DANGEROUS TONGUES: STORYTELLING IN CONGRESSIONAL TESTIMONY

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[T]he procedures of limitation of discourse should be analyzed.¹

Life and death are in the hands of the tongue.²

Abstract:
The important and dangerous use of storytelling in making legislation has been largely ignored by legal academics. Although notable scholars, including Justice Scalia and Cass Sunstein, have written extensively about the use of legislative history in statutory interpretation, and much has been written about the use of storytelling in advocacy, the important role that stories play in making legislation has been overlooked by the legal academy, outside of a few articles relating to criminal statutes.

The Congressional Record on a recent farm bill is full of stories told by special interests that draw on metaphors, archetypes, and myths. Snow White’s apple, the Feisty Octogenarian, and the Yeoman Farmer crowd out any consideration of dissenting voices, sound data, or good science. As Michel Foucault observed about institutions in general, in insisting on rituals that permit only special interest testimony packaged in a crowd-pleasing production, Congress asserted its power over the production of discourse to the detriment of sound lawmaking.

This pioneering interdisciplinary article uses as its example the Food Safety and Modernization Act and draws on the work of linguists from the Pragmatics school and Deborah Tannen as well as critical theorists Michel Foucault and Norman Fairclough to describe the dangers in the act’s testimony. The article offers a cutting-edge solution interpolated from the world of clinical

*Assistant Teaching Professor, Drexel University Thomas R. Kline School of Law. I am very grateful for support and encouragement from the LWI/ALWD/Lexis Scholarship, the LWI Writers Workshop-Retreat, Dean Roger Dennis, and the Legal Research Center. This article would not have occurred without my friend and colleague Amy Montemarano, who suggested the idea as a joint presentation at the 2011 Denver Applied Legal Storytelling Conference. And, from beginning to end, I thank Liz, Matt, and Helen Foster.

²Proverbs 18:21.
medicine to suggest applying evidence-based legislation to curtail the dangers of storytelling in Congressional testimony.

I. Introduction

Imagine you’re a burned out litigator who’s decided to trade in eighty-hour workweeks and chronic antagonism for farming. Organic bean sprout farming. You’ll start small and sell locally; the customers will come to your farm stand and you’ll deliver a few flats a week to local farm markets. Then, a distributor buys your sprouts at a market and sells them to a restaurant that has a catering division. Within a matter of weeks, thirty-nine people are dead and more than three thousand are sick, 852 of them with life-threatening kidney disease. This happened because Congress ignored the scientists, listened only to its cronies, and passed a food safety law on the strength of evidence as mythical as the bedtime story you read your kids last night.

In fact, Congress relies heavily on testimony in enacting legislation, and much of the official record in Congressional committees’ considerations of proposed legislation is in the

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4 See, e.g., William N. LaForge, TESTIFYING BEFORE CONGRESS xxvi (The Capital Net 2010) (“Congressional testimony is a key institutional element of the legislative process before government”); see generally United States Army, Congressional Activities Office, Handbook, “So, You’ve Been Asked To Testify Before Congress.”

Congress holds four different types of hearings: legislative, oversight, investigative, and, for the Senate only, confirmation. This paper addresses “legislative hearings,” in which Congress considers, among other things, proposed legislation.

5 The Rules vary on whether and to what extent the various committees need to include testimony. “The text of the hearings usually contains only the prepared statements submitted by witnesses, not actual testimony.” “Guide to Federal Legislative History,” Rutgers University
form of testimony, supplemented by written statements, both of which, if prepared according to
the recommendations of professionals, contain “stories.” The problem with stories, of course, is
that their compelling nature makes them poor tools for reasoned decision-making.

The second problem with the use of storytelling in making federal legislation is that few
people get to be the storytellers and, even when they do, their stories are curtailed by strict
procedures. Unlike some state legislatures, Congress does not consider stories from all sides,
incorporating statements from members and guests to create the best version of legislation after
considering all constituencies. In fact, access to a seat at the testifying table is limited, and the
testimony is further “controlled, selected, organized and redistributed” by Congressional
procedures. Thus, the normative structure of Congressional testimony, as Foucault observed of
the work of institutions in general, “solemnises [sic] beginnings, surrounds them with a circle of
attention and silence, and imposes ritualized forms on them.” These constraints mean that
Congress can avoid valuable information about proposed legislation; Congressional procedures
muffle dissenting voices so the hearings are not muddied by any off-message testimony.

(last accessed Aug. 7, 2015).
6 See e.g., US Army, “So You’ve Been Asked,” supra n. __ at 7, 24, 31; LaForge, TESTIFYING
BEFORE CONGRESS, __.
7 See Steven J. Johansen, This is Not the Whole Truth: The Ethics of Telling Stories to Clients, 38
ARIZ. ST. L. J. 961, 961 (2006) (“[S]tories, by their nature, can never tell the whole truth”).
8 See infra, n. __ and accompanying text.
9 See Foucault, “The Order of Discourse,” supra n. __, at __.
10 Id. at __; see also Michael McCarthy and Ronald Carter, “There’s Millions of Them”
Hyperbole in Everyday Conversation, 36 J. PRAGMATICS 149, 150 (2004) (“Rhetoric, in the
ancient world, was associated with persuasive speech and the exercise of power”).
To describe the dangers of the use of storytelling in making legislation, I look here at the texts of spoken and written statements of witnesses and members of Congress as the House and the Senate considered the Food Safety Modernization Act. Although much has been written about interpreting legislation after its enactment, and much has been written about the use of storytelling in the practice of law, the important role of storytelling in the formation of

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11 Critics may note that in using “reported speech,” that is speech that is transcribed and then analyzed out of context, speech can take on different meanings at the hands of the analyst. See Gregory M. Matoesian, LAW AND THE LANGUAGE OF IDENTITY: DISCOURSE IN THE WILLIAM KENNEDY SMITH TRIAL 7, 105-132 (Oxford 2001); Richard Parmentier, The Political Function of Reported Speech, in REFLEXIVE LANGUAGE: REPORTED SPEECH AND METAPRAGMATICS, 261 (John A. Lucy, ed. Cambridge Univ. Press 2004).


14 See infra n. _____ and accompanying text.
legislation has been largely overlooked in the legal academic literature,\(^{15}\) outside of a few studies relating to criminal statutes.\(^{16}\)

Many of the statements made by members of Congress and the witnesses in support of the bill were in the form of stories\(^ {17}\) that incorporated myths\(^ {18}\) and archetypes using literary

\(^{15}\) See Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 *Indiana L. J.* 315, 320 & n. 40 (2001) (“Despite the relentless focus on rhetoric in every nook and cranny of the law … [s]cholars have largely ignored the rhetoric of legislative debate” and citing a few scholars who have discussed “legislative rhetoric”). Sociologists have, however, analyzed discourse surrounding policy making. *See, e.g.*, Deborah Stone, *Policy Paradox: The Art of Political Decision Making* at 158, 157- (3d ed. W.W. Norton 2012) (noting that in politics “narrative stories are the principal means for defining and contesting policy problems”) (emphasis in the original) (discussing symbolic devices and story lines used in politics); Susan Ehrlich, *Representing Rape: Language and Sexual Consent* (Routledge 2001) (discussing the power of “talk” to “define and delimit” the meanings attached to rape and its “subjects”).


\(^{17}\) A more popular word of critical theorists is “narrative.” But the distracting debate over definitions has left me to use the more colloquial word “stories.” *See* Charles J. Butler, *Note, The Defense of Marriage Act: Congress’s Use of Narrative in the Debate Over Same-Sex Marriage*, 73 *N.Y.U. L. Rev.* 841, 843-44 (1998) (narratives are stories circulated within communities and institutions that both shape and reveal society’s attitudes toward issues, particularly polemic questions”); *see also id.* at 850 (citing Louis O. Mink Narrative Form as a Cognitive Instrument …); “[N]arratives are socially organized phenomena which, accordingly, reflect the cultural and structural features of their production.” Patricia Ewick and Susan S. Silbey, “Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative.” 29 *Law & Soc. R.* 197, 200 (1995); *see also* Bert van Roermund, *Law, Narrative and Reality: An Essay in Intercepting Politics* I (“‘Narrativity,’ that is to say: the characteristic structure of tales, stories, in contradistinction to other genres of texts”) (Kluwer Academic Publishers 1997).

For the purposes of this article, narrative and storytelling are synonymous and are used interchangeably, unless otherwise noted. In telling a story, the narrator selects the events, the characters, and their order. Patricia Ewick and Susan S. Silbey, *Subversive Stories and
devices, or in Deborah Tannen’s words, “involvement strategies” of hyperbole, detail, images, and metaphor\textsuperscript{19} to create fear and provoke sympathy in the listeners. The myths, the stories, and the fear-baiting all reinforced the Congress’s control of the debate that, according to Foucault, is inherent in the production of discourse\textsuperscript{20} in our society; that is, that the social practice of language is “controlled, selected, organized and redistributed by a certain number of procedures whose role is to ward off its powers and dangers, to gain mastery over its chance events.\textsuperscript{21}

To describe the way Congressional testimony in the form of stories reinforces existing power structures, I employ tools from three sources: Tannen’s description of “involvement strategies”; pragmatics, which is a linguistics approach that looks at language in its cultural context.


\hypertextlink{footnote-19}{\textsuperscript{19}} For involvement strategies, see Tannen, Talking Voices, supra at n. ___; infra at notes ___ and accompanying text.


\hypertextlink{footnote-21}{\textsuperscript{21}} Michel Foucault, The Order of Discourse, supra n. ___ at 52; see also Ewick and Sibley, supra n. ___ at (stories reinforce hegemony).
context by studying some of the assumptions in, implications of, and the context of speech;²² and, finally, I employ Michel Foucault’s work on power and discourse, in which he suggests we analyze who is excluded from speaking and how rituals restrict even those who are permitted to speak.²³ Foucault’s work influenced a school of critics who use “critical discourse analysis,” which is a method of studying the way “social power abuse, dominance, and inequality are enacted, reproduced, and resisted by text and talk in the social and political context.”²⁴ “Critical”


²³ See Michel Foucault, The Order of Discourse at ___. “Discourse analysis in the social sciences is often strongly influenced by the work of Foucault.” Norman Fairclough, ANALYSING DISCOURSE: TEXTUAL ANALYSIS FOR SOCIAL RESEARCH 2 (Routledge 2003). See also Gregory M. Matoesian, LAW AND THE LANGUAGE OF IDENTITY: DISCOURSE IN THE WILLIAM KENNEDY SMITH TRIAL 4 (Oxford 2001) (situating “detailed linguistic analysis of trial discourse within broader frameworks of power”).

in this sense means close examination, to look at something known and to “problematize” it.\textsuperscript{25} Here, I will look use critical discourse analysis to look at issues in Congress of “power and control.”\textsuperscript{26} My blend here of textual analysis via pragmatics and social theory\textsuperscript{27} is not wholly original to me, but finds support in the work of Norman Fairclough, among others.\textsuperscript{28}

The article proceeds in the following way: In Part II, I discuss the scholarship on the use of storytelling in the law and note that the observations of skilled litigators and academics about the power of stories to sway juries are transferrable to the effect of stories on audiences of members of Congress.\textsuperscript{29} In Part II, also, I will touch on the scholarship on the use of storytelling in making criminal laws\textsuperscript{30} and I will relay some concerns of social scientists about the use of storytelling. Next, in Part III.A, I offer a descriptive account of the testimony of the Food Safety  
\textsuperscript{27} See Janet Cotterill, \textit{Language and Power in Court: A Linguistic Analysis of the O.J. Simpson Trial} (Palgrave Macmillan 2003) (noting her “eclectic” approach to data analysis in her study, drawing on works, among others, in international sociolinguistics, participant roles, frameworks, semantic prosody, and rhetoric).
\textsuperscript{28} See generally Norman Fairclough, \textit{Analysing Discourse: Textual Analysis for Social Research} 2 (Routledge 2003); \textit{see also} Norman Fairclough, \textit{Language and Power} 46 (2d ed.) (Routledge 2013) (“[T]he whole social order of discourse is put together and held together as a hidden effect of power”); Bruce Lincoln, “Introduction” in \textit{Discourse and the Construction of Society} 3 (Oxford 1989) (“[n]o consideration of discourse is complete that does not also take account of force”).

This approach is consistent with pragmatics, which also takes a critical perspective. See generally Teun A. Van Dijk, \textit{Critical Discourse Analysis}, in Debrah Schiffrin, et al., \textit{The Handbook of Discourse Analysis} 352 (Blackwell 2001). A “critical” approach is simply a way of reading a text for interpretation and analysis.

\textsuperscript{29} See infra notes \_ and accompanying text.
\textsuperscript{30} See infra notes \_ and accompanying text.
Modernization Act as framed by Tannen and pragmatics and I propose that testimony on the Tester Amendment, excluded small local farms, and was rife with the Myth of the American Farmer. In Part III.B, I apply Foucault to argue that the procedures by which Congress controlled, selected, and organized the testimony permit Congress to retain power. In Part IV, I note some alternative theories that may explain why the Food Safety Modernization Act was enacted; and I conclude by exploring a solution to the dangers of storytelling in testimony and recommending that Congress employ the new field of evidence-based legislation to test the assumptions in proposed legislation and the outcomes at certain points post-passage, such that ineffective legislation would die in committee or from mandatory, built-in sunshine provisions.  

