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AN ANALYSIS OF CLOSING ARGUMENTS TO A JURY

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This article examines the lawyers' closing arguments to the jury in a single criminal case: a 1991 homicide prosecution in New York City.¹ The defendant was a twenty-two-year-old man whom we will call David Jones.² He was socially acquainted with the victim, twenty-year-old Mary Smith, and with her two friends, Susan Stone and Nancy Gregg.

Late one evening in 1987, Smith, Stone, and Gregg were seated in Gregg's parked car talking with other young people on the sidewalk. Stone and Gregg were in the front seat, Smith in the rear. A friend of Stone's came by and Stone got out of the car to talk with him. At about this time, Jones came over to the car. Jones began to argue with Gregg and then with Smith. He accused them of spreading stories that he had engaged in oral sex with women. After a few minutes, Gregg left the car to talk to some friends. Jones got into the rear of the car, closing the door behind him, and sat beside Smith. He and Smith continued to argue inside the car.

Stone and Gregg remained nearby, talking with their acquaintances. They heard Jones and Smith yelling at one another. Stone heard Smith call out: "David, no!" Stone saw Smith grab at Jones's jacket, then heard a gunshot.

Just before the shot, Gregg saw the right rear car door open and Jones back out. She saw Jones pop a link chain off Smith's neck. Gregg heard

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1. Earlier versions of the article were presented at the Lawyering Theory Conference at New York Law School and in sessions of the Lawyering Theory Colloquium at New York University Law School. We are grateful for the criticisms of the participants and for much aid and inspiration by Jerry Bruner, Peggy Davis, Kim Hawkins, Florian Miedel, Richard Sherwin, and David Soskin. [For purposes of clarity and understanding, the style used in this article departs at times from the 15th edition of *The Bluebook: A Uniform System of Citation* (Ed.).]

2. We have assigned fictitious names to everyone involved: the defendant, victim, witnesses, and lawyers. A reporter's transcript of the closing arguments is on file with the *New York Law School Law Review*. In quoting from the transcript, we sometimes italicize words or phrases to emphasize specific language; all such emphases are ours. An asterisk between quotations indicates that they are taken from separated passages of the transcript.

the shot and saw Jones put a handgun in his pocket. Jones was standing bent over, partly outside the car, with his head still inside. Other young people urged him to take off before the cops came. He did and was not apprehended for more than three years.

Stone and Gregg drove Smith to the hospital, where she died. The cause of death was a single bullet entering her chest and penetrating her heart, liver, stomach, and pancreas before lodging in her back.

The sole issue at trial was whether Jones was guilty of second-degree murder or of manslaughter. Under New York law, murder requires a specific intent to kill. Killing by a reckless act is only manslaughter. Thus, the question for the jury was whether, when Jones shot Smith in the chest at close range, he intended to cause her death.³ That question had to be decided on the testimony of the prosecution's witnesses, principally Stone and Gregg. Jones did not testify or present evidence.

In our experience, this is the kind of case in which a jury can go either way. During times of media clamor about violent crime, it would probably be listed at two-to-one odds for a murder verdict in the weekly D.A.'s and P.D.'s office pools. In less frenzied times it would be an even-money case. Savvy lawyers in both offices would bet both sides at both sets of odds.

After the verdict was in, the second-guessers in both offices would have a lot to say about why the case was won or lost. The backgrounds of the jurors, the prosecutor's or defense counsel's eloquence or maladroitness, this or that witness's emotionality or dispassion, whether juror number three was looking at the judge when the left judicial eyebrow rose in that practiced arc of skepticism—all these topics and others would be fully canvassed in the controversies of the *cognoscenti* at the coffee machines.

3. The judge charged the jury:

"Section 125.25 of the Penal Law . . . reads as follows: A person is guilty of murder in the second degree when[,] with intent to cause the death of another person, he causes the death of such person.

"Now, for you to find the defendant guilty of this crime, the People are required to prove from all the evidence in the case beyond a reasonable doubt . . . that the defendant shot Mary Smith with the intent to cause her death."

The judge defined intent as "a person's conscious aim or objective," then added:

"Now the element of intent is obviously a subjective element, certainly can't look into a person's mind to see what he was thinking at the time of the incident. Intent is the secret operation of the mind. But the law permits you to infer intent from a person's actions, leading up to, surrounding and following the incident. That is, you are permitted to infer but need not that a person intends that which is the natural and necessary and probable consequences of the acts done by him."

Without disparaging the importance of each of these factors, we think the *Jones* case is a useful setting in which to study particularly the lawyers' closing arguments. For it is in this kind of case—where the evidence, being subject to divergent interpretations, frames the jury's decision but does not compel it—that the lawyers' arguments can make a crucial difference.⁴ What do the lawyers say to the jury in such a case, and how?⁵

Our first examination of the arguments produced no surprises. Both lawyers used the same time-tested pattern. They praised the jury for approaching the case in a proper frame of mind. They summarized the testimony. They stated the issue that the jury must decide. They analyzed the evidence or the lack of evidence bearing on that issue. They explained how it supported their own position. They summarized their opponent's argument and criticized its logic. They expressed confidence in the jurors' good judgment, which would assure the verdict sought. This was all very

4. Cf. W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* 89-90 (1981):

"[T]he structure of stories becomes crucial to judgment in cases in which a collection of facts or evidence is subject to competing interpretations. In such cases, it may not be the evidence that sways final judgment; judgment hinges on the structure of interpretation that provides the best fit for the evidence."

5. Closing argument is, of course, only one of the means through which a lawyer speaks to the jury. S/he may address the jurors directly in opening argument and, in some courts, by questioning them personally on voir dire during jury selection. Where the latter practice is not permitted, s/he may communicate indirectly with the jurors by submitting questions for the judge to ask on voir dire. S/he may submit requests for instructions to be included in the judge's charge to the jury.

In examining witnesses, the lawyer speaks both directly through the phrasing of questions and indirectly through the answers, which are often shaped by meticulous pretrial preparation. The lawyer's choice of witnesses may itself be a communication: a witness may symbolize or convey by his or her appearance more than the content of the testimony s/he gives. A lawyer may offer physical evidence and may prepare and offer visual aids as exhibits. S/he may make objections and arguments on objections that communicate a part of the message constituting his or her case. The way s/he interacts with his or her client at counsel table may send another part of that message.

And so forth.

By isolating closing argument for study in this article, we do not ignore or disparage the importance of these other means of making presentations to the jury. Rather, by concentrating on a single form of presentation, we hope to contribute to efforts to understand others as well. Analyses of lawyers' courtroom storytelling can be found in JANICE SCHUETZ & KATHRYN HOLMES SNEDAKER, *COMMUNICATION AND LITIGATION: CASE STUDIES OF FAMOUS TRIALS* (1988); BENNETT & FELDMAN, *op. cit. supra* note 4; BERNARD S. JACKSON, *LAW, FACT AND NARRATIVE COHERENCE* (1988); W. Lance Bennett, *Storytelling in Criminal Trials: A Model of Social Judgment*, 64 Q.J. SPEECH 1 (1978).

straightforward and obvious. We discuss it in somewhat more detail in Parts I and II.

However, below the surface, complex things were going on. These are the subjects of Parts III through V. Two broad generalizations emerge:

First, a trial lawyer has great latitude in choosing what story s/he will tell and how s/he will tell it even when s/he is arguing a relatively uncomplicated case. Although the lawyer's range of choice is circumscribed by the evidence, by the substantive law, by procedural rules, and by the stock scripts that shape everybody's notions of what a closing argument should look like, lawyers nonetheless retain the power to construct widely diverse tales beneath a superficial semblance of sameness and conventionality. In the *Jones* case, the prosecution and defense arguments ostensibly analyze an identical set of events within an identical logical framework, using an almost identical terminology. However, they tell entirely different stories. The prosecutor's story is about what happened on a New York City street in 1987. Defense counsel's story is about what is happening at the trial itself in 1991.

Second, the story that is told and the manner of the telling are inseparable. The lawyer's power to create his or her chosen tale is exercised, and its exercises can be detected, largely in terms of language structuring. Much of what a jury argument says is conveyed by implicit narrative and dialogic structure and by linguistic microstructure.

I. A FIRST TAKE: FORENSIC TECHNIQUE

From beginning to end, the lawyers' closing arguments in *Jones* are textbook models of the recommended content and style of a jury argument.

Both lawyers started with the conventional gambit of lauding traits that the jurors had demonstrated on voir dire and would now be called upon to demonstrate once more in deciding the case. They referred to the principles which the jurors had accepted in undertaking their responsibilities (to decide the case solely on the evidence presented, to hold the government to its burden of proof, and so forth) and to the characteristics which enable jurors to adhere to these principles and fulfil these responsibilities. Defense counsel (who, under New York practice, argues first⁶) extolled dispassion and fidelity to the principle of proof beyond a reasonable doubt; the prosecutor extolled intelligence and common sense. As treatises on closing argument explain, this kind of preamble simultaneously reinforces the attitudes to which each lawyer will appeal and establishes *rappport* between the lawyer and the jurors.⁷

6. N.Y. CRIM. PROC. LAW §§ 260.30(8)-(9), 320.20(3)(c) (McKinney 1982). In a case such as *Jones*, each lawyer argues once; there is no rebuttal argument.

7. See, e.g., HENRY ROTHBLATT, *SUCCESSFUL TECHNIQUES IN THE TRIAL OF*

Both lawyers then reviewed the evidence, focusing upon the testimony of Susan Stone and Nancy Gregg, which established (as the prosecutor emphasized) and established only (as defense counsel emphasized) that David Jones shot Mary Smith in the chest at close range during a quarrel. They specified the question posed for the jury's decision upon this evidence: whether Jones intended to bring about Smith's death. They pointed to the particular factual circumstances that, in their view, did or did not support a finding of intent to kill. Defense counsel emphasized that the prosecution had presented no proof that Jones aimed specifically at Smith's chest and no proof that Jones said anything signifying an intention to take Smith's life. He conceded that Jones's pulling out a gun while engaged at close quarters in an altercation was an act of complete and culpable indifference to human life (the state of mind required for a manslaughter conviction), but denied that it proved a conscious purpose to kill. The prosecutor urged the jury to infer an intent to kill from the firing of a single, close-range shot directly into Smith's heart and from the defendant's coolness in walking away immediately after he fired that shot, unconcernedly leaving Smith to die. Each lawyer paraphrased and rebutted his or her opponent's reasoning (or anticipated reasoning) from the facts.

Once again, all of this conforms to the canons. The lawyers do—and do well—exactly what the treatises recommend doing. Each lawyer identifies the issues that are and are not in controversy.⁸ Each marshals the facts, law, and logic supporting his or her position.⁹ Each dissects the evidence, highlighting favorable details and explaining away problematic features.¹⁰ Each rehearses or anticipates and refutes the other side's arguments.¹¹

Both lawyers' perorations reflect the received wisdom that a jury argument should end with an appeal to the higher interests at stake.¹²

CRIMINAL CASES 107 (1961); LAWRENCE SMITH, *ART OF ADVOCACY—SUMMATION* § 1.12, 1-B.12 (1982); CHARLES W. TESSMER, *CRIMINAL TRIAL STRATEGY* 120 (1968); 3 ANTHONY G. AMSTERDAM, *TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES* § 337, at 44-45 (1989); Joseph T. Karcher, *The Closing Argument*, 15 *PRAC. LAW.*, No. 3, at 49, 67 (1969); G. Arthur Martin, *Closing Argument to the Jury for the Defense in Criminal Cases*, 58 *J. CRIM. L., CRIMINOLOGY & POL. SCI.* 2, 5 (1967).

8. See, e.g., THOMAS A. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* 288-89 (3d ed. 1992); 3 AMSTERDAM, *op. cit. supra* note 7, § 446(C) at 264.

9. See, e.g., ROTHBLATT, *op. cit. supra* note 7, at 115-19.

10. See, e.g., *id.* at 119, 123, 128, 163; SMITH, *op. cit. supra* note 7, § 1.22; TESSMER, *op. cit. supra* note 7, at 121-22.

11. See, e.g., MAUET, *op. cit. supra* note 8, at 298; ROTHBLATT, *op. cit. supra* note 7, at 123-24, 128, 163; TESSMER, *op. cit. supra* note 7, at 129-32.

12. See, e.g., ROTHBLATT, *op. cit. supra* note 7, at 168-69; SMITH, *op. cit. supra* note 7, § 1.26.

Using the approach favored in primers for defense attorneys,¹³ defense counsel reminded the jurors of the responsibility that rests upon their shoulders as the ultimate adjudicators of the defendant's guilt or innocence. The prosecutor used a similarly well-worn prosecutorial coda,¹⁴ appealing to the jury to deliver its verdict in accordance with the interests of justice.

