now. Yet the questions posed by Sherwin are vital, even necessary, ones. Our prevailing interest in visual

¹³ *Ibid.* at 4-5.

¹⁴ *Ibid.* at 5.

¹⁵ *Ibid.* at 169.

culture, and the representations of conflict that it generates, must be considered as one of the modern foundations for how we have come to perceive law.

Law as Cinematic Storytelling

Carefully-structured narrative paradigms have always figured prominently in dramatic storytelling. Aristotle's principles of Greek tragedy in his *Poetics* have been followed by dramatists for thousands of years, and are virtually indistinguishable from modern day scriptwriting guides. Compare, for instance, Aristotle's discussion of "Completeness" with that of Syd Field, modern-day guru for almost every screenwriter in Hollywood:

A *whole* is that which has a beginning, a middle and an end. A *whole* is that which itself does not follow necessarily from anything else, but some second thing naturally exists or occurs after it. Conversely, an *end* is that which does itself naturally follow from something else, either necessarily or in general, but there is nothing else after it.¹⁶

Dramatic structure may be defined as: A LINEAR ARRANGEMENT OF RELATED INCIDENTS, EPISODES, OR EVENTS LEADING TO A DRAMATIC RESOLUTION.¹⁷

Trials, of course, are clearly both a *whole* and a *dramatically-resolved* story. Given that both drama and any dispute resolution process are based on conflict, it is unsurprising that numerous parallels exist between the structural paradigm of film and television programs and the litigation system. What is surprising, however, is the *degree* to which these storytelling processes are distinctly reflected in one another, which almost leads one to wonder which came first – the narrative structures of drama or that of the formal legal process. If one considers the form and structure of both cinematic (dramatic) and legal storytelling, five distinct similarities can be observed:

¹⁶ Aristotle, *Poetics*, trans. Malcolm Heath, (London: Penguin Classics, 1996) at 13.

¹⁷ Syd Field, *Screenplay: The Foundations of Screenwriting* (New York: Dell, 1982) at 10.

- (1) both traditional legal storytelling and cinematic storytelling focus on *action*, particularly people/characters making active decisions;
- (2) both legal and cinematic storytelling focus on *facts*, *logic* and *causally-related* events;
- (3) in focusing on action, both legal and cinematic storytelling focus on *strengths*, rather than weaknesses;
- (4) both legal and cinematic storytelling focus on *polarized* and *competing* interests;
- (5) both law and cinema require clear *resolution* through the adjudication/determination of one interest over another.

I will consider each of these in turn.

1. Action

Dramatic storytelling has always been founded on action, rather than thought. Dramatists are encouraged to define characters on the basis of “what they do,” not what they say.¹⁸ This approach, of course, is not only evident in art, but in life. As Aristotle observed, “Well-being and ill-being reside in action, and the goal of life is an activity, not a quality; people possess certain qualities in accordance with their character, but they achieve well being or its opposite on the basis of how they fare.”¹⁹ True or not, there is no question that society uses action as the determining factor by which we evaluate moral character and regulate behaviour.

Similarly, traditional legal storytelling focuses on actions. In court, we ask whether the accused committed the crime, or whether there was a breach of contract through the

¹⁸ *Ibid.* at 26-7; “Action is character,” is another of Field’s well-known principles.

¹⁹ Aristotle, *supra* note 16 at 11.

defendant's actions. When assessing negligence, we ask whether the defendant failed to act. Adjudicative structures have been guided, in part, by attempts to determine *what actions took place and which did not*.

The focus on action in both legal and cinematic storytelling is not only a pragmatic necessity. While it can be argued that visual storytelling *depends* on action (*i.e.* how can we otherwise tell a visual story) and that the rule of law can *only* be based on what individuals do or fail to do, I would argue that both are rooted in a larger principle – we trust action, and that which we can clearly see. Much of our legal system is predicated on the movements of the body, rather than those of the mind.

Conversely, we distrust what we *don't* see. The explicitly public nature of the legal system emphasizes this – once someone has filed a claim, his or her “story” is publicly available to all. This distrust explains how the most vociferous criticism of mediation and other ADR mechanisms tends to be of its private and confidential nature.²⁰

2. Facts and Causation

No matter how common they may be in real life, randomness and accident are anathema to both cinematic and legal storytelling, no matter how. Storytelling, after all, is our attempt to impose order on chaos, to find meaning in the nonsensical and indeterminacy in the indeterminate. We desire linear arrangements of related events, and we *expect* resolution. Most of our popular genres of drama – from Greek tragedy to murder mystery

²⁰ See *e.g.* David Luban, “Settlements and the Erosion of the Public Realm” (1995), 95 *Georgetown Law Journal* 2619.

