THE ART OF STORYTELLING: DELIVERING THE THEME TO THE JURY

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Storytelling for Lawyers

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STORYTELLING FOR LAWYERS

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INTRODUCTION

There are great souls out there who have extraordinary powers of persuasion. If we have been fortunate, we have encountered several of them over the course of our lives. In ways unique to each, they combine authority and wisdom. They appear in different roles—parents, relatives, teachers, pastors, and even political leaders. Their wisdom has shaped us fundamentally, in ways that are discernible long after they are no longer part of our lives. I did not always understand what my favorite law school professor was saying, but his words had power that pulled me along as I was trying to understand. In the words of Jack Nicholson, he made "me want to be a better man."[1] I do not know how to teach this. It is a gift and we are very fortunate when we are exposed to it, and have the maturity to recognize it.

For the great majority of us who do not have this gift, persuasion is a harder task. We encounter skepticism and resistance. If we are to be successful in persuading someone, we must first recognize that it is his or her decision, not ours. In contrast with the great teacher, the process cannot be from the top down. It must work from the ground up. If lawyers have a general problem in the art of persuasion, it is that they preach too much, but lack moral authority. They do not recognize that the movement toward a decision comes primarily from within the decision-maker. This does not mean we cannot be great persuaders; we simply have to do it by other means.

One of the principal techniques of persuasion comes through understanding the art of storytelling. Storytelling is primal.[2] It can show the way to a common ground that ties in to the basic values of the listener. We all grew up with stories. There is a deep psychological need here. I sense, but cannot fully describe, the importance of stories in my childhood. I am able to see more clearly, however, the importance of stories in the development of my own children. My oldest, now a pathologist in Minneapolis, would absorb words and

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1. *Memorable Quotes for As Good As It Gets (1997)*, IMDb.com, http://www.imdb.com/title/tt0119822/quotes (last visited Apr. 18, 2012).

2. Gerry Spence described storytelling in this vivid passage:

> Of course it is all storytelling – nothing more. It is the experience of the tribe around the fire, the primordial genes excited, listening . . . the shivers racing up your back to the place where the scalp is made, and then the breathless climax, and the sadness and the tears with the dying of the embers, and the silence.

Gerry Spence, 72 A.B.A. J. 63 (April 1986).

storylines as if they were the water of life itself. I remember her usual response before the age of two to a story reading was: "More . . . more." *Frog and Toad*,[3] *Harold and the Purple Crayon*,[4] *Where the Wild Things Are*,[5] *The Velveteen Rabbit*,[6] along with the *Winnie-the-Pooh* series,[7] were the main staples of bedtime reading for all of my daughters. I read these stories hundreds of times. The repetition might be viewed as indoctrination, but it is much more complex than that because, even at an early stage, my kids were not a blank slate. There was already some psychological need there that the stories were addressing.[8] It must be deeply embedded in the genetic code. The stories become part of the moral infrastructure that is being worked out as part of the child's development. As noted by Bruno Bettelheim: "The child intuitively comprehends that although these stories are unreal, they are not untrue."[9] The almost insatiable desire for stories is also reflected in the active fantasy life that kids have with their stuffed animals and dolls, as well as action toys. We do not outgrow this.

The search for meaning is mediated through stories.[10] Stories help to make sense of life. Some stories confirm existing beliefs and prejudices, while others stretch the worldview.[11] They are part of our search for meaning. Movies, for example, are about entertainment, but the better ones are also about meaning. Meaning is not necessarily limited to what is intended by the storyteller. The story may take on additional meaning from its audience. In discussing the popularity of *The Shawshank Redemption*,[12] director Frank Darabont made the following observation:

> The film seems to be something of a Rorschach for people. They project their own lives, their own difficulties, their own obstacles, and their own triumphs into it, whether that's a disastrous marriage or a serious, debilitating illness that somebody is trying to overcome. They view the bars of *Shawshank* as a metaphor for their own difficulties and then consequently their own hopes and triumphs and people really do draw

3. ARNOLD LOBEL, ADVENTURES OF FROG AND TOAD (Sandy Creek 2010) (1970).

4. CROCKETT JOHNSON, HAROLD AND THE PURPLE CRAYON (Harper Collins 1983) (1955).

5. MAURICE SENDAK, WHERE THE WILD THINGS ARE (Scholastic 1974) (1963).

6. MARGERY WILLIAMS & WILLIAM NICHOLSON, THE VELVETEEN RABBIT (Doubleday & Co., Inc. 1960) (1922).

7. A.A. MILNE AND ERNEST H. SHEPARD, THE COMPLETE TALES AND POEMS OF WINNIE-THE-POOH (2001).

8. The exploration of these needs and how stories, especially fairy tales, address the unconscious needs is the subject of Bruno Bettelheim's *The Uses of Enchantment*. BRUNO BETTELHEIM, THE USES OF ENCHANTMENT: THE MEANING AND IMPORTANCE OF FAIRY TALES (1975).

9. *Id.* at 73.

10. For example, Jesus often taught through stories, known as parables. *See, e.g., Luke* 10:25-37 (answering the question "who is my neighbor?" with the story about the Good Samaritan). Jesus also taught from authority. *See, e.g., John* 14:6 (Jesus stating, "I am the way the truth and the life.").

11. I do not like bullies, nor corruption by public officials. Thus, the film PALE RIDER (1985) appeals to me. As a teenager, my evolving views on race relations, and also lawyers, were shaped by the films WEST SIDE STORY (1961) and TO KILL A MOCKINGBIRD (1962).

12. THE SHAWSHANK REDEMPTION (1994).

strength from the movie for that reason.[13]

People project their own values on a good story. They identify with characters and their predicament and begin, in the words of James McElhaney, to pull for one side or the other.[14] This is critical for persuasion built from the bottom up. People should not be told what to think. They will reach the conclusion on their own and will hold on to it more firmly if they can relate it to their own life story.

There is already considerable literature on the use of storytelling by lawyers.[15] The purpose of this Article is to articulate specific propositions regarding the techniques of storytelling. While most of what follows is not necessarily new, it is useful to collect these propositions and set them out in a systematic and accessible format.

TWENTY-FIVE PROPOSITIONS ABOUT STORYTELLING

1. Story Is Not a Collection of Facts. The Story Must Have At Least One Theme To Give It Meaning.

Themes are essential to the story. They make sense of the facts. A story without a theme is not a story. It is chatter. What is a theme? It is a short statement that articulates a principle underlying a story. A principle is not a fact, it is a rule. It helps to evaluate the facts. A principle points to a resolution or conclusion. It provides direction for the story. For example, "promises should be kept" may be the underlying principle for a breach of contract case. It identifies the relevant facts, brings them together, and shapes how the story is

13. *Charlie Rose: A discussion with the cast* of "The Shawshank Redemption," (PBS television broadcast Sept. 6, 2004), available at http://www.charlierose.com/view/interview/1285.

14. JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 178-79 (4th ed. 2006).

15. *See, e.g.*, JIM M. PERDUE, WINNING WITH STORIES: USING THE NARRATIVE TO PERSUADE IN TRIALS, SPEECHES & LECTURES (2006); ERIC OLIVER, PERSUASIVE COMMUNICATION: TWENTY-FIVE YEARS OF TEACHING LAWYERS (2009); ERIC OLIVER, FACTS CAN'T SPEAK FOR THEMSELVES: REVEAL THE STORIES THAT GIVE FACTS THEIR MEANING (2005). *See also* Howard L. Nations, *Powerful Persuasion*, Nations Law Firm, http://www.howardnations.com/persuasivejury arguments /persuasion.pdf (last visited Apr. 18, 2012); Howard L. Nations, *Themes*, Nations Law Firm, http://www.howardnations.com/themes/hlnthemes.pdf; J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 53 (2008); Jeanne M. Kaiser, *When the Truth and the Story Collide: What Legal Writers Can Learn From the Experience of Non-Fiction Writers About the Limits of Legal Storytelling*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 163 (2010); Dominic J. Gianna & Lisa A. Marcy, *Winning in the Beginning by Winning the Beginning*, 39 BRIEF 40 (2010); Bret Rappaport, *Tapping the Human Adaptive Origins of Storytelling by Requiring Legal Writing Students to Read a Novel in Order to Appreciate How Character, Setting, Plot, Theme, and Tone (CSPTT) Are As Important As IRAC*, 25 T.M. COOLEY L. REV. 267 (2008); Ruth Anne Robbins, *Harry Potter, Ruby Slippers, and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Heroes Journey*, 29 SEATTLE U. L. REV. 767 (2006); David J. Dempsey, *Master the Magic of Storytelling*, 29 VT. B. J. 32 (Fall 2003); Tom Galbraith, *Storytelling: The Anecdotal Antidote*, 28 LITIG., no. 3, 2002 at 17; Brian J. Foley and Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Fact Sections*, 32 RUTGERS L.J. 459 (2001); Gerald Reading Powell, *Opening Statements: The Art of Storytelling*, 31 STETSON L. REV. 89 (2001); Benjamin Reid, *The Trial Lawyer as Story Teller: Reviving an Ancient Art*, 24 LITIG., no. 3, 1998 at 8.

told by giving it a cohesive moral structure. No one likes a bully. In the eyes of the law, all are equal. Fairness requires notice and the opportunity to be heard. One should not complain about a problem that is the result of his or her own choice. These statements are propositions that drive the argument. They also can drive the story.

A theme has organizing power.[16] It helps the storyteller to decide what to include and what not to include. It supplies the measure by which to sort the facts. It provides a focus through which to highlight the important facts and a filter through which to exclude or diminish lesser or countervailing facts. The theme reflects a moral infrastructure by which to judge the facts.

If the theme resonates with the listeners, it can become so powerful as to override any opposing narrative. Embedding a theme in a story becomes a way to tie into people's own narrative stories that drive their decision-making processes.[17] The theme will shape the story all the way down to the details, especially the word choices. Word choices should reflect and reinforce the theme.[18] The theme will also supply continuity to the story by connecting the dots and even allowing the listener to anticipate how the dots will be connected, thus making the connection harder to dislodge in the listener. A good story allows the listener to get to the conclusion just slightly ahead of the teller.

A story may have more than one theme. The themes may be complementary or in tension. In such case, one of the chief tasks of the story will be to work through the themes to arrive at a resolution, at least in part, if not completely. Although posing some organizational issues, different themes will actually work to keep the story manageable for the listener. Themes are a sorting device. They help to collect and organize disparate parts of the story. They highlight and they bring focus. But, most of all, they may touch deeply embedded emotional beliefs or themes already held by the listener. They are essential in making a connection with the one who is to be the decision-maker.

For the law student or the lawyer, it is not enough to look at a case and begin to recite the facts. You have to read the whole thing, so that you begin to figure out what is important to the story. Most times, it takes several readings. One of the most effective ways to break down a case is to work backwards from the required legal elements and highlight them in the facts. The facts do not necessarily have significance on their own. They are like the guitar string to the sounding board. By themselves, they do not resonate; they produce a sound like a dull thud. But, plucked next to a sounding board, the vibrations produce a beautiful tone. Facts without law, nothing. Facts next to the law, beautiful

16. *See* Jonathan K. Van Patten, *Themes and Persuasion*, 56 S.D. L. REV. 256 (2011).

17. For example, one of the jurors who was interviewed immediately after the O.J. Simpson verdict in the Nicole Brown Simpson and Ronald Goldman murder trial stated, after sitting through several months of testimony and offers of tangible evidence, that she did not hear *any* evidence suggesting that Simpson committed the murders. This suggests that her own narrative made her identify with the defense's preposterous argument that Simpson was framed by the police. It allowed her to process through such inconvenient facts such as Goldman's blood found inside Simpson's vehicle.

18. MCELHANEY, *supra* note 14, at 629-36.

music. In the same way, the underlying themes will make the facts resonate. Stories are about meaning, not just information or entertainment.

How does one find an appropriate theme? You should probably start from the facts as you know them. Try putting them together in chronological order and see if anything on the order of principle emerges. Work through them with different starting points and variable sequences. See what emerges as a simple explanation of why you should win based on the facts as you know them.[19] If working from the ground up doesn't produce anything that seems right, you might then go to external sources. A book of quotes is a good place to start. The best one, by far, is Thomas Vesper's collection of quotes.[20] This may work, if you read widely and choose carefully. It may be a little artificial in that you may then try to impose meaning on the facts that doesn't quite ring true. In other words, don't distort the facts to fit the theme. Don't let the theme get ahead of the evidence. Another way to find a theme is to find the type of argument that fits your intuition about your strongest point. By type of argument, I mean the arguments classified by classical rhetoric.[21] See if you can recognize the structure of the argument that you are trying to make and then, possibly, how a principle, or at least a metaphor, emerges from that. For example, the argument from comparison focuses on similarities and differences.[22] "A wound, though cured, yet leaves behind a scar."[23] Here, a metaphor is used to compare the lasting effect of a common wound to what the plaintiff has suffered in your case. The argument from relationship focuses on connections (or non-connections) between events.[24] "If the glove doesn't fit, you must acquit."[25] The facts make point to a principle based on a lack of connection between a key piece of evidence and the accused.

The search for the right theme should never stop. It may not emerge until relatively late in the game. Although the story must have a theme, the lawyer must continually test that theme against the facts as they evolve through fact investigation and discovery. The theme must be tested with more neutral observers like colleagues, friends, and, if needed, focus groups. The right theme is essential to the story and that makes it essential to the case. If you settle on a decent theme too early, you may be inclined to resist a better theme even though

19. One of my favorite quotes in this regard is from the Continental Op, one of Dashiell Hammett's fictional detectives: "Plans are all right sometimes . . . and sometimes just stirring things up is all right – if you're tough enough to survive, and keep your eyes open so you'll see what you want when it comes to the top." DASHIELL HAMMETT, *Red Harvest, in* THE NOVELS OF DASHIELL HAMMETT 57 (Alfred A. Knopf, Inc. 1965) (1929).

20. THOMAS J. VESPER, UNCLE ANTHONY'S UNABRIDGED ANALOGIES: QUOTES, PROVERBS, BLESSINGS & TOASTS FOR LAWYERS, LECTURERS & LAYPEOPLE (West 2d ed. 2010). *See also* A SCHOLAR'S PURSUIT: THE JOHN HAGEMANN QUOTATION COLLECTION (Hagemann Center Press 2010).

21. Van Patten, *supra* note 16, at 264-79.

22. *Id.* at 267-72.

23. VESPER, *supra* note 20, at 796 (quoting John Oldham).

24. Van Patten, *supra* note 16, at 273-74.

25. JEFFREY TOOBIN, THE RUN OF HIS LIFE: THE PEOPLE V. O.J. SIMPSON 420 (1996) (quoting Johnnie Cochrane).

the evolving case begins to suggest a different emphasis or direction. Always be open to where the argument may lead.

2. The Theme Need Not Be Stated As Such. In Fact, It Will Be Much More Effective If It Is Implicit in the Story.

Although the theme will be the driving force underlying the story, its presence on the surface must be subtle, or else it feels like preaching. Preaching has its place, but in telling a story for persuasion, it will be counter-productive, because it gets ahead of the evidence and does not allow the listener the freedom to follow the story to its end. Generating sales resistance is not the way of persuasion. After finding the right theme, there must be discipline and maturity to counter the temptation to shout it to the hills. *Sotto voce*,[26] as my former voice instructor would say. A light touch with the theme within the story will be enough because of the strength of the theme underneath driving the narrative.[27]

Let us consider the observation of a professional writer who advises would-be novelists and scriptwriters:

> Theme is best expressed through the structure of the story, through what I call the moral argument. This is where you, the author, make a case for how to live, not through philosophical argument, but through the actions of characters . . . . Probably the most important step in that argument is the final moral choice you give to the hero.[28]

Even though the lawyer does not get to write the story onto a blank canvas, it is useful to think of telling the story of the case with this frame of reference. The story may very well come in as a set of facts. In order to make sense of them, you must begin, right away, to look for the underlying moral argument or what I prefer to call the moral infrastructure.

The moral infrastructure consists of the ground rules, both legal and moral, in which the story plays out. The moral infrastructure may often be assumed, especially when the story is told to those who share common beliefs. But it is not necessarily a given. The storyteller should consciously locate the moral infrastructure in which the story takes place. At the most superficial level, it consists of figuring out the law of the jurisdiction in which the story takes place. It is not limited to that, however. This sense of place is more than statutes, regulations, and cases. It includes some sense of right and wrong, community customs and mores, and some grounding in reality. It is not a made up world, but instead, a real world inhabited by listeners who operate on a daily basis

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26. "[U]nder the breath: in an undertone . . . very softly." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993).

27. I am speaking here mainly of storytelling as an introduction to the case in the opening statement. Storytelling in the context of closing argument is different and will be addressed more fully below. In closing argument, the jury has seen the evidence and thus storytelling can be much more direct, often in the form of metaphors, which should not be holding back on subtlety.

28. JOHN TRUBY, THE ANATOMY OF STORY: 22 STEPS TO BECOMING A MASTER STORYTELLER 35 (Faber & Faber 2007).

within the moral infrastructure. Identifying the moral infrastructure is the key to persuading the listener.

The dynamic of telling a story within a fundamentally different moral structure may be seen in what is called "science fiction" or "fantasy," as in the works of Frank Herbert, author of Dune,[29] or the works of J.K. Rowling.[30] Part of the delight is in the experience of a different moral structure that shapes the characters and events. Sometimes, the story is told by one who is at odds with the underlying moral structure. It is not an easy task to sing a song in a strange land[31] but this is the basis of many detective novels, where the protagonist strives to find order in a world of chaos and justice in a world of corruption and evil.[32]

The moral infrastructure is often expressed in the theme itself. "No one likes a bully" implies that might does not make right. There is a sense of right and wrong, to which the bully's intimidation and force are an anathema. When the bully violates our sense of the moral order, we begin to root for ways in which the bully will be brought down. The story usually starts out with the apparent success of the bully (*e.g.*, *The Princess Bride*[33] or *The Lord of the Rings*[34]) who is eventually brought down by a seemingly weaker, flawed, but essentially good protagonist. These stories make little sense without a moral infrastructure to give the story meaning.

Fairness is another basic theme that reflects an underlying moral infrastructure. Again, it is not a world in which might makes right.[35] Fairness is a principle independent of raw power, which acts as a critique and, ultimately, as a judgment on those who act unfairly. It is not only a basic principle understood by most kids on the playground, it is also an essential principle of our Bill of

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29. FRANK HERBERT, DUNE (1965).

30. *See, e.g.*, J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE (1999).

31. Psalm 137: 1-4

By the rivers of Babylon
there we sat down and there we wept
when we remembered Zion.
On the poplars there
we hung up our harps.
For there our captors asked us
for songs;
and our tormentors asked for mirth, saying,
"Sing us one of the songs of Zion!"
How could we sing the Lord's song
in a foreign land?

Id. *See also* ROBERT A. HEINLEIN, STRANGER IN A STRANGE LAND (1961).

32. *See, e.g.*, DENNIS LEHANE, MYSTIC RIVER (2001); MICHAEL CONNELLY, A DARKNESS MORE THAN NIGHT (2001).

33. THE PRINCESS BRIDE (1987).

34. THE LORD OF THE RINGS (Movie Trilogy): THE FELLOWSHIP OF THE RING (2001); THE TWO TOWERS (2002); and THE RETURN OF THE KING (2003).

35. PLATO, GORGIAS (E.R. Dodds trans., 1959).

Rights.[36] As such, it is a prime candidate for a theme because of its potential to resonate with so many listeners.

The search for a theme that will resonate with the listener's own values must be tied to the facts so as to support the storyteller's credibility. Perhaps too often, the storyteller will succumb to the temptation of stretching the facts to fit the theme or stretching the theme to fit the facts.[37] It must be a natural, not a contrived, fit. In addition, the fit can come undone as the case evolves during fact investigation and discovery.

The theme that emerges from the story will appear as part of what could be called the subtext. This is the text that lies beneath the story, conveying a more compact version of the facts and containing the theme or themes. It is a synthesis of the facts and their meaning. The subtext is used to clarify the essential facts and to identify how the theme will give the facts the intended meaning.

Let me start with something simple. One of the Frog and Toad stories is about the planting of a garden in the spring.[38] Toad, the more serious of the two friends, sets out to plant a garden. He is very excited about it and tells Frog his plans. He is going to do the very best he can to grow a wonderful garden. Frog, the wiser of the two friends, knowing how the exuberance of Toad often outpaces his performance, listens politely. So, Toad prepares the soil and plants the seeds with great care. He then watches over his garden. He watches and waits. At some point, he begins to sing to his seeds: "Grow seeds grow." And he waits. Nothing appears to be happening. Frog visits Toad to check on the progress and Toad assures him that he is doing everything he can to grow a successful garden. After several days of watching and encouraging the seeds to grow, and without any visible success, Toad falls asleep at his post. Frog comes along and wakes him up and they discover together that, while Toad had been sleeping, the seeds had sprouted and the visible signs of a garden were finally on the way.[39]

The subtext of this story would go something like this. Toad starts a project with enthusiasm. He wants to do the best job possible, and he does. He believes that he can further help out by being with the seeds and singing to them, believing, through the fallacy of anthropomorphism,[40] that they will respond to

36. U.S. CONST. amend. V.

37. This is a classic temptation for many politicians, and they acquire a bad reputation as a result.

38. As I write this account, I will disclose that I am doing it from memory. I will be right as to most of it, which will demonstrate the power of a simple story for children that I last read for my youngest daughter, over twenty years ago. To the extent that I have any of the details wrong, it will demonstrate how time can erode the details from memory, but not the essence of the story.

39. ARNOLD LOBEL, ADVENTURES OF FROG AND TOAD: FROG AND TOAD TOGETHER 18-29 (Sandy Creek 2010).

40. "[a]n interpretation of what is not human or personal in terms of human or personal characteristics." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993). The fallacy has consequences when they are acted upon as if true. Thus, treating snakes as if they harbor some kind of reciprocal affection can be a grave mistake (pun intended). Think also of the volleyball "Wilson" named by Tom Hanks in CAST AWAY (2000).

his care.[41] The seeds do not. They have their own time and way. Toad's efforts and his will do not affect the course of nature. After he falls asleep (but not because of this), the sprouts emerge. The theme of the story is that our will, no matter how strong, cannot change the pace of nature.

With kids, it makes no sense to put the themes on the surface. A theme like I have just described would be a distraction from the story. But the power of the story is almost nothing without the underlying theme. As the story unfolds, the child will see before Toad does the futility of trying to encourage seeds to grow. Far better was Toad's preparation and care to create the conditions for growth. Good stuff. I am appreciative probably even more today of what that story was teaching than when I read it so many times to my daughters, so very long ago.

If we move to a more sophisticated text, it is important to look for the subtext. It will keep your focus on the track of the argument. Again, think of outlining the text in the margin. Let us consider the following remarkable letter written by a former slave to his former master.

Dayton, Ohio,
August 7, 1865

To My Old Master, Colonel P.H. Anderson, Big Spring, Tennessee

Sir: I got your letter, and was glad to find that you had not forgotten Jourdon, and that you wanted me to come back and live with you again, promising to do better for me than anybody else can. I have often felt uneasy about you. I thought the Yankees would have hung you long before this, for harboring Rebs they found at your house. I suppose they never heard about your going to Colonel Martin's to kill the Union soldier that was left by his company in their stable. Although you shot at me twice before I left you, I did not want to hear of your being hurt, and am glad you are still living. It would do me good to go back to the dear old home again, and see Miss Mary and Miss Martha and Allen, Esther, Green, and Lee. Give my love to them all, and tell them I hope we will meet in the better world, if not in this. I would have gone back to see you all when I was working in the Nashville Hospital, but one of the neighbors told me that Henry intended to shoot me if he ever got a chance.

I want to know particularly what the good chance is you propose to give me. I am doing tolerably well here. I get twenty-five dollars a month, with victuals and clothing; have a comfortable home for Mandy,—the folks call her Mrs. Anderson,—and the children—Milly, Jane, and Grundy—go to school and are learning well. The teacher says Grundy has a head for a preacher. They go to Sunday school, and Mandy and me attend church regularly. We are kindly treated. Sometimes we overhear others saying, "Them colored people were slaves" down in Tennessee. The children feel hurt when they hear such remarks; but I tell them it was no disgrace in Tennessee to belong to Colonel Anderson. Many darkeys would have been proud, as I used to be, to call you master. Now if you

41. Actually, the whole Frog and Toad series is an extended and positive use of anthropomorphism in that it allows the telling of a story about human beings through the enchanted world of talking frogs and toads. Enchanted characters tell us that the story is not real, but it is nonetheless true.

will write and say what wages you will give me, I will be better able to decide whether it would be to my advantage to move back again.

As to my freedom, which you say I can have, there is nothing to be gained on that score, as I got my free papers in 1864 from the Provost-Marshal-General of the Department of Nashville. Mandy says she would be afraid to go back without some proof that you were disposed to treat us justly and kindly; and *we have concluded to test your sincerity by asking you to send us our wages for the time we served you. This will make us forget and forgive old scores, and rely on your justice and friendship in the future.* I served you faithfully for thirty-two years, and Mandy twenty years. At twenty-five dollars a month for me, and two dollars a week for Mandy, our earnings would amount to eleven thousand six hundred and eighty dollars. Add to this the interest for the time our wages have been kept back, and deduct what you paid for our clothing, and three doctor's visits to me, and pulling a tooth for Mandy, and the balance will show what we are in justice entitled to. Please send the money by Adams's Express, in care of V. Winters, Esq., Dayton, Ohio. *If you fail to pay us for faithful labors in the past, we can have little faith in your promises in the future. We trust the good Maker has opened your eyes to the wrongs which you and your fathers have done to me and my fathers, in making us toil for you for generations without recompense. Here I draw my wages every Saturday night; but in Tennessee there was never any pay-day for the negroes any more than for the horses and cows. Surely there will be a day of reckoning for those who defraud the laborer of his hire.*

In answering this letter, please state if there would be any safety for my Milly and Jane, who are now grown up, and both good-looking girls. You know how it was with poor Matilda and Catherine. I would rather stay here and starve—and die, if it come to that—than have my girls brought to shame by the violence and wickedness of their young masters. You will also please state if there has been any schools opened for the colored children in your neighborhood. The great desire of my life now is to give my children an education, and have them form virtuous habits.

Say howdy to George Carter, and thank him for taking the pistol from you when you were shooting at me.

From your old servant,

Jourdon Anderson.[42]

The subtext would go something like this: I am glad to hear from you, despite all that has passed between us. I am a bit surprised you are not dead because you were such a rascal. I would like to hear more about your intentions if I come back, especially since my family and I are treated well here. As to wages, whatever they are for the future, there is the matter of back wages. In order to gauge your sincerity, we would like you to pay wages for the time we served you without pay. If you fail to pay us for faithful labors in the past, we can have little faith in your promises in the future. The failure to pay us was wrong, and surely there will be a day of reckoning for those who took the labor

42. L. MARIA CHILD, THE FREEDMEN'S BOOK, 265-67 (Ticknor and Fields 1865), available at http://www.gutenberg.org/files/38479/38479-h/38479-h.htm#Page_265 (emphasis added).

from the laborer without just compensation. In addition, please state your intentions with respect to my two youngest daughters. I know what you did with my other children. I would rather starve here in Ohio than have such shame and violence brought upon them by your kin. Finally, please let me know about the schools my children may attend. I would like them to have an education and to form virtuous habits.[43]

The power from this story comes from contrast between the wry humor and remarkable restraint on the surface and the skepticism and deep anger that lies underneath. What is also interesting is that the writer is giving his former master a lesson in first principles. The themes that articulate these principles are: all workers, regardless of color, are entitled to fair compensation for their labor; our trust in your word is dependent on your recognition of that principle; violence against and rape of the weak is wrong; and education and virtuous habits are necessary in order for children to grow into good citizens. The short form would be: Because the regime of slavery, the regime of might makes right, is over, will you now live accordingly to principles of natural justice? Given the history of race relations and the specific history between the two, this letter is a powerful testament to the possibility of forgiveness and healing, if only we could live according to principles of fairness and equality.

Now, this could easily veer off into the superficial and ultimately empty world of clichés. Clichés are very often a part of a narrative, especially in political speeches. It is important to distinguish clichés from principles. Clichés are empty. They are *faux* principles. The apparent meaning of clichés is often undermined by the failure of the speaker to apply them to his or her own life. Hypocrisy and "lip service" are fellow travelers with cliché. They reflect the failure, usually intentional, to act on the truth of what is asserted. Genuine principles are grounded on fundamental truths and will require actions that acknowledge these truths in a serious way.

The search for the theme or themes underlying the story will be a search for truth. Because this kind of talk has a checkered past, to say the least, it understandably scares people to go at it directly. So much damage has been done in the name of truth that one does not approach the problem of persuasion with a blank slate. There are too many unresolved grievances and grudges here. In the modern age, everyone is entitled to his or her own opinion. As famously stated by Justice Powell: "Under the First Amendment there is no such thing as a false idea."[44] Instead of a blank slate, there are lots of ideas out there (and, with due respect to Justice Powell, some of them are false) and people start from

43. If I were putting notes in the margin, they would look something like this:

¶ 1 – Greetings, with both respect and a humorous observation about the master's unseemly past.

¶ 2 – Consideration of offer requires trust. Trust requires acknowledgement of past wrong and action to correct it.

¶ 3 – Concern for how daughter will be treated, in light of past abuse; concern for daughters' education and moral habits.

44. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

the premise that theirs are correct. That is the primary reason the theme, as a form of truth, should not be explicit at first. A full-scale charge attacking the barriers directly rarely succeeds, at least in the realm of opinion, if not also on the battlefield.[45] A story with an implicit theme is a powerful way to overcome barriers that have been erected, some over centuries old, in order to appeal to a common humanity.[46]

3. Begin Your Organization of the Case By Thinking About the Underlying Structure of the Story.

Underlying the story is a structure, of which the moral infrastructure is but a part. Both story and structure co-exist, although the structure is underneath; it is not explicit. It is the job of the storyteller to think about that structure and how it affects the narrative. The structure will have many elements that will be discussed below, including point of view, where to begin, consideration of the basic who, what, when, where, how, and why questions of the story, the sequence of disclosures, when to add emotion, and when to close the deal. But most important in the structure will be the theme or themes.

If you are reading something carefully, like an essay or a book, you might put notes in the margin to indicate the structure. The annotations might also include commentary or reactions to the text. The notes and annotations form an outline-like annotation on the margin. This is a good practice for breaking down stories and writing in general. It is also the beginning of the identification of the subtext. Perhaps more familiar to law students is the annotation of issue, rule, application, and conclusion that should appear in the margins of law school casebooks.[47] This is the basic breakdown of the text from a structural standpoint. This is an important step in any serious analysis of an argument. It is also useful to be aware of these structural parts when constructing the narrative. Moreover, attention to structure will help to maintain the coherency of the narrative, as well as aid in memorization when it comes to delivery of the story to an audience.

While the underlying structure of the story will be taken up with answering the specific questions of point of view, where to begin, etc., it is still useful as an

45. Consider, for example, the battle of Fredericksburg, a huge win for the South due to the frontal assault on an entrenched defensive position ordered by General Joseph Hooker, and the battle of Gettysburg, a huge win for the North, due to an ironic switch of positions and mistake of judgment (or hubris) by General Robert E. Lee. *See generally* SHELBY FOOTE, THE CIVIL WAR: A NARRATIVE, VOLUME 2: FREDERICKSBURG TO MERIDIAN (1963).