II. A SECOND TAKE: RHETORICAL STRUCTURE

Let us now examine the fit between the arguments and classic rhetorical models. Both lawyers start by referring to the last time they spoke with the jurors, when the jury was selected on voir dire. We have just noted that this standard technique is designed to recall the amicable relationship established between counsel and the jurors at the beginning of the trial and to remind the jurors that they were accepted by counsel and the court because they exhibited the qualities necessary to be *good* jurors. Counsel can then go on to define those qualities in terms of values that favor his or her case.

Notice that this stock beginning is nothing less—although, as we shall soon see, defense counsel makes it a great deal more—than an Aristotelian Proem. In Aristotle's formal model for a rhetorical presentation, the Proem serves to secure the good will of the audience by making the speaker appear to be a worthy person (for, as Aristotle puts it, "good character always commands more attention") and, at the same time, by appealing to values that the audience and the speaker share (sounding, as Aristotle puts it, a "note of praise [that] includes [the audience]").¹⁵

13. See, e.g., CRIMINAL JUSTICE TRAINING COMMISSION, STRATEGIES AND TECHNIQUES IN CRIMINAL DEFENSE 242 (2d ed. 1983); TESSMER, *op. cit. supra* note 7, at 133.

14. See, e.g., John F. Keenan, *Thoughts on Summations*, in BUREAU OF PROSECUTION SERVICES & DIVISION OF CRIMINAL JUSTICE SERVICES, CRIMINAL LAWYER'S SUMMATION MANUAL 14, 22 (1987).

15. ARISTOTLE, THE RHETORIC OF ARISTOTLE, bk. 3, ch. 14, at 224-25 (Lane Cooper trans., 1960); see also I CICERO, DE ORATORE, bk. I, ch. XXXI, at 99 (E.W. Sutton trans., 1942) ("[B]efore speaking on the issue, we must first secure the goodwill of our audience."); II QUINTILIAN, THE INSTITUTIO ORATORIA OF QUINTILIAN, bk. IV, ch. 1, at 9 (H. Butler trans., 1921) (The "sole purpose of the *exordium* [or Proem] is to prepare our audience . . . by making the audience well-disposed" and "secur[ing]" their "good-will" so as to "gain admission to the mind of the judge in order to penetrate still further."); cf. KENNETH BURKE, A RHETORIC OF MOTIVES 55 (1969) ("If, in the opinion of a given audience, a certain kind of conduct is admirable, then a speaker might persuade the audience by using ideas and images that identify his cause with that kind of conduct.").

Thereafter, the prosecutor's argument continues to track the Aristotelian structure for a speech.¹⁶ From the Proem it proceeds to a Statement, in which the prosecutor relates the defendant's shooting of the victim in vivid detail. The prosecutor does a good job of aligning this rhetorical structure¹⁷ with a strong narrative sequence by the device of purporting to tell the jury what is *not* in issue between the parties, much as Shakespeare's Antony resolutely insists that he has not come to praise Caesar. Thus, says the prosecutor:

"You don't have to decide whether the defendant was the one who pulled the trigger of that gun and who caused that bullet to penetrate Mary's heart and her liver and eventually lodge in her back and eventually cause her to bleed to death in Harlem Hospital. You don't have to decide who did that. We know it was . . . the defendant."

After relating the case in this manner, as a series of historical acts that indisputably occurred and leave only the actor's motivation to be considered, the prosecutor passes on to the Aristotelian Argument proper, first specifying the nature of the dispute between the parties, then erecting the prosecution's case, then stating and refuting each of defense counsel's contentions with the logic of historical fact. For example:

16. See ARISTOTLE, *op. cit. supra* note 15, bk. 3, ch. 13, at 220 (explaining that a speech generally consists of four stages: the "Proem, Statement, Argument, and Epilogue").

17. The classical rhetoricians viewed the selection of an appropriate argument structure as a critical part of the art of persuasion. See, e.g., I CICERO, *op. cit. supra* note 15, bk. I, ch. XXXI, at 99; III QUINTILIAN, *op. cit. supra* note 15, bk. VII, ch. 10, at 165. Quintilian compared the orator's arrangement of the parts of an argument to a wartime general's "distribut[ion of] his forces for battle." See *id.* at 170-71. Modern rhetoricians have found other analogies in the arts, comparing the construction of an argument to the process of "composing an essay," EDWARD P.J. CORBETT, CLASSICAL RHETORIC FOR THE MODERN STUDENT 274 (1965), and comparing the "set stages in the strucure [sic] of an oration" to the "formal . . . movements of a symphony," BURKE, *op. cit. supra* note 15, at 69. In these very different contexts, the identification of a "natural" or inherently "appropriate" arrangement of the parts, III QUINTILIAN, *op. cit. supra* note 15, bk. VII, ch. 10, at 165, is said to produce an essential "'quality of organic wholeness,'" CORBETT, *op. cit. supra*, at 274-75 (quoting RONALD S. CRANE, THE LANGUAGE OF CRITICISM AND THE STRUCTURE OF POETRY (1951-1952)). Compare MONROE C. BEARDSLEY, THE POSSIBILITY OF CRITICISM 58-59 (1970) (A "whole poem can be thought of as a single act, made up of several: the compound illocutionary act of its fictional speaker.").

"Do [the defendant's] . . . actions after committing this crime comport with the actions of someone who just committed a terrible accident? [Defense counsel] argues to you that he was just cool and calm and just didn't care what . . . he . . . did. That's right, he didn't care. He had just killed a person he intended to kill in front of people to show he was a big . . . man . . . and he walked away I mean he wasn't saying, 'Oh, call the ambulance, let's get her to a hospital.'"

Consequently, in the Aristotelian Epilogue, the prosecutor can argue that a trial is a search for the truth, that justice is a verdict based on the evidence, and that the only verdict based on the evidence is guilty of second-degree murder.

Defense counsel's argument, by contrast, does not follow any standard rhetorical sequence. Nor does it have any intelligible narrative structure as a story with the defendant and the victim as the principal characters. It contains ten separate capsule descriptions of the shooting:

- first, in the form of a chronological recitation of the testimony of Susan Stone;
- second, in the form of a chronological recitation of the testimony of Nancy Gregg;
- third, in a shorthand, nontemporal inventory of the salient circumstances of the shooting;
- fourth, in a nontemporal review of the defendant's words and actions at the outset of the encounter that led to the shooting;
- fifth, in a shorthand, nontemporal inventory of the salient characteristics of the defendant's character as revealed by the shooting;
- sixth, in a brief summary of the physical motions of the defendant and victim at the moment of the shooting;
- seventh, in a condensed, chronological version of the "worst gloss" that the jury can put on the shooting;
- eighth, in a nontemporal review of the defendant's actions after the shooting;
- ninth, in a review of the victim's words and actions just prior to the shooting; and

- tenth, in a series of one-sentence “hypotheses” as to how the shooting might have happened without any intent to kill on the defendant’s part.

With the exception of the recitations of the testimonies of the two prosecution witnesses—which defense counsel fills with reminders that the witnesses are speaking from their individual perceptual standpoints and cannot be telling the complete story¹⁸—none of these mini-stories is sustained for long enough to build up an engrossing narrative momentum. They are vignettes, not tales. And again with the exception of the two witnesses’ accounts, they have neither the familiar form of narratives (“patterns of events occurring over time”¹⁹) nor the Aristotelian benchmarks of a narrative (a beginning, a middle, and an end) nor the structure that has been found to characterize even short and humble narratives.²⁰ Nor do these mini-stories build upon each other to compose a narrative whole.²¹ They appear and disappear with no regard for any sequential, durational, plot-like development of the argument as a whole. So, if the defense argument is about what happened to the victim at the hands of the defendant, it is either a very poor and patchwork narrative or no narrative at all.

18. There are more than a dozen such reminders, ranging from statements (made in the course of conceding the witnesses’ credibility) that the witnesses “testified as best they could” (or “as best they recalled”) to statements (made in the course of summarizing their testimony) that “[s]he couldn’t remember the exact words” or “[i]t appeared to Nancy that there was an argument in the car.”

19. Jerome Bruner, *The Narrative Construction of Reality*, 18 *CRITICAL INQUIRY* 1, 6 (1991); see also PAUL RICOEUR, *HERMENEUTICS & THE HUMAN SCIENCES* 277 (John B. Thompson trans., 1981) (describing narrative as “a sequence of actions and experiences of . . . characters . . . represented in situations which change or to the changes of which they react . . . giving rise to a new predicament which calls for thought or action or both”); MIEKE BAL, *NARRATOLOGY: INTRODUCTION TO THE THEORY OF NARRATIVE* 8 (Christine van Boheemen trans., 1985); CLAUDE BREMOND, *LOGIQUE DU RECT* 131, 332 (1973).

20. For example: orientation, complication, evaluation, resolution, and coda. See William Labov & Joshua Waletzky, *Narrative Analysis: Oral Versions of Personal Experience*, in *ESSAYS ON THE VERBAL AND VISUAL ARTS* 431-40 (June Helm ed.) (Proceedings of the 1966 Annual Spring Meeting of the American Ethnological Society).

21. Cf. VLADIMIR PROPP, *MORPHOLOGY OF THE FOLK TALE* 92-96 (Laurence Scott trans., 1968); BAL, *op. cit. supra* note 19, at 143-49; see also ROLAND BARTHES, *Introduction to the Structural Analysis of Narratives*, in *THE SEMIOTIC CHALLENGE* 95, 111-17, 128-33 (Richard Howard trans., 1988).

III. A THIRD TAKE: NARRATIVE STRUCTURE

But if the defense argument is viewed as a tale with *the jury* as protagonist and the courtroom as its setting, it has not only a coherent overall narrative structure but an almost classic narrative theme:

First, the Hero is set on stage. Defense counsel's opening sentences depict the voir dire process through which the jury is constituted.

Second, the virtues of the Hero are extolled. Defense counsel describes the "concepts" and "values" that make for valorous jurors, for duteous jurors, and he attributes them to this jury.

Third, the temptations that may sway the Hero from obedience to duty are described: the understandable temptations of the jury to despise the defendant, to convict him for his evil nature without demanding proof of his criminal guilt, or to demand that he prove his innocence by evidence. Forewarned of these temptations, the jury swears a sacred oath (several times recounted) to resist them. "How easy," defense counsel exclaims and repeats, "how easy would it be" to break those sacred oaths! But if the jury can uphold its oaths and do its duty, "then you deserve our great admiration and I hope you can do it."

Fourth, with its vows sworn, the Hero is called to its Task. There is a break in scene (not unlike the traditional transportation of the Hero to the Kingdom where the Quest must be pursued²²); the prosecution's witnesses are introduced; their testimonies are recounted. In this scene, the prosecutor first appears, as Questioner of the Witnesses. Under questioning, the witnesses present testimony that confronts the Hero with a Riddle. The witnesses' testimony, while certainly not "an exact match of the story," appears to be basically truthful. "There is a problem, though. Does anyone in that testimony actually tell you how specifically the shooting occurred?" The Riddle, which the Hero must solve, is whether to accept the prosecutor's version of the facts (in which the defendant intended to kill the victim) or to conclude that "in no way can you be satisfied that the evidence proves beyond a reasonable doubt that my client shot . . . [the victim] with the conscious . . . objective of causing her death."

Fifth, the Hero struggles to solve the Riddle. Where is the evidence of intent to kill? Can intent to kill be inferred from the defendant's words? (These are reviewed.) From his actions at the time of the shooting? (They are reviewed.) From the consequences of those actions? (They, too, are reviewed.) From his behavior after the shooting? (It is reviewed.) From his character or motives? (These are reviewed.) From the victim's outcry? (It is set in context and thereby made ambiguous.) From any other evidence? (The dregs are searched.) No. "[I]f you just look at the

22. See PROPP, *op. cit. supra* note 21, at 50-51.

evidence, the lack of evidence and don't make any irrational leaps or bounds . . . [,] you can't find proof beyond a reasonable doubt that my client intended to cause the death. The ambiguity remains." Hence does the Hero, puzzled, arrive at the predicted temptation. It is driven to demand that defense counsel "tell us how a woman is shot in the chest at close range if it's not intentional murder?" And defense counsel can offer no answer. "I don't know." All that counsel can offer is a set of "hypotheses"—a series of alternative possible visions flashed across the screen like the successive acts of Kurosawa's *Rashomon*—which may or may not be true. So the Riddle appears unanswerable.

But, sixth, the Hero finds the Answer. The Answer lies in keeping faith with the sacred oath that the Hero swore before beginning this Quest, "the promise that you made to not make me prove to you in any way how . . . [the killing] may have occurred." Thus does the Hero perform the Difficult Task and achieve Apotheosis:

"So what I'm really asking you to do is to do what I think will probably be one of the hardest things that you have ever been required to do in public, which is to stand up and at some point look over at David Jones and while looking at him vote not guilty of charges brought against him. Thank you."