– are essentially “puzzle-solving” paradigms, where one fact inevitably leads to predictable result.

Similarly, traditional legal storytelling focuses on facts as the essential components of a case. Lawyers learn to establish facts carefully and methodically in examination in chief, and to systematically dismantle them in cross-examination. As Sherwin writes in describing the O.J. Simpson trial, good lawyers depend on the clear revelation of facts to advance a story a judge or jury will understand:

For the prosecution, the Simpson jurors’ task was obvious. Like detectives in a mystery story, all they needed to do was add up the pieces in an evidentiary puzzle. As prosecutor Christopher Darden would say, ‘This case really is a simple case when you get down to the bottom line.’ Simple because deductive logic and inductive logic in the face of objective reality dictate the result. Once the factual truth has emerged the jurors have no choice but to comply with the law’s demands. Within this narrative scheme, factual and legal imperatives keep the jury’s role under strict control. No wonder the prosecutors were so anxious to place rhetoric and feelings out of bounds – they might disrupt the linear march of the state’s mystery-solving logic.²¹

Yet the messy facts of our lives often resist such a “linear march,” whether in drama in or litigation. Consider the critically-acclaimed film *A Beautiful Mind*, a film which recently won the Academy Award for Best Picture.²² Based on Sylvia Nasar’s book by the same title,²³ a biography of mathematical genius and Nobel Laureate John Forbes Nash Jr., the film generated unprecedented controversy because of the manner in which its subject’s actual life was altered to “fit” the conventions of the big screen.²⁴

²¹ Sherwin, *supra* note 5 at 45.

²² *A Beautiful Mind*. Dir. Ron Howard. With Russell Crowe and Jennifer Connelly. Universal. 2001.

²³ Sylvia Nasar, *A Beautiful Mind: The Life of Mathematical Genius and Nobel Laureate John Nash* (New York: Simon & Schuster, 1998).

The film can be summarized as follows. John Nash, a brilliant math prodigy who develops what comes to be known as Game Theory, meets and falls in love with Alicia, a young woman who is one of his students. While working for an agency of the United States Defense Department, Nash begins to see delusions which lead him to spend increasing amounts of time decoding nonexistent secret messages in magazines. When his behaviour becomes more erratic, Alicia is forced to have him hospitalized, and he is diagnosed with schizophrenia. Although medication begins to alleviate his symptoms, Nash refuses to take his prescriptions, concerned about his ability to work. After being treated several times and faced with the threat of Alicia leaving him with their young son, Nash manages to control his paranoid delusions through sheer strength of will, go back to work at Princeton, and regain Alicia's love. As his earlier theories become increasingly important in modern economics, he is awarded the Nobel Prize and is revered by adoring students. In his acceptance speech in Stockholm, he thanks Alicia for teaching him how to love.

An anyone who has seen the film knows, *A Beautiful Mind* is an inspiring, heart-warming story. It is also predominantly false. As Nasar's book makes clear, the actual facts of Nash's life are far from being a clear narrative trajectory. Not only was Nash hospitalized countless times, but he was also married twice, and involved with other women *and* men throughout his life. He also had another son by his first wife. He and Alicia divorced after his consistent abuse and the enormous strain placed on the young mother once repeated hospitalizations and poverty became too much to handle.

²⁴ See e.g. the original review of the film by A.O. Scott, "From Math to Madness, and Back," *The New York Times*, December 21, 2001.

Yet neither Ron Howard, the director of the film, nor Akiva Goldsman, the screenwriter who adapted Nasar's book, are perpetrating a fraud on the moviegoing public – at least no more than any other filmmaker who creates the carefully-structured cinematic narrative that movie audiences expect. Following Nasar's book chapter by chapter would involve many repeated scenes, numerous incidents unconnected to previous events, and the apparently unmotivated and discordant behaviour of someone with a serious mental illness. Just as any smart litigator would do, Howard and Goldsman made choices in how to tell this story with a singular focus – the strength and possibility of the human mind. They deliberately left out facts that would confuse the focus of the main narrative, such as Nash's earlier marriage, his numerous attempts to renounce his American citizenship, or the fact that his second son also has schizophrenia.

Yet by being coerced into this structure, there is no question that much of the essence of Nasar's book – and that of Nash's life – have been disregarded. The particular conventions of cinema and litigation, in requiring clearly defined facts and causation, will always limit the nature and quantity of facts that can be considered in any story.