46. Music and humor are other possible ways with the potential to overcome these barriers.

47. I am both confessing and expressing a bias here. In law school, I did a heavy dose of underlining and highlighting. Now, after over thirty-five years of law teaching, it seems clear that the underlining was less effective and became even more so the more I underlined. Highlighting is okay if it indicates structure, but not so much if it is simply a form of underlining. Underlining says: "Remember this, it looks like it is important." Much better would be to figure out *why* something is important and to label it accordingly, such as "Issue" or "Rule" or "Rule Restated" if the ground of the decision is moving around a bit.

initial matter to look for an organizational structure. This will help to collect and distribute the facts to the different parts of the story. It is not always a simple chronological distribution, although it may start that way. There is nothing wrong with establishing a timeline early on in the case. The structure here suggested is one of division, which may be chronological (phase one, phase two, and so on) or categorical (facts relating to the breach of contract claim; facts relating to the negligence claim) or personal (relating to particular parties or witnesses). As long as it does not become an end in itself and exclude new evidence that does not seem to fit, the organizational structure will keep the growing file from becoming chaotic.

In addition to looking for an initial organizational structure, attention should be given to the internal dynamic of the story. As Aristotle observed, the plot must be a whole, with a beginning, middle, and end.[48] This observation is not trite; it has significant meaning. The plot must be viewed as a whole, not as the sum of its parts. There are specific functions within the whole – introduction or beginning, middle as development, and the conclusion or resolution of the problem. In addition to the functions of each part, the internal dynamic describes the movement of the plot. There is a dramatic code that runs through the plot:

> The dramatic code, embedded deep in the human psyche, is an artistic description of how a person can grow or evolve. This code is also a process going on underneath every story. The storyteller hides this process beneath particular characters and actions. But the code of growth is what the audience ultimately takes from a good story.[49]

In the dramatic code, change is usually fueled by desire.[50] "A story tracks what a person wants, what he'll do to get it, and what costs he'll have to pay along the way."[51] The story evolves as that person learns new information and makes a decision to change the course of action. As John Truby states:

> All stories move in this way. But some story forms highlight one of these activities over the other. The genres that highlight taking action the most are myth and its later version, the action form. The genres that highlight learning the most are the detective story and the multiperspective drama.
>
> Any character who goes after a desire and is impeded is forced to struggle (otherwise the story is over). And that struggle makes him change. So the ultimate goal of the dramatic code, and of the storyteller, is to present a change in a character or to illustrate why that change did not occur.
>
> . . . .
>
> Drama is a code of maturity. The focal point is the moment of change, the *impact*, when a person breaks free of habits and weaknesses and

48. ARISTOTLE, POETICS (1995).
49. TRUBY, *supra* note 28, at 7.
50. *Id.*
51. *Id.*

> ghosts from his past and transforms to a richer and fuller self. The dramatic code expresses the idea that human beings can become a better version of themselves, psychologically and morally. And that's why people love it.[52]

Remember that this is advice to fiction writers, but there is something here for lawyers as well. First, there is a dynamic to a story that should be respected. It is a dynamic of desire and action, knowledge and decision, and change or rejection of change. Second, this not only connects the points along the plot but also drives the plot forward. This way the story is not static. The lawyer should look for these points as impact points to be developed in accordance with the facts as known. It produces something like a roadmap. If followed, it increases the chances of the story resonating with the listener because it will honor the dramatic code that is embedded in the human psyche.

There is a lot here to think about in terms of initial organization. Outline the structure, begin sorting the facts according to structure, and understand how the story dynamic will drive the narrative. The point is that starting with the initial client interview and continuing through to the trial, the lawyer must be looking for a structure that gives the facts their best chance to resonate. They may not produce a win, but the lawyer must put them in a position to win, if it is possible.

4. Know Your Audience.

As with many things, preparation is important. Knowing your audience and the situation that the story is intended to address will shape your decision about what story to tell and how to tell it. This includes knowing the setting. The courtroom is different than an office. What might be successful in a jury trial may not work for a court trial. What is appropriate in the trial court may not be acceptable at the appellate level. The point is to recognize where you are and to act appropriately, as to the person or persons you are addressing and with respect to the place.

Sometimes, it is not possible to know your audience in advance, like when jury selection leads right into opening statement. You need to go slow. Get them to talk and listen carefully for clues. People often reveal more than they intend when they talk, especially about themselves. The more you can get them to talk while you are absorbing their information on the fly, the better your chances of knowing your eventual jury. Don't make quick assumptions that can come back to haunt you. Stereotypes can easily lead to false assumptions if you are not careful. Do not talk down to people. Give them respect. The need for respect is huge. Do not wind up short here. Give more respect than you think might be due without being insincere. Lack of respect or insincerity will cause your stock with the audience to drop like a stone. Be alert to how you come

52. *Id.* at 8.

across to people. Scout yourself in this respect. Jury selection is a prime example of where plans may change as a result of first contact with the audience.

Do not try to be something you are not. People can usually spot a phony. Do not pander. If you start droppin' your g's and makin' like you're one of 'em, you may hurt your standing more than if you just came across as your normal self.

Humor is a traditional icebreaker for speakers. The universality of humor provides a bridge across the gap of unfamiliarity. But, be very careful. Although humor in general is universal, humor in particular depends a lot on whom you are talking to. Some of the worst gaffes happen because the humor is inappropriate for the particular audience. Know your audience.

Knowing your audience is especially important in figuring out how a story will resonate (or not). Finding shared values and telling the story in a way that affirms those values is great if you can do it. Finding shared values is not always possible, and sometimes, "a man got to do what he got to do."[53] That is, take a stand and perhaps even die because the narrative is more important than the life.[54] Even then, however, the stand is more effective if the story is intended to remind the audience of their own values and to return to them.

5. Try to Think in Paragraphs When Telling a Story.

There is an essential technique in writing that will serve the speaker well. According to Strunk & White, the paragraph is the unit of composition.[55] I believe this to be the most useful principle for both writing and editing.[56] It is the best tool for the creation and organization of prose and the most effective tool for the diagnosis of writing problems. If the paragraph is the unit, then the unit should be about a single proposition and that proposition will be expressed in the topic sentence. The topic sentence imposes a discipline that keeps the paragraph on track; it wards off intruders and brings in support. The paragraph, not the sentence, is the appropriate size unit in which to think about writing. When put in a sequence, the topic sentences form the outline of an argument. Think of a brief as a series of propositions where each argument proceeds from foundation to conclusion.[57]

This elemental principle of writing may be useful in telling a story. If there is a tendency for a writer to wander off topic, it can be even more so for the speaker. The discipline of going from proposition to proposition will give the continuity that the listener needs in order to follow. It will sharpen the discussion under each proposition because of the imposed discipline of gathering

53. JOHN STEINBECK, GRAPES OF WRATH, 306 (1939).

54. *See* PLATO, THE APOLOGY (Louis Dyer, ed., Ginn & Co. 1890).

55. WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE 11-13 (1959).

56. Jonathan K. Van Patten, *Twenty-Five Propositions on Writing and Persuasion*, 49 S.D. L. REV. 250, 252 (2004) [hereinafter Van Patten, *Propositions on Writing and Persuasion*].

57. *Id.* at 254-55.

relevant facts and excluding or saving the facts that would otherwise be out of place. This discipline is very useful for the lawyer who dictates letters and short memos. It provides a mental outline that is easier to manage from a memory standpoint.

A story will have a different dynamic than the formality of a brief. It marches to its own particular set of facts, not to the sequence of argument suggested by the law. However, the notion of propositions that help to organize and drive the story is worth considering. Certainly, it is a staple of oral argument on the legal side. There is no reason it cannot be useful in oral argument on the narrative side as well.

Maybe it is just me, but my memory capacity has been slipping. I first noticed this when I was in community theater. I had difficulty remembering lines, especially when my character was multi-tasking. I had to latch onto the anchor points in the script in order to survive. The propositions are like anchor points or handholds, whichever metaphor you prefer. They help to move us from point to point. No small task these days with so much less being committed to memory than ever before. With all the contemporary ways that memory is stored, one might be tempted to think that it would leave a greater capacity for the brain. But alas, memory in the brain is more a function of use (like a muscle) than capacity. The atrophy of memory is undoubtedly related to our increasing reliance on "memory storage."

It is both astonishing and humbling to contemplate the capacity for memory that earlier generations exhibited. Homer's *Iliad* and *Odyssey* were part of an oral tradition, meaning they were composed and passed on long before they were written down.[58] The *Iliad* is an epic poem containing over 15,000 lines.[59] The Odyssey is another epic poem consisting of 12,110 lines.[60] How was it possible to pass this on in this manner? The verse form would of course help, but it still represents an amazing achievement of the mind. Of more recent vintage, Aleksandr Solzhenitsyn tells of how a great deal of his work had to be memorized because of the fear that any manuscript would be confiscated:

> In the camp this meant committing my verse–many thousands of lines–to memory. To help me with this I improvised decimal counting beads and, in transit prisons, broke up matchsticks and used the fragments as tallies. As I approached the end of my [prison] sentence I grew more confident of my powers of memory, and began writing down and memorizing prose–dialogue at first, but then, bit by bit, whole densely written passages. My memory found room for them! It worked. But more and more of my time–in the end as much as one week every month–

58. *See Homer*, WIKIPEDIA, THE FREE ENCYCLOPEDIA, http://en.wikipedia.org/wiki/Homer (last visited April 29, 2012).

59. *See Iliad*, WIKIPEDIA, THE FREE ENCYCLOPEDIA, http://en.wikipedia.org/wiki/Iliad (last visited April 29, 2012).

60. *See Odyssey*, WIKIPEDIA, THE FREE ENCYCLOPEDIA, http://en.wikipedia.org/wiki/Odyssey (last visited April 29, 2012).

went into the regular repetition of all I had memorized.[61]

We cannot, nor would we want to, return to the conditions that prompted such astounding feats of memory. But we can draw inspiration and confidence that we could expand our memory "muscles" through more exercise. Thinking in paragraphs will help in that regard.

If thinking in paragraphs helps for organization and sequence, it cannot but help the listener to follow the narrative. Clarity in the delivery leads to clarity in the reception. This fosters a better connection with the listener, giving the story a greater chance to resonate with the listener's deep-seated values. Thinking in paragraphs is the right size for storytelling. In other words, it is easier on you for organization and memorization, and thus, it will make it easier for your listeners.

6. Think About Where to Begin the Story.

In the first year Torts class, I try to use the recitation of the facts of the case as an opportunity for storytelling. Probably the most common problem I see is poor choice on where to start. The story does not necessarily start with the earliest act noted in the case. The story must be told in light of the task at hand. If the character or circumstances of a party, particularly the plaintiff, is important to the story, then lay it in first as foundation, either at the beginning, or where appropriate. Introduce the characters before making them actors. Before we get to the scene of an accident, is there something that we should note about this person before proceeding with the action? Before the defendant's actions have any consequences, is there something we should know about what the defendant did or did not do that eventually led to the moment in question? If some law students are a little short on laying foundation, it may be that some lawyers do too much foundation before getting to the action. There must be economy to the story. The right to hold jurors captive while you tell the story is not a license to bore. One of the most common resentments of jurors (not to mention judges), rightly or wrongly, is that lawyers waste their time.

With respect to actions, think about what is the "first" act. "Who started it" is a common theme and a good question to think about in deciding where to start. Another way to evaluate the "first" act is to think about the theme of the case. For many years, the conventional wisdom on the plaintiff's side was to make the case about the plaintiff. So, the attorney would start with a portrait of the "before" leading to the event and then to the "after." On the basis of books like Patrick Malone and Rick Friedman's *Rules of the Road*,[62] the current thinking has shifted to making the case about the defendant. Doing so almost always requires the story to start further back in time. Using the standard tools of discovery, one can then act almost like a scriptwriter in describing how the

61. ALEKSANDR ISAEVICH SOLZHENITSYN, THE SOLZHENITSYN READER, *The Oak and the Calf* 89 (Edward E. Erickson, Jr. & Daniel J. Mahoney eds., paperback ed. 2008).

62. PATRICK MALONE AND RICK FRIEDMAN, RULES OF THE ROAD: A PLAINTIFF LAWYER'S GUIDE TO PROVING LIABILITY (2d ed. 2010).

defendant's decision, made perhaps months or even years before, led to the accident. Here is Jim McElhaney, starting with the defendant's decision to do nothing, well in advance of the accident:

> Ladies and gentlemen, if you had been in the corporate offices of the Midwest Conveyor Belt Manufacturing Company on June 12, you would have seen a group of corporate officials have the chance to prevent a tragedy. On that day they were notified that one of their conveyor belts–a new model they called their "System 900"–had malfunctioned at the Papco Bottling Company.
>
> [Discussion of the problem with the machine]
>
> Then, if you returned to those offices exactly ten days later, you would have seen how the officials at Midwest Conveyor Belt decided to handle that opportunity to avoid a tragedy.
>
> They ignored it. They decided it was not worth their while to investigate how the bottles had exploded at Papco. Midwest decided it was not their problem. So they made another conveyor belt system–just like the one that had jammed at Papco, and they sold it to the Sunshine Cola Company here in town.[63]

If liability is not a problem, you might consider starting the story with damages. Jim McElhaney has given a recitation of a famous opening where the jury follows a middle-aged woman through the corridors of what turns out to be a hospital and into a room where there is a man lying in a bed. During the course of this account, it becomes apparent that the man is unconscious and that the woman is his wife. After she talks with him and kisses him before leaving to go to work for the day, the lawyer then asks: "Who is this man? How did he get this way? And who is responsible? That's what this case is about. Now let me talk about the answers to those questions."[64]

Where to start the story is not a given. It requires careful thought. The decision where to start should reflect your thinking about the theme of the case. It is very significant because of the rule of primacy, what you talk about first is important. Be open to the possibility of revisiting that decision as the case evolves before trial or as focus groups suggest a different emphasis or point of view in the case.

7. Think About Point of View and Emphasis in the Story.

In fiction, point of view usually refers to the teller of the story. Is the narrator of the story the main character, who is telling it in the first person? Or is the narrator an omniscient narrator, who knows the thoughts, conversations, and actions of all. It is a major decision in fictional storytelling.[65] It is not as much a factor in storytelling for lawyers, but it should not be neglected. A good

63. MCELHANEY, *supra* note 14, at 33-34.

64. James W. McElhaney, *Opening Statement and Closing Argument* (Professional Education Group CLE, now no longer available, cassette tape on file with the author).

65. TRUBY, *supra* note 28, at 310.

story attempts to do indirectly what the lawyer may not do directly and that is ask the jury to step into the shoes of a party.[66] By speaking for a party in the first person and using the present tense, the storyteller offers the jurors insight as to the circumstances the party faced and how and why the decisions of the party were made. The storyteller invites identification with the party because of this intimacy, in contrast with the others who are described in the third person. If the jurors identify with this person, they are effectively put in his or her shoes. Where there is a death, say of a child, the jurors may put their own child in the now empty chair that represents the victim in the case.

Consideration of point of view, like the question of where to begin, requires the storyteller to also think seriously about what to emphasize. Who is the story about? Malone and Friedman put the emphasis on the defendant and how the defendant breached one or more "rules of the road."[67] It is a familiar defense tactic to try to shift attention to the plaintiff and ask whether the plaintiff was contributorily negligent, or assumed the risk, or failed to mitigate damages. What is the story about? Is it about the liability event or the damages? Think about how point of view or emphasis will relate to the theme of the story. Think also about how it may affect the sequence of the story. These are important structure issues that must be addressed. Don't let the other side take control over these decisions by default.

8. Constructing the Basic Narrative Will Require Answering the Questions of Who, What, When, Where, How, and Possibly, Why.

The basic questions of the story are who, what, when, where, how, and why. I know this is very rudimentary, but I am surprised how often that important facts relating to these questions are left out in a recitation of the case. Be sure to check off on these questions when putting together the story. Most of these will naturally come from the first interview with the client. If you do not know the answers to any of these basic questions, then you should find out as soon as possible. This is the fact investigation part of your case development. Do not stop short on this. In particular, do not rely completely on your client, who, for various reasons, may not have the clearest view of the situation. Always check against the other available evidence.

9. It Is Important to Think About What Goes In the Story and Especially About What Does Not.

After the essential facts have been accounted for, this collection of information is subject to editing to further refine the focus of the story. If the prior proposition requires the storyteller to go through a checklist to make sure

66. *See, e.g.*, State v. Blaine, 427 N.W.2d 113, 115 (S.D. 1988).

67. MALONE AND FRIEDMAN, *supra* note 62.

that the necessary facts are accounted for, this proposition suggests trimming and pruning. Lawyers tend to over-include in the narrative, much the same way they may over-include in brief writing. It is common to see briefs that go way beyond what could conceivably be persuasive because the operative principle seems to be "If I found it, you're going to hear about it." Same way with facts. Not every fact is important. There is a place for completeness, but not in a story intended to persuade. The story must be more focused than a complete statement of the facts.

Over-inclusion is not always the lawyer's fault. Clients and witnesses have a tendency to run on when given the chance. One of my favorite examples is from the movie, *Fargo*. Here, a law enforcement officer follows up on a call that came in regarding a suspect in a homicide investigation. He meets a Mr. Mohra, who is shoveling snow and ice off his driveway:

> Mr. Mohra: So, I'm tendin' bar there at Ecklund and Swedlin's last Tuesday, and this little guy's drinkin' and he says, "So where can a guy find some action? I'm goin' crazy out there at the lake." And I says, "What kinda action?" and he says, "Woman action, what do I look like?" And I says, "Well, what do I look like, I don't arrange that kinda thing," and he says, "But I'm goin' crazy out there at the lake," and I says, "Well, this ain't that kinda place."
>
> Officer Olson: Uh-huh.
>
> Mr. Mohra: So he angrily says, "Oh I get it, so you think I'm some kinda crazy jerk for askin'," only he doesn't use the word "jerk."
>
> Officer Olson: I understand.
>
> Mr. Mohra: And then he calls me a jerk, and says that the last guy who thought he was a jerk is dead now. So I don't say nothin' and he says, "What do ya think about that?" So I says, "Well, that don't sound like too good a deal for him, then."
>
> Officer Olson: [*chuckles*] Ya got that right.
>
> Mr. Mohra: And he says, "Yah, that guy's dead, and I don't mean of old age." And then he says, "Geez, I'm goin' crazy out there at the lake."
>
> Officer Olson: White Bear Lake?
>
> Mr. Mohra: Well . . . Ecklund & Swedlin's, that's closer ta Moose Lake, so I made that assumption.
>
> Officer Olson: Oh sure.
>
> Mr. Mohra: So, ya know, he's drinkin', so I don't think a whole great deal of it, but Mrs. Mohra heard about the homicides down here last week and she thought I should call it in, so. . . . I called it in. End o' story.
>
> Officer Olson: What'd this guy look like, anyway?
>
> Mr. Mohra: Oh, he was a little guy. . . . Kinda funny lookin'.
>
> Officer Olson: Uh-huh. In what way?
>
> Mr. Mohra: Oh, just in a general kinda way.[68]

68. *Memorable Quotes for Fargo (1996)*, http://www.imdb.com/title/tt0116282/quotes (last visited Apr. 28, 2012).

Mr. Mohra's powers of recollection apparently apply only to conversation, not so much as to what the suspect looked like. In any event, there is a lot of useless stuff in this narrative (intentionally so). The storyteller's job is to prune and trim, or in this case, remove most of the vine because not much is there, other than the geographic area where the suspect may be found.

The editing process must be done under the close guidance of the theme. "Themes have organizational power – they collect certain pieces and discard others, provide guidance in sequencing, influence word choices, supply continuity, and generally shape the argument, often through a story that ties the particulars to the moral center of the argument."[69] The trimming process will rely on the theme to help sort through the many true facts to find the best ones. The storyteller needs to be disciplined here. Less is more.

10. Don't Break the Spell By Editorializing on the Story.

The storyteller must understand the difference between the story itself and the storyteller's opinion or commentary on the story.[70] Keep your ego in check. It is about the story, not the storyteller.[71] Do not intrude on the story with editorializing. Remember that the story allows the listener to respond to the themes and to make connections to the facts. When you jump in with commentary, you run the risk of breaking the spell of the story. You also run the risk of prematurely attempting to close the deal and generating sales resistance. Telling the listener what to think just at the point he or she is beginning to make decisions interrupts that process. Heavy-handedness is counterproductive because it intrudes and distracts, and raises the sales resistance. It breaks the spell of a good narrative. Editorializing can be used, but only sparingly and only to provide direction and shape to the story, not to preach. Keep your touch, that is, the editorializing, light.

Watch out for side trips that distract from the main theme. Again, do not let your ego get in the way. Just because you find an interesting scent off the main trail doesn't make it useful to the story. As a law professor, I am guilty of that as much or more than anyone. But class does allow for some treks off the trail. Stories do not.

Bias is an unforced editorial error. Bias reveals way too much, and unnecessarily. A snide remark can reveal a meanness of spirit, which is not a good quality in a sales person. Because of the emotional reactions that bias can trigger, it should be avoided always. With the wrong word or phrase, you can

69. Van Patten, *supra* note 16, at 256.

70. The fact/opinion distinction is fundamental in the law. It is understandable that many first year students are initially shaky on this distinction. If you are still confused, there is some important remedial work to be done.

71. There are storytellers who function more like entertainers. In that case, it is usually more about the storyteller than the story. But, if the principal task is persuasion, not entertainment, it should be about the story, not the storyteller.

almost hear the sound of minds snapping shut. Most of the time, it is not that the speaker does not know better, it just reflects a lack of discipline. Other times it is more reflective of arrogance. In *Glidden v. Szybiak*, the New Hampshire Supreme Court considered a dog bite case.[72] A four year old girl, Elaine, had gone to the town's general store on her own and stopped to play with the store's dog, Toby, who was resting on the store porch. Elaine jumped on Toby and pulled at his ears. Toby didn't like that and he bit her. In the course of the recitation of the facts, it was observed by the court, gratuitously, that the owner of Toby, a young woman named Jane, was 26 years old, unmarried, and living with her parents.[73] It is not difficult to infer from this remark that the court believed Jane to be odd, different, and possibly even weird. By the way, Jane lost the case. It is very unseemly for a court, sworn to dispense justice on a neutral basis, to do such a thing. This is not about political correctness. It is about the appearance of bias and its poisonous effect on the system of justice. It does not belong in the courts, whether from the judges or the lawyers. Do not poison your story with stuff like that.

11. Be Aware of the Sequence of Disclosure of Facts. Save Your Best Facts for the Right Spot.

If facts are like a card game, amateurs inevitably will play their best facts too early. They just cannot help it. Maybe the justification is reliance on the theory of primacy, but I think the best explanation is lack of experience. It is rare where a case can be resolved by simply laying down your cards and watching the other side concede. The disclosure of facts, outside of when there is a duty to make timely disclosures, should therefore be thought about in strategic terms in order to maximize their impact on the other side.

The same thing is true in storytelling. In fact, it enhances the storytelling because it helps to hold the audience's attention. Here is John Truby's advice on the fiction side:

> As a creator of verbal games that let the audience relive a life, the storyteller is constructing a kind of puzzle about people and asking the listener to figure it out. The author creates this puzzle in two major ways: he tells the audience certain information about a made-up character, and he *withholds* certain information. Withholding, or hiding, information is crucial to the storyteller's make-believe. It forces the audience to figure out who the character is and what he is doing and so draws the audience into the story. When the audience no longer has to figure out the story, it ceases being an audience, and the story stops.[74]

Selective withholding of information with strategic disclosure will draw the audience into the story. It also encourages them to subtlety identify with a party

72. 63 A.2d 233 (1949).
73. *Id.* at 234.
74. TRUBY, *supra* note 28, at 7.

or witness because they begin to address the problems that the person faced, under similar conditions of uncertainty.

Instead of disclosing facts too soon, the experienced storyteller uses the artistic tool of foreshadowing to set up their disclosure later on. "It was a dark and stormy night . . ." is an example of foreshadowing because it suggests that something dark and sinister will follow. By the time it is appropriate to disclose the good facts, the audience has been prepared for them by the foreshadowing. The underlying theme will assist here, by influencing the choice of words or phrases that will set the tone.

I have made reference to the fiction writer's toolbox. There is much that can be learned from the techniques of fiction. In a sense, the lawyer is like a screenwriter. Not that the lawyer has license to make up the story, but the lawyer can use screenwriting techniques, such as setting the scene through tone, establishing a point of view through which the characters and the facts are viewed, and moving the action and the story ahead through strategic disclosure of the facts. The lawyer is the screenwriter, the director, and a member of the cast,[75] all in one.

12. Do Not Miss an Opportunity to Use the Right Words or Phrases to Reinforce the Theme.

A good theme is a good start. It is not an end in itself, however. It cannot be dropped into the story like a talisman.[76] It cannot be artificial or last minute, like the addition of liquid smoke to pulled pork. It must be well integrated into the story and reflected in all its parts, down to the word choices.[77] Like good barbeque, this takes time. In part, it is because we have to overcome the tendency to talk like lawyers, or even worse, like law professors. If law school education is like learning a foreign language, with the ultimate goal "to think like a lawyer," then there must be a transition back to one's native tongue after law school. Think like a lawyer, but talk like a real person.

Work through the language of the case. There are words to be embraced and there are some to refrain from embracing. Figure out which ones to use or to discard through writing out the story. I think there are too many word choices to be made on the fly. Write them out and come back to evaluate them with a thesaurus on the one hand and a firm grip on the theme with the other. A thesaurus is an essential tool for picking the right word. When you are close, but it doesn't feel quite right, consult the thesaurus. Depending on your tendencies

75. Remember that in cross-examination, the lawyer should be the witness, asking for agreement or disagreement from the witness on the stand with propositions put forth by the lawyer. MCELHANEY, *supra* note 14, at 442.

76. "Talisman. 1: an object . . . thought to act as a charm to avert evil and bring good fortune. 2: something that produces extraordinary or apparently magical or miraculous effects." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2333.

77. *See* MCELHANEY, *supra* note 14, at 33-34, 629-36.

as a writer, it will help you tone it down a notch or to kick it up a notch. The theme will give your choice of words a guiding principle. Make the choices in light of the theme in order to enhance the theme and not to subtract or distract from it. If your themes are tied to deeply embedded values of the listener, the words should be chosen to touch those emotional "buttons" that the themes set up.

Look for phrases that touch those emotional buttons. In *Spivey v. Battaglia*, an employee was injured during lunchroom horseplay by a fellow employee.[78] The defendant employee's last name was the same as the company's name. I am sure that it would touch emotional buttons if you opened the story with: "This is a case involving the boss's son." Without saying it, without arguing it, "the boss's son" speaks of privilege, of nepotism, and possibly, of lack of responsibility, because he may have immunity that other employees do not have. In fact, argument gets in the way. The simplicity of "the boss's son" gets the job done in a much deadlier fashion.

Metaphors have special power.[79] A good metaphor is vivid, often humorous, and provides a way of telling the listener how to think about something without seeming too aggressive. Most people resist being told how to think. But a good metaphor slips past that resistance without being noticed. If your metaphor reflects a theme, so much the better. A good metaphor is an important exception to the "don't break the spell of the story by editorializing" rule. It is an outside opinion or commentary on the story, but, like a good-hearted, but mischievous, young boy, the metaphor seems to get away with it nearly every time. Perhaps it is the delight produced by the well-crafted metaphor that provides the license. What is clear is its ability to persuade in ways that direct argument cannot touch. Metaphors are the language of persuasion because they break through (or go around) barriers by touching on the common ground between the teller and the listener. Be careful, however. Although the metaphor has great potential for persuasion, it must be thought through so that it is not turned around against you. You should spend a significant amount of time on developing good bullet-proof metaphors in your case.

13. Do Not Argue When Telling the Story. Let Your Facts Do the Arguing.

The use of argument in opening statement is prohibited. This rule is often violated by amateurs, but the punishment does not have to come from the judge. Rather, it will come from the jury that usually doesn't like to be told what to think at such an early stage. If not punishment from the jury, it will at least create sales resistance, which is not where you want to be on opening.

78. 258 So. 2d 815 (Fla. 1972).

79. *See, e.g.*, PERDUE, *supra* note 15, at 273-312.

Argument usually creeps into the story when the storyteller wants to tell the listener what the story means. Opinion is argument. Facts can be persuasive on their own if they tie in to recognizable themes or values, especially if the values are already held by the listener. You will want your theme to be reflected in the story, but if you press to hard on that, you will give the impression that you are not entirely confident, or worse, that you are even desperate. Themes require gentle use. "Don't leave home without them," as Karl Malden used to say.[80] But do it with subtlety.

Stories do not bloom under the heavy hand of the gardener. They take a lot of preparation and initial care, but, like Toad's garden, they must grow and bloom on their own. The more you fuss with the story in front of the audience, the worse the result. A light touch is what is needed. Let the story blossom without heavy-handed preaching from the storyteller.

14. Do Not Oversell Your Facts.

In advocacy, the credibility of the speaker is very important. If you have a long-standing or close relationship with the listener, there might be a safety net to save your credibility from minor lapses. But the lawyer in front of the jury has no such safety net. It is likely that the average juror comes in with a great deal of resistance because of a pre-existing fear that the lawyer is there to trick people with words. You do not start out even. You should figure that you are starting out behind. Fortunately, this predicament is not set in stone. The bad reputation of lawyers can be a plus, so long as you do not resemble the apparition of what the average juror fears. Part of what you want to accomplish during *voir dire* is the building of trust, based on the appearance of competence, fair mindedness, and good sense. You want to be accepted by the jury as one they can trust, as one who can be a guide through the trial.[81] The process of building that trust is slow, the process of losing it can be very swift.

You obviously lose credibility very quickly if you get caught asserting something that is not true. You do not have to lie, however, to lose credibility. You can lose it by overselling the facts. Just as you can oversell the law to a judge, you can oversell your facts to a jury. This usually happens when you claim too much for the evidence. When you sponsor an idea, your credibility is at stake. Choose your fights wisely.

You can oversell also by getting ahead of the evidence. It is not stretching the facts, it is a matter of timing. If you let your desire to comment on what the jury should be thinking, you may be getting ahead of the evidence and losing credibility as a result. You can minimize this by not asking for the sale until the case is all in. Let the facts speak. Keep in mind that facts do not speak for

80. *American Express Commercial – Karl Malden – 1970's, available at* http://www.youtube.com/watch?v=4K4seWtxEeA.

81. *See* MCELHANEY, *supra* note 14, at 145-46.

themselves,[82] you must use themes to shape them into a story. The phrase "leading from behind" may be an apt description for what you are trying to do.

Remember that you are the initial judge of the credibility of what you are trying to sell. Do not try to sell what you would not buy. Listen to your inner voice on this. If you would not buy it, try to figure out what you would buy. Sometimes it is a matter of overkill. Keep in mind that there are two ways to win a race. The first is to run faster than anyone, the second is to make sure that no one else runs faster than you.[83] This means that you do not have to *win* every race, that is, by being the fastest or strongest. You can also win a race by not losing. Think about the difference. Lawyers seem to want to win every race. This might cause overreaching when it is not necessary. You do not have to sell the biggest and best, you might just need to sell something that fits, something that works. Your credibility is much more convincing when you believe in what you are selling.