II. The Use of Storytelling in the Law

A substantial amount of recent interdisciplinary scholarship explores narrative and cognitive science. A noteworthy subcategory of that work is the recent legal scholarship devoted to exploring the widespread use of storytelling in the law. The scholarship shows that

31 See infra notes ___ and accompanying text.


33 For the most current list of the use of storytelling in lawyering, see J. Christopher Rideout “Applied Legal Storytelling: A Bibliography,” 12 LEGAL COMMUNICATION AND RHETORIC: JALWD ____ (forthcoming, 2015) (categorizing the comprehensive list of legal scholarship presented at the annual Applied Legal Storytelling conference); see also Daniel M. Filler, Making the Case for Megan’s Law: A Study in Legislative Rhetoric, 76 INDIANA L. J. 315, 319-20 (2001) (“[a] remarkable body of literature has developed on the use of storytelling in legal
stories are used often in litigation because they are effective in helping people make sense of the world.34 Stories are a way of “processing the stimuli and events that make up our existence.”35 Stories create frameworks for understanding the world,36 and thus they create “blueprints” for decision-making.37 As linguists have observed about the use of stories in general, language is not


the mere “passive vehicle” for transmitting information; rather, language transforms information such that it creates new knowledge.  

A. Storytelling in Litigation

Legal writing professors and trial attorneys champion the use of storytelling. Legal writing professors participate in an annual “Applied Legal Storytelling Conference,” which began in 2007 with presentations by academics “bound by the common thread that stories convey meaning in the day-to-day practice of law” and based on the notion that “[s]torytelling is the backbone of the all-important theory of the case, which is the essence of all client-centered lawyering.”  

Other scholars have produced prodigious amounts of literature on the use of storytelling by practicing attorneys and judges.  

These scholars advocate the use of storytelling because stories are effective in persuading audiences.  

See Gregory M. Matoesian, LAW AND THE LANGUAGE OF IDENTITY: DISCOURSE IN THE WILLIAM KENNEDY SMITH TRIAL 3 (Oxford 2001) (noting that a “central premise” of his book is that language use “is not the mere passive vehicle for the imposition or transmission of law but actually constitutes and transforms evidence, facts, and rules into relevant objects of legal knowledge”).  


See Jonathan K. Van Patten, Storytelling for Lawyers, 57 S.D. L. REV. 239 (2012); Kenneth D. Chestek, Judging by the Numbers: An Empirical Study of the Power of Story, 7 J ASS’N LEGAL WRITING DIR. 1, 3 (2010) (“[s]tories are helpful because, properly done, they evoke emotional
juries. Stories can make complex ideas easy, and they are hard to refute.

The very effectiveness of storytelling demands that we consider the ethical issues in using stories; by their nature, stories are misleading or misleading as “[s]tories are always told within particular historical, institutional, and interactional contexts that shape their telling, its meanings and effects. They are told with particular interests, motives, and purposes in mind.” Stories that employ symbolic devices, such as metaphors, can be so “subtle and their poetry so emotionally compelling” that listeners do not challenge the myriad assumptions and responses within the reader that make the legal claim seem more ‘real,’ and hence believable, to the reader”). That’s why professors of legal writing urge their students to develop expertise in storytelling techniques. See, e.g., RUTH ANNE ROBBINS, STEVE JOHANSEN, KEN CHESTEK, YOUR CLIENT’S STORY: PERSUASIVE LEGAL WRITING, Wolters Kluwer (2013).

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42 See, e.g., Gerry L. Spence, How to Make a Complex Case Come Alive for a Jury, 72 ABA J 62, 62 (April 1986) (“Of course it’s all story telling – nothing more. It is the experience of the tribe around the fire, the primordial genes excited, listening –”); see also Kenneth D. Chestek, The Plot Thickens: Appellate Brief as Story, 14 LEGAL WRITING 127 (2008).

43 See Gerry L. Spence, “How to Make a Complex Case Come Alive for a Jury,” 72 ABA J 62, 64 (stating that he’s tried cases with many exhibits, cases that took months and “scores” of witnesses, but by using stories he has “never tried a complex case”); Gregory M. Matoesian, LAW AND THE LANGUAGE OF IDENTITY: DISCOURSE IN THE WILLIAM KENNEDY SMITH TRIAL 5 (Oxford 2001) (noting that criminal trials are a type of “regulated storytelling contest”) (quoting Gary Goodpaster, On the Theory of American Adversary Criminal Trial, 78 J. CRIM. LAW AND CRIMINOLOGY 118, 120 (1987)).

44 As Ewick and Sibley state: “[T]he dominance of the narrative form in most social situations invites us to consider the extent to which narratives may actually be complicit in constructing and sustaining the very patterns of silencing and oppression that some narrative scholars seek to reveal through the use of the narrative method [of analysis]. Patricia Ewick and Susan S. Silbey, Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative, 29 LAW & SOC. R. 197, 205-06 (1995); see also Todd A. Berger, A Trial Attorney’s Dilemma: How Storytelling as a Trial Strategy Can Impact a Criminal Defendant’s Successful Appellate Review, 4 DREXEL L. REV. 297, 307 (2012) (demonstrating how a defendant who testifies on his or her own behalf – or “provides a narrative at trial” – can harm the appeal when the appeal is based on a weight of the evidence claim).
consequences implicit in the story. The story and its embedded symbols “make it hard to see the conflict from any other perspective.” Among the ethical questions posed by the use of storytelling in the law, says Steve Johansen, is that a story’s believability comes from its narrative coherence, not its truth; that stories cannot include all points of view; and that stories’ appeals to emotions may undermine our concepts of impartial justice. Further, as social scientist have observed, stories may be used as tools to construct or reinforce hegemony; ethical storytelling requires us to ask who has “narrative privilege” and to query the mediation effect of telling others’ stories.

45 DEBORAH STONE, POLICY PARADOX at 177.

46 DEBORAH STONE, POLICY PARADOX at 177-78. “Literary devices serve to make something look more like one thing than another.” Id. at 382

47 See, e.g., Steven J. Johansen, Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling, 7 J. ASS’N L. WRITING DIRECTORS 63, 64 (2010) (nevertheless concluding that Applied Legal Storytelling “does not create new ethical dilemmas” but that “storytelling is consistent with our existing norms about the ethical practice of law”); Binny Miller, Telling Stories About Cases and Clients: The Ethics of Narrative, 14 GEO. J. L. ETHICS 1 (2000); see also Todd A. Berger, A Trial Attorney’s Dilemma: How Storytelling as a Trial Strategy Can Impact a Criminal Defendant’s Successful Appellate Review, 4 DREXEL L. REV. 297, 297 (2012) (noting how a criminal defendant’s storytelling can negatively affect an appeal and thus providing a “counter-point to the every-growing focus on the sue of storytelling as an essential component of criminal-trial practice”)

48 See generally Patricia Ewick and Susan S. Silbey, Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative, 29 LAW & SOC. R. 197, 212 (1995) (noting that “the resilience of ideologies and hegemony may derive from their articulation within personal stories”).

49 Tony E. Adams, A Review of Narrative Ethics, 14 QUALITATIVE INQUIRY 175, __ (2008).
B. Storytelling in Making Legislation

Storytelling is also used in legislative debate with similar troublesome effects, although much less scholarship is devoted to this phenomenon. Members of Congress and state legislatures use stories to “justify the need” for legislation, to make “claims” about its “anticipated benefits,” and to discuss “possible drawbacks.” Storytelling is the heart of political reasoning.

Stories find their ways into legislative deliberation by statements of members of the legislative body and from testimony of outside witnesses. Some observers believe that Congressional testimony is essential to gathering information to inform the making of legislation. Congressional testimony, proponents say, is a “vital means through which congressional committees become knowledgeable about issues that are before them for discussion, debate, and the development of legislative remedies. It is a method of collecting data and gathering intelligence through an open and public forum and dialogue.”

However, relying on testimony to form opinion is problematic because so much of the testimony is in the form of stories rather than data and information gathering. In politics, writes

50 See Filler, Daniel M., Making the Case for Megan’s Law: A Study in Legislative Rhetoric, 76 Ind. L. J. 315, 329 (2002) (dividing legislative debate about Megan’s law into these three categories).
51 See DEBORAH STONE, POLICY PARADOX, at 11-12 (“Political reasoning is reasoning by metaphor and analogy…It is strategic portrayal for persuasion’s sake and, ultimately, for policy’s sake”).
52 See, e.g., WILLIAM N. LAFORGE, TESTIFYING BEFORE CONGRESS (The Capitol Net 2010)
53 WILLIAM N. LAFORGE, TESTIFYING BEFORE CONGRESS, at xxvi. (The Capitol Net 2010) However, LaForge also notes that an “occasional staff professional,” will state that witness input in the form of testimony and statements “are relatively meaningless activities that produce little in the way of substantive results.” Id. at 14.
political scientist Deborah Stone, policy problems are defined and contested principally through “narrative stories.”  

54 The issues have “heroes and villains and innocent victims, and they pit forces of evil against the forces of good.”  

55 If, as was the case with the Food Safety Modernization Act, the Congressional Record is comprised of stories rife with symbolic figures and extended metaphors, then our laws are being made on the basis of myths.  

56 In fact, experts on testifying before Congress advocate the use of storytelling. An Army training manual advises, “Use examples or stories where possible” because “people remember them.”  

57 Lobbyist William N. LaForge recommends the use of “anecdotes” and “real-world stories” to “reinforce or support” testimony.  

58 Other advocacy groups suggest, “As much as possible talk about how the issue/problem has affected you personally … as opposed to providing statistics and numbers.”  


55 Id.  

56 See infra notes ___ and accompanying text. In speaking of myths in this article, I am speaking of stories that contain symbols and archetypes that convey meaning to a group. See infra notes ___ and accompanying text. See also Julie Lester at 1 (quoting, Leo Marx, “American Studies: A Defense of an Unscientific Methods” in New Literary History 1 75, 75 (1969); Bruce Lincoln, An Early Moment in the Discourse of “Terrorism”: Reflections on a Tale from Marco Polo, COMPARATIVE STUDIES IN SOCIETY AND HISTORY 242, 242 (2006) (myths are “stories that claim to speak with authority about issues of deep importance”). In this article, I do not address whether, or the extent to which, myths are embedded in our subconscious and are common to all humans.  


58 William N. LaForge, TESTIFYING BEFORE CONGRESS (The Capitol Net 2010) at 283.  

59 americansabroad.org/issues/representation/supporting-hr597/testifying-congress (last accessed July 15, 2014).
Compounding the problem of the lack of analysis in the testimony is that those who do testify “typically are stakeholders in the issues before the committee holding the hearing.” For example, in a Senate hearing on an early version of the food safety bill, the Senate Committee on Health, Education, Labor, and Pensions heard from corporate and institutional voices only. “In some cases a committee will strive to make sure that all reasonable points of view are represented, while in other cases witnesses expressing only particular points of view will be invited.” In the House and Senate committee hearings on the various bills that culminated into the Food Safety Modernization Act, no invited witnesses testified against the legislation.

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60 See STONE, POLICY PARADOX at 159 (noting that “good analysis” can eliminate the ambiguity wrought by the use of metaphor in discussing policy problems); see also David A. Hyman, Lies, Damned Lies, and Narrative, 73 IND. L. J. 797, n. 1 (1998) (“[w]hen a story is well told, I park my analytic faculties at the door”) (quoting Harlon L. Dalton, “Storytelling on Its Own Terms,” in LAW’S STORIES, 57, 57 (Peter Brooks, et al., eds. 1996).

61 WILLIAM N. LAFORGE, TESTIFYING BEFORE CONGRESS (The Capitol Net 2010) at xxvi.

62 The invited speakers were: the Commissioner of the U.S. Food and Drug Administration, the Director of Food Policy, Center for Science in the Public Interest, a representative from the Food Marketing Institute, the Director of the North Carolina Department of Agriculture and Consumer Services, Food and Drug Protection Division, and the president and CFO of United Fresh Produce Association. In addition, prepared statements were invited from the president of the Association of Food Industries, the president and CEO of the American Frozen Foods Institute; and from the Cheese Importers Association of America, the Fresh Produce Association of the Americas. Appearing also was the director of corporate quality assurance at Publix grocery stores. Oct. 22, 2009. Keeping America’s Families Safe: Reforming the Food Safety System: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions, 111th Congress.

The House hearing’s non-government witnesses were equally entrenched: American Farms Bureau Federation, American Meat Institute, National Cattlemen’s Beef Association, Rocky Mountain Farmers Union, Sara Lee Corporation, National Turkey Federation, Nick’s Organic Farm, Taylor Farms. Hearing to Review Current Issues in Food Safety,” H. Comm. on Agriculture, July 16, 2009. The witnesses may have further ties as former government employees. See id., at 40 (statement of Carol L. Tucker-Foreman (“I was formerly, Assistant Secretary of Agriculture with responsibility for meat and poultry inspection”).

Although House and the Senate committees and subcommittees must hold open meetings, no committee or subcommittee must take or record testimony. If witnesses do testify, the rules require that they submit their written statements at least one day before they appear. The spoken statements, by rule, are limited to a summary of the written testimony and are restricted in length to a matter of minutes.

