STORIES TOLD AND UNTOLD: LAWYERING THEORY ANALYSES OF THE FIRST RODNEY KING ASSAULT TRIAL

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These analyses, arranged as a mosaic article, emerged from the collaboration of five law students, a practicing lawyer, and two clinical law teachers. In the years since our work began, the students have graduated and are practicing or teaching. We have continued to correspond, exchanging ideas and drafts from time to time, in subgroups or as an ensemble. Although the separate tiles of the mosaic are attributed to the members of the group primarily responsible for crafting them, all parts of the article reflect the work and thinking of the whole group.

INTRODUCTION

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Our collaboration stems from the *Lawyering Theory Colloquium*, a long-running seminar and workshop at NYU. Faculty and students in the *Colloquium* examine legal practice with the aid of techniques and insights derived from cognitive and cultural psychology, linguistics and semiotics, narrative and dramaturgical theory.[1] Our particular

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[1] Brief descriptions of the *Colloquium* appear in Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 N.Y.U. L. REV. 1635 (1991); Peggy C. Davis, *Law and Lawyering: Legal Studies With an Interactive Focus*, 37 N.Y.L. SCH. L. REV. 185 (1992); ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 4 - 6 (2000) [hereafter, "MINDING THE LAW"]. Works presented in the *Colloquium* or written in connection with the *Colloquium* include Christopher J. Meade, *Reading Death Sentences: The Narrative Construction of Capital Punishment*, 71 N.Y.U. L.

group undertook to see what we could learn by applying the *Colloquium*'s microanalytic techniques[2] to the study of prosecution and defense lawyers' performances in the trial of a single criminal case.[3]

The case we chose to study was the 1992 state-court trial of the four Los Angeles police officers charged with assaulting motorist Rodney King.[4] One reason for selecting the *Rodney King* case (as we will call it here) was that a videotape of the entire trial was available, allowing us to examine performative aspects of lawyers' trial work that are not captured in a written transcript.[5] Another reason was that

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REV. 732 (1996); David Reiss, *Jefferson and Madison as Icons in Judicial History: A Study of Religion Clause Jurisprudence*, 61 MD. L.REV. 94 (2002); Robert Rubinson, *Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 CLIN. L. REV. 833 (2004).

[2] Other studies using these and similar methodologies include NEAL FEIGENSON, LEGAL BLAME – HOW JURORS THINK AND TALK ABOUT ACCIDENTS (2000) [hereafter, "FEIGENSON"]; Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992) [hereafter, "*Closing Arguments*"]; Peggy C. Davis, *Performing Interpretation: A Legacy of Civil Rights Lawyering in* Brown v. Board of Education, in AUSTIN SARAT (ed.), RACE, LAW, AND CULTURE: REFLECTIONS ON BROWN V. BOARD OF EDUCATION 23 (1997); Neal R. Feigenson, *The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility*, 47 HASTINGS L. J. 61 (1995); Philip N. Meyer, *"Desperate for Love": Cinematic Influences upon a Defendant's Closing Argument to a Jury*, 18 VT. L. REV. 721 (1994); Philip N. Meyer, *"Desperate for Love II": Further Reflections on the Interpenetration of Legal and Popular Storytelling in Closing Arguments to a Jury in a Complex Criminal Case*, 30 U.S.F. L. REV. 931 (1996); Philip N. Meyer, *"Desperate for Love" III: Rethinking Closing Arguments as Stories*, 50 S.C. L. REV. 715 (1999); Philip N. Meyer, *Making the Narrative Move: Observations Based Upon Reading Gerry Spence's Closing Argument in the Estate of Karen Silkwood v. Kerr-McGee, Inc.*, 9 CLIN. L. REV. 929 (2002); Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39 (1994). Regarding the theoretical underpinnings of the methodologies, see, *e.g.*, MINDING THE LAW; Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 CLIN. L. REV. 9 (1994); Jerome Bruner, *The Narrative Construction of Reality*, 18 CRIT. INQUIRY 1 (1991) [hereafter, "Bruner, *Narrative Construction*"]; Peggy Cooper Davis, *The Proverbial Woman*, 48 RECORD BAR ASS'N C.N.Y. 7 (1993); Linda Holdeman Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUDIES FORUM 7 (1996); Richard Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681 (1994) [hereafter, "Sherwin, *Narrative Construction*"].

[3] We particularly wanted to explore the possibility of doing this through a process of intensive student-faculty collaboration. It has been suggested that collaborations of this kind in clinical scholarship can yield significant benefits. See Gary Palm, *Reconceptualizing Clinical Scholarship as Clinical Instruction*, 1 CLIN. L. REV. 127 (1994). We anticipated – and our anticipations were fully borne out – that the interaction of students, faculty members, and a practitioner in our work would provide a stimulating experience for all of us and substantially enrich our perspectives.

[4] *People v. Powell*, Los Angeles Super. Ct. No. BA 035498. This was the first of two criminal trials of the four officers on charges arising out of the incident. The second trial, in federal court, was based on charges of civil rights violations: *United States v. Koon*, No. CR 92-686-JGD (C.D. Cal. 1993), filed August 4, 1992. See note 6 *infra*.

[5] The disadvantage of choosing so complex and richly elaborated a performance for study is that we have had to limit our microanalyses to a very small part of it. We reviewed the entire tape – plus the full trial transcript, transcripts of some pretrial proceedings, nu-

we expected we would find something worth studying in the dynamics of this trial. The jury, after all, acquitted most of the defendants (and convicted nobody)[6] although the prosecution's evidence included a videotape of the defendants *in flagrante delicto*, beating Mr. King with an apparent savagery that glued prime-time television viewers to their screens in horrified fascination and completely convinced the national viewing public of the defendants' guilt before and even after the jury declined to convict them.

The prevailing wisdom, endorsed by most of the post-trial popular and scholarly commentary, was that the verdict had little to do

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merous court documents, and contemporary news accounts – but we treated only a few specific aspects of the trial proceedings as our "texts" for detailed analysis and relegated the rest to the status of context (after having first viewed it as the menu from which to select the particular "texts" we would concentrate on). A consolation, if not a corrective, for leaving so much untouched in our close-up, high-resolution examination of the trial is that our findings can be collated with those of other studies and analyses of the *Rodney King* case, see, *e.g.*, LOU CANNON, OFFICIAL NEGLIGENCE: HOW RODNEY KING AND THE RIOTS CHANGED LOS ANGELES AND THE LAPD (1997); JEWELLE TAYLOR GIBBS, RACE AND JUSTICE: RODNEY KING AND O.J. SIMPSON IN A HOUSE DIVIDED (1996); the essays collected in ROBERT GOODING-WILLIAMS (ed.), READING RODNEY KING - READING URBAN UPRISING (1993); Anthony Cook, *Cultural Racism and the Limits of Rationality in the Saga of Rodney King,* 70 DENVER U. L. REV. 297 (1993) [hereafter, "Cook"]; Kimberlé Crenshaw & Gary Peller, *Reel Time/Real Justice*, 70 DENVER U. L. REV. 283 (1993) [hereafter, "Crenshaw & Peller"]; Jerome McCristal Culp, Jr., *Notes from California: Rodney King and the Race Question*, 70 DENVER U. L. REV. 199 (1993); Abraham L. Davis, *The Rodney King Incident: Isolated Occurrence or a Continuation of a Brutal Past*, 10 HARV. BLACKLETTER J. 67 (1993); John Fiske, *Admissible Postmodernity: Some Remarks on Rodney King, O.J. Simpson, and Contemporary Culture*, 30 U.S.F. L. REV. 917 (1996) [hereafter, "Fiske"]; ROBERT GARCIA, RIOTS AND REBELLION: CIVIL RIGHTS, POLICE REFORM AND THE RODNEY KING BEATING (videodisc 1997); Charles Goodwin, *Professional Vision*, 96 AMER. ANTHROPOLOGIST 606 (1994) [hereafter, "Goodwin"]; A. Leon Higginbotham, Jr., & Aderson Bellegarde Francois, *Looking for God and Racism in all the Wrong Places*, 70 DENVER U. L. REV. 191(1993) [hereafter, "Higginbotham & Francois"]; Harvey Levin, *Trial by Fire*, 66 So. CAL. L. REV. 1619 (1993) [hereafter, "Levin"]; Elizabeth F. Loftus & Laura A. Rosenwald, *The Rodney King Videotape: Why the Case Was Not Black and White*, 66 So. CAL. L. REV. 1637 (1993); Sherwin, *Narrative Construction* at 690 - 692; David Dante Troutt, *Screws, Koon and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18 (1999) [hereafter, "Troutt"], particularly at pp. 97 - 98, 106 - 117; Lawrence Vogelman, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 FORDHAM URBAN L. J. 571 (1993) [hereafter, "Vogelman"], and of additional studies that we or others may later make of this fascinating artifact and mirror of our times. See also the interesting article on pedagogic uses of narrative in relation to the *Rodney King* case: Judith G. Greenberg & Robert V. Ward, *Teaching Race and the Law through Narrative*, 30 WAKE FOREST L. REV. 323 (1995).

[6] The jury acquitted three of the four officers of all charges against them. It acquitted the fourth officer of charges of assault with a deadly weapon and of filing false reports (to cover up the beating) but deadlocked on a single count charging him with having used excessive force under color of police authority. (The later federal trial resulted in convictions of two of the officers for wilfully depriving Mr. King of his civil rights under color of state law (18 U.S.C. § 242) and acquittals of the other two. See, *e.g.*, *Koon v. United States*, 518 U.S. 81 (1996).)

with either the evidence or the trial lawyering on either side. Instead, the outcome had been foreordained by a pretrial change of venue. As a prosecution of four white cops for beating a black man, the case was innately all about race. So, prevailing wisdom said, when it was transferred out of demographically diverse Los Angeles into Simi Valley – an ex-urb created by white flight from L.A., having an African-American population of about 2% – the prosecutors lost the case. Doubtless, this theory had force.[7] But a similar theory, that a racially-charged, politically-explosive criminal trial was essentially decided when the jury was picked, had also dominated public perception of the Angela Davis case twenty years earlier. And one of us, who knew the Davis trial well, recalled that selection of the jury had been only the starting point for a complicated exercise in trial strategy.[8] So we wondered whether an in-depth examination of the lawyers' strategies and performances at the *Rodney King* trial might suggest that they had more influence on the verdict than the prevailing wisdom declared, and also whether there might have been more opportunities for a conviction, even in the Simi Valley venue, than the prevailing wisdom predicted.

I. Our Focus on Narrative

Almost from the outset of our study, we concentrated on the uses that the prosecution and defense lawyers made or could have made of various narrative strategies. In part, this focus reflected the methodological orientation of the Lawyering Theory Colloquium and our interest in trying to apply its analytic techniques to the fully visualized record of a complex criminal trial. In part, it reflected our own view that narrative theory is a particularly useful way of understanding much of what lawyers do in litigation and that narrative analysis is the key to an invaluable toolbox for litigators.

A. Why Narrative is Important in Litigation

"Narrative," as we use the term, means constructing and telling stories and includes the rhetorical creation of an imaginative world in which the story can happen[9] – a world that gives the story its point.[10]

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[7] See Darryl K. Brown, *The Role of Race in Jury Impartiality and Venue Transfers*, 53 Md. L. Rev. 107 (1994), particularly at p. 152; Levin at 1620 - 1627; Henry Weinstein & Paul Lieberman, "Location of Trial Played Major Role, Legal Experts Say," *Los Angeles Times*, April 30, 1992, p. 18.

[8] Concerning the 1972 trial and acquittal of Angela Y. Davis on charges of murder, kidnaping and conspiracy, see Mary Timothy, Jury Woman (1974), and Bettina Aptheker, The Morning Breaks: The Trial of Angela Davis (1975).

[9] Every story simultaneously generates and depends upon a world in which that kind of story is possible. See, *e.g.*, Bruner, *Narrative Construction* at 13 - 14; Michael J. Toolan, Narrative, A Critical Linguistic Introduction 227 - 262 (1988); *cf.* the text at

There are several reasons why this narrative process is crucial in litigation.

First, narrative is "a primary and irreducible form of human comprehension,"[11] humankind's basic tool for giving meaning to experience or observation[12] – for understanding what is going on.[13] It is the way most people make sense of the world most of the time.[14] "[N]arrative . . . gives shape to things in the real world and often bestows on them a title to reality."[15] We link perceptions into happenings, happenings into events, events into stories; and our narrative expectations tell us how each story hangs together and how it will end. Jurors bring this everyday sense-making process to their work and use it to descry the "facts" from the evidence.[16] Trial lawyers seeking to

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note 45 *infra*. Often in litigation the parties contest not only what happened but the very nature of the world. Is it an orderly, logical place, where people deliberately plan what they do and ordinarily do what they plan; or is it a seething tide of unpredictable events and supervening circumstances in which people are largely swept along willy-nilly? Is it a brightly-lit stage on which well-defined characters enact well-formed plays and where what you see is very likely what is going on; or is it a dark den of doubts and dubieties in which appearances are prone to be deceiving and must always be distinguished from realities? To wage these Wars of the Worlds, lawyers' story-telling often must include the use of rhetorical procedures to lay the ontological foundations for their stories (that is, to establish the essential features of Reality in the world in which the story takes place) and to develop suitable epistemological perspectives on their stories (that is, to establish how human cognition can detect Reality in that world). See Sherwin, *Narrative Construction*. And for a description of some useful procedures, see Chapter 6 of MINDING THE LAW, particularly at pp. 177 - 192, and the portions of Chapters 3 and 7 to which these pages refer for examples.

[10] Stories always have a point. It is generally recognized that the worst pan a storyteller can receive is to be asked: "So, what's the point?" Jerome Bruner puts it succinctly when he writes that in "narrative generally, 'what happened' is tailored to meet the conditions on 'so what.'" JEROME BRUNER, ACTS OF MEANING 86 (1990) [hereafter, "ACTS OF MEANING"].

[11] Louis O. Mink, *Narrative Form as a Cognitive Instrument*, in ROBERT H. CANARY & HENRY KOZICKI (eds.), THE WRITING OF HISTORY: LITERARY FORM AND HISTORICAL UNDERSTANDING 129, 132 (1978) [hereafter, "Mink"].

[12] See, *e.g.*, MARK TURNER, THE LITERARY MIND (1996).

[13] "[B]oth in Tonight's News and in the newest fiction, 'True Romance' will either Win Through or leave its Poignant Pain; 'Betrayal' will bereave both Betrayer and Betrayed; there will Come a Moment and God Help Those Who Fail to Seize It, etc. These narratives, their characters, plots, and predicaments, constantly furnish us a standard library of categories by which to classify and interpret the human scene." MINDING THE LAW at 47.

[14] "[A]ny narrative, from the very simplest, is hermeneutic in intention, claiming to retrace event in order to make it available to consciousness." PETER BROOKS, READING FOR THE PLOT: DESIGN AND INTENTION IN NARRATIVE 34 (paperback ed. 1992) [hereafter, "BROOKS"]. "In stories, there are agents and actions; there are patterns; there is direction; most of all, there is meaning. Even when the consequences are tragic, there is a point; there is a message, a moral, a teaching. And that is a consolation. It is consoling to believe that our lives have a shape, a purpose and direction . . . ." WILLIAM H. GASS, TESTS OF TIME 5 (2002) [hereafter "GASS"].

[15] JEROME BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE 8 (2002) [hereafter, "MAKING STORIES"].

[16] See text at notes 185 - 187, 384 - 391 *infra*; FEIGENSON at 87 - 169; ROBERT P. BURNS,

persuade jurors of a particular version of the facts need to tap into the process.[17]

Second, the narrative process also tells us how a story *should* end. "[N]arrative is necessarily normative,"[18] providing the interface between facts and values.[19] "Stories fly like arrows toward their morals."[20] They embody a society's manifest of moral imperatives.[21] For,

> while a culture must contain a set of norms, it must also contain a set of interpretive procedures for rendering departures from those norms meaningful in terms of established patterns of belief. It is narrative and narrative interpretation upon which folk psychology depends for achieving this kind of meaning. Stories achieve their meanings by explicating deviations from the ordinary in a comprehensible form . . . .[22]

So, effective story-telling by a lawyer can help to make the lawyer's case to jurors who want to reach the *right* result.

Third (an elaboration of the preceding point), the narrative process is specialized for reconciling our expectations about the normal, proper course of life with deviations from it.[23] "Deviance is the very condition for life to be 'narratable.'"[24] The launching pad of narrative is *breach*, a violation of expectations, disequilibrium.[25] The landing pad of narrative is *balance*, the reestablishment of equilibrium.[26] We will have more to say about these things when we come to talk about the structure of narrative soon. For present purposes, the point is sim-

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A THEORY OF THE TRIAL 141 - 176 (1999) [hereafter, "BURNS"], and sources collected there.

17 See *Closing Arguments*; the articles by Philip N. Meyer cited in note 2 *supra*; W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE (1981), particularly at pp. 89-90. Judges deciding "legal issues" make use of the same narrative process. See, *e.g.*, MINDING THE LAW, Chapters 3 and 5; Anthony G. Amsterdam, *Selling a Quick Fix for Boot Hill: The Myth of Justice Delayed in Death Cases*, in AUSTIN SARAT (ed.), THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS AND CULTURE 148 (1999).