3. Strengths and Weaknesses

One rarely sees vulnerabilities emphasized in conventional films or in litigation. This results largely from the focus on action – showing what a character *does* is obviously going to focus on their strengths, rather than weaknesses. Traditional cinematic storytelling emphasizes strengths and de-emphasizes weakness and vulnerability. In *A*

Beautiful Mind, the filmmakers present the strength of John Nash's mind, and ultimately, his heart, rather than his inherent weaknesses, such as any of his more unlikable qualities.²⁵

Similarly, lawyers must focus on the strengths of their case, whether they are the plaintiffs or defendant, prosecution or accused, and on proving the facts that support these strengths. The narrowing process of legal discourse often translates strengths into rights – a right to claim damages, for instance. Consequently, vulnerability or weakness in a case is only emphasized as an active defense, a sword and not a shield: *he could not have committed the act, for he did not have the mental capacity; because he was so intoxicated, he did not have the intent; she did not understand the contract she was signing.*

The consequences of this are clear – a person's weaknesses or vulnerabilities, no matter how important to the underlying interests or needs of a case, will rarely be addressed in the litigation process unless it is of tactical advantage. As the Honourable Barry Stuart²⁶ has discussed, one of the problems of any dispute resolution process based on strengths is that there is little opportunity, or incentive, to express vulnerability. As he argues, only when a party is willing to express concern, doubt or weakness will another party reciprocate, and consequently create useful dialogue that may help to resolve conflict.²⁷

²⁵ e.g. in Nasar's book, Nash is often shown to be cold, anti-social and occasionally cruel to both his wives and his sons, as well as driven by a desire for academic fame.

²⁶ Chief Justice of the Territorial Court of the Yukon Territory.

4. Polarized and Competing Interests

“Conflict happens when two characters have mutually exclusive goals at the same time,” writes a well-known script consultant,²⁸ a statement that could also be said to characterize the litigation process. As any moviegoer knows, nearly all films focus on one central character, the protagonist who must struggle against an antagonist – either a person with opposing interests or some other force – until the crisis or climatic scene. In the climax, these competing interests must ultimately be determined. One writer has aptly characterized this as the “Obligatory Scene”²⁹, based on the fact that it exists to satisfy audience expectations about the way the story must be resolved.

If determining who wins and who loses in cinematic narratives is obligatory, in law it is *required*. Nonetheless, it is useful to consider legal adjudication in light of the terms and structures of dramatic storytelling. As Paul Berman has argued, legal decision-making is another form of storytelling in itself, one where the trier of fact must “choose” one story over another:

Both trials and judicial opinions, for example, ultimately construct a narrative about a disputed event by rendering a decision or verdict. They do so, however, only after first enacting a performance in which the society “creates, tests, changes and judges” the various competing discourses that could make up our social knowledge.³⁰

²⁷ The Honorable Barry Stuart, Chief Justice of the Territorial Court of the Yukon Territory, “Peacemaking Circles for Dialogue and Democracy,” (Green College Lecture, Green College, University of British Columbia, February 11, 2002) [unpublished].

²⁸ Linda Seger, *How to Make a Good Script Great* (Hollywood: Samuel French, 1987) at 125.

²⁹ Discussed in Robert McKee, *Story: Substance, Structure, Style and the Principles of Screenwriting* (New York: Harper-Collins, 1997) at 198-199.

³⁰ Paul Berman, “Telling a Less Suspicious Story: Notes Towards a Non-Skeptical Approach to Legal/Cultural Analysis,” 13 *Yale Journal of Law and the Humanities* 95 at 134.

In this manner, stories are publicly legitimized – the judicial version of the story becomes the “correct” story or “metastory” signifying the truth.³¹ As critics of ADR have discussed, this decision serves an crucial “public” function of recognizing each society’s particular values, and as precedent for the correct principles on which to make future decisions. Implicit in their criticism of ADR is the conception that this “story-determining” function of litigation is the only way to uphold the rule of law as the “principle of order in society.”³²

Yet the fallible and not-necessarily conclusive nature of judicial decisions demonstrates how judgments can also be seen as “just another version” of the story. The language employed by judges in their decisions often demonstrates that they are clearly aware of the need to utilize narrative techniques themselves in justifying their interpretation of a particular story. Consider the very cinematic “fade in” opening of Lord Denning’s judgment in the English Court of Appeal decision of *Maharanees of Baroda v.*

Wildenstein.³³

The plaintiff, the Maharanees of Baroda, lives in France; but she has lived in England for long periods, and has had many flats and large houses in this country. She is intimately connected with English social life. She frequently visits England for considerable periods, and has horses in training here. She has a stud farm in Ireland.