The Quest of the Hero theme is unmistakable.²³

23. "The myth of the hero" has been characterized as "the most common and the best known myth in the world." Joseph L. Henderson, *Ancient Myths and Modern Man*, in *MAN AND HIS SYMBOLS* 101, 101 (Carl G. Jung ed., Laurel 1968); see *id.* at 101-19. A few of the epic versions are the stories of Inanna (later Ishtar, Isis, Aphrodite, and Venus), Gilgamesh, Odysseus, Theseus, the Argonauts, Hercules, Psyche, Beowulf, Cuchulainn, the Grail Hero, Shen I, Hare (and Red Horn), Budak Yoid Intoie, Paul Bunyan and—more recently—J.R.R. Tolkien's *The Lord of the Rings*, Stephen Donaldson's *Chronicles of Thomas Covenant the Unbeliever*, Gordon Dickson's *Childe Cycle*, Janny Wurts' *Cycle of Fire*, Gene Wolfe's *Book of the New Sun*, Katherine Kurtz's *Deryni Chronicles*, Terry Brooks' *Shannara* and *Magic Kingdom* cycles, and Robert Jordan's *Wheel of Time* cycle. Hierophantic versions are found in the traditions of many religious creeds. The structure of the common folktale versions is the subject of Propp's great formalist classic cited in note 21 *supra*. "Popular tales represent the heroic action as physical; the higher religions show the deed to be moral; nevertheless, there will be found astonishingly little variation in the morphology of the adventure, the character roles involved, the victories gained." JOSEPH CAMPBELL, *THE HERO WITH A THOUSAND FACES* 38 (1968). Campbell's book is the best general survey of these subjects of which we are aware. Aspects are illuminated in, *e.g.*, GEORGES DUMEZIL, *THE DESTINY OF THE WARRIOR* 111-38 (A. Hildebeitel trans., 1970); NORTHROP FRYE, *Archetypal Criticism: Theory of Myths*, in *ANATOMY OF CRITICISM: FOUR ESSAYS* 131, 186-206 (1957); DOROTHY NORMAN, *THE HERO: MYTH/IMAGE/SYMBOL* (1969); CAROL PEARSON & KATHERINE POPE, *THE FEMALE HERO IN AMERICAN AND BRITISH*

This particular story line has a distinct advantage for defense counsel. It permits the defendant's activity in killing the victim—an activity that defense counsel is not denying and can hardly tuck under the rug—to be fitted into the narrative without becoming the dominant action of the tale. For it is a commonplace of narrative structure that, in addition to the protagonist or "subject" of a *fabula*,²⁴ at least one other active agent plays an accepted role. This is the role which Greimas called the *destinateur*

LITERATURE (1981); LORD RAGLAN, *THE HERO: A STUDY IN TRADITION, MYTH AND DRAMA* 58-72, 120-209, 267-275 (1949); JESSIE L. WESTON, *FROM RITUAL TO ROMANCE* (Doubleday Anchor 1957).

More specifically, the version of the Quest of the Hero embodied in defense counsel's argument parallels the common oriental form of Quest narrative that has the World Savior as its Hero. This is no accident. Like defense counsel's argument, that version in particular undertakes the ultimate, difficult task of persuading the listener to accept No Answer as the Answer to the riddle of existence. It is the special task of this narrative to lead the listener to nirvana—to the void—by endowing him or her with the strength to bear the terrors of a cosmic disorder without succumbing to the illusion of order. Here the Quest assaults the Hero in the Hero's home territory, and the Hero must and does remain unmoved before the onslaught of the most powerful positive and negative forces of persuasion:

First, the Hero takes his position—for example, Gautama Shakyamuni (the Buddha-to-be) on the eastern side of the Bodhi Tree; Lord Parshva (of the Jain teaching of Mahavira) standing naked in the dismissing-the-body posture.

Second, the virtues of the Hero are recalled—the life or lives that led to this position at the midpoint of the universe.

Third, the Hero swears that he will not be moved from his seat until he has attained ultimate wisdom.

Fourth, the Lord of Life Illusion appears and assaults Gautama first with appeals to the duty of his caste and rank, then with an army of hideous, misshapen demons; Meghamalin assaults Parshva with tigers, elephants, scorpions, darkness, and a cyclone.

Fifth, the Hero remains unmoved, ignoring all of these alluring and frightening illusions. The Adversary ravens and steps up the attack, sending new hordes against the Hero.

And, sixth, a voice utters from the sky to protect Gautama, dispersing the Adversary's hordes with a few words; or, from beneath the earth, the king and queen of serpents arise to shield and protect Parshva; whereupon, the Hero is illuminated, and a rain of flowers descends.

See EDWARD THOMAS, *THE LIFE OF BUDDHA AS LEGEND AND HISTORY* 227-32 (3d ed. 1949); E.H. BREWSTER, *THE LIFE OF GOTAMA THE BUDDHA* (from the Pali Canon) 75-76, 77-78, 135 (1926); 2 JOSEPH CAMPBELL, *THE MASKS OF GOD [ORIENTAL MYTHOLOGY]* 218-19 (Penguin Books 1976).

24. We use *fabula* in the traditional formalist sense of "a series of logically and chronologically related events that are caused or experienced by actors," BAL, *op. cit. supra* note 19, at 5, as distinct from the *sjuzet*, which is a "*fabula* that is presented in a certain manner," *id.* We sometimes use "story" as a synonym of *sjuzet* and use "story line" as a synonym of *fabula*.

("sender")—an actor or a force that enables the protagonist to achieve his or her objective or prevents the protagonist from achieving it.²⁵ The *destinateur's* role in the *fabula* requires a high level of activity,²⁶ which nonetheless remains functionally subordinate to the protagonist's and does not overshadow it. Thus the defendant can kill the victim without that action becoming the center of attention if the story line goes: *The jurors, faithful to their oath, acquitted the defendant although he sorely tempted them to do otherwise by killing the victim in a dastardly fashion.*

The trick is to do at a semantic level what this italicized sentence does at a grammatical level: to put the activity of killing into a dependent clause and to create a narratively convincing independent clause having the jury as its subject and acquittal as its outcome. Defense counsel does this by a number of structural devices:

In the opening sentences of the defense argument, the subject is defense counsel, but the verbs are all about *talk*²⁷ and immediately make apparent that counsel's role is simply that of Wollflin's *Sprecher*—one who points verbally to the central action that is taking place. This action—the jury's assumption of its Task—is described in sentences in which the jurors or their intentional states and emotions are consistently the subject. The defendant has no active role in these sentences. He appears not as an agentive subject, but as the object of the jury's actions²⁸

25. A.-J. GREIMAS, *SEMANTIQUE STRUCTURALE: RECHERCHE DE METHODE* 128-34, 172-91 (1986); in the English translation: A.-J. GREIMAS, *STRUCTURAL SEMANTICS: AN ATTEMPT AT A METHOD* 146-52, 197-221 (Daniele McDowell, Ronald Schleifer, & Alan Velie trans., 1984).

26. See BAL, *op. cit. supra* note 19, at 28: "In principle, the subject [the protagonist] and the power [the *destinateur*] predominate more, or are more active in a grammatical sense . . . because they are the agent, or the (grammatical) subject, either of the function of intention/evasion or of giving/receiving."

27. *E.g.*,

"When I spoke to you all about a week ago I tried to emphasize with you all what I thought were two critical concepts" * "And I'm going to assume now that I was right in thinking that these two values permeated this jury, because if I'm wrong then I fear that my summation will fall on deaf ears." * "What are the two concepts or values that I tried to speak about in voir dire?" * "Why do I say it's important that you have a feeling or a notion that however you feel towards the defendant won't influence you in the decision you make?"

28. *E.g.*,

"And that you would not assign blame to him [the defendant] unless specific blame worthiness had been proved to you beyond a reasonable doubt." * "Because each and every one of you has a right to despise the man who I represent."

or attitudes.²⁹ The first clauses of the defense argument in which the defendant takes the place of subject are dependent members of compound sentences or their equivalent.³⁰ Sometimes the jury is the subject of the independent clauses;³¹ sometimes it is not (as when the independent clause is some form of the statement: "A witness testified")³²; in either case, the

29. *E.g.*,

"One concept was that whatever passion you felt or didn't feel towards the Defendant, no matter what attitude you may have toward the Defendant David Jones, that no way would that interfere with the verdict that you would bring in this case." * "Why do I say it's important that you have a . . . notion that however you feel towards the defendant won't influence you in the decision you make?"

30. *E.g.*,

"You all said . . . that you can still apply the laws to him, a man who is obviously responsible for the death of Mary Smith." * "And if at the end you decided that something was not clarified for you, if you decided that ambiguities in the evidence still remain, that you would in no way hold us responsible for clarifying these ambiguities for you and you would in no way expect us, me or Mr. Jones or Mr. Bell, to make up for the lack of clarity"

The very first passage of the defense argument in which the defendant is the subject of a verb is this:

"Whatever he did in a legal sense or an illegal sense, whatever his state of mind may have been at the time, that man had a loaded gun in his hand during an argument in a car and he pulled the trigger and he killed a young woman. Yet you all tell me that you can still apply the law to him, a man who created such a perilous situation."

See note 33 *infra*.

31. *E.g.*,

"How easy it would be for each of you to say, 'Why should we care about what crime is actually proved against him when he in so cavalier a manner apparently pulled a gun and ended up killing another humanbeing [sic]?' * "If it's not proved by the People's evidence that he had an intent to kill, then you would just find him not guilty of that charge."

See also the first example in note 30 *supra*.

32. *E.g.*,

"Well Susan Stone testifies that everybody knew each other. That Dave came down, Dave being my client. That he had an argument with Nancy Gregg. That Dave got into the car. . . ." * "Another question from Ms. Brooks, 'Let me take you back. You said that after Mary said something to the effect of "No, Dave, don't." That is when you said he shot her?' Susan Stone's answer, 'Yeah, I was looking, it's like she was holding onto his jacket or something and then he shot her. It's like he backed out of the car and he spun around like" Or "evidence" or "testimony" may be the subject of the independent clause: *e.g.*, "Ms. Brooks will argue that in context that testimony shows that my client shot Mary Smith with intent to kill"

relegation of the defendant's activity to a structurally subordinated plane keeps it from invading the narrative mainstream.³³ At every pivot of the argument, whenever a new perspective is introduced, the same sort of compound sentence structure is used (although with wide stylistic variation) to subordinate the active verbs whose subject is the defendant.³⁴

The *fabula* develops in three large movements: the jury undertakes its duty; the jury is tempted to abandon its duty; the jury perseveres and does its duty. Only in the second movement, and after that movement has been both foreshadowed³⁵ and framed³⁶ by locutions that consign the defendant's

33. This is striking even at the level of grammatical analysis. Throughout the initial three-fifths of the defense argument there is only a single sentence in which the defendant is the subject of a verb found in a simple sentence or independent clause. The one exception is quoted at the end of note 30 *supra*: it is an instance in which the defendant's activity, while grammatically coordinate (at least in the reporter's transcript) is syntactically subordinate to the jury's activity. Concerning subordination, see BREMOND, *op. cit. supra* note 19, at 320-21.

34. *E.g.*,

"Yet you all tell me that you can still apply the law to him, a man who created such a perilous situation." * "I mean how easy would it be for each of you to say, 'Why should we show any serious regard for a man who showed so little regard for the life of another?'" * "If it's not proved beyond a reasonable doubt that Mr. Jones is guilty of intentional murder, then it's just not proved." * "You all said basically that you would not say at this point, '... Let him get up and tell us what really occurred if it's not a murder that he committed ...'" * "You cannot fail to acquit because Jones or myself have not adequately explained to you what occurred in the car." * "Nancy testifies that she sees Dave come down. ... [S]he says that my client says to Mary" * "And I will argue that it's not shown, that in no way can you be satisfied that that evidence proves to you beyond a reasonable doubt that my client shot Mary with the conscious aim or objective of causing her death." * "Is there any proof before you that shows that my client actually aimed the gun at Mary? There is none. Is there any evidence before you that shows that my client actually pointed the gun at Mary? There is none." * "Well what should you do then ... ? Just figure that some reason must have made him decide to kill Mary?" * "But where is the proof presented to you that he aimed there?" * "She says stuff, he grabs at her neck and she grabs at his jacket and assume that he knowingly and voluntarily and consciously fires a bullet into a car"

See also the first and third examples in note 32 *supra*.