15. Set the Scene and Describe the Characters with the Language of Immediacy.

Storytellers recommend telling the story in the present tense.[84] It brings the facts closer to the audience and involves them in the story:

> Good storytelling lets the audience relive events in the present so they can understand the forces, choices, and emotions that led the character to do what he did. Stories are really giving the audience a form of knowledge–emotional knowledge–or what used to be known as wisdom, but they do it in a playful, entertaining way.[85]

Use of the present tense helps to ground the story in real time. Past tense is the language of history; present tense is the language of re-enactment.

Persuasion in storytelling requires audience participation. And the key to audience participation is the language of immediacy. For description, the present tense will call on the senses – sight, hearing, smell, touch, and taste.[86] Present tense makes the description immediate and the result is that certain details may evoke a response or a recollection from the listener's own life story. Now, results may vary, as the ads for Viagra say. For me, the sound of a pipe organ triggers something primal. Especially when I have not heard that sound for a while, I begin to tear up almost immediately. It reminds me of funerals and weddings, my time as a church musician, and the presence of the unseen mystical hand that has shaped my life. Emotionally, I am pulled back to the basics. For some, it may be the sound of an acoustic or electric guitar. For me,

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82. ERIC OLIVER, FACTS CAN'T SPEAK FOR THEMSELVES: REVEAL THE STORIES THAT GIVE FACTS THEIR MEANING (2005).

83. *See* Van Patten, *Propositions on Writing and Persuasion*, *supra* note 56, at 252-54.

84. *See, e.g.*, PERDUE, *supra* note 15, at 145-46.

85. TRUBY, *supra* note 28, at 6.

86. *See* PERDUE, *supra* note 15, at 37-48.

it is the pipe organ. Similarly, entering a home and smelling roast turkey immediately pulls me back forty to fifty years to Thanksgiving holidays in Southern California, where I grew up. The aroma of fresh baked bread will trigger associations of home for others. These associations do not have to be triggered by the actual sound or the actual smell. They can be triggered by words, if the scene has been set with the language of immediacy.

A story has a time and place. It is important to provide the listener that setting. Time is invisible, but it gives context to place; it ties into culture and history. Place is visible, but it may tap into emotions that are ordinarily kept below the surface. For examples of how associations may be triggered by the setting, one need not look any further than television commercials. The most effective ones have a sense of time and place that push emotional buttons.[87] Setting the main scene of the story, with attention to detail, is important to summoning forth those emotions that will drive the listener to the desired conclusions.

In describing the characters in the story, the focus is not necessarily on their appearance, although it can be if it is appropriate. More important is the description of their thoughts. If speaking in the first person, the thoughts are limited to those of the narrator. The advantage of choosing the first person voice is that it shares in a very intimate way what the narrator knows and, by inference, what the narrator does not know. The thoughts and emotions of the narrator have an immediacy that invites the audience to share in those thoughts and feelings. It also retains the tension in the story because the narrator's thoughts and feelings are articulated under conditions of uncertainty, which is how they were experienced in real time. Similarly, if it is important to the story to give the audience the inner dialogue of more than one character, then the third party narrator should be used. Note that narrator may alternate between omniscient and simple observer in order to provide the inner dialogue only when necessary to the story. The point is to think carefully about how to achieve the desired audience participation through the description of setting and characters.

As Jim Perdue says: "Courtroom storytellers often neglect to set a scene that conjures up the proper emotional backdrop for the action.... Gifted storytellers begin with the 'where.'"[88] Setting the scene and the characters with the language of immediacy will stimulate audience participation without running into the sales resistance that is generated by the hard sell.

16. Let the Facts Illustrate Complicated Concepts.

87. JIM M. PERDUE, *The Art of Storytelling: Presenting an Unforgettable Story in Your Case* (Trial Guides Video 2012) cites a famous Folgers Coffee commercial. http://www.youtube.com/watch?v=zZnqBL6iYjA&feature=player_embedded. This is how you sell coffee. Note that you don't have to actually smell the coffee in order to experience the sensation that the ad is intended to evoke. That commercial relies on pictures and a few sounds to work its pitch. The lawyer must use words, most of the time, to evoke the senses.

88. PERDUE, *supra* note 15, at 40.

If there is a common fault among inexperienced storytellers, it is that they are too wordy. Too much information or, worse, explanation, can prevent the story from taking hold of the imagination of the audience. Try to keep the law out of the initial telling of the story.[89] Facts before law, instead of law before facts. Here is a good example from a recent appellate argument before the South Dakota Supreme Court that involved several criminal charges:

> On September 21, 2010, there was a full harvest moon and it was a bad night in Bridgewater. The innocent victims in this case were Summer Newman and Carrie Lake and they were spending a quiet evening at home that night. Summer was up late working on a puzzle with her seventeen year-old daughter and Carrie was asleep. One fact about Summer and Carrie that is relevant to this appeal is that they tended to have frequent houseguests staying with them, some that they knew very well, relatives, and others that they did not really know at all. And on that particular evening there was a man staying on their couch, who they knew only by the nickname Dre and otherwise could not identify him and he apparently was never located again. And for whatever reason, and I am not capable of looking into people's hearts, but the presence of these various men in town, in Bridgewater, was drawing a lot of attention and causing a stir. Many of them were African-American and without casting any judgment on these unknown men several people in town were blaming a rash of thefts and other incidents on them. And one of those who did so was City Councilman Robert Lee Anderson, the next character in our story. Councilman Anderson had shown some tires that he was selling to some of these men and the next day the tires and transmission were apparently stolen and whether fair or not, Anderson blamed the thefts on those men and whether correctly or not, he associated the men with the house where Summer Newman and Carrie Lake lived. Councilman Anderson was receiving a lot of complaints from his constituents about the men he believed were staying at this house and one can certainly speculate that some of the complaints were based on negative racial stereotypes. But some are based on stolen property and other minor altercations that were again associated rightly or wrongly with these men. Anderson had had an earful from his constituents about this perceived problem. And that day, a Monday, he decided to go to the Bridgewater City Bar to get drunk. He drank steadily and he talked to anyone who would listen about the men who he thought were in that house all evening. By midnight he was very intoxicated.
>
> That's where my client enters the picture. Kevin Jucht is a farmer, he is in his 40s, lives on a farm with his elderly parents. They farm several miles south of Bridgewater. He was on the farm all day, was still in his bib overalls. He hadn't been to the town of Bridgewater for months. But he walked into the bar that night, about midnight, to have a few beers. He barely knew Councilman Anderson, but he got drawn into Anderson's ranting about the men in this house. Eventually Anderson invited Kevin

89. This is a good generalization for opening statement, but definitely not so for storytelling during closing argument.

over to his office for some more drinks and he got it into his head that he was going over to this house and confront these men about these thefts and tell them about the other incidents happening in town and tell them that they weren't welcome in this town. It's the very epitome of a bad and stupid idea. And my client went along with it. Anderson had heard that the men supposedly staying at this house had guns, so he opened his safe in his office and got out a pistol, put it into my client's hands. Kevin put it in the pocket of his bib overalls for protection. Now, Anderson marched across the street to Summer Newman's house with my client following. Anderson opened the screen door and broke the latch in the process. And then the front door came open, they were pounding on it. Anderson was pounding on it and the front door came open, whether it was kicked or busted open, but it was busted open.

The record is very clear that when the door comes open, Summer Newman, who had heard the commotion, she was awake doing a puzzle, was two feet away from the door. And when it comes open, Anderson who is a very wide, large, overweight man, is filling the doorway. So the door is open and there is Anderson in this narrow doorway. And there are pictures in the record. She can see Kevin Jucht behind him on the porch, but not enough to ever even get a good look at him and he is never identified, either that night with photo lineups, or at the grand jury. However, he was there, obviously. Anderson gets a few feet inside the house. He starts yelling "get out of my town. We don't want you here. People are committing crimes around town"—believing that the men are in this house.

Now the man named Dre who is an African-American, he was on the couch. He looks up and looks over and Anderson then uses a racial epithet directed at him. Summer and Carrie were not timid. They justifiably went right back at Anderson, said, "You get out of our house. This is ridiculous. Get out of here." The police are called. Anderson stumbles back and he puts his elbow through the glass screen door and my client at that point has been on the porch. There is evidence he may have stepped one foot across the threshold and looked in. Otherwise, he is on the porch. He is by that time back on the street. In the middle of the street he's scared, and a van is pulling up. He is scared. He fires three shots directly into the air. They find three shell casings, empty casings in the street. Anderson's wife, who for some reason is listening to the police scanner, hears the police calls and figures, well, Bob must be involved. So she gets into her car. At that point, her car pulls up. Bob grabs his gun away from Kevin, gets into the car and drives away. And my client stumbles off.[90]

Although one ordinarily addresses the South Dakota Supreme Court differently than a jury, this is not far off from an opening statement to a jury. The case involved several charges, including burglary and discharge of a

90. Audio Recording: Oral Argument in State of South Dakota v. Kevin Roger Jucht, #26074, March 20, 2012, *available at* http://ujs.sd.gov/player/UJSPlayerArchive.aspx?AudioFile=../Media/2012_03_20_26074.mp3 (Sioux Falls lawyer Ron Parsons presenting for the Appellant).

firearm. Notice how the burglary charge, which requires entry of a dwelling with the intent to commit a felony is treated in this narrative. The legal elements are covered in the facts, not in the law. If the law were to be included in this narrative, it would be much longer and would introduce another level of complexity. The simple narrative covers the necessary ground without becoming wordy. Providing the listener with an accessible introduction to the case by way of story also helps to prepare the listener for the law to come.

17. Think About the Other Side and Make Sure You Are Thinking Clearly When You Do.

You are never done with an argument until you have thought seriously about the other side. A case that has not already settled cannot be as easy as your narrative might suggest. You must account for what the other side may do to counter your narrative. It may be difficult to think about the other side's arguments because you start out hearing your client's perspective and often buying into it. But taking the other side seriously will pay dividends. One way to do this is to write out what you think the other side's opening and close should look like. When you feel it falter, take note. When you feel it going well, take note. This may help you to understand what is pulling the jury to the other side. The exercise of advocating the case against you should deepen your understanding of the case. Thinking about the other side is especially important in light of the metaphors that you intend to use. There is hardly anything worse than having your own metaphor turned against you.

There are at least two obstacles to a clear understanding of the other side. Both are self-imposed problems. The first is what may be called "mirror-imaging." The second is the problem of "blind spots." Mirror-imaging involves the projection of your own thought process or value system on to someone else.[91] It is easy to miss something when your assessment of someone else is

91. A New York Times article on the failures of the CIA discussed the phenomenon of mirror-imaging. Tim Weiner, *Naivete at the CIA: Every Nation's Just Another U.S.*, N.Y TIMES, June 7, 1998, *available at* http://www.users.muohio.edu/shermalw/group-think_nyt98.html.

> Niccolo Machiavelli had it right: never assume the other guy will never do something you would never do. Too bad Machiavelli never worked for the CIA.
>
> The world might be less dangerous than it is today had the CIA and its sister intelligence services foreseen India's nuclear tests last month. Armed with that foresight, the United States might have been able to forestall a test, as it did back in 1995, and thus prevent an arms race in one of the planet's least pacific places.
>
> A report last week by retired Adm. David Jeremiah, a former vice chairman of the Joint Chiefs of Staff, blamed the failure on systemic flaws in the way the intelligence community gathers and handles information, trains its thousands of analysts and commands its $27-billion-a-year empire.
>
> But underlying those failures, Jeremiah said, was a classic American cultural assumption: "This 'everybody thinks like us' mind-set."
>
> The "underlying mind-set" was that India "would behave as we behave," he said. "We should have been much more aggressive in thinking through how the other guy thought."
>
> Instead, he said, U.S. analysts decided that the newly elected Hindu nationalist political

distorted by your own projections onto the subject. It is like the baseball scout who makes recommendations based on who reminds him of himself when he was that age. J.R.R. Tolkien referenced mirror-imaging in *The Lord of the Rings*. Gandalf explained that the path to Mount Doom could be unguarded because Sauron would never imagine someone trying to enter Mordor and destroying the Ring of Power: "For he is very wise, and weighs all things to a nicety in the scales of this malice. But the only measure that he knows is desire, desire for power; and so he judges all hearts. Into his heart the thought will not enter that any will refuse it."[92] When you think about the other side, be clear in your assessment. Do not project yourself on the subject.

The second obstacle to objective assessment of the other side is the problem of blind spots. Unlike blind spots experienced in driving a vehicle, which may be inevitable, these emotional blind spots are self-created.[93] Whether due to unexamined prejudice or actual life experience, the shutting off of information based on who that person is or represents creates the possibility that your assessment of the other side will not be accurate or complete. Lawyer Rick Friedman confesses he has an aversion to certain conservative ideas, but nevertheless warns: "[W]e risk creating our own blind spots, hiding the power of the other side's arguments from ourselves."[94] The best way to minimize or eliminate these blind spots is to start with a healthy respect for the other side. See what they can teach you about the problem. Walk a mile or two in their shoes.

> party, the BJP, couldn't possibly be serious when it campaigned on a nuclear weapons platform. Westerners saw good reasons for India to eschew testing and therefore thought Indians must understand their own best interests the same way.
>
> Intelligence professionals have a name for this kind of thinking: mirror-imaging. It is considered one of the most basic mistakes in the spy manual.
>
> "Mirror-imaging -- projecting your thought process or value system onto someone else -- is one of the greatest threats to objective intelligence analysis," a senior CIA officer, Frank Watanabe, wrote last year in Studies in Intelligence, the agency's in-house journal. "Avoid mirror-imaging at all costs," he advised.
>
> Failing to follow such counsel led the United States to believe that Japan would never attack Pearl Harbor and that Saddam Hussein would never invade Kuwait.

Id.

92. *See* Richard Fernandez, *Negative*, THE BELMONT CLUB, Nov. 4, 2011, http://pjmedia.com/richardfernandez/2011/11/04/negative.

93. RICK FRIEDMAN, ON BECOMING A TRIAL LAWYER 167 (2008).

> Just as Carl Rogers said and countless psychological studies have confirmed, our sense of self distorts our perception of what is going on around us.
>
> . . . .
>
> We formed our selves to deal with a reality that no longer exists–or at least *largely* no longer exists. It's as if we spent our first twenty years in a small room doing close-up work on watches and jewelry, wearing thick lenses to help us see clearly. Now we are outside, driving a car at sixty miles per hour, still wearing those thick lenses designed for close-up work.
>
> Simply stated, our sense of self creates blind spots and distorts of perception. We don't see ourselves as we really are (perhaps we're afraid to), and we are unable to see others as they really are. As events unfold, we are often reacting to unexplored things inside of us rather than to the events themselves.

Id. at 166-67.

94. *Id.* at 141.

18. Deal with Reluctant or Even Hostile Jurors By Finding a Theme That Will Resonate With Them.

It is inevitable that some perfectly good themes will run into difficulty with certain jurors. This is due, in part, to the success of the "tort-reform" movement in poisoning the jury pool to believe that lawsuits are a danger to the system. Whether it is the belief that lawsuits undermine the quality, availability, and cost of health care, or threaten to ruin the economy by making everything more expensive, or impede the development of newer and safer products, lawsuits in general, and plaintiff's lawyers in particular, are the target of derogatory jokes and unrelenting criticism that has embedded itself deeply into the culture.[95] Thus, the opening that "we have come here to ask you to right a wrong"[96] sometimes falls on deaf ears. This may be due to a fear that giving the plaintiff any money will cause the juror's insurance rates to go up or that the events are the result of God's will and that the plaintiff should simply "buck up" and accept it as such. It may feel like an impenetrable barrier to the plaintiff's lawyer who faces a jury composed of a critical mass of "tort-reform" believers.

An extremely important book by David Ball and Don Keenan, *Reptile: A 2009 Manual of the Plaintiff's Revolution*, addresses that problem. Identifying in ordinary people a deeply embedded concern for survival and a consequent sensitivity to danger, Ball and Keenan argue that themes ought to be grounded in ways to make individuals and the community safer.[97] By changing the theme to resonate with a person's unconscious concerns, it increases the chances of success.[98]

Another way to restructure the theme to deal with other underlying hostile values has been observed by Rick Friedman. A lawyer friend of his, practicing in an anti-tort area of the country, reframed the negligence case into the new theme of sanctity of contract:

> When we get our driver's license from the state, we are entering into a contract with the State of Oklahoma and all other drivers who are legally on the road. The laws of the state are the contract we all agree to follow. Among other things, all of us agree to yield when the state puts a yield

95. DAVID BALL AND DON C. KEENAN, REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION 25-26 (2009).

96. MCELHANEY, *supra* note 14, at 31.

97. BALL & KEENAN, *supra* note 95, at 29-40.

98. Ball and Keenan describe the deepest, most basic concerns as being part of the Reptilian brain. They believe that individuals can be turned with the right kind of appeal to those unconscious concerns:

> The Reptile prefers us for two reasons: First, the Reptile is about community (and thus her own) safety – which, in trial, is our exclusive domain. The defense almost never has a way to help community safety. The defense mantra is virtually always, "Give danger a pass."
>
> Second, the courtroom is a safety arena. Trials were invented (by the safety conscious ancient Greeks, not the burn-'em-at-stake early English) for the purpose of making the public safer. So when we pursue safety, we are doing what the courtroom was invented and maintained for.

Id. at 27.

> sign up. A year and a half ago, at the corner of Elm and Shuster, Mr. Simpson broke that contract.[99]

Nice move, but does it work? Friedman says yes, as to his friend, and explains why:

> [U]ltimately, a jury verdict is a reflection of how the jurors see the world or would like the world to be. . . .
>
> Jurors want to live in a world that has hope, where people who break the rules are punished, where hard work is rewarded, where contracts are honored, where no one gets something for nothing.[100]

Reframing the theme to deal with underlying concerns of potentially hostile jurors is not a gimmick or manipulation. It is about meeting the jurors where they are and appealing to their good instincts and their self-interest.

19. Think About the Timing of Emotion in Your Story and About When to Close the Deal.

There is clearly room for emotion in storytelling. The issue is timing. Rick Friedman talks about the counter-productive consequences of an emotional opening statement:

> If you are emotional in opening statement, venting your anger at the defendant, you leave little room for the juror's anger. They may even push back, finding ways to view your anger as inappropriate. One friend of mine expresses this concept by saying, "You should never let your emotions get out ahead of the jurors'." Gerry Spence expresses a similar concept, saying you should not destroy a witness until the jury wants that witness destroyed.[101]

You risk damaging your credibility as a guide who can be trusted. There will be time for emotion later, on cross. Not at the beginning of the cross (the so-called "angry cross"), but, as Spence suggests, when the time is right. Emotion is very appropriate in closing argument, but only after you have earned the right.

Don't tell the audience what they are going to think ("You won't believe this") or how to think before they reach the conclusion on their own. There is a time for editorializing, but don't jump the gun. Give the listeners the emotional space to arrive at where the story is heading. The ending of your story should confirm the conclusion they have already arrived at. They are then ready to hear the ending because it will empower their judgment about what is right and what is wrong. Do not get there before they do.

20. Your Voice Is an Instrument. Use It Accordingly.

There are those who are blessed with the gift of a great voice. It is

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99. FRIEDMAN, *supra* note 93, at 123.
100. *Id.* at 127.
101. *Id.* at 111.

impossible to imagine better narrators than Morgan Freeman in *The Shawshank Redemption*[102] or Sam Elliott in *The Big Lebowski*[103] or the voice of a great character, like James Earl Jones as Darth Vader in *Star Wars*.[104] World class voices. We cannot be like them, but you should not ignore the importance of your voice when telling the story. Your voice should be thought of as an instrument to be played. Storytelling is not just talk. It requires attention to such matters as pace, pitch and volume, and even silence.

Pace should be reflective of the storytelling. A story has a shape, like a musical phrase will have a shape. It begins, it rises, it falls. It pushes toward conflict and then finds resolution. Like a musical theme, it may crescendo near the end. The pace of the storytelling cannot be even. The listener will need relief in order to avoid monotony. Pace must be varied, moving more quickly through the foundational parts and slowing down for the more important parts. Pace should match what you are trying to achieve at any particular part of the story. Of course, the most dramatic variance of pace is to stop completely. "Great orators, great trial lawyers, and those with even superficial involvement in theater have always known there is great power in silence."[105] There *is* great power in silence. Do not mess it up with fumbling around for an exhibit or other distracting movement. It must be intentional, and your facial expression and body posture should be commensurate with the silence.

Although telling a story through speech, rather than music, involves the speaking voice, you should not neglect the tools of pitch and volume. High or low, loud or soft, are options at your disposal. Do not fall into a pattern of high and low that becomes sing songy. Remember that pitch is how the voice gives the listener the punctuation of the sentences, with a lift at the end to designate a question and a turn down at the end to indicate a period. A pause may indicate a paragraph ending. Variation in pitch and volume may also help to bring in emotion appropriate to the story. As a caution, you may want outside appraisal of your voice pitch, volume, clarity, and resonance in order to understand how your voice comes across to others. Work to eliminate, or at least tone down, the aspects that annoy or distract. Your voice should be the messenger, not the message.

Delivery of the story, with emphasis through facial expressions as well as hand and body gestures can enhance or break the spell of the narrative.[106] Practice your delivery and, if possible, have it videotaped. It is a different experience watching yourself. Scout yourself, like a coach would scout an upcoming opponent. Use that review to correct the problems that emerge.

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102. THE SHAWSHANK REDEMPTION (1994).

103. THE BIG LEBOWSKI (1998).

104. STAR WARS: EPISODE IV, A NEW HOPE (1977); EPISODE V, THE EMPIRE STRIKES BACK (1980); and EPISODE VI, RETURN OF THE JEDI (1983).

105. FRIEDMAN, *supra* note 93, at 144.

106. *See generally* DAVID BALL, THEATER TIPS AND STRATEGIES FOR JURY TRIALS (3d ed. 2003).

21. Practice and Visualize the Storytelling.

Practicing telling the story before you deliver it to an audience is probably a good idea. Storytelling is interactive and you need to have your own issues settled before you meet your audience. It will likely be different when you do.[107] Try to visualize the impact that the unfolding of the narrative will have on the audience. Do not paint yourself into a corner. I once saw an experienced Sioux Falls attorney paint himself into a corner because of a failure to visualize the presentation. He was giving a children's sermon on grace during the regular service at church. To illustrate his point, he brought candy to give to the kids. However, there were more kids who showed up than he had candy for. To the kids' obvious dismay (as well as his), he did not realize that until he ran out. Result, crying kids and an embarrassed lawyer. Not a good visual, and not a good message on grace either. Like the new science teacher in high school who attempts the in-class experiments, try the presentation more than once ahead of time. And have a Plan B.

22. Use Humor, But Do It Carefully; Make It Appropriate to the Story and the Audience.

Humor in general is a great universal connector. It helps to break the ice and to begin connecting with the audience. Even better is the humorous opening that previews the theme. That is, don't follow a mechanical formula and drop a joke into the opening without looking for the right example of humor to make a point that will be developed in the story. One of my best openings occurred as a guest lecturer for third year medical students, as part of their orientation week before starting on their clinical rotations. My subject was medical malpractice. I felt like Daniel, going into the Lion's Den. I knew one of the medical students, who was a friend of my oldest daughter. In fact, I had taught his high school Sunday School class several years before. So, after being introduced and stating my topic, I acknowledged that I faced a daunting task. I said, "The last time I felt this apprehensive about talking to a group was when I taught high school Sunday School." And then, looking directly at my former student, I said, "And Paul was in that class, too." The class loved that remark because Paul was a popular, but mischievous, member of the med school community (as he was in the church community). With that breaking of the tension, I was off to a good

107. Helmuth von Moltke, Chief of Staff of the Prussian army for thirty years in the latter part of the nineteenth century, is known for the following statement: "No battle plan survives the first contact with the enemy." DANIEL J. HUGHES, ED., MOLTKE ON THE ART OF WAR: SELECTED WRITINGS 45-47 (1993). That wisdom applies to many situations. Whether it is a first date, a first class, a first interview for a job, or the first day of trial, visualization of the event may help to avoid some mistakes that otherwise will haunt you for a long, long time. On the other hand, mistakes, especially of the social kind, are important in character development. As Miss Manners says, how else can one acquire those emotional scars that make us so much more interesting later on in life? *See generally* JUDITH MARTIN, MISS MANNERS' GUIDE TO EXCRUCIATINGLY CORRECT BEHAVIOR (Freshly Updated ed. 2005).

start and the presentation was a success.

Although my med school orientation went well, humor in particular can be very risky. Telling the wrong joke at the wrong time or at the wrong place will show you just how risky. In these times of political correctness, even if you are a tenured professor, it may demonstrate that there is no such thing as tenure. If you are talking to the wrong jury, punishment will be swift and sure. The fall from grace (or tenure) can happen in the blink of an eye.

Although there is great risk, there is also great benefit. Be careful, and think it through from many angles. If there is any question, talk to people about it. Do not toss in a joke just because you think it is required in order to connect. Make it appropriate to the audience. If you exercise care, the use of humor will assist greatly in making connections with that audience. High risk, but high rewards.

23. Make a Habit of Using Simple Declarative Sentences As Much As Possible.

One of the most important principles of persuasive writing – using simple, declarative sentences[108] – is even more important for speaking. The ability of a reader to re-read a sentence or retrace steps further back to re-read gives the writer somewhat greater latitude on matters, such as sentence length, dependent clauses, and references. Obviously, it is not good if the reader has to do that, but there is some flexibility there. With listeners, there is not much flexibility. The listener cannot rewind the tape. You must keep your statements short and direct. Do not burden the listeners with long circuitous sentences to make your point. Size matters, shorter is better.

Simple, declarative sentences will not win you the Pulitzer Prize, but they will communicate. Subject, verb, object. Subject, verb, object. Make it a practice to think in that simple sentence format because there is a tendency of lawyers, and especially law professors, to embellish with dependent clauses and multiple modifiers. Dependent clauses are not banned from speaking, but use them sparingly. They make for wonderful transitions from proposition to proposition. But the reason they cause problems is that a dependent clause at the beginning of the sentence will delay the time for the listener to learn about the subject who acts, often with respect to an object. In order to make sense of the sentence, the mind focuses first on the subject, verb, and object and then returns to the dependent clauses at the beginning and wherever else they are found in a complex sentence. And this is all supposed to happen before you as the speaker starts the next sentence. The delivery of a dependent clause can be used to enhance tension, but do it knowingly and do not overuse it.

In speaking, you should be careful about references. The listener, unlike the reader, does not have the opportunity to go back and figure out a reference.

108. Van Patten, *Propositions on Writing and Persuasion*, *supra* note 56, at 266-67.

Do not make your audience mind readers. For example, you must be careful when using pronouns. Most stories have multiple characters. As the storyteller, you know to whom you are referring, but the audience does not. A less than careful use of pronouns can produce confusion. You can use them, but the reference must be clear. The use of modifiers can often create ambiguities. The ambiguity is: what does the modifier modify? The usual rule is it modifies the object closest to it, but the rule is not always followed, especially in speech. The classic example is Groucho Marx's famous line: "One morning I shot an elephant in my pajamas. How he got into my pajamas, I'll never know."[109] The humor here comes from the intentionally misplaced modifier. This is also an example of why the rule of last antecedent does not apply in every case.[110] The point here is do not get close to ambiguity. If your listener has to resort to the Rule of the Last Antecedent, you have already lost. Make sure your references are tight.

24. Speak With Conviction.

As much or more powerful than well-placed emotion is conviction. Delivering a narrative when you are speaking from the heart is one of the joys of life, both for the storyteller and for the listener. This cannot be taught, except by example. Former Senator Tom Daschle's eulogy at former Governor William Janklow's funeral is a very good place to start.[111] Although I do not share Senator Daschle's politics, I thought it was one of the best speeches I have ever heard. It was very moving, and persuasive. Another powerful example would be Randy Pausch's last lecture, *Achieving Your Childhood Dreams*.[112] The emotional setting of these two speeches was clearly an important reason for the impact, but it wasn't the sole basis.

Speaking with conviction does not require an emotional situation. It requires sincerity. You can't sell what you wouldn't buy, so the conviction must be real. That is why searching for the right theme is so important. Take the hardest case. Defending someone who is apparently guilty as charged. That's a hard sell. But, remembering that there are two ways to win a race – running faster than any one or making sure that no one runs faster than you – you can attack the government's case with conviction, if there is a basis for the theme: before the government may imprison anyone, it must follow its own rules. The right theme helps to keep you from overselling your evidence.

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109. Groucho Marx, BRAINYQUOTE, http://www.brainyquote.com/quotes/quotes/g/grouchomar128462.html (last visited April 29, 2012).

110. *See, e.g., Kaberna* v. School Board of Lead-Deadwood School Dist., 438 N.W.2d 542, 543 (S.D. 1989).

111. *See* KELOLAND.COM, Janklow Funeral Service, http://sms.keloland.com/videoarchive/?VideoFile=120118janklowfuneral (last visited April 29, 2012). The speech may be seen beginning at the 52:25 mark, but I would also recommend Russ Janklow's moving introduction of Senator Daschle, beginning at the 49:30 mark.

112. http://www.youtube.com/watch?v=ji5_MqicxSo (last viewed June 19, 2012).

For storytelling, the same is true, even if understood in a slightly different way. Like the children's stories, the story you tell may be unreal, but not untrue. The truth in the story you tell helps the listener to find the truth in the argument you are making. But that will not happen if you use the story as a contrivance, if you don't take the truth of your own story seriously. People can sense manipulation and insincerity. Tell the story from the heart.

25. Keep It Simple.

It takes time to make it simple. The classic line is from Pascal, who apologized to a friend for the length of a letter, saying he did not have time to write a shorter one.[113] Work on your story—pick the right theme, think about the moral infrastructure, the underlying structure, the sequence, the word choices, and know when to add emotion and close the deal. Be sure to leave time to trim and tighten. No editorializing or side trips. Distractions interfere with the power of the story. An important distraction may be your ego. Unless there is a good reason to do so, make it about the story, not the storyteller. Just keep it simple.

CONCLUSION

Stories and metaphors (which are tiny stories) are a vital medium for persuasion. If conceived and executed correctly, they break down the familiar barriers of resistance. Stories allow you to find a common ground with the listener in a non-threatening way, without the appearance of coercion or trickery. By tapping into deeply held, often unconscious beliefs, a good story speaks more directly to real concerns than one could ever hope to do with plain argument. A good story makes the language of persuasion both universal and concrete.

113. *See* Blaise Pascal, The Provincial Letters of Blaise Pascal, Letter XVI, to the Reverend Fathers, the Jesuits, December 4, 1656, *available at* http://oregonstate.edu/instruct/phl302/texts/pascal/letters-c.html#LETTER%20XVI.