The defendant, Daniel Wildenstein, lives in Paris. He is in an art dealer of international repute. In September 1970 *Paris Match* published an article about him. It describes him as the greatest

³¹Even though trial level judgments are appealable, the first decision generally determines the narratives that follow – “Every court makes a fundamental decision about the question before it, and the wording in that first decision controls all others,” argues Robert A. Ferguson in “The Judicial Opinion as Literary Genre,” 2 *Yale Journal of Law and the Humanities* 201 (1990) at 208.

³²Laura Nader, “The ADR Explosion – The Implications of Rhetoric in Legal Reform,” (1988) 8 *Windsor Yearbook of Access to Justice* 269 at 287.

³³[1972] 2 All ER 689 (CA).

art dealer in the world. The business was founded by his grandfather in Paris and New York. It was extended by his father to London, who had a gallery in New Bond Street and a small flat above it. Daniel Wildenstern himself succeeded to it. He was at all material times a director of Daniel Wildenstern Ltd., the important art dealers of 147 New Bond Street in London. Mr. Wildenstein is also connected with the important New York house of Wildenstein Inc. He has another great interest, racehorses. He has a stud farm in Ireland, and he comes over to England from time to time for the races here.

Whether it is between protagonist and antagonist or plaintiff and defendant, orienting stories around competing interests creates a linear and easily understood form and unilateral meaning – narrative lines must “converge” at the point of decision making. Just as conventional movies rarely allow for ambiguous endings, litigation by its nature requires similar closure, a process that limits the remedies available in the judicial system.

5. Closure and Resolution

Adjudicative conclusions are generally as unequivocal as the endings in movies – either the plaintiff or the defendant, prosecution or defense, is successful. In films the good guys win, the woman gets the man, or the detective solves the case. Often the climatic scene provides the answer to a “central question” or problem that drives the story, for example, “will the hero defeat the villains” or “will the two lovers get together?”³⁴ Legal storytelling requires its own central question – the “issue” that must be decided by the trier of fact. Consider the implicit stories in common issues such as “did the defendant owe a duty of care to the consumer who purchased its product?” or “does the legislation effectively discriminate against people on the basis of disability?”

But while consolidating story elements into a “controlling idea”³⁵ serves a thematic purpose in cinematic storytelling, its function in legal storytelling is strictly pragmatic. The resources of the adjudicative system can only consider a limited number of issues. The effect, however, is the same. Compressing what may be multiple interests into one or two issues/themes serves to develop familiar paradigms in both cinematic and legal narratives, where conflicts are elevated to a metaphoric and symbolic level.³⁶ The way the above legal issues are framed demonstrates how value-laden the litigation process becomes. We automatically make certain assumptions and associations about the company that may have breached a duty of care, or the legislators who created the potentially discriminatory legislation, that may have little to do with the truth of the situation. In this way, legal storytelling creates its own archetypes.

In eliminating potentially important issues from consideration, legal storytelling focuses the adjudicative process onto one or two simpler (and linear) narratives that must be resolved. In many cases this is not only appropriate but necessary. In a simple assault case, all that may be important is a consideration of certain elements of the offence. But in other conflicts where a multiplicity of issues and perspectives may be important to consider, this rigid approach can effectively flatten the discourse. As the Honorable Barry Stuart has observed, that fact that most court-based processes are only set up to deal with

³⁴ See *e.g.* Seger, *supra* note 28 at 13-14.

³⁵ Another term discussed in McKee, *supra* note 29 at 114-117.

³⁶ See *e.g.* legal anthropologist Victor Turner’s discussion of this in *Dramas, Fields and Metaphors: Symbolic Action in Society* (Ithaca, N.Y.: Cornell UP, 1974) at 17.

one or two issues is often at the expense of developing a broader and more lasting dialogue between *all* the parties that may be involved in a particular dispute.³⁷

II. Mediation as Literary Storytelling

The Writer as Mediator

To state the obvious – people do not formulate or express their experiences in three-act structure or cinematic paradigms. What we look for in art, we generally do not seek in life. Yet it could be argued that the storytelling process in mediation is much closer to that of traditional literature – novels, stories and essays. And to the degree that many novels and personal essays have a better ability to approximate the types of actual conflict that drive our lives³⁸ than that of visual culture, this similarity is significant.

