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## Storytelling for Lawyers

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# STORYTELLING FOR LAWYERS

JONATHAN K. VAN PATTEN†

## 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.”<sup>1</sup> 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.<sup>2</sup> 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*,<sup>3</sup> *Harold and the Purple Crayon*,<sup>4</sup> *Where the Wild Things Are*,<sup>5</sup> *The Velveteen Rabbit*,<sup>6</sup> along with the *Winnie-the-Pooh* series,<sup>7</sup> 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.<sup>8</sup> 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."<sup>9</sup> 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.<sup>10</sup> Stories help to make sense of life. Some stories confirm existing beliefs and prejudices, while others stretch the worldview.<sup>11</sup> 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*,<sup>12</sup> 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

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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.<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup> 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

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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](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 (CSPIT) 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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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

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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.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> "A wound, though cured, yet leaves behind a scar."<sup>23</sup> 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.<sup>24</sup> "If the glove doesn't fit, you must acquit."<sup>25</sup> 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

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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 Cochran).

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*,<sup>26</sup> 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.<sup>27</sup>

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.<sup>28</sup>

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*,<sup>29</sup> or the works of J.K. Rowling.<sup>30</sup> 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<sup>31</sup> 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.<sup>32</sup>

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*<sup>33</sup> or *The Lord of the Rings*<sup>34</sup>) 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.<sup>35</sup> 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

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, *GORGAS* (E.R. Dodds trans., 1959).



Rights.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup>

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,<sup>40</sup> that they will respond to

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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.<sup>41</sup> 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

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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-Marshall-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.<sup>42</sup>

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

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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](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.<sup>43</sup>

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.”<sup>44</sup> 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

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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.<sup>45</sup> 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.<sup>46</sup>

### 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.<sup>47</sup> 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

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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.<sup>48</sup> 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.<sup>49</sup>

In the dramatic code, change is usually fueled by desire.<sup>50</sup> “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.”<sup>51</sup> 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

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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.<sup>52</sup>

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

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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."<sup>53</sup> That is, take a stand and perhaps even die because the narrative is more important than the life.<sup>54</sup> 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.<sup>55</sup> I believe this to be the most useful principle for both writing and editing.<sup>56</sup> 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.<sup>57</sup>

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

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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.<sup>58</sup> The *Iliad* is an epic poem containing over 15,000 lines.<sup>59</sup> The *Odyssey* is another epic poem consisting of 12,110 lines.<sup>60</sup> 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—

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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.<sup>61</sup>

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*,<sup>62</sup> 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

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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.<sup>63</sup>

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.”<sup>64</sup>

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.<sup>65</sup> It is not as much a factor in storytelling for lawyers, but it should not be neglected. A good

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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.<sup>66</sup> 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.”<sup>67</sup> 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

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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.<sup>68</sup>

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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."<sup>69</sup> 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.<sup>70</sup> Keep your ego in check. It is about the story, not the storyteller.<sup>71</sup> 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

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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.<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup>

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

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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,<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup> 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

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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.<sup>78</sup> 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.<sup>79</sup> 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.

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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 too 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.<sup>80</sup> 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.<sup>81</sup> 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

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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,<sup>82</sup> 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.<sup>83</sup> 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.<sup>84</sup> 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.<sup>85</sup>

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.<sup>86</sup> 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.<sup>87</sup> 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.'"<sup>88</sup> 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.

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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](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.<sup>89</sup> 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

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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.<sup>90</sup>

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

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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](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.<sup>91</sup> It is easy to miss something when your assessment of someone else is

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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](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."<sup>92</sup> 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.<sup>93</sup> 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."<sup>94</sup> 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.

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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.

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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.<sup>95</sup> Thus, the opening that “we have come here to ask you to right a wrong”<sup>96</sup> 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.<sup>97</sup> By changing the theme to resonate with a person’s unconscious concerns, it increases the chances of success.<sup>98</sup>

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

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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.<sup>99</sup>

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.<sup>100</sup>

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.<sup>101</sup>

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*<sup>102</sup> or Sam Elliott in *The Big Lebowski*<sup>103</sup> or the voice of a great character, like James Earl Jones as Darth Vader in *Star Wars*.<sup>104</sup> 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."<sup>105</sup> 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.<sup>106</sup> 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.<sup>107</sup> 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

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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<sup>108</sup> – 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.

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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."<sup>109</sup> 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.<sup>110</sup> 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.<sup>111</sup> 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*.<sup>112</sup> 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](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.<sup>113</sup> 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.

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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>.