18 Bruner, *Narrative Construction* at 15.

19 See notes 242 - 243, 385 - 386 *infra* and accompanying text; BURNS at 160 - 164.

20 GASS at 4.

21 See, *e.g.*, HAYDEN WHITE, *The Value of Narrativity in the Representation of Reality*, in THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION 1 (1987).

22 ACTS OF MEANING at 47.

23 "All sorrows can be borne if you put them into a story or tell a story about them." Isak Dinesen, quoted by HANNAH ARENDT, THE HUMAN CONDITION 175 (1958).

24 BROOKS at 139. See also Bruner, *Narrative Construction* at 11: "[T]o be worth telling, a tale must be about how an implicit canonical script has been breached, violated, or deviated from in a manner to do violence to what Hayden White calls the 'legitimacy' of the canonical script."

25 See MAKING STORIES at 15 - 20; BROOKS at 26, 85 - 87, 103, 130, 138 - 139, 155 - 168.

26 See MINDING THE LAW at 45 - 47, 121 - 124.

ply that narrative has always done for the human mind what juries are called upon to do for the body politic in every trial, and particularly in criminal trials – to deal with deviance by restoring order.[27] Small wonder, then, if jurors resort to narrative to do much of the work.

Fourth, jurors come to their task equipped not only with the narrative process as a mode of thought but with a store of specific narratives channeling that process. Stock scripts and stock stories accreted from exposure to the accountings and recountings that continually bombard us – through television, movies, newspapers, books, the internet, and word of mouth from our earliest childhood[28] – provide all of us with walk-through models of how life is lived, how crimes are committed, how reality unfolds. When a juror perceives the familiar lineaments of one or another of these narratives emerging from the evidence, s/he "recognizes" what is afoot and s/he is cued to interpret other pieces of evidence and eventually the whole of it consistently with the familiar story line.[29] "This means that in order to perform effectively, many lawyers, particularly litigators, may be obliged to keep abreast of (in order to tap into) the popular storytelling forms and images that people commonly carry around in their heads."[30]

Fifth, evidentiary trials in which facts are contested are not conducted on the premise of Kurosawa's *Rashomon* – that multiple versions of reality are possible and equally true – nor do most jurors operate on this premise.[31] The uncompromising ontological first prin-

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[27] "What Frank Kermode calls the 'consoling plot' is not the comfort of a happy ending but the comprehension of plight that, by being made interpretable, becomes bearable." Bruner, *Narrative Construction* at 16. See also MAKING STORIES at 27 - 31.

[28] ACTS OF MEANING 82 - 84; see also Mink at 133 ("story-telling is the most ubiquitous of human activities, and in any culture it is the form of complex discourse that is earliest accessible to children and by which they are largely acculturated").

[29] See notes 322 - 328, 387 - 391 *infra* and accompanying text; Paul Gewirtz, *Narrative and Rhetoric in the Law*, in PETER BROOKS & PAUL GEWIRTZ (eds.), LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 2, 8-9 (1996). For additional discussion of stock scripts and stock stories, see MINDING THE LAW at 45 - 48, 117 - 118, 121 - 122, 186 - 187, 282 - 283; Gerald P. López, *Lay Lawyering*, 32 U.C.L.A. L. REV. 1 (1984); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411(1989) [hereafter, "Delgado"]; and the sources collected in *Closing Arguments* at 114 - 116 n. 146.

[30] Sherwin, *Narrative Construction* at 692.

[31] "The necessity of concluding with a decision about the case distinguishes the popular trial from every other public forum. Formal closure provides the genre with both its aesthetic unity and its ability to stimulate and focus debate. One reason trials continue to be the representative anecdotes of issues . . . is that they of all the occasions for the controversy result in a decision, whereas all the editorials, white papers, documentaries, public hearings, special reports, books, sermons, and so forth do not." Robert Harriman, *Performing the Laws: Popular Trials and Social Knowledge*, in ROBERT HARRIMAN (ed.), POPULAR TRIALS: RHETORIC, MASS MEDIA, AND THE LAW 17 (1990), at p. 27. Jurors may be more or less tolerant of the notion that alternative interpretations of reality are possible, and more or less prone to discredit conventional interpretations. See text at notes 172 - 222 *infra*. But few are likely to believe that when it comes to what happened "out there" in the world in

ciple of every trial is that *something real really happened out there*. Jurors are permitted to vote that they cannot tell what happened, but this verdict is conceptualized as a failure of persuasion on the part of whichever party bears the burden of proof. And every trial lawyer knows that it is very dangerous – a desperation tactic of last resort – to stake his or her case on the argument that the truth is so recondite that the opposing party has failed to meet its burden on that account alone. Even if the lawyer's aim is simply to cast enough doubt on the opponent's case to prevent the jury from agreeing that an applicable burden of proof has been met, s/he will almost always want to suggest some alternative thing or things that could plausibly have *really happened out there*, instead of the thing that the opponent needs to prove. Under these circumstances trials of "the facts" tend to turn into story-telling contests. As in the classical dramatic *agon*, there is a hard core of material that the contestants must incorporate and account for in their stories – the Athenian audiences at the Greater Dionysia of the Fifth Century, B.C. knew from the Homeric epics that Agamemnon had summoned Iphigenia to Aulis for the purpose of sacrificing her to Artemis; the juries in the homicide trials of our times know (for example) from seemingly incontrovertible ballistics and fingerprint evidence that at some point in time the defendant handled the gun that fired the fatal shots – and the story-teller is required to encompass these mandatory materials in his or her plot. But where they cease to "tell the whole story," the story-telling competition begins; and the story-teller whose tale best interprets the mandatory materials consistently with the audience's understanding of the human scene can hope to carry off the prize.

Sixth, story-telling offers the litigator a vital means to expand or change the audience's understanding of the human scene. And it equips the litigator to explore in his or her own head, as a necessary prelude, a range of *possibilities* for expanding or changing the audience's perception of that scene. For, in addition to its other functions, narrative serves as the mind's primary way of surveying alternative possible worlds. It is imagination's instrument for getting beyond the familiar and the obvious, for playing out never-experienced scenarios and projecting the consequences of counterintuitive conceptions. It enables us to travel paths we have not walked before and to see where they lead, to create realms of *what if* where we can experiment with new varieties of thinking and believing, of doing and being.[32]

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such-and-such a location at such-and-such a time, inconsistent alternative versions are equally true or that, as Gertrude Stein would have it, there is no *there* there.

[32] See text at notes 322 - 327 *infra*; MINDING THE LAW at 235 - 239; JEROME BRUNER, ACTUAL MINDS, POSSIBLE WORLDS (1986); *cf.* Troutt, particularly at pp. 88 - 93, 119 - 121.

So, what follows from all this? Our reason for rehearsing the functions that the narrative process serves in litigation is not to encourage litigators to make greater use of narrative. That would be as superfluous as exhorting fish to make greater use of water. Litigators are inextricably immersed in narrative; they cannot survive without it.[33] Our aim is rather to suggest that they will navigate the medium more effectively to the extent that they *focus consciously* on narrative construction as an integral part of their work, *survey systematically and creatively* the range of options available to them in constructing narratives, and make *strategic choices* among the options with an understanding of the basic elements of narrative construction and how those elements fit together.

In our own work, we have found it possible to jump-start this kind of thinking by drawing up for oneself a few preliminary inventories and compendiums. (Please note that these are where the thinking *begins*, not where it ends.) The first inventory is a roster of the ways in which story-telling can affect litigation, like the roster we set out in the preceding pages. The second inventory, derived from the first, catalogs the specific practical uses that a litigator may be able to make of narrative in any particular case. (Our inventory is in subpart I.B, immediately below.) Then come an outline of the basic structure and process of narrative (subpart I.C below) and a specification of the special features, conditions and constraints on narrative in the litigation setting (subpart I.D below).[34] We emphasize that these are *our* working inventories, designed to help *us* (both in our litigation work and in our collective analysis of the *Rodney King* case). If they lead our readers to say, "no, that hasn't got it right," and to make their own inventories – which are more effective for their own litigative use and which may also enable them to improve upon our analyses of *Rodney King* – then our subparts I.A through I.D will have served the most useful purpose we could have hoped for. (One of the chief benefits of inventories – as of theories – is to provoke perception of what is missing or wrong in them. Our checklists and our theories both aspire to perform this office.)

B. The Specific Uses that a Litigator Can Make of Narrative

This inventory enumerates potential uses of narrative in jury-trial litigation.[35] Some involve the litigator's own thinking (categories 1

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[33] See text at note 404 *infra*; MINDING THE LAW at 110.

[34] Item I.D is a summary of the interface between items I.A and I.B and item I.C, expressed as a set of cautions to be observed in constructing one's litigation narratives.

[35] Many of the items in the inventory apply *mutatis mutandi* to other litigation settings or to litigation generally. But we describe them all in terms specific to a jury trial.

and 2 immediately below). (We include in the term "litigator" all members of a litigation team.[36]) Some have to do with gauging the thinking of other people in the litigation process (category 3). Some involve making explicit references or implicit allusions to stock scripts in communications aimed at the jury (categories 4, 5 and 6). In subpart 7, we catalog the range of techniques by which a litigator communicates to the jury; and in subpart 8, we briefly discuss the choice between explicit and implicit invocations of stock scripts.

1. *Using narrative to generate hypotheses that guide investigation and to avoid shutting down investigation by making premature judgments.* To be efficient, factual investigation must be directed by working hypotheses about what happened and why. Hypotheses fleshed out in narrative form – with a scene, characters, actions, instruments, and motives[37] – serve this function particularly well, because their projection requires the litigator to construct in his or her imagination a world containing all of the details that are necessary for the plot to unfold. These details in turn suggest others that would probably exist in conjunction with the necessary details, or that could *not* coexist with the necessary details, providing specific focuses for investigation.

Projecting alternative possible causal or explanatory stories that could fit around information already in hand enables a litigator to multiply hypotheses. And having multiple hypotheses in mind throughout a litigation can be crucial to success. In our experience, litigators tend too often to zero in on the first plausible version of events that emerges from available information, or at most the first couple of plausible scenarios. They tend to confine their investigations to attempting to confirm the most immediately obvious favorable scenario (or two) or to refute the most immediately obvious unfavorable scenario (or two). They forget that the fundamental tenet of effective investigation is, *The world is a mysterious, surprising place, where strange things happen.* Narrative provides the best safeguard against these tendencies. Narrative restores the mystery of the world. Insisting upon telling oneself alternative possible stories even after it has become "obvious" what happened is an invaluable check against prema-

[36] Narratives can be particularly useful in collective thinking and in some communications among members of a litigation team: co-counsel, consultants, investigators, paralegals, experts, and so forth. For example, an attorney who is briefing an investigator on the theory of the case will often find that alternative possible scenarios which would support or undercut this theory, played out in "walk-through" form, provide the most efficient way of focusing the investigator on potentially relevant information without crimping his or her flexibility to develop new leads in the field. And narrative can be a valuable *lingua franca* in communications between attorneys and experts in fields with their own esoteric jargon. But we need not go into intra-team communications in detail for present purposes; it will suffice to make our "litigator" figure stand for the entire team.

[37] See text at note 72 *infra*.

ture closure.[38]

2. *Using narrative to develop a theory of the case.* A litigator's *theory of the case* is a detailed summary of the factual propositions that s/he plans to assert as the basis for a favorable verdict or decision, with the facts organized in such a way that they invoke the application of the normative dictates (substantive rules of law; procedural rules, such as those relating to burdens of proof and presumptions; considerations of fairness, propriety, and other moral values; empathy or sympathy) that the litigator will rely on. A theory of the case informs every aspect of the litigator's trial preparation and presentation.[39] Because of the efficacy of narrative in mediating facts and norms,[40] a litigator's whole theory of the case usually takes the form of a story. When it does, the litigator will often benefit from modeling it on one or more of the stock stories current in the culture, and s/he will almost always benefit by considering alternative possible versions of the story and assessing their relative believability by drawing on the culture's current register of accepted stories as examples of what is plausible and coherent, what makes a tale hang together sufficiently to be convincing.

Even when the litigator's theory of the case cannot be encompassed by a single story, it is likely to depend in part upon the persuasiveness of key facts. Jurors' probable reactions to evidence of those facts can sometimes be usefully gauged by reference to the prevalence of similar factual elements in the scenes, plots, and characters of currently accepted story types. Conversely, if a theory of the case calls for discrediting the opposing party's story or components of it, popular narratives featuring an appearance/reality dichotomy[41] – as many popular detective stories, courtroom dramas and other suspense "thrillers" do[42] – can suggest useful litigation strategies for reducing

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[38] Peter Brooks makes the point that the very structure of narrative wards against "the danger of short-circuit: the danger of reaching the end too quickly." READING FOR THE PLOT at 103 - 104. See *id.* at 90 - 142.

[39] The concept and uses of a theory of the case are discussed in, *e.g.*, Edward D. Ohlbaum, *Basic Instinct: Case Theory and Courtroom Performance*, 66 TEMPLE L. REV. 1 (1993); 1 HERTZ, GUGGENHEIM & AMSTERDAM, TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT 170 - 181, 272, 277 - 278, 286 - 287; 2 *id.* at 846, 898 - 906 (1991). A theory of the case has to be developed within a broader framework of strategic planning. See Richard K. Neumann, Jr., *On Strategy*, 59 FORDHAM L. REV. 299 (1990).

[40] See text at notes 18 - 27 *supra*.

[41] CHIAM PERELMAN & LUCIE OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION 415 - 444 (University of Notre Dame Press paperback 1971) [hereafter, "PERELMAN & OLBRECHTS-TYTECA"].

[42] *E.g.*, *Witness for the Prosecution* (United Artists 1957); *House of Games* (Orion 1987); *Dead Again* (Paramount Pictures 1991); *Shattered* (MGM 1991); *Usual Suspects* (Gramercy Pictures 1995); *L.A. Confidential* (Regency Enterprises 1997); *Following* (Zeitgeist 1998); *The Perfect Murder* (Warner 1998); *Arlington Road* (Lakeshore 1998);

the opponent's evidence to the status of deceiving appearances.

3. *Using narrative to fathom or affect the thinking of witnesses and other sources of information, jurors and other trial participants.* Litigators must constantly make strategic decisions on the basis of predictions about how people are thinking or how they will react to something that the lawyer does. In investigative interviewing and in interviews preparing witnesses to testify at trial, the litigator frames questions in ways that are designed both to elicit information and to shape it by structuring the framework within which the witness understands the information and its significance. Because memories are commonly stored and recounted in narrative form and the information remembered is affected by the stories the witness has in mind or can be gotten to think about as giving the information meaning,[43] the litigator needs to be alert to detect those stories and the possibilities for rewriting them. This is equally true in cross-examining the opposing party's witnesses. Witnesses who have had little or no prior experience with the law are frequently playing out in their heads scripts for appropriate witness responses that they have picked up from TV or the movies; this is a setting in which life tends to imitate art almost slavishly. And even witnesses who have had considerable prior experience in a witness role (such as police officers) often have organized aspects of that experience (such as cross-examination by defendants' lawyers) – together with the courtroom stories they have heard (*e.g.*, at the precinct station) – into scripts that can be put to good use by a cross-examiner who discerns them.

Voir dire examination of prospective jurors calls for much of the same sensitivity to narrative processes and stock scripts as witness interviewing and examination. So, often, does predicting how opposing counsel will interpret and react to what a litigator does. And whether or not the litigator makes deliberate use of narrative strategies, techniques and allusions in his or her own presentation of the case (in the various ways we catalog immediately below), the jurors are likely to be perceiving and interpreting the evidence they hear as the unfolding of a story that they recognize from familiar models. The litigator has to anticipate the stories jurors will see in the evidence, in order either to deconstruct them or to turn them to advantage.

Under Suspicion (Revelations Entertainment 1999); *Memento* (Newmarket Films 2000); *Nine Queens* [*Nueve Reinas*] (Patagonik Group 2000); *Reindeer Games* (Dimension Films 2000); *Heist* (Morgan Creek 2001); *Confidence* (Lions Gate 2003).

[43] See, *e.g.*, ACTS OF MEANING at 55 - 58, discussing the classic work of Bartlett and Mandler, FREDERICK C. BARTLETT, REMEMBERING: A STUDY IN EXPERIMENTAL AND SOCIAL PSYCHOLOGY (1932), and JEAN MANDLER, STORIES, SCRIPTS AND SCENES: ASPECTS OF SCHEMA THEORY (1984); MAKING STORIES at 63 - 87; JAMES OLNEY, MEMORY & NARRATIVE: THE WEAVE OF LIFE-WRITING (1998).

4. *Using narrative to attune the jury to lines of thinking that advance the litigator's case or set back the opposing party's case.* Narrative involves a special way of thinking, of processing information, of proceeding from premises to conclusions.[44] If a litigator can get jurors into a narrative mindset early in a trial – by, for example, stressing in *voir dire* interchanges with prospective jurors, in an opening statement, and/or in the way s/he talks about the trial process when making and arguing objections in the hearing of the jury – that the jury's job is to [reconstruct the story] [figure out the real story] [get to the bottom of the story] of what happened, s/he can tap into this mode of thinking and use it to shape the jurors' understanding of the case.