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Psychodrama and the Training of Trial Lawyers: Finding the Story

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INTRODUCTION

Go to any courthouse in the country just about any day of the week and you'll hear it – the sounds of lawyers droning on and on with their technical arguments, their redundant questioning of reluctant witnesses, the subtle points which are relevant only to them. Look at the poor helpless jurors who are tied to their seats by civic duty, by law. They struggle to pay attention but fade in and out as the noise continues to wash over them – numbing them. Look at the litigants whose lives will be directly affected by the result of the proceedings. Even their stake in the outcome cannot hold their attention. Their eyes glaze over despite a valiant effort to appear interested. As Thomas A. Mauet says, "Boredom is the enemy of effective communication . . . ."[1]

Why are these people – these lawyers who have dedicated their professional lives to the art of persuasion – so incapable of telling a simple story passionately and succinctly? Why are the jurors not hanging on every word, [2] mesmerized as they watch these masters perform their art? Each Monday morning, we recount the events of the weekend to our colleagues with more passion and greater animation.

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I appreciate the support of the University of Akron School of Law in providing me a summer research grant.

I acknowledge the kind assistance of John Nolte, Ph.D., for his teaching, direction and suggestions. To have a psychodramatist of his caliber advising me has been a great gift. I also recognize the significant contributions of Gerry Spence, Esq., who is engaged in a constant struggle, not only to find a better way to represent people as a lawyer, but also to share his great gifts with young lawyers through his non-profit Trial Lawyer's College. The successful development of psychodrama as a tool for trial lawyers is largely the result of his vision and generosity.

I am grateful for the invaluable research assistance and encouragement of Anthony Gallia and Melinda Smith. Students like Anthony and Melinda are the reason most of us went into legal education.

This article expands upon a presentation at the Northern Illinois University Law Review's Ninth Annual Symposium, "Defense Strategies in Death Penalty Litigation," on March 23, 2000, entitled "Psychodrama in Capital Cases: A New Tool for Humanizing the Accused."

[1] THOMAS A. MAUET, TRIAL TECHNIQUES 19 (5th ed. 2000).

Why then are we seemingly incapable of effective communication when we are in court?

There seems to be little dispute among trial lawyers and trial advocacy teachers that the essence of the trial is storytelling and that storytelling principles are not only helpful, but also essential to an engaging and persuasive presentation.[2] Trial lawyers and trial advocacy teachers are looking for ways to take advantage of storytelling techniques to make our presentations more persuasive.

Part of the problem is that the format in which the trial lawyer must operate is not conducive to good storytelling. Good stories have a beginning, a middle and an end. They often begin with "once upon a time" and end with "and they lived happily ever after," and in between is a logical progression, a series of scenes interrelated by cause and effect. However, in trial, the story is jumbled. The evidence comes in piecemeal through witnesses and exhibits – often out of chronological order and disrupted by the opponent through objections and cross-examination.[3] To make matters worse, the opponent is simultaneously advancing a competing story. The jury is left with the task of constructing its own narrative as a way of organizing the pieces in a coherent fashion.[4] Opening statements are used to mitigate the problem by giving the [3] jury a cohesive story as a guide for organizing the evidence.[5] Trial advocacy teachers also stress the importance of theme as an organizing principle used throughout the trial to steer the jury in its construction of the evidence.[6]

The problem of format is only part of the problem and may be given too much credit for disrupting our presentations. Format is a convenient scapegoat for our inadequacies as storytellers. Even without the challenge of the format of a trial, most lawyers are simply not good storytellers. The truth is that trial lawyers are not

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[2] *See Lawyers as Storytellers and Storytellers as Lawyers: An Interdisciplinary Symposium Exploring the Use of Storytelling in the Practice of Law*, 18 VT. L. REV. 567 (1994); Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989); Symposium, *Speeches from the Emperor's Old Prose: Reexamining the Language of Law*, 77 CORNELL L. REV. 1233 (1992). The legal storytelling movement is not limited to the courtroom but has spread to the classroom and legal scholarship. *See, e.g.*, Daniel Farber & Suzanne Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (purporting to offer a systematic appraisal of the storytelling movement, particularly as it relates to legal scholarship); Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994) (disagreeing with Farber and Sherry); Richard A. Matasar, *Storytelling and Legal Scholarship*, 68 CHI.-KENT L. REV. 353 (1992) (discussing the advantages of narrative in scholarship and teaching); Sandra Craig McKenzie, *Storytelling: A Different Voice for Legal Education*, 41 KAN. L. REV. 251 (1992) (discussing the need to teach storytelling in law school).

[3] *See generally* Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 559, 559 (1991). Lempert suggests that trial lawyers should present the case in chronological order, not witness order. Witnesses should not be called and then asked everything they know about the case; they should be asked only as much as is necessary to advance the story. Witnesses should then step down, only to be recalled later when further testimony would fit more nicely into the story. *Id.* at 565-66. Lempert recognizes that predictable impediments to this approach would be the inconvenience to the witness and the discretion of the judge under Rule 611 of the Federal Rules of Evidence. *Id.* at 566.

[4] *See generally* Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991).

[5] J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS AND ETHICS 263 (1983).

[6] RONALD L. CARLSON & EDWARD J. IMWINKELRIED, DYNAMICS OF TRIAL PRACTICE: PROBLEMS AND MATERIALS 39-40 (2d ed. 1995).

trained to be good storytellers.[7] Lawyers are trained to think analytically.[8] In the words of one writer: "Starting with the first day of law school, lawyers are taught to suspend emotion in favor of cold, legal analysis."[9] They learn to decontextualize facts and categorize them according to their legal significance, sorting the relevant facts issue by issue.[10] They deconstruct and reduce the experience and then reorganize it to correspond with abstract legal principles.[11] The pieces, now reorganized and grouped in a legal context, lose the information-rich context of the experience as lived and felt.[12] Legal analysis, while essential to the lawyer and legal argument, is death to the story.[13] Legal theory and legal discourse are simply too far removed from human experience.[14]

[4] Given the format of the trial and our legal training, there is little wonder that many trial lawyers are boring, repetitive speakers. Lawyers should focus on techniques designed to compensate for the awkward format, and they should strive to communicate with jurors like human beings. But there is another, more fundamental issue that prevents the trial lawyer from communicating the story of the case. The problem with storytelling is that we simply do not know the story. We

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[7] McKenzie, *supra* note 2, at 251-52 ("Although lawyers are storytellers, they are not trained as such. Legal education in the United States today is dominated by the 'case method' of instruction first used by Christopher Langdell at Harvard University in the late nineteenth century. . . . [T]he role of the lawyer as storyteller . . . has been largely ignored in legal education.").

[8] Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 248 (1978).

[9] Adrienne Drell, *Chilling Out*, A.B.A. J., Oct. 1994, at 70 (1994).

[10] *See* Graham B. Strong, *The Lawyer's Left Hand: Nonanalytical Thought in the Practice of Law*, 69 U. COLO. L. REV. 759, 781 (1998).

[11] *See* Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2103 (1989) ("The popular image of lawyers is that we are committed to formal rationality. We are trained to cabin 'empathic' responses and remain steadfast in our commitment to legal principles despite emotional dissonance.").

[12] *See* Strong, *supra* note 10, at 781, 782.

[13] *See* Philip N. Meyer, *"Desperate for Love III": Rethinking Closing Arguments as Stories*, 50 S.C. L. REV. 715, 716 (1999) ("There are two modes of functioning, two modes of thought, each providing distinctive ways of ordering experience, of reconstructing reality. The two [the analytical and the narrative] (though complementary) are irreducible to one another. . . . A good story and a well-formed logical argument are different natural kinds . . . . It has been claimed that one is a refinement of or abstraction from the other. But this must be either false or true only in the most unenlightening way.").

[14] Massaro, *supra* note 11, at 2105. Most people and, therefore, most jurors, are affective (right brain) decision-makers. MAUET, *supra* note 1, at 14-15. They care more about people than problems. They use deductive reasoning that is primarily emotional and impulsive. Once they make a decision, they justify the decision as logical and fair by discounting, discrediting or even ignoring information that is inconsistent with their decision. *Id.*; *see also* BERT DECKER, YOU'VE GOT TO BE BELIEVED TO BE HEARD (1992). In stark contrast, lawyers are trained to be cognitive (left brain) decision-makers. *See* Strong, *supra* note 10, at 761. They are more likely to withhold judgment until all of the facts have been accumulated. They then use inductive reasoning and come to logical conclusions based on an analysis of the facts. To the extent that lawyers approach the trial of a lawsuit as a factual/legal dispute, they will fail to effectively communicate with jurors who approach the trial as a human drama. Lawyers typically focus on the facts while the jurors are more interested in the people, their relationships and their human experiences. *See* JAMES E. MCELHANEY, TRIAL NOTEBOOK 133 (3d ed. 1994).

know the facts as our client and other witnesses have told them to us, but not the real story as lived, felt and experienced by our client and the witnesses.

Trial lawyers necessarily focus on the facts that reveal *what happened.* Better trial lawyers add additional facts that describe *why it happened.*[15] Good storytellers develop *how it was experienced* by the characters.

In his article entitled *The Trial as a Persuasive Story*, Professor Steven Lubet gives us a useful example – a simple personal injury case.[16] The lawyer represents the plaintiff who was injured when the car she was operating was struck from behind by the car operated by the defendant. Immediately before the collision, the traffic slowed to allow a fire truck to pass. These are the basic facts describing *what happened*, and they may be all that is legally essential.

We know why the plaintiff slowed down – because of the fire truck. But the jury may be left wondering why the defendant, also part of the traffic, did not slow down. Perhaps the defendant was negligent, but perhaps the plaintiff stopped too abruptly and was at least partially to blame. Perhaps there was no fire truck at all. Perhaps the fire truck was not sounding its siren or otherwise alerting traffic to stop. Professor Lubet insightfully notes that the story will be more persuasive if the lawyer can establish a reason for the defendant's conduct – in other words *why it happened.*[17] For example, what if the [5] defendant was late for a very important business meeting? The defendant's reason to rush now makes it more likely that he did rush. Understanding why the actor might do something gives context and meaning to the action and makes the action more likely to have occurred.

But there is more to the story we could explore. How did the defendant experience the facts? Perhaps the defendant felt his blood pressure rise as the digital clock on the dashboard served as a constant reminder that he would certainly be late. He tightly gripped the steering wheel and leaned forward, angry with himself for not allowing more time as he envisioned the embarrassing scene that awaited him upon his arrival at the office. He stared at the congestion ahead and saw the traffic as a frustrating impediment. He calculated how late he would be and said to himself almost audibly, "Why didn't I leave ten minutes earlier? What am I going to say when I get there?" With the insight of *how it was experienced*, we can now compare our own experience with the actor's experience. We recognize the experience as akin to our own. We can now empathize in the sense of understanding that the action of the defendant is not only more likely, but also ultimately believable.

Trials are frequently likened to a drama.[18] The comparison is an easy one to accept since both theater and trial involve storytelling.[19] One of the lessons we can take from the theater is the notion that credibility originates with the inner feelings the actor is experiencing and not the action itself. Actors and directors have long

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[15] Steven Lubet, *The Trial As a Persuasive Story*, 14 AM. J. TRIAL ADVOC. 77, 78-81 (1990).

[16] *Id.* at 80-81.

[17] *Id.*

[18] JAMES W. JEANS, TRIAL ADVOCACY 303 (2d ed. 1993); *see also* DAVID BALL, THEATER TIPS AND STRATEGIES FOR JURY TRIALS (2d ed. 1997).

[19] Strong, *supra* note 10, at 780 ("In the . . . theater of the courtroom, lawyers become themselves principle storytellers, and the producers and directors of tales told by others.").

understood the critical importance of "motivation."[20] Motivation is referred to by different terms – inner motive forces,[21] the objective,[22] and so forth – but the idea is the same. All action in the theatre must have an inner justification.[23] The motivation to act lies in the wishes, needs and desires of the human.[24] When the action is generated by true feelings, the action is logical, coherent and real.[25] When the action is not generated by true feelings, the action is artificial. The inner feelings are the guiding force that generates the action. The inner feelings are the reason for [6] the action and are, therefore, more important than the action itself. The inner forces are what "excite the audience and make the action believable."[26]

If inner motive forces are at the heart of credibility, the typical presentations in court fail to use the most persuasive material. We discuss the action in terms of what happened. But the trial lawyer who stops there fails to give the jury sufficient input to accept or reject the action. Better presentations include the situation or external forces that preceded the action to explain why the action happened. This information is critical to evaluating the action, but only insofar as it gives context to the inner forces (the feelings) that generate the action. If the jury is not also given the inner motive forces (how the facts were experienced) the link between external force and action is missing.

Psychiatrist and psychodramatist Dr. John Nolte[27] also distinguishes between facts and our experience of the facts:

> It is not just what happens to us that is important and that makes us who we are, it is how we experience what has happened to us. The facts are only a small part of anything that happens. Our experiences are stories, our stories. Together they comprise the story of our lives.[28]

Perhaps we tell only the facts (what happened and why) because all we know are the facts. In presenting our cases to the jury, if we could communicate the facts in a way that reveals how the witnesses experienced those facts, the jury would be better able to understand and relate to the witnesses on an emotional level and accept the facts.

We cannot tell what we do not know. As lawyers charged with the responsibility of telling our client's story, if we could somehow experience our client's stories – not just hear about them, but experience them – we would understand on an

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[20] *See* JOHN E. DIETRICH & RALPH W. DUCKWALL, PLAY DIRECTION 6 (2d ed. 1983).

[21] CONSTANTIN STANISLAVSKI, AN ACTOR PREPARES 244 (1963).

[22] WILLIAM BALL, A SENSE OF DIRECTION: SOME OBSERVATIONS ON THE ART OF DIRECTING 70-92 (1984).

[23] STANISLAVSKI, *supra* note 21, at 46.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 5.

[27] John Nolte, Ph.D., is a psychologist and psychodramatist in Hartford, Connecticut. Dr. Nolte is on the teaching faculty of Gerry Spence's Trial Lawyer's College, where psychodrama is used extensively in the training of trial lawyers.

[28] John Nolte, Brochure for the "Psychodrama and Telling the Story" Workshop, Oct. 23-25, 1998 (Midwest Ctr. for Psychodrama & Sociometry, Omaha, Neb.) [hereinafter "Psychodrama and Telling the Story" Brochure].

emotional level how the facts were experienced. We could then communicate that experience to the jury.

Proponents of a method called "psychodrama" contend that it is a tool that permits us to access the experience of others – to see things as they saw them and to feel it as they felt it – in other words, to truly empathize. Psychodrama also allows us to access our own experiences and to better [7] understand our experiences. "Psychodrama expands our understanding of experiences, hence our understanding of ourselves."[29]

I attempt in this article to make trial lawyers and trial advocacy teachers aware of this tool called psychodrama and how it is being used in preparation for trial and at trial. But psychodrama is an action method.[30] Writing an article about psychodrama is like writing a manual on how to swim. You will have only a slightly better understanding of swimming after studying a Red Cross manual on how to perform the various strokes. It is not until you are in the water that you will begin to fully appreciate the concept. So it is with psychodrama. No article could serve as a substitute for the experience of doing. To fully evaluate the usefulness of psychodrama in the trial of cases will require experience with the method.

I. WHAT IS PSYCHODRAMA?

A. INTRODUCTION TO PSYCHODRAMA

Psychodrama is considered, first and foremost, a method of psychotherapy.[31] However, unlike traditional Freudian psychoanalysis, where the subjects talk about their experiences, dreams and fantasies, psychodrama requires action.[32] Psychodrama has the subject dramatize certain events as a spontaneous play on a "stage" in a group setting.[33] The subject literally goes through the motions of physically acting out the scene.

Dr. J.L. Moreno, the creator of psychodrama, defined psychodrama as "the science which explores the 'truth' by dramatic methods."[34] Adam Blatner described psychodrama as follows:

> Psychodrama is a method of psychotherapy in which patients enact the relevant events in their lives instead of simply talking about them. This involves exploring in action not only historical events but, more

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[29] *Id.*

[30] TIAN DAYTON, PH.D., THE DRAMA WITHIN: PSYCHODRAMA AND EXPERIENTIAL THERAPY 1 (1994).

[31] 3 J.L. MORENO & ZERKA T. MORENO, PSYCHODRAMA: ACTION THERAPY & PRINCIPLES OF PRACTICE 11 (1969). Psychodrama was, from its inception, a therapeutic method. Moreno proposed the replacement of Freudian psychoanalysis with psychodrama. 3 *id.* at 11, 24.

[32] ADAM BLATNER, FOUNDATIONS OF PSYCHODRAMA: HISTORY, THEORY, AND PRACTICE 1 (3d ed. 1988).

[33] *Id.*

[34] J.L. MORENO, WHO SHALL SURVIVE?: FOUNDATIONS OF SOCIOMETRY, GROUP PSYCHOTHERAPY, AND SOCIODRAMA 81 (3d ed. 1978).

> importantly, [8] dimensions of psychological events not ordinarily addressed in conventional dramatic process: unspoken thoughts, encounters with those not present, portrayals of fantasies of what others might be feeling and thinking, envisioning future possibilities, and many other aspects of the phenomenology of human experience.[35]

Psychodrama is a spontaneously created play, produced without script or rehearsal, with improvised props, for the purpose of gaining insight that can only be achieved in action. In psychodrama, life situations and conflicts are explored by enacting them, rather than talking about them.[36]

Psychodrama is used primarily as a group therapy method but, as we shall see, its uses are not limited to therapy. Psychodrama is a method used for promoting personal growth and creativity.[37] In addition to referring to a specific therapeutic method, the term "psychodrama" involves a wide variety of techniques that have application in business, education[38] and now the trial of lawsuits.

B. THE ORIGIN OF PSYCHODRAMA

Dr. J.L. Moreno (1889-1974) originated psychodrama in 1921 and refined it over the next few decades.[39] Moreno is best known as a principal co-founder of group psychotherapy.[40] It was out of his work developing group psychotherapy that Moreno originated the method of psychodrama.[41]

Psychodrama is a reflection of the eclectic interests and eccentric genius of Moreno. Understanding how such a method could develop requires some understanding of Moreno himself.

[9] *1. J.L. Moreno*

Moreno was born in Bucharest, Romania, on May 18, 1889.[42] His family moved to Vienna, Austria, in 1894.[43] He studied philosophy and medicine at the University of Vienna from 1909 until 1917.[44] In 1919 he became a general practitioner in Bad Voslau, a small town south of Vienna, where he used a family counseling approach – a forerunner of his later work.[45] While in Vienna, Moreno was very active and

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[35] BLATNER, *supra* note 32, at 1.

[36] *See, e.g.*, RENE F. MARINEAU, JACOB LEVY MORENO 1889-1974: FATHER OF PSYCHODRAMA, SOCIOMETRY, AND GROUP PSYCHOTHERAPY 157 (1989); MORENO & MORENO, *supra* note 31, at 233.

[37] PETER FELIX KELLERMANN, FOCUS ON PSYCHODRAMA: THE THERAPEUTIC ASPECTS OF PSYCHODRAMA 31 (1992).

[38] *See* BLATNER, *supra* note 32, at 2.

[39] *Id.*

[40] *See* MARINEAU, *supra* note 36, at ix.

[41] *See id.* at xi.

[42] *Id.* at 6.

[43] PSYCHODRAMA SINCE MORENO 2 (Paul Holmes et al. eds., 1994).

[44] MARINEAU, *supra* note 36, at 32; PSYCHODRAMA SINCE MORENO, *supra* note 43, at 2.

[45] PSYCHODRAMA SINCE MORENO, *supra* note 43, at 2.

influential in the artistic and dramatic life of the city.[46] Moreno emigrated from Austria to the United States in 1925 where he began his more formal contributions to psychotherapy.[47] In 1932, he coined the term "group psychotherapy."[48] He developed his theories working in hospitals, prisons and reform schools.[49] He founded Beacon Hill Sanitarium, a teaching institution where psychodrama was the principal method of treatment, in New York in 1936.[50] He founded training institutes for group psychotherapists and psychodramatists and started influential journals and professional associations.[51] J.L. Moreno died on May 14, 1974 in New York.[52] With him when he died were his nurse, Ann Quinn, and one of his students, John Nolte.[53]

Several experiences influenced Moreno and laid the foundation for the development of psychodrama. Three of these formative experiences are discussed here.[54]

[10] 2. *Child's Play*

While a student at the University of Vienna, Moreno observed the way children played and interacted in the parks in Vienna. He began to interact with them and tell them stories. He invented games for them that called upon their imagination. During this time, Moreno created a theater for children and had a regular group of young actors including Elisabeth Berger, who later became a famous actor.[55] They invented and improvised plays and presented classics in the parks and in a small hall that temporarily served as a theater.[56]

Moreno described his experience with the children:

> It was as a teenager, just prior to my matriculation in the Faculty of Philosophy at the University of Vienna that I first noticed the healthy spontaneity of children. At play in the parks of that city of my younger years and in observing the children as they played I found myself struck by the richness of their fantasy life. I hereupon made friends with them and subsequently led them in play, directing them in the creation of little "stories" that they acted out, and helping them to draw readily, from their

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[46] *Id.*

[47] MARINEAU, *supra* note 36, at 9; PSYCHODRAMA SINCE MORENO, *supra* note 43, at 2.

[48] *See* PSYCHODRAMA SINCE MORENO, *supra* note 43, at 2.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] MARINEAU, *supra* note 36, at 153; PSYCHODRAMA SINCE MORENO, *supra* note 43, at 2.

[53] MARINEAU, *supra* note 36, at 153.

[54] These episodes in Moreno's life are recounted in slightly varying ways in several books, including: IRA A. GREENBERG, PSYCHODRAMA AND AUDIENCE ATTITUDE CHANGE (1968); A. PAUL HARE & JUNE RABSON HARE, J.L. MORENO (1996); MARINEAU, *supra* note 36; J.L. MORENO, THE AUTOBIOGRAPHY OF J.L. MORENO, M.D (1985); MORENO & MORENO, *supra* note 31; PSYCHODRAMA SINCE MORENO, *supra* note 43.

[55] MARINEAU, *supra* note 36, at 35-39.

[56] *Id.* at 39.

> own knowledge and experience, to make real for these children that magic moment of the fantasies which their active imaginations and their high states of spontaneity brought excitedly to life. The realization of what was occurring during these periods that the children were involved in creating while they acted and in living in the worlds of their enactments during the times I directed them at play was for me a remarkable moment of discovery. This discovery subsequently led to the development of a movement . . . .[57]

Moreno later commented on the profound impact of his experience of working and playing with children:

> Gradually the mood came over me that I should leave the realm of the children and move into the world, the larger world, but, of course, always retaining the vision which my work with the children had given me. Therefore, whenever I entered a new dimension of life, the forms I had seen with my own eyes in that virginal world stood before me. [11] Children were my models whenever I tried to envision a new order of things or to create a new form. When I entered a family, a school, a church, a parliament building, or any other social institution, I rebelled. I knew how distorted our institutions had become and I had a new model ready to replace the old: the model of spontaneity and creativity learned from being close to the children.[58]

Moreno's work with children was instrumental in the development of his ideas about play, spontaneity, dramatic reenactment and creativity.

3. The Benefit of Groups

Moreno began working with disadvantaged groups. It happened this way: One afternoon while at the University of Vienna, Moreno saw a pretty woman on the street smiling at him. She was wearing a white blouse and red skirt with red ribbons to match. As Moreno began speaking with her, she was suddenly arrested by a police officer. Moreno followed her to the police station and waited for her. After her release, Moreno spoke with her about the reason for her arrest. She explained that she was a prostitute and that she was not allowed to wear such striking clothes during the day as she might attract customers. Moreno discovered a whole class of people who were segregated, not on the basis of race or religion, but on the basis of their occupation. They had no rights and no respect. They could not find doctors to treat them or lawyers to represent them. They had been stigmatized by society for so long they perceived themselves as despicable sinners and unworthy people. In 1913, Moreno began to visit their houses. He took with him two persons: a specialist in venereal disease, and a publisher of a Viennese newspaper. Moreno's purpose was

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[57] GREENBERG, *supra* note 54, at 22.

[58] MORENO, *supra* note 54, at 34; *see also* MARINEAU, *supra* note 36, at 40.

not to reform the prostitutes, but to give them self-respect and dignity. He met with them in groups of eight to ten, two or three times per week. Gradually they began to realize the value of the group – that they could become the therapeutic agents of each other. They found ways to help each other. Moreno had discovered the potential of group psychotherapy.[59]

4. "Spontaneity Theater"

In 1921, a few years after the end of World War I, Moreno was concerned about the lack of social and political leadership in Austria. He wanted to bring [12] the community together and stimulate debate about the future of Austria.[60] He became involved with a group of actors who met regularly at the Café Museum in Vienna.[61] In 1922, Moreno rented space that could hold fifty to seventy-five people. Moreno's new theater group put on spontaneous plays suggested by the audience, or reenacted current news stories – a production called "The Living Newspaper."[62]

One of the actors in the group was Ann Hollering, who became known in psychodrama circles as "Barbara."[63] Barbara was very popular in Moreno's productions because of her excellent performances in romantic or heroic roles. She soon attracted the attention of a young poet and playwright, George Kulka, who sat in the front row of all her performances. A romance developed between them and they were married. Barbara continued to act and George continued to admire her from the front row.

One day George approached Moreno to ask for help. George explained that this seemingly sweet woman was mean-spirited and physically abusive when they were alone. Moreno promised to help. Under the pretense of ensuring that her performances did not grow stale, Moreno asked Barbara if she would be willing to try other roles – roles that would reveal the "rawness of human nature, its vulgarity, and stupidity, its cynical reality . . . ."[64] Barbara gladly accepted the challenge and began playing prostitutes, spinsters, revengeful wives, spiteful sweethearts, and so on. George reported immediate changes. While the couple still argued, the arguments lost their intensity. At times Barbara's conduct toward George reminded her of a character she played and she would laugh in the middle of an argument, diffusing the tension. George also reported that watching Barbara play these roles had caused him to be more tolerant of her and more patient with her. Moreno invited George to act on stage with Barbara. He had them portray scenes from their daily lives at home, from their families, her childhood and their dreams and future plans. Their relationship continued to improve.

Moreno began to appreciate the therapeutic value of insight gained through drama for the protagonist. But the audience also reported that the scenes portrayed

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[59] HARE & HARE, *supra* note 54, at 8-9.
[60] MARINEAU, *supra* note 36, at 70.
[61] *Id.*
[62] *Id.* at 72.
[63] *Id.* at 70.
[64] *Id.* at 74-75.

by George and Barbara had a great emotional impact on them. Audience members personally benefited from the experience. Moreno began to appreciate the therapeutic value of the dramas for the audience. [13] Eventually, Moreno sat down with George and Barbara and explained to them the "development of their psychodrama . . . and . . . the story of their cure."[65]

Moreno combined the spontaneity and creativity of children, the inherent value of group dynamics and the insight of dramatic role playing to create a completely different approach from Freudian psychoanalysis that was action-oriented, public and rooted in immediate reality.[66] His experiences prepared him for the development of psychodrama.

C. WHAT DOES A PSYCHODRAMA SESSION LOOK LIKE?

Psychodrama is usually done with a group of participants.[67] The group can vary in size from as few as five to a hundred or more, but most practitioners prefer a group of ten to fifteen.[68] The psychodrama session can take place in any space that provides room for physical movement and privacy with no distractions.[69] The group includes the *director*, the *protagonist*, the *auxiliaries* and the *audience*.[70]

The *director* runs the session and is usually a therapist in a therapeutic situation. A *protagonist* is selected to work on an issue. Aspects of the protagonist's life will be explored during the psychodrama session. Therefore the protagonist will be the principal actor in the drama.[71] An area for the protagonist to work is established. This area is referred to as the *stage*. The stage can be as simple as a small area in the center of the room.[72]

The director or the protagonist will typically recruit members of the group to assist in dramatizing the scene. These group members are called *auxiliaries*. They will be asked to portray the actual or imagined personae in the protagonist's drama. Members of the group who are not directly involved in the enactment will be the *audience*.

During the session, the protagonist is given the opportunity to work on an issue by acting out a particular scene (or scenes) spontaneously. The scene can be from the protagonist's *past*. The director may choose to have the protagonist reenact the scene as the protagonist recalls it, to allow the protagonist to access the feelings of the moment in a safe environment. [14] Alternatively, the protagonist could act out this past scene in another way – examining how things might have been done differently – giving the protagonist a chance to do it over.

The scene could also depict a *current* or recurring situation in the protagonist's life. This might allow the protagonist to explore the feelings generated, perhaps

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[65] 1 J.L. MORENO, PSYCHODRAMA 3-5 (1946); *see also* MARINEAU, *supra* note 36, at 74-76.

[66] *See* MARINEAU, *supra* note 36, at 76-77.

[67] *See id.* at 157.

[68] *See* KELLERMANN, *supra* note 37, at 26.

[69] *See id.* at 22.

[70] Because J.L. Moreno developed psychodrama from his earlier experiences in "spontaneity theater," he used theater vocabulary. *See* MARINEAU, *supra* note 36, at 136, 156.

[71] *Id.* at 157.

[72] *See* MORENO & MORENO, *supra* note 31, at 233.

examine the source of those feelings and investigate other options for dealing with the situation.

The scene may depict a situation the protagonist anticipates in the *future*. The goal may be to help the protagonist prepare for the event – a kind of rehearsal or role training in anticipation of the future event.

The scenes that could be depicted are unlimited. Every aspect of the protagonist's subjective life can be presented with the help of the group.[73] A protagonist could act out a dream, have an encounter with a loved one who is now deceased or meet her unborn children. Psychodrama is not limited by time, space or reality.[74] Whatever the scene, the protagonist, led by the director and assisted by the auxiliaries, physically acts out the scene as if the event were happening here and now – in the present.

[73] *See* KELLERMANN, *supra* note 37, at 11-12.
[74] *See* MORENO & MORENO, *supra* note 31, at 23.

D. PSYCHODRAMATIC TECHNIQUES

Numerous techniques were developed by Moreno to achieve various goals during the psychodrama session. A few of the more common techniques include role reversal, soliloquy, doubling and mirroring.

1. Role Reversal

When Atticus Finch, the fictional lawyer portrayed by Gregory Peck in the movie *To Kill a Mockingbird*, advised his daughter that her temper and propensity for fist-fighting were not an appropriate way of dealing with problems, he said, "You never really understand a person until you consider things from his point of view[,] . . . until you climb into his skin and walk around in it."[75] Psychodramatists refer to this method as *role reversal.*

During the drama, the protagonist will typically be asked by the director to reverse roles with various auxiliaries. The protagonist takes the role previously played by the auxiliary and the auxiliary plays the role previously played by the protagonist. This process allows the protagonist to experience the scene from the vantage point of other characters in the drama. It also [15] permits the protagonist to observe the self from the vantage point of other characters in the drama. Role reversals will typically take place many times during the course of the psychodrama session.

Several lines from a poem authored by Moreno are often used to explain his concept of role reversal.[76] The poem suggests the total commitment necessary to the task:

> A meeting of two: eye to eye, face to face.
> And when you are near I will tear your eyes out
> and place them instead of mine,
> and you will tear my eyes out
> and place them instead of yours,
> then I will look at you with your eyes . . .
> and you will look at me with mine.[77]

In reversing roles, the person does not simply try to act as the other person would act, but to feel how the other person would feel – to take on their passions, prejudices, life experience, age, gender, ethnicity, and so on, and experience the depicted scene as the other person would experience it. Adam Blatner commented on the importance of this technique:

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[75] MIKE PAPANTONIO, IN SEARCH OF ATTICUS FINCH: A MOTIVATIONAL BOOK FOR LAWYERS 55 (1996).

[76] *See* HARE & HARE, *supra* note 54, at 15.