A particularly well-known example of this sort of cherry-picked testimony came in February 2012 when the House Oversight and Government Reform Committee held a hearing on the rule adopted by the Health Resources and Services Administration that the exemption for mandatory contraceptive care under the Affordable Care Act did not extend to nonprofit corporations, such as hospitals, that are affiliated with houses of worship. See generally “Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Federal Register No 38,870 (to be codified at 47 C.F.R. pf 147 & 156). There, the chair refused to allow the testimony of the minority party’s invited guest, Sandra Fluke, the co-president of Georgetown Law Center’s chapter of Law Students for Reproductive Justice, who had an undergraduate degree in feminist, gender, and sexuality studies and a background in domestic violence work. See Jenna Johnson, Sandra Fluke Says She Expected Criticism, Not Personal Attacks, over Contraception Issue, THE WASHINGTON POST, March 3, 2012. Instead, the committee heard testimony from a panel made up of five men.

C.f., Filler, Megan’s Law at n. 52 (noting, “[t]he legislative debate in the Congress was an example of virtually one-sided dialogue; only one person spoke against any portion of Megan’s Law, and even he ultimately voted for it”).

See Senate Rules, XXVI(3) (“Each standing committee (except the Committee on Appropriations) shall fix regular weekly, biweekly, or monthly meeting days for the transaction of business before the committee …). Of course, meetings may be closed in the interest of national defense, foreign relations, and the like. See id. at XXVI(5(b))

See Senate Rules, XXVI(1) (“Each standing committee… may make investigations … may report such hearings …, and may employ stenographic assistance …” (emphasis supplied); Rules of the House of Representatives, Rule XI (4)(c) “Each committee may have printed and bound such testimony and other data as may be presented at hearings held by the committee or its sub-committees”).

See Senate Rule XXVI(4(b)) (“Each committee … shall require each witness who is to appear before the committee in any hearing to file with the clerk of the committee, at least one day before the date of the appearance of that witness, a written statement of his proposed testimony …”); House Rule XI (“Each committee shall, to the greatest extent practicable, require witnesses who appear before it to submit in advance written statements of proposed testimony”). Individual rules of some committees may require submission up to seventy-two hours before appearing.
III A. Fear and Myth: A Descriptive Account of the Testimony

[P]oliticians, [who live] in the midst of disconnected daily facts, are prone to imagine that everything is attributable to particular incidents.70

The FDA Food Safety and Modernization Act arose as a response to concerns about the outbreaks of food-borne illnesses that punctuated the news in the first decade of the twenty-first century: fast food hamburgers, chicken, fresh spinach, peanut butter, and cookie dough were among the common, every-day food products that sickened thousands of Americans.71 President Obama used anecdote to describe the nature of the problem of food-borne illnesses, noting that his younger daughter ate “peanut butter sandwiches for lunch probably three days a week,”72 and he formed the Food Safety Working Group in 2009.73 The House74 and Senate75 worked on


69 See Lester at 5-6 (describing the qualitative case study method she uses to describe the narratives in Congressional testimony on farm bills); see also Norman Fairclough, “Discourse and Text: Linguistic and Intertextual Analysis Within Discourse Analysis” in 3 Discourse & Society 193, 194 (1992) (defending the use of a “detailed textual analysis” “to strengthen discourse analysis”).


73 http://www.foodsafetyworkinggroup.gov/ContentAboutFSWG/HomeAbout.htm

different versions of a food safety bill, culminating in the Food Safety and Modernization Act, which President Obama signed into law on January 4, 2011. Senators Jon Tester and Kay Hagan sponsored two amendments to exempt local food growers and processors, which found their way into the final version of the bill. In this section, I examine the on written and spoken statements in the Senate and the House as they appeared in the Congressional Record to show how stories were used to convince members to vote for the bill.

In their speeches, backers of the bill rallied support by telling detailed stories about specific individuals who ate specific, tainted foods and suffered devastating illnesses or death. Stories such as these raised fear and garnered interest and support for the bill by using several “involvement” strategies: (1) hyperbole to suggest that outbreaks occur nearly daily; (2) detail to lend authenticity; and (3) images and metaphors to call to mind commonly held American archetypes and myths.


77 http://www.worc.org/userfiles/file/Local%20Foods/QA_Tester_Amendment.pdf. The amendments were enacted at 21 U.S.C. § 350(G)(l); see infra n. ___ and accompanying text.

78 Critics, of course, could levy challenges at my use of transcripts. Although the Congressional Record transcripts of testimony are, by and large, accurate, they are, of course, one-dimensional in that transcripts fail to record tone, gestures, and the like, which are important to the pragmatics of the testimony. See generally Filler, “Megan’s Law” at n. 70 (citing J.A. Hendrix, “A New Look at the Textual Authenticity in Speeches in the Congressional Record,” 31 Speech J. 153 (1965). But see David N. Bleisch, Note, “Congressional Record and the First Amendment: Accuracy is the Best Policy,” 12 B.C. ENVTL. AFF. L. REV. 343 (1985) (decrying the privilege members of Congress have to revise and extend their spoken remarks).


80 See generally TANNEN, TALKING VOICES at 134 (“involvement is created by the simultaneous forces of music (sound and rhythm), on the one hand, and meaning through mutual participation
Involvement strategies, such as those mentioned in the previous paragraph, are systematic ways of using language that draw listeners in. Involvement strategies, in the words of linguist Deborah Tannen, “reflect and simultaneously create interpersonal involvement.”

“Involvement” does not necessarily mean that the audience is an active participant in the conversation; it can include, and does for this article, mean “an internal, even emotional connection” that individuals feel when hearing a story, and that “binds them to other people as well as to places, things, activities, ideas, memories and words.”

1. **Hyperbole.** Since the days of Aristotle, hyperbole, or “purposeful exaggeration” in speech, has been used as a tool of persuasion. Hyperbole is also an involvement strategy that draws listeners because listeners do not hear hyperbole as falsehoods; instead it is a type of “joint


81 Deborah Tannen, *Talking Voices* 25 (Cambridge Univ. Press 2d. ed. 2007) (discussing “repetition, dialogue, and imagery,” which work with other “linguistic (and nonlinguistic) strategies to create” interpersonal involvement).

82 Deborah Tannen, *Talking Voices* at 27; see also id. at 25-27 (discussing different definitions of “involvement” by linguists John Gumperz and Wallace Chafe); see also Carmen Simich-Dudgeon, *Interpersonal Involvement Strategies in Online Textual Conversations: A Case Study of a Learning Community* (1999) available at files.eric.ed.gov/fulltext/ED435169.pdf arguing that familiarity with involvement strategies of imagery, repetition, and dialogue “creates meaning and rapport among [the asynchronous] participants” which facilitated “the negotiation of meaning, or the process of conveying meaning and inferring meaning during spoken interaction.”

pretense in which speakers and addressees create a new layer of joint activity.” By intentionally emphasizing one account of reality, the speaker brings the listeners around to his or her point of view.

The speeches and testimony on the Food Safety legislation incorporated hyperbole in three different ways to gather support for the bill. First, when the House began hearings on food safety issues in July 2009, members of Congress hyperbolically touted American superiority on food safety – “We have the safest food in the world” (then tempered those statements: “[B]ut we can always do better”). Then, as the legislation stalled, fourteen months later, hyperbole was

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84 HERBERT H. CLARK, USING LANGUAGE at 143 (Cambridge Univ. Press 1996); There’s Millions of Them”: Hyperbole in Everyday Conversation, 36 J. PRAGMATICS 149, 153 (2004) (“hyperbole is validated in interaction and can only be described adequately by including the listener’s contributions to the emergent act, rather than being examined as a single, creative act by the speaker alone”).


Members of Congress who spoke against the proposed legislation used this trope too. See, e.g., Opening Statement of Hon. Goodlatte, Hearing to Review Current Issues in Food Safety, H. Comm. on Agriculture, July 16, 2009 at 3 (“[O]ur country is blessed to have farmers who continually produce the safest, highest quality, most abundant and affordable food supply in the history of the world”).
used to raise fear: The food safety situation was “a life-and-death issue for families.”\textsuperscript{87} Senator Durbin mentioned “unsuspecting people across America” who ate contaminated eggs.\textsuperscript{88} Finally, the hyperbole took the form of xenophobia with warnings about imported foods\textsuperscript{89} and that a “critical aspect” of the food safety “problem” was “smuggled food” from Mexico.\textsuperscript{90}

\textsuperscript{87} Durbin, Senate, Sept. 23, 2010 p. S7400\
\textsuperscript{88} Durbin, Congressional Record – Senate, Sept. 23, 2010 p. S7400\
\textsuperscript{89} Harkin, Congressional Record – Senate, Sept. 23, 2010 p. S7398; see also id. (“[W]e rely more and more on foods imported from abroad, often from countries with less rigorous regulation and different standards than our own”); Prepared Statement of Senator Enzi, “Keeping America’s Families Safe: Reforming the Food Safety System,” Committee on Health, Education, Labor, and Pensions, Oct. 22, 2009 at 2 (“The volume of food imports and the number of foreign producers and manufacturers are growing”); see also Statement of Senator Brown, “Keeping America’s Families Safe: Reforming the Food Safety System,” Committee on Health, Education, Labor, and Pensions, Oct. 22, 2009 at 4 (“In the last 2 years alone our country has been faced with melamine in infant formula [and] harmful seafood from China, tainted peppers from Mexico…”); Statement of Senator Frankin, “Keeping America’s Families Safe: Reforming the Food Safety System,” Committee on Health, Education, Labor, and Pensions, Oct. 22, 2009 at 7 (“Fifteen percent of our food comes from overseas”). See also Prepared Statement of Caroline Smith DeWaal, Director of Food Policy, Center for Science in the Public Interest, “Keeping America’s Families Safe: Reforming the Food Safety System,” Committee on Health, Education, Labor, and Pensions, Oct. 22, 2009 at 33 (“92 percent [of Americans] support requiring foreign countries that export to the United States to certify that their food safety systems are as strong as ours” (emphasis in the original); Durbin, “Statements on Introduced Bills and Joint Resolutions, March 3, 2009, Congressional Record – Senate at 2692 (“Serrano peppers in Mexico”).


From his opening remarks, the bill’s sponsor Senator Tom Durbin put forward a view that tainted food outbreaks were frequent occurrences: “There is not a day that goes by” without mention of another recall or outbreak.91 “These [food safety] problems seem par for the course,” he later stated.92 And, as he pushed the legislation forward, he again exaggerated, “Hardly a week goes by that there isn’t some new food tragedy.”93 His colleague, Senator Harry Reid, again hearkened to American superiority into his comments about quotidian foods, stating, “No one in America should have to worry if their salad or sandwich is going to kill them.”94

2. Repetition and Detail. Linguists study the concept of repetition in a host of ways.95 Here, I talk about the involvement strategies of repeating sounds, repeated words and phrases, and repeating stories over time with increasing detail. Repetition facilitates a sense of connection

91 Durbin, Congressional Record – Senate, March 3, 2009 at 2693.
92 Durbin, Congressional Record – Senate, March 3, 2009 at 2693.
94 Senator Reid, Congressional Record – Senate, Nov. 18, 2010 p 8001
95 See generally TANNEN, TALKING VOICES at 48-101 (and works cited therein) (repetition as the definition of structure; repetition as a method for producing more efficient discourse; repetition as a means of enhancing comprehension; repetition as a method to demonstrate connections in a work; use of repetition to show interpersonal involvement; repetition in conversation); see also GREGORY M. MATEOIAN, LAW AND THE LANGUAGE OF IDENTITY: DISCOURSE IN THE WILLIAM KENNEDY SMITH TRIAL 4 (Oxford 2001) (looking at “stylistic and aesthetic forms of language,” including repetition, create “powerful and persuasive images”) (citing Roman Jakobson, Concluding Statement: Linguistics and Poetics,” in Thomas Sebeok (ed.) STYLE IN LANGUAGE
among speakers and audience; repetition functions as a way of demonstrating that the speaker has listened to previous speakers, and it links one speaker’s ideas to another’s. Repetition “ties parts of discourse to other parts” and “bonds the participants to the discourse and to each other.” Repetition works to “communicate ideas and move audiences.”

The repetition of sound, or musicality, in language engages listeners. Citing our “inherent tendencies to repetition” in many forms of music and speech, neurologist and author Oliver Sacks noted, “We are attracted to repetition, even as adults; we want the stimulus and the reward again and again.” Members of Congress drew on this unconscious natural tendency in a repeated drumbeat of tainted foods, for example spinach, peppers, peanuts. In these statements members of Congress and their invited speakers used the poetry of sound as an involvement strategy by mentioning specific foods – seemingly healthy and wholesome foods – that caused recent outbreaks. This paradox of healthy foods as the source of outbreaks was also oft-repeated, raising fears of a certain kind of lawlessness. If spinach and peppers could kill you, what was safe?