One important characteristic of narrative thinking, for example, is that it is inescapably hermeneutic. In a story, the meaning of the whole is derived from the parts at the same time that the meaning of the parts is derived from the whole.[45] In a deductive "evidence-marshalling" jury argument,[46] this process can be derided as "circular" or as "bootstrapping," but a litigator can make it acceptable, even necessary, to a jury despite this derision if s/he can persuade the jurors that the process is the best way to see how the story hangs together.

Another important characteristic of narrative thinking is that it generates expectations through a presumption of relevancy. This is why a reader knows that if s/he is told in Chapter One there is a gun hanging on the wall, s/he can expect a gunshot and a dead body or at least a near miss by the end of Chapter Three.[47] A related structural feature of stories is that they translate Time into a sequence of events that must be "of relatively equal importance (or value), and . . . of approximately similar 'kinds.'"[48] Thus, "[i]n a story it won't do to say: after the battle of Waterloo I tied my shoe."[49] These aspects of narrative thinking can be used to imbue small items or events with large significance. And narrative thinking not only intensifies people's ordinary tendency to regard the actions of other people as a product of

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[44] We discuss narrative structure, which is a principal aspect of this way of thinking, in the text at notes 72 - 93 *infra*.

[45] See, *e.g.*, Bruner, *Narrative Construction* at 7 - 11.

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

[47] See ANTON TCHEKHOV, LITERARY AND THEATRICAL REMINISCENCES 23 (Samuel S. Koteliansky trans. 1927); JOHN GARDNER, THE ART OF FICTION: NOTES ON CRAFT FOR YOUNG WRITERS 4 (Vintage Books ed. 1991) [hereafter, "GARDNER"]; *cf. id.* at 192. The film *Gosford Park* (Sandcastle 5 2001) literally goes Tchekhov's famous dictum one better by presenting the audience with two murder weapons early in the movie. Those of our readers who have seen the film know the intriguing result; those who have not will enjoy it more if we don't tell.

[48] GASS at 11.

[49] GASS at 5.

will – indeed, of character – rather than of external circumstances.[50] It also gives this tendency the twist of focusing attention on "'reasons' for things happening, rather than strictly [on] . . . their 'causes.'"[51] By working with these and other distinctive qualities of narrative thinking, a litigator can cue the jurors to process what they see and hear at trial in ways that bolster his or her case, undermine the opposition's, or both.

5. *Using particular narratives to accredit, discredit, configure or code pieces of evidence or information.* A jury is likely to find evidence persuasive to the extent that the "facts" it portrays conform to the jurors' understanding of The Way the World Works. Jurors enter a trial with strong views, based on personal experience and on the second-hand information prevalent in their cultural milieu, about The Way the World Works. But these views are neither monolithic nor immutable. We all carry around in our heads an inharmonious assortment of notions, sometimes even flatly inconsistent notions, about what is usual, plausible, probable, possible, right, in human affairs.[52] These notions usually take story form.[53] Depending on which stories are salient when we are trying to make sense of things, we can come to different conclusions about what happened and why. By reminding the jury of apt stories to be thinking about as it receives and evaluates the evidence at a trial, a litigator can prompt the jurors to be more trusting or more skeptical regarding particular kinds of evidence or the facts the evidence is offered to prove.

The stories can be drawn from "news" or fiction. At training programs for criminal defense lawyers after the recent, widely-broadcast media reports of ineptitude at criminalistics laboratories in Oklahoma and Virginia, the lawyers were advised to refer to those exposés when objecting in open court to the admission of crime-lab evidence on *Daubert* grounds[54] or grounds of unreliability. Disparaging comparisons could also or alternatively be made to the crackerjack performance of crime-scene investigators in well-known TV entertainment series like *CSI*, which appear to be leading juries to expect a greater measure of perfection from forensic-science evidence.[55] And it doesn't

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[50] See, *e.g.*, LEE ROSS AND RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY (1991), particularly at pp. 119 - 144.

[51] Bruner, *Narrative Construction* at 7.

[52] *E.g.*, "People change." but "A leopard can't change its spots." "A rising tide lifts all boats." but "Every tub on its own bottom." "Seeing is believing." but "Appearances are deceiving." See DOROTHY HOLLAND AND NAOMI QUINN (eds.), CULTURAL MODELS IN LANGUAGE AND THOUGHT (1987), particularly at pp. 9 - 10; PERELMAN & OLBRECHTS-TYTECA at 85, 411 - 459; FEIGENSON at 95 - 104.

[53] See MINDING THE LAW 39 - 47.

[54] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

[55] See Richard Willing, "CSI Effect," *U.S.A. Today*, posted August 5, 2004 at http://

always take a series to do it. A generation ago, defense attorneys were being advised to refer to the George C. Scott film, *Hospital*, when objecting to medical-center records and were reporting an unusual level of juror skepticism with regard to such records while the film was in vogue and for a time thereafter.[56]

Stories are also useful in coding items of evidence or other pieces of a case. Coding is the process by which words, images, objects, and ideas become associatively linked with others, so that the former bring the latter to mind.[57] Narrative construction involves considerable coding, which contributes heavily to the verisimilitude of good stories.[58] And the conceptual, emotional, even sensory "baggage" packed into an item by narrative coding travels with the item beyond the story where the packing was done. Say, for example, that a prosecutor in a strangulation-murder case uses language in examining witnesses and arguing to the jury which successfully evokes a juror's recollection of the automobile garroting episode near the end of *The Godfather I*. This can bring the whole vivid scene to the juror's mind – the victim, Carlo, clawing helplessly at the wire cutting into his neck, Carlo's legs spasming again and again, his feet fracturing the windshield. It may even suggest that the defendant acted with the pitiless pit-bull savagery of a mafia assassin. These kinds of associations not only invest the physical facts depicted by evidence with powerful emotional and normative significance. They can sometimes give the litigator's case a gritty corporeality s/he could not otherwise achieve, because of lack of evidence – or inadmissibility of evidence – as when, in a strangulation-murder prosecution, there were no eyewitnesses to the killing and the crime-scene investigators' reconstruction of the victim's movements while being strangled are too speculative to pass muster as expert

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www.usatoday.com/life/television/news/2004-08-05-csi-effect_x.htm?POE=click-refer:

> Shows such as *CSI* are affecting action in courthouses across the USA by, among other things, raising jurors' expectations of what prosecutors should produce at trial.
>
> Prosecutors, defense lawyers and judges call it "the *CSI* effect," after the crime-scene shows that are among the hottest attractions on television. The shows – *CSI* and *CSI: Miami* in particular – feature high-tech labs and glib and gorgeous techies. . . .
>
> . . . [T]he programs . . . foster what analysts say is the mistaken notion that criminal science is fast and infallible and always gets its man. That's affecting the way lawyers prepare their cases, as well as the expectations that police and the public place on real crime labs. Real crime-scene investigators say that because of the programs, people often have unrealistic ideas of what criminal science can deliver.

[56] *Hospital* told the story of a patient who was driven mad when his internal organs were progressively removed in error at a hospital where he was repeatedly sent into the operating room accompanied by x-rays and charts of other patients rather than his own.

[57] See MINDING THE LAW at 187 - 192; HERBERT W. SIMONS, PERSUASION IN SOCIETY 96 - 99 (2001).

[58] See MICHAEL RIFFATERRE, FICTIONAL TRUTH (1990).

opinion.

6. *Using particular narratives to cue the jury's interpretation of the case as a whole or to free the jury from sets that dispose it to fit the case into a harmful mold.* The ultimate task of the jurors in any jury trial is not only to decide what happened in terms of physical bodies moving in space and time, or even bodies moved by minds possessing specified mental states. It is also to *interpret and categorize the actions and mental states as understandable human behavior* susceptible to legal and moral judgment.[59] As we noted above, "[p]lacing things, events, and people in these categories is very much a matter of *what stock script one recognizes* as being in play or *what story one chooses to tell.*"[60] A litigator who taps into stock narratives familiar to jurors – either the conventional story lines of prevalent news and entertainment *genres* or specific books, films, or TV shows that are recognizable by name, by leading characters, or by other signature features – can put those narratives to work as a cognitive framework for the jury's interpretation of the evidence. S/he can thus shape the jury's understanding of "what really happened" and what it means.

The collective defense mounted by the lawyers for Officers Powell, Koon, and Wind at the *Rodney King* trial illustrates this tactic. It drew upon the stock story of the heroic team of roving police officers defending civilized society against rampaging hordes of wild inner-city barbarians and barely holding their own by a combination of courage, discipline, skill, strength and teamwork. Always at risk, often at bay, these Brave Survivors of a Thousand Daily Deadly Encounters [with the Third World] are human enough to understand and love, godlike enough to revere and rally 'round. They are, in two words, the *New Centurions*, immortalized in Joseph Wambaugh's 1957 book of that name and the 1972 Columbia Pictures version starring George C. Scott and Stacy Keach.[61] Their story was told again, grippingly, in the 1988 Orion Pictures film, *Colors*, directed by Dennis Hopper, starring

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[59] See BURNS, particularly at pp. 221 - 227.

[60] MINDING THE LAW at 47. "Our very definition as human beings is very much bound up with the stories we tell about our own lives and the world in which we live. . . . [I]t is not clear that we could even put together a story, or construe a story as meaningful, without this competence – acquired very early in life – in narrative construction. If narrative form were to be entirely banished from the jury's consideration, there could be no more verdicts." Peter Brooks, *The Law as Narrative and Rhetoric*, in PETER BROOKS & PAUL GEWIRTZ (eds.), LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 14, 19 (1996).

[61] In the late 80's and early 90's, Wambaugh was one of the country's most widely read novelists. The five novels he published between 1981 and 1989 – four of them embodying the classic Wambaugh formula of the precinct-cop chronicle – "sold a combined seven million copies. Only a handful of authors have sold more during a similar span." Edwin McDowell, "Morrow's All-Out Push Helps Wambaugh Book to the Top," *New York Times*, March 13, 1989, p. D8.

Sean Penn and Robert Duvall. Variants were repeated to repletion in innumerable episodes of Steven Bocho's immensely popular police drama series, "Hill Street Blues," and other fictional and reality-cop series (*e.g.*, "Rescue 911," "Unsolved Mysteries," "Top Cops," "Miami Vice") that dominated television in the late 80's and early 90's.[62] Throughout the *King* trial, defense counsel had the *New-Centurion/Colors* story sharply in focus and played it to the hilt. It unfolded from their opening statements (delivered in tones straight from the police parade-ground and strictly in order of the rank of their clients, so as to ground their case in the reassuring professional order and discipline of police organization) through their presentation of extensive systematic testimony about police training and weapons-use protocols (evoking all of the rousing police-academy drill scenes that had become standard-issue movie and TV fodder) to their closing arguments (which personified the barbarian hordes in the assertedly PCP-crazed-and-supercharged Rodney King and portrayed their clients' efforts to restrain King's violence as meticulous performances of precision police teamwork).

When an opposing party's case points to an obvious conclusion (that is, fits a convincing stock script with this conclusion as the final chapter), often the best way to dissuade the jury from drawing that conclusion is to produce a story that puts a different spin on the same basic facts. Detective stories are excellent models because that *genre* is specialized to *reinterpret* an apparent episode or chain of events in

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62 "Police work is portrayed on television more often than any other profession. It has been that way since the cowboys rode off into the television sunset." Bill Carter, "Police Dramas on TV Were Always Popular; Now They're Real," *New York Times*, October 17, 1990, p. C13. See also Judith Grant, *Prime Time Crime: Television Portrayals of Law Enforcement*, 15 J. AMER. CULTURE 57 (1995); Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process – A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AMER. CRIM. L. REV. 743, 769 - 772 (1995):

> Crime is a staple of prime time television. A 1985 survey revealed that more than forty percent of prime time hours during the 1985-86 television season were devoted to shows featuring police officers, detectives, private investigators or other law enforcement agents. . . .
>
> . . . . . .
>
> . . . Law enforcement agents are central heroic figures in prime time crime dramas. Whether police officers, detectives, private investigators, federal agents . . . or even medical examiners or attorneys, the common characteristic shared by crime-fighters is their archetypal role as instruments of crime detection and enforcers of the established order. . . .
>
> Crime dramas rarely focus on complaints of police brutality. When they do, the complaint is belittled and the brutality is characterized as necessary. . . .

Today there are exceptions, to be sure. In the years following the *Rodney King* trial, some TV series have undertaken to present a more balanced and nuanced portrayal of the police and their relationships to inner-city communities, particularly in neighborhoods of color. These series include "Homicide: Life on the Street" (NBC 1993 - 1999) and "The Wire" (HBO 2002 - present).

order to persuade the reader to correct an initial false impression.[63] Satire and comic irony can also do this work.[64] From Petronius to *Pulp Fiction*, they have performed the functions of parodying stock plots and upending the obvious.[65] Other sorts of deconstructive fiction,[66] including Orwellian fantasy, can sometimes do it. Later we will explore whether these *genres* offered resources that the prosecution could have used to counter the *New-Centurion/Colors* defense at the *Rodney King* trial.[67]

7. *Techniques for communicating narratives to the jury.* One virtue of grounding a litigator's case in stock stories is that s/he can begin to evoke the scripts and trappings of the story during pretrial proceedings or at the very outset of the trial. This makes it possible to use the *voir dire* examination of prospective jurors to sound out the jury's likely reactions to a story before the litigator commits to it by presenting evidence or even taking an overt position regarding the facts of the case in opening argument.

In a high-profile case like *Rodney King*, the litigator may be able to shape a public image of the case before trial, by what s/he says in court filings or pretrial motions arguments or to a quotation-hungry media. The extent to which s/he can talk directly to the media will depend, of course, on whether the judge issues a gag order and, if so, its terms. (Some gag orders, forbidding the lawyers and parties to talk about "the facts" of the case, leave leeway to create impressions of the nature of the case, the issues, even the facts, by talking in terms of analogies to other situations – a kind of discourse in which the creative use of stock stories is particularly at a premium.) All of these

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63 As Tony Hillerman has pointed out, the classic detective story "emerged as a competition between writer and reader," in which the writer was obliged to "introduce the criminal early, produce all clues found for immediate inspection by the reader" and refrain from *deus ex machina* solutions or scams. In other words, the reader was to be deceived *fairly*, then made to appreciate how s/he had got it wrong. See the *Introduction*, in TONY HILLERMAN & ROSEMARY HERBERT (eds.), THE OXFORD BOOK OF AMERICAN DETECTIVE STORIES (1996), at pp. 3 - 4. See also BROOKS at 18 - 29, 211, 238 - 263.

64 See Delgado, particularly at pp. 2412 - 2415; and, for an example in the criminal trial context, see Philip N. Meyer, *"Desperate for Love": Cinematic Influences upon a Defendant's Closing Argument to a Jury*, 18 VT. L. REV. 721 (1994).

65 See NORTHROP FRYE, ANATOMY OF CRITICISM: FOUR ESSAYS 223 - 239 (Princeton paperback ed. 1971) [hereafter, "FRYE"]. The contemporary popularity of macabre comedy in film and on TV – stories that vacillate between wisecracking and bloodbaths, horror exaggerated into humor and *vice versa* – make it particularly easy to move back and forth between parody and pathos without alienating the jury even in trials involving crimes of shocking violence. But this, too, is simply the present variation on an age-old theme: the close proximity between comic irony and the demonic. See *id.* at 178 - 179, 226, 235 - 236.

66 We use the term in John Gardner's sense: "Deconstructive fiction is parallel to revisionist history in that it tells the story from the other side or from some queer angle that casts doubt on the generally accepted values handed down by legend." GARDNER at 88.

67 See text at notes 314 - 335 and 598 - 616 *infra*.

pretrial image-building communications present the dangers of prematurity: the image they succeed in projecting may not be the one the litigator would prefer after trial preparation is further advanced. Subject to this *caveat*, though, three points are worth noting: (1) A litigator's freedom to refer explicitly to film or TV analogs of his or her client's situation – or to label an opponent's position as, *e.g.*, "worthy of Jack Nicholson playing Colonel Jessup in *A Few Good Men*"[68] – while arguing to a judge at a pretrial motions hearing is usually greater than it will be in any open-court proceedings during a jury trial. (2) Such pop analogies are frequently the kind of sound-bite stuff the media like to broadcast. And (3) once broadcast, they may stick to the case in later reporting.

If story-based images have attached to a case in pretrial publicity, that makes it easier for the litigator to advert to them in connection with *voir dire* examination of prospective jurors. But if they have not, it may still be possible to use language evocative of stock narratives in talking with the jurors on *voir dire* or in framing written *voir dire* questions in courts where the judge conducts the oral questioning. These evocations have the dual purpose of priming the jury early to think in terms of the narratives that a litigator expects to tap into later and of giving the litigator an opportunity to observe any reactions of prospective jurors to the narrative. Their reactions may suggest that s/he will be wise to play it down – or, conversely, to play it up – or to strike particular jurors.