[77] THE ESSENTIAL MORENO: WRITINGS ON PSYCHODRAMA, GROUP METHOD, AND SPONTANEITY BY J.L. MORENO, M.D. 4 (Jonathan Fox ed., 1987).

> If one skill could be learned by everyone, I want it to be role reversal – to be able to see things from another's point of view (which does not mean always agreeing with that point of view). The ability to role-reverse fosters a way of being in the world that offers the potential for co-creating understanding, conflict clarification, and resolution. Each of us can learn and actively practice it in our daily lives, and thereby teach others to use it.[78]

2. Soliloquy

Soliloquy is the act of revealing inner feelings and thoughts that would normally be kept hidden.[79] The director will ask the protagonist to express out loud what he is feeling or thinking. The protagonist verbalizes what is otherwise internal.

[16] The soliloquy is often used in psychodrama as a warm-up technique. Giving voice to the feelings and emotions causes the protagonist to begin to focus on them. The soliloquy also provides valuable information the director can use to determine what issues or scenes should be explored.

The soliloquy is often used in conjunction with a role reversal. The protagonist is asked to soliloquize in the role of another person. This allows the protagonist to "warm up" to the role, and also gives the auxiliary, who may play the role, information needed for an accurate portrayal.

3. Doubling

The "double" is a particular kind of auxiliary whose function is to assist the protagonist in presenting the protagonist's position or feelings.[80] The protagonist may be having difficulty accessing or expressing his emotions, or may seem blocked or resistant. Another group member may have an idea about what the protagonist might be feeling. The director could let that other group member model a certain idea, action or emotion, thereby "doubling" for the protagonist.[81] The protagonist is then asked to accept, reject or modify the expression by the double, depending on whether the expression feels accurate to the protagonist. The protagonist will use the accurate suggestion or the suggestion as modified, and reject any suggestion that is not accurate. The result is that the protagonist is able to work through the block or overcome the resistance.

4. Mirroring

Mirroring is a technique that allows protagonists to see themselves. After the protagonist has acted out a particular scene, the protagonist is asked to come off stage and observe a reenactment of his behavior by an auxiliary. The auxiliary will

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[78] BLATNER, *supra* note 32, at ix.
[79] *Id.* at 176.
[80] *Id.* at 164.
[81] *See* KELLERMANN, *supra* note 37, at 147-48.

mimic the protagonist's body posture, use the same gestures, and use the same language as the protagonist. The auxiliary will imitate the protagonist's behavior, both verbal and non-verbal, to give the protagonist a sense of how he is acting or reacting in a particular situation.[82]

Mirroring is intended to give the protagonist insight about his feelings or his behavior. For example, the protagonist may be saying one thing while his body language is conveying something very different. Mirroring may allow the protagonist to discover the contradiction and to explore the protagonist's underlying feelings. The protagonist may be unaware of how a particular [17] behavior is perceived by others. Mirroring gives the protagonist an opportunity to judge his own behavior from a third-party perspective – a human version of video playback.[83] The technique may suggest exploring alternative ways to respond to a situation.

E. THE SEGMENTS OF A PSYCHODRAMA SESSION

A psychodrama session consists of three parts: the warm-up process, the action portion and the post-action sharing by the group.[84]

1. The Warm-Up Process

The warm-up process prepares the protagonist for the action portion to follow. There is no set time for the warm-up process. It may take only a few minutes, but it may take quite a long time, depending on the protagonist. The protagonist is invited onto the stage. The director may have a conversation with the protagonist to focus attention on the issue to be explored and identify a place to start. The director may have the protagonist soliloquize. The director may ask the protagonist to "set the scene" – describing the scene where the drama will take place as if the protagonist is there at the time – in the here and now. Regardless of the techniques employed by the director, the idea is to get the protagonist emotionally readied for the action portion.

2. The Action Portion

The action portion is where the critical scenes are enacted. The protagonist is asked to experience the scene (or scenes) in the here and now. A single scene can be explored one time, or the same scene can be explored multiple times with variations. One scene may lead to other scenes – taking the protagonist closer to the source of the issue. The goal is to provide the protagonist with emotional insight that can only

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[82] *Id.* at 148.

[83] *See* BLATNER, *supra* note 32, at 169.

[84] *See* MORENO & MORENO, *supra* note 31, at 237; *see also* MARINEAU, *supra* note 36, at 136; DAYTON, *supra* note 30, at 63 (depicting a diagram of the psychodrama segments). The diagram shows a fourth segment called "analysis." This additional segment was never formally incorporated into the psychodrama process. *Id.* at 61-62. A fourth segment called "processing" is used in psychodrama training to discuss and analyze the psychodrama session.

be gained through action.

[18] *3. Post-Action Sharing By The Group*

The action portion of psychodrama often produces a raw, exposed feeling in the protagonist. Post-action sharing is a critically important component that gives the individual members of the group an opportunity to empathize with the protagonist by sharing their own thoughts, feelings and experiences with the protagonist. The group members do not give advice, but rather express similar thoughts, feelings or experiences the drama produced or reproduced for them. It is a time to appreciate and acknowledge the gift the protagonist gave to the group and to embrace the protagonist.

F. HOW DOES PSYCHODRAMA WORK?

The goal of psychodrama is to discover the emotional truth of the protagonist, allowing the protagonist to gain insight, self-awareness, enlightenment and illumination – in essence, a deeper and richer understanding. In therapy, insight has generally been regarded as an important factor in producing a "cure."[85] But it has also been recognized that intellectual understanding is not enough to cause emotional or behavioral change. Intellectual understanding may come from reading, discussion or passive introspective analysis. "If information alone could bring about therapeutic change, patients could get well by reading their psychiatric case studies and psychological test reports."[86]

In order to be sufficient to evoke change, the process of self-discovery must be emotional, not just intellectual.[87] The protagonist must *experience* the meaning of their feelings in the present.[88] Psychodrama was designed by Moreno to facilitate the emotional insight that can only be accomplished by actual experience and not written or verbal information. To emphasize the focus on experiential learning, he called the self-discovery generated through psychodrama "*action-insight.*"[89] The term describes insight based on overt behavior and not inner thinking.[90] It is learning by doing. "The learning gained through such an experience is passionate and involved, emphasizing the personal participation in the discovery and validation of knowledge."[91]

Kellermann offers this example:

> [19] [I]t would be meaningless to tell an overprotective mother to be less protective. However, if, in psychodrama, she is persuaded to reverse

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[85] KELLERMANN, *supra* note 37, at 85.

[86] S.A. Appelbaum, *Psychoanalytic Therapy: A Subset of Healing*, 25 PSYCHOTHERAPY 201, 205 (1988).

[87] *See* KELLERMANN, *supra* note 37, at 86.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 92.

[91] *Id.* at 90 (citation omitted).

> roles with her child, even for a short time, and to experience intensely how it feels to live under her own protective behaviour, she might change. Such a first-hand awareness may give the protagonist an experience which is sufficiently meaningful to produce a lasting impact.[92]

The objective of action-insight is a search inward. It is the emotional experience of the protagonist, as opposed to the outer world of the senses, that is the goal.[93] Action-insight is non-cognitive in that it does not involve intellectualizing. It is a "gut-level" learning that involves processing at the bodily and perceptual-motor level – a process that favors feeling over thought, emotion over intellect, intuition over analysis.[94] It is a learning that often cannot be translated into words because it involves physical and mental sensations that evolved at a pre-verbal, early child development phase.[95] Psychodrama allows the protagonist to enact or reenact, live or relive, any event, real or imagined, past, present or future, and receive, at a gut-level, the insight that can only be gained by being there.

II. PSYCHODRAMA AND TRIAL LAWYERS

A. THE NATIONAL CRIMINAL DEFENSE COLLEGE

In April of 1975, John Ackerman became the first permanent Dean of what is now known as the National Criminal Defense College ("NCDC").[96] The NCDC organizes and sponsors training seminars for criminal defense [20] lawyers, including an intensive residential seminar in the summer that lasts several weeks. In 1975, the training sessions were purely lecture. But Ackerman became familiar with techniques used at the National Institute of Trial Advocacy ("NITA") that required the attendees to actively participate by performing the various skills being taught. After some modifications, Ackerman adopted the NITA method.

The NITA approach proved successful for the NCDC, but after a few years, Ackerman wanted more:

> [I] saw the good lawyers, . . . not just the name lawyers, but the people who were doing extremely good work around the country in criminal defense work, that they had developed ways to do certain parts of the trial that came out of who they were. And I thought, if we could figure out a

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[92] *Id.* at 90-91.

[93] *Id.* at 91.

[94] *Id.* at 93-94.

[95] *Id.* at 93.

[96] The NCDC, located at Mercer Law School in Macon, Georgia, and sponsored by the National Association of Criminal Defense Lawyers, was originally located in Houston, Texas. The college was originally called the National College of Criminal Defense Lawyers and Public Defenders. The name was subsequently changed to the National College for Criminal Defense. When the College relocated to Georgia, the name was changed again to its current name. Videotape: Interview with John Ackerman, Instructor, The Trial Lawyer's College, in Dubois, Wyo. (Aug. 11, 1998) (transcript on file with author) [hereinafter Interview with Ackerman].

> way to train the people that came to the college to do all the things necessary in trying a criminal case by intuition, by just knowing at some level inside themselves how to go about the process, that instead of training carpenters, we'd be really training lawyers who would be a lawyer for all seasons, so to speak. Because when you're teaching carpenters you have to worry about exceptions. "You do this in almost every case except in this kind of case where, you know, that's the worst thing you could do," or something like that. That's . . . what happens when you are training carpenters. I wanted to figure out a way to teach lawyers to be intuitive and creative and, and to just kind of understand at a . . . gut-level that there were certain ways that would be effective in dealing with the trial of cases and dealing with juries. And I didn't know how to do that.[97]

Ackerman called his friend John Johnson, a sociologist who was originally from Wyoming but by then was living in the State of Washington. Ackerman and Johnson had met through Gerry Spence in 1966, when they worked together for Spence on a case in Wyoming while Ackerman was still a law student at the University of Wyoming. Ackerman brought Johnson to Houston in the spring of 1978 when Spence was in town, and Johnson presented the idea of using psychodrama to teach lawyers.

[21] The next scheduled NCDC program was at St. Simons Island, Georgia in the summer of 1978, where Spence was scheduled to speak. Ackerman, Spence, Johnson and two or three others tried to do a psychodrama session without the benefit of a trained psychodramatist, to see what it was like.

> [A]t that point we saw the potential, but the potential we saw was certainly different from what it has become today. At that time we basically saw it as a way to help people get in touch with themselves, figure out who they were as a human being, to be real, to be open, to be honest, and at that time it hadn't occurred to us that it could be what it is today, and that is a training tool in and of itself, rather than just a way to help people learn about who they were.[98]

Encouraged by the potential they experienced at St. Simons Island, Ackerman, Johnson and Spence scheduled the first ever psychodrama workshop for lawyers – a two-and-a-half day seminar at the Snow King Inn in Jackson Hole, Wyoming, in the fall of 1978. They hired a professional psychodramatist to direct the sessions. The brochure called the seminar "The Criminal Trial: A Psychodramatic Analysis," and it mentioned Gerry Spence, who had already achieved national recognition. Fifty to sixty people signed up. The experiment was successful.

> [W]e got through that two-and-a-half days and the feedback we got from

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[97] *Id.*
[98] *Id.*

> the people that had come was that it was just an absolutely fantastic experience. And in addition to the personal psychodramas, we dealt a lot with problems people were having with cases they were involved in, problems with judges, problems with clients, things like that. And we were able to work through some things there that worked out quite well.[99]

A series of psychodrama programs were scheduled from 1978 until 1983 through the NCDC, using a psychodramatist named Don Clarkson.[100] The psychodrama sessions were run as separate programs; they were not integrated into the NCDC summer training program. When Ackerman's tenure at the college ended in 1983, the interest in using psychodrama began to wane. Only two or three psychodrama programs were scheduled after Ackerman left.

By 1988, psychodrama was no longer used as a training method at the NCDC. However the idea of using psychodrama to train trial lawyers remained alive. When Gerry Spence decided to begin his own training [22] program for lawyers, he called his friend John Johnson and they involved Don Clarkson. Clarkson called his colleague, John Nolte, to participate as a psychodramatist. On July 31, 1994, a new experiment began: the Trial Lawyer's College.

B. GERRY SPENCE'S TRIAL LAWYERS COLLEGE

In 1994, Gerry Spence started an intensive trial advocacy course at his 34,000-acre Thunderhead Ranch, located twenty miles east of the small town of Dubois, Wyoming. Forty-eight lawyers are selected each year from hundreds of applicants to stay at the ranch for twenty-one days and to experience psychodrama as a method of trial preparation.[101] Spence calls the course "the Trial Lawyer's College" and he describes it in his 1998 book, *Give Me Liberty*:

> Let me tell you a story: . . . We are in our fifth year at our nonprofit Trial Lawyer's College (TLC), a pilot program we have organized and which we conduct every year at my ranch for training trial lawyers for the people. . . . The first step in the program is to give the [attendees] the opportunity to become human again. . . . At our Trial Lawyer's College, both [attendees] and [faculty] are given the opportunity to rediscover themselves. They are put through days of psychodrama by experienced psychologists. . . . [T]hey learn how to crawl into the hides of their clients, to experience their pain, to understand the witness on the witness stand, even to understand and care for their opponent. In the course of their training, they become the judge, and even feel how it is to be the

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[99] *Id.*

[100] Don Clarkson is a licensed independent clinical social worker and certified psychodramatist. He is on the staff of Howard University Counseling Service and is an Associate Professor in the Howard University School of Social Work in Washington, D.C.

[101] From 1994 through 1999, the Trial Lawyer's College was a thirty-one day program. In 2000, the program was condensed to twenty-one days.

> juror. . . . By the end of their experience at TLC, we have witnessed a miracle. Nearly every attendee has entered into the most sacred realm of human experience – that place I call personhood. They have learned to tell the truth, not only about their case but about themselves. They have learned the power of credibility.[102]

[23] Spence revived and expanded Ackerman's idea of using psychodrama to train trial lawyers.[103] Not surprisingly, Ackerman is now on the teaching faculty of Spence's Trial Lawyer's College.

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[102] GERRY SPENCE, GIVE ME LIBERTY: FREEING OURSELVES IN THE TWENTY-FIRST CENTURY 303-05 (1998).

[103] Interview with Ackerman, *supra* note 96.

III. PSYCHODRAMA AND TRIAL SKILLS TRAINING

The trial of a case is telling the jury the client's story.[104] We can only tell what we know. Traditional methods focus on telling the facts as they have been related to us. Psychodrama is a method that enhances empathy by permitting us to experience the facts vividly and to discover how those facts were experienced.[105] Psychodrama allows us to find the true story – to discover important facets of our story that were previously overlooked.

A. DIRECT-EXAMINATION: FINDING THE STORY

1. Lawyer Preparation

In direct-examination, we tell our client's story through the witnesses, each witness responding to the questions asked by the lawyer. Because the lawyer controls the information by the very questions asked, the story is revealed as the lawyer understands it. If the lawyer has only a limited understanding of the events, a limited story will be revealed. Typically the lawyer knows the story through informal interviews, witness statements or depositions. The lawyer knows only the facts reported by the witnesses. The lawyer was not there when it happened. The lawyer did not observe the event, much less experience the event as the witness experienced it.

Through psychodrama, the lawyer is able to experience the event. The lawyer can reverse roles with the witness and experience the event from the vantage point of the witness. The lawyer will have access to the emotional content involved in the story that is not otherwise fully available. The lawyer will have a deeper understanding of the truth involved – an understanding [24] grounded in empathy, not sympathy.[106] The lawyer's deeper understanding of the witness' story will suggest different questions – better questions.

One psychodramatic tool that can be used to accomplish this task is the reenactment – a psychodrama that recreates the event the way it is remembered by the witness. Let me give you an example from a recent psychodrama session

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[104] Philip N. Meyer, *Will You Please Be Quiet, Please?: Lawyers Listening to the Call of Stories*, 18 VT. L. REV. 567, 567-68 (1994).

[105] *See* BLATNER, *supra* note 32, at 6.

[106] Lynne Henderson has defined "empathy" as including: "(1) feeling the emotion of another; (2) understanding the experience or situation of another . . . ; and (3) action brought about by experiencing the distress of another . . . ." Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1579 (1987). Psychodrama is a tool that provides a means of attaining parts (1) and (2) of Henderson's definition. The availability of this tool may also make it more likely that the third segment will be achieved, i.e. that understanding will lead to action in the form of decision-making by jurors and judges. The appropriateness of the third portion, of including emotions or sympathy or empathy (as it is varyingly described, *see* Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1 nn.15-39 (1997)) in decision-making has been the subject of considerable debate. *See, e.g.*, Susan Bandes, *Empathy, Narrative, and Victim Impact Statement*, 63 U. CHI. L. REV. 361 (1996); Feigenson, *supra*; Henderson, *supra*; Massaro, *supra* note 11; Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737 (1997).

conducted at the Trial Lawyer's College.[107] A lawyer was preparing for a medical malpractice trial involving a brachial plexus injury – a birth injury caused by pulling too hard on the head and neck of the infant during delivery. The result of the injury was permanent paralysis of one of the arms. This lawyer was working on the direct-examination of her client with a group of about twenty that consisted primarily of other trial lawyers. She practiced her direct-examination in front of the group. The direct-examination of the mother failed to convey a sense of the excitement, urgency, panic and horror that was likely involved immediately before, during and after the delivery. The questions by the lawyer were clinical, revealing only hard, factual information.

The lawyer was asked by the group leader, the director, to become a *protagonist* in a psychodrama. She was asked to reverse roles with her client. She agreed. An area was cleared in the center of the room. This area became the *stage*. The other members of the group became the *audience*. They sat in chairs arranged in a semicircle in front of the stage. The lawyer/protagonist was asked to walk around on the stage and perform a *soliloquy* as her client. She spoke her thoughts and feelings about how it feels to be a woman pregnant with her first child and late in the third trimester. As she spoke she placed her hand on her stomach and imagined her stomach large and round and the feeling of the baby moving inside. The soliloquy allowed her to *warm up* to the role before moving to the first scene.

[25] The first scene involved the lawyer/protagonist, in the role of her client in the car on the way to the hospital. Four chairs became improvised props. The chairs, arranged in two rows of two, became the car – the first row for the front seat and the second row for the back seat. A member of the audience was recruited to be an *auxiliary* and to play the role of the client's husband as he drove the client to the hospital. This scene allowed the protagonist to further warm up to the role in preparation for the critical scene.

When they arrived at the hospital, other audience members were recruited to serve as auxiliaries in the roles of doctors, nurses and other health care professionals. The reenactment took place in a room that was used as an exercise room. There was a variety of exercise equipment in the room including a weight bench and weight belts. The weight bench became a hospital bed as the lawyer/protagonist, still in character, was moved from the car to the delivery room. She clutched her husband's hand and expressed the pain and excitement of the moment. As the fetal monitors began to sound their alarm, her excitement turned to panic. Audience members mimicked the sound of the monitors. Doctors began to bark orders and the health care professional hurried in response. The lawyer/protagonist expressed fear and confusion. Finally, the baby was delivered and the panic dissipated and was replaced by the joy of seeing her firstborn child – a girl. A weight belt wrapped in a sweatshirt represented the baby. As the mother unwrapped the baby, she discovered the arm that was limp. She went through the motions of picking up the tiny arm and

[107] Psychodrama sessions are confidential. Only the protagonist is permitted to describe the psychodrama session without consent. The protagonists involved in the psychodrama sessions described in this article have reviewed the descriptions for accuracy and have given their consent that these descriptions be used.

releasing it, only to see it fall lifeless against the crying newborn. Her joy was replaced by anguish. She began screaming, "What's wrong with my baby? What have you done to my baby?" At the direction of one of the doctors, a nurse forcibly took the baby from the mother. The childless mother sobbed as her husband made a futile attempt to console her.

With the emotion of the scene still fresh, the lawyer was asked to try her direct-examination again. The direct-examination that followed was dramatically different than the first. It revealed the mixture and rapid change of emotion experienced by the client. It took on a quality of being told in the present tense – the here and now. It effectively conveyed the emotional content of the story. The lawyer understood not only the facts, but also how the client experienced those facts. A wealth of new material was now available to the lawyer for use in the direct examination. The lawyer was now in a position to ask questions that revealed not only the facts, but also how the client experienced those facts.

[26] *2. Witness Preparation*

Often it is the witness who is having difficulty accessing the emotional truth. During the direct-examination she tells what should be a compelling and emotionally charged story in clinical terms or in a monotone that belies the subject matter. The subject and the delivery are incongruous. It is bad enough that the jury will not get the full impact of the story. It is worse if the jury concludes that the witness is uncaring and emotionally detached. It could be disastrous if the jury concludes that the witness is simply lying.

Psychodrama permits the witness to relive the emotions in a safe environment. The psychodramatic experience serves to prepare the witness for trial. The exercise does not mask the truth with trumped-up emotion, but allows the witness to tell more of the truth by releasing the pent-up emotion. "Protagonists are not manipulated into expression, but helped to overcome those resistances which block their spontaneity."[108] The witness is now able to articulate the feelings because the feelings have been brought from a subconscious level to a conscious level. Unspoken thoughts can now be expressed.[109]

B. CROSS-EXAMINATION: FINDING THE STORY

As the phrase suggests, cross-examination is typically interrogation that is "cross," or as Webster defines the term, "showing ill humor or annoyed."[110] We cross-examine the witness out of our fear. The witness is called by the other side to destroy our case. Despite all of the discovery available to us, the witness is still unpredictable. More often than not, we set about the task of destroying the witness' credibility by verbally attacking the witness in a harsh and demeaning tone. The problem with this approach is that the jurors are not motivated out of the same sense

[108] KELLERMANN, *supra* note 37, at 83.
[109] *See* BLATNER, *supra* note 32, at 9.
[110] JEANS, *supra* note 18, at 414.

of fear. They do not want the witness to be attacked simply because the witness was called as a witness by one party to this lawsuit and not the other. The jurors are searching for the truth. What is the truth of this particular witness as it relates to the case?

Psychodrama is the search for the truth through dramatic methods. A simple role reversal will allow the lawyer to see the witness not as an enemy to be destroyed, but as a human being whose motivation is to be revealed. The lawyer must experience the world as the witness experiences the world – not just think about it, but also become the witness.

Consider the following example:

> [27] You represent Mike O'Loughlin who is accused of selling drugs. The prosecution's chief witness is Rose Gray, who now admits to being a partner of O'Loughlin's in the drug trade. When first arrested, she denied knowing the defendant. She explained on direct examination that she lied to the police "to keep from going to jail." She is a single mother of two daughters, ages five and three. The penalty for selling drugs is twenty years. Ms. Gray has agreed to testify against the defendant in exchange for the prosecutor's agreement to charge her with possession only, rather than for the sale of drugs, and to recommend a three-year suspended sentence. Ms. Gray was convicted of possession of a controlled substance eight years ago and was sentenced to one year in the penitentiary. She was released after three months. [111]

A typical cross-examination might go as follows:

> Q: Ms. Gray, this is not the first time you have been involved with the authorities as a result of drugs, isn't that true?
> A: Yes.
> Q: In fact, you were convicted of possession of a controlled substance eight years ago, isn't that true?
> A: I know it was a while ago, yes.
> Q: You received a sentence of one year, correct?
> A: Yes, but I was released early.
> Q: You served three months in the penitentiary for women, true?
> A: Yes, that's right.
> Q: You understand that the prosecutor has the option of charging you with drug dealing?
> A: I understand.
> Q: If convicted you would go back to the penitentiary, isn't that true?
> A: Yes.
> Q: This time for twenty years?

[111] The example used here was developed at the Trial Lawyer's College. It is described in more general terms in another article. *See* James D. Leach et al., *Psychodrama and Trial Lawyering*, TRIAL, Apr. 1999, at 46.

A: That's my understanding.
Q: But the prosecutor offered you a deal, isn't that true?
A: Yes. [28]
Q: If you testify against Mike, they will not charge you with dealing drugs, true?
A: That's what they said.
Q: They will only charge you with possession of drugs, isn't that true?
A: Yes.
Q: By testifying against Mike, you are guaranteed that you will not go to prison for twenty years, right?
A: By telling the truth, yes.
Q: Having now testified, you will likely receive a three-year suspended sentence, true?
A: That will be up to the judge.
Q: A three-year suspended sentence is what the prosecution will recommend, right?
A: That's right.
Q: When you were arrested for dealing drugs, you denied knowing Mike, true?
A: Yes, I was scared.
Q: Now you say that he was your partner in this drug operation.
A: That's right.
Q: You lied to the police?
A: Yes, I didn't want to go to jail.
Q: You lied to keep from going to jail?
A: Yes.
Q: And that is your goal here today – to keep from going to jail?
A: I'm not lying.
Q: You entered into this deal with the prosecutor to keep from going to jail for twenty years, isn't that true, Ms. Gray?
A: I agreed to tell the truth, yes.
Q: You will lie to keep from going to jail, isn't that true?
A: I'm not lying.
Q: We have already established that you have lied to keep from going to jail, true?
A: Yes, but I'm not lying now.
Q: No further questions.

This approach is intended to discredit the witness by revealing the witness's motivation for lying. The witness's motivation is brought to the jury's attention by forcing the witness to acknowledge the motivation. The [29] approach will usually require a stern attitude and some persistence to overcome a predictably reluctant witness.

There are two shortcomings with this approach. First, this approach explores only the intellectual truth of the witness's circumstances, but fails to explore the

emotional truth. The jury has been supplied with the facts, but has not been shown how the witness experiences those facts – how they affect her emotionally. Second, the approach takes unnecessary risks of offending the jury. By focusing only on the factual truth and ignoring the emotional truth, the lawyer appears cold and uncaring, even hostile, to the witness.

A different approach could be developed using psychodramatic techniques. In preparing for the cross-examination, a lawyer reversed roles with the witness and experienced what it might feel like to be a young mother facing prison. The insight generated by performing the exercise resulted in the following cross-examination delivered in a soft voice:

Q: Ms. Gray, I understand you have small children?
A: Yes.
Q: Daughters?
A: Yes.
Q: Could you please tell the members of the jury their names and ages?
A: Sure. Sarah is five and Taylor is three.
Q: Do you have any help raising your children?
A: No.
Q: Their father does not help you?
A: No, we haven't seen him in quite some time.
Q: It must be difficult for you?
A: We do okay.
Q: Well, if you go to the penitentiary for twenty years, who would look after your little girls?
A: I don't know.
Q: That must worry you quite a bit.
A: Yes, it does.
Q: How old will Taylor be in twenty years?
A: Twenty-three, I guess.
Q: She will be a grown woman?
A: Yes.
Q: What about Sarah?
A: She'll be twenty-five.
Q: If you go to prison for twenty years, your children will grow up without you? [30]
A: Yes.
Q: That must be frightening for a young mother?
A: (No response.)
Q: You will not take them to school?
A: No.
Q: You will not see them in school plays?
A: No.
Q: You will not read to them at night or tuck them into bed?
A: No.

Q: You will not see them off to the high school prom, or attend their high school graduations?
A: No.
Q: You will not be there to take care of them when they are sick?
A: Not if I'm in prison, no.
Q: They may even get married while you are away in the penitentiary?
A: They could.
Q: You would like to be there for them, isn't that true?
A: Of course I would.
Q: You have been to prison before?
A: Yes.
Q: You know what it is like there?
A: Yes.
Q: You were scared while you were there?
A: Sometimes.
Q: Scared of the other inmates?
A: Some of them.
Q: There is no privacy in prison?
A: Not much.
Q: You sleep in the same room with other inmates?
A: Yes.
Q: Shower with other inmates?
A: Yes.
Q: The guards tell you when you can eat?
A: Yes.
Q: When you can sleep?
A: Yes.
Q: When to take a shower?
A: Yes.
Q: You can only have visitors on specified days? [31]
A: Yes.
Q: And for specified times?
A: Yes.
Q: In a large and noisy room?
A: Yes.
Q: Sometimes nobody comes to visit?
A: (No response.)
Q: You count the days until you can go home?
A: Yes, if you know how long it will be.
Q: You don't want to go back there, isn't that true?
A: That's true.
Q: Not for twenty years?
A: (No response.)
Q: There is a way you can avoid all that?
A: Yes.

Q: You understand that if you testify for the prosecutor in this case, the prosecutor will charge you with simple possession and not dealing in drugs?
A: That's what he said.
Q: And you believe him?
A: Yes.
Q: He will recommend a three-year suspended sentence?
A: Yes.
Q: That means you may not have to go to prison at all, isn't that true?
A: Yes.
Q: And you can go home to Sarah and Taylor?
A: Yes.
Q: Wouldn't that be wonderful?
A: Yes.
Q: To have your life back?
A: Yes.
Q: And so you accepted that deal?
A: Yes.
Q: Well Ms. Gray, even Mike can understand why you are doing this. I don't have any more questions.

The goal of discrediting the witness is accomplished to a greater extent here than in the first example. First, not only are the facts presented, but how the witness emotionally experiences those facts has also been explored. The jurors can empathize with the witness while concluding that she cannot [32] be believed. She has too much to gain and too much to lose to be a credible source of information. Second, the lawyer is perceived as kind, compassionate and understanding, and the risk of offending the jurors has been reduced or eliminated.

The material generated out of the role reversal allows the lawyer to approach the witness, not as an enemy to be destroyed, but as a human being whose motivation is to be understood. The lawyer has looked at the situation from the witness's vantage point, through the witness's eyes and has felt what it must be like to be her. The lawyer spent time in preparation for the cross-examination, not simply by playing the role of the witness, but by becoming the witness psychodramatically, feeling the pressure of testifying or going to prison, and agonizing over the prospect of losing her children and having them lose her.

C. OPENING STATEMENT AND CLOSING ARGUMENT: FINDING THE STORY

The opening statement and the closing argument are the times during the trial when the story can be told, not in question-and-answer form, not piecemeal, but as a narrative. It is an opportunity to tell a complete story, passionately and persuasively. We have already discovered that the facts are only a part of what happens. The way those facts are experienced is the rest of the story. The story is not complete and will

lack human drama and compassion if the experience of the facts is ignored.

Lawyers often visit relevant scenes in preparation for trial.[112] It may be the scene of the alleged crime – the intersection where the automobile accident happened, or the machine that caused the plaintiff's injuries. This experience permits the lawyers to gain insight and understanding about the facts of the case so they can accurately and richly convey those facts to the jury. However, most lawyers do not visit the emotional aspects of the story. They do not experience the events as experienced by the witnesses or the client. Psychodrama provides an opportunity to visit the emotional aspects of the case, to experience the facts. The lawyer is then in a better position to tell the jury not only what happened, but how it felt. Let me give you an example:

> Rod received a telephone call at home. His wife, Jan, and their two sons had been involved in an automobile collision on the interstate highway. They had been taken to a hospital more than an hour away. As Rod frantically prepared to [33] leave for the hospital, he received a second telephone call. His youngest son, Paul, was dead. Paul was only thirteen years old.
>
> When Rod arrived at the hospital, he was asked to identify his son's body. He waited while they prepared Paul. Finally, a woman came for Rod, and escorted him down a long hallway to a large stainless steel door. The woman opened the door and started to lead Rod inside. Rod asked the woman if he could go in alone. She agreed, but reassured Rod that she would be nearby if he needed her. Rod entered the room alone. He found Paul on a table in the center of the room. Paul was fully dressed, including his winter coat. Rod cried, and for the next twenty minutes, said goodbye to his son.