35. The foreshadowing occurs in two passages early in the defense argument, one quoted in part in the last examples in each of notes 28 and 30 (indented) *supra*, the other quoted in part in the first example in note 31 *supra* and in the second example in note 34 *supra*.

36. After summarizing the testimony of the prosecution witnesses, defense counsel begins his analysis of that testimony with the following framing passage:

action in killing the victim to the status of a subplot (one of the jury's temptations)³⁷ do there occur simple declarative sentences or independent clauses in which the defendant is the subject.³⁸ In the first movement, he appears almost always in prepositional phrases, as the object of "to" or "toward";³⁹ in the last movement, he emerges as the object of the jury's activity of acquitting.⁴⁰ By contrast, in the prosecutor's argument, the defendant's actions are usually recounted either in simple sentences⁴¹ or in dependent clauses joined to independent clauses that contain no competing narrative to subordinate the story line "David shot Mary in the chest": Most commonly, they are variants of "There is no question that . . ." ⁴² or "You know that . . ." ⁴³

A subtler signature of the difference between the stories being told in the defense and prosecution arguments is their differing focalizations. *Focalization* has to do with the perspective, the vantage point, from which a narrated event is seen.⁴⁴ The *focalizer* is not necessarily the *narrator*:

"Look, the issue here is not so mysterious. Ms. Brooks will argue that . . . that testimony shows beyond a reasonable doubt that . . . [the defendant's] intent was to kill that woman. And I will argue that it's not shown, that in no way can you be satisfied that that evidence proves to you beyond a reasonable doubt that my client shot Mary with the conscious aim or objective of causing her death."

37. The passages referenced in note 35 *supra* and those quoted in text and footnote at note 82 *infra* exemplify the temptation motif.

38. *E.g.*,

"Did he say during the shooting, 'Die.' Did he say, 'I want you . . . dead.' Did he say, 'I'm going to kill you.?' * "Is he angry? Yes. Does he have a gun? Absolutely. Does he fire a shot in a small confined space? No doubt." * "I mean look at the evidence in a really bad light. My client's mad. She says stuff, he grabs at her neck. He has no specific conscious objective. He shoots . . ."

See also the passage quoted in text at note 75 *infra*.

39. *E.g.*, the examples in note 29 *supra* and the first example in each of notes 30 and 34 *supra*.

40. *See* defense counsel's peroration, the last passage quoted on page 65 *supra*.

41. *See, e.g.*, the last example in note 53 *infra*.

42. *E.g.*,

"There is no question as to who pulled the trigger[,] who fired the shot into Mary Smith's chest causing her death." * "[T]here is no question that the defendant felt insulted and I'm sure you all know that people have been killed for less."

43. *E.g.*,

"[Y]ou know that he was angry and you know that he was insulted by remarks that Nancy or that Mary had been spreading around about him."

44. The concept of focalization originated with Genette, *see* GERARD GENETTE,

"narrator" refers to the voice that is recounting an event; "focalizer," to the lens or eye—the epistemological intake scoop—through which the event is perceived.⁴⁵ In narrative analysis, it is often instructive to disentangle the two.⁴⁶

When this is done to the predicative statements in the *Jones* arguments in which defense counsel and the prosecutor recount the actions of David and Mary in 1987, the result is revealing. The statements fall into five general categories. Category one consists of recountings of acts performed by David or Mary from the standpoint of *what the evidence does or does not tend to show*.⁴⁷ Defense counsel makes thirteen such statements; the prosecutor, nine. This is quite an even distribution, since defense counsel's overall argument is slightly less than half again as long as the prosecutor's. Category two consists of recountings of acts performed by David or Mary from the standpoint of *what has or has not been proved*.⁴⁸ Defense counsel makes seven such statements; the prosecutor, one.

FIGURES III (1972), and has been most usefully elaborated by Bal, *see* BAL, *op. cit. supra* note 19, at 100-17, 130-32; MIEKE BAL, *NARRATOLOGIE: ESSAIS SUR LA SIGNIFICATION NARRATIVE DANS QUATRE ROMANS MODERNES* (1984); Mieke Bal, *On Meanings and Descriptions*, in 6 *STUDIES IN TWENTIETH CENTURY LITERATURE* 100, 134-42 (Nomi Tamir-Ghez ed., 1981); *cf.* Lubomír Doležel, *Truth and Authenticity in Narrative*, 1 *POETICS TODAY*, no. 3, at 7, 15-24 (1980).

45. BAL, *op. cit. supra* note 19, at 100-01, articulates the distinction as being "between, on the one hand, the vision through which the elements are presented and, on the other, the identity of the voice that is verbalizing that vision. To put it more simply: . . . a distinction between *those who see* and *those who speak*." Thus, when the *Jones* prosecutor argues: "I submit to you that he had just shot her in the chest," the *narrator* is the prosecutor herself—the lawyer who is doing the submitting; the *focalizer* is an *omniscient* or *external* focalizer—commonly called an "EF" by narratologists, *see* BAL, *op. cit. supra* note 19, at 105.

46. Bal's 1984 *Essais*, cited in note 44 *supra*, develop a number of powerful insights through this analytic technique. In his 1981 article, cited in the same note, he illustrates the use of the technique to unravel an aspect of Emma's character in Flaubert's *Madame Bovary*. *See id.* at 134-37.

47. Common frames for this focalizer are, *e.g.*:

"No, you don't have any evidence of the defendant getting in that car and saying to Mary, 'I'm going to kill you.'" * "[W]hat you do have is evidence of the defendant getting out of that car with a smoking gun right after that shot is fired." * "Is there any evidence that shows him reaching back and getting a mark on her so he can be sure to shoot in a specific place?"

48. Common frames for this focalizer are, *e.g.*:

"Ms. Brooks will argue that in context that testimony shows that my client shot Mary Smith with intent to kill" * "[That] doesn't show that [at] the time when she was killed that he intended to cause her death." * "If it's not proved by the People's evidence that he had an intent to kill, then you would just find him not guilty of that charge."

Category-two focalization, like category-one focalization, is, of course, traditional closing-argument jargon for both prosecutors and defense lawyers; it differs from category one principally in that the perspective of the jury is slightly more engaged than in category one.⁴⁹

Category three consists of recountings of acts performed by David or Mary from the standpoint of *what the jury finds, thinks, believes, infers*, and so forth.⁵⁰ Defense counsel makes fifty-six such statements; the prosecutor, twenty. Category four consists of recountings of acts performed by David or Mary from the standpoint of *what a witness perceived or what an attorney conceived*.⁵¹ Defense counsel makes seventy-eight such statements; the prosecutor, seven. Category five consists of recountings of acts performed by David or Mary from the standpoint of an EF—an external focalizer⁵²—statements, that is, about

49. "We have proved X" or "they have not proved Y" implicates the jury's perspective as factfinder somewhat more than "the evidence shows X" or "there is no evidence showing Y" or "where is there any evidence of Z?"

50. Common frames for this focalizer are, e.g.:

"You know what, give this case and this scenario really the worse gloss that I think you can. I mean look at the evidence in a really bad light. My client's mad. She says stuff, he grabs at her neck . . ." * "[E]ven if he's a man who you think is capable of killing because he carries a gun . . ." * "[D]oesn't that make you question whether or not Mr. Jones had the intent to kill?" * "[B]y the woman's plea, by her statement, 'Dave, no[,] . . . [i]s she really saying to us Dave was pointing the gun at my chest and I am begging for my life . . ." Standard-form rhetorical questions are also a subspecies of this category.

51. Common frames for this focalizer are, e.g.:

"[Reading from the transcript of testimony of Nancy Gregg:] Question, 'When was the first time that you looked over in the direction of the defendant and Mary? . . .' Answer, 'After the car door opened and he stepped out of the car.' 'And as he was stepping out of the car, what did you see him do if anything?' 'She had a link chain on her neck and he popped it off.'" * "According to Nancy[,] he's actually the one who brings it up. He's the one who goes over to a car and within the hearing of other people says, 'Why are you saying that I like to suck pussy?'" * "[T]here is no question in there [sic] minds that he was the one that shot her. And that in fact they did see the gun in his hand as he was walking away." * "I can put forward another [hypothesis], that he has a gun and he's taking it out to scare her, that she grabs at his coat and in the struggle he accidentally pulls the trigger."

52. See note 45 *supra*.

*what happened.*⁵³ Defense counsel makes nineteen such statements; the prosecutor, sixty.

Plainly, the prosecutor is telling a tale about how David shot Mary in 1987 and is asking the jury to accept that tale as true in 1991. Equally plainly, defense counsel is telling a tale about how the jurors in 1991 are deciding where the truth lies after listening to the testimony of witnesses and the arguments of lawyers anent an intriguing but intangible murder mystery set in 1987—a play within a play, and one in which Gonzago's poisoning is of considerably lesser consequence than the catching of Claudius's conscience.⁵⁴

On the compositional level, it is particularly interesting to compare how the two lawyers talk about the central issue that the jury must decide: whether David Jones's killing of Mary Smith was intentional. Now and again each lawyer uses most of the grammatical parts of speech through which the concept of intentionality is commonly expressed in English: verbs (such as whether Jones "intended to kill" Smith), adverbs (such as whether Jones "intentionally killed" Smith), nouns (such as whether Jones "had an intent to kill" Smith or whether Jones shot Smith "with an intent to kill"), and adjectives (such as whether this was "an intentional killing"). These four parts of speech are essentially interchangeable from a denotative standpoint. But they are not interchangeable from a narrative standpoint. Verb formulations fit seamlessly into a story about what David Jones did to Mary Smith in 1987; they intrude awkwardly into a story about the trial in 1991 because they do not predicate any plot action that can occur in 1991.⁵⁵ Noun formulations fit smoothly into both stories and can serve to mediate between them—Jones's "intent" being, on the one hand, something that he did or did not have in 1987 and, on the other

53. Common frames for this focalizer are, *e.g.*:

"Is he angry? Yes. Does he have a gun? Absolutely. Does he fire a shot in a small confined space? No doubt." * "That's right, he didn't care. He had just killed a person he intended to kill in front of people to show that he was a big, you know, he was a big man, wasn't going to take any insults from Mary or anybody else and he walked away."

54. Of course the different focalizations of the defense and prosecution arguments have not only syntagmatic but paradigmatic—specifically, epistemological—implications. We will return to the latter, particularly in note 127 *infra*.

55. Thus, expressions of intentionality in verb form tend to look backward to the events of 1987 even when the defendant is not the subject of the verb. Consider, for example, the prosecutor's argument:

"[I]t's only through speculation and hypothesizing that you can find anything other than that the defendant in this case when he pulled the trigger and fired that shot into Mary's heart that he intended to kill her.

"You don't point a loaded . . . gun at someone and . . . pull the trigger when you don't intend to kill them."

hand, something that the jury searches for and does or does not find in 1991.⁵⁶ Adverb formulations are primarily grounded in the story of the 1987 killing but connect it to the story of the 1991 trial by emphasizing that the way in which Jones did what he did in 1987 depends upon the way in which the jury does its interpretive job in 1991.⁵⁷ Adjective formulations highlight even more strongly the jury's interpretive role.⁵⁸

Thus, the frequency with which the lawyers use the various parts of speech reveals—and at the same time shapes—the stories that they choose to tell. The prosecutor overwhelmingly favors verb formulations, using relatively few nouns, very few adjectives, and no adverbs at all. Defense counsel favors noun formulations over verb formulations; he also uses significant numbers of adjectives and adverbs.⁵⁹ While the prosecutor

56. Consider, for example, defense counsel's argument:

"Were any words heard before, during or after that my client uttered that shows an intent to kill? . . . Is there any of that shown in the evidence that you have before you to prove to you an intent to kill?"

57. When a description of the quality of an action is embedded in a verb, its dependence on interpretation is less obvious than when it is isolated in an adverb. This is why Gérard Genette was obliged to make his well-known demonstration that verbs *are* to some extent descriptive; "Even a verb can be more or less descriptive in the precision it gives to the spectacle of the action. It suffices to compare 'seized a knife' with 'took a knife'; consequently no verb is totally free of descriptive implication." Gérard Genette, *Boundaries of Narrative*, in 8 *NEW LITERARY HISTORY* 1, 5-6 (Ann Levenas trans., 1976). Far from concealing their descriptive thrust, adverbs advertise it and thereby call attention to the necessity for a separate narrative to motivate an interpreter/describer. Cf. Evelyn Cobley, *Description in Realist Discourse: The War Novel*, 20 *STYLE*, No. 3, at 393, 404 (1986) ("A new arrival appears because a description of the devastated landscape requires his presence. Although the narrative succession might persuade us that the new arrival generates the description, the causal relationship is in fact the reverse."); see also MICHAEL RIFFATERRE, *TEXT PRODUCTION* 24 (Terese Lyons trans., 1983). Thus, defense counsel's turn to adverbs to express intentionality spotlights the jury's fact-finding quest. Consider, for example, his argument:

"I mean[,] look at the evidence in a really bad light. My client's mad. She says stuff, he grabs at her neck and she grabs at his jacket[,] and assume that he knowingly and voluntarily and consciously fires a bullet into a car, a small place[,] knowing a human is there, knowing that a bullet may well strike another and he just doesn't care."