Means for suggesting narratives to the jury at later points in the trial abound. During opening and closing argument, the litigator may or may not be permitted to make explicit references to stories current in public discourse,[69] but s/he will usually be able to trigger recognition of widespread and recurrent stock narratives – and even of the better-known books or films or TV series that exemplify them – by implicit allusions. She can usually find occasions for similar allusions in questioning witnesses and in making and arguing objections. Witnesses can be prepared to testify in ways that make the narratives come to mind. The very order of a litigator's presentation can imply the narrative.[70] The litigator's style of witness examination and even his or her physical activity in the courtroom can be designed to summon up the narratives s/he wants the jurors to recognize in the evi-

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[68] See text at notes 329 - 336 *infra*.

[69] See A. Leo Levin & Robert J. Levy, *Persuading the Jury with Facts Not in Evidence: The Fiction-Science Spectrum*, 105 U. PA. L. REV. 139 (1956).

[70] As we have previously mentioned, the order of defense opening arguments at the *Rodney King* trial was regimental – in order of the defendants' respective positions in the police command chain. This portrayed the defendants from the outset as rule-bound, respectful of authority, playing it by the book.

dence.[71] (Criminal defense lawyers will consult their clients extensively at the defense table in cases where the prosecution is seeking to depict the client as impulsive and lacking in self-control but not in cases where the prosecution's theory is that the defendant was a criminal mastermind.)

8. *Choosing between explicit and implicit invocation of stock stories*. When a litigator has the option of making more or less explicit references to the stock stories that s/he wants jurors to have in mind, s/he needs to balance the values of clarity and dramatic emphasis against their risks.

One risk is related to the risk of premature commitment. The more unequivocally a litigator has announced his or her reliance on a particular narrative, the more difficult it will be to back off it if subsequent developments weaken that theory of the case or reveal a better one. Overt or overly clear identification of a particular stock story as the theme of a litigator's case invites opposing counsel to argue that the case is built around a fable or that the facts don't fit the fable. More oblique reference to the stock story would confront opposing counsel with a hard choice between ignoring it or reinforcing it by recognizing it and undertaking to refute it. And if a refutation seemed sufficiently persuasive, the litigator could always reply, "That isn't what I meant at all." Similarly, the clarity of a reference increases the extent to which it offers traction for resistance. A juror may be roused to quarrel with the story who would not have reacted to a more ambiguous reference that was nonetheless sufficient to engage the imaginations of jurors more in tune with the tale.

C. *The Basic Structure and Process of Narrative*

Journalists learn and teach that the recipe for making stories is the Five W's: *Where? Who? What? When? Why?* There is a conspicuous resemblance between this formula and Kenneth Burke's Pentad or "Five Key Terms of Dramatism":

1. Scene - the situation, the setting, the where and when
2. Agent - the actors, the cast of characters
3. Act - the action, the plot
4. Agency - the means, the instruments of action
5. Purpose - the motivations, goals, aims of the characters[72]

Either roster will serve as a handy checklist of the elements that need

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[71] See text at notes 479 - 489 *infra*.

[72] KENNETH BURKE, A GRAMMAR OF MOTIVES xv (1945) [hereafter, "BURKE"]: "any complete statement about motives will offer *some kind of* answers to these five questions: what was done (act), when or where it was done (scene), who did it (agent), how he did it (agency), and why (purpose)."

attention in constructing stories for the uses we identified in the preceding subsection. "Elements" as in *elemental*. For each element represents a whole dimension in which choices are possible and arrays of variables should be canvassed before making the final choices.

The five dimensions are, of course, interconnected. They need to be in tune.[73] (Sherlock Holmes could not solve crimes on the scenes of Dostoevsky's *Brothers Karamazov* or Graham Greene's *Brighton Rock*. He would be as clueless as the County Attorney at the scene of Susan Glaspell's *A Jury of Her Peers*. The characters' motivations in the worlds created by Dostoevsky, Greene, and Glaspell are simply too disordered, their actions too unpredictable, to be puzzled out by Holmes' brand of linear cause-effect logic.) Choices made in one dimension affect each of the others. (For example, adding characters to a story may require an expansion of the scene to encompass a longer period of time or a wider stage. It may also, by increasing the complexity of the interpersonal dynamics, change the motivations of the characters previously onstage. Furio's addition to the cast of *The Sopranos* necessitated an episode set in Italy and considerably complicated the emotional chemistry of Carmela's and Tony's breakup.) Intensifying the focus upon one dimension may diminish the significance of another.[74] (If Upton Sinclair had devoted less attention to the Chicago stockyard scene and the general plight of the proletariat in *The Jungle*, Jurgis would have been a more complex character and would "naturally" have come to a more tragic end.) And transmutations from one dimension to another can be accomplished by the narrative alchemy that Kenneth Burke describes as re-forging distinctions in the "great central moltenness" where all of the dimensions have a common ground.[75] (Capital defense attorneys, for example, transmute Scene into Agent when they construct mitigation stories in which the defendant's childhood environment becomes the Villain of the plot.[76])

The interdependence and partial interchangeability of Scene, Agent, Act, Agency, and Purpose make narrative a highly variable and flexible medium. Still, there is a certain constancy in the way in which agents act to pursue their purposes within the temporal framework of the scene. This constancy resides in what is usually called "plot" – the "principle of interconnectedness and intention [necessary] . . . in moving through the discrete elements – incidents, epi-

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[73] See BURKE at 3 ("It is a principle of drama that the nature of acts and agents should be consistent with the nature of the scene").

[74] See BURKE at 17.

[75] See BURKE at xix.

[76] See, *e.g.*, Alex Kotlowitz, "In the Face of Death," *New York Times Magazine*, July 6, 2003, pp. 32 - 38, 46 - 50; Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547 (1995).

sodes, actions – of a narrative."[77] It reflects "a 'mental model' whose defining property is its unique pattern of events over time."[78] Most stories have a common plot structure. The unfolding of the plot requires (implicitly or explicitly):

(1) an initial ***steady state*** grounded in the legitimate ordinariness of things
(2) that gets disrupted by a ***Trouble*** consisting of circumstances attributable to human agency or susceptible to change by human intervention,
(3) in turn evoking ***efforts*** at ***redress*** or ***transformation***, which lead to a ***struggle***, in which the efforts succeed or fail,
(4) so that the old steady state is ***restored*** or a new (***transformed***) steady state is created,
[(5) and the story often concludes with some ***point*** or ***coda*** – say, for example, Aesop's characteristic *moral of the story*: "Birds of a feather flock together," or "One lie will lead to another and ultimately seal one's doom " – a/k/a "*This is the Way the World Works*."][79]

To illustrate, let us look at a couple of stories. We have chosen very short ones, so that we can set out the entire story in our text. That will give the reader a chance to identify the *anterior steady state*, the *Trouble*, and so forth, for himself or herself before we comment further.

The Water Nixie

A little brother and sister were once playing by a well, and while they were thus playing, they both fell in. A water-nixie lived down below, who said: "Now I have got you, now you shall work hard for me!" and carried them off with her. She gave the girl dirty tangled flax to spin, and she had to fetch water in a bucket with a hole in it, and the boy had to hew down a tree with a blunt axe, and they got nothing to eat but dumplings as hard as stones. Then at last the children became so impatient, that they waited until one Sunday, when the nixie was at church, and ran away. But when church was over, the nixie saw that the birds were flown, and followed them with great strides. The children saw her from afar, and the girl threw a brush behind her which formed an immense hill of bristles, with thousands and thousands of spikes, over which the nixie was forced to scramble with great difficulty; at last, however, she got over. When the children saw this, the boy threw behind him a comb which made a great ridge with a thousand times a thousand teeth,

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[77] BROOKS at 5.

[78] Bruner, *Narrative Construction* at 6.

[79] This chart is based on one at pages 113 - 114 of MINDING THE LAW. For illustrations of the structure in appellate opinions, see *id.* at 77 - 99; 143 - 164.

but the nixie managed to keep herself steady on them, and at last crossed over. Then the girl threw behind her a looking-glass which formed a hill of mirrors, and was so slippery that it was impossible for the nixie to cross it. Then she thought: "I will go home quickly and fetch my axe, and cut the hill of glass in half." Long before she returned, however, and had hewn through the glass, the children had escaped to a great distance, and the water-nixie was obliged to trundle back to her well again.[80]

Get it? The *steady state* – an idyllic domestic portrait of two children playing near their home – is abruptly shattered by the Trouble (they literally fall out of this happy scene into a hell-world) which worsens (they are enslaved and abused) until they initiate *efforts* (to escape) that precipitate the *struggle* (which, as in so many folktales, lasts for three rounds), in which they defeat the villainous nixie, and then all's back to the original idyllic state, with everybody firmly anchored in their proper places again. Now consider:

The Star-Money

There was once upon a time a little girl whose father and mother were dead, and she was so poor that she no longer had a room to live in, or bed to sleep in, and at last she had nothing else but the clothes she was wearing and a little bit of bread in her hand which some charitable soul had given her. She was good and pious, however. And as she was thus forsaken by all the world, she went forth into the open country, trusting in the good God. Then a poor man met her, who said: "Ah, give me something to eat, I am so hungry!" She handed him the whole of her piece of bread, and said: "May God bless you," and went onwards. Then came a child who moaned and said: "My head is so cold, give me something to cover it with." So she took off her hood and gave it to him; and when she had walked a little farther, she met another child who had no jacket and was frozen with cold. Then she gave it her own; and a little farther on one begged for a frock, and she gave away that also. At length she got into a forest and it had already become dark, and there came yet another child, and asked for a shirt, and the good little girl thought to herself: "It is a dark night and no one sees you, you can very well give your shirt away," and took it off, and gave away that also. And as she so stood, and had not one single thing left, suddenly some stars from heaven fell down, and they were nothing else but hard smooth pieces of money, and although she had just given her shirt away, she had a new one which was of the very finest linen. Then she put the money into it, and was rich all the

[80] JACOB AND WILHELM GRIMM, THE COMPLETE GRIMM'S FAIRY TALES 364 - 365 (Margaret Hunt, trans., revised by James Stern, 1972).

days of her life.[81]

Here, the initial happy-family steady state exists only momentarily. (It is created by implication, in the scene with which a reader reflexively surrounds "a little girl.") It is immediately destroyed by Trouble – the death of the girl's parents – which worsens into penury, homelessness, imminent starvation. The Trouble drives her to initiate efforts at self-help. (These take a classic folktale form, the Departure on a Journey, assisted by a classic folktale Helper-figure, the "charitable soul.") Notice that the Trouble here is less dramatic, more a part of the ordinary pattern of human life (children losing parents to death), than in *The Water Nixie*. Indeed, the real indication that the Trouble is unusual enough to require a story to work it out is the *disequilibrium* resulting from the parents' death, signaled by the word "however." Since the little girl is good and godfearing, she doesn't deserve the unhappy condition into which life has plunged her.

The great Russian folklore scholar and theoretician of narrative, Vladimir Propp, described the basic structure of narrative as a sequence of steps similar to ours but more elaborate. Propp's scheme has 31 steps (Propp calls them "functions"), instead of our 5. The point of present interest is that Propp identified two alternative versions of the Trouble by which "the actual movement" of a story is launched: – "Villainy" (which he labeled Function VIII) and "Lack" (Function VIIIa).[82] *The Water Nixie* is a Villainy story; *The Star Money* is a Lack story.

Once launched, the two stories proceed in a similar manner through a series of efforts and struggles ("tests," "trials," "challenges") of the protagonist[s], to a final resolution that rectifies the imbalance wrought by the Trouble, so that things are once again stable and orderly. But the nature of the resolution is different in the two kinds of stories. In *The Water Nixie* we see the classic outcome of a *restoration narrative*: a return to the original, anterior steady state. In *The Star Money*, we see the classic outcome of a *transformation narrative*: the emergence of a new steady state. Stories launched by *Lack* are inevitably *transformation narratives*, for the obvious reason that whatever was missing or out of kilter in the anterior steady state has to be *supplied* by the action of the story, thereby creating a new steady state. Stories launched by *Villainy* are usually *restoration narratives*, although they may be *transformation narratives* if the Villain succeeds in wreaking enough havoc so that Eden in its original form

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[81] *Id.* at 652 - 654.

[82] VLADIMIR PROPP, MORPHOLOGY OF THE FOLKTALE (1928) 30 - 36 (Laurence Scott trans., 2d ed., 1990).

cannot be restored.[83]

Notice that if *The Water Nixie* had been written by and for nixies instead of humans, it would either have to be told as a *Lack* story or have to begin at a different point in time. As a *Lack* story, the opening scene would depict the good, godfearing, penurious nixie needing but lacking servants. A providential Helper would pitch the idle, good-for-nothing children into the well, but they would prove refractory. After the obligatory three high-speed chases (motorized, if the

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[83] Contemporary stories exhibit the same basic plot structure, for the most part. In those that are relatively straightforward, the basic structure is all you see and all you get. (Watch any crime or international-intrigue or terrorist-threat thriller on TV or rent anything in the Action section of your local Blockbuster.) Stories with more intellectual aspirations and catchier styles may obscure the structure a bit and will usually abjure the happy ending. Take (for another example short enough to reproduce in full), Leonard Michaels' story:

The Hand

> I smacked my little boy. My anger was powerful. Like justice. Then I discovered no feeling in my hand. I said, "Listen, I want to explain the complexities to you." I spoke with seriousness and care, particularly of fathers. He asked, when I finished, if I wanted him to forgive me. I said yes. He said no. Like trumps.

Here, the anterior steady state is not spelled out, but is created by implication. The phrase "my . . . boy," particularly when conjoined with "little," implies that an ordinary domestic scene – a parent-and-child-relationship-as-usual – existed before the slap. This technique, commonplace nowadays because of the penchant of contemporary writers to cater to the impatience of contemporary readers by starting *in media res*, is nevertheless no invention of recent date. (Witness *The Star Money*.) The slapping of the author's child, with its suddenness and violence emphasized by the verb choice, "smacked," is altogether classic Trouble. So are the ensuing efforts and struggles to come to terms with the Trouble. And there is a decisive resolution – a psychological and moral plateau – at the end ("trumps"!), although it is neither happy nor clean-cut. But endings that are happy and clean-cut are only one, not the exclusive, kind of terminal stasis in the traditional structure. (Witness all extant classic Greek tragedies.) As Jerome Bruner has observed:

> Narrative outcomes vary, of course, from the banal to the sublime; they may be inner, like a cleared conscience, or outer, like a safe escape. A wholesome setting-right of what the peripeteia put asunder may be the stuff of true adventure and other old-fashioned stories, but with the growth of the novel – and it is scarcely two centuries old – outcomes have taken an increasingly inward turn, as has literature generally. Story action in novels leads not so much to restoration of the disrupted canonical state of things as to epistemic or moral insights into what is inherent in the quest for restoration. Perhaps this is fitting for our times, though it is scarcely new. If it can be said, for example, that Thomas Mann's "Death in Venice" or *The Magic Mountain* gains its power from an inward resolution of the peripeteia, the same can be said of Sophocles' *Oedipus at Colonus* two millenia before. There may be many fashions in literary narrative, but deep innovations are scarce.

MAKING STORIES at 19 - 20. True, there are forms of post-modernist stories that disregard the traditional basic structure. Many of these obtain their shock effects by visibly flouting that basic structure – often by arousing and then violating the reader's expectation that the basic structure will hold. The latter stories are, in many ways, the best demonstration of the grip that the basic structure continues on have on contemporary readers. Without it, the stories would could not work; they would fall flat for want of expectations to cross. See DAVID LODGE, THE ART OF FICTION 188 (1992).

story were filmed for nixie TV), the children would at length be apprehended and reconciled to righteous labor, duly enriching the nixie (if the story were filmed for *bourgeois* nixie TV). As a *Villainy* story, it would have to start at a later time. The anterior steady state would be the solid, satisfying social order in WellWorld during the period when the children were dutifully and productively employed by the nixie before their rebellion. Then, after their villainous rebellion (read as Trouble) and the obligatory three high-speed chases, the restoration of this anterior steady state would inexorably follow.

We believe that the choice of the point in time at which Trouble is depicted as occurring – let's call this the Trouble Point – is both more unconstrained and more important than are commonly understood. It is more unconstrained because history and daily life *considered apart from their organization into story* seldom offer unmistakable, viewpoint-free criteria for distinguishing between trouble and solution. All of us know this only too well in the round of our everyday existence: Today's solution to today's Problem A becomes tomorrow's Problem B, and so on – one damn thing after another.[84] So, too, in world affairs. Was the imposition of much-resented restrictions on Germany the solution that fixed the problem of World War I or the trouble that started the problem of World War II? Was regulation or was deregulation of air fares [the problem] [the solution]? So, too, in the familiar barroom sequence. Where exactly is the Trouble Time when X jocularly insults Y, Y angrily insults X back, X threatens Y, Y spits at X, X slaps Y, Y punches X, X stabs Y, Y shoots X dead?