Those are the sad facts – a small, but important, part of a tragic story. The trial lawyer had to relate this part of the story in court as an element of damages in the wrongful death case. The lawyer could have done an adequate job with these facts alone. However, to uncover all of the available material to choose from in constructing the opening or the closing, the facts are only the beginning. The lawyer must understand how those facts were experienced by Rod. After reversing roles with Rod, the lawyer reenacted the scene psychodramatically. After the psychodrama session, the lawyer described Rod's experience at the hospital:

> The white walls, the white tile floor and the florescent lights gave the narrow hallway the appearance of a tunnel of light described by survivors of near death experiences. Rod had the metallic taste of panic in his mouth. Each heavy step required a deliberate act on his part. Twice he felt his consciousness slip away, but only for an instant. The bright

[112] *See, e.g.*, FED. R. CIV. P. 34; FED R. CRIM. P. 16 (permitting entry on land or other property for inspection and other purposes).

hallway faded to black but quickly returned again. It was as if he had been asleep for a time, but the interval of unconsciousness was so brief he did not have time to fall. Rod steadied himself by touching the wall with his left hand as he continued to walk. The woman looked at him and asked if he were okay. Rod lied, "I'll be fine." He needed to see Paul. He was afraid that she might not take him to see Paul if she knew how weak and nauseated he felt. He avoided her eyes and continued his methodical march.

They arrived at a large stainless steel door. For the first time since the telephone call, Rod realized that he took [34] comfort in the thought that the doctors might be mistaken. Maybe Paul was not dead. He knew that seeing Paul would make the news more real and extinguish the last of his unrealistic hope. The woman placed her hand on the door handle, but before turning it, looked at Rod – her sad eyes asking if he could handle this. He nodded to her and she opened the door. She started inside, but paused when she realized that Rod did not follow. "Can I have some time alone with him?" he asked. "Of course," she said. She would be right outside if he needed her. She backed away and Rod entered the morgue of Lima Memorial Hospital alone.

There he was – lying on a table in the center of the room – fully dressed. He was even wearing his winter coat. He looked like he was sleeping. Rob approached and looked down at his son. Paul's image blurred as Rod's eyes filled with tears. Rod stroked Paul's soft brown hair and gently repeated, "Oh, Paul; oh, Paul." It was so cold in there. Paul's hair felt cold to the touch. Rod thought, "It's so cold in here. I'm glad he's wearing his coat."

The role reversal and reenactment permitted the lawyer to experience the facts rather than simply learn about them. The story, whether told in opening or closing, is rich with the emotional detail that can only be accessed by the experience.

D. EXPERIENCES WITH PSYCHODRAMA IN THE CLASSROOM

One of the challenges for trial advocacy teachers is to keep everyone engaged in the class while working with one or two students at a time. Psychodrama can be useful in accomplishing this task. First, the size of the typical trial advocacy class is relatively small, ranging from ten to twenty students. This is an ideal number for a psychodrama session.[113] Second, trial advocacy classes are often scheduled in three-hour blocks, which provide sufficient time to use psychodrama.

Psychodrama is not a substitute for skills training in the classroom. Students must learn fundamental techniques – how to deliver a proper opening statement and

[113] *See* KELLERMANN, *supra* note 37, at 26.

how it differs from closing argument, how to ask leading questions on cross-examination, how to impeach a witness with a prior inconsistent statement, and so forth. However, psychodrama is a valuable tool [35] in helping the students discover the most effective story to tell and in enhancing their presentations.

1. Reenactments to Enhance Storytelling

Since 1990, I have taught trial advocacy at the University of Dayton School of Law and the University of Akron School of Law. At some point during the semester, each student is asked to relate a true story from his or her own experience. The stories they choose vary. Some select comical stories while others opt for more serious, personal stories. The way in which they tell their own stories is compared to the way in which they present opening statements or closing arguments. For their personal stories the students typically stand before their classmates and relate the events with great physical involvement. Their gestures reveal that they are describing events as they are envisioning or "seeing" them in their mind's eye.

For example, one student used her hands to trace the outline of a pony she was describing. With her arms out in front of her, hands raised just above eye level, palms facing down, she defined for the class the height of the pony's back. It was apparent that she was envisioning the pony as she described it for us. She even honored the physical space the pony occupied in the room by stepping around the space rather than walking through it. Another student, telling a story that involved standing waist-deep in a pool of water, unconsciously used her hands to touch the surface of the water and to swish the water back and forth with her hands as she related the events of her story. In another story, a student described pulling his friend back from the street and out of the path of a passing car. In doing so he mimicked the quickness and physical characteristics of his reaction by quickly taking a step forward, reaching his hands out, pulling his hands back and stepping back to his original position. This movement allowed the audience to see how it happened.

The class invariably accepts these personal stories as true, in part because the physical involvement is consistent with the words. The student appears to be describing the event as she is reliving it in her mind. Her physical movements place the objects or define the action, and permit the audience to relive it with her. The stories are credible because the student is describing it as it is happening in her mind.

When the same students are asked to present an opening statement or closing argument, the presentations generally lack physical involvement. For example, the height of a brick wall is described in terms of feet without setting the scene physically by touching the top of the wall. A doorway is described verbally without the physical movement that would outline and place that doorway in the [36] room. Movements of the characters in the story are described without the benefit of a physical demonstration. Having never seen the object or experienced the movement, the student does not envision the object to be described or relive the movement.

These students are then asked to participate in a psychodramatic reenactment of the case they are arguing. They assume the role of a character in the story through a simple role reversal and then physically act out the scene to be described. Other

students in the class play the other required roles. After the reenactment, the students are asked to give the opening statement or closing argument again. This time physical involvement joins the language and the events are told with the same degree of animation as the personal stories. The students now have a sense of having been there, and their performances reflect the quality of reliving the story rather than just retelling it.

2. Reenactments to Select the Factual Theory

The students are given simulated cases to try during the course of the semester. The facts in these cases, as in real cases, are in dispute. With conflicting evidence, the students are left to select a factual theory among two or more possible theories. Reenactments have been very helpful in selecting the factual theory that is most persuasive. A factual theory that was attractive at first has proven incredible when the students tested the theory by physically going through the motions.

3. Role Reversals to Gain Insight

Students who are having difficulty embracing a particular client or directing or cross-examining a particular witness are asked to assume the role of the client or witness through a simple role reversal. Through soliloquy, interview or reenactment, the student gets a better sense of the client or witness. This insight is often all that is required to work through the impasse.

IV. DO PSYCHODRAMA SESSIONS REQUIRE A TRAINED PSYCHODRAMATIST?

Psychodrama has not gained widespread acceptance as a *therapeutic method.*[114] In fact, there has been a great deal of controversy concerning the use of psychodrama as a therapeutic tool. Whether psychodrama is effective for therapy is beyond the focus of this article. The issue here is the usefulness of psychodrama for the non-therapeutic application of trial preparation and [37] trial.[115] However, the therapeutic use of psychodrama does raise concerns that the use of psychodrama by someone other than a therapist trained in psychodrama would be inappropriate and could result in unintended consequences, such as psychological harm to the participants. For example, reenactment of a traumatic event in the client's life, such as the death of a loved one, or rape, could have the effect of re-traumatizing the client.[116]

In an article for the American Trial Lawyers Association's *Trial Magazine*, jury

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[114] *See* BLATNER, *supra* note 32, at 32 (discussing "Resistance to Psychodrama").

[115] Kellermann argues that psychodrama is a form of treatment to be used by professionally trained clinicians who attempt to treat more or less disturbed clients. He does not suggest, however, that non-therapeutic applications are inappropriate. He would simply like to distinguish non-therapeutic applications and give them a different name, such as "creative dramatics." *See* KELLERMANN, *supra* note 37, at 18-19.

[116] *See* Leach et al., *supra* note 111, at 48.

consultant Amy Singer, Ph.D., stated:

> Psychodrama is one of the psychologist's most powerful tools for quickly penetrating someone's defenses, while at the same time enabling the person to break through denial and reveal highly personal truths. It is an ideal technique to help the injured client – particularly young abuse victims – get in touch with painful thoughts and feelings regarding his or her own tragedy, and to reveal these feelings to others – first to the attorney and later to jurors.
>
> Since psychodrama is a complex therapeutic activity, a trained psychologist licensed to practice psychodrama is necessary to organize and direct psychodrama sessions with clients. Attorneys should not attempt to organize a psychodrama session by themselves.[117]

In direct response to Dr. Singer's statement, James Leach, John Nolte and Katlin Larimer[118] wrote:

> Psychodrama is a powerful and complex methodology that requires extensive training to master, and psychodramatic psychotherapy should only be conducted by a credentialed mental health professional. Still, psychodrama has many [38] nonclinical applications that easily include role reversals and can include simple reenactment of the client's experiences.
>
> A lawyer with sufficient training in psychodrama can and should use it for the purposes outlined in this article. If, however, the lawyer wishes to reenact a traumatic event in the client's life, such as a death, a rape, or abuse of a child, the lawyer should seek assistance from a professional psychodramatist to avoid retraumatizing the client. If the client is being treated by a mental health professional, the lawyer should consult the professional to determine whether to use psychodrama.[119]

Both articles would suggest that involving severely traumatized clients and witnesses as protagonists in a psychodrama session concerning the subject matter of the trauma presents certain risks to the protagonist. There seems to be a consensus that this situation would demand the skill and knowledge of a professionally trained psychodramatist to avoid the risk of inflicting further psychological harm to the

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[117] Amy Singer, *Connecting with Severely Injured Clients*, TRIAL, June 1998, at 50.

[118] James D. Leach practices law in Rapid City, South Dakota, and has extensive training in psychodrama. John Nolte, Ph.D., is a psychologist in Hartford, Connecticut, who studied psychodrama under J.L. Moreno. Katlin Larimer, of Omaha, Nebraska, is a psychotherapist with certification in psychotherapy. All three authors are on the teaching faculty of Gerry Spence's Trial Lawyer's College, where psychodrama is used extensively in the training of trial lawyers.

[119] Leach et al., *supra* note 111, at 48.

protagonist. However, Singer's blanket statement that, "[s]ince psychodrama is a complex therapeutic activity, a trained psychologist licensed to practice psychodrama is necessary to organize and direct psychodrama sessions with clients," and that "[a]ttorneys should not attempt to organize a psychodrama session by themselves," apparently leaves no room for psychodrama sessions involving less extreme circumstances.[120] Leach, Nolte and Larimer disagree with Singer. They would not only permit lawyers with psychodrama experience to use psychodrama with clients in the absence of a psychologist, they encourage it.[121]

The conflict may stem from a fundamental difference of opinion concerning what psychodrama is and what it is not.[122] Singer views psychodrama as a complex therapeutic activity.[123] Certainly this view would lend itself to a heightened concern about the appropriateness of using psychodrama in the absence of a psychologist. However, Nolte, while acknowledging that psychodrama can be used in therapy, has a much broader view of the method:

> [39] Because it was originated by a psychiatrist and because he developed it largely within the setting of a mental hospital, psychodrama is widely thought of as "a method of psychotherapy." This is misleading at best and has had a strong negative influence upon the development of the non-clinical applications of the method. It is more accurate to consider psychodrama as a method or system of communication, and psychotherapy as one of its uses.[124]

Viewed as a method or system of communication there will be less reservation about using the method.

A few ideas emerge from the debate. When the lawyer is the protagonist and is using various psychodramatic techniques to gain a better understanding of the client and witnesses, the risks are minimized. Even in a reenactment, the lawyer, having not experienced the trauma in the first place, is not at risk of being re-traumatized in the relatively safe environment of the psychodrama session. Similarly, when the lawyer is using psychodrama to understand how various jurors or the judge might view the case, the concerns raised by Singer are not implicated. It is when the client or the witness is involved in the psychodrama session that the issue arises. Being aware of the issue permits the lawyer to exercise judgment about when a certified psychodramatist should be used.

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[120] *See* Singer, *supra* note 117, at 50.

[121] *See* Leach et al., *supra* note 111, at 48.

[122] Kellermann argues that psychodrama is a form of treatment. While he admits that non-therapeutic applications are appropriate, he distinguishes non-therapeutic applications by giving them a different name. *See* KELLERMANN, *supra* note 37, at 18-19. However, the issue cannot be dismissed as merely a matter of semantics. Regardless of the terminology used, the issue remains whether psychodrama, by any name, presents risks to participants when used by attorneys who have only a modest amount of psychodrama training.

[123] *See* Singer, *supra* note 117, at 53.

[124] John Nolte, Psychodrama (1998) (unpublished manuscript, on file with author).

CONCLUSION: THE STORYTELLER IN TRIAL

The trial of a case is the telling of a story. Therefore, to be good trial lawyers, we must be good storytellers.[125] The problem is that most of us were hampered in our development as storytellers by an inadequate and counterproductive legal education – one that not only failed to teach us how to tell stories, but also dictated that we dismiss emotion and empathy in favor of formal legal principles and cold legal analysis.[126] Upon graduation from law school, we can list the elements of a tort, but cannot embrace and convey the human tragedy behind the cause of action. To become good storytellers and effective trial lawyers, we must now accept what we once learned to reject, to take up what we once set aside – the human drama, how the experience was lived and felt by the people involved.

[40] We can only tell what we know. Our discovery of the story may begin with the facts, but the underlying story, the real story, is in the way those facts were experienced by our client and the witnesses.[127] Psychodrama is a discovery tool that allows us to access the experience – to see things as they saw them, to feel it as they felt it – and then use what we have discovered in every phase of the trial. We can then present our case to the jury in a way that reveals not only what happened and why it happened, but also how it was experienced – the inner motive forces involved.[128] In doing so we will bridge the gap between the reason to act and the action itself. The jury can then understand and relate to our client and the witnesses on an emotional level. The jurors will recognize the experience as parallel to their own. They may not have experienced the precise situation described in the trial, but they have experienced similar emotions. They have now been given sufficient input to truly empathize with the characters involved and accept the story as true. The story as lived, felt and experienced is not only engaging – it is ultimately believable.

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[125] *See generally* McKenzie, *supra* note 2.

[126] *See* Cramton, *supra* note 8, at 248; Drell, *supra* note 9, at 70; Massaro, *supra* note 11, at 2103.

[127] "Psychodrama and Telling the Story" Brochure, *supra* note 28.

[128] *See* STANISLAVSKI, *supra* note 21, at 244.

STORYTELLING FOR OPPOSITIONISTS AND OTHERS: A PLEA FOR NARRATIVE

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STORYTELLING FOR OPPOSITIONISTS AND OTHERS: A PLEA FOR NARRATIVE

*Richard Delgado**

INTRODUCTION

Everyone has been writing stories these days. And I don't just mean writing *about* stories or narrative theory, important as those are.[1] I mean actual stories, as in "once-upon-a-time" type stories. Derrick Bell has been writing "Chronicles," and in the *Harvard Law Review* at that.[2] Others have been writing dialogues,[3] stories,[4] and metastories.[5] Many others have been daring to become more personal in their writing, to inject narrative, perspective, and feeling — how it

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1. *See* ON NARRATIVE (W. Mitchell ed. 1981); 1 & 2 P. RICOEUR, TIME AND NARRATIVE (1984-85); Cover, *The Supreme Court, 1982 Term — Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983); Des Pres, *On Governing Narratives: The Turkish-Armenian Case*, 75 YALE REV. 517 (1986); West, *Jurisprudence As Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 146 (1985) [hereinafter *Jurisprudence As Narrative*]; *see also* J. ADAMS, THE CONSPIRACY OF THE TEXT: THE PLACE OF NARRATIVE IN THE DEVELOPMENT OF THOUGHT (1986); J. CAMPBELL, THE POWER OF MYTH (1988) (transcript of interview with Bill Moyers); T. LEITCH, WHAT STORIES ARE: NARRATIVE THEORY AND INTERPRETATION (1986).

2. D. BELL, AND WE ARE NOT SAVED (1987) [hereinafter AND WE ARE NOT SAVED]; Bell, *The Supreme Court, 1984 Term — Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985) [hereinafter *The Civil Rights Chronicles*].

3. *E.g.*, Delgado, *Derrick Bell and the Ideology of Race Reform Law: Will We Ever Be Saved?* (Book Review), 97 YALE L.J. 923 (1988) [hereinafter *Saved?*]; Delgado & Leskovac, *The Politics of Workplace Reforms: Recent Works on Parental Leave and a Father-Daughter Dialogue* (Book Review), 40 RUTGERS L. REV. 1031 (1988); *see also* B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 238-39 (1980) (dialogue between a disadvantaged and an affluent person on the notion of equal sacrifice).

4. *E.g.*, I NEVER TOLD ANYONE, WRITINGS BY WOMEN SURVIVORS OF CHILD SEXUAL ABUSE (E. Bass & L. Thorsten eds. 1983); Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 401-02 (1987) [hereinafter *Alchemical Notes*]; *see also* 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); Meisol, *A New Genre of Legal Scholarship: Storytelling Feminist Takes on the Fundamentals of Law*, L.A. Times, Oct. 7, 1988, part V, at 8, col. 1 (quoting Robin West: "We need to flood the market with our own stories until we get [the] point across.").

5. *E.g.*, Bracamonte, *Foreword: Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297, 297 (1987); *Alchemical Notes*, *supra* note 4, at 401. *See generally* J. GARDNER, THE ART OF FICTION 82-94 (1984) (defining and giving examples of metafiction).

was for me — into their otherwise scholarly, footnoted articles[6] and, in the case of the truly brave, into their teaching.[7]

Many, but by no means all, who have been telling legal stories are members of what could be loosely described as outgroups,[8] groups whose marginality defines the boundaries of the mainstream, whose voice and perspective — whose consciousness — has been suppressed, devalued, and abnormalized. The attraction of stories for these groups should come as no surprise. For stories create their own bonds, represent cohesion, shared understandings, and meanings. The cohesiveness that stories bring is part of the strength of the outgroup. An outgroup creates its own stories, which circulate within the group as a kind of counter-reality.

The dominant group creates its own stories, as well. The stories or narratives told by the ingroup remind it of its identity in relation to outgroups, and provide it with a form of shared reality in which its own superior position is seen as natural.[9]

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6. *E.g.*, Colker, *Feminism, Sexuality, and Self: A Preliminary Inquiry into the Politics of Authority* (Book Review), 68 B.U. L. REV. 217, 230 (1988); Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 574-75 (1984) [hereinafter *The Imperial Scholar*]; Estrich, *Rape*, 95 YALE L.J. 1087 (1986) (beginning article on rape reform by recounting her own rape); Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 329 (1988); *see also* MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1982) [hereinafter MacKinnon, *Theory*]; MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983) [hereinafter MacKinnon, *Jurisprudence*].

7. *E.g.*, Crenshaw, *Foreword: Toward A Race-Conscious Pedagogy in Legal Education*, 11 NATL. BLACK L.J. 1 (1989); Johnson & Scales, *An Absolutely, Positively True Story: Seven Reasons Why We Sing*, 16 N.M. L. REV. 433 (1986); Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1, 14-16 (1988) [hereinafter *Affirmative Action*] (use of S. WEBB & R.W. NELSON, SELMA, LORD, SELMA: GIRLHOOD MEMORIES OF THE CIVIL RIGHTS DAYS (1980) to explain civil rights movement and limits of liberal legalism in American Legal History class; use of an Alice Walker essay to explain rationale of compensation for wrongful death in torts class); D. Friedrichs, Narrative Jurisprudence and Other Heresies: Legal Education at the Margin 16-27 (Mar. 1988) (unpublished manuscript on file with author) (use of narrative forms, including biographies and autobiographies of legal practitioners and scholars, in teaching interdisciplinary law and society class). Professors who teach in nonstandard fashion sometimes evoke strong reactions of rejection from their students. *See, e.g.*, Bell, *The Price and Pain of Racial Perspective*, Stan. L. Sch. J., May 9, 1986, at 3, col. 1.

8. By "outgroup" I mean any group whose consciousness is other than that of the dominant one. *Cf.* Walker, *Choice: A Tribute to Dr. Martin Luther King, Jr.*, in IN SEARCH OF OUR MOTHERS' GARDENS 142 (1983); *Affirmative Action*, *supra* note 7, at 1 n.2 (term "outsiders" used to include those who are not white males and who are historically underrepresented in law schools); *The Imperial Scholar*, *supra* note 6, at 566 (nonwhites' exclusion from inner circles of civil rights scholarship). *See generally* M.-L. VON FRANZ, PROBLEMS OF THE FEMININE IN FAIRYTALES (1976).

9. Des Pres, *supra* note 1; *see* T. PETERSON, HAM & JAPHETH: THE MYTHIC WORLD OF WHITES IN THE ANTEBELLUM SOUTH 5 (1978); *see also* J. ZIPES, FAIRYTALES AND THE ART OF SUBVERSION (1985); A. GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS (Q. Hoare & G.N. Smith trans./eds. 1971); Lévi-Strauss, *The Structural Study of Myth*, 66 J. AM. FOLKLORE 428 (1955).

The stories of outgroups aim to subvert that ingroup reality. In civil rights, for example, many in the majority hold that any inequality between blacks and whites is due either to cultural lag, or inadequate enforcement of currently existing beneficial laws — both of which are easily correctable. For many minority persons, the principal instrument of their subordination is neither of these.[10] Rather, it is the prevailing *mindset* by means of which members of the dominant group justify the world as it is, that is, with whites on top and browns and blacks at the bottom.[11]

Stories, parables, chronicles, and narratives are powerful means for destroying mindset — the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place.[12] These matters are rarely focused on. They are like eyeglasses we have worn a long time. They are nearly invisible; we use them to scan and interpret the world and only rarely examine them for themselves.[13] Ideology — the received wisdom — makes current social arrangements seem fair and natural. Those in power sleep well at night — their conduct does not seem to

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10. *See, e.g.*, AND WE ARE NOT SAVED, *supra* note 2; D. BELL, RACE, RACISM, AND AMERICAN LAW (1981) [hereinafter RACE, RACISM, AND AMERICAN LAW]; Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1359 (1988); *Saved?*, *supra* note 3; *Alchemical Notes*, *supra* note 4.

11. *See, e.g.*, T. PETERSON, *supra* note 9; Bonsignore, *In Parables: Teaching About Law Through Parables*, 12 LEGAL STUD. F. (forthcoming); Des Pres, *supra* note 1; Freeman, *Legitimating Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) [hereinafter *A Critical Review*]; Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Williams, *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 LAW & INEQUALITY 103 (1987) [hereinafter *Taking Rights*] (role of "Euromyths" in sustaining white domination); *see also* A. LORDE, SISTER OUTSIDER (1984); Kennedy, *Legal Education as Training for Hierarchy*, in THE POLITICS OF LAW 40 (D. Kairys ed. 1981); Steele, *I'm Black, You're White, Who's Innocent?*, HARPER'S, June 1988, at 45 (innocence-giving myths and accounts enable whites to be comfortable with things as they are).

12. *See* AND WE ARE NOT SAVED, *supra* note 2, at 5-7; W. BENNETT & M. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM 5 (1981) ("Stories are systematic means of storing, bringing up to date, rearranging, comparing, testing, and interpreting available information about social behavior"); *The Master's Tools Will Never Dismantle the Master's House*, in A. LORDE, *supra* note 11, at 110; Cover, *supra* note 1, at 4-5; *Saved?*, *supra* note 3; Delgado & Leskovac, *supra* note 3; Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Storytelling*, 87 MICH. L. REV. 543, 550-52 (1988) (on the need to balance rhetoricians' search for belief and community against deconstructionists' suspicion); *see also* J. GARDNER, *supra* note 5, at 88; Tagliabue, *Police Draw the Curtain, but the Farce Still Plays*, N.Y. Times, June 14, 1988, at A4, col. 3.

13. *See generally* M. BALL, LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY 135 (1985); H. GADAMER, TRUTH AND METHOD (1975); Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 13 (1988); *Saved?*, *supra* note 3, at 929; Delgado & Leskovac, *supra* note 3, at 1039; Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151 (1985); White, *The Value of Narrativity in the Representation of Reality*, in ON NARRATIVE, *supra* note 1, at 23.

them like oppression.[14]

The cure is storytelling (or as I shall sometimes call it, counterstorytelling). As Derrick Bell, Bruno Bettelheim, and others show, stories can shatter complacency and challenge the status quo.[15] Stories told by underdogs are frequently ironic or satiric;[16] a root word for "humor" is humus — bringing low, down to earth.[17] Along with the tradition of storytelling in black culture[18] there exists the Spanish tradition of the picaresque novel or story, which tells of humble folk piquing the pompous or powerful and bringing them down to more human levels.[19]

Most who write about storytelling focus on its community-building functions: stories build consensus, a common culture of shared understandings, and deeper, more vital ethics. Counterstories, which challenge the received wisdom, do that as well. They can open new windows into reality, showing us that there are possibilities for life other than the ones we live. They enrich imagination and teach that

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14. *See supra* note 8 (consciousness as the defining characteristic of "outgroups"); *The Imperial Scholar, supra* note 6; *Saved?, supra* note 3, at 926, 931; Delgado & Leskovac, *supra* note 3, at 1050-54, 1058. *See generally* Lévi-Strauss, *supra* note 9, at 428-29 (supporting the idea that myths are used by social groups to overcome contradiction —to feel comfortable with a reality that would otherwise be difficult to explain).

15. *See* B. BETTELHEIM, THE USES OF ENCHANTMENT (1975); Kundera, *The Novel and Europe,* N.Y. REV. BOOKS, July 19, 1984, at 15 (stories enable us to go beyond conventional interpretation; good storytellers subvert and deepen culture); Steele, *supra* note 11, at 45; Stone, *The Reason for Stories: Toward a Moral Fiction,* HARPER'S, June 1988, at 71 (stories essential to sense of self; fiction expands range of human possibilities); *see also supra* note 12.

16. *See, e.g., infra* section I.D (the savage satire of Al-Hammar X); *infra* section I.E (the more subtle use of irony by the author of the anonymous leaflet); *see also* LAY MY BURDEN DOWN: A FOLK HISTORY OF SLAVERY 1-2 (B. Botkin ed. 1945); PUTTIN' ON OLE MASSA: THE SLAVE NARRATIVES OF HENRY BIBB, WILLIAM WELLS BROWN, AND SOLOMON NORTHRUP 33, 46 (G. Osofsky ed. 1969) [hereinafter PUTTIN' ON OLE MASSA]; Arnez & Anthony, *Contemporary Negro Humor as Social Satire,* 29 PHYLON 339 (1968); Bell, *The Final Report: Harvard's Affirmative Action Allegory,* 87 MICH. L. REV. 2382 (1989); Marshall, *Reflections on the Bicentennial of the United States Constitution,* 101 HARV. L. REV. 1 (1987); Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations,* 22 HARV. C.R.-C.L. L. REV. 323, 335-37 (1987) [hereinafter *Looking to the Bottom*]; Warren & Ellison, *A Dialogue,* REPORTER, Mar. 25, 1965, at 42; *Taking Rights, supra* note 11.

17. J. SHIPLEY, THE ORIGINS OF ENGLISH WORDS 441 (1984) (humor derives from *ugu,* a word for wetness; related to humus — earth or earthly sources of wetness); *see also* THE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY 452 (C. Onions ed. 1966).

18. *See* THE BOOK OF NEGRO FOLKLORE (L. Hughes & A. Bontemps eds. 1958); THE NEGRO AND HIS FOLKLORE IN NINETEENTH CENTURY PERIODICALS (B. Jackson ed. 1967); Greene, *A Short Commentary on the Chronicles,* 3 HARV. BLACKLETTER J. 60, 62 (1986); *see also* L. PARRISH, SLAVE SONGS OF THE GEORGIA SEA ISLANDS (1942).

19. *See, e.g.,* M. CERVANTES, DON QUIXOTE OF LA MANCHA (W. Starkie trans./ed. 1954) (1605). For ironic perspectives on modern Chicano culture, see R. RODRIGUEZ, HUNGER OF MEMORY (1980); López, *The Idea of a Constitution in the Chicano Tradition,* 37 J. LEGAL EDUC. 162, (1987); Rodriguez, *The Fear of Losing a Culture,* TIME, July 11, 1988, at 84. *Cf. The Imperial Scholar, supra* note 6 (ironic examination of the dearth of minority scholarship in the civil rights field); Tagliabue, *supra* note 12 (Polish street theater group uses humor and irony to expose Communism's flaws).

by combining elements from the story and current reality, we may construct a new world richer than either alone.[20] Counterstories can quicken and engage conscience. Their graphic quality can stir imagination in ways in which more conventional discourse cannot.[21]

But stories and counterstories can serve an equally important destructive function. They can show that what we believe is ridiculous, self-serving, or cruel. They can show us the way out of the trap of unjustified exclusion. They can help us understand when it is time to reallocate power. They are the other half — the destructive half — of the creative dialectic.

Stories and counterstories, to be effective, must be or must appear to be noncoercive. They invite the reader to suspend judgment, listen for their point or message, and then decide what measure of truth they contain.[22] They are insinuative, not frontal; they offer a respite from the linear, coercive discourse that characterizes much legal writing.

This essay examines the use of stories in the struggle for racial reform. Part I shows how we construct social reality by devising and passing on stories — interpretive structures by which we impose order on experience and it on us. To illustrate how stories structure reality, I choose a single race-tinged event and tell it in the form of five stories or narratives. Each account is followed by analysis, showing what the story includes and leaves out and how it perpetuates one version of social reality rather than another. Part II deals with counterstories,

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20. The process of *creating* that new world will not always be pleasant or easy, but sometimes full of challenge and tension. *See Saved?, supra* note 3, at 927 n.20, 947; *Alchemical Notes, supra* note 4, at 406-09; D. Friedrichs, *supra* note 7, at 4 ("[Stories] challenge taken-for-granted hierarchies both by exposing . . . the cruel consequences of such hierarchies, and by imaginatively promoting alternative accounts of how humans might live . . . ."); *see also* D. HOFSTADTER, GÖDEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID 28 (1980); Rycroft, *The Sixth Sense* (Book Review), N.Y. Rev. Books, Mar. 13, 1986, at 11. *See generally* M. BALL *supra* note 13; J.B. WHITE, THE LEGAL IMAGINATION (1973) [hereinafter THE LEGAL IMAGINATION]; J.B. WHITE, WHEN WORDS LOSE THEIR MEANING (1984) [hereinafter WHEN WORDS].

21. *See* Stone, *supra* note 15, at 71, 75; West, *Economic Man and Literary Woman: One Contrast*, 39 MERCER L. REV. 867, 875 (1988) [hereinafter *Economic Man*]; *Jurisprudence as Narrative supra*, note 1, at 145-46 ("When we discuss what is, we rely quite rightly upon description and analysis. But when we discuss what is possible, what we desire and what we dread, we quite naturally turn to stories . . . ."); Friedrichs, *supra* note 7, at 13. *Cf.* Gabel, *Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEXAS L. REV. 1563 (1984); Tushnet, *An Essay on Rights*, 62 TEXAS L. REV. 1363, 1382-84 (1984). *See generally* J. GARDNER, ON MORAL FICTION 5, 15-16 (1978); G. ELIOT, *The Natural History of German Life*, in ESSAYS OF GEORGE ELIOT 266 (T. Pinney ed. 1963).