58. Consider, for example, defense counsel's argument:

"Then what then, what[,] Mr. Lee, you tell us[,] I can hear you all saying, you tell us how a woman is shot in the chest at close range if it's not intentional murder."

59. The prosecutor uses the verbs *intend*, *mean*, *try*, and *want* 19 times in connection with the defendant's or a suppositious killer's mental state at the time of the killing. She says four times that the defendant "knew" something, once that he "perceived" something, four times that he "didn't care," and once that he "wasn't

recounts an historical chronicle, defense counsel incants a narrative of rediscovery.

IV. A FOURTH TAKE: DIALOGIC STRUCTURE

Yet, more than storytelling is going on here. Because the subject of the prosecutor's argument is the killing in 1987, its form of narrative is the History. Because the subject of defense counsel's argument is the trial in 1991, its form of narrative is the Drama. Both lawyers use their particular forms of narrative to embody an epistemology.⁶⁰

The defense epistemology, as befits Drama, is performative and constructivist. Its organon is dialogue. By contrast, the prosecutor wants no part of dialogue. For, to engage in dialogue is to participate in the creation of meaning. Defense counsel strives mightily to draw the jurors into this kind of constitutive conversation. The prosecutor strives as mightily to keep them out of it.

Both strategies make sense. Consider that in the *Jones* trial the prosecutor has presented all the evidence; the defense, none. So long as meaning, reality, truth are conceived as immutable, inherent properties of "the facts," to be found in the evidence and not constructed out of it, the prosecutor has a big advantage. Moreover, the first impression created by the prosecution's evidence fits a folk-cultural script for intentional killing. If the jury takes the evidence at face value, a murder verdict is assured. Imaginative pursuit of alternative meanings is required to derail that train.

concerned." She says twice that he "was [or is] angry" and twice that he "was [or felt] insulted." Once she uses a purposive infinitive to describe his motivation ("he had just killed a person . . . to show that he was a big . . . man . . ."). By contrast with these 34 verb formulations, she uses 10 noun formulations ("intent" six times, "conscious desire" once, and "accident" three times), two adjective formulations ("intentional shooting" and "intentional murder"), and no adverb formulations.

Defense counsel uses the verbs *intend* and *want* seven times—*try* and *mean* not at all—in this connection. He uses the verb phrase "make sure" four times and he uses "decide" once. He says thrice that the defendant "knew" something, once that the defendant "doesn't care," once that the defendant "[i]s . . . unconcerned," and once that the defendant "showed . . . little regard" for the victim. He speaks three times of the defendant's being embarrassed, shamed, or ashamed, and twice of the defendant's being angry or mad. Once defense counsel uses a purposive infinitive to describe the defendant's motivation ("he has a gun and he's taking it out to scare her"). By contrast with these 24 verb formulations, defense counsel uses 30 noun formulations ("intent" 17 times, "aim" or "objective" or both five times, "reason" twice, "state of mind" once, "depraved and damnable mind" once, "depravity" once, "complete indifference to human life" once, and "callous disregard" twice), four adjective formulations, and four adverb formulations.

60. Cf. JACKSON, *op. cit.* *supra* note 5, at 33-36.

Defense counsel wants to stimulate the pursuit; the prosecutor wants to suppress it.

But defense counsel cannot explicitly invite the jury to be imaginative, for at least three reasons.

First, the judge will charge the jury that it is not permitted to "speculate," so defense counsel cannot allow what he is doing to be perceived as asking the jury to speculate.

Second, the common image of defense counsel in a criminal case includes the con-artist (smoke-and-mirrors) stereotype and the "Officer Krupke" stereotype. Defense counsel must avoid the appearances of being either a trickster or a peddler of psychological soft stuff.⁶¹

Third, the judge will charge the jury that the prosecution bears the burden of proving every element of the crime beyond a reasonable doubt. Defense counsel cannot afford to forfeit the benefit that this standard of proof, as applied to the elusive element of intent to kill, confers on the defense.

For all of these reasons, defense counsel must *implicitly* draw the jurors into an imaginative dialogue while *explicitly* insisting that they "stick to the facts." He must embed in the structure of his argument the notion that the jury has an active role to play in the creation of facts. And he must embed this notion in his argument too deeply and too subtly to be extracted and criticized because, as we shall mention in a moment, the notion is at war with powerful legal and folk-cultural conceptions of "facts" as objective realities. To counter those conceptions, defense counsel must proceed by immersing the jury in a different and more compelling reality—the reality of the trial in which they are actors, the reality of the dialogic process, which assigns meaning to events.

For her part, the prosecutor can explicitly urge the jurors to be unimaginative—and can do so without demeaning their intelligence and independence—only to the extent that she can identify imaginativeness with "speculation." She wants to ask them to restrict their thinking to conventional patterns because two conventional patterns of considerable force favor her position.

The first is the legal canon, which the judge will charge the jury, that the defendant can be found to have intended the natural and probable consequences of his acts.⁶²

The second is the canon of folk psychology that "[c]omplex human actions are assumed to be voluntary unless something indicates otherwise. A voluntary action is one in which someone did something to accomplish some goal."⁶³

61. We return to this subject at pages 106-10 *infra*.

62. See note 3 *supra*. The prosecutor explicitly tells the jury that the judge will so instruct them.

63. Roy D'Andrade, *A Folk Model of the Mind*, in CULTURAL MODELS IN

The two conventions authorize a line of reasoning that gives the prosecutor her best hope of satisfying the jury, beyond a reasonable doubt, that the defendant intended to kill. Lawyers and logicians would call this kind of reasoning a permissive inference. But the prosecutor does not want the jury to think about it as permissive or as an inference. She wants them to view it rather as a connection that is innate in the facts of the case. She would much prefer that the jury not think about the reasoning involved at all, but just *do* it, since thinking about it may detract it.

The prosecutor faces the problem that if she emphasizes the strength of her evidence concerning the physical acts and events surrounding the killing—which she wants to do because she possesses a monopoly of such evidence and it paints a picture of the defendant as a wanton killer—the very strength of this evidence may call the jury's attention to the comparative weakness of her evidence concerning the defendant's mental state, which is the rubber issue (in every sense) in the case. She can overcome this problem if she can keep the jury from focusing on the epistemological differences between physical acts and mental states.⁶⁴ In this she is aided by another and deeper convention of folk psychology: that mental states and physical acts are interconnected parts of an objective chain of events, a true story, something that happens in the world, something that is *real* and, being real, is knowable—something, in short, that a jury can *find* from *evidence*. She will want to root her argument in this convention.

LANGUAGE AND THOUGHT 112, 120 (Dorothy Holland & Naomi Quinn eds., 1987). The prosecutor repeatedly argues that "you don't fire a shot into someone's chest from a handgun without intending to kill them, without that being your conscious desire."

64. One way in which the prosecutor does this is to embed the physical details in the narrative flow of her argument at every point, thereby avoiding transitions that would flag the question of their epistemological status. See Bal, *supra* note 44, at 109-10 (discussing the technique of description in which a "character carries out an action with an object. The description is . . . [thus] made fully narrative." *Id.* at 109.). See generally PHILIPPE HAMON, INTRODUCTION A L'ANALYSE DU DESCRIPTIF 180-223 (1981). The most striking example of this technique is the prosecutor's repeated narration of the defendant's action as "shooting a person in the chest." Virtually every time the prosecutor talks about "shooting" or "firing," she follows the verb with the phrase "in the chest" or "in the heart," as though *shoot in the chest* was an indissoluble predicative unit. By contrast, defense counsel talks about the chest shot only when he wants to focus the jury precisely on the question whether the location of the wound will support an inference that the defendant intended to kill: "In no way am I telling you to ignore the fact that she was shot in the chest where her heart was. . . . But where is the proof presented to you that he aimed there?"

A. Macrostructure

The macrostructure of the lawyers' arguments reflects their respective strategies.

1. The Defense Argument

Defense counsel's opening words portray him as engaged in a dialogue with the jury:

"When I spoke to you all about a week ago I tried to summarize with you all what I thought were two critical concepts [or values] that I thought were necessary in a jury that was going to hear the evidence in this case."

The dialogue is partly verbal and partly empathic:

"[E]ven though I didn't talk to each and every one of you, I sensed from most of you or from the collective that was here an awareness of those values and an assuredness that you would apply these two values to the evidence in the case."

"[Counsel's argument will] assume . . . that I was right in thinking that these two values permeated this jury, because if I'm wrong then I fear that my summation *will fall on deaf ears*."

But the jury will have to do more than listen; it will have to continue the dialogue after counsel has finished speaking. Counsel calls on those jurors who appreciate the two concepts to "talk to the other members of the jury and explain to them" the importance of these concepts.⁶⁵

Counsel proceeds to cast the jury for its part in the dialogue by describing the two concepts "that I tried to speak about in voir dire."

The first concept is that the jurors would set aside their natural repugnance for the defendant as someone who has killed a young woman by a wanton act of violence and would hold him accountable only for the specific crimes "proved to you beyond a reasonable doubt." This concept is enacted performatively in a pair of explicit dialogues between counsel and the jury in which the jury is depicted as speaking out repeatedly:

"Yet *you all tell me* that you can still apply the laws to him, a man who created such a perilous situation."

65. See the first indented passage quoted on page 92 *infra*.

"*You all said or said to me that you can still apply the laws to him You said you would still apply the laws to him*"

"I mean, how easy would it be for *each of you to say*, 'Why should we show any serious regard for a man who showed so little regard for the life of another?' How easy it would be for *each of you to say*, 'Why should we care about what crime is proved against him when he in so cavalier a manner apparently pulled a gun and ended up killing another humanbeing[sic]?'"

The second concept is that if facts were not proved, the jury would treat them as unproved and would not expect the defense to present evidence about them. This concept, too, is developed in the form of an active dialogue between the jury and defense counsel and the defendant:

"*You all said basically that you would not say at this point, 'Well, wait a second, there were two people in that car, . . . [the defendant] and . . . [the victim]. . . . [T]hey are the two who really knew what happened. She obviously can't speak, let him speak. Let him get up and tell us what really occurred [I]f it wasn't a shooting with intent to kill, then you . . . [the defendant] get up and you tell the jury what occurred.'*"

"*Well, you promised him and you promised me that you understood that the law does not give you a right to demand or ask that of . . . [the defendant]. You cannot ask him to speak and most importantly you cannot in any way use his silence against him.*"

Defense counsel then summarizes the testimony of the witnesses, states that the issue that the jury must resolve is whether the defendant had an intent to kill, and argues that there is insufficient evidence to allow the jury to find an intent to kill. His argument ends with a final dialogue, a fully enacted dramatic dialogue, between himself and the defendant and the jury, in which defense counsel asks the jury to "stand up," to "look over at" the defendant, and "while looking at him[,] vote not guilty."⁶⁶

2. The Prosecution Argument

The prosecutor also begins by describing her argument as a "discussion" with the jury, but she does so in a perfunctory, conventional style and immediately signals that her conception of "discussion" is non-dialogic:

66. See the last passage quoted on page 65 *supra*.

"This is the last opportunity I'll have *to talk with you* concerning the evidence in this case. I am going to take this opportunity *to discuss with you* how the evidence proves the defendant's guilt beyond a reasonable doubt. You may find my argument to be persuasive and you may not.

"... [Defense counsel's] arguments are not evidence and my arguments are not evidence and I'm relying on the common sense and your own intelligence and innate abilities to determine the facts in this case."

Thus, no interchange of ideas appears to be contemplated. The prosecutor will offer the jury her arguments on a take-it-or-leave-it basis. Moreover, the arguments are not evidence, and the jury's real job is to get right down to the work of determining the facts of the case on the basis of the evidence.

Of course, the statement that counsels' arguments are not evidence is a boilerplate item that has a number of traditional functions and may be virtually obligatory in some prosecutors' offices. Technically, it helps to insulate the prosecutor from reversible error if she inadvertently misstates the record; rhetorically, it reminds the jury of her dominant position when, as is ordinary, the prosecution's evidence was bulkier than the defendant's; and in cases where, as in the present one, the defendant has presented no evidence at all, it permits the prosecutor to call the jury's attention to that omission without risking a rebuke for commenting on the defendant's exercise of the privilege against self-incrimination. Here, the arguments-are-not-evidence statement lays the groundwork for the prosecutor's premier theme to come: that defense counsel has offered nothing but irresponsible speculation to support a finding of unintentional homicide. But the interjection of the statement at the outset reinforces the tendency of that theme to project the prosecutor's relationship with the jury as non-dialogic: When one's claim is that the evidence said it all, there is little left to converse about.