On a simple level, this characteristic accounts for the reason why certain kinds of conflict are particularly well-suited to mediation. Disputes between neighbours or roommates, and employment or simple debt-collection cases, while subjectively of great consequence to those involved, often do not involve the types of conflict that can be served in a litigation context. Such conflicts also fall under the radar of visual culture – the real conflict in John Nash’s life that is conveyed poignantly in Sylvia Nasar’s biography, his *inner* conflict to reestablish himself as an important thinker in the face of his disease, is unable to be conveyed to a moviegoing audience, who instead are given “larger” and external conflicts such as marital turmoil and imagined delusions.

³⁷ Stuart, *supra* note 27.

³⁸ *i.e.* the more banal, subtler, and complex problems and conflicts that fill our lives.

Like mediation, literature has often been better equipped to express inner conflict than the conventional dramatic culture of its time. The predominant conflict being explored in a novel is as likely to be resolved through a subtle shift in thinking or feeling, or a perspicacious insight realized at the border between conscious and unconscious and thought. Determining and deciphering facts is less important than expressing how a fact was experienced and felt.

Novels and other literary forms exist in a private space that is created by both author and reader, an unspoken dialogue that enables readers to share their own understanding with what the author has intended to say. Artful literature communicates unique yet universal ideas that can not be categorized into a “central question” or “issue”; as Annie Dillard has written, “literature does not operate on borrowed feelings.”³⁹ Rather than a linear process, literature often presents an *associative* progression of ideas. In this way, it invites readers to feel and think in individual ways. The ultimate experience of literature, therefore, is unpredictable, infinite, and uncontrollable. Novels may lead to resolution – both for the characters and for the reader – but are just as likely to have an open-ended conclusion, or partly-resolved conflict. Novels do not always *settle*.

Not only are novels more tolerant of ambiguity than visual storytelling, but they are more flexible in structure. Consider the disparate structures of works such as *Ulysses*, *As I Lay Dying*, or *The English Patient*. Stories of conflict in novels are often told through different voices and *multiple* points of view, rather than polarized and competing

³⁹ Annie Dillard, *Living By Fiction* (New York: Harper & Row, 1982) at 26.

interests. While novels create their own expectations, convergence or catharsis is not required as a matter of form. There is usually no obligatory scene in novels.

These inherent similarities between the literary and mediation processes may explain why writers and artists have often been referred to as “mediators of experience.”⁴⁰ Even literary criticism has begun to explore the ways in which authors such as James Joyce can be seen to engage in “mediation” – in one case defined as the attempt to “make the ordinary and insignificant the medium of feeling and meaning.”⁴¹

Compared to visual culture, traditional literary storytelling clearly plays a more peripheral role in society today, both in popularity and influence. However, the ways in which postmodern writers have developed certain literary forms is particularly intriguing given the ways in which it has distinguished itself from many of the conventions of cinematic narratives – and, therefore, *legal* storytelling. In recent years, the innovative use of the literary memoir form by young writers such as Dave Eggers and the increased popularity of the genre itself⁴² reveals an interest in techniques that may be considered more “mediative” than cinematic. In such works as Eggers’ best-selling *A Heartbreaking Work of Staggering Genius*,⁴³ authors show an almost-obsessive interest in discussing everything in their experience, often in unexpected and unpredictable ways.

⁴⁰ As an example, the curator of a recent major art exhibition discussed how the show asks “how do artists mediate our experience of the mechanical world.” See Robin Laurence, “Mechanical Thinking,” *The Georgia Straight*, February 7-14, 2002.

⁴¹ See e.g. David Weir, *James Joyce and the Art of Mediation* (Ann Arbor: U of Michigan P, 1996) at 8.

⁴² See Dana Goodyear, “I, Me, Mine,” *The New Yorker*, February 11, 2002 at 17.

⁴³ Dave Eggers, *A Heartbreaking Work of Staggering Genius*, (New York: Simon & Schuster, 2000).

A Heartbreaking Work, for example, might be summarized as Eggers' account of the years in which he raised his younger brother after their parents both died when Eggers was twenty-one. Yet what the book is *about* is virtually indescribable – it is equal parts about grief, family, young adulthood, friendship and popular culture, among other things. In telling his story, Eggers jumps around in time, frequently shifting tense and voice, and includes made-up discussions with people in his life and even explicit descriptions of *how* he is writing the book. There *is* a conflict that drives his story, as well as a form of resolution, but it could only be said to have been accomplished through a dialogue with the reader. In her book *Swing Low: A Life*,⁴⁴ Miriam Toews tells the story of her father's life, including his struggle with depression and suicide, from *his* point of view, developing a different kind of dialogue in the process. These works and others demonstrate an implicit belief in the ability of discussion and dialogue to address interests, ideas, and issues that traditional storytelling often marginalizes. They demonstrate why, especially in our visual media-bombarded culture, we need such storytelling more than ever to mediate important experiences to others.