96 See Deborah Tannen, TALKING VOICES at 30-31 (discussing language as the blend of sound and idea).
97 Deborah Tannen, Talking Voices at 61
98 Deborah Tannen, Talking Voices at 90.
100 See, e.g., cites needed.
101 See, e.g., Statement of Drew McDonald, “Hearing to Review Current Issues in Food Safety,” House of Representatives, Committee on Agriculture, July 16, 2009 at 78 (“For example the
Beyond rhythmic phrases of tainted vegetables, as months of discussion passed, members of Congress began to repeat certain stories to support passage of the Food Safety Bill. For example, the detailed poignancy of the story of Shirley Almer, who ate a piece of toast spread with tainted peanut butter and later died,\(^{102}\) was told in Congress three times, with the source of her illness mentioned repeatedly. Senator Al Franken first mentioned Ms. Almer:

> Over 700 people became ill, and nine people died as a result of the [Peanut Corporation of America’s tainted peanut butter outbreak, including Shirley Almer, a Minnesota mother of three who had survived brain cancer and was in good health at the time of the outbreak. ]\(^{103}\)

A few days later, Senator Franklin’s Minnesota colleague Senator Amy Klobuchar spoke again about Ms. Almer:

> Three of the people who died were from Minnesota. One of them was named Shirley Almer. Her family expected her home for Christmas in 2008. She was a strong-spirited grandmother… But she didn’t make it home for Christmas that

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\(^{103}\) Senator Al Franken, Sept. 15. 2010, Congressional Record Page: S7111 (emphasis supplied). One of Mrs. Almer’s sons was invited to speak before the House. See note ## and accompanying text.
year. She died on December 21, 2008. … It was a little piece of peanut butter on her toast that 72-year-old grandmother ate.\textsuperscript{104}

And, a month later, Senator Klobuchar mentioned Ms. Almer again on the Record:

Three people died in Minnesota, one was an elderly woman at a nursing home. She was in perfectly good shape. She had a little piece of toast with peanut butter. That was it, a little piece of toast with peanut butter. … She ate one piece of toast with peanut butter.\textsuperscript{105}

The increasing level of detail told about Ms. Almer – from Senator Franklin’s passing mention in 2009 when describing an outbreak of tainted peanut butter, to Senator Klobucher’s incorporating “Christmas” and “a little piece” of peanut butter, to, a month later Senator Klobucher’s blending of repetition and detail: “She had a little piece of toast with peanut butter. That was it, a little piece of toast with peanut butter. … She ate one piece of toast with peanut butter”\textsuperscript{106} – suggests a growing sense of urgency in getting the bill passed.

With the addition of detail, repeated stories about the danger of tainted food became more personalized and more real. The greater the detail, the more the speaker demonstrates the individuality of the victim.\textsuperscript{107} Details create images in the minds of the speaker and of the audience. These detailed images, suggests Deborah Tannen, evoke scenes, and “understanding is derived from scenes,” which, in turn, creates shared sense-making between speaker and

\textsuperscript{104} Senator Amy Klobuchar, Congressional Record – Senate, Sept. 23, 2010 p. S7404 (emphasis supplied).

\textsuperscript{105} Senator Klobuchar, Congressional Record – Senate, Oct 22, 2009 at 10658 (emphasis supplied). The extent of the reoccurrence of stories in speeches before Congress might benefit from an intertextual analysis, which is, however, beyond the scope of this article.

\textsuperscript{106} Senator Klobuchar, Congressional Record – Senate, Oct 22, 2009 at 10658

\textsuperscript{107} The use of detail to create images “suggest[s] schemes which trigger emotions and make possible both understanding and personal involvement.” Deborah Tannen, \textit{How Is Conversation Like Literary Discourse}” in \textit{The Linguistics of Literacy} 32 (Pamela Downing, et al., eds., (1992).
audience, and among the members of the audience.\textsuperscript{108} A more prosaic source suggests that witnesses use “concrete examples that trigger sympathetic reactions.”\textsuperscript{109}

The consequences on those who got ill and survived were also spelled out in specific detail. One invited speaker told of Michael Thomas, a fifty-year-old who “loved peanut butter and had a spotless health history” until he ate salmonella-contaminated peanut butter, and got very ill: “He suffered dehydration, stomach pains, and high blood pressure. His right eye hemorrhaged. And harm extended to his heart, his nervous system, and intestines. … He lost his job … so he paid out-of-pocket for the medical bills. He ended up losing his house. He now lives with his … grown children.”\textsuperscript{110}

\textbf{3. Images, metaphors, themes, and archetypes.}\textsuperscript{111}

The specific examples\textsuperscript{112} in the testimony drew on common images\textsuperscript{113}: the victims were vulnerable – either very young or old – but were “strong-spirited,” “feisty,”\textsuperscript{114} or had a “zest for

\textsuperscript{108} See DEBORAH TANNEN, TALKING VOICES at 134; see generally WILLIAM ZINSSER, ON WRITING WELL 30TH ANNIVERSARY EDITION 196 (7th ed.) (HarperCollins 2006) (describing the persuasive benefits of using detail in a variety of non-fiction genres: “[U]se specific detail. This avoids dealing in generalities, which, being generalities, mean nothing”).


\textsuperscript{111} “Political reasoning involves metaphor-making and category-making […] It is strategic portrayal for persuasion’s sake and, ultimately, for policy’s sake.” STONE, POLICY PARADOX at 12. See generally GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (Univ. of Chicago 2003); Susan Bay, Book Review, “I Is an Other”: The Secret Life of Metaphor and How it Shapes the Way We See the World, by James Geary, 11 J.ALWD 189 (2014).
life” before being stricken. For example, another victim of the tainted peanut butter outbreak was:

an 80-year-old grandmother with a zest for life. She was an avid reader, a skilled puzzle solver, and an unwavering fan – a difficult task – of the Cleveland Indians. She was the mother of six children. She had 13 grandchildren, 11 great grandchildren. She became ill in January, after eating a peanut butter sandwich that was tainted with salmonella. When the doctors were called, they told the family they couldn’t do anything, and she died shortly thereafter.\footnote{115}

\footnote{112} Joel Best noted that, among other techniques, advocates select particularly striking examples to typify a problem, even if the examples are not representatives of the most common situations. See Filler, \textit{Random Violence}, supra n. \_ (describing Best’s theories) at 1101.


\footnote{114} Reid, Congressional Record – Senate, Nov. 18, 2010 p 8002. Senator Reid told the story of “a little girl named Rylee Gufstafson.” “When she was 9 years old, she ate a salad that almost killed her. It had spinach in it. That spinach had E. coli. Rylee got so seriously ill that she, of course, was hospitalized for a long time. Three others who got E. coli from fresh spinach died. This little girl is a feisty little thing. But her growth has been stunted. She will never be the size she should be.

Senator Reid also told a personal anecdote about a family trip to New York City. “We had dinner at a nice restaurant. [My wife and I] both had chicken, the same dish. . . . We were so sick [the next day]. . . . And, frankly, my wife never, ever got over that completely.” Id.

\footnote{115} Statement of Senator Brown, “Keeping America’s Families Safe: Reforming the Food Safety System,” Committee on Health, Education, Labor, and Pensions, Oct. 22, 2009 at 4-5: Nelly Napier, in Mentor, OH – is a suburb just east of Cleveland – was an 80-year-old grandmother with a zest for life. She was an avid reader, a skilled puzzle solver, and an unwavering fan – a difficult task – of the Cleveland Indians. She was the mother of six children. She had 13 grandchildren, 11 great grandchildren. She became ill in January, after eating a peanut butter sandwich that was tainted with salmonella. When the doctors were called, they told the family they couldn’t do anything, and she died shortly thereafter.
Similarly, “Kyle, a mischievous and energetic 2 year old, died of E. coli poisoning after his mother gave him a smoothie that contained bagged spinach that was contaminated with that deadly pathogen.”

Drawing on the metaphor of danger buried in an innocent object, akin to the shiny red apple used to lure Snow White, many stories in the testimony emphasized the innocent nature of the foods that were in fact dangerous or deadly. For example one eighty-year-old grandmother made a salad before driving to meet her family for Labor Day weekend: “So, she reached in and took out a bag of spinach from her refrigerator. She thought this was a good, healthy food to give to her family.”

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All of us know of stories in our own States. Haley Bernstein, of Wilton, CT, 3 years old, became ill, eating lettuce contaminated with E. coli. It has been quite an ordeal. She spent 14 weeks in the hospital, suffered kidney failure, had a seizure that led to bleeding in the brain, and temporary blindness. As a result of her illness she developed diabetes. Her food-borne illness occurred more than a decade ago, and she lives with the effects every single day of her life since then. She also has a vision deficit, weakness in her right side, and suffers from reduced kidney function. She’s been on insulin pump for 7 years. She’s one of the lucky ones. She survived.

117 “Snow White and the Seven Dwarfs,” 1937 produced by Walt Disney Productions and released by RKO Radio Pictures.

Another victim had a blameless affection for childhood’s ubiquitous peanut butter: “Jake loved peanut butter and crackers, in the little packages that came out. When he became sick earlier this year, they knew about the King Nut peanut butter [recall], but they were assured that the brand that they were eating was fine. And so, [he] continued – even while he was sick, he continued to eat his favorite food – peanut butter. And it turned out it was, in the end, a brand also coming from the same source.”

The archetype of a nurturing mother preparing food for her children framed other stories. In September 2010, Senator Durbin described a letter he received from a woman in Chicago, who “told me the story of her 6-year-old son Alex. She brought home a pound of hamburger from the local grocery store and fed it to her son, and he was dead 3 days later from food contamination.” Other speakers drew on images of traditional motherhood to raise fears. Senator Harkin noted, “When kids die from eating peanut-butter sandwiches their mothers pack for lunch, we have a problem.”

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120 Durbin, Congressional Record – Senate, Sept. 23, 2010 p. S7394; see also Statement of Senator Durbin, “Keeping America’s Families Safe: Reforming the Food Safety System,” Committee on Health, Education, Labor, and Pensions, Oct. 22, 2009 at 10 (“Nancy Donnelly “raised my attention to this issue many, many years ago, when Nancy, living in Chicago, gave hamburger, bought at a local store, to her 6-year-old son Alex, who died within a matter of days from E. coli contamination”). The story seems to have originated from a lobbyist, however. See Statement of Carol L. Tucker-Foreman, “Hearing to Review Current Issues in Food Safety,” House of Representatives, Committee on Agriculture, July 16, 2009 at 40 (introducing during her statement, “Nancy Donley from Chicago” whose “only child, 6 year old Alex, also died of E. coli poisoning after eating contaminat[ed] ground beef”).

121 Harkin, Congressional Record – Senate, Sept. 23, 2010 p. S7398; see also id., “bagged spinach and lettuce” and “cookie dough sold in supermarkets.”
Others stories were framed by the familiar tale of a promising life felled before its time: a fifteen-year-old who fell ill when he returned from a camping trip, and a fourteen-year-old died after just passing her driver’s license test.

Witnesses, too, used the same storytelling techniques as the members of Congress, employing poignant details and the archetype of a blameless person felled by a seemingly innocent outside force. Ms. Almer’s son testified about his mother: “[A] business woman, [who had] defeated cancer twice … It is very hard to imagine to see somebody struggle to get that far beat cancer and then have something as simple as peanut butter take her life.”

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123 Durbin, Congressional Record – Senate, Sept. 23, 2010 p. S7394: “Now I would like to introduce you to a young man… His name is Richard…” “At age 15, … he returned home from a camping trip and began experienced headaches, diarrhea, and his urine turned black.” Richard had contracted E. coli, and eight years later, “Richard was having a kidney transplant while the House was debating and passing a food safety bill.” “Days ago, Richard was moved to the intensive care unit due to swelling in his brain and his inability to speak.

124 Harkin, Congressional Record – Senate, Sept. 23, 2010 p. S7400:

These aren’t just numbers, these are real people. Real people like Kayla … [who] turned 14 and passed her driver’s license test. The next day she stayed at home with a foodborne illness and was admitted to Pella Community Hospital… within a week her kidneys began to fail. Kayla was transferred to Blank Children’s Hospital for dialysis … she suffered a seizure and began to have heart problems. Just a few days later, Kayla’s brain activity stopped and her parents made the painful decision to take their beautiful 14-year-old daughter off life support.

The stories were so compelling that even the few objections to the bill noted the power in the stories: “If we have disagreements as to how we get to where we want to get to, it is not because we are callous and heartless and insensitive to the heartbreaks that these [ ] families have suffered as a result of these tragedies, but it will be legitimate differences of opinion between informed individuals where we might wind up.”

4. The Tester Amendment and the Myth of the American Farmer

“The preponderance of mythical thought over rational thought in some of our modern political systems is obvious.”

The Food Safety and Modernization Act gave the FDA new powers to inspect facilities, gather information about food production, and to act when outbreaks happen. An amendment sponsored by Senators Jon Tester and Kay Hagan, “commonly called the Tester Amendment,” exempts small farms from those regulations. The Tester Amendment found its way into the final version of the Act based only testimony that drew on the Myth of the American farmer.