22. For discussion of this "willing suspension of disbelief," see Friedrichs, *supra* note 7, at 7 (narrative form useful for conveying "heretical notions" because less "abrasively didactic" than other forms; readers willingly expose themselves to narrative accounts of outgroup figures). But note Bell's warning: Moses, Jesus, Plato, and Socrates all used stories to explain or challenge law and politics. Even so, the minority storyteller must balance tale telling with solid legal analysis, so as not to seem "too general and too devoid of legal theory for some of [his or her] academic friends." *The Civil Rights Chronicles, supra* note 2, at 82.

competing versions that can be used to challenge a stock story and prepare the way for a new one. Section II.A lays out in greater detail the case for counter-storytelling by outgroups. Section II.B addresses the questions, Why should members of the dominant group listen to the stories told by outgroups? How can they — members of the in-group — benefit?

I. STORYTELLING AND COUNTER-STORYTELLING

The same object, as everyone knows, can be described in many ways.[23] A rectangular red object on my living room floor may be a nuisance if I stub my toe on it in the dark, a doorstop if I use it for that purpose, further evidence of my lackadaisical housekeeping to my visiting mother, a toy to my young daughter, or simply a brick left over from my patio restoration project. There is no single true, or all-encompassing description. The same holds true of events. Watching an individual perform strenuous repetitive movements, we might say that he or she is exercising, discharging nervous energy, seeing to his or her health under doctor's orders, or suffering a seizure or convulsion. Often, we will not be able to ascertain the single best description or interpretation of what we have seen. We participate in creating what we see in the very act of describing it.[24]

Social and moral realities, the subject of this essay, are just as indeterminate and subject to interpretation as single objects or events, if not more so. For example, what is the "correct" answer to the question, The American Indians are — (A) a colonized people; (B) tragic victims of technological progress; (C) subjects of a suffocating, misdirected federal beneficence; (D) a minority stubbornly resistant to assimilation; or (E) ——; or (F) ———?

My premise is that much of social reality is constructed. We decide what is, and, almost simultaneously, what ought to be. Narrative habits, patterns of seeing, shape what we see and that to which we aspire.[25] These patterns of perception become habitual, tempting us to

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23. *See* J. DERRIDA, OF GRAMMATOLOGY (1976) (words alter — do violence to — events or experiences); *A Map that "Changes the World,"* San Francisco Chron., Oct. 14, 1988, at A3, col. 1 (National Geographic adopted new "more realistic" world map that depicted United States smaller than previous map, Soviet Union and oceans larger; experts quoted as saying that no map is a "true representation of the world." "[A]n Eskimo cartographer . . . might do something different."); *see also* Tagliabue, *supra* note 12.

24. *See, e.g.*, R. AKUTAGAWA, *In a Grove*, in RASHOMON AND OTHER STORIES 19 (T. Kojima trans. 1970); R. LEONCAVALLO, I PAGLIACCI (1892) (in the *Prologue*, hunchbacked clown Tonio explains that stories are real, perhaps the most real thing of all, turning *commedia dell'arte* — "it's only a play, we're just acting" — on its head).

25. *See* J.B. WHITE, HERACLES' BOW 175 (1985) [hereinafter HERACLES' BOW]; Stone, *supra* note 15; *see also* Cole, *Thoughts from the Land of And*, 39 MERCER L. REV. 907, 921-25

believe that the way things are is inevitable, or the best that can be in an imperfect world.[26] Alternative visions of reality are not explored, or, if they are, rejected as extreme or implausible.

In the area of racial reform the majority story would go something like this:

> Early in our history there was slavery, which was a terrible thing. Blacks were brought to this country from Africa in chains and made to work in the fields. Some were viciously mistreated, which was, of course, an unforgivable wrong; others were treated kindly. Slavery ended with the Civil War, although many blacks remained poor, uneducated, and outside the cultural mainstream. As the country's racial sensitivity to blacks' plight increased, the vestiges of slavery were gradually eliminated by federal statutes and case law. Today, blacks have many civil rights and are protected from discrimination in such areas as housing, public education, employment, and voting. The gap between blacks and whites is steadily closing, although it may take some time for it to close completely. At the same time, it is important not to go too far in providing special benefits for blacks. Doing so induces dependency and welfare mentality. It can also cause a backlash among innocent white victims of reverse discrimination. Most Americans are fair-minded individuals who harbor little racial prejudice. The few who do can be punished when they act on those beliefs.

Yet, coexisting with that rather comforting tale is another story of black subordination in America, a history "gory, brutal, filled with more murder, mutilation, rape, and brutality than most of us can imagine or easily comprehend."[27] This other history continues into the present, implicating individuals still alive.[28] It includes infant death rates among blacks nearly double those of whites, unemployment rates among black males nearly triple those of whites, and a gap between the races in income, wealth, and life expectancy that is the same as it

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(1988) (discussing theories that language determines the physical world, rather than the opposite); White, *Thinking About Our Language*, 96 YALE L.J. 1960, 1971 (1987) [hereinafter *Thinking About Our Language*] (describing the dangers of reification). *See generally* N. GOODMAN, WAYS OF WORLDMAKING (1978); E. CASSIRER, LANGUAGE AND MYTH (1946).

I say "shape," not "create" or "determine," because I believe there is a degree of intersubjectivity in the stories we tell. *See infra* sections I.A-.E, recounting an event in the form of five stories. Every well-told story is virtually an archetype — it rings true in light of the hearer's stock of preexisting stories. But stories may *expand* that empathic range if artfully crafted and told; that is their main virtue. *See infra* Part II.

26. *See* Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW, *supra* note 11, at 281, 286-87 (ascribing this seeming inevitability to unthinking adoption of belief systems); Kairys, *Introduction* to THE POLITICS OF LAW, *supra* note 11, at 3-4.

27. AND WE ARE NOT SAVED, *supra* note 2, at 217. *See generally* RACE, RACISM, AND AMERICAN LAW, *supra* note 10, at 1-58 (chapter entitled Slavery and American Law); D. GLASGOW, THE BLACK UNDERCLASS (1980) (examining the roots and ongoing causes of the black underclass).

28. *See Saved?*, *supra* note 3, at 938.

was fifteen years ago, if not greater.[29] It includes despair, crime, and drug addiction in black neighborhoods, and college and university enrollment figures for blacks that are dropping for the first time in decades.[30] It dares to call our most prized legal doctrines and protections shams — devices enacted with great fanfare, only to be ignored, obstructed, or cut back as soon as the celebrations die down.[31]

How can there be such divergent stories? Why do they not combine? Is it simply that members of the dominant group see the same glass as half full, blacks as half empty? I believe there is more than this at work; there is a war between stories. They contend for, tug at, our minds. To see how the dialectic of competition and rejection works — to see the reality-creating potential of stories and the normative implications of adopting one story rather than another — consider the following series of accounts, each describing the same event.

A. *A Standard Event and a Stock Story That Explains It*

The following series of stories revolves around the same event: A black lawyer interviews for a teaching position at a major law school (school *X*), and is rejected. Any other race-tinged event could have served equally well for purposes of illustration. This particular event was chosen because it occurs on familiar ground — most readers of this essay are past or present members of a law school community who have heard about or participated in events like the one described.

The Stock Story

Setting. A professor and student are talking in the professor's office. Both are white. The professor, Blas Vernier, is tenured, in mid-career, and well regarded by his colleagues and students. The student, Judith Rogers, is a member of the student advisory appointments committee.

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29. *See* CENTER ON BUDGET AND POLICY PRIORITIES, FALLING BEHIND: A REPORT ON HOW BLACKS HAVE FARED UNDER THE REAGAN POLICIES 4 (1984); J. SMITH & F. WELCH, CLOSING THE GAP: FORTY YEARS OF ECONOMIC PROGRESS FOR BLACKS xxiv-xxv, 81, 101-11 (1986) (Rand report finding increase in black families headed by a female, in percentage receiving AFDC, and in number of black males unemployed or no longer looking for jobs); *id.* at 105, 108-09 (gap between blacks and whites same as it was a generation ago); *Saved?, supra* note 3, at 931-32 (discussing statistics); McLeod, *Report Says Poverty Increasing for Hispanics Living in U.S.*, San Francisco Chron., Nov. 4, 1988, at A-4, col. 4 (family income for black and Hispanic families, adjusted for inflation, decreased during past decade; poverty increased; gap between blacks and whites widened).

30. *See Saved?, supra* note 3, at 931-32; *Black Males Increasingly Rare in College*, Washington Post, Jan. 16, 1989, at A7, col. 1.

31. *See* AND WE ARE NOT SAVED, *supra* note 2; *Saved?, supra* note 3, at 924; *A Critical Review, supra* note 11, at 1051, 1097, 1118.

Rogers: Professor Vernier, what happened with the black candidate, John Henry? I heard he was voted down at the faculty meeting yesterday. The students on my committee liked him a lot.

Vernier: It was a difficult decision, Judith. We discussed him for over two hours. I can't tell you the final vote, of course, but it wasn't particularly close. Even some of my colleagues who were initially for his appointment voted against him when the full record came out.

Rogers: But we have no minority professors at all, except for Professor Chen, who is untenured, and Professor Tompkins, who teaches Trial Practice on loan from the district attorney's office once a year.

Vernier: Don't forget Mary Foster, the Assistant Dean.

Rogers: But she doesn't teach, just handles admissions and the placement office.

Vernier: And does those things very well. But back to John Henry. I understand your disappointment. Henry was a strong candidate, one of the stronger blacks we've interviewed recently. But ultimately he didn't measure up. We didn't think he wanted to teach for the right reasons. He was vague and diffuse about his research interests. All he could say was that he wanted to write about equality and civil rights, but so far as we could tell, he had nothing new to say about those areas. What's more, we had some problems with his teaching interests. He wanted to teach peripheral courses, in areas where we already have enough people. And we had the sense that he wouldn't be really rigorous in those areas, either.

Rogers: But we need courses in employment discrimination and civil rights. And he's had a long career with the NAACP Legal Defense Fund and really seemed to know his stuff.

Vernier: It's true we could stand to add a course or two of that nature, although as you know our main needs are in Commercial Law and Corporations, and Henry doesn't teach either. But I think our need is not as acute as you say. Many of the topics you're interested in are covered in the second half of the Constitutional Law course taught by Professor White, who has a national reputation for his work in civil liberties and freedom of speech.

Rogers: But Henry could have taught those topics from a black perspective. And he would have been a wonderful role model for our minority students.

Vernier: Those things are true, and we gave them considerable weight. But when it came right down to it, we felt we couldn't take that great a risk. Henry wasn't on the law review at school, as you are, Judith, and has never written a line in a legal journal. Some of us

doubted he ever would. And then, what would happen five years from now when he came up for tenure? It wouldn't be fair to place him in an environment like this. He'd just have to pick up his career and start over if he didn't produce.

Rogers: With all due respect, Professor, that's paternalistic. I think Henry should have been given the chance. He might have surprised us.

Vernier: So I thought, too, until I heard my colleagues' discussion, which I'm afraid, given the demands of confidentiality, I can't share with you. Just let me say that we examined his case long and hard and I am convinced, fairly. The decision, while painful, was correct.

Rogers: So another year is going to go by without a minority candidate or professor?

Vernier: These things take time. I was on the appointments committee last year, chaired it in fact. And I can tell you we would love nothing better than to find a qualified black. Every year, we call the Supreme Court to check on current clerks, telephone our colleagues at other leading law schools, and place ads in black newspapers and journals. But the pool is so small. And the few good ones have many opportunities. We can't pay nearly as much as private practice, you know.

[*Rogers, who would like to be a legal services attorney, but is attracted to the higher salaries of corporate practice, nods glumly.*]

Vernier: It may be that we'll have to wait another few years, until the current crop of black and minority law students graduates and gets some experience. We have some excellent prospects, including some members of your very class.

Rogers: [*Thinks: I've heard that one before, but says*] Well, thanks, Professor. I know the students will be disappointed. But maybe when the committee considers visiting professors later in the season it will be able to find a professor of color who meets its standards and fits our needs.

Vernier: We'll try our best. Although you should know that some of us believe that merely shuffling the few minorities in teaching from one school to another does nothing to expand the pool. And once they get here, it's hard to say no if they express a desire to stay on.

Rogers: [*Thinks: That's a lot like tenure. How ironic; there are certain of your colleagues we would love to get rid of, too. But says*] Well, thanks, Professor. I've got to get to class. I still wish the vote had come out otherwise. Our student committee is preparing a list of

minority candidates that we would like to see considered. Maybe you'll find one or more of them worthy of teaching here.

Vernier: Judith, believe me, there is nothing that would please me more.

* * *

In the above dialogue, Professor Vernier's account represents the stock story — the one the institution collectively forms and tells about itself.[32] This story picks and chooses from among the available facts to present a picture of what happened: an account that justifies the world as it is. It emphasizes the school's benevolent motivation ("look how hard we're trying") and good faith.[33] It stresses stability and the avoidance of risks. It measures the black candidate through the prism of preexisting, well-agreed-upon criteria of conventional scholarship and teaching.[34] Given those standards, it purports to be scrupulously meritocratic and fair; Henry would have been hired had he measured up. No one raises the possibility that the merit criteria employed in judging Henry are themselves debatable, *chosen* — not inevitable. No one, least of all Vernier, calls attention to the way in which merit functions to conceal the contingent connection between institutional power and the things rated.

There is also little consideration of the possibility that Henry's presence on the faculty might have altered the institution's character, helped introduce a different prism and different criteria for selecting future candidates.[35] The account is highly procedural — it emphasizes that Henry got a full, careful hearing — rather than substantive: a black was rejected.[36] It emphasizes certain "facts" without examin-

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32. Compare this stock story with the larger one, of which it is a part, *supra* text accompanying note 27. *Cf.* THE LEGAL IMAGINATION, *supra* note 20, at 299-304 (discussing ways institutions talk about people).

33. *See Saved?, supra* note 3, at 936 (discussing Supreme Court decisions that require intent and tight chains of causation for discrimination to be actionable).

34. Feminists have argued that the law is essentially a male instrument and that male-normed criteria of excellence operate to injure women in tenure and promotion decisions and on law school examinations. *See, e.g.*, Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERK. WOMEN'S L.J. 39, 44 (1985); Polan, *Toward a Theory of Law and Patriarchy*, in THE POLITICS OF LAW, *supra* note 11, at 299; Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, in THE POLITICS OF LAW, *supra* note 11, at 117.

35. That is to say, the faculty would be a different collectivity with the addition of an articulate and outspoken black, unless of course his voice was silenced by peer pressure or hostility. Compare Heisenberg's Principle of Uncertainty, discussed in G. ZUKAV, THE DANCING WU LI MASTERS: AN OVERVIEW OF THE NEW PHYSICS 133-36 (1979).

36. *See The Imperial Scholar, supra* note 6, at 568 (emphasis on procedure in "imperial" scholarship). In former times, powerful whites used *substantive* myths, stories about blacks' purported actual inferiority, to justify oppression. Delgado, Bradley, Burkenroad, Chavez, Doering, Lardiere, Reeves, Smith & Windhausen, *Can Science Be Inopportune? Constitutional Validity of Governmental Restrictions on Race-IQ Research*, 31 UCLA L. REV. 128 (1983); *cf.* Buck v. Bell,

ing their truth — namely, that the pool is very small, that good minority candidates have many choices, and that the appropriate view is the long view; haste makes waste.[37]

The dominant fact about this first story, however, is its seeming neutrality. It scrupulously avoids issues of blame or responsibility. Race played no part in the candidate's rejection; indeed the school leaned over backwards to accommodate him. A white candidate with similar credentials would not have made it as far as Henry did. The story comforts and soothes.[38] And Vernier's sincerity makes him an effective apologist for his system.[39]

Vernier's story is also deeply coercive, although the coercion is disguised. Judith was aware of it but chose not to confront it directly; Vernier holds all the cards. He pressures her to go along with the institution's story by threatening her prospects at the same time that he flatters her achievements. A victim herself, she is invited to take on and share the consciousness of her oppressor. She does not accept Vernier's story, but he does slip a few doubts through cracks in her armor. The professor's story shows how forceful and repeated storytelling can perpetuate a particular view of reality. Naturally, the stock story is not the only one that can be told. By emphasizing other events and giving them slightly different interpretations, a quite different picture can be made to emerge.[40]

B. *The Same Event Told by John Henry*

Scene. John Henry has just received his rejection letter from the head of the appointments committee. The letter is quite cheerful. It tells Henry how much the faculty enjoyed meeting him and hearing his presentation on trends in civil rights litigation. It advises him that because of curricular concerns, the school's prime emphasis this year will be on filling slots in the Commercial Law and Corporations area. It concludes by encouraging Henry to remain in contact with the

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274 U.S. 200 (1927) (permitting states to sterilize the "feeble-minded"). Today, racial myths take a *procedural* turn — remediation must be deliberate, a backlash by "innocent" whites must be avoided at all costs, some remedies constitute "reverse discrimination," and tight standing and causation requirements are reasonable when a black sues for redress.

37. *See supra* text accompanying note 32.

38. It may be argued that Henry's story, which follows, and the two counterstories also soothe and comfort those of the storyteller's persuasion. *See* HERACLES' BOW, *supra* note 25, at 171.

39. *See* Denvir, *Justice Brennan, Justice Rehnquist, and Free Speech*, 80 NW. U. L. REV. 285, 288-89 (1985) (liberals' sincerity key ingredient in their ability to justify their position).

40. *See Thinking About Our Language*, *supra* note 25, at 1963-64 (legal hearings designed to test different versions of language).

school and wishes him luck in his search for a teaching position. It nowhere tells him that he has been rejected.

A few days after receiving the letter, John Henry is having lunch with a junior colleague from the Fund. The colleague, who is also black, wants to teach some day and so quizzes Henry about his experiences in interviewing at school *X*.

Henry: It was, how shall I put it? Worse than I hoped but better than I feared. I'm not going to get an offer, although they of course never came right out and said so. And, from what I saw I'm not sure I would want to teach there, even if I had gotten one. If school *X* is any sample of what blacks can expect in this supposedly colorblind, erudite world of legal education, I think I prefer Howard, where, incidentally, I'm interviewing next week. I got more than a whiff of these attitudes when I went to law school almost 15 years ago, but I had dared to hope that things might have changed in the interim. They haven't.

Junior colleague: But how did they treat you? Did you give a colloquium?

Henry: You bet I gave a colloquium, and that's where it began. A good half of the faculty looked bored or puzzled and asked no questions. A quarter jumped down my throat after I had spoken maybe ten minutes, wanting to know whether I would advocate the same approach if the plaintiff were white and the defendant black. The old "neutral principles" idea,[41] thirty years later. In the question-and-answer period, several younger professors tried to rescue me; one even changed the subject and asked about my philosophy of teaching. That brought everybody to the edge of their chairs. I got the impression many of them merely wanted assurance that I would write *some* articles, even if they were mediocre. But they were *all* extremely concerned that I be a good teacher. I think many of them were looking for a mascot, not a fellow scholar — someone who would counsel and keep the students in line, not someone who could challenge his or her colleagues at their own game.

During the small-group interviews, many of them didn't even show up. The ones that did asked me about curricular matters, what courses I would like to teach, how I enjoyed going to law school at Michigan and whether I took courses from their friend, so-and-so, who teaches there. The few who asked me anything about my colloquium ignored what I had said but asked me questions based on recent law review articles, written by their friends, most of which, of course, I

41. Wechsler, *Toward Neutral Principles of Constitutional Law*, 75 HARV. L. REV. 1 (1959).

had not read. They all seemed to deal with issues of equality, but none seemed to bear much connection to my work and litigation perspective.

Several asked what my grade point average was in law school — fifteen years ago, can you believe it! — and whether I was on the law review. They had my resume in front of them, so they knew the answer to that perfectly well. The first two who asked seemed dumbfounded when I said I had been invited to join the review and even more so when I said I had declined in order to work part-time in a prison law program. After a while I just answered the question by saying no.

Don't get me wrong. They're a good law school; I could see myself teaching there. But I think they're looking for someone they will never find — a black who won't challenge them in any way, who is just like them. I tried telling them about the cases I have argued and the litigation strategies I have pioneered. Most of them couldn't have cared less. Their eyes glazed over after three minutes, or they changed the subject.

Junior colleague: John, let me ask you something flat out. You don't have to answer this if you don't want to. You know that I practiced corporate law in a large firm in Atlanta for three years before coming to the Fund. I could see myself teaching business subjects some day, in addition of course to civil rights. The school you interviewed at is advertising that they need professors of business law. Do I want to teach there?

Henry: [*Slowly*] That's a tough one. If I went there, my greatest fear is that I would be marginalized and ignored — either that or coopted into the mainstream. I doubt they would see my work in civil rights as on a level with theirs in, say, property. You might have a different experience, though, teaching corporate and business law courses. Are you serious about applying?

Junior colleague: I think so.

Henry: Okay, my man. Let me call the Asian professor I met there. His name is Chen, I think. He seemed sympathetic, and I guess he would level with us. I'll ask him what he thinks the climate would be like for someone like you. Maybe in the process I'll learn something about how I was seen and get some pointers on how to conduct myself the next time I interview at a white, elite law school — if I have to. I think Howard is quite interested in me, and frankly I'm tempted to just accept an offer there if they make one. It would simplify life a great deal.

Junior colleague: I would appreciate that. You're a good buddy. Let me know what you find out.

* * *

Henry and his younger colleague's story is, obviously, quite different from the institution's story. Their story shows, among other things, how different "neutrality" can feel from the perspective of an outsider.[42] Henry's story emphasizes certain facts, sequences, tones of voice, and body language that the stock story leaves out.[43] It infers different intentions, attitudes, and states of mind on the part of the faculty he met.[44] Although not completely condemnatory, it is not nearly so generous to the school. It implies that the supposedly color-blind hiring process is really monochromatic: School *X* hires professors of any color, so long as they are white. In Henry's story, process questions submerge; the bottom line becomes more important. The story specifically challenges the school's meritocratic premises. It questions, somewhat satirically, the school's conception of a "good" teaching prospect and asks what came first, the current faculty (with its strengths and weaknesses) or the criteria. Did the "is" give birth to the "ought"? Henry's account, although less obviously slanted than Vernier's, contains exaggerations of its own. This is perhaps natural and understandable; Henry wanted his younger colleague to think well of him. His account is self-serving. For example, he implied that many of the faculty asked him about his law school grades, when in fact only two did. And, although Henry does struggle to free himself from the process trap to which Vernier succumbed, he does not succeed entirely. He charges that his "hearing" at the law school was substantively biased by racism and inappropriate criteria. But he also charges that the hearing was afflicted by ordinary defects: For example, many of his hearers did not bother to show up — it was a mock hearing. Henry still accepts the system's dominant values, wants to play, and win, by its rules. Perhaps this explains the calmness, the tone of resignation about Henry's story. Whether this is because he

42. *See* City of Memphis v. Greene, 451 U.S. 100, 138-44 (1981) (Marshall, J., dissenting). Marshall tells a "counterstory," in which a traffic barrier erected between an affluent white and a black neighborhood is put into a different perspective from that adopted by the majority.

43. Vernier's story also patronizes Rogers; the professor treats her as some whites treat blacks. Rogers is temporarily a member of an outgroup. She has the potential to leave her student status and become like Vernier, but for now he and she are on unequal footings, an inequality Vernier exploits.

44. Henry's narrative includes the details that: some of the members of the appointments committee appeared bored; that others asked paternalistic questions; that some faculty members failed to attend their own interviews of him; that a question uppermost in the minds of most of his interviewers was whether or not he would teach competently, rather than write brilliantly; and that his Civil Rights interests were peripheral.

has internalized some of his victimizers' consciousness, has a good alternative coming up next week at Howard, or simply despairs of changing School *X* we do not know. But this situation soon changed drastically.

Following Henry's lunch with his younger colleague, Henry telephoned Chen and one other younger, bearded faculty member he met at the law school. The other professor, who is white, had visibly warmed up to Henry. He had asked him to call any time if Henry had questions. As a result of talking with these two at length, Henry learns facts that leave him seriously upset.[45] No longer resigned, Henry consults with several colleagues at the Fund about a lawsuit. After receiving an offer from Howard, Henry retains private counsel.[46] The following two stories are the result.

C. *The Legal Complaint and Judge's Order*

1. *The Complaint*

About a year after his unsuccessful interview, and ten months after speaking with Chen and the white professor, Henry files the following complaint in the superior court of College County of State *X:*

> *Henry v. Regents, et al.* Comes now the plaintiff and alleges as follows.
>
> [Following various jurisdictional and exhaustion-of-remedies allegations]: 8) That the defendant has intentionally engaged in an unlawful employment practice in that the defendant has discriminated against plaintiff by denying him an appointment as Professor of Law, because of his race and color; that defendant has denied plaintiff employment as Professor of Law because of his engagement in civil rights activities; that defendant has denied plaintiff employment as Professor of Law because as a black Professor teaching Civil Rights he would not "fit in"; and that the above mentioned acts of discrimination violate 42 U.S.C. section

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45. Henry learned:

(i) That Professor White had delivered a vitriolic attack on his intellectual qualifications to teach law and had implied he would leave if Henry were hired;

(ii) That another faculty member had purportedly obtained telephone information from a former co-worker that Henry "had a few skeletons in his closet";

(iii) That the faculty feared that someone like Henry could cause trouble by stirring up the students ("wouldn't be a good role model even for the minorities");

(iv) That the faculty had disliked his colloquium, finding it devoid of history, economics, or theory. It struck them as the talk of "just a practicing lawyer"; it was "too much like a brief."

A desiccated version of Chen's account appears in the legal complaint that follows.

46. Part of Henry's change of mood was caused by his belated realization that he (like Judith Rogers) was coerced. He was coerced, during his interview, to agree to be just like his interviewers. This was something he was unwilling to do; his rejection was the direct result. He resolves to reconstruct John Henry's story. But he chooses, because of his experience as an attorney, the familiar route of a legal complaint. Unlike Al-Hammar X (whose story is told *infra* section I.D), Henry has not yet rejected dominant values. In time, he may. He is still committed to reasonableness — to telling measured, legal stories.

1981 in that they were based on race, color, and civil rights activities and orientations.

9) That the plaintiff has lost wages by reason of the illegal employment practices of defendant and has earned less money in other employment than he would have earned had he received appointment as Professor of Law at defendant institution.

Whereupon plaintiff prays that this Court find that the defendant has intentionally and illegally denied plaintiff employment because of his race, color, and civil rights activities, and because as a black man he would not "fit in"; that the Court enjoin defendant from engaging in these and similar practices; that the defendant be ordered to pay plaintiff all lost wages because of said unlawful employment practices; that the defendant pay plaintiff's reasonable attorney's fees; and that defendant be ordered to pay all costs in this action.

Phyllis M. Leventhal
Attorney for Plaintiff
Address: 49 State Building
Capitol City, State *X*

2. *The Judge's Order Dismissing the Action*

After a short period of discovery, the judge dismissed Henry's suit with a brief opinion:

The defendant's motion for summary judgment is granted.

Even viewing the evidence in the light most favorable to Plaintiff, it is clear to this Court that he cannot prevail. Plaintiff has adduced no evidence, save his own assertion that he was not hired, that he has suffered unlawful employment discrimination. Given the historic shortage of qualified minorities in the applicant pool, it is not surprising that white faces should preponderate on a law faculty. This imbalance is not irrelevant but by itself does not constitute invidious discrimination. It is of no greater or less significance than the proportion of blacks to whites on the school's athletic teams.

Even assuming that he is qualified to teach at School *X*, Plaintiff has not made out a claim that his failure to be hired there is a product of discrimination. If he could adduce even one example of obvious discrimination — for example, if he had been told that his lack of authorship disqualified him, but he could prove that some white faculty members had neither published nor perished — this would be a far different case. But there is no such smoking gun. Plaintiff believes he was blackballed as a potential "troublemaker," someone who might use his position atop the ivory tower to cry out against the university, to bite the very hand that had uplifted him. But a propensity toward disloyalty is simply one of the competing considerations in the hiring process, the weight of which our scales of justice shall not attempt to assay. There is, however, nothing intrinsically wrong with requiring a college professor to be true to his school.

Nor do we find that differential standards were applied to Plaintiff's application. It may be that the law faculty devalued his potential contri-

> butions as a teacher and scholar of civil rights law. But a faculty is entitled to make judgments that one class or area of study is more urgently needed to round out the school's curriculum than another.
>
> Moreover, this Court would be most hesitant to substitute its own standards for those of the professors who make up the faculty of *X* School of Law. The Law School is an eminent institution, one of the nation's finest. The decisions of such a body are necessarily judgmental and highly subjective. It is not an appropriate function for this Court to tell the faculty whom they should hire. That is a matter for their professional judgment, and short of manifest unfairness or illegality, this Court cannot and will not interfere. The factors that make a good law professor are many, subtle, and eminently professional in character. They are best made by those who, had he been hired, would have been Plaintiff's peers. It would ill serve the Plaintiff to force him on an unwilling institution. We find no actionable wrong. This case is dismissed.

Both the complaint and the order dismissing it are stylized versions of Henry's story. Both use existing statutory and case law as a type of "screen" that makes certain facts relevant and others not.[47] Henry's lawyer struggled to present her client's story in terms a court would accept. She failed. Unless reversed on appeal, the complaint's story will remain a renegade version of the world, officially devalued.[48]

Putting the facts in the linguistic code required by the court sterilized them. The interview was abstracted from its context, squeezed into a prescribed mold that stripped it of the features that gave it meaning for Henry. It lost its power to outrage. In a sense, even if successful the complaint would have legitimated the current social order. As Cornel West and others have warned, litigation and other seemingly revolutionary activity can serve this end.[49] Civil rights liti-

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47. *See* HERACLES' BOW *supra* note 25, at 174-75; Milovanovic, *Jailhouse Lawyers and Jailhouse Lawyering*, 1988 INTL. J. SOC. (forthcoming) (describing what gets "lost in the translation" when inmate jailhouse lawyers rewrite what happened in the streets into the language of the courts — a loss of the race-, class-, and sex-based inequalities that contributed to the inmate's dilemma, as well as such features as alienation, anger, and despair); Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987) (judiciary's fidelity to facts and canons of fair argumentation less than perfect); Bannister & Milovanovic, The Necessity Defense, Substantive Justice and Oppositional Linguistic Praxis 23-24 (1988) (unpublished manuscript, on file with author) (screening function of legal rules). The screening function of formal legal standards sometimes benefits litigants of color by suppressing blatant racism and holding the participants to higher standards than they would otherwise display. Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 [hereinafter *Fairness and Formality*]. These advantages can cause minorities to place unrealistically high hopes on formal adjudication as a means of achieving social justice. Delgado, *ADR and the Dispossessed: Recent Books About the Deformalization Movement* (Book Review), 13 LAW & SOC. INQUIRY 145 (1988).

48. *See* Cover, *supra* note 1, at 53 ("[j]udges are people of violence," whose object is to kill competing legal traditions); *Thinking About Our Language*, *supra* note 25, at 1963-64 (legal proceedings designed to pit different narratives against each other).