Narrative Mediation

An increased interest in storytelling through mediation itself is perhaps best evidenced by Winslade and Monk's *Narrative Mediation*.⁴⁵ Combining many of the postmodern concerns of many of the social sciences with their experiences in mediation, Winslade and Monk's book articulates what they call a "new approach to mediating conflict," one

⁴⁴ Miriam Toews, *Swing Low: A Life* (Toronto: Stoddart, 2001).

⁴⁵ Winslade and Monk, *supra* note 3.

that focuses on story as a “version or construction of events rather than a set of facts.”⁴⁶

In the words of the authors, Narrative Mediation aspires to deconstruct the “epistemologies underpinning the problem-solving interest-based models” and instead apply an alternative approach, one that challenges traditional discourses of the storytelling that is first established by parties. The authors outline many suggested techniques, including ways in which to “open up space” in conflict-saturated stories, challenging what they term “entitlement discourse,” and “disarming” conflict through “deconstructive listening.”

Narrative Mediation vividly illuminates how literary-oriented concerns – breaking down polarities and encouraging multiplicity and complexity, for instance – can be practically utilized in a mediation context to help resolve conflict. However, in focusing on the need for mediators to help shape the storytelling process, Winslade and Monk curiously, and perhaps unconsciously, implant nearly the entire paradigm of cinematic storytelling into the mediation model:

First, a good story must have a story line. This implies a coherent series of plot events that hang together rather than a random collocation of chance happenings. The story needs to be plausible as a story, not just to the mediator but to the disputing parties as well. This suggests a careful crafting process that sustains a certain level of suspense so that the participants in the story are drawn forward toward some sense of denouement.

For such narrative momentum to be sustained, the protagonists in the story need to be challenged to develop characterizations that fit the story and yet still honour their histories. These characterizations may well be foreshadowed by previous events in the parties’ lives. Indeed, the discovery of unique outcomes and the making of meaning about those outcome are key steps in the crafting of an alternative story, but such snippets of story do not constitute works of art in themselves. What they foreshadow

⁴⁶ *Ibid.* at 140.

needs to be developed. The past is a resource on which to draw for this development. But the developments must come forward into the present and project a future in order for the plot momentum to be plausible.

A story also requires thematic consistency. A mediator who is aware of this need should attend to the development of key themes in the building of momentum for the counterplot to the conflict story. These themes should express the preferences of the parties for the path forward. They should also serve as counterpoints to the themes of conflict and disharmony (or the like) that have been featured in the previously dominant story. For example, themes such as equity, agreement, cooperation, or respect may be featured and woven into the plot developments that are taking place. In a recent mediation about a conflict among members of a school board, the idea of working together as a team emerged as a theme that the participants preferred as a future focus for their work. The challenge then was to seek out expressions of this theme in the plot developments that followed.⁴⁷

For the reasons I have discussed earlier, it seems clear that adopting such an approach would be tantamount to turning a mediation into a trial. Winslade and Monk fail to see how developing constructive momentum in a mediation does not necessarily require a “coherent series of plot events,” nor “thematic consistency.” Stories do not have to be “crafted” – guided, perhaps, but not carefully crafted so as to create a “denouement.” Such an approach might impair the ability of parties whose interests don’t *need* to coalesce into more traditional narratives with cause and effect, suspense, and closure. Furthermore, it runs contrary to the underlying rationale of consensus. To encourage all parties to see the dispute as the same story, with the same “theme,” might eliminate agreements being reached where the parties desire fundamentally different things. As Carrie Menkel-Meadow and others have argued, criticism of mediated settlements is often based on the mistaken assumption that all parties value the same thing equally,

⁴⁷ *Ibid.* at 182.

whereas negotiated settlement can often actually allow the full representation and expression of interests and needs that maximize party's goals.⁴⁸

There are other problems with Winslade and Monk's conception of the role of storytelling in mediation. Many of the chapters in their book focus on ways in which a mediator might "deconstruct" the stories of one person so that they may see their interests in a different light. While this is a necessary skill for any mediator, trained mediators, particularly those working in a legal context, must be careful not to be "correcting," rather than "deconstructing," parties' narratives. A mediator who brings in any agenda into the mediation session, such as challenging the notion of "patriarchal entitlement" (one of the sections of their book), risks becoming, and being seen as, an adjudicator of interests.⁴⁹ Furthermore, privileging one narrative over another through value-laden concepts, no matter how socially important, may cause the actual interests of parties to be reconstituted as legal rights. It may also force the unnecessary convergence of different narratives, where all parties "agree" with the same story – a conclusion that is an adjudication, rather than organic settlement.