The prosecutor proceeds immediately to offer a rather different account than defense counsel of the virtues for which the jurors "were chosen": these were "common sense, . . . fairness and . . . what we perceived to be in you the ability to judge the evidence in this case."⁶⁷

67. Thus, the prosecutor defines the jury's role as bringing common sense to the task of judging evidence, *see* note 87 *infra*, whereas defense counsel (in the opening set out at pages 78-79 *supra*) defines the jury's role as exercising self-discipline in the critical scrutiny of evidence, *see* note 80 *infra*.

Note another difference between the lawyers' openings. Both undertake to establish an empathetic relationship between counsel and the jury in the traditional way: by adverting to the previous interchange between counsel and the jury during *voir dire*. But

Hearing, rather than speaking, discernment rather than discourse, seem to be their chief features:

"Now there are certain things which aren't in issue . . . [,] certain things which are not being disputed in this case as I'm sure you just *heard* [during the defense argument] and as you probably *perceived* during the course of this trial."

The prosecutor dwells for some time on these things, which permit her to talk about the fact of the killing "over four years ago," its "violent and senseless" nature, its concrete anatomical details, the defendant's identity as the killer, the fact that the killing occurred in the course of a quarrel between the defendant and the victim, and (simultaneously) the credibility of the prosecution's witnesses — all to a double drum roll of epistemological certainty:

"I mean there is no question that"

"There is no question that"

"There is no question"

"There is no issue apparently"

"[T]here is no issue that"

"[T]here is no question about"

"[T]here is no question"

"Those things aren't in issue"

And:

"We all know that."

"You know they were telling the truth."

"You know they didn't tailor their testimony."

"You know that"

"You know that"

"You know that"

"[Y]ou know"

"[Y]ou know"

"We know it was . . . the defendant."⁶⁸

defense counsel's portrayal of the relationship is dialogic: counsel "*sensed* from most of you or from the collective that was here an awareness of . . . [certain] values and an *assuredness* that you would *apply these . . . values to the evidence*." Defense counsel *receives* from the jurors a sense that they will be *active* in upholding *values* of a particular sort. The prosecutor *perceives* in the jurors certain attributes bearing on their *ability to judge*, and she (together with the judge and defense counsel), *chose* the jurors for those attributes. Here there is a less active interplay between counsel and the jurors, less activity of any sort on the jurors' part.

68. These "there is no question" and "you know" formulations will recur later in

With this firm substructure of indisputable facts established—not by dialogue or reasoning, but because “there is no question” about any of it and the jury “know[s]” it all from the evidence—the prosecutor next states “[t]he thing that is in issue”: “[T]he only question for you is what did . . . [the defendant] intend” The way the jury is to decide that question is immediately stated:

“ . . . I’m not going to ask you to speculate on things that aren’t in evidence. I’m not going to ask you to hypothesize about other theories of this case.

“ . . . The Judge will tell you that you’re not to speculate on things that aren’t in evidence. So what I am going to discuss with you is what the evidence shows in this case.”

There follow a dozen pages (about fifteen minutes) of interwoven arguments of three sorts:

a. “The defense would have you believe that in this case and in fact in any case unless . . . the defendant walks up to another person[,] declares his intent to kill that person, pulls the trigger, aims the gun at a chest or head, says ‘Gee[,] I’m glad I did that, I really meant to kill you’ . . . [a]nd walks away, that it’s impossible to prove a person’s intent beyond a reasonable doubt.” But “I’m sure you all know that simply isn’t true.”⁶⁹

b. Rather, the jury needs only use its “common sense”⁷⁰ to put together the physical facts of the case (which “you know”) and certain principles of human conduct (which, also, “you know”) in order to conclude that the defendant intended to kill the victim. For example, “[y]ou don’t point a loaded gun at someone . . . and pull the trigger when you don’t intend to kill them”; also, the defendant’s “callous disregard” for someone he had just shot in the chest “shows that this wasn’t an accident.”⁷¹

c. “It would be pure speculation and pure imagination on your part” to accept defense counsel’s hypothetical scenarios of unintended killing, because “[t]here is no evidence in this case that anything other than and

the argument as well. See note 127 *infra*.

69. This point is elaborated at some length, with variations on the theme, in three separate passages in the middle and at the end of the argument.

70. See text and note at note 87 *infra*.

71. This point is elaborated recurrently and extensively, with variations on the theme, from the middle through the end of the argument.

[sic] intentional murder took place,"⁷² and "it's only through speculation and hypothesizing that you can find anything other than that the defendant in this case when he pulled the trigger and fired that shot into . . . [the victim's] heart that he intended to kill her."⁷³

The prosecutor's peroration picks up the theme that "I'm not going to ask you to hypothesize, to use your imaginations. I'm simply going to ask you to use your common sense to evaluate the evidence that you heard and to base your verdict on that evidence." "What's being sought in this courtroom . . . is . . . justice[,] and justice is a verdict based on the evidence." "Justice cries out for a conviction in this case."

B. *Microstructure*

By contrasting defense counsel's argument with the prosecutor's, we have seen that the defense argument has three interrelated properties. It tells the story of the trial, not the killing. It tells that story as Drama. The Drama is performed by drawing the jury into dialogue.

So far we have examined these properties primarily as functions of macrostructure. We now focus on microstructure.

1. Defense counsel's use of verb tense is a powerful instrument for focusing the jury on the present rather than the past. The events surrounding the killing are, for the most part, described in the *present tense*. The play of tense throughout the defense argument is remarkable:

- The form for describing the witnesses' testimony is mostly "she testifies" that "X happened," but sometimes counsel even paraphrases testimony in the present tense.
- *Analysis* of the evidence is mostly but not entirely in the present tense: "Where does she see all this from?" "Where does she position herself?"
- *Tension* ("difference") in the evidence is described in the present tense. The jury is asked to wrestle in the present with the present (or eternal present) state of evidence about what happened in the past tense: "[Y]ou must find in his actions something that proves to you what was in his mind." * "But if ther [sic] is no adequate motive that

72. This point is made, with variations, a half-dozen times within four pages.

73. This point is made, with variations, in three passages of some length within four pages.

has been presented to you, doesn't that make you question whether or not Mr. Jones had the intent to kill?"

- *Lack* of evidence is almost always described in terms of present-tense ignorance about past-tense happenings. "But where is the proof presented to you that he aimed there?" When there is an unclarity in the story, it is (suddenly) because this all "happened four years ago."
- The facts that the prosecutor and defense counsel are portrayed as arguing or as having to prove are described in the past tense. "Ms. Brooks will argue that . . . that testimony shows my client shot Mary Smith with intent to kill"
- But direct accounts of the "reality" of what happened on the street are virtually all in the present tense.⁷⁴ For example:

"Is an intent to kill established by his cold manner in which he walks away from the scene? He spins around and puts the gun away and walks away. I mean he knew this woman. They're all friends of some sort. He killed her. Is he unconcerned? Likely, he leaves a woman dying, he's a bad guy. Is he in shock when he walks away? Maybe. We don't know. Everyone says split, someone says to him go up the street and he goes. He gets out of the scene. . . ."⁷⁵

The prosecutor, on the other hand, tells the story of the killing wholly in the past tense.⁷⁶ For the most part, even the testimony of the witnesses is recounted with the introduction "she testified" or "she said."

74. See, e.g., the last two examples in note 38 *supra*. (The first example in that footnote shows the use of the past tense in a lack-of-evidence statement.)

75. Notice that the two past-tense verbs in this passage function syntactically as past perfect statements. Sometimes counsel's persistence in using the present tense to describe the happenings on the street produces extraordinary verbal gymnastics. Once, for example, counsel interpolates a single sentence of his own into a lengthy recitation of witness testimony; all of the testimony is in the past tense but counsel's interpolation is in the present tense. In another passage, within a few lines counsel shifts from a past-tense lack-of-evidence statement to a present-tense narration of events: "But where is the proof presented to you that he aimed there? . . . [H]ere we have people in a car, in motion, in movement. He's aiming at what? Is he aiming at anything at all?" Elsewhere, within a single sentence he shifts from a past-tense statement of what the prosecutor has to prove to a present-tense statement of what the facts are.

76. There are only two exceptions in the prosecutor's 15-page argument, and one appears in a sentence that contains a past perfect tense in another clause.

2. The prosecutor uses several additional, connected devices to give her story the solidity of an authoritative history:

- She keeps her prefatory remarks short, states matter-of-factly that “certain things . . . aren’t in issue,” and—within twenty-five lines of greeting the jury—begins her tale. It starts: “I mean there is no question that on February 10, 1987 over four years ago Mary Smith, a 20 year old woman was the victim of a violent and senseless death.”
- Her discussion of the killing itself has a physical quality—an iconicity—that is almost totally lacking in the defense argument. We have given one example of this in footnote sixty-four: Defense counsel talks about Mary’s being shot in the chest only when he is explicitly debating whether the location of the entry wound proves an intent to kill; the prosecutor repeatedly refers to a chest shot whenever she talks about shooting, whether or not the location of the wound is logically relevant in context. The point is made more generally by the following chart, which shows the frequency with which the two lawyers use various phrases to describe the act of killing:

<i>phrase</i>	<i>defense counsel</i>	<i>prosecutor</i>
created a perilous situation	1	—
killed her	6	2
shot [<i>intransitive</i>]	2	—
shot her [or Mary or a person]	6	3
fired	3	7
pulled the trigger	2	6
caused a shot to go into her side	—	1
caused the bullet to penetrate her heart and liver	—	1 ⁷⁷

- The prosecutor also gives concrete solidity to the historical events of the killing by making frequent use of an object metaphor to describe

77. That this pattern is not the result of a higher level of abstraction in the defense argument as a whole is indicated by the respective lawyers’ uses of the following phrases in discussing the defendant’s actions before and after the killing:

<i>phrase</i>	<i>defense counsel</i>	<i>prosecutor</i>
had a gun	7	3
pulled the gun	5	—
pointed the gun	3	1
aimed the gun	6	2
put the gun [back] in his pocket	5	—

facts or evidence or testimony about the killing as *things* that the jury *has*.

"[W]e *have* . . . [the victim] and the defendant inside a car." * "What other evidence *do we have* of the defendant's intent . . . " * "No, *you don't have* any evidence of the defendant . . . saying . . . 'I'm going to kill you.' But *what you do have* is a continuing argument . . . where the defendant is angry and the defendant has a gun and *what you do have* is a shot being fired and *what you do have* is evidence of the defendant . . . with a smoking gun" ⁷⁸

3. Defense counsel's means for transmuting the process of factfinding into a Drama with the jury as protagonist are complex:

a. As noted above, counsel begins his argument by describing the way in which the jurors should go about deciding the case. He frames this description in terms of certain *virtues* that the jurors will bring to the task of decision making—namely, two basic "concepts" or "values" concerning a juror's proper role in a criminal trial, which the jurors "have" and will "apply." These concepts and values are described as being in tension with other, negative emotions that the jury may entertain toward the defendant—passions, feelings, and attitudes⁷⁹ that each juror "has the right" to have but which the jurors have promised on voir dire that they would put aside. Thus, the jury's decision making is portrayed as a process which begins with the jurors' own mental activity, involves a conflict between the jurors' feelings and duties, and requires the exercise of *will* to resolve that conflict.

So the Drama in which the jury is cast as the Hero is a psychological drama. Externally, the jury's Difficult Task is to answer the riddle of the evidence. Psychologically, it is to overcome the temptation to answer the riddle in a manner that is inconsistent with the Hero's Duty. The Duty is portrayed as that of disciplined inquiry.⁸⁰ The temptation is repeatedly

78. In all, the prosecutor uses this object metaphor nine times. Defense counsel uses it only twice.

79. Defense counsel's language is: "whatever passion you felt or didn't feel towards the Defendant" * "no matter what attitude you may have towards the Defendant" * "however you feel towards the defendant."

80. The jury is not to "assign blame" to the defendant "unless specific blame worthiness had been proved to you beyond a reasonable doubt." Although the defendant cavalierly did a perilous act that killed another human being (defense counsel twice concedes), "you all tell me that you can still apply the laws to him" (a formula that

described in terms of undisciplined passions and feelings that are at war with this duty:⁸¹

"Is it horrible? Is it proof of a depraved and damnable mind? Yes. But even if you think that[,] you must acquit."⁸²

"The law is specific that you have agreed to uphold. . . ."