It is only "stories [that] break up the natural continuum of life into events."[85] "Really," as Henry James pointed out, "universally, relations stop nowhere, and the exquisite problem of the artist is eternally but to draw, by a geometry of his own, the circle within which they shall happily *appear* to do so."[86] Peter Brooks puts it just right when he says that the story-teller's work is "to wrest beginnings and ends from the uninterrupted flow of middles, from temporality itself."[87] An altogether commonplace strategy for doing this is to create the familiar binary movement of the classic revenge-tragedy (Titus *versus* Tamora, the Hatfields *versus* the McCoys, X *versus* Y), by describing the ascent of either leg of the eternal seesaw as "the origi-

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[84] You probably didn't notice anything unusual in our use of the word "round" when you read it halfway through this sentence. That's revealing, right?

[85] GASS at 5.

[86] HENRY JAMES, RODERICK HUDSON (1875), *Preface*, vii (1917 ed.). See JAMES B. STEWART, FOLLOW THE STORY: HOW TO WRITE SUCCESSFUL NONFICTION 171 (1998), discussing the writing of a newspaper story about a flood following a torrential rain: "As is often the case, the starting point of any chronology is at least a little arbitrary."

[87] BROOKS at 140.

nal act . . . [that] sets up an antithetical or counterbalancing movement, . . . [so that] the completion of the movement resolves the tragedy."[88] The story-teller gets to pick which leg.

For illustration, consider the ways in which we Americans (or at least Northerners) tell ourselves the stories of the American Civil War and of the American Revolution, respectively:

> THE AMERICAN CIVIL WAR STORY. Once there was a nation composed of peoples with a common language and heritage but very different regional conditions and customs. Convinced that the central government was oblivious to local needs and hostile to local interests, the partisans of regional self-determination rebelled. A fratricidal war was fought; death and destruction ravaged the land. But in the end the rebels were put down and unity was restored.
>
> THE AMERICAN REVOLUTION STORY. Once there was a nation composed of peoples with a common language and heritage but very different regional conditions and customs. *The central government insisted on imposing its authority everywhere.* Convinced that it was oblivious to local needs and hostile to local interests, the partisans of regional self-determination rebelled. A fratricidal war was fought; death and destruction ravaged the land. But in the end the rebels won their freedom.

Prior to the word "end" in both stories, the only difference is the insertion of the italicized sentence into the Revolution story, immediately following the "Once-there-was" description of the anterior steady state. That sentence creates a Trouble that turns the rebels' uprising into an Effort at Redress. Without it, the rebels' uprising was the Trouble. The different endings of the two stories therefore rectify different Troubles. (And notice: (1) The italicized sentence does the trick even without attributing any especially villainous behavior to the central government; indeed (2) the same sentence could have been inserted into the Civil War story with impeccable historical propriety.)

For another example, consider the contrast between two appellate opinions reaching opposite results in the same case. In the first opinion, the Alabama Court of Criminal Appeals ("CCA") is affirming the conviction and death sentence of Dennis McGriff. In the second, the Alabama Supreme Court is reversing the CCA and ordering a new trial for McGriff on the ground that the trial court erred in failing to instruct the jury properly on McGriff's heat-of-passion defense that would have reduced his crime to manslaughter.

The CCA opinion begins:

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[88] FRYE at 209. Consider, for example, the manifold tragedies recounting the tale of the House of Atreus; or Shakespeare's *Titus Andronicus*; or compare John Wayne in *The Searchers* with Burt Lancaster in *Apache* (a film whose only redeeming virtue is that it starts with the unconventional leg of the seesaw up).

The appellant, Dennis Demetrius McGriff, was convicted of murdering Michael McCree by shooting McCree while McGriff was in a motor vehicle, a violation of § 13A-5-40(a)(18), Ala.Code 1975. The jury found, as the only aggravating circumstance, that McGriff had "knowingly created a great risk of death to many persons" and recommended, by a vote of 10 to 2, that McGriff be sentenced to death. The trial court accepted the jury's recommendation and sentenced McGriff to death by electrocution.

The State's evidence tended to show the following. On October 22, 1996, as McGriff, Ebra "Yetta" Hayes, and Gabriel Knight, were driving by a residential area on 7th Avenue in Ashford, McGriff leaned out of the car window and fired three shots. One shot hit McCree in the back, fatally wounding him. The coroner testified that McCree died from a gunshot wound that entered his chest cavity through his back; the bullet pierced both lungs and his aorta.

Jeffery McCree, the victim's brother, was present at the shooting and testified to the events surrounding his brother's death. [*Two and a half paragraphs are omitted here. They relate in graphic detail how McGriff was observed shooting McCree, how the police apprehended him with the murder weapon, and how he told them he shot McCree, hadn't intended to kill McCree, but "would not lose any sleep over it."*]

At trial McGriff admitted that he had fired the fatal shot. In opening statement, counsel said that McGriff had fired the shot that had killed McCree but that the crime was not a capital offense because, he said, McGriff did not intend to kill McCree. McGriff's defense was that he had been aiming at the car McCree was standing near when he fired the fatal shot. He called witnesses who testified that earlier in the day of the murder, McCree and McGriff had had a confrontation and that McCree and two others, Jerry Thompson and "Scat" Walker, had been chasing McGriff and his companions and throwing gasoline bombs at the car McGriff was riding in. According to witnesses, these events occurred about five hours before McCree was shot and killed.[89]

Now, here is how the Alabama Supreme Court opinion begins:

Dennis Demetrius McGriff was indicted, tried, and convicted for capital murder committed by shooting from a vehicle. [*The balance of this paragraph is omitted. It cites the statute under which McGriff was convicted and relates the procedural history of the case ending with the affirmance of McGriff's death sentence by the Court of Criminal Appeals.*]

Facts

According to McGriff, Michael McCree and others accompanying McCree tried to injure or to kill McGriff and his companion by

[89] *McGriff v. State*, 908 So.2d 961, 972 - 974 (Ala. Crim. App. 2001) [footnotes omitted].

> throwing a firebomb at them and pursuing them in a high speed car chase, on October 22, 1996. A disputed period of time thereafter on the same day, McGriff rode as a passenger in a car driven slowly by an abandoned club and its parking lot, where McCree mingled with 30 or 40 others near the car McCree and his companions had used in the preceding chase. McGriff fired one "warning shot" into the air and then two shots in rapid succession toward the people in the parking lot by some accounts, or toward the car used by McCree and his companions in the earlier chase by McGriff's own account. One of the shots hit and killed McCree. In a statement to the police, while McGriff did not deny that he had fired the shot which killed McCree, McGriff insisted that he had not intended to kill McCree or anyone else and claimed that he had wanted only to scare McCree and the others involved in the incident earlier that day.
>
> Similarly, at trial McGriff did not dispute that he had killed McCree. Rather, a principal feature of McGriff's trial strategy was his effort to persuade the jury to find him not guilty of capital murder but guilty only of manslaughter because he had fired the shots in a heat of passion provoked by the assault initiated and perpetrated by the victim and his companions.[90]

In the CCA's version, the anterior steady state – a brief but placid scene of three people riding in a car through "a residential area on 7th Avenue in Ashford" – was abruptly shattered by Trouble when "McGriff leaned out of the car window and fired three shots." It is not until three paragraphs later, after McGriff and his lawyer have both admitted his guilt in shooting McCree to death, that the CCA tells us about evidence of a pre-shooting episode in which McCree and companions chased McGriff and hurled Molotov cocktails at him. This episode enters the narrative as *testimony* rather than *fact*. Its location in the story makes it a *post hoc* excuse-abuse defense concocted by McGriff at trial in the hope of getting away with murder. By contrast, the Alabama Supreme Court tells the story in a sequence that makes the Trouble the episode in which McCree pursues McGriff in a high-speed car chase and firebombs him. (The Alabama Supreme Court prefaces the episode with the qualifying phrase "According to McGriff," but it counteracts the tendency of the phrase to reduce the episode from *fact* to *testimony* by baldly labeling the entire tale "*Facts*".) This change of sequence from the CCA's account turns McGriff's shooting of McCree from Trouble into a part of the struggle aimed at redressing the Trouble, and it thereby points to a very different outcome than the CCA's. (Notice how the choice of a different Trouble Time changes even the physical scene. What was a "residential neighborhood" – a fitting part of the anterior steady state in the CCA's account – be-

[90] *Ex parte McGriff*, 908 So.2d 1024, 1026 - 1027 (Ala. 2004).

comes a war zone in the Supreme Court's: "an abandoned club and its parking lot, where McCree mingled with 30 or 40 others.")

The defense lawyers in the *Rodney King* trial used precisely the same sequence-shifting technique. They did to the prosecution's version of the assault on Rodney King what the Alabama Supreme Court did to the CCA's version of the shooting of Michael McCree and what the American Revolution story does to the American Civil War Story. They started the narrative earlier, with Rodney King speeding outward from Central L.A. – an embodiment of the dangerous inner-city, nonwhite horde heading for the city's vulnerable exurbs like Simi Valley.[91] They made that the Trouble, compounded by King's high-speed flight when a California Highway Patrol vehicle tried to pull him over, and by his belligerent exit from the vehicle when it was finally stopped by the CHP vehicle and cars from two other police agencies. This turned the episode of the police officers beating Rodney King, captured on the videotape that had horrified so many TV viewers, from Trouble into part of the redressive struggle. Thus, without altering the videotape, they could alter its meaning entirely.[92] And they then proceeded to do again at the micro level what this time-change maneuver had done at the macro level. By breaking the beating episode shown on the tape down into a sequence of baton strokes and kicks by the officers and showing that each stroke or kick had been preceded by some (often minuscule) movement of King's body which could be interpreted as threatening, they made the jerkings of King's limbs the Trouble and turned the officers' truncheon blows from Trouble into Solution.[93] Later parts of this article will examine in detail how this transformation of the narrative was carried off.

D. The Special Features of Narrative in a Jury-Trial Setting

Although stories have a core of common elements and a common basic structure, they obviously differ widely depending upon the purposes for which they are told, the setting in which they are told, and the conventions and constraints of that setting. Fictional stories told for didactic purposes (in the tradition of Aesop's Fables) have different conventions and constraints than do cautionary tales, or novels

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[91] See Vogelman at 574 & n.6; Cook at 310.

[92] See text at notes 264 - 270, 429 - 435 and 662 - 672 *infra*; Judith Butler, *Endangered/Endangering: Schematic Racism and White Paranoia*, in ROBERT GOODING-WILLIAMS (ed.), READING RODNEY KING – READING URBAN UPRISING 15 (1993) [hereafter, "Butler"]; Troutt at 110 - 111.

[93] See text at notes 261 - 263, 271 - 284, 436 - 457, 461 - 465, 500 - 503 *infra*; Crenshaw & Peller, at 285 - 286; Goodwin at 616 - 621; Darryl K. Brown, *Trial Advocacy as Legal Reasoning – and Legal Realism*, 24 N.Y.U. REV. LAW & SOC. CHANGE 315, 326 - 327 (1998).

and dramas aimed at exploring the human condition, or novels and movies and TV shows aimed at entertainment. (Only in the fourth of these *genres* – and perhaps in some homiletic variants of the second – is the rule "[i]f you get bogged down, just kill somebody."[94]) Purportedly nonfiction stories told by historians[95] have different conventions and constraints than those told by ethnographers and anthropologists[96] or by propagandists.[97] Certain conventions and constraints binding the stories that litigators can tell in jury trials deserve special attention:

First, the stories that litigators ask the jury to believe are "the facts" of the case (although not necessarily the stories to which they refer for analogies or illustrations) *must appear to be true*. Jurors view their job as getting at the truth of what happened. A litigator's version of events must appear to be true not only from the standpoint of verisimilitude (lifelikeness) but from the standpoint of external referentiality (conformity to any information that jurors will take to be objective "fact"). In the *Rodney King* trial, the videotape of the defendants beating Mr. King was a brute fact that defense counsel had to accommodate into whatever narrative they chose to tell. (Indeed, the brute was a 500-pound gorilla, requiring considerable narrative ingenuity to housebreak.) And a trial litigator's resources for creating facts are limited. S/he cannot, like a novelist or playwright, conjure physical props out of thin air or put into the mouths of witnesses any words that s/he cannot convince them to utter under oath. If admissible evidence of fact *X* just isn't out there (or if bad luck or a client's inability to pay for thoroughgoing investigation prevents the litigator from obtaining evidence of fact *X*), then the litigator's story at trial has either got to jibe with the nonexistence of fact *X* or contain a sub-story that explains why fact *X* is unprovable though true.

Further, some jurors have an unshakeable belief that truth is a matter of objective fact to be discerned exclusively by logical deduction from physical evidence and the accurate testimony of reliable wit-

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[94] Michael Maren, "How to Manufacture a Best Seller," *New York Times Magazine*, March 1, 1998, p. 30, at p. 32.

[95] There has been much useful analysis of the role of narrative in writing history. See the sources cited in MINDING THE LAW at 365 n. 10; ARTHUR C. DANTO, NARRATION AND KNOWLEDGE (1985); SIMON SCHAMA, DEAD CERTAINTIES: (UNWARRANTED SPECULATIONS) (1991).

[96] See, *e.g.*, CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES (1973); CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY (1983); CLIFFORD GEERTZ, WORKS AND LIVES: THE ANTHROPOLOGIST AS AUTHOR (1988).

[97] See, *e.g.*, JACQUES ELLUL, PROPAGANDA: THE FORMATION OF MEN'S ATTITUDES (Konrad Kellen & Jean Lerner trans. 1973); ANTHONY R. PRATKANIS & ELLIOT ARONSON, AGE OF PROPAGANDA: THE EVERYDAY USE AND ABUSE OF PERSUASION (1992).

nesses. These jurors will resent and resist any suggestion by a trial attorney that the jury needs to *interpret* the evidence. They will be positively outraged at the idea that *stories* have anything to do with truth-finding. Such jurors are not immune to the influence of narrative. Indeed, their denial of the need for interpretation in fact-finding may make them peculiarly prone to reach uncritical conclusions on the basis of stories that they do not realize they have in their heads – like the very story that the only way to get at truth is Sherlock Holmes'. But a litigator facing jurors of this sort needs to tell his or her stories in the manner advised by the classic rhetors, using art to conceal his or her art.[98]

Second, a litigator's story to a jury usually needs to accommodate the opposition's story (because it needs to trump it) *and always needs to be made as immune as possible against challenge*. Trial stories are stories told in contemplation of contest.[99] Except on the rare occasions when a story can be unveiled for the first time in rebuttal closing argument, the opposition will get a chance to refute it or coopt it. This means that, to the extent possible, stories should be built in such a way that an assault on any piece will not bring down the whole; vulnerable pieces should be eliminated; loose ends are usually better left hanging than tucked in, if the opposition is likely to pull them out again. And, the litigator always needs to consider whether something s/he is thinking of putting into his or her story can be spun by the opposition to support a competing story.

Third, a litigator's story to a jury will invariably be an incomplete story, a story without a last chapter. It has to point to a concluding chapter that the jury's verdict will write. It has to have a role for the jury to play, and that role has to be made an attractive one – sleuth, quester-after-Truth, avenger, righter-of-otherwise-irremediable-wrongs.

And, fourth, of course, *the last chapter that the jury is called upon to write must be a verdict in favor of the litigator's client*. Q.E.D.

II. The Backtrail and the Backdrop of the Trial

So much for our analytic orientation. We need now to get oriented to the setting of the *Rodney King* trial itself. We first summarize the procedural posture of the case at the outset of the trial, identify the people principally involved, and remind ourselves and our readers of the general positions of the parties on the issues to be tried. (Sub-

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[98] See, *e.g.*, [Cicero], *Rhetorica ad Herennium*, book IV, ch. vii, ¶ 1; Quintilian, *Institutio Oratoria*, book I, ch. xi, 11; book IV, ch. i, 55 - 60 and ii, 58 - 60.

[99] See Burns at 164 - 166; *cf.* Delgado at 2418 ("there is a war between stories. They contend for, tug at, our minds.").

part II.A below.) We then sketch the cultural surround, with a focus on the prevalent public images of urban crime, its perpetrators, and the job and plight of the police. (Subpart II.B.)