49. *See* C. WEST, PROPHESY DELIVERANCE! AN AFRO-AMERICAN REVOLUTIONARY CHRISTIANITY 41 (1982).

gation also demeans, humbles, and victimizes the victim, draining away outrage and converting him or her into a supplicant.[50]

Stories do not pose these risks. Stories do not try to seize a part of the body of received wisdom and use it against itself, jiujitsu fashion, as litigation does. Stories attack and subvert the very "institutional logic" of the system. On the rare occasions when law-reform litigation is effective for blacks, the hard-won new "rights" are quietly stolen away by narrow interpretation, foot dragging, delay, and outright obstruction.[51] Stories' success is not so easily circumvented; a telling point is registered instantaneously and the stock story it wounds will never be the same.

John Henry's complaint was doubly unsuccessful. It was dismissed, its failure validating the dominant story, its principal opponent so far. It also gave the judge an opportunity to tell his own story — dismissive, curt, verging on insult, and give it circulation and currency.[52]

D. *Al-Hammar X's Counter-story*

None of the above stories attempts to unseat the prevailing institutional story. Henry's account comes closest; it highlights different facts and interprets those it does share with the standard account differently. His formal complaint also challenges the school's account, but it must fit itself under existing law, which it failed to do.

A few days after word of Henry's rejection reached the student body, Noel Al-Hammar X, leader of the radical Third World Coalition, delivered a speech at noon on the steps of the law school patio. The audience consisted of most of the black and brown students at the law school, several dozen white students, and a few faculty members. Chen was absent, having a class to prepare for. The Assistant Dean was present, uneasily taking mental notes in case the Dean asked her later on what she heard.

Al-Hammar's speech was scathing, denunciatory, and at times downright rude. He spoke several words that the campus newspaper reporter wondered if his paper would print. He impugned the good faith of the faculty, accused them of institutional if not garden-variety

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50. Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Equal Protection*, 12 SIGNS 421 (1987).

51. *See Saved?*, *supra* note 3, at 396.

52. How does a judge get away with this form of discourse? The answer must lie in our "story" of judging, what judges do. That story includes the function of scolding persons who have brought complaints we disapprove of — such as Henry's — and excluding them from the universe of "reasonable" complainants: John, like all the others, is an ever-complaining minority.

racism, and pointed out in great detail the long history of the faculty as an all-white club. He said that the law school was bent on hiring only white males, "ladies" only if they were well-behaved clones of white males, and would never hire a black unless forced to do so by student pressure or the courts. He exhorted his fellow students not to rest until the law faculty took steps to address its own ethnocentricity and racism. He urged boycotting or disrupting classes, writing letters to the state legislature, withholding alumni contributions, setting up a "shadow" appointments committee, and several other measures that made the Assistant Dean wince.

Al-Hammar's talk received a great deal of attention, particularly from the faculty who were not there to hear it. Several versions of his story circulated among the faculty offices and corridors ("Did you hear what he said?"). Many of the stories-about-the-story were wildly exaggerated. Nevertheless, Al-Hammar's story is an authentic counterstory. It directly challenges — both in its words and tone — the corporate story the law school carefully worked out to explain Henry's non-appointment. It rejects many of the institution's premises, including we-try-so-hard, the-pool-is-so-small, and even mocks the school's meritocratic self-concept. "They say Henry is mediocre, has a pedestrian mind. Well, they ain't sat in none of my classes and listened to themselves. Mediocrity they got. They're experts on mediocrity." Al-Hammar denounced the faculty's excuse making, saying there were dozens of qualified black candidates, if not hundreds. "There isn't that big a pool of Chancellors, or quarterbacks," he said. "But when they need one, they find one, don't they?"

Al-Hammar also deviates stylistically, as a storyteller, from John Henry. He rebels against the "reasonable discourse" of law. He is angry, and anger is out of bounds in legal discourse, even as a response to discrimination. John Henry was unsuccessful in getting others to listen. So was Al-Hammar, but for a different reason. His counterstory overwhelmed the audience. More than just a narrative, it was a call to action, a call to join him in destroying the current story. But his audience was not ready to act. Too many of his listeners felt challenged or coerced; their defenses went up. The campus newspaper the next day published a garbled version, saying that he had urged the law faculty to relax its standards in order to provide minority students with role models. This prompted three letters to the editor asking how an unqualified black professor could be a good role model for anyone, black or white.

Moreover, the audience Al-Hammar intended to affect, namely the faculty, was even more unmoved by his counterstory. It attacked

them too frontally. They were quick to dismiss him as an extremist, a demagogue, a hothead — someone to be taken seriously only for the damage he might do should he attract a body of followers. Consequently, for the next week the faculty spent much time in one-on-one conversations with "responsible" student leaders, including Judith Rogers.

By the end of the week, a consensus story had formed about Al-Hammar's story. That story-about-a-story held that Al-Hammar had gone too far, that there was more to the situation than Al-Hammar knew or was prepared to admit. Moreover, Al-Hammar was portrayed *not* as someone who had reached out, in pain, for sympathy and friendship. Rather, he was depicted as a "bad actor," someone with a "chip on his shoulder," someone no responsible member of the law school community should trade stories with. Nonetheless, a few progressive students and faculty members believed Al-Hammar had done the institution a favor by raising the issues and demanding that they be addressed. They were a distinct minority.

E. *The Anonymous Leaflet Counterstory*

About a month after Al-Hammar spoke, the law faculty formed a special committee for minority hiring. The committee contained practically every young liberal on the faculty, two of its three female professors, and the Assistant Dean. The Dean announced the committee's formation in a memorandum sent to the law school's ethnic student associations, the student government, and the alumni newsletter, which gave it front-page coverage. It was also posted on bulletin boards around the law school.

The memo spoke about the committee and its mission in serious, measured phrases — "social need," "national search," "renewed effort," "balancing the various considerations," "identifying members of a future pool from which we might draw." Shortly after the memo was distributed, an anonymous four-page leaflet appeared in the student lounge, on the same bulletin boards on which the Dean's memo had been posted, and in various mailboxes of faculty members and law school organizations. Its author, whether student or faculty member, was never identified.[53]

The leaflet was entitled, "Another Committee, Aren't We Wonderful?" It began with a caricature of the Dean's memo, mocking its measured language and high-flown tone. Then, beginning in the mid-

53. Like all the stories, the leaflet is purely fictional; perhaps it was born as an "internal memo," stimulated by Al-Hammar's speech, in the minds of many progressive listeners at the same time.

dle of the page the memo told, in conversational terms, the following story:

'And so, friends and neighbors (the leaflet continued), how is it that the good law schools go about looking for new faculty members? Here is how it works. The appointments committee starts out the year with a model new faculty member in mind. This mythic creature went to a leading law school, graduated first or second in his or her class, clerked for the Supreme Court, and wrote the leading note in the law review on some topic dealing with the federal courts. This individual is brilliant, personable, humane, and has just the right amount of practice experience with the right firm.

Schools begin with this paragon in mind and energetically beat the bushes, beginning in September, in search of him or her. At this stage, they believe themselves genuinely and sincerely colorblind. If they find such a mythic figure who is black or Hispanic or gay or lesbian, they will hire this person in a flash. They will of course do the same if the person is white.

By February, however, the school has not hired many mythic figures. Some that they interviewed turned them down. Now, it's late in the year and they have to get someone to teach Trusts and Estates. Although there are none left on their list who are Supreme Court clerks, etc., they can easily find several who are a notch or two below that — who went to good schools, but not Harvard, or who went to Harvard, yet were not first or second in their classes. Still, they know, with a degree verging on certainty, that this person is smart and can do the job. They know this from personal acquaintance with this individual, or they hear it from someone they know and trust. Joe says Bill is really smart, a good lawyer, and will be terrific in the classroom.

So they hire this person because, although he or she is not a mythic figure, functionally equivalent guarantees — namely first- or second-hand experience — assure them that this person will be a good teacher and scholar. And so it generally turns out—the new professor does just fine.

. 'Persons hired in this fashion are almost always white, male, and straight. The reason: We rarely know blacks, Hispanics, women, and gays. Moreover, when we hire the white male, the known but less-than-mythic quantity, late in February, *it does not seem to us like we are making an exception.* Yet we are. We are employing a form of affirmative action — bending the stated rules so as to hire the person we want.[54]

54. *See Fairness and Formality, supra* note 47, at 1388-92 (prejudice flourishes in informal settings). I am indebted to my colleague, Mari Matsuda, for this observation.

The upshot is that whites have two chances of being hired — by meeting the formal criteria we start out with in September — that is, by being mythic figures — and also by meeting the second, informal, modified criteria we apply later to friends and acquaintances when we are in a pinch. Minorities have just one chance of being hired — the first.

To be sure, once every decade or so a law school, imbued with crusading zeal, will bend the rules and hire a minority with credentials just short of Superman or Superwoman. And, when it does so, *it will feel like an exception.* The school will congratulate itself — it has lifted up one of the downtrodden. And, it will remind the new professor repeatedly how lucky he or she is to be here in this wonderful place. It will also make sure, through subtle or not-so-subtle means, that the students know so, too.

But (the leaflet continued), there is a coda.

If, later, the minority professor hired this way unexpectedly succeeds, this will produce consternation among his or her colleagues. For, things were not intended to go that way. When he or she came aboard, the minority professor lacked those standard indicia of merit — Supreme Court clerkship, high LSAT score, prep school background — that the majority-race professors had and believe essential to scholarly success.

Yet the minority professor is succeeding all the same —publishing in good law reviews, receiving invitations to serve on important commissions, winning popularity with students. This is infuriating. Many majority-race professors are persons of relatively slender achievements — you can look up their publishing record any time you have five minutes. Their principal achievements lie in the distant past, when aided by their parents' upper class background, they did well in high school and college, and got the requisite test scores on standardized tests which test exactly the accumulated cultural capital they acquired so easily and naturally at home. Shortly after that, their careers started to stagnate. They publish an article every five years or so, often in a minor law review, after gallingly having it turned down by the very review they served on as editor twenty years ago.

So, their claim to fame lies in their early exploits, the badges they acquired up to about the age of twenty-five, at which point the edge they acquired from Mummy and Daddy began to lose effect. Now, along comes the hungry minority professor, imbued with a fierce desire to get ahead, a good intellect, and a willingness to work 70 hours a week if necessary to make up for lost time. The minority person lacks

the merit badges awarded early in life, the white professor's main source of security. So, the minority's colleagues don't like it and use perfectly predictable ways to transfer the costs of their discomfort to the misbehaving minority.

So that, my friends, is why minority professors

'(i) have a hard time getting hired; and,

'(ii) have a hard time if they are hired.

When you and I are running the world, we won't replicate this unfair system, will we? Of course not — unless, of course, it changes us in the process.

* * *

This second counterstory attacks the faculty less frontally in some respects — for example it does not focus on the fate of any particular black candidate, such as Henry, but attacks a general mindset. It employs several devices including narrative and careful observation — the latter to build credibility (the reader says, "That's right"), the former to beguile the reader and get him or her to suspend judgment.[55] (Everyone loves a story.) The last part of the story is painful; it strikes close to home. Yet the way for its acceptance has been paved by the earlier parts, which paint a plausible picture of events, so that the final part demands consideration. It generalizes and exaggerates — many majority-race professors are *not* persons of slender achievement. But such broad strokes are part of the narrator's art. The realistically drawn first part of the story, despite shading off into caricature at the end, forces readers to focus on the flaws in the good face the dean attempted to put on events. And, despite its somewhat accusatory thrust, the story, as was mentioned, debunks only a mindset, not a person. Unlike Al-Hammar X's story, it does not call the chair of the appointments committee, a much-loved senior professor, a racist. (But did Al-Hammar's story, confrontational as it was, pave the way for the generally positive reception accorded the anonymous account?)

The story invites the reader to alienate herself or himself from the events described, to enter into the mental set of the teller, whose view

55. For a discussion of narrative strategies to intrigue and beguile the reader, see THE LEGAL IMAGINATION, *supra* note 20, at 802:

> From the beginning you know where the lawyer wants to come out, and every word points that way.... But the judge is bound to keep an open mind, to keep his reader in suspense as long as he can, if he is to express fairly the process of his decision. There is a difference between an opinion that reaches a conclusion and one that is aimed there ....
>
> ... [I]f it is to express the process by which the original intention is worked out, the judicial narrative must keep the reader in a sort of suspense or open-mindedness, during which he is exposed one by one to the facts and arguments that seem important to the judge, until the reader has them all, at which point he should find himself agreeing with the judgment. Very few opinions do this ....

is different from the reader's own. The oppositional nature of the story, the manner in which it challenges and rebuffs the stock story, thus causes him or her to oscillate between poles.[56] It is insinuative: At times, the reader is seduced by the story and its logical coherence — it is a plausible counter-view of what happened; it has a degree of explanatory power.

Yet the story places the majority-race reader on the defensive. He or she alternately leaves the storyteller's perspective to return to his or her own, saying, "That's outrageous, I'm being accused of . . . ." The reader thus moves back and forth between two worlds, the storyteller's, which the reader occupies vicariously to the extent the story is well-told and rings true, and his or her own, which he or she returns to and reevaluates in light of the story's message. Can my world still stand? What parts of it remain valid? What parts of the story seem true? How can I reconcile the two worlds, and will the resulting world be a better one than the one with which I began?

These are in large part normative questions, which lead to the final two issues I want to explore. Why *should* members of outgroups tell stories? And, why *should* others listen?

II. Why Outgroups Should Tell Stories and Why Others Should Listen

Subordinated groups have always told stories.[57] Black slaves told, in song, letters, and verse, about their own pain and oppression.[58]

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56. *E.g.*, Heracles' Bow, *supra* note 25, at 94, 174; Note, *Figuring the Law: Holism and Tropological Influence in Legal Interpretation*, 97 Yale L.J. 823, 843 (1988). On the theory that the force of narrative may be independent of the narrator, see The Legal Imagination, *supra* note 20, at 865-66 (possibility that whenever a story is told, it may take on a life of its own, escaping the writer's control and becoming an unshakable presence for the auditor). For a summary of major theories of persuasion, see J. Sproule, Argument: Language and Its Influence 260-68 (1980). Sproule identifies three types of theories: Rhetorical Theories, Cognitive Consistency Theories, and Interpersonal Theories. Rhetorical Theories can be traced back to the Greek sophists, are typified by Aristotle's *Rhetoric*, are generally based on observations of public communication rather than on experimentation, and assume arguments should be studied not only for their effects, but for their ethics. Cognitive Consistency Theories (among the best-known of which is L. Festinger, A Theory of Cognitive Dissonance (1957)) are experimental and statistical and grounded on the tendency of the individual to move toward a coherent system of images by eliminating, reducing, or incorporating discordant new ideas. Interpersonal Theories consider the informal influences people have on each other. For example, the Balance Theory developed by Fritz Heider and Theodore Newcomb in the decade after World War II predicts that two persons who initially disagree over an issue will move toward harmony that may result in a unilateral change of mind, a purposeful ignoring or misinterpreting of each others' attitudes, or a changed relationship in which the disagreement becomes "consistent with dislike."

57. All groups do. *See supra* text accompanying notes 8-9; sources cited *supra* note 16; Steele, *supra* note 11, at 47-48; *cf.* Cover, *supra* note 1, at 49-50 (on the "interpretation of texts of resistance"); Tagliabue, *supra* note 12 (street theater used to expose Communism's flaws).

58. Dorinson & Boskin, *Racial and Ethnic Humor*, in Humor in America 172 (L. Mintz

They described the terrible wrongs they had experienced at the hands of whites, and mocked (behind whites' backs) the veneer of gentility whites purchased at the cost of the slaves' suffering.[59] Mexican-Americans in the Southwest composed *corridos* (ballads) and stories, passed on from generation to generation, of abuse at the hands of gringo justice, the Texas Rangers, and ruthless lawyers and developers who cheated them out of their lands.[60] Native American literature, both oral and written, deals with all these themes as well.[61] Feminist consciousness-raising consists, in part, of the sharing of stories, of tales from personal experience, on the basis of which the group constructs a shared reality about women's status vis-à-vis men.[62]

This proliferation of counterstories is not an accident or coincidence. Oppressed groups have known instinctively that stories are an essential tool to their own survival and liberation. Members of outgroups can use stories in two basic ways: first, as means of psychic self-preservation;[63] and, second, as means of lessening their own subordination.[64] These two means correspond to the two perspectives from which a story can be viewed — that of the teller, and that of the

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ed. 1988); *see Looking to the Bottom, supra* note 16, at 347 n.105; *see also* sources cited *supra* notes 16 & 18.

59. *See* L. LEVINE, BLACK CULTURE AND BLACK CONSCIOUSNESS: AFRO-AMERICAN FOLK THOUGHT FROM SLAVERY TO FREEDOM 105 (1977) (trickster tales), 121-33 ("fooling master" tales), 298-320 ("black humor" to confront obliquely their oppressor, including jokes that mock hypocrisy, segregation, and integration); PUTTIN' ON OLE MASSA, *supra* note 16; Dorinson & Boskin, *supra* note 58, at 173; *see also* other sources cited *supra* note 16.

60. *E.g.*, A. LUCERO-WHITE LEA, LITERARY FOLKLORE OF THE HISPANIC SOUTHWEST (1953); Campa, *Sayings and Riddles in New Mexico*, U.N.M. BULL., Sept. 5, 1937, at 3.

61. *E.g.*, A GATHERING OF SPIRIT: WRITING AND ART BY NORTH AMERICAN INDIAN WOMEN (B. Brant ed. 1984); R. ORTIZ, THE GREAT SIOUX NATION: SITTING IN JUDGMENT ON AMERICA (1977); Deloria, *Indian Humor*, in LITERATURE OF THE AMERICAN INDIANS 152-69 (A. Chapman ed. 1975); Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219.

62. *See* FEMINIST THEORY: A CRITIQUE OF IDEOLOGY (N. Keohane, M. Rosaldo & B. Gelpi eds. 1982); A. LORDE, *supra* note 11; MacKinnon, *Theory*, *supra* note 6; MacKinnon, *Jurisprudence*, *supra* note 6; *see also* Colker, *Feminism, Sexuality, and Self: A Preliminary Inquiry into the Politics of Authenticity* (Book Review), 68 B.U. L. REV. 217, 241-48 (1988) (critiquing various aspects of feminist consciousness-raising); Polan, *supra* note 34.

63. *See* AND WE ARE NOT SAVED, *supra* note 2, at 215-21 (Chronicle of the Slave Scrolls); *see also* Al-Hammar's story, *supra* section I.D, which seems to have been told as much as a mental health imperative as in hopes of swaying the audience.

64. *See supra* notes 15-19 and accompanying text; Steele, *supra* note 11, at 47-49 (racial myths center about idea of innocence). Will whites listen to blacks' and other outgroups' stories — or simply "tune them out" or reinterpret them? *See* sources cited *infra* note 79. Some may do the latter, but others will not. (i) As was observed earlier, stories are often entertaining and not particularly threatening, *see supra* notes 51-52 and accompanying text; (ii) Stories benefit the majority-race listener, by enriching his or her reality, *see infra* section II.B; (iii) Often it will be the majority-race individual who initiates the encounter, tells the first story ("What do you think of John Henry's not getting hired? I'm sure it wasn't discrimination, aren't you?") in which case he or she is obliged by the norms of social etiquette to listen to the black's counterstory.

listener. The storyteller gains psychically, the listener morally and epistemologically.

A. *How Storytelling Benefits Members of Outgroups*

The member of an outgroup gains, first, psychic self-preservation. A principal cause of the demoralization of marginalized groups is self-condemnation. They internalize the images that society thrusts on them — they believe that their lowly position is their own fault.[65]

The therapy is to tell stories. By becoming acquainted with the facts of their own historic oppression — with the violence, murder, deceit, co-optation, and connivance that have caused their desperate estate — members of outgroups gain healing.[66]

The story need not lead to a violent act; Frantz Fanon was wrong in writing that it is only through exacting blood from the oppressor that colonized people gain liberation.[67] Rather, the story need only lead to a realization of how one came to be oppressed and subjugated. Then, one can stop perpetrating (mental) violence on oneself.[68]

So, stories — stories about oppression, about victimization, about one's own brutalization — far from deepening the despair of the oppressed, lead to healing, liberation, mental health.[69] They also promote group solidarity. Storytelling emboldens the hearer, who may have had the same thoughts and experiences the storyteller describes, but hesitated to give them voice. Having heard another express them, he or she realizes, I am not alone.[70]

Yet, stories help oppressed groups in a second way — through their effect on the oppressor. Most oppression, as was mentioned earlier, does not seem like oppression to those perpetrating it.[71] It is ra-

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65. John Henry's state before talking with Chen was close to this. *See supra* note 60; F. FANON, THE WRETCHED OF THE EARTH (1968); Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 135 (1984); Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989); *see also* A. GRAMSCI, *supra* note 9; Gordon, *supra* note 26, at 284-86; Steele, *supra* note 11, at 48.

66. *See* sources cited *supra* note 62; Wiecek, *Preface to the Historical Race Relations Symposium*, 17 RUTGERS L. REV. 407, 412 (1986).

67. F. FANON, *supra* note 65.

68. *See* AND WE ARE NOT SAVED, *supra* note 2, at 215-21 (Chronicle of the Slave Scrolls).

69. *Id.*

70. For example, recall John Henry's lunch conversation with his younger colleague, *supra* text accompanying notes 41-42. *See also* E. NOELLE-NEUMANN, THE SPIRAL OF SILENCE (1984); Crenshaw, *supra* note 10, at 1336 (blacks' greatest resource the ability to speak and share experience of racism, to "name our reality"), 1349 (warning of danger of absorbing wrong stories, wrong reality).

71. *Supra* note 14 and accompanying text; *see* Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 309-10 (1987); *see also The Imperial Scholar*, *supra* note 6; *A Critical Review*, *supra* note 11, at 1054-55.

tionalized, causing few pangs of conscience. The dominant group justifies its privileged position by means of stories, stock explanations that construct reality in ways favorable to it.[72] One such story was put forward in the Introduction to this essay — the stock story of race relations in this country.[73]

This story is drastically at odds with the way most people of color would describe their condition. Artfully designed parables, chronicles, allegories, and pungent tales like the one told in the anonymous leaflet can jar the comfortable dominant complacency that is the principal anchor dragging down any incentive for reform.[74] They can destroy — but the destruction they produce must be voluntary, a type of willing death. Because this is a white-dominated society in which the majority race controls the reins of power, racial reform must include them.[75] Their complacency — born of comforting stories — is a major stumbling block to racial progress. Counterstories can attack that complacency.

What is more, they can do so in ways that promise at least the possibility of success. Most civil rights strategies confront the obstacle of blacks' otherness.[76] The dominant group, noticing that a particular effort is waged on behalf of blacks, increases its resistance. Stories at times can overcome that otherness, hold that instinctive resistance in abeyance.[77] Stories are the oldest, most primordial meeting ground in human experience. Their allure will often provide the most effective means of overcoming otherness, of forming a new collectivity based on the shared story.[78]

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72. *See supra* notes 25-26 and accompanying text; *see also* West, *Critical Legal Studies and a Liberal Critic*, 97 YALE L.J. 757, 767 (1988); Steele, *supra* note 11 (innocence-giving myths validate things as they are).

73. *Supra* text accompanying note 27. This story is reassuring. There is little need for guilt or responsibility; we have all the case law and statutes that we need; black people have been and are making steady progress; and the few out-and-out racists that remain will be punished when they step out of line.

74. *See* sources cited *supra* note 16 (underdogs' stories often ironic or satiric); Phelps, *The Story of Law in* Huckleberry Finn, 39 MERCER L. REV. 889 (1988); Crenshaw, *supra* note 10, at 1335.

75. *See* M. BALL, *supra* note 13, at 135-36; 1 P. RICOEUR, *supra* note 1, at x-xi; Crenshaw, *supra* note 10, at 1335-37, 1359, 1366-68; *Saved?*, *supra* note 3, at 943.

76. Note the almost reflex rejection of Al-Hammar's story, for example. *Supra* section I.D.

77. For illustration, note the serious attention given to the anonymous leaflet by faculty and the law school community. *Supra* section I.E.

78. Stories may thus be the private-life analogue of formality in litigation and in the public sphere generally, namely, devices whose purpose and effect is to discourage and reduce prejudice. *See Fairness and Formality*, *supra* note 47.

B. *Why Members of the Ingroup Should Listen to Stories*

Members of outgroups should tell stories. Why should members of ingroups listen to them?

Members of the majority race should listen to stories, of all sorts, in order to enrich their own reality. Reality is not fixed, not a given.[79] Rather, we construct it through conversations, through our lives together.[80] Racial and class-based isolation prevents the hearing of diverse stories and counterstories. It diminishes the conversation through which we create reality, construct our communal lives. Deliberately exposing oneself to counterstories can avoid that impoverishment, heighten "suspicion,"[81] and can enable the listener and the teller to build a world richer than either could make alone.[82] On another occasion, the listener will be the teller, sharing a secret, a piece of information, or an angle of vision that will enrich the former teller; and so on dialectically, in a rich tapestry of conversation, of stories.[83] It is through this process that we can overcome enthnocentrism and the unthinking conviction that our way of seeing the world is the only one — that the way things are is inevitable, natural, just, and best — when it is, for some, full of pain, exclusion, and both petty and major tyranny.[84]

Listening to stories makes the adjustment to further stories easier; one acquires the ability to see the world through others' eyes.[85] It can

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79. *Saved?, supra* note 3, at 947; *see* Teachout, *Worlds Beyond Theory: Toward the Expression of an Integrative Ethic for Self and Culture* (Book Review), 83 MICH. L. REV. 849 (1985); *Thinking About Our Language, supra* note 25, at 1962.

80. *See* sources cited *supra* note 10; J. MILL, ON LIBERTY 35 (D. Spitz ed. 1975) (we should accept as true only those interpretive beliefs that we have invited *the whole world* to prove unfounded); *Saved?, supra* note 3; Shapiro, *supra* note 47. *See generally* N. DAVIS, FICTION IN THE ARCHIVES: PARDON TALES AND THEIR TELLERS IN SIXTEENTH-CENTURY FRANCE (1987).

81. *See* Sherwin, *supra* note 12 (critical rhetoric can combine culture-building, constituent-strengthening dimension of storytelling and "deconning" element).

82. *See* sources cited *supra* note 20; M. BALL, *supra* note 13, at 135; *Saved?, supra* note 3.

83. *See* sources cited *supra* note 74. Stories enable us to begin to reform thought structures by means of which we create our world — no small accomplishment. The task is akin to making a bed while still lying in it. Stories give us a glimpse of a world we have never seen, using the current stock of narratives to point the way to another better, larger, more inclusive one. *But see supra* notes 47-48 and accompanying text (poorly told stories can result in rejection, rationalization, or cognitive dissonance on part of listener and fail to have intended effect).

84. *See, e.g.*, the pain and anger in Al-Hammar's story, *supra* section I.D. Stories make belief structures visible and show that they need not be as they are. On the disjunction between majority- and minority-race life experiences and perceptions of the world, see Delgado, *Critical Legal Studies and the Realities of Race — Does the Fundamental Contradiction Have a Corollary?*, 23 HARV. C.R.-C.L. L. REV. 407, 407-08 (1988). *See also Economic Man, supra* note 21, at 873-77.

85. *See Affirmative Action, supra* note 7, at 8. Note that Al-Hammar's explosive tale of rage and disgust may have paved the way for the more ironic and appealing anonymous account. Stories can often be staged, arranged in sequence so as to heighten consciousness incrementally.

lead the way to new environments. A willing listener is generally "welcomed with open arms."[86] Listening to the stories of outgroups can avoid intellectual apartheid. Shared words can banish sameness, stiffness, and monochromaticity and reduce the felt terror of otherness when hearing new voices for the first time.[87]

If we would deepen and humanize ourselves, we must seek out storytellers different from ourselves[88] and afford them the audience they deserve. The benefit will be reciprocal.

CONCLUSION

Stories humanize us. They emphasize our differences in ways that can ultimately bring us closer together. They allow us to see how the world looks from behind someone else's spectacles. They challenge us to wipe off our own lenses and ask, "Could I have been overlooking something all along?"

Telling stories invests text with feeling, gives voice to those who were taught to hide their emotions. Hearing stories invites hearers to participate, challenging their assumptions, jarring their complacency, lifting their spirits, lowering their defenses.

Stories are useful tools for the underdog because they invite the listener to suspend judgment, listen for the story's point, and test it against his or her own version of reality. This process is essential in a pluralist society like ours, and it is a practical necessity for underdogs: All movements for change must gain the support, or at least understanding, of the dominant group, which is white.

Traditional legal writing purports to be neutral and dispassionately analytical, but too often it is not. In part, this is so because legal writ-

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The stories told in Part I represent, if not a linear progression, at least movement — something more than simple oscillation around an undefinable midline.

86. *Id.* at 16.

87. *Id.* at 12-16. There are dangers in storytelling, particularly for the first-time storyteller. The hearer of an unfamiliar counterstory may reject it, as well as the storyteller, precisely because the story unmasks hypocrisy and increases discomfort. *See Saved?, supra* note 3; *cf.* R. LAING, THE POLITICS OF EXPERIENCE 77-81 (1967) (double bind theory of schizophrenia); Bateson, Jackson, Haley & Wakeland, *Toward a Theory of Schizophrenia,* 1 BEHAV. SCI. 251 (1956) (same). *See generally* L. FESTINGER, *supra* note 56. Or, the hearer may consciously or unconsciously reinterpret the new story, in light of the hearer's own belief system and inventory of stock stories, so as to blunt, or even reverse its meaning. *See id.*; Winkler, *Scholars Nourished on the 60's Question the Impact of Their Research on Public Policy and Law,* Chron. Higher Ed., Nov. 9, 1988, at A5, col. 2 (Mary Frances Berry, professor of history and former Assistant Secretary of HEW, and other historians recounted cases where scholars' testimony to courts and Congress had an effect opposite from that intended because the decisionmaker had a different agenda, or reinterpreted scholar's account to favor the other side).

88. Note the abstract, bloodless — not to mention ineffectual — quality of John Henry's legal complaint. *Supra* subsection I.C.1. It does little to challenge, enlighten or move us, as some of the other stories do.

ers rarely focus on their own mindsets, the received wisdoms that serve as their starting points, themselves no more than stories, that lie behind their quasi-scientific string of deductions. The supposedly objective point of view often mischaracterizes, minimizes, dismisses, or derides without fully understanding opposing viewpoints. Implying that objective, correct answers can be given to legal questions also obscures the moral and political value judgments that lie at the heart of any legal inquiry.

Legal storytelling is an engine built to hurl rocks over walls of social complacency that obscure the view out from the citadel. But the rocks all have messages tied to them that the defenders cannot help but read. The messages say, let us knock down the walls, and use the blocks to pave a road we can all walk together.[89]

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89. HOW THINGS CAME OUT

The curious reader will be glad to know that:

Professor White never modified his view.

Al-Hammar X graduated in the top 15% of his class, enrolled in a famous LL.M. program, and plans to become a law professor.

Judith Rogers continued to be friendly with Professor Vernier, and actually succeeded in making him more receptive to minority candidates.

John Henry was hired at Howard, where he had a long and illustrious career.

The students at school *X* formed a committee to press for more minority and women professors. They did all the things Al-Hammar X suggested except disrupt classes. Two years later, the school hired two black women and a Hispanic male, maintaining however that this was not the result of student pressure but rather its own long-term recruiting.