"Then what then, what[,] Mr. Lee [defense counsel], you tell us[,] I can hear you all saying, you tell us how a woman is shot in the chest at close range if it's not intentional murder. If there was no intent to kill, what's the scenario[,] how did it happen. I don't know. And I'm not going to play detective and it's not my job and I'm going to just hold you to the promise that you made to not make me prove to you in any way how it may have occurred."⁸³

defense counsel repeats thrice). "The law is specific that you have agreed to uphold": it requires the prosecutor to prove that the defendant had a conscious intent to kill. The jury cannot convict the defendant even if it is persuaded that he has a "depraved and damnable mind." The jury must put aside such impressions and "apply the law in a cool rational way," "in a cool dispassionate way." "[I]f you can do that . . .," says counsel "then you deserve our great admiration and I hope you can do it."

81. See, e.g., the second indented passage quoted on page 79 *supra*; the first indented passage quoted on page 90 *infra*; the first indented passage quoted in paragraph d on page 91 *infra*. This point is reiterated in a half-dozen passages in addition to the examples given in the text.

82. The defendant's conceded blameworthiness undergoes a significant trans-mogrification in the course of the defense argument. It starts out as something that the jury will feel because of what the defendant did—because of the killing that he committed and for which he is on trial. But then the defendant's blameworthiness is recast in the present tense and in personal terms, as in the quoted passage or, e.g., "Is he blameworthy? Absolutely." Thus, it will be "one of the hardest things that you have ever been required to do in public . . . to . . . look over at David Jones and while looking at him vote not guilty." Progressively, blameworthiness becomes something that attaches to the defendant *not* because of the evil acts for which he is on trial but because of some (unspecified) evil aura that hangs about him. Consequently, while it is natural for the jury to detest the defendant, it is not cool to do so; this kind of emotionality must be recognized as human but resolutely controlled.

83. And:

"You all said basically that you would not say at this point, 'Well, wait a second[,] there were two people in that car, . . . [the defendant and the victim]. . . . [T]hey are the two who really know what happened, She obviously can't speak, let him speak. Let him get up and tell us what really occurred if it's not a murder that he committed'"

"Well, you promised him and you promised the judge that you understood that the law does not give you a right to demand or ask that of . . . [the

The prosecutor, on the other hand, does not depict the jury as internally conflicted. Like defense counsel, the prosecutor emphasizes the importance of the jury's own attitudes and natural reasoning processes. And like defense counsel, the prosecutor acknowledges that these may be of two kinds. First, the jurors have "imagination[s]." The prosecutor several times identifies "imagination[s]" with "hypothesizing" and with "speculating,"⁸⁴ and she warns the jurors that the judge will tell them not to speculate.⁸⁵ But this prohibition is not couched in such a way as to generate tension: hypothesizing and speculating are not temptations that have much allure for sensible people to begin with.⁸⁶ Second, the prosecutor tells the jurors that they have "common sense." Common sense is a good and attractive quality, and the prosecutor repeatedly invites the jury to use its "common sense."⁸⁷ To the extent that there is any

defendant]. You cannot ask him to speak and most importantly you cannot in any way use his silence against him."

"Well what should you do then, just assume he's crazy? . . . You can't speculate in that way. You need proof presented to you before you make that decision."

84. The following passage is representative:

"I'm not going to ask you *to speculate* on things that aren't in evidence. I'm not going to ask you *to hypothesize* about other theories of this case.

I'm not going to ask you to use your *imagination[s]* . . . because that is not your job."

85. See the indented passage quoted on page 82 *supra*.

86. Defense counsel's argument had also told the jurors that they "can't speculate." Both attorneys were anticipating that the judge's boilerplate charge would admonish the jury not to speculate, as indeed it did.

87. Thus:

"I'm relying on the common sense and your own intelligence and innate abilities to determine the facts in this case.

"You were chosen because of that common sense, because of that fairness and what we perceived to be in you the ability to judge the evidence in the case."

"Common sense" is the repeated keynote. The prosecutor uses the phrase a half-dozen times and reinforces it with cognate phraseology (for example, asking the jury to make "a reasonable assumption"). A variant is the "you [*or we*] all know that" appeal to common sense, which the prosecutor uses again and again. See note 127 *infra*.

Note the absence of words of analysis and intellection in the prosecutor's description of the jury's role: the jury will intuit truth directly and comfortably. The prosecutor's final paragraph begins: "I know that when your service is over here you want to look back on your jury service and *feel* that you did the right thing, you want to *feel* that you returned the just and appropriate verdict in this case and that is a verdict based on the evidence" Similarly, the evaluation of the credibility of testimony appears to be linked to intuition rather than analysis: "You heard the witnesses testify[,] you heard with compelling emotions how they told you of Mary's death four years ago."

possibility of conflict between the appealing quality of common sense and the unappealing quality of hypothesizing or speculating, the prosecutor defuses it by a double move. She employs an object metaphor (THOUGHTS ARE OBJECTS) to *externalize* both qualities—making “imagination” and “common sense” *objective instruments*⁸⁸—and she then asks the jurors to *use* the fitter instrument.⁸⁹

“I’m not going to ask you to *use your imaginations* . . . because that is not your job.”

“I’m relying on you as I said in the beginning to *use your own common sense* in deciding what it was the defendant intended to do.”

“I’m not going to ask you hypothesize, to *use your imaginations* . . . I’m simply going to ask you to *use your common sense* to evaluate the evidence that you heard and to base your verdict on that evidence.”

b. Defense counsel, having by contrast cast the jury as a Hero torn between desire and duty, calls upon it to resolve this conflict in the classic heroic mode: by an exercise of will.⁹⁰ He consistently uses verbs of volition to describe what the jury must do and to remind the jurors of the responsibilities that they have taken on themselves:

88. The prosecutor’s argument does not attribute emotions of any sort to the jury. She uses the verb *feel* with the jury as the subject only twice, in a single passage, describing how the jurors will want to feel at a later day, after their jury service is finished. This passage (which is set out in footnote 87 *supra*) harmonizes rather than opposing feeling and duty.

89. Defense counsel never makes the jurors’ internal states the object of the verb *use*. When the jury is the subject of this verb in the defense argument, the object is something other than the jurors’ own mentation:

“You cannot ask him to speak and . . . *you cannot in any way use his silence against him.*”

90. In a very subtle move, defense counsel praises the prosecution’s star witnesses, Susan Stone and Nancy Gregg, as models of dispassion. “[T]hey testified as best they could.” * “[T]hey were both recounting as they described, as best they could, as best they recalled the death of a close friend.” * “[T]hey actually testified pretty much free of any bias they have a right to hold or have against the defendant.” Surely, counsel insinuates but avoids saying overtly, the jury can do as well. After all, Nancy Gregg is a criminal who had to be caught and put behind bars before she came to “understand that she has a real obligation to the Criminal Justice System” to tell the truth. Maybe she “is really proof that in some way our much maligned criminal justice system actually works.” Inspired by such paragons of discipline, the jury is called to make the system work.

"One concept [mentioned on voir dire] was that whatever passion you felt or didn't feel towards the Defendant, no matter what attitude you may have towards the Defendant . . . that no way *would* that interfere with the verdict that you *would bring* in this case."⁹¹

"[Y]ou *would not assign* blame to him unless specific blame worthiness had been proved to you beyond a reasonable doubt"

"[Y]ou *would not in anyway expect* us . . . to prove or to disprove anything"

"[Y]ou *would in no way hold us responsible* for clarifying these ambiguities for you and you *would in no way expect* us . . . to make up for the lack of clarity"⁹²

The prosecutor, by contrast, never uses forms of the verb "will" with the jury as the subject.

c. Another way in which defense counsel plays the same theme is by the use of phrases that conjoin volition and emotion: "show . . . regard for"; "care about"; "desire to analyze"; "be concerned."⁹³ Phrases of this sort mark an exception to the ordinary tenet of folk psychology that "[f]eelings, like perceptions, are not considered to be under one's direct control."⁹⁴ They reflect a belief, or at least an aspiration, that one can

91. See also, e.g., the last indented passage quoted on page 79 *supra* and the first indented passage quoted in paragraph d on page 91 *infra*.

92. And:

"[T]he second concept I thought was critical was if *you would be willing* at the end of the case to say if certain matters aren't proved beyond a reasonable doubt that there[sic] just not proved."

"If it's not proved by the People's evidence that he had an intent to kill, then *you would just find him not guilty* of that charge."

See also paragraph e *infra*.

93. See the second indented passage quoted on page 79 *supra* and the first indented passage quoted in paragraph d on page 91 *infra*.

94. D'Andrade, *supra* note 63, at 119. D'Andrade explains that:

"One may be able to modify one's feelings by thinking of one thing rather than another, or by engaging in various activities, but according to the folk model, one cannot will oneself to hate or not to hate, to love or not to love someone, or even to enjoy something (but one can try)."

Id. The last parenthetical suggests that D'Andrade is aware of some tension on this point in folk psychology. And the exhortations commonly heard in American discourse to "care" and to "be concerned" do appear to reflect a belief that at least certain aspects of one's feelings are subject to a measure of volitional control. It is particularly noteworthy in the *Jones* arguments that words that touch upon these aspects—words such

direct one's feelings by an act of will. The prosecutor uses no such language in connection with the jury.

d. A key passage in the defense argument summarizes the jury's moral dilemma and the need for the jurors to make a deliberate choice between the paths of natural temptation and higher duty:

"I hope I make clear to you why I still believe . . . [that the concepts and values which the jurors accepted on voir dire] are critical to your ability and maybe even more to your desire to analyze this case.

"Why do I say that it's important that you have a feeling or a notion that however you feel towards the defendant won't influence you in the decision you make? Why is that critical in this case? Because each and every one of you has the right to despise the man who I represent.

"Whatever he did in a legal sense or an illegal sense, whatever his state of mind may have been at the time, that man had a loaded gun in his hand during an argument in a car and he pulled the trigger and he killed a young woman. Yet you all tell me that you can still apply the laws to him, a man who created such a perilous situation.

"You all said or said to me that you can still apply the laws to him, a man who is obviously responsible for the death of Mary Smith. You said *you would still apply the laws to him, still be concerned and still only convict him for what is really proven against him.*"

By contrast, the prosecutor describes the jurors' "innate abilities" as given, requiring no act of will to exercise, and harmonious with the paths of law and logic which lead naturally to conviction:

"I'm relying on *the common sense and your own intelligence and innate abilities* to determine the facts in this case."

"You were chosen because of that *common sense*, because of that fairness and because of what we perceived to be in you *the ability to judge* the evidence in this case."

The following parallel passages epitomize the contrast:

as "expect" and "ignore"—are found exclusively in defense counsel's summation, never in the prosecutor's.

Defense counsel: "[S]ome of you do have these values and understand these concepts [referring to the same values and concepts mentioned in the immediately preceding excerpt from the defense argument] and I'm going to rely on those of you who do have these concepts to talk to the other members of the jury and explain to them why these concepts or values are so critical in evaluating the evidence"

The prosecutor: "And I'm going to rely on your common sense and your ability to determine the facts in this case in making a decision as to whether the defendant in fact intended the natural consequences of his actions."⁹⁵

e. The way in which the respective lawyers use the deontic forms *must*, *need*, *have to*, and *should* in relation to the jury are particularly revealing. With one exception,⁹⁶ defense counsel always invokes these forms in the positive voice, as commands of duty:

"[I]f proof is lacking then you *must* acquit."

"But you *must* find before you convict him of Murder a specific intent to kill and you *must* find in his actions something that proves to you what was in his mind."

"But even if you think that[,] you *must* acquit."⁹⁷

Conversely, in the prosecutor's arguments, the same forms are invariably negative or dismissive, stating an absence of command:

"You don't *need* to consider whether it [the motive] might be enough for a reasonable person."⁹⁸

95. See also the second and third indented passages quoted on page 89 *supra*.

96. "Is there something presented to you that proves an intent to kill so that you don't have to speculate to draw that conclusion?"

97. And:

"You need to be—has to be proven to you that . . . [the defendant's] conscious aim . . . was to cause her death"

"[H]ow easy would it be for each of you to say, 'Why *should* we show any serious regard for a man who showed so little regard for the life of another?' How easy it would be for each of you to say, 'Why *should* we care about what crime is actually proved against him . . . ?'"

"Well what *should* you do then, just assume he's crazy? You can't speculate in that way. You need proof presented to you before you make that decision."

98. And:

"You don't *have to* put yourself in the defendant's mind and decide whether[,] you know[,] you think it's reasonable that that was enough of an insults [sic]."