A. Foreground Orientation: Time, Place, Persons, Case

On February 24, 1992, *voir dire* examination of prospective jurors began in the case formally styled *People of the State of California v. Laurence Powell, Timothy E. Wind, Theodore Briseno, and Stacey Koon*. For the better part of a year before this day, the court and counsel had been occupied with pretrial motions. The most important of these for our purposes was the defendants' motion for a change of venue out of Los Angeles, the site of the beating of Rodney King. As a consequence of that motion, the case was transferred to Simi Valley, Ventura Country, for trial.[100]

The four defendants were uniformed officers of the Los Angeles Police Department ("LAPD"). The indictment against them contained five counts. Count I charged all of the defendants with Assault with a Deadly Weapon (Baton or Shod Foot) upon Rodney King.[101] Count II charged them all with Excessive Force Under Color of Authority.[102] Counts III and IV charged Officer Laurence Powell and

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[100] The grand jury that indicted the four defendants was a Los Angeles Grand Jury. See Leslie Berger & Tracy Wood, "At Least 4 Officers Indicted in Beating – Police Probe: Grand Jury Goes Beyond Gates' Recommendation that Three Be Prosecuted and 12 Be Disciplined," *Los Angeles Times*, March 15, 1991, p. A1. The four defendants then moved for a change of venue; the trial court denied the motion; but its ruling was overturned on appeal. See *Powell v. Superior Court*, 232 Cal. App. 3d 785, 792, 802, 283 Cal. Rptr. 777, 781, 788 (2d Dist. 1991). The Court of Appeal concluded that "there is a substantial probability Los Angeles County is so saturated with knowledge of the incident, so influenced by the political controversy surrounding the matter and so permeated with preconceived opinions that potential jurors cannot try the case solely upon the evidence presented in the courtroom," and directed the trial court to grant a change of venue, leaving to that court "the ultimate selection of a site for a fair trial." *Id.* at 803, 283 Cal. Rptr. at 788. On remand, the trial court selected Ventura County as the site for the trial. See Andrea Ford & Daryl Kelley, "King Case to be Tried in Ventura County," *Los Angeles Times*, November 27, 1991, p. A3. For further discussion of the change of venue and its ramifications, see text at notes 196 - 222 *infra*; sources cited in note 7 *supra*.

[101] See People v. Powell, Reporter's Daily Transcript of Proceedings, vol. 44, page 5255, lines 16 to 20 (March 5, 1992) (opening statement of Deputy D.A. Terry White [hereafter, "White opening"]). [The transcript of the trial will hereafter be cited as "Tr." with references to volume, page and line numbers and the date of the proceedings.] As the judge instructed the jury at the close of the trial, California law (Cal. Penal Code § 245(a)(1)) defined the elements of Assault with a Deadly Weapon as (1) "an unlawful attempt, coupled with a present ability, to apply physical force upon the person of another," by an individual possessing "the present ability to apply such physical force," with "general criminal intent"; and (2) "with a deadly weapon or instrument [defined as "any object, instrument or weapon which is used in such a manner as to be capable of producing and likely to produce death or great bodily injury"] or by means of force likely to produce great bodily injury." Tr. vol. 78, 14096/29 - 14101/4 (April 23, 1992).

[102] See Tr. vol. 44, 5255/20 - 24 (March 5, 1992) (White opening). In the jury instructions,

Sergeant Stacey Koon, respectively, with Submission of a False Police Report.[103] Count V charged Koon with being an Accessory After the Fact to a Felony.[104] The defendants pleaded not guilty to all charges.

The roster of major players at the trial included the four defendants, Judge Stanley M. Weisberg, and the following six lawyers:

FOR THE PEOPLE: Terry White and Alan Yochelson
Deputy District Attorneys in the Office of Ira Reiner, Los Angeles County District Attorney

FOR THE DEFENSE: Darryl Mounger
Counsel for Defendant Stacey Koon

Michael P. Stone
Counsel for Defendant Laurence Powell

Paul R. De Pasquale
Counsel for Defendant Timothy E. Wind

John Drummond Barnett
Counsel for Defendant Theodore Briseno

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the judge defined the crime of Excessive Force Under Color of Authority (Cal. Penal Code § 149) as having the following elements: "One, the defendant was a police officer; Two, a person was assaulted or beaten by a police officer; Three, the assault or beating was committed under color of authority and without lawful necessity." Tr. vol. 78, 14101/19 - 25 (April 23, 1992). The judge explained that "[i]n making an arrest the officer may subject the person being arrested to such restraint as is reasonable for the arrest and detention . . . [and] may use reasonable force to make such arrest or to prevent escape or to overcome resistance . . . [but] is not permitted to use unreasonable or excessive force in making an otherwise lawful arrest . . . [and a] person being arrested may use reasonable force to protect himself against such excessive force." *Id.* at 14102/17 - 14103/28. "The reasonableness of a particular use of force," the judge explained, "must be judged from the perspective of a reasonable officer under the same or similar circumstances." *Id.* at 14105/26 - 14106/2.

[103] See Tr. vol. 44, 5255/25 - 5256/5 (March 5, 1992) (White opening). The judge defined the crime of "Filing a False Police Report by a Peace Officer" (Cal. Penal Code § 118.1) as having the following elements: (1) "the defendant was acting as a peace officer at the time of the offense"; (2) "the defendant filed a report with the agency which employs him regarding the commission of any crime or investigation of any crime"; (3) "the defendant made any statement regarding any material matter in the report which he knew to be false, whether or not the statement was certified or otherwise expressly reported as true"; and (4) "the defendant had the specific intent to make a false statement regarding any material matter in the report." Tr. vol. 78, 14109/11 - 27 (April 23, 1992).

[104] See Tr. vol. 44, 5256/3-5 (March 5, 1992) (White opening). The judge defined the crime of "Accessory to a Felony" (Cal. Penal Code § 32) as the conduct of a "person who, after a felony has been committed, harbors, conceals or aids a principal in such a felony with the specific intent that such principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that such principal . . . has committed such felony or has been charged with such felony or convicted thereof." Tr. vol. 78, 14110/22 - 14111/9 (April 23, 1992).

In this lineup of defendants, judge, and lawyers, only one individual was African-American: Deputy District Attorney Terry White.

In later portions of this article, we will meet other important actors in the trial – the jurors, defense expert witness Charles Duke, and prosecution witness Melanie Singer, in particular. *Not* onstage as a player – at least in the events that unfold as courtroom drama – is Rodney King himself. The prosecutors did not call him to the witness stand and, as one might expect, defense counsel did not do so.[105] His story and his perspective, to the extent that they were presented at all, were conveyed to the jury by the testimony of other people, by the videotape of the defendants' beating of Mr. King, and by expert witnesses' interpretations of the events that appear in the videotape.

As the jury would soon learn during the opening statements for all parties, the events leading up to the encounter between Rodney King and the four defendants on March 3, 1991, were not in dispute.[106] At about 12:30 a.m. that day, California Highway Patrol Officers Melanie and Tim Singer (spouses assigned to the same patrol

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[105] Although Mr. King was on the list of possible prosecution witnesses at the beginning of the trial and Deputy D.A. Terry White stated to reporters early in the trial that "'Rodney King will testify at some time during this trial'" (see Richard A. Serrano, "Prosecution to Rest Without Calling King," *Los Angeles Times*, March 17, 1992, at p. B1), the prosecution rested without calling him to the witness stand in the state's case-in chief (see *id.*; Henry Weinstein, "Keeping King Off Stand Was a Wise Move, Experts Say," *Los Angeles Times*, March 19, 1992, at p. B1) or in rebuttal to the defense case. In the subsequent trial of the four officers in federal court on charges of civil rights violations, Mr. King did take the witness stand in the prosecution's case-in-chief. See Jim Newton, "2 Officers Guilty, 2 Acquitted," *Los Angeles Times*, April 18, 1993, p. A1 ("And in the [federal] trial's emotional climax, King took the stand, testifying in public for the first time about the beating."); Jim Newton, "'I Was Just Trying to Stay Alive,' King Tells Federal Jury," *Los Angeles Times*, March 10, 1993, p. A1.

[106] The events leading up to the encounter were described by Deputy District Attorney Terry White at considerable length in his opening statement. See Tr. vol. 44, 5257/13 - 5265/5 (March 5, 1992). White's description was not contested by the lawyers for the four defendants in their opening statements. See *id.* at 5279/21 - 5280/1 (opening statement of Darryl Mounger on behalf of Stacey Koon [hereafter, "Mounger opening"]) ("Now, the evidence is going to show you that approximately, like the district attorney has given you and the way the facts will come out, and I'm not going to cover a lot of those in detail because I don't want to go over the same thing, but you are going to hear that at about 12:37 in the morning that the California Highway Patrol did in fact see a car speeding and they did try to stop it."); *id.* at 5296/16 - 5303/13 (opening statement of Michael Stone on behalf of Laurence Powell [hereafter, "Stone opening"]) (describing the initial events, with occasional asides like "[a]s Mr. White mentioned to you" (5296/17-18) and "as Mr. White told you" (5299/28)); *id.* at 5331/18 - 5333/17 (opening statement of Paul De Pasquale on behalf of Timothy E. Wind [hereafter, "De Pasquale opening"]) ("I'm not going to speak to you at great length about the evidence. You've already heard it discussed by three attorneys from their various perspectives.... [A]fter a process that you've heard described in various ways and emphasizing various details, the King vehicle stopped."); *id.* at 5343/8 - 10 (opening statement of John Barnett on behalf of Theodore Briseno [hereafter, "Barnett opening"]) ("I'm not going to rehash what the other lawyers have said and I'm sure you are kind of tired of listening to lawyers not argue this case.").

vehicle that night) attempted to stop a car for speeding and, when the car did not stop, pursued it and radioed the Los Angles Police Department to send a unit to assist them. As the Singers continued to pursue the motorist at high speeds, they were joined by LAPD patrol cars, one of which contained Officers Timothy Wind and Laurence Powell and another of which contained Sergeant Stacey Koon. Eventually the car stopped and, in response to a police order to exit the car, the driver and two passengers emerged. The two passengers left the car first and, one by one, obedient to police orders, assumed a prone position, face-down, on the ground. The driver, Rodney King, then got out of the car.

What happened next was the subject of intense dispute and was the central focus of the trial. The prosecution's version, spelled out in Terry White's opening statement to the jury, was that Mr. King "was initially uncooperative" but did comply with the officers' orders to lie down on the ground. CHP Officer Melanie Singer approached to handcuff him but was told by LAPD Sergeant Koon to "Stop, we'll handle this." The LAPD officers then attempted to subject the recumbent Mr. King to "some type of control move . . . [that] was done in an ineffective manner." Mr. King, "while he was not actually punching anyone or hitting anyone, was not allowing them to get control of him." Sergeant Koon attempted to subdue him with a taser dart,[107] but "the taser apparently was not effective," and Mr. King "rose to his feet" and began to run, in a move that "could be viewed either as an attack of Officer Powell or running away from Officer Powell." Powell "struck him a blow to the face with a [metal police] baton much as a baseball batter would swing at a pitch," knocking Mr. King off his feet. Then, when King was on the ground, no longer resisting, Powell and the other officers swarmed around him, beating him with their batons and kicking him in a torrent of violence that "continued and continued and continued for no just reason."[108] And, according to the prosecution, Sergeant Koon and Officer Powell later wrote false police reports to try to "cover up" this misconduct.[109]

The defense versions of these events were sharply at odds with the prosecution's, although the four defendants did not completely agree among themselves. Koon, Powell and Wind made common cause, contending – as their lawyers told the jury in their opening

[107] A taser is a device that fires darts tailed by electric wires. When the dart sticks in a person's skin or clothing, the device discharges a powerful electric current through the person's body, causing him or her to lose muscle control and fall to the ground.

[108] See Tr. vol. 44, 5263/25 - 5269/24 (March 5, 1992) (White opening). The quoted passages are in *id.* at 5269/21, 5265/5, 5265/11 - 13, 5265/18 - 21, 5266/22, 5266/27 - 5267/2, 5267/5 - 7, and 5269/4 - 8.

[109] *Id.* at 5269/9 through 5275/23.

statements – that King exhibited "bizarre behavior from the very moment he was first sighted by the CHP officers through the point that he was finally taken into custody" after the LAPD officers had subdued his resistance by the necessary use of force.[110] Because of this bizarre behavior, King's physical appearance, and King's apparent imperviousness to electric shocks from the taser that would have floored a normal human being,[111] the officers all concluded that King was under the influence of PCP, "angel dust," a drug that they asserted makes a "duster" highly dangerous and difficult to control.[112] When ordered to assume a prone position, King got down on his hands and knees but refused to lower himself all the way to the ground.[113] He shook off four officers who tried to seize his arms and legs, and "began to rise up."[114] Koon then fired two taser darts into King but, "rather than causing Rodney King to fall down, . . . Rodney King rose up to his feet and groaned, "Ahh, ahh," and started advancing toward Koon."[115] Koon shot him twice more with the taser and then "managed to talk Rodney King down to the prone position"; but a moment later, "King, without warning, with no one touching him, rose to his feet and turned, within two seconds . . . in a violent charge to[ward Officer] Powell."[116] After Powell responded by knocking King to the ground with a baton stroke, King continued to show signs of efforts to

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110 *Id.* at 5326/1- 13 (Stone opening). For example, when Mr. King first got out of the car he laughed, put one hand on the vehicle, "waved at a helicopter . . . [and then] reached down and put his hands to his rear, and when Melanie Singer ordered him 'Get your hands away from your butt,' Rodney King turned to her and shook [his rear end] at her." *Id.* at 5282/12 - 16 (Mounger opening); see also *id.* at 5302/27 - 530311 (Stone opening); *id.* at 5335/5 - 25 (De Pasquale opening).

111 See *id.* at 5289/3 - 12 (Mounger opening); *id.* at 5304/15 - 5305/7, 5325/14 - 19 (Stone opening); *id.* at 5336/25 - 5337/3 (De Pasquale opening).

112 See, *e.g.*, *id.* at 5282/17 - 25 (Mounger opening) ("Rodney King displayed the objective symptoms of being under the influence of something, and Sergeant Koon will tell you, 'I knew he was under the influence of something.' I saw a blank stare in his face. I saw watery eyes. I saw perspiration. I saw that he swayed. I saw that he was slow to follow the command of the officers. I saw him looking through me."); *id.* at 5325/17 - 5326/19 (Stone opening) ("The conclusion of every officer who was there at the scene was that they had a duster on their hands, a person who was under the influence of phencylcidine, PCP, or angel dust."; "Police officers are trained not to tie up with persons that are violent or possibly under the influence of drugs. In particular, PCP is . . . one of the most dangerous drugs that confronts police officers in the course of their duties."); *id.* at 5334/24 - 5335/4 (De Pasquale opening) ("It was Tim Wind's awareness, upon hearing this advice, 'Watch out, he's dusted,' that not only for police officers, but even for the subject, even for the person suspected of being under the influence, you have a very dangerous situation, the potential for life-threatening confrontation."). See also note 269 *infra*.

113 *Id.* at 5283/13 - 15 (Mounger opening); see also *id.* at 5303/12 - 13 (Stone opening).

114 *Id.* at 5304/15 (Stone opening); see also *id.* at 5288/7 - 25 (Mounger opening).

115 *Id.* at 5289/7 - 10 (Mounger opening).

116 *Id.* at 5289/13 - 27 (Mounger opening); see also *id.* at 5305/1 - 16, 5320/19 - 21 (Stone opening).

rise, presumably to renew his assaultive behavior.[117] Under these circumstances, counsel for Koon, Powell and Wind argued, the officers were compelled to use force to overcome King's resistance; the amount of force they used was reasonable; hence, it was justified as necessary to effect a lawful arrest. Defense counsel for Officer Briseno, who presented his opening statement last, told the jury that Briseno had been trying to protect King and had, in particular, tried to stop his fellow officer and co-defendant Powell from repeatedly striking King in the face with a metal police baton.[118]

B. Background Orientation: Race and the City

Setting the scene for our analysis of the trial requires that we look beyond the case itself and the confines of the Simi Valley courtroom. As we have noted, an estimation of the probable mindsets of the jurors – and of the opportunities the lawyers had for influencing the jurors' views and ultimately their verdict – requires familiarity with the stock scripts and stock stories common at that time in television, movies, newspapers and books. Particularly relevant are scripts and stories about the police, especially those that feature encounters between white police officers and African-American civilians in an urban setting like Los Angeles.

Of course we cannot assume that any individual member of the jury venire was exposed to these stock narratives – let alone influenced by them. Nor could the lawyers in the *Rodney King* trial make such assumptions about a particular juror. But the lawyers could consider narratives current in the culture as indicia of likely predispositions of the jurors generally and as raw material for stories to be embedded in *voir dire* questions, opening statements, witness examinations, and closing arguments. So those narratives can serve a similar function for us as we reconstruct the lawyering choices made by the prosecutors and defense attorneys in the trial and as we imagine alternative choices that could have been made.

Our task, then, is to cast our minds back a decade and a half . . . .

In the years preceding the Rodney King trial in 1992, the driving force in national criminal justice policy was the so-called "War on Drugs." This militant initiative was generating an ever-growing num-

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117 See *id.* at 5292/23 - 27 (Mounger opening) ("[W]hen he starts to rise Sergeant Koon believes, based upon observing his body actions . . . , that he is attempting to get back up to attack."); see also *id.* at 5305/1 - 16 (Stone opening); *id.* at 5339/9 - 12, 5340/11 - 14 (De Pasquale opening).