There is an important difference, after all, between recognizing the interests and needs of another party in a dispute, and being *told* to understand those interests by the mediator. The larger goals of moral growth and personal transformation through mediation, as discussed by Bush and Folger, stem from the former, and are threatened by the latter. In their view, a mediation model where conflicts become *opportunities* for moral

⁴⁸ Carrie Menkel-Meadow, "Whose Dispute is it Anyway: A Philosophical and Democratic Defense of Settlement (In Some Cases) (1995), 95 *Georgetown Law Journal* 2663 at 2672-73.

development can only be achieved by strengthening one's capacity for "experiencing and expressing concern and consideration for others, especially those whose situation is 'different' from one's own."⁵⁰ It might be argued that such an approach is intrinsically literary or novelistic – after all, what are *Anna Karenin*, *Great Expectations*, or *The Catcher in the Rye* but novels about personal growth and transformation?⁵¹

Consequences and Conclusions

After discussing the coercive nature of certain types of storytelling in requiring resolution, it is with some awkwardness that I conclude this paper with recommendations. First, however, I would like to make it clear that I am not advocating that mediation storytelling provides an intrinsically *better* form of dispute resolution process for *all* disputes, but rather, that the expectations of mediation participants – formed largely from popular conceptions of cinematic and legal storytelling – must be accommodated for a session to realize its potential.

I do believe, however, that the literary nature of mediation storytelling *does* provide opportunities for resolving conflicts that may not be possible in a traditional litigation context. In this sense, characterizing mediation as novelistic is only truly useful as a pedagogical tool, rather than as practical technique. Hopefully, it encourages practitioners to see possibilities inherent in the process, and to avoid recasting stories into the potentially more limiting form of cinematic and legal storytelling structures.

⁴⁹ See in particular the entire chapter entitled "Entitlement," Winslade and Monk, *supra* note 3 at 94-115.

⁵⁰ Robert Bush and Joseph Folger, *The Promise of Mediation* (San Francisco: Jossey-Bass, 1996) at 81-83.

⁵¹ This is admittedly a pretty obvious attempt at justifying my title.

There are also many practical considerations for mediation practitioners – both lawyers and mediators – which stem from these distinctions. If participants in mediation do not have their own cultural story-telling assumptions acknowledged, expectations will not be fulfilled, and the process may break down. For instance, someone who expects “crisis” or “climatic” resolution may be dissatisfied with any settlement offer, no matter how appropriate, that takes place too early in the mediation process, if he or she feels it hasn’t been “earned” through sufficient struggle.

Another potential problem is that a person accustomed to a strengths or rights-based discourse may perceive any expressed emotion or feeling as irrelevant or peripheral to the process. Conversely, mediators must realize that facts and causation, while not preeminent as they are in a legal context, are still relevant. If *only* emotions are considered without acknowledging an important fact, such as the negligence of a third party, all the parties’ interests will not be fully understood.

Perhaps the most important consideration is developing an understanding of society’s inherent distrust of non-visual storytelling. Mediators must be able to bridge the gap between such preconceptions and the reality of what mediation storytelling aims to accomplish. When asked the common question, “How will the mediator know that he/she is lying,” a pat response that “this is not relevant here” will do little to gain trust or respect for the process. But an explanation of why it may be important to recognize *why*

the other person may be lying, and of the consequences on the client's *perception* of their story, may assist clients to participate in the process in a more productive way.

In this respect, is incumbent upon mediators to recognize the deep unease with which many people regard language-based discourse, and be ready to respond to the preconception that "Lies are the ultimate risk of storytelling as method."⁵² Understanding how a possible untruth threatens to do more damage to a fact-based paradigm, for instance, than it does to a non-linear narrative, requires practitioners to be aware of the more fundamental differences between these storytelling processes.

Mediators must also be careful not to help convert mediations into *de facto* adjudications through coercing parties' interests into legal storytelling paradigms, as I have discussed. Certain tactics aimed at dislodging positional thinking and encouraging negotiation, such as discussing possible judicial outcomes, in essence extradite the "story" to an inevitable (and "obligatory") conclusion. Such techniques must be utilized carefully to ensure that reality checking does not mean *determining* the reality of the conflict.

Without understanding these different storytelling structures, we risk unconsciously "bending" and "flattening" people's most personal concerns and interests into yet another narrative scheme that can't accommodate them. This will undermine public faith in the integrity of the mediation process at a time when it is needed most. It will reaffirm the need for lawyers to "translate" every dispute, rather than developing more organic methods of resolving certain kinds of conflict.