"All you *have to* do in this case is to make a reasonable assumption about the defendant's intent based on his conduct"

f. The verbs of action that the lawyers attribute to the jury in their respective arguments are also significant. Defense counsel uses the verb *do* in connection with the jury nine times, thrice in his closing sentence asking the jury to vote his client not guilty. With two possible exceptions,⁹⁹ all of these uses are affirmative and empowering.¹⁰⁰ The prosecutor uses the verb *do* in connection with the jury four times. With one exception,¹⁰¹ each of these uses is negative or restrictive.¹⁰²

"I said you may infer. You *need not*, but one of the ways that you can tell what somebody means to do is what they eventually do."

"You don't *have to* decide whether the defendant was the one who pulled the trigger of that gun. . . . You don't *have to* decide who did that. We know it was, the defendant."

99. "Well *what should you do* then, just assume he's crazy? . . . You can't speculate in that way. You need proof presented to you before you make that decision."

See also note 96 *supra*.

100. "If you *can do that*, if you *can do that* in a cool dispassionate way, then *do it*."

"[I]f you can put that aside, if you can apply the law in a cool rational way, then you deserve our great admiration and I hope that you *can do it*."

"So what *I'm really asking you to do* is *to do what* I think will probably be one of the hardest things that you have ever been *required to do* in public, which is to stand up and at some point look over at . . . [the defendant] and while looking at him vote not guilty of charges brought against him."

101. "[W]hen your service is over here you want to look back on your jury service and feel that *you did the right thing*"

(The full passage is set out in the first indented passage quoted on page 94 *infra*.) Notice that the temporal perspective, looking backward from the future, blunts the active quality of the verb *did*.

102. "You don't have to put yourself in the defendant's mind and decide whether[,] you know[,] you think it's reasonable that that was enough of an insults [sic] *No one is asking you to do that*."

"[Y]ou can't go into the defendant's mind and decide what exactly was going through it *Nobody can do that*"

"All you *have to do* in this case is to make a reasonable assumption about the defendant's intent."

Defense counsel often refers to the ultimate act that the jury will perform in the case, using verbs of action: "convict," "acquit," "vote not guilty." The prosecutor never uses such action verbs. Even in her peroration, the prosecutor uses a remarkable combination of devices—a relatively abstract verb phrase (*return a verdict*),¹⁰³ a muted future perfect tense,¹⁰⁴ and a compound sentence ending in two successive copulas—to mitigate the action that she is asking the jury to take:

"I know that when your service is over here you want to look back on your jury service and feel that you did the right thing, you want to feel that *you returned the just and appropriate verdict* in this case and that is a verdict based on the evidence and I submit to you that the only verdict based on the evidence in this case is guilty of Murder in the Second Degree."

This peroration contrasts starkly with defense counsel's, in which the jury is asked to "stand up," to "look over at" the defendant, and "while looking at him," to "vote not guilty."¹⁰⁵ And the contrast is plainly strategic. For in the passage immediately preceding her peroration, the prosecutor is at pains to portray the jury's verdict as something other than an engine of the jury's agentivity—or, indeed, of any human agency. Not human will or human purpose, but transcendent "Justice" will speak in the verdict:

"Ladies and Gentlemen, we are not—the People are not seeking vengeance in this case. . . . [The victim's] family is not seeking vengeance in this case. I mean a trial is a search for truth. I mean it's not an excuse to find doubts. I'm not going to ask you to hypothesize, to use your imaginations, I'm simply going to ask you to use your common sense to evaluate the evidence that you heard and to base your verdict on the evidence.

"What's being sought in this courtroom¹⁰⁶ as I said is not vengeance but it's justice and justice is a verdict based on the evidence. Justice cries out for a conviction in this case, Ladies and Gentlemen."

103. The *most* abstract term that defense counsel uses to describe the jury's final action in the case (to *bring in* a verdict) is less abstract than this. And it occurs only once, early in the defense argument.

104. See note 101 *supra*.

105. See the last passage quoted on page 65 *supra*.

106. Note the depersonalizing shift to a passive form.

In defense counsel's philosophy, on the other hand, it is "law" rather than "justice" that is the transcendent value; and "law" is not a self-moving force but a canon that the jury must *apply*.¹⁰⁷

"[I]f you can put . . . [aversion to the defendant] aside, if you can *apply* the law in a cool rational way, then you deserve our great admiration and I hope that you can do it."¹⁰⁸

g. Defense counsel tends to use metaphors that depict the jury's thinking processes as physical and active:

- He makes extensive use of the metaphor THINKING IS SPEAKING. When referring to the mental operations of the jury, defense counsel consistently describes the jurors as *talking*:

"[H]ow easy would it be for each of you to *say*, 'Why should we show any serious regard'"

"[H]ow easy would it be for each of you to *say*, 'Why should we care'"

"[T]he second concept I thought was critical was if you would be willing at the end of the case to *say* if certain matters aren't proved beyond a reasonable doubt that there [sic] just not proved."

"[On voir dire:] You all said basically that you would not *say* [meaning "think"] at this point, 'Well, wait a second'"

"Can you go from assuming that . . . [particular fact] to leaping and *saying* therefore when the gun went off he intended to kill?"

"I can hear you all *saying*,"¹⁰⁹

107. See the first indented passage quoted in paragraph d at page 91 *supra*.

108. Also:

"I sensed from most of you or from the collective that was here an awareness of these two values and an assuredness that you would *apply* these two values to the evidence in the case."

The prosecutor never speaks of the jury as applying the law. In the prosecutor's argument, the jury's job is "to determine the facts" and to "judge the evidence." See pages 97-98 & note 114 *infra*. Thus, on the one occasion when the prosecutor speaks of the jury "applying" anything, it is "common sense principals [sic] you all *apply* every day."

109. The prosecutor uses the THINKING IS SPEAKING metaphor in connection with the jury only three times; in two of these, the activity of the verb is diluted by non-declarative and dismissive formulations:

This metaphor is consistent with two defense strategies: (a) to depict the trial as an exercise in dialogue, in which the lawyers and the jury are engaged in an exchange and in which the jury's role is an active, not merely a passive one, and (b) to support the defense argument that because David Jones never *spoke* a single *word* expressing an intent to kill, the evidence of intent to kill is fatally ambiguous.¹¹⁰ Of course, defense counsel neither states the THINKING IS SPEAKING metaphor overtly nor connects it explicitly with the issue of the defendant's intent. If he did so, he'd get chopped to pieces. What he does do is to establish the metaphor *performatively*¹¹¹ and then reason implicitly from its entailments.¹¹²

— Defense counsel uses the metaphor LOOKING IS ATTENDING TO in the same way:

"Look, the issue here is not so mysterious."

"Look, in no way am I telling you to ignore the result."

"Look at the evidence in a really bad light."

"If you just *look* at the evidence, the lack of evidence"

Then, in the peroration of defense counsel's argument, the verb "look" is used literally to dramatize the jury's agentivity and responsibility: Defense counsel asks the jury to "stand up and . . . *look over at David Jones and while looking at him* vote not guilty."¹¹³

"Does it make sense to say, 'Oh, well[,] maybe he just meant to hurt her.' . . . He wasn't twenty feet away on a sidewalk firing aimlessly at someone, 'Well, *maybe you can say* he didn't mean to kill the person'"

Indeed, only once in the prosecutor's argument does she use the verb *say* with the jury as its explicit subject. See note 121 *infra*.

110. "Were any words heard before, during or after that my client uttered that shows an intent to kill? Did he say during the shooting 'Die.' Did he say, 'I want you . . . dead.' Did he say, 'I'm going to kill you.'? Is there any of that shown in the evidence that you have before you to prove an intent to kill?"

The same point is also made in another passage.

111. The art of "definition by performance," JAMES BOYD WHITE, *HERACLES' BOW* 144 (1985), is explicated in *id.* at 146-47, 148, 153-55, 158, 162-64, 180, 238; see also Victor Turner, *Social Dramas and Stories About Them*, in *ON NARRATIVE* 137, 155, 157, 162 (W.J.T. Mitchell ed., 1981).

112. Cf. GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 52-54 (1980); PAUL RICOEUR, *THE RULE OF METAPHOR* 235-38, 243-46, 302 (Robert Czerny trans., 1981).

113. See the last passage quoted on page 65 *supra*. The prosecutor only twice uses the verb "look" with the jury as the subject. One use is literal and unremarkable ("[The medical examiner] described the path of the wound and you can *look* at the chart if

h. Defense counsel occasionally uses classic heroic verbs with the jury as the subject:

"[I]f proof is lacking then you must acquit. You cannot *fail* to acquit"

"The law is specific that you have agreed to *uphold*"

The prosecutor uses no such verbs. The prosecutor's verbs to describe the jury's function in the trial stress *judgment*;¹¹⁴ defense counsel's stress *action* and the Heroic Quest. Consider the comparison in the following chart:

necessary"); the other involves no present activity by the jury but portrays the jurors in the future remembering ("look[ing] back") on their jury service (quoted in the first indented passage on page 94 *supra*).

114. This is one aspect of the prosecutor's more general tendency to cast the jury in the roles of disengaged observer and arbiter. For example:

(1) With the jury as the subject, the prosecutor uses the verb *hear* five times and *perceive* once. Defense counsel uses the verb *hear* once and *perceive* never. Defense counsel does make one indirect reference to the jury *hearing*—a reference in which *hearing* is portrayed as neither passive nor disengaged. He says that unless the jury holds the two basic concepts or values that are the virtues of good jurors, his "summation will fall on deaf ears." Notably, both of the defense references to *hearing* occur in the opening moments of the argument, when counsel is describing what an idealized jury should be or do. Once defense counsel begins to discuss the actual activity of this jury, the verb *hear* is never used. By contrast, defense counsel twice uses the active verb *listen* with the jury as the subject; the prosecutor never does.

(2) The prosecutor makes scant use of the verbs *have* and *be* in connection with the jurors. These are the verbs most commonly used in English to round out personality by endowing people with attributes. For example, in defense counsel's argument, the jurors "have", *inter alia*, "values," "concepts," "attitude[s]," "a feeling or a notion," and a "right" to feel in a certain way. The prosecutor uses the verb *have* to give the jurors only "evidence" (several times), "testimony" (a couple of times), and facts (e.g., "what you do *have* is a continuing argument in a car where the defendant is angry and the defendant has a gun and what you do *have* is a shot being fired") (a couple of times)—plus, on one occasion, the attribute of good imaginations, *see* pages 88-89 *supra*. In this "imaginings" passage, the prosecutor appears rather to be taking off on defense counsel than independently imbuing the jury with a characteristic of personality; in any event, the characteristic is unequivocally disparaged:

"I'm not going to ask you to use your imaginations, although I'm sure you all *have* good ones[,] and try to figure out some scenario of how this could have occurred, because that is not your job."

And while defense counsel uses the verb *be* to attribute a number of intentional states to the jury—states in which the jurors are "concerned," "willing" to act, and "satisfied" or not satisfied that they have a basis for action—the prosecutor never once uses the verb *be* with the jurors as the subject.

VERB	NUMBER OF USES WITH JURY AS SUBJECT	
	<i>prosecutor</i>	<i>defense counsel</i>
judge	1	0
decide (or <i>make a decision</i>)	6	4
tell (in the sense of <i>discern</i>)	1	0
determine	2	0
conclude (or <i>draw a conclusion</i>)	1	1
base a verdict on evidence	1	0
infer	1	0
figure (or <i>figure out</i>)	1	1
evaluate	1	1
analyze	0	1
ADD IT ALL TOGETHER	0	1
APPLY THE LAW	0	4
ASSIGN BLAME	0	1
<i>FIND</i>	2	4
<i>BE SATISFIED</i>	0	1

i. Another way in which defense counsel creates an heroic role for the jury is apparent in his use of the verb *can* with the jury as its subject. Both lawyers' arguments are full of statements that the jury "can" or "cannot" do certain things—draw inferences, reach conclusions, take a certain view of the evidence, etc. However, in the defense argument, more than half of these passages refer to positive or negative constraints of duty—obligations that the jury has undertaken or must observe to keep faith with the law:

"If you *can* do that, if you *can* do that in a cool dispassionate way, then do it."¹¹⁵

115. See also the first indented passage quoted in paragraph d on page 91 *supra* and the first indented passage quoted on page 95 *supra*. And:

"[Y]ou promised him and you promised the Judge that you understood that the law does not give you a right to demand or ask that . . . [the defendant testify and explain what really happened]. *You cannot ask* him to speak and . . . *you cannot* in any way use his silence against him."

"[I]f proof is lacking then you must acquit. *You cannot* fail to acquit because . . . [the defendant] or myself have not adequately explained to you what occurred."

"You *can't* speculate in that way. You need proof presented to you before you make that decision."

The residue refer to things that the jury can or cannot do as a matter of logic.¹¹⁶

In the prosecution's argument, by contrast, almost all of the *can* and *cannot* passages have to do with what is physically or logically possible¹¹⁷ rather than