118 See *id.* at 5344/10 - 27 (Barnett opening) ("And when he [Briseno] saw . . . the torrent of blows [by Powell], he went over to Officer Powell, who was . . . poised to strike again. ¶ And he stopped him. . . . And he pushed Powell back . . . because Officer Briseno was afraid . . . that Mr. King was going to be further beaten and so he pushed him away.").

ber of arrests of African-Americans in the inner city and an ever-increasing over-representation of African-American men in prisons.[119] Politicians were advancing their careers by "talking tough" on law-and-order issues, typically portraying the inner city as a dangerous war zone that could be pacified only by expanding the police force, arresting more drug dealers, lengthening prison sentences, and building more prisons.[120] Many of the mainstream media were propagating these images by prominently featuring stories about drug wars, youth gangs, and the prevalence of violence in the inner city.[121]

Jurors who watched crime films or television shows were typically exposed to portrayals of the inner city that made the world of a metropolitan police officer appear a relentlessly dangerous one. It was hardly surprising that Sergeant Phil Esterhaus of "Hill Street Blues" would end each week's roll call with the admonition: "Let's be careful out there." At least for fictional police officers, danger lurked everywhere and violence could erupt at any moment. The pilot episode of "Hill Street Blues" ended with Officers Bobby Hill and Andy Renko gunned down in an abandoned building by drug dealers. The climax of the movie *Colors* comes when Robert Duvall's character, Officer Bob Hodges is shot to death in a burst of gunfire that erupts without warning (to Duvall/Hodges, although the viewing audience has been cued to expect it) during the arrest of partying gang members. In Joseph

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119 See *e.g.*, STEVEN R. DONZIGER (ed.), THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 115 - 118 (1996); MARC MAUER, RACE TO INCARCERATE 143 - 151 (1999); JEROME MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM 80 - 86 (1996); MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA (1995).

120 See *e.g.*, Michael deCourcy Hinds, "The Primary for Mayor is Leaving Many in Philadelphia Befuddled," *New York Times*, May 20, 1991, p. A13 ("former Mayor Frank L. Rizzo [then running for Mayor of Philadelphia] . . . is, for the fifth time in 20 years, bearing the standard of law and order here in what he calls 'Dodge City,' . . . [and] has said he would find the money to hire 1,500 more police officers by doing things like eliminating programs for AIDS victims and the homeless"); Joseph Treaster, "Drug Office Would Have New Voice Under Florida's Low-Key Governor," *New York Times*, November 30, 1990, at p.16 ("As the Governor of Florida, Bob Martinez doubled the state's prison cells, [and] stiffened penalties for drug dealers . . . . Mr. Martinez is known primarily as a tough law-and-order man."); "The Candidates on the Issues: Comparing Their Answers: Crime and Punishment," *New York Times*, August 30, 1989, at p. B3 (quoting Rudolph Giuliani, then running for Mayor of New York City, that "we're going to need 4,000 to 5,000 more cells over a five-year period . . . [a]nd we've got to look for military camps that can be used as prison camps, for both the city and the state . . . [and] we need somewhere between 4,000 and 5,000 [more] police officers over the next three to four years").

121 See *e.g.*, David Freed, "Crime Overloads L.A. Justice System," *Los Angeles Times*, December 16, 1990, at p. A1; Donatella Loch, "Record Year for Killings Jolts Officials in New York," *New York Times*, December 31, 1990, Metropolitan Section, at p. 1; Tom Coakley & John Ellement, "As 1990 Ended, So Did 3 More Lives," *Boston Globe*, January 1, 1991, at p. 1; Roger Cohen, "Poor Youths Swarming to Las Vegas Are Blamed for Rise in Gang Violence," *New York Times*, October 15, 1991, at p. A16.

Wambaugh's novel, *The New Centurions*, the rookie officers are warned by their Police Academy instructor that "[w]hen you guys leave here, you're going out where there's guys that aren't afraid of that badge and gun."[122] And, in a speech that could not have been better designed to prime jurors to credit the standard defense storyline of police officers in a case like Rodney King's, the instructor explains to the cadets that "it's goddamn hard to take a man who doesn't want to be taken"; "[t]hat's why you see these newspaper pictures of six cops subduing one guy"; "[b]ut try explaining it to the jury . . . . They'll want to know why you resorted to beating the guy's head in."[123] In preparing for the King trial, the prosecutors and defense attorneys could reasonably expect that at least some of the jurors were conditioned by such books, movies, and television shows to see the world through the eyes of a beleaguered police patrol officer and to regard that world as frighteningly perilous.

At that time, by contrast, there were relatively few movies and television shows that presented the world through the eyes of ordinary citizens harassed by abusive police officers, and even fewer that presented such a scenario involving an African-American civilian and white police officers. Our twenty-first century readers will find this scenario familiar, but virtually all of the movies and television shows that have made it a part of their cultural experience postdated the *Rodney King* trial and may well have been spawned by the Rodney King incident itself. These include *The Glass Shield* (Miramax 1995), *Dark Blue* (United Artists 2003), and *Crash* (Lions Gate 2005), all portraying racism on the part of officers in the LAPD or the L.A. Sheriff's Department.[124] At the time of the *Rodney King* trial, movies such as this were only beginning to appear. Indeed, when John Singleton's movie *Boyz N the Hood* (Columbia Pictures) was released in 1991, it was hailed for its unusually sympathetic and nuanced portrayal of inner-city African-American youth trying to escape the dead-end trap of a world defined by gang violence and police oppression.[125]

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122 JOSEPH WAMBAUGH, THE NEW CENTURIONS 8 (Dell paperback ed. 1987).

123 *Id.* at 11.

124 The Sheriff's Department was the object of a widely publicized police-brutality suit filed by attorneys for the NAACP Legal Defense Fund about five months before the Rodney King episode. See, *e.g.*, *Thomas v. County of Los Angeles*, 978 F.2d 504 (9th Cir. 1992, as amended February 12, 1993); [Special to the New York Times] "Los Angeles County Deputies Accused of Brutality," *New York Times*, September 30, 1990, at p. 23; Seth Mydans, "Los Angeles's Sheriff Also Under Fire," *New York Times*, September 17, 1991, at p. A12.

125 See *e.g.*, Rita Kempley, "'Boyz': In the Neighborhood of Fears," *Washington Post*, July 12, 1991, at p. F1; Janet Maslin, "A Chance to Confound Fate," *New York Times*, July 12, 1991, at p. C1. *See also* ED GUERRERO, FRAMING BLACKNESS: THE AFRICAN-AMERICAN IMAGE IN FILM 182 - 186 (1993). In its portrayal of police abuse, the movie eschews

The lawyers in the King trial could probably assume that Singleton's film and movies like it would not be part of the popular culture repertory that Simi Valley jurors would bring with them into the courtroom. Newspaper accounts at the time reported that *Boyz N the Hood* was drawing largely African-American audiences.[126] To the extent that Simi Valley jurors were familiar with the film, it was likely to be from articles recounting that its opening in Los Angeles prompted violent confrontations between rival gangs.[127]

What, then, were the images popular at the time in *mainstream* films portraying interactions between white police officers and African-American civilians? The 1988 film, *Colors*, which opened to favorable reviews[128] and solid box-office figures,[129] has already provided us with an example of the cinematic portrayal of the police officer as Hero, besieged by the lawless elements of society and beset by danger at every turn. Equally significant for our purposes are the messages about race that are implicit in the movie's storytelling and casting.[130] The central characters, through whose eyes the story is told,

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the facile story line of white racism. The officer who places a gun to the throat of an African-American main character is himself African-American. As film historian Guerrero observes, the barriers to "survival or escape . . . [are] made chillingly real . . . when a rabid, self-hating black cop arbitrarily terrorizes the 'hood's best and brightest." GUERRERO, *supra* at 185. At the time the movie was released, Singleton criticized the Black Policemen's Association for being "one of the first groups to support Police Chief Darryl Gates." Patrick Goldstein, "His New 'Hood is Hollywood," *Los Angeles Times*, July 7, 1991, at p. 6.

126 See Richard Bernstein, "Hollywood Seeks a White Audience for New Black Films," *New York Times*, July 17, 1991, at p. C13 ("Although Columbia Pictures, which financed 'Boyz N the Hood,' supported the film in the hope that Mr. Singleton's work would appeal to white audiences, 'Boyz' has played to an audience estimated at 75 percent black, said a studio executive, who spoke on condition of anonymity.").

127 See Richard W. Stevenson, "An Anti-Gang Movie Opens to Violence," *New York Times*, July 14, 1991, at p. 10 (reciting that "[g]unfire and pandemonium broke out at movie theaters around the nation," when *Boyz N the Hood* opened; and featuring a photograph of "police looking after an injured teen-ager after a showing of the film 'Boyz N the Hood' in Los Angeles"). See also, *e.g.*, John Lancaster, "Film Opens with Wave of Violence," *Washington Post*, July 14, 1991, at p. A1.

128 See *e.g.*, Janet Maslin, "Police vs. Street Gangs in Hopper's 'Colors,'" *New York Times*, April 15, 1988, at p. C4; Judy Stone, "'Colors' – Mirror of Madness: Hopper's Vision of Violence in Gang Warfare," *San Francisco Chronicle*, April 15, 1988, at p. E1.

129 See Pat Berman, "Box-Office Figures Can Be Deceptive," *Columbia State*, April 22, 1988, at p. 4B (reporting a very strong showing by *Colors* even though it had only opened in some areas and was not due to open in the remaining areas until the following week).

130 See Troutt at 21 - 22:

> Familiar accounts by state and federal prosecutors that police brutality is nearly impossible – and therefore futile – to prosecute reflect a range of experience in expensive and unsuccessful investigations, grand jury proceedings, trial outcomes and, if they get that far, punishments. This . . . results from the powerful influence of myths in our culture, often communicated through authority narratives (*e.g.*, by police union officials, defense lawyers, and judges), many of which are offered and received through the medium of unconscious racism.
>
> These myths are flexibly adapted plots and storylines of cognitive near-certain-

are two white police officers, played by Robert Duvall and Sean Penn.[131] The Trouble that afflicts them – and ravages the city of Los Angles that they struggle to protect – consists of warring gangs, made up of African-American and Latino young men.

Lawrence Kasdan's film, *Grand Canyon* (20th-Century Fox), which opened in Christmas week, 1991, and similarly enjoyed good reviews[132] and financial success,[133] also presents viewers with a stark interracial confrontation in the inner city, again using Los Angles as the setting. The central character, a white, well-dressed lawyer played by Kevin Kline, avoids traffic on his way home from a Lakers game by cutting through the city. He gets lost and is pictured driving through mostly empty streets, trying to find his way. Suddenly the sound of a hip-hop score fills the air, followed immediately by the appearance of an expensive-looking car containing five African-American young men, in the lane next to Kline's. As Kline stares into the other car, the driver stares back and one of the occupants waves at Kline. The music, the look of the other car and its occupants, and their behavior (which was, it bears noting, a response to Kline's staring at them) all are clearly designed to signal impending menace. At that point, Kline's car breaks down and we witness him stranded in a low-income neighborhood.[134] He telephones for road service and, in the course of the

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ties which many of us simply regard as normal: that, for example, desperate, often hardened criminals inhabit the poorest sections of our cities and make law enforcement difficult and dangerous; that most people stopped or arrested by the police are young black men with little education and uncontrolled impulses living unstructured lives; that criminal suspects in custody frequently resist arrest; and that police officers protect us from random harm. Some of these notions are partially true, so that is not what makes them myths. Myths are constructed out of the epistemological reflex to assume that these and other ideas govern virtually all situations between the police and civilians, especially low-income black male civilians.

131 The decision to cast white actors in both leading roles reflected the predominant race of the LAPD at that point in time. But a person of color could have been cast as a lead without offending realism. The LAPD was then 23.3% Latino and 14.1% African-American. See Peter Kilborn, "New York Police Force Lagging in Recruitment of Black Officers," *New York Times*, July 17, 1994, at p. 26 (presenting statistics on demographics of police forces in various cities, including Los Angeles, in 1992). At the conclusion of *Colors*, after Duvall's death, Penn is partnered with an African-American officer who swaggers through a brief braggadocio scene before being instructed in street lore by the now sadder-but-wiser Penn.

132 See *e.g.*, Janet Maslin, "The Accidents and Miracles in Everyday Life," *New York Times*, December 25, 1991, at p. 118; Gene Siskel, "Kasdan's 'Grand Canyon' Is Well Worth a Visit," *Chicago Tribune*, January 10, 1992, Friday section, at p. C ("one of the year's very finest films").

133 See Bernard Weintraub, "Director Criticizes 'Grand Canyon' Critics," *New York Times*, January 16, 1992, at p. C17 (reporting that the film "seems to be moving toward financial success" and has received "general praise" but has generated some criticism for its "glib look at serious urban problems," prompting Kasdan to defend the film).

134 The viewer is obviously intended to regard this as a dangerous area. That is the way it was characterized by reviewers at the time (see, *e.g.*, Maslin, *supra* note 132 ("dangerous

phone conversation, says that if the repair truck "takes that long, I might be, like, dead." He hangs up and, immediately thereafter the African-American youths reappear, ordering Kline out of his car and showing him that they are armed. The encounter is cut short by the arrival of the tow-truck driver (played by Danny Glover), who convinces the youths to leave.

The *Grand Canyon* episode takes advantage of racial stereotypes likely to be held by large numbers of viewers – using visual and audio cues at the beginning of the sequence to create the sense of foreboding – and then reinforces those stereotypes by having the youths turn out to be precisely as dangerous as the lawyer (and many viewers) initially assumed. In this respect, the scene is like many in *Colors* and other movies of the time[135] that used hip-hop music and race to set the viewer to perceive an individual as prone to crime and violence.

These negative images of young African-American men in the inner city reflected perceptions and fears that had been simmering for years in the public consciousness. A decade earlier, in 1984, Claude Brown, who had written eloquently about his own Harlem childhood in *Manchild in the Promised Land* (1965), published an article in the *New York Times Magazine* in which he described the Harlem of the early '80's as plagued by "more violence, more crime, and more violent crime than at any other period in its history" and characterized its "present-day manchild" as a "considerably more sophisticated adolescent . . . and more likely to commit murder."[136] Such views – that the conditions of life in the inner city had reached an all-time low and that the modern generation of youth was dramatically different (and worse) than previous generations – were echoed in many other articles of the time.[137] And the prognosis was that things could only get

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neighborhood"); Siskel, *supra* note 132 ("tough neighborhood")) and the way it is described in the synopsis that appears on the back cover of the commercial packet for the videotape ("dangerous neighborhood"). But all that the film actually shows about the neighborhood is that there are broken-down cars on the street and the kind of urban market commonly found in low-income areas. Thus, low-income neighborhood signals "dangerous neighborhood."

135 These included *Juice* (Paramount 1992) (which opened on January 17, 1992, shortly before the start of the Rodney King trial), *New Jack City* (Warner Brothers 1991), and *Ricochet* (HBO 1991).

136 Claude Brown, "Manchild in Harlem," *New York Times*, September 16, 1984, Sunday Magazine.

137 See generally FRANKLIN E. ZIMRING, YOUTH VIOLENCE 6 - 7 (1998), recounting the results of a survey of accounts of youth crime "in the print media of the mid-1970s and mid-1990s," which commonly portrayed young offenders as "*qualitatively* different from young persons who had violated the law in previous times." Zimring quotes, as illustrative, a 1975 *Time* article reciting that "'[t]he youth who are terrorizing the cities often belong to gangs, but gone are the old style rumbles with switch-blade knives and zip guns'" and that "'[e]ven criminals are frightened to work the streets in big-city areas.'" See also, *e.g.*, Edi-

worse. At the end of the '60's, the National Commission on Violence had at least hedged this pessimistic prognosis with a quasi-optimistic "unless," followed by a broad social-reform agenda.[138] But by the mid-1990's, sociologist John DiIulio and his influential co-authors were predicting – erroneously, as it would turn out – that there was bound to be a terrifying increase in youth violence by the turn of the century.[139]

In the kind of feedback loop that often marks the relationship between popular culture and popular opinion,[140] the movie scriptwriters and directors of the day absorbed these prevailing attitudes and then sent them back out to the public in vivid, gripping images likely to solidify and enhance those very attitudes. Thus, in contrast to the almost romanticized treatment of white adolescent gangs in literature throughout much of the twentieth century[141] and to *West Side Story*'s[142] sanitized images of white and light-skinned Latino youth "gang" members dancing on urban roof tops, Hollywood had moved

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torial, "No Kid Gloves for Teen Criminals," *New York Post*, March 7, 1995, at p. 22 ("Treating young offenders differently from adults – offering them light punishment and numerous opportunities for rehabilitation – made sense in an earlier era when juvenile delinquency meant little more than stealing hubcaps or joy-riding in stolen cars. Today's juvenile delinquents aren't petty thieves or pranksters – they're hardened criminals, many if not most beyond hope of meaningful 'rehabilitation.'").

138 FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE: TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY (1969).

139 See WILLIAM J. BENNETT, JOHN J. DIIULIO, JR., & JOHN P. WALTERS, BODY COUNT: MORAL POVERTY – AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS (1996); John J. DiIulio, "The Coming of the Super-Predators," *The Weekly Standard*, November 27, 1995, at p. 23. In direct contravention of DiIulio's prophesies, the juvenile crime rate *decreased* during the period from 1994 to 2000 despite increases in the juvenile population during this period. See David S. Tanenhaus & Steven A. Drizin, *"Owing to the Extreme Youth of the Accused": The Changing Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 642 - 643 (2002). DiIulio later expressed regret about the position he had taken. See Elizabeth Becker, "As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets," *New York Times*, February 9, 2001, at p. A19 (reporting that DiIulio's "chief theory was discredited: instead of rising, the rate of juvenile crime dropped by more than half"; quoting criminologist Franklin E. Zimring as saying that DiIulio's "'prediction wasn't just wrong, it was exactly the opposite [of what happened] . . . . His theories on superpredators were utter madness'"; and stating that DiIulio himself "wished he had never become the 1990's intellectual pillar for putting violent juveniles in prison and condemning them as 'superpredators'").