Myth has many definitions and incorporates many different concepts. From our grade school definition (”myths are stories about gods”) to Freud’s and Jung’s beliefs that myths and

127 Ernst Cassirer, THE MYTH OF THE STATE 3 (Yale 1946).
128 See generally the FDA Food Safety and Modernization Act, CITE; http://www.fda.gov/Food/GuidanceRegulation/FSMA/default.htm
130 Small farms are those that sell less than $500,000 in food annually, which is consumed in the same state or within 275 miles of production. Cite to statute.
131 See Roy Willis, Forward, THE DICTIONARY OF WORLD MYTH, at 6 (ed. Peter Bently) (1995) (“What is myth? This questions has exercised some of the world’s greatest thinkers over the past 2,500 years, but sill without any finally definitive conclusion”); CLAUDE LÉVI-Strauss, STRUCTURAL ANTHROPOLOGY, 207 (1963) (noting that studies in the field of mythology remain
the characters, or archetypes, who populate them, are universal and innate.\textsuperscript{133} More recently, Joseph Campbell adopted the ideas of nineteenth-century ethnographer and anthropologist Adolph Bastian that “myth” refers to stories that operate on two levels: a universal level as part of the biology of all humans; and a local level, which are the different ways in which the myth is interpreted or conveyed.\textsuperscript{134} For my purposes here, myth means a story,\textsuperscript{135} whose characters and plot are so familiar that the story is immediately recognizable to the audience such that it serves as a shorthanded method of communicating a broad concept.\textsuperscript{136}

“chaotic.” “Myths are still widely interpreted in conflicting ways: as collective dreams, as the outcome of a kind of esthetic play, or as the basis of ritual’’); Ernst Cassirer, XXXX (“As soon as we pose the question, ‘What does the word myth mean?’ we find ourselves entangled in a great dispute among conflicting points of view”); Linda Edwards, \textit{Once Upon Time in Law: Myth, Metaphor, and Authority}, 77 \textit{Tenn. L. Rev.} 883, 889 (2010) (“[t]he term ‘myth’ has been used in a variety of ways with a variety of definitions”).

\textsuperscript{132} See, e.g., \textsc{Joseph Campbell \& Bill Moyers, The Power of Myth} at 28 (Anchor 1991)

\textsuperscript{133} Carl G. Jung “Concerning the Archetypes and the Anima Concept,”” in \textit{Collected Works of C.G. Jung} Vol. 9 Part 1 (tr. R.F.C. Hull) (“[Archetypes are] in the main, common to all, as can be seen from [their] universal occurrence”) (Princeton Univ. Press 1980); Freud cite needed

\textsuperscript{134} See \textsc{Joseph Campbell, The Inner Reaches of Outer Space}, xiii-xiv (New World Library 2012); see also Linda Edwards, \textit{Once Upon Time in Law: Myth, Metaphor, and Authority}, 77 \textit{Tenn. L. Rev.} 883, 889 (2010) (“Myths … may be simply cultural, soaked up by living in a particular place and time, or they may be encoded at birth”).

\textsuperscript{135} See \textsc{Roland Barthes, “Myth Today,” in Mythologies} 110 (tr. Annette Lavers) (Farrar, Straus and Giroux 1972) (“[m]yth is a system of communication. […] Speech of this kind is a message.”).

\textsuperscript{136} See \textsc{Roland Barthes, “Myth Today,” in Mythologies} 112 (tr. Annette Lavers) (Farrar, Straus and Giroux 1972) (“Myth is a type of speech defined by its intention much more than by its literal sense”) (parentheticals omitted); \textsc{Will Wright, Six Guns and Society: A Structural Study of the Western} 6 (Univ. of Calif. Press 1975) (discussing the myths at work in the genre of the American Western that “readily portray fundamental conflicts by relying on the established meanings of various types”). Similarly, in this, semiotics may prove helpful: To French semiotician, Roland Barthes, myths are specifics (“signs”), that carry (or “signify”) specific meaning (“signified”). \textit{See Roland Barthes, “Myth Today,” in Mythologies} 112-14 (tr. Annette Lavers) (Farrar, Straus and Giroux 1972). Semioticians are “entitled” to treat myths in the same way as they do pictures – as signs with “signifying functions.” \textit{Id.} at 115; Leo Marx,
By drawing on myths, members of Congress and witnesses could bypass explanations and count on the audience to be satisfied by information that merely sounded familiar because it was reminiscent of a common myth; the speakers, therefore, did not need to explain, offer proof, or otherwise justify their remarks.\(^{137}\)

In passing the Food Safety and Modernization Act, Congress created legislation based on myth.\(^{138}\) The testimony on the Tester Amendment\(^ {139}\) drew on the Myth of the American Farmer, which contains two components, a “rational” one in which the agrarian whose hard work and

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\(^{137}\) See Deborah Stone, Policy Paradox at 158 (“Stories provide explanations of how the world works. These explanations are often unspoken, widely shared, and so much taken for granted that we aren’t even aware of them”) (citing Bruno Bettelheim, The Uses of Enchantment: The Meaning and Important of Fairy Tales, Knopf 1976).

\(^{138}\) See generally Stone, Policy Paradox, 157-182 (considering the use of narrative structure, synecdoche, and metaphors in policy making); see also Carol Nackenoff, Locke, Alger, and Atomistic Individualism Fifty Years Later: Revisiting Louis Hartz’s “Liberal Tradition in America,” 19 Stud. in Am. Pol. Devel. 206, 207, 212-13 (2005) (noting “distinctive elements and various patterned narratives in American political discourse” and citing scholars who argue the place in American political discourse of “religious meanings and tropes” that yield a “religiously-infused story about the meaning of America”).

dedication to the land benefits the “economical and political health of the nation.” The other component is “romantic,” and features an agrarian who derives individual “moral, emotional, and spiritual” benefits from working the land. These two visions of the American Farmer share similar values: that agriculture is the “basic occupation” of our culture; that “rural life is morally superior to urban life”; and that “a nation of small, independent farms is the proper basis for a democratic society.” The myths also share an archetype – the land-owning, or “yeoman” farmer, a “virtuous, hard-working man” – and a symbol, the land, which represents freedom.

140 See Julie Lester, The Agrarian Myth as Narrative in Agricultural Policymaking, unpublished doctoral thesis at 2 (noting Thomas Jefferson as the “typical[]” rational agrarian, but tracing the archetype to Aristotle, Cicero, and other ancients who “celebrated the contributions and virtues of an agrarian lifestyle”). Jefferson believed that farming was essential to democracy. Id. 141 Lester at 2 (using Henry David Thoreau as an example of a romantic agrarian). 142 Lester at 9 (quoting Ronald Knutson, et al, “Political Setting” in THE 2002 FARM BILL: POLICY OPTIONS AND CONSEQUENCES (Joe Outlaw and Edward Smith, eds.) (Texas A&M Univ. Agricultural & Food Policy Center 2001) at 7-12. 143 The archetype of the yeoman farmer shares characteristics of rugged individualism with other American myths, where men fend for themselves and thrive. See, e.g., Carol Nackenoff, THE FICTIONAL REPUBLIC: HORATIO ALGER AND AMERICAN POLITICAL DISCOURSE (Oxford 1994) (examining the myths of self-help and individualism contained in Horatio Alger’s works to examine how pervasive ideologies make sense of the world); Frederick Jackson Turner, “The Significance of the Frontier in American History,” in THE FRONTIER IN AMERICAN HISTORY (Henry Holt 1921) at 37 (a seminal work in creating the myth of the ; Turner writes, “to the frontier the American intellect owes its striking characteristics. That coarseness and strength combined with acuteness and inquisitiveness; that practical, inventive turn of mind, quick to find expedients; that masterful grasp of material things, lacking in the artistic but powerful to effect great ends; that restless, nervous energy; that dominant individualism, working for good and for evil, and withal that buoyancy and exuberance which comes with freedom [...]” 144 Lester at 9-10. Feminist scholar Annette Kolodny has added important observations to these myths, describing: “Perhaps America’s oldest and most cherished fantasy: a daily reality of harmony between man and nature based on the experience of land as essentially feminine—that is, not simply the land as mother, but the land as woman, the total female principle of gratification—enclosing the individual in an environment of receptivity, repose, and painless and integral satisfaction.” ANNETTE KOLODNY, THE LAY OF THE LAND: METAPHOR AS EXPERIENCE AND HISTORY IN AMERICAN LIFE AND LETTERS 4 (Univ. of N. Car. Press 1975).
because a landowner can do whatever he likes with that land.145

Although these myths were likely formed in a time when the American economy relied on agriculture,146 the twenty-first century economy does not.147 Most Americans do not live on farms—but they hearken to agrarian myths to understand agricultural policy,148 and both components of the myth supported a narrative that gave rise to the Tester Amendment149 by painting family farms as safer, insinuating that yeoman farmers are more caring of their customers than corporate farmers, and trotting out preserve-selling grandmothers as innocent victims of big government.

Senator Tester also touted the safety of family farms in speeches outside of Congress: “Let’s face it, dangerous food-borne outbreaks don’t start with family agriculture. as some big factory that mass produces food for the entire country.”150 In Congressional debate, he said much the same thing, that his amendment would “recognize that family-scale producers that have an immediate relationship with their customers at a local level have not been at the root of our food safety problems.”151 Similarly, Rep. Costa commented, “[C]ommon sense tells you that farmers

145 Lester at 15.
146 Lester at 12.
147 In 2012, the “agriculture, forestry, fishing, and hunting” sector was 1.2% of gross domestic product. Bureau of Economic Analysis.
148 Lester at 8.
149 See Lester at 3 (“rational and romantic components of the agrarian myth are used to create a narrative presented by interest groups or other actors in the agricultural policymaking process”). Lester considers whether contemporary use of the agrarian myth helps to create policy that “is compromised and may not accurately reflect current conditions.” Id. at 4.
151 Tester, Congressional Record – Senate, Nov. 29, 2010 at S823; see also
are, first and foremost, consumers. They eat the food they grow, as do their families and their neighbors.” And the president of the Rocky Mountain Farmers Union, which represents “family farmers and ranchers,” argued that “farmers are the first line of defense” in food safety, not the cause of the problem.

Small farms are safer, the amendment’s proponents argued, because the farmers know their customers:

In most cases, [the owner of an organic farm testified,] we are only one step down from the final consumer. This direct personal marketing relationship allows us to develop trust with our customers based on full accountability and traceability. The customer has no doubt where to find accurate information about our operation or products.


152 Costa, “Hearing to Review Current Issues in Food Safety,” House of Representatives, Committee on Agriculture, July 16, 2009 at 102. Also, accepting that small and organic farms should be treated differently without stating why, Hon. Woolsey stated that he believed “we need to do more to respect the unique needs of small and organic farmers … food safety legislation should protect the health of consumers and respect the needs of family farms and sustainable producers. Hon. Woolsey, Congressional Record – House, Sept. 24, 2009 at 2356-7; see also Holt, Congressional Record – House, Jul 30, 2009 at 2154 (noting with approval the Tester amendment because, as originally written, the bill “would negatively impact small, family-owned, and organic farms).

153 Statement of Ken Peppler, “Hearing to Review Current Issues in Food Safety,” House of Representatives, Committee on Agriculture, July 16, 2009 at 52; 52-59 (emphasizing the difference between “independent family farmers and ranchers,” and “large corporate multi-national processors”); see also Maravell, “Congressman, as a farmer, everybody knows the saying, ‘If it ain’t broke, don’t fix it.”’ Hearing to Review Current Issues in Food Safety,” House of Representatives, Committee on Agriculture, July 16, 2009 at 96.

154 Statement of Nicholas C. Marvell, “Hearing to Review Current Issues in Food Safety,” House of Representatives, Committee on Agriculture, July 16, 2009 at 64. Mr. Marvell also stated that the growth of “small and decentralized farms” have not been associated with “major food safety issues.” Id. Mr. Marvell’s prepared remarks included handouts from the Organic Trade
In response to gentle questioning from the members of the committee, the organic farmer reiterated, “I am probably more concerned about food safety than most of my customers are. … I have personal contact with my customers.”

The narrative before Congress on protecting small farms was rooted in the yeoman farmer archetype. Senator Harkin of Iowa reminisced about his family farm, employing a gentle expletive from a mythical era: “My gosh, when [the first food safety law was passed], my own family had our own garden, we canned our own vegetables, we canned our own meat. Yes, we canned meat, in glass jars, by the way.”

As the vote on the act grew near, Senator Tester continued to urge passage of the version of the bill that contained his amendment “for family-scale producers” by hitting on the rational and romantic versions of the Agrarian Myth:

The family-sized growers and processors … are folks who helped build this country … they are small and there is a pride of ownership there that is real. They

Association, which read, in part: “[M]any organic farmers are small farmers. Many problems in food safety occur at the national or international level.” Id. at 75.

155 Maravell, “Hearing to Review Current Issues in Food Safety,” House of Representatives, Committee on Agriculture, July 16, 2009 at 96. Hon. Jeff Fortenberry (Nebraska) picked up on Maravell’s personal relationship with his customers: “[T]alking about farmers markets, buying local, as well as community-supported agriculture – represent innovations and alternatives to the mainstream food chain. At the core, they have already implemented transparency and connection between the producer and final customer.” Fortenberry, “Hearing to Review Current Issues in Food Safety,” House of Representatives, Committee on Agriculture, July 16, 2009 at 100. Fortenberry noted the “broader philosophical movement of a desire for a reconnection with the land between the urban and the rural, between the family and the farm.” “Hearing to Review Current Issues in Food Safety,” House of Representatives, Committee on Agriculture, July 16, 2009 at 100; see also Maravell, “Hearing to Review Current Issues in Food Safety,” House of Representatives, Committee on Agriculture, July 16, 2009 at 100-01 (“I see that happening all the time, people transition from the cities into agriculture on the urban fringe”).


