

Historians of the Singular: Lawyers, Judges, and the Work of Factual Construction

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Gregory J. O'Meara, S.J., *The Name is the Same, But the Facts Have been Changed to Protect the Attorneys: Strickland, Judicial Discretion, and Appellate Decision-Making*, 42 **Val. U. L. Rev.** 687 (2008).

Gregory J. O'Meara, S.J., an Assistant Professor at Marquette University Law School, has written a breakthrough article on role of fact interpretation in the judicial construction of criminal law rules that is likely to escape the attention of many criminal law teachers and practitioners who would benefit from it. On the surface it purports to be a careful doctrinal analysis of the Supreme Court's hidden expansion of the ineffective assistance of counsel doctrine, in defiance of the *Anti-Terrorism and Effective Death Penalty Act's* (AEDPA), 28 U.S.C. Sec. 2254(d) (2008), prohibition on even the Supreme Court using *Habeas* cases to make new legal rules. From *Strickland v. Washington*, 466 U.S. 668 (1984), to the most recent cases, *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005), O'Meara shows that the Court continues to express loyalty to the logic of the *Strickland* rule. However, when the analysis is extended to the facts of recent cases, O'Meara shows convincingly that the Court has found relevant facts explicitly treated as irrelevant in *Strickland*. Readers who get a bit farther in discover that the article is also a rather copious introduction to the late continental philosopher and theorist of narrative, Paul Ricoeur. Unfortunately, neither of these highly technical subjects is likely to attract the general teacher or practitioner of criminal law, but this is precisely who should read the article.

Indeed, the discussion of AEDPA, as important as it is for capital lawyers, is really only a case study of a very important argument about the role of factual construction in legal change. Drawing on the work of Anthony Amsterdam and Jerome Brunner, **Minding the Law** (2000), O'Meara sets out to convince lawyers of something many practitioners appreciate but which law students (and teachers) strenuously resist, i.e., the idea that facts rather than law are primary craft of legal advocacy (or judicial construction). As O'Meara compelling demonstrates with the *Strickland* line of cases is that rigid controls on law leave judges free to change norms by expanding their vision of relevant facts. There are parallels with Mark Kelman's classic article *Interpretive Construction in the Substantive Criminal Law*, 33 **Stan. L. Rev.** 591 (1982). Kelman identified a number of techniques by which courts routinely rework facts, for example, time framing which stretches or shrinks the time frame in which the defendant's actions are considered. In this article, O'Meara reaches into the formidable and largely legally unplumbed depths of the late philosopher Paul Ricoeur, to develop a systematic analysis of how facts get changed. Ricoeur analyzes the work of non-fiction writers as a three stage process. The first stage is one of "documentation" in which a factual archive established. The second stage is one of explanation, in which certain facts from this archive are selected. In this process, a key dimension is the "scale" in which facts are framed. Since scale in narrative can be subtle (unlike in architecture or engineering), narratives can be significantly shifted by resetting the scale (or density) with which facts are explained. The third phase, that of narration, is where the scaled array of facts are connected with a set of "because" clauses which weave a causal story into them. While many legal scholars influenced by Robert Cover have attended to the importance of narration, few have noticed the earlier work of scale setting which largely determines the range of causal explanations that will seem relevant. By bringing out this missing dimension of narrative work, O'Meara has advanced a systematic understanding of fact exegesis in law.

For Ricoeur, history epitomizes non-fiction narrative. While the fiction writer is held only to aesthetic judgments, the non-fiction writer is accountable to public debate on the adequacy of her account to the common understanding. Drawing on this fascinating exegesis O'Meara analogizes lawyers (judges and legal scholars as well) to historians, obliged to provide the history of singular moment (an act or a lower court decision). According to Ricoeur, the

historian's can reinterpret a common history by varying the density with which the facts of a particular event are sampled and presented in a narrative to change the meaning of a historical sequence. According to O'Meara, the lawyer (judge, scholar) changes precedent by varying the density with which the facts of a case are represented in a brief or an opinion. He then applies this model to show how the Court's legal fealty to *Strickland* by varying the "density" with which the facts of a particular case are presented. O'Meara's application of this analysis to the recent ineffective assistance cases is compelling. But the analogy is worth independent development. While historians generally focus on scales of decades, like 19th century Russia, or France during the Revolution, lawyers and judges find themselves confronted with more micro-level events; e.g., a homicide, or a police interrogation. Yet once the differences in scale are noted, the problems of method are strikingly similar. Both are primarily focused on developing a body of largely textual but sometimes live witness information into a workable archive. Both need to make selections of which facts to present (it is an illuminating game to simply compare the facts in majority and dissenting opinions in the same case). Both ultimately need to weave a causal story through the selected facts. In portraying lawyers and judges as historians, O'Meara reminds us of the enduring ambiguities that afflict both fields and provide the resource for change.

This is also a way of recasting the early 20th century legal realist project and the article does a wonderful job of reviewing some of the central ideas and protagonists of the realist movement as anticipatory of the narrative/cognitive approach O'Meara is extending as much as of the empirical social science to which it often compared itself.

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