In this respect, mediation can serve as the narrative antithesis of the role of the judicial process. If one of the implicit functions of the justice system is to “own” conflict for the sake of the public good, as ADR critics such as Fiss and Nader have suggested,⁵³ then mediation allows for the greater opportunity for people to take control over their own stories of conflict and how these are expressed.

There is no question that litigation and the judicial process have an essential public role to play in our society in resolving disputes. Mediation and other ADR mechanisms must be scrutinized carefully if they are to be taken seriously by, and supported through, traditional legal culture.

But we must also be careful with the ways in which we characterize our commitment to the litigation process. There is enormous danger in describing the public function of law as “using state power to bring reality closer to our chosen ideals,” as Nader has stated, echoing Fiss’s earlier arguments.⁵⁴ It is precisely this coercive narrative process that leads to the kind of erosion of the justice system’s legitimacy that Sherwin discusses in *When Law Goes Pop*.⁵⁵ Forcing “reality” to fit into a symbolic paradigm – this story is “about” X – presumes that we clearly recognize the same ideals. Yet judicial ideals, after all, are frequently as elusive and oversimplified as those in films. Just as films must distort the truth of a story to become resonant with symbolic meaning (John Nash must represent the

⁵² Catherine A. MacKinnon, “Law’s Stories as Reality and Politics,” in *Law’s Stories*, *supra* note 4 at 232.

⁵³ See Owen Fiss, “Against Settlement,” 93 *Yale Law Journal* 1073 at 1085; Nader, *supra* note 32 at 281.

⁵⁴ Nader, *supra* note 32 at 281.

⁵⁵ Sherwin, *supra* note 5 at 5.

noble, troubled man who can learn to love, which we can all easily understand, rather than a fallible, conflicted genius struggling with a severe mental disorder, which we can not), so must adjudicative processes, if we follow Nader and Fiss' logic. But judicial ideals shift only slightly less often than cultural ones. Only two decades ago, our ideal of "equality" according to the Supreme Court of Canada meant that a legislative regime that effectively discriminated against women based on pregnancy was acceptable because such inequality was created by "nature."⁵⁶

While mediated resolutions have often drawn criticism and distrust,⁵⁷ such responses are frequently based on assumptions about the public interest that are not always supported by the real-life needs of individuals. As Menkel-Meadow argues, negotiation in a settlement process is not unprincipled or undemocratic, but often a more just and equitable result. In her view, settlement offers the opportunity to craft solutions that are not mere compromises, but rather, "greater expression of the variety of remedial possibilities in a postmodern world."⁵⁸ In essence, this is an argument that explicitly moves mediation away from binary, rule-based legal processes and the expectations of cinema, and towards the tolerance of ambiguity and multiple resolutions found in novelistic storytelling. Menkel-Meadow correctly understands the differences between what she terms "settlement facts" and "adjudicative facts," and how these are, in essence, components of different types of storytelling.⁵⁹

⁵⁶ *Bliss v. Attorney General of Canada* (1978) 92 D.L.R. (3d) 417 at 422.

⁵⁷ See e.g. Luban, *supra* note 20; Fiss, *supra* note 53; Nader, *supra* note 32.

If ADR and mediation are to bring about a fundamental “shift” in how we as a society deal with conflict, then we must begin to pay close attention to the ways in which participants in such processes expect to have their stories told, and heard. In a culture that privileges visual narratives, and which often distrusts language-based storytelling, it is essential that we understand the assumptions about narrative that parties may bring to alternative dispute resolution processes. People may leave their legal baggage behind, but they never lose their expectations.

The way we tell stories goes to the very heart our lives. It shapes our perceptions of what is right and wrong more powerfully than any judicial decision will ever do. But as any mediator knows, individual human stories are also more open to change and evolution than are narrative paradigms. Mediators must be careful not to “rewrite” people’s conflicts for the “big screen” of litigation, and instead allow parties to make their own determinations of what their stories mean when juxtaposed against those of others. In recognizing this, we must begin to realize that justice does not always require a translation – in fact, in many cases, it requires that we just *listen*, and allow for response, instead.

⁵⁸ Menkel-Meadow *supra* note 48 at 2674-77. See also Julie McFarlane’s discussion of “value-added” outcomes in *Dispute Resolution: Readings and Case Studies* (Toronto: Emond Montgomery, 1999) at 596-97.

⁵⁹ Menkel-Meadow, *ibid.* at 2685.