157 Tester, Congressional Record – Senate, Nov. 18, 2010 at S8010.
raise food, they don’t raise a commodity … the consumer and the connection with
that consumer makes it so that local entities can do [ ] regulation much better than
we can.”158

The yeoman farmer’s archetype “farm wife”159 also entered the debate on the Tester
Amendment, as one whose small thrifts might be stifled if the exemption for family farms were
quashed. Senator Merkley warned that, without the exemption, “roadside stands would be put out
of business, farmers’ markets would be put out of business, backyard gardens would be put out
of business.”160 But “[c]oncerns that Uncle Sam would send deputized agents to stop grandma
from selling her apricot jam at the local farmers’ market” subsided when the act containing the
amendment was passed.161

Thus, a bill that protects the yeoman farmer and his farm wife, that defends a roadside
corn stand and grandma’s famous apricot preserves, and also garnered the support of a new

158 Tester, Congressional Record – Senate, Nov. 18, 2010 at S8010-11.
159 See Craig Chenoweth, Here Are the Senators Who Voted in Favor of Big Government Today,
in OURKLAMATHBASINWATERCRISIS.ORG, Nov. 17, 2010
www.klamathbasincrisis.org/representatives/2010/senatorswhovotedbiggovt111710.htm (last
accessed March 17, 2015) (expressing concern that the bill as passed would affect “the farm wife
who sells jam, preserves and apple butter at a Christmas bizarre [sic] […]”).
160 Statement of Senator Merkley, “Keeping America’s Families Safe: Reforming the Food
Commissioner Margaret Hamburg believed that food not introduced to interstate commerce
would be exempt, id., and Senator Harkin stated that “the farm-operated roadside stand that sells
food directly to consumers as its primary function would be exempt from registration.” Id. at 24-
25. Similarly, Senator Isakson confirmed that S510 contained an exemption for intrastate direct
sales to: “That’s very important to Iowa, when you buy roadside corn when the crop comes in.”
Senator Isakson. “Keeping America’s Families Safe: Reforming the Food Safety System,”
161 Patrick Jonsson, Senate Clears Bill to Tighten Food Safety. Will House Go Along?, CHRISTIAN
SCIENCEMONITOR, Nov. 30, 2010, available on line at www.csmonitor.com/USA/Politics/2010/1130/Senate-
archetype, The Locavore Mother\textsuperscript{162} and her gurus, Michael Pollan and Eric Scholosser,\textsuperscript{163} passed both houses of Congress and became law.

The problem is that nothing introduced in the Congressional Record supports the myth that became the Tester Amendment. No data, no study, and no science even suggests that local foods sold by farmers who knew their customers are inherently safer than products purchased at a chain supermarket. Although numbers and data have their own problems,\textsuperscript{164} and although many members of Congress began their remarks by repeating\textsuperscript{165} statistics\textsuperscript{166} on the widespread nature of foodborne illnesses,\textsuperscript{167} the record on the Tester Amendment is devoid of any science-based or


The “locavore” movement encourages consumers to buy from farmers’ markets or even to grow or pick their own food, arguing that fresh, local products are more nutritious and taste better. Locavores also shun supermarket offerings as an environmentally friendly measure, since shipping food over long distances often requires more fuel for transportation. [...] “Locavore” was coined two years ago by a group of four women in San Francisco who proposed that local residents should try to eat only food grown or produced within a 100-mile radius.

\textsuperscript{163} Pollan and Schlosser, food writers who champion the use of local, unprocessed foods, supported the Tester Amendment. See Michael Pollan and Eric Scholosser, A Stale Food Fight, N.Y. TIMES, Nov. 29, 2010, A25; available on line at www.nytimes.com/2010/11/29/opinion/29schlosser.html

\textsuperscript{164} See generally STONE, POLICY PARADOX, 183-205, 186 (warning that numbers can be as manipulative as metaphors because to count and to analogize “is to select one feature of something, assert a likeness on the basis of that feature, and ignore all the other features”).

\textsuperscript{165} See supra n. ___ and accompanying text [on repetition].

\textsuperscript{166} “Most policy discussions begin with a recitation of figures purporting to show that a problem is big or growing, or both.” STONE, POLICY PARADOX at 183.

\textsuperscript{167} For example, when Senator Richard Durbin introduced the bill in the 111th Congress, he stated, “Every year, more than 76 million Americans become sick because of a food-borne illness, 325,000 are hospitalized, and 5,000 die.” Congressional Record-Senate, March 3, 2009 at S2692.
risk-based assessment. In fact, some journalists did report on some epidemiologists’ and institutions’ efforts to challenge the myth that small, family-run farms were not likely to generate food borne illnesses. One editorial warned, “Don’t let the romance of the ‘small is better’ movement deceive you; food can be unsafe no matter how small the farmer or purveyor.”

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168 Chambliss, Congressional Record – Senate, Nov. 29, 2010 at S8225 (“The newly added language, referred to as the ‘Tester Amendment,’ creates an exemption for small farms and business operations through an arbitrary size and distance threshold – neither of which have any basis in science or risk”); see generally Union of Concerned Scientists, Policy Brief, “Toward Healthy Food and Farms: How Science-Based Policies Can Transform Agriculture,” Feb 2012

169 See, e.g., 5/31/10 PTLDGN (No Page), Lynne Terry, THE OREGONIAN (noting a 2005 E. coli outbreak traced to a small parsley grower in Clackamas County, OK; a 2008 E. coli outbreak caused by a small grower of spinach in Washington; and quoting a senior epidemiologist with the state Public Health Division citing ten other in Oregon since 2005 were traced to small growers or processors. “Small operations can and do cause outbreaks,” he said. “There is no data to suggest that small farms or food processors are any less risky than big ones”)

170 Editorial, Giving Small Farmers a Break, THE OREGONIAN, June 4, 2010; see also; 9/27/10 AGWEEK 35 (noting that the United Fresh Produce Association and other groups had initially favored an exemption for small and organic farms but then stated that bill and any exemptions should be based on “science and risk” rather than size of farm or to whom they sell); Ellyn Ferguson, Food Safety Amendment Sets Off Fight Between Farmers and Health Groups, CQ TODAY 10/21/10 CQTODAY (No Page) (noting that a coalition of well respected groups, including Center for Science in the Public Interest, Consumers Union, and The Pew Charitable Trusts argued against the exemptions use of a 400-mile radius to define local farm producers is “too expansive”); Viewpoints, Go Slow on Exemptions from Food-Safety Legislation, GREAT FALLS TRIBUNE, November 24, 2010 (“[W]e can't help but worry that … bacteria don't discriminate on the basis of farm size”); Editorial: Senate Should Fix Food Inspections, THE SACRAMENTO BEE, 11/25/2010 (“This [exemption] ought to be stripped, or modified to consider the risk associated with the crop produced”; Mark Hamstra, Groups Balk at Safety Bill, SUPERMARKET NEWS, Nov. 29, 2010 (quoting lobbyists who argued, “Food-safety reform must be based on risk and science, and exemptions based on how far your food travels to market or how big your company is are not risk- or science-based” and that the exemption “rejects a risk-based approach to food safety, setting up a federal food safety system that adheres to arbitrary exemptions”).
However, these lone voices were not heard. The Agrarian Myth and the archetypes – feisty grandparent, lunch-making mother, promising teen, rugged American farmer – do not exist in a “cultural vacuum.” By latching onto familiar types, Congress resisted chance events, such as uncomfortable facts or areas of the unfamiliar. Thus, the audience was soothed by the familiar and unchallenged by information that might force them to re-think or think anew.

III. B. Theory: Power in Congressional Testimony

Foucault and the pragmaticists provide many tools to the theorist studying why Congress clung to familiar myths in considering the Food Safety and Modernization Act. Both approaches consider the social aspect of speech, that is, speech as it occurs in the wider framework of the culture in which it was produced. Pragmatics, which looks beyond the structural properties, or syntax, of speech, and beyond the signs and the things they signify, or the “semantics,” of the text, is, by its practicing scholars’ own acknowledgement, somewhat ill defined. However,

171 See infra notes __ and accompanying text. [Rachlinski article that people ignore social science studies, data.]


173 “The pragmatic question par excellence is […] why has this utterance been produced?” Editorial, Linguistics and Pragmatics, 25 Years After, 34 J. PRAGMATICS 1671, 1671 (2002); see also id. at 1673 (there is “not much room for doubt” that pragmatics considers “the use and users of language”).

174 See A Bezuidenhout, Semantics-Pragmatics Boundary, in CONCISE ENCYCLOPEDIA OF PRAGMATICS (ed. Jacob L. Mey) (2d ed. 2009 Elsivier) 913 (citing C. MORRIS, FOUNDATIONS OF THE THEORY OF SIGNS (Univ.of Chicago 1938). Of course, the division between semantics and pragmatics is not nearly so sharply drawn in recent scholarship. See generally Michiel Leezenberg, Power in Communication: Implications for the Semantics-Pragmatics Interface, 34 J. OF PRAGMATICS 893 (2002); W Koyama, Pragmatics and Semantics, in CONCISE ENCYCLOPEDIA OF PRAGMATICS (ed. Jacob L. Mey) (2d ed. 2009 Elsivier) 767 (defining
it always refers to language as it is anchored in culture. To pragmaticists, culture and discourse are distinct; they look at how sentences are used in conversation to communicate the speaker’s message. Therefore, pragmatics links language to culture.

Foucault goes further. To Foucault, discourse is not simply a tool to describe a culture. Instead, discourse itself is power. Institutions maintain power by creating taboos around certain topics, by instituting rituals and circumstances in which speech happens, and by controlling the right to speak.

pragmatics as the study of “language use” and linguistics, including semantics, is the study of language “in the abstract,” but then noting “This [division] is very general … there is no consensus on what those fields are about [and] where boundaries lie”).

See, e.g., Editorial, Linguistics and Pragmatics, 25 Years After,” 34 J. PRAGMATICS 1671, 1674 (2002) (the inability of the discipline to define itself is “reflected in the fact that the Journal of Pragmatics, in all of its 25 years of existence, has not been willing (or able?) to mark a clean line between what is pragmatics and what is not (read: what can be published in the journal, and what has to be rejected on principled grounds).”)

And, in being so conscious of my use of pragmatics, I am falling into “metapragmatics.” See Introduction, REFLEXIVE LANGUAGE: REPORTED SPEECH AND METAPRAGMATICS, ## (ed. John A. Lacy) (Cambridge 1993) (explicit verbal statements that refer to language use is “metapragmatics.”)


Foucault, The Order of Discourse, at 52-53. Some pragmatics does consider power in the context of “power v. solidarity,” or the relationship between two people as being one where one is more powerful than the other or where they are equal. See Roger Brown and Albert Gilman, The Pronouns of Power and Solidarity, in STYLE IN LANGUAGE 253-76 (T.A. Sebeok, ed.) (MIT 1960); see also B. Kryz-Katzovsky, Legal Pragmatics in CONCISE ENCYCLOPEDIA OF PRAGMATICS 513 (Jacob L. May ed.) (the pragmatic properties of colloquial speech are like the pragmatic properties of the language of the law: “presupposition, deixis [the manner in which
For the purposes of this article, each theory contributes to understanding the testimony on the Food Safety Modernization Act and the Tester Amendment: Pragmatics helps look at the presumptions and implications in the testimony,¹⁸⁰ and Foucault broadens the analytical gaze to look at the testimony as evidence of Congressional power.¹⁸¹

In this description, Tannen lies somewhere in between, but closer to the pragmaticists. She, too, is concerned with the social use of language and how speaker and audience work together to create sense. That portion of Tannen’s work on which I’ve focused here looks at, like the pragmaticists, implications and assumptions in the speech by examining its literary tropes. In this article, the presumptions and implications contained in the testimony were addressed, supra, in Part III.A by my discussing the use of common referents in symbol and myth. Here, in III.B, I move a step further by using Foucault to examine the power implications in the way testimony on the statute was arranged and proffered because “communication is always a certain way of acting upon another person.”¹⁸²

* * *

Speech is powerful and for that reason frightening. Governments fear unfettered speech and therefore work to control it by imposing structure, creating ritual, restricting access, and
constraining subject and content. Thus, the stories told in testimony on the Food Safety and Modernization act were tools used to maintain existing social structures of Congressional power. As Foucault famously stated: “[I]n every society, the production of discourse is at once controlled, selected, organized and redistributed by a certain number of procedures whose role is to ward off its powers and dangers, to gain mastery of its chance events, to evade its ponderous, formidable materiality.”

**Structure.** Congress structures its hearings and controls speech, thus “guiding the possibility of conduct and putting in order the possible outcome.” The power to arrange and compel testimony demonstrates the social dominance of the lawmakers. Congress is the gatekeeper, controlling the hearings by listening only to those whom it invites to speak, only

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183 Foucault McClout 54? ; Sheridan smith at 216; Foucault at 55.
184 Foucault, *The Subject and Power* at 789-790 (“The exercise of power consists in guiding the possibility of conduct and putting in order the possible outcome. Basically power is less a confrontation between two adversaries […] than a question of government [which refers to more than] “political structures or to the management of states; rather [“government”] designate[s] the way in which the conduct of individuals or of groups might be directed. […] To govern, in this sense, is to structure the possible field of action of others”).
185 See, e.g., Teun A. Van Dijk, *Critical Discourse Analysis,*” in THE HANDBOOK OF DISCOURSE ANALYSIS 354 (Deborah Schiffrin, et al., eds.) (Blackwell 2001) (“A central notion in most critical work on discourse is that of power, and more specifically the social power of groups or institutions) (emphasis in the original).
186 For more on gatekeepers, see FAIRCLOUGH, POWER, 39-40
187 WILLIAM N. LAFORGE, TESTIFYING BEFORE CONGRESS (The Capitol Net 2010) at 10. “Witnesses must be invited by a congressional committee in order to be able to appear and testify at a hearing.” *Id.* at 93.

on subjects on it permits, and only in the manner in which it directs. Congress even directs witnesses how to dress and comport themselves. Thus, witnesses are permitted to testify only if they act within the social conventions of Congress as articulated in its rules and traditions. This control of public testimony gives Congress influence over the knowledge and opinions of others.