140 See MINDING THE LAW at 47; Susan Bandes & Jack Beermann, *Lawyering Up*, 2 GREEN BAG 2d 5, 6 (1998), and sources cited. For a discussion of the relationship between media accounts of criminal cases and the public's views of the criminal justice system, see RICHARD L. FOX & ROBERT W. VAN SICKEL, TABLOID JUSTICE: CRIMINAL JUSTICE IN AN AGE OF MEDIA FRENZY (2001).

141 See *e.g.*, JAMES T. FARRELL, YOUNG LONIGAN (1932), THE YOUNG MANHOOD OF STUDS LONIGAN (1934), JUDGMENT DAY (1935); IRVING SHULMAN, THE AMBOY DUKES (1947); RICHARD PRICE, THE WANDERERS (1974).

142 *West Side Story* (MGM 1961).

on to depicting the inner city as an apocalyptic hellworld,[143] its denizens tormented by gangs of youths of color.[144]

The story lines that were playing on the big screen were equally apparent in the directions taken by contemporary music and by the debates about it that were appearing in the print and broadcast media. In the years immediately preceding the *Rodney King* trial, "gangsta rap" had emerged as a prominent *genre* in the world of hip-hop music.[145] Those in mainstream America (and Simi Valley) who had never heard any of the music would certainly have heard *of* it, due to newspaper, magazine and broadcast media reports about rap lyrics glorifying hate and violence[146] and (according to some articles of the time) endorsing attacks upon the police.[147]

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[143] Science fiction books and movies of the time provide, as they often do, the most graphic extrapolations of contemporary views about the state of society and fears about where things are headed. Thus, we have, in 1981, the release of John Carpenter's film, *Escape from New York*, which looks ahead to a not–so-distant future in 1997, and imagines that the high crime rate has resulted in the conversion of Manhattan to a maximum-security prison. See also, *e.g.*, SPIDER ROBINSON, NIGHT OF POWER (1985); BEN BOVA, *City of Darkness*, in FUTURE CRIME 7 (1990); STEVEN BARNES, STREETLETHAL (1983; Tor mass market ed. 1991); MARGE PIERCY, HE, SHE AND IT (1991); CHARLES DE LINT, SVAHA (1989). For an inversion of the theme, see the low-budget film *City Limits* (SHO Films 1984) (featuring a future mega-corporation so evil that it turns the street gangs into rebels with a cause).

[144] That evolution was not lost upon the critics and moviegoers of the time. See *e.g.*, Mark Muro, "Coming to Grips With . . . Gangs," *Boston Globe,* May 1, 1988, Focus section ("From the musical romance of 'West Side Story' to the gritty violence of 'Colors,' youth gangs have long exerted romantic attraction. But in the 1980s, urban gangs dramatize the story of America's invisible society, the underclass. . . . [T]he raging kids in Chicago and LA bear little resemblance to the confected dash of 'West Side Story,' or even to the disciplined bureaucracies of the Mafia.")

[145] JEFF CHANG, CAN'T STOP WON'T STOP: A HISTORY OF THE HIP-HOP GENERATION 320 - 322 (2005). For an indication of gangsta rap's popularity in the period immediately preceding the *Rodney King* trial, see, *e.g.*, Wendy Cole, "Rapid Rap Rise," *Time Magazine*, June 24, 1991, at p. 67 (reporting that N.W.A.'s latest album "is No. 1 this week on Bilboard's pop-album chart after just two weeks in release" and observing: "You know rap has cracked the mainstream when even the most radical fare hits the top of the pop charts"); Jon Pareles, "Should Ice Cube's Voice Be Chilled?," *New York Times*, December 8, 1991 (reporting that Ice Cube's album *Death Certificate* "zoomed up to No. 2 on Billboard's album chart").

[146] See *e.g.*, Edna Gundersen & James T. Jones IV, "Rap's Violent Edge: When Does Art Become Anarchy?," *USA Today*, January 16, 1992, at p.1D; Jim Sullivan, "Pop's New Voices of Rage," *Boston Globe*, December 22, 1991, at p. A1; Jon Pareles, "Distributor Withdraws Rap Album Over Lyrics," *New York Times*, August 28, 1990, at p. C11; Jon Pareles, "Outlaw Rock: More Skirmishes on the Censorship Front," *New York Times*, December 10, 1989, section 2, at p. 32. And see MICHAEL ERIC DYSON, BETWEEN GOD AND GANGSTA RAP: BEARING WITNESS TO BLACK CULTURE 181 - 182 (1996): "Many critics argue that since gangsta rap is often the only means by which many white Americans come into contact with black life, its pornographic representations and brutal stereotypes of black culture are especially harmful. The understandable but lamentable response of many critics is to condemn gangsta rap out of hand."

[147] See *e.g.*, Elmer Ploetz, "Bang You're Dead: Ice-T Takes Metal to the Streets," *Buf-*

It does not seem like a stretch to imagine that the racially polarizing images in the media and popular culture, fueling the ever-present Fear of the Other,[148] would have had an effect on the attitudes of white Simi Valley residents who supplied the venire for the *Rodney King* trial.[149] For a contemporary illustration of the degree to which racial stereotypes and assumptions could shape – and distort – perception and judgment, we can look to an incident of a few years earlier, the New York City "Central Park Jogger" case of 1989. Shortly after the jogger was found, unconscious, the police settled upon a theory that the crime must have been the work of a group of African-American young men, even though no physical evidence or eyewitness testimony linked them to the crime.[150] The case for the prosecution rested entirely on confessions extracted by the police.[151] Despite the early disclosure that DNA evidence did not link the young defendants to the crime,[152] there was a widespread public assumption that they *must* be guilty,[153] and the defendants were convicted.[154] Yet, in 2002, after

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falo News, April 24, 1992, at p. G37 (stating that the Ice-T album *Body Count*'s "opening and closing, 'Smoked Pork' and 'Cop Killer' . . . are flat-out endorsements of killing police"); Jim Sullivan, "Ice-T Proves Street-Smart – And Stupid," *Boston Globe*, February 24, 1992, at p. 33 (Ice-T's "'Cop Killer,' the song, is like NWA's '. . . tha Police,' an incendiary rant directed at the men in blue, a slashing, hard-rocking, chant-along slab of rage in which the outlaws get to rule the roost. And yes, kill a cop."). The controversy over Ice-T's song "Cop Killer" was growing during the months of the *Rodney King* trial but it did not erupt into a high-profile national story until a couple of months after the verdict, when Vice-President Dan Quayle publicly attacked the song. See [Associated Press], "The 1992 Campaign: Vice President Calls Corporation Wrong for Selling Rap Song," *New York Times*, June 20, 1992, at p. 19.

148 See, *e.g.*, Kenneth B. Nunn, *The Child As Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, 690 - 706 (2002); Jane Harris Aiken, *Striving to Teach "Justice, Fairness and Morality,"* 4 CLIN. L. REV. 1, 11 - 22 (1997); Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989); and the sources collected in MINDING THE LAW 333 - 334 n. 34.

149 See Troutt at 117; Leonard M. Baynes, *White Out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming*, 45 ARIZ. L. REV. 293, 304 (2003). Defense counsel appear to have made the assessment and to have played systematically on racial stereotyping to depict Rodney King as a dangerous beast because he was black and big. See Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TULANE L. REV. 1739 (1993); Vogelman at 573 - 577; Cook at 298, 310; Higginbotham & Francois at 192.

150 See Ronald Sullivan, "Scientific Link is Still Missing in Jogger Trial," *New York Times*, July 20, 1990, at p. B1 (prosecutors, "[o]ffering what is believed to be their final forensic evidence, . . . failed again yesterday to link scientifically three defendants to the rape and attempted murder of the Central Park jogger").

151 See Ronald Sullivan, "Videotapes Are Core of Central Park Jogger Case," *New York Times*, June 11, 1990, at p. B3.

152 See Ronald Sullivan, "Genetic Tests 'Inconclusive' in Jogger Case," *New York Times*, October 10, 1989, at p. B1.

153 See William Glaberson, "In Jogger Case, Once Viewed Starkly, Some Skeptics Side with Defendants," *New York Times*, August 8, 1990, at p. B3 (reporting that "as the trial drew to a close, a visible group of skeptics openly questioned whether the criminal-justice

the youths had already completed their prison sentences, they were exonerated, based on the confession of the actual perpetrator and DNA evidence proving his guilt.[155] Reflecting on how such a grave injustice could have occurred, *New York Times* columnist Bob Herbert observed:

> There is no doubt that much of the press coverage of the Central Park jogger case was racist and way, way over the top. But I thought the defendants were guilty. And as I look back at the environment we were in and the "facts" as they were presented at the time, I'm convinced there was virtually no chance that the five youths accused of attacking the jogger could have been acquitted. . . .
>
> New York in 1989 was a city soaked in the blood of crime victims. Rapists, muggers and other violent criminals seemed to roam the city at will. Gunfire and the horrifying screams of the mortally wounded were common. Someone was murdered every four or five hours.
>
> The jogger case fused the worst of the city's fears with the worst of its stereotypes. The jogger was white, female, attractive and blameless. The accused were black, male, predatory and obligingly sullen. . . .
>
> Most New Yorkers believed the defendants were guilty. But more important, most New Yorkers in that period – for reasons that spanned a continuum from out and out racism to a deeply felt desire to see criminals brought to justice for a terrible crime – wanted them to be guilty.
>
> And when a desire is strong enough it can overwhelm such flimsy stuff as facts and truth. Reality is a funny thing. It is what we say it is.[156]

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system had been too willing to fix blame on a group of mostly black youths," but that "[f]or more than a year, the six black and Hispanic teen-agers charged with the rape and attempted murder . . . appeared to find few supporters as New Yorkers recoiled from what the prosecutors said the youths did during a brutal rampage on an April night").

154 See "The Case of the Central Park Jogger," *New York Times*, August 19, 1990, at p. 33 (reporting the convictions of three defendants tried in the first trial); Ronald Sullivan, "2 Teen-Agers Are Convicted in Park Jogger Trial," *New York Times*, December 12, 1990, at p. A1 (reporting the convictions of two other defendants at a separate trial).

155 See Susan Saulny, "Convictions and Charges Voided in '89 Central Park Jogger Attack," *New York Times*, December 20, 2002, at p. A1; Jim Dwyer, "Man Cleared in Jogger Case Goes Free at the Age of 28," *New York Times*, December 24, 2002, at p. B3.

156 Bob Herbert, "That Terrible Time," *New York Times*, December 9, 2002, at p. A27. Herbert is doubtless right in linking the rush to judgment and the absence of doubt to the Zeitgeist of 1989. But the actions of the New York City Police Department in the wake of the 2002 exoneration suggest that another phenomenon at work throughout the Central Park Jogger case was the human tendency to hold fast to a conclusion once reached, and to reject or harmonize any contrary evidence. Even after the Manhattan District Attorney's Office confessed error and the court vacated the convictions, an investigatory panel appointed by the Police Department declared that the youths had "'most likely' participated

Less than three months after the convictions of the last of the Central Park Jogger defendants, Rodney King was beaten and kicked by officers of the LAPD in the early-morning hours of March 3, 1991. Slightly less than a year after that, the trial of the four officers began.

III. The Devil Is in the Details

The following three studies examine various aspects of the trial in detail. Together they flesh out and reinforce an overview of the trial that earlier thoughtful commentators have proposed: The *Rodney King* trial was essentially a contest about epistemology – about the way in which the human mind should go about getting at the Real Truth of Things.[157] The prosecution staked its case on the propositions that seeing is believing, that vidcams do not lie, that the images on the videotape of the defendants beating Rodney King showed What Happened, what counted as Reality.[158] The defendants replied that appearances are deceiving, that images need to be interpreted in order to discern the story they tell, and that it was only by stopping the tape, scrutinizing it frame by frame, and making sense of each frame in relation to a broader notion of How Things Happen, that the Real Story could be known.[159]

We concluded early in our study of the trial that this overview was a fruitful way of understanding the basic positions that the prosecution and defense, respectively, were advocating to the jury.[160] It opened a connected set of interesting questions. *How* – by what specific trial techniques and tactics – did the lawyers wage an epistemological struggle of this sort? What alternative techniques and tactics

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in the beating and rape," resting this assertion on a completely unsupported theory – easily dismissed by even the District Attorney's office – that the youths must have acted together with the actual perpetrator. See Robert D. McFadden, "Boys' Guilt Likely in Rape of Jogger, Police Panel Says," *New York Times*, January 28, 2003, at p. A1; Marc Santora, "Prosecutor Rejects Theory of Boys' Attack on Jogger," *New York Times*, January 31, 2003, at p. B6; Jim Dwyer, "One Trail, Two Conclusions; Police and Prosecutors May Never Agree on Who Began Jogger Attack," *New York Times*, February 2, 2003, at p. 35.

157 Goodwin summarizes the trial perfectly in two words: "Contested Vision." Goodwin at 615. His analysis of the contest, *id.* at 615 - 628, is brilliant.

158 Goodwin at 615, 621; Levin at 1626 - 1628.

159 Crenshaw & Peller at 285 - 291; Goodwin at 617 - 621, 622 - 626; Fiske at 918 - 919; Troutt at 110; Butler at 20; Cook at 309.

160 We have continued to consider whether the overview bears up under close inspection and whether a different or more refined formulation of the parties' basic positions would be more useful than this one as a framework for analysis or exposition. So far, we remain satisfied with the overview for these purposes. We are, of course aware that our own endeavor to make sense of the trial is akin to the efforts of the lawyers to make sense of the encounter between Rodney King and the LAPD: both are intractably hermeneutic. See text at note 45 *supra*. So, much of what we find in our study of the details of the trial that "confirms" the overview flows in part from a way of looking at details that is framed by the overview itself. The readers' alternatives will be gratefully welcomed.

might they have chosen to use, or what alternative battles might they have chosen to fight? What available information and what considerations might have led them to conclude that some alternative to the course they took would have been a better strategic choice?

We found it particularly intriguing to explore alternatives that might have been pursued by the prosecution, the losing party. It was not so much the joy of Monday-morning quarterbacking that turned us on to this as the challenge of developing strategies which might have changed the outcome. And as we came increasingly to think that the defense case derived much of its force from a resourceful exploitation of stock stories,[161] we were led increasingly to look for counter-stories that the prosecution might have told.[162]

In the first of the following studies, our colleagues Rachel Shapiro Janger and Jennifer McAllister-Nevins begin their analysis where the trial itself began – with the selection of the jury. They consider what sorts of epistemological orientations the lawyers might have expected to find or hoped to be able to cultivate among members of the venire after the change of venue to Simi Valley; what the *voir dire* revealed about the orientations of venire members; and how the very processes of *voir dire* contributed to shaping the jurors' orientations. Rachel and Jenny then examine the epistemological premises of the stories told by the prosecution and by the defense at trial and the extent to which these stories, respectively, were tailored to fit the likely orientation of the jurors. Concluding that the defense did a substantially better job of tailoring, they detail the specific techniques by which it accomplished this, and then they imagine possible counter-stories and counter-techniques that the prosecution might have used.

In the second study, our colleague Todd Edelman focuses on the cross examination of a single prosecution witness by one of the defendants' lawyers – a performance generally accounted to have made a major contribution to the ultimate success of the defense. Todd finds that this contribution is best explained in terms of story-telling. After sketching the principal plot lines of the prosecution and of the defense and elaborating on a key subplot in the defense story, he conducts a detailed microanalysis of the crucial cross examination and illustrates the remarkable variety of methods used by the defendant's lawyer to turn cross examination into an affirmative story-telling tool.

In the third study, our colleagues Ty Alper and Sonya Rudenstine explore the tactical and narrative problems and possibilities presented to the prosecution by the lone defendant who took a defensive tack different from the other defendants'. Through a close reading of the

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161 See text at notes 61 - 62, 91 - 93 *supra*; text at notes 257 - 309, 423 - 476 *infra*.

162 See text at notes 63 - 67 *supra*; and see Delgado; Troutt.

successive steps in the trial that bore directly on this defendant – the opening statements of the prosecution and of the defendant's lawyer, the direct examination of the defendant and his cross examinations by the prosecution and by counsel for another defendant, and the closing arguments of the defendant's lawyer and the prosecution – Ty and Sonya identify the points at which opportunities arose for the prosecution to take advantage of the defendant's separate stance, and describe how an alert prosecutor could have perceived and seized those opportunities. They then analyze a narrative dilemma that complicated the opportunities; they develop three exemplary narrative strategies that might have enabled the prosecution to resolve the dilemma; and they implement the strategies in draft lines of cross examination and closing argument.