Ritual. Committee hearings are “the forum for congressional testimony,” and congressional testimony is “rather structured and formal.” House and Senate rules guide

188 For example, the rules of the Senate Committee on Agriculture, Nutrition, and Forestry require witnesses to file their written testimony at least twenty-four hours before the hearing. www.ag.senate.gov/about/committee-rules. “Oral testimony” in the House Appropriations Committee is limited to a summation of the written testimony. docs.house.gov/meetings/AP/AP00/CPRT-113-HPRT-AP00-CommitteeRules-U1.pdf


190 Journalists are admonished: “House and Senate rules require appropriate and professional attire for access to the Speakers Lobby and the Senate Chamber. (For example, men are required to wear jacket and tie, and women may wear suits, skirts and slacks.)” US Senate Radio Television Correspondents Gallery, Coverage Rules, available at www.radiotv.senate.gov/?page_id=247. Witnesses should wear “business suits” or “for the ladies” “dress ensembles.” WILLIAM N. LAFORGE, TESTIFYING BEFORE CONGRESS 246 (The Capitol Net, 2010). To avoid embarrassment, Mr. LaForge suggests that “it is prudent to consult with committee staff.” Id. Further, a witness should appear “engaging, personable, and professional.” Id. A witness should “face the committee at all times and maintain an upright posture, with both hands resting on the witness table.” Id. In sum, “An effective hearing witness knows, looks, and plays her or his role and part.” Id.

191 See FAIRCLOUGH, POWER, at 23 (“Part of what is implied in the notion of social practice is that people are enabled through being constrained: they are able to act on condition that they act within the constraints of types of practice”); see generally Foucault at 55;

192 Teun A. Van Dijk, Critical Discourse Analysis,” in THE HANDBOOK OF DISCOURSE ANALYSIS 355 (Deborah Schiffrin, et al., eds.) (Blackwell 2001). (“[M]embers of more powerful social groups and institutions, and especially their leaders (the elites), have more or less exclusive access to, and control over, one or more types of public discourse. Thus … politicians control] policy and other public political discourse”).

193 LAFORGE, TESTIFYING BEFORE CONGRESS at xxviii (emphasis in the original).
the general conduct of hearings, and most committees establish detailed guidelines for their hearings. The opening and closing spoken statements are so standardized as to be a “ritual,” and the body of the testimony follows the strictures of oral advocacy that would be familiar to any LRW instructor or practitioner: don’t read from a script; make eye contact; state your request up front; then present major themes, “preferably no more than three to five in number”; in closing, restate your request. Witnesses are also advised to make a “personal connection” with the committee with a “personal comment.”

194 WILLIAM N. LAFORGE, TESTIFYING BEFORE CONGRESS at xxvi.

195 http://rules.house.gov/

196 http://www.rules.senate.gov/public/

197 See, e.g., https://agriculture.house.gov/about/rules-committee; http://www.ag.senate.gov/about/committee-rules

198 See, e.g., U.S. Army, HANDBOOK: SO YOU’VE BEEN ASKED TO TESTIFY BEFORE CONGRESS 6-8. The handbook refers on five separate occasions to the “ritual” opening and closing. http://www.tradoc.army.mil/tpubs/misc/handbooktestifyingbeforecongress.pdf and suggests the following “ritual Opening” (italics and capital letter in original):

Good morning, Mr. Chairman, and Members of the Committee. My name is General Monroe. As the Commander of …, I am responsible for…” “I am pleased to be before the committee today, testifying….” “I have submitted my full statement to the committee, which I ask be made part of the hearing record. I will now give a brief opening statement.

And the following as the “ritual Closing” (italics and capital letter in original): “Thank you, Mr. Chairman and committee members, for the opportunity to appear before you today. I stand ready to answer any questions you might have.” Id. at 8.

199 WILLIAM LAFORGE, TESTIFYING BEFORE CONGRESS at 282.

200 See generally WILLIAM LAFORGE, TESTIFYING BEFORE CONGRESS, Ch. 5.

201 WILLIAM LAFORGE, TESTIFYING BEFORE CONGRESS, at 280.
Although witnesses have the “capacity to disrupt” Congressional hearings, taboos, strict rules, and traditions of testifying inhibit the speaker. Thus, Congress has created a social order for testimony and an order of discourse that involves structuring its space into a set of situations in which discourse occurs: written testimony, spoken testimony, and questions.

**Right of Access.** Congress’s ability to control those who testify rests in the lawmakers’ access to the “scarce social resources” of status, fame, and information. Congress is the most exclusive club in the world, and those who are invited before it are intimate with the “in”

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203 See Marie L. Radford & Gary P. Radford, Power, Knowledge, and Fear: Feminism, Foucault, and the Stereotype of the Female Librarian, 67 LIBRARY QUARTERLY 250, 257-58 (1997) (library patrons have the “capacity to disrupt” a library, but the librarians and the nature of libraries constrain patrons); see also Foucault, Sheridan Smith trans at 216 (“We know perfectly well we are not free to say just anything, the we cannot simply speak of anything, when we like or where we like”).

204 See, e.g., “Each member shall be limited to 5 minutes in the questioning of any witness until such time as all members who so desire have had an opportunity to question a witness. Questions from members shall rotate from majority to minority members in order of seniority or in order of arrival at the hearing.” http://www.ag.senate.gov/about/committee-rules.


206 The Senate is often portrayed as a “‘gentlemen’s club,’ or as the “world’s most exclusive club,” managed by a small inner circle of skilled legislators. www.senate.gov/reference/reference_item/Citadel.htm (last accessed March 18, 2015) (discussing WILLIAM S. WHITE, CITADEL: THE STORY OF THE U.S. SENATE, Harper & Bros. 1957). White, then the chief Congressional correspondent of The New York Times, ultimately argued that equality in the Senate stopped at the Senate’s chamber door. He disregarded the notion of a senator as “one among 100 equals,” presenting instead stories of people who make up an “inner” club of the Senate. Members of this so-called inner club displayed a “tolerance toward his fellows, [and] intolerance toward any who would in any real way change the Senate, its customs or its way of life.” *Id.*
crowd. The ability to testify itself requires access sufficient to catch the attention of the committee. Those who testify are “stakeholders in the issues before the committee holding the hearing” and often have long-standing relationships with the committee. For example, Thomas Stenzel, the president and CEO of the United Fresh Produce Association, according to Sen. Harkin has had a “long and very enjoyable working relationship” “going back to the early 1990s.”

**Subject and content.** Testifying before Congress is an invitation-only affair. Witnesses are invited to speak only on specific subjects; in contrast to some state legislatures, the U.S. Congress does not invite open testimony to everyone who wants to comment proposed legislation. Further, Congressional invitations to speak describe the purpose of the hearing and

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210 See e.g., U.S. Army, “So, You’ve Been Asked to Testify before Congress” at 5 www.tradoc.army.mil/tpubs/misc/HANDBOOKTestifyingBeforeCongress.pdf and from the author (the chair of the committee “usually sends a letter to the Defense Department that describes the subject of the hearing and invites the witnesses the committee wants to hear from”); American College of Emergency Physicians, “Testifying Before Lawmakers” http://www.acep.org/Advocacy/Testifying-Before-Lawmakers/ (“Opportunities to testify are often obtained more through persistent seeking, rather than waiting for invitations”)

211 C.f., http://www.leg.wa.gov/legislature/Pages/Testify.aspx. In Washington State, a “bill has a public hearing before Senate and House committees before being considered on the floor of the House and Senate.” Individuals may testify at the committee hearing.

212 See LAFOREGE, *TESTIFYING BEFORE CONGRESS,* at 93-97. In this section subtitled, “How to Get Invited to Testify,” LaForge offers tips for initiating contact with committee staff and notes that it is “very helpful to have a representative or senator initiate the offer [to testify] on behalf” of the person who wants to testify. *Id.* at 97.
the outline the reason for which the witness has been invited, thus limiting the witness’s testimony. Witnesses’ testimony is further constrained as they must submit copies of their written statements before appearing, and oral remarks are limited to a “brief summary of the written testimony.”

Given the constraints of ritual and limits on access, subject, and content, “a good case can be made that many congressional hearings are more theatre than substance.”

The curtailing and constraining of testimony by Congressional procedures creates a normative structure for Congressional testimony that, as Foucault observed of institutions in general, “solemnises [sic] beginnings, surrounds them with a circle of attention and silence, and imposes ritualized forms on them.” The rigid structure of witness testimony and the ritual of Congressional hearings create and reinforce power disparities between members of Congress and

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213 See, e.g., LaForge at 94-96 (including examples of invitations to testify).
214 See, e.g., Rules of the Committee on Agriculture, Nutrition, And Forestry:

3.2: Witness Statements. Each witness who is to appear before the committee or any subcommittee shall file with the committee or subcommittee, at least 24 hours in advance of the hearing, a written statement of his or her testimony and as many copies as the Chairman of the committee or subcommittee prescribes.

216 WILLIAM LAFORGE, TESTIFYING BEFORE CONGRESS, at 265.
217 Michel Foucault, “The Order of Discourse,” at 52; see also Michael McCarthy and Ronald Carter, “There’s Millions of Them” Hyperbole in Everyday Conversation, 36 J. PRAGMATICS 149, 150 (2004) (“Rhetoric, in the ancient world, was associated with persuasive speech and the exercise of power”).

That rules of speaking become norms so as to guide behavior outside hearings is exemplified by the bi-partisan reaction to Representative Joe Wilson’s who shouted, “You lie!” in the middle of President Barak Obama’s State of the Union Speech. The House of Representatives formally censured him, with votes from both sides of the aisle. H . Res . 744, passed Sept. 15, 2009.
the public\textsuperscript{218} because Congress and its committees and sub-committees are gatekeepers, permitting only those whom they invite to testify, and excluding others who do not have access to the “scarce social resources” of status and information.\textsuperscript{219}

Applying this theory, these constraints mean that the House and Senate did not hear valuable information about the proposed Food Safety Modernization Act. Rules permit Congress to avoid dissenting voices and any off-message testimony.\textsuperscript{220} Instead, to make sure the act passed, House and Senate committees permitted stories only about government’s need to protect people from the unseen dangers lurking in food, with no quantitative analysis.

Congressional practices on testimony have an insidious nature. Because the practices are engrained, they appear “universal and commonsensical.”\textsuperscript{221} The longstanding use of constraining procedures reify and reaffirm the unequal power relationship between the institution—here, Congress—and the individual—here, any person whose livelihood or kitchen table is affected by the legislation. As Fairclough notes, “The power to project one’s practices as universal and ‘common sense’ is a significant complement to economic and political power.”\textsuperscript{222}

\textsuperscript{218} Even within Congress, power structures are rigidly enforced. See, e.g., Hon. Collin C. Peterson, “Hearing to Review Current Issues in Food Safety,” House of Representatives, Committee on Agriculture, July 16, 2009 at 85 (“[W]e are going to recognize [permit to speak] Members by seniority.”)

\textsuperscript{219} See Teun A. Van Dijk, “Critical Discourse Analysis,” in THE HANDBOOK OF DISCOURSE ANALYSIS 355 (Deborah Schiffrin, et al., eds.) (Blackwell 2001); see also supra n. __. [ See Michel Foucault, “The Subject and Power,” 8 CRIT. INQUIRY 777, 781 (1982) noting “power” as being linked with the “privileges of knowledge,” that is competence, qualification, and secrecy.]

\textsuperscript{220} See supra notes ____ and accompanying text.

\textsuperscript{221} FAIRCLOUGH POWER at 27.

\textsuperscript{222} FAIRCLOUGH, POWER AT 27.
IV. COUNTERNARRATIVE AND SOLUTIONS

“For centuries, governing through knowledge instead of politics has been a utopian dream.”

“The magnitude of the influence of any legal reform on behavior cannot be assessed by intuition.”

This paper has largely been a descriptive account of a situation. I have strived to show that storytelling, rather than reason and data, caused the Food Safety and Modernization Act, with the Tester Amendment to be passed, and that the methods by which the stories were told served to reinforce existing power structures as between Congress and the people. This description, however, has been mediated only through my theoretical lens, which borrows and blends from three schools of discourse analysis. Other views of why the bill succeeded may discount my approach. For example, a law and economics view might simply note that, for example, in carving out the exception for family farms via the Tester Amendment, Congress did a cost-benefit analysis that the impact of illnesses caused by pathogens from small local farms, may be so small or so rare that the cost of regulation outstrips the harm. In this, however, Congress would be wrong. Small, local, family, and organic farms have caused expensive and devastating outbreaks.

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223 DEBORAH STONE, POLICY PARADOX at 379.

224 Jeffrey J. Rachlinski, Evidence-Based Law, 96 CORNELL L. REV. 901, 909 (2011).

225 Here, I mean law and economics as it formulates and interprets laws consistent with pure market efficiency theories. See generally WERNER Z. HIRSCH, LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS xix (2d ed. 1988).

226 See supra n. 3 [a tale/sprout farm.] See, e.g., 5/31/10 PTLDGN (No Page), Lynne Terry, The Oregonian (noting a 2005 E. coli outbreak traced to a small parsley grower in Clackamas County, OK; a 2008 E. coli outbreak caused by a small grower of spinach in Washington; and quoting a senior epidemiologist with the state Public Health Division citing ten other in Oregon since 2005 were traced to small growers or processors. “Small operations can and do cause
Another view of the bill’s success may simply be that the opposition failed to develop a counter-narrative.\(^{227}\) Even in the face of good data, people rely on anecdotes to cling to their beliefs,\(^{228}\) and it’s hard to image an anecdote that big, corporate farms are safer than farmstands that carry your grandmother’s famous cherry preserves.\(^{229}\)

Another view of storytelling, however, challenges my notion that storytelling serves those in power as a way of maintaining their position because those not in power can use stories to gain attention for their concerns. Under this view, storytelling and counter-storytelling are outliers,“ he said. “There is no data to suggest that small farms or food processors are any less risky than big ones”); see also supra n. ___ [Editorial, give small farmers a break.]

\(^{227}\) There were a few early voices of opposition early in the Congressional hearings. For example, Hon. Goodlatte introduced his opposition by using fear techniques: “Directing the Food and Drug Administration to tell farmers how to farm will make food more expensive. It will threaten our food security. It will increase our reliance on foreign food. It will not make our food supply safer.”

And, objections to the Tester Amendment focused on the lack of scientific rigor. Senator Chambliss objected: “[W]e are faced with voting for S. 510 with new language that was added at the 11th hour which creates a loophole in the Federal food safety system. The newly added language, referred to as the ‘Tester Amendment,’ creates an exemption for small farms and business operations through an arbitrary size and distance threshold – neither of which have any basis in science or risk.” Chambliss, Congressional Record – Senate, Nov. 29, 2010 at S8225. Similarly, Cong. Frank Lucas said, “We need policy based on sound science, and exempting certain sectors of the industry is not sound policy. . . . [The Tester Amendment] is simply unacceptable and dangerous” and Rep. Jim Costa agreed: “This process should be based on science and not based on miles and sales.” Finally, another member of Congress warned, “[W]e’ve learned in our committee hearings that food-borne pathogens don’t care if you’re a big facility or a small facility, a big farm or a small farm. They affect everyone.” Cong. Joe Pitts.

\(^{228}\) Jeffrey J. Rachlinski, Evidence-Based Law, 96 Cornell L. Rev. 901, 919-920 (2011) (noting that the rise in empirical research in the legal academy on the death penalty and tort reform has failed to produce more well-informed legislation in part because some interests benefit from unsound anecdotes and “not all anecdotes take hold,” especially in the face of individual deeply-held individual beliefs).

\(^{229}\) See Jeffrey J. Rachlinski, Evidence-Based Law, 96 Cornell L. Rev. 901, 919 (2011) (analyzing the inability of empiricism to affect death penalty law and stave off “tort reform” because, “[n]o single anecdote can capture the idea that the civil justice system is stable, or that the murder rate would be the same without the death penalty”).
tools used by non-dominant groups whose voice and perspective have “been suppressed, devalued, and abnormalized.” In this vein, some social scientists prize the virtues of storytelling as a way to reveal truths that the logic-based methods of social science cannot and as a way to “unsettle power,” because stories are recorded and collected.

However, as I have tried to show in this article, Congress’s ability to control the structure and ritual of legislative storytelling, and to name the storytellers, dictates what stories are heard. The stories of subalterns may be recorded and collected, but their effects are limited if they lack a distribution method.

In laying that groundwork, I rely on theorists, Tannen, the pragmatists, and Foucault, who examine speech in conversation, whereas here, I have looked at testimony. But, as Bakhtin noted, all language is “dialogic”; that is, all speech—even if it is delivered in monologue—is addressed to someone and anticipates a response; and all speech draws on and responds to what

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230 Richard Delgado, Storytelling For Oppositionists And Others: A Plea For Narrative, 87 Mich. L. Rev. 2411, 2412 (1989); see Daniel G. Solórzano and Tara J. Yosso, Critical Race Methodology: Counter-Storytelling as an Analytical Framework for Education Research, 202 Qualitative Inquiry 23 (2002); see also Patricia Ewick and Susan S. Silbey, Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative,” 29 Law & Soc. R. 197, 199 (1995) (noting that scholars who favor narrative argue that “narratives have the capacity to reveal truths about the social world that are flattened or silenced by an insistence on more traditional methods of social science and legal scholarship” and that by preserving stories power is “unsettle[d]”).

231 Patricia Ewick and Susan S. Silbey, Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative,” 29 Law & Soc. R. 197, 199, 205 (1995) (Noting that “narratives have very successfully and effectively challenged dominant discursive, epistemological, and political norms in social science and legal scholarship by relying on and offering stories rather than surveys, statistics, or legal documents as evidence …”)
has been said before. Therefore I think observations about power dynamics in conversation are translatable to Congressional testimony.

The few scholars who have looked at the dangers of storytelling in creating legislation have proffered possible solutions to the problem of narrative’s influence on forming legislation. For example, Dan Filler suggests that legislators create a “public advocate” to participate in debate on bills that have little or no opposition. That advocate would “argue reasons to oppose a law, challenge claims made by a provision’s supporters or suggest better alternatives to the bill.” Troutt suggests that Congress adopt a fair storytelling code in which storytellers acknowledge the problems with storytelling and back up their statistical claims by citations to applicable studies. Nancy Levit recommends that the audience “Empirically interrogate the story line” while being aware that statistics are often unquestioned or manipulated. Others call for science-based solutions. One solution proposed by Mary Beth Beazley would recognize

233 Dan Filler, Megan’s Law at 365.
234 Filler, Megan’s Law, citing Troutt at 365.
235 Nancy Levit, Reshaping the Narrative Debate, 34 SEATTLE U. L. REV. 751, ___ (2011); see also DEBORAH STONE, POLICY PARADOX at 183 (“[J]ust as there are infinite ways of describing an objet in words or paint, so there are infinite ways of describing with numbers”). Numbers themselves, of course, are problematic. “Just as there are infinite ways of describing an object in words or paint, so there are infinite ways of describing with numbers.” Deborah Stone, Policy Paradox at 181, 196 (noting the politicizing of counting).

Ewick and Silbey note that the first salvos against the use of narrative in law and legal scholarship condemned stories for their incorporation of “subjective, contextualized, and specific accounts of social life.” Patricia Ewick and Susan S. Silbey, Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative,” 29 LAW & SOC. R. 197, 198 (1995). Ironically, however, this early criticism suggested “statutes or statistics” as better fodder for scholars.

236 See, e.g., Prepared Statement of Thomas E. Stenzel, President and CEO of the United Fresh Produce Association, “Keeping America’s Families Safe: Reforming the Food Safety System,”
the value of storytelling when stories are used to help one person, for example a defendant in a criminal matter or a victim in a tort claim. But to retain skepticism about stories that are used to make policy that will affect millions.237

Solution: Evidence-Based Legislation

Given the extensive use of storytelling in making legislation, I think that the amount of attention paid to legislative history needs serious re-evaluation.238 If, as I have suggested, testimony found in legislative history contains little information on the efficacy of proposed legislation, then academicians’ energy would be much better spent on devising methods by which legislators could draft more effective laws. To that end, I recommend a multi-pronged solution in which a public advocate would be assigned to exam all legislation under serious


237 Audience comment, Mary Beth Beazley, Biennial Conference, LWI, 2 July 2014.

consideration\textsuperscript{239} and who would employ the tools of empiricists to analyze bills so that Congress creates evidence-based legislation.\textsuperscript{240}

Based on an approach initially adopted in medicine that incorporates research and clinical experience,\textsuperscript{241} an evidence-based approach to making legislation would subject proposed legislation to “conscientious, explicit, and judicious” study.\textsuperscript{242} The goals of the legislation as articulated by its drafters would be “scientifically tested in controlled studies and proven effective.”\textsuperscript{243} If the goals were not achievable, the bill would die.\textsuperscript{244}

\textsuperscript{240} See generally ADAM BENFORADO, UNFAIR: THE NEW SCIENCE OF CRIMINAL INJUSTICE xvii (Crown 2015) (“[W]e need a new model, grounded in the science of the mind, for our legal system to be truly just”).

\textsuperscript{241} See generally “California Courts: The Judicial Branch of California, Evidence-Based Practice, www.courts.ca.gov/5285.htm.(last accessed July 12, 2015) (“EBP [evidence-based practice] refers to approaches and interventions that have been scientifically tested in controlled studies and proven effective. EBP implies that there is a definable outcome(s); it is measurable; and it is defined according to practical realities (recidivism, victim satisfaction, etc.”); Jeffrey J. Rachlinski, Evidence-Based Law, 96 CORNELL L. REV. 901, 902 n. 4 (2011) (“Evidence based medicine is the conscientious, explicit, and judicious use of current best evidence in making decisions about the care of individual patients”) (quoting David L. Sackett, et al, Evidence Based Medicine: What It Is and What It Isn’t, 312 BRIT. MED. J. 71, 71 (1996)); see generally Victoria Nourse and Gregory Shaffer, Empiricism, Experimentalism, and Conditional Theory, 67 SMU L. Rev. 141 (2014) (examining the “virtues” and “risks” of “fact-bound studies”).

\textsuperscript{242} See David L. Sackett, et al, Evidence Based Medicine: What It Is and What It Isn’t, 312 BRIT. MED. J. 71, 71 (1996) (“[e]vidence based medicine is the conscientious, explicit, and judicious use of current best evidence in making decisions about the care of individual patients”) (quoted in Jeffrey J. Rachlinski, Evidence-Based Law, ” 96 CORNELL L. REV. 901, 902 n. 4 (2011)).

\textsuperscript{243} California Courts: The Judicial Branch of California, Evidence-Based Practice, www.courts.ca.gov/5285.htm.

Evidence-based practice has extended beyond the medical field to other professions, such as business. Evidence-based solutions work well in situations in which the aims are clear, such as better patient outcomes or a more robust bottom line.\textsuperscript{245} Thus, evidence-based legislation would require sponsors to articulate a bill’s goals and rationale, for example permitting small farms to avoid the cost of complying with new safety regulations because small farms don’t cause health hazards. Proposals with murky goals would be sent back to committees for re-drafting; and bills containing goals unsupported by data would not be permitted to go forward.\textsuperscript{246} Not all theories would be testable,\textsuperscript{247} but “empiricism is particularly adept” at testing reasons people offer for support or opposition to a rule.\textsuperscript{248}

Adopting evidence-based legislation rules is not as naively Utopian as it may first seem.\textsuperscript{249} Mechanisms for objective analysis of data exist in the federal government. For example, the Congressional Budget Office provides independent and objective economic information,

\textsuperscript{245} Rachlinski, at 917-918.
\textsuperscript{246} See Rachlinski at 916 (noting that the statistics undermining the stories about the need for tort report are “overwhelming”).
\textsuperscript{247} See Victoria Nourse and Gregory Shaffer, Empiricism, Experimentalism, and Conditional Theory, 67 SMU L. Rev. 141, 156 (warning that quantitative researchers tend to be biased toward material that is measurable and thus looks to the past for present solutions
\textsuperscript{248} Rachlinski at 918; see also Shai Wozner, Response, Evidence-Based Law by Jeffrey J. Rachlinski, 96 Cornell L. Rev. 925, 925 (2011) (although law deals with immeasurable concepts such as right and wrong, it is “connected by an intricate network to reality and facts, to which empirical methods could very well apply. By definition, every legal norm relates to a certain set of circumstances to which it should be applied, and the role of the law is to shape behavior in the context of these circumstances”).
\textsuperscript{249} Adam Benforado suggests that an independent group provide “reports on relevant topics” to the members of the Supreme Court to limit the justices’ biased research efforts and to eliminate amicus briefs. BENFORADO, UNFAIR at 264.
projections, and analysis to committees and members of the House and Senate,\(^{250}\) and although some Inspectors General are political appointees, the charge of the seventy-two IGs is to conduct independent audits and investigations of federal agencies.\(^{251}\) These efforts combined with the rise of empiricism in the legal academy\(^{252}\) show that evidence-based law-making need not be an election-year pipe dream.

\(^{250}\) See 2 U.S.C. §§ 601 et seq. (West, Westlaw 2015); see e.g., David Lawder, *Bush Budget Plan Likely Underestimates the U.S. Deficit*, Reuters.com, Feb. 4, 2008 (White House predicting growth in economy of 2.7% while the Congressional Budget Office predicted 1.7%).


\(^{252}\) See Jeffrey J. Rachlinski, *Evidence-Based Law*, 96 CORNELL L. REV. 901, 904, 906 (2011) (Noting that “[e]mpirical legal research has witnessed exponential growth in just the past few years” but empiricism in the law dates back decades to Supreme Court decisions in *Muller v. Oregon*, 208 U.S. 412 (1908) and *Brown v. Board of Education*, 347 U.S. 483 (1954)); see also *id.* (noting, too, the rise in the use of a variety of testing methods in the fields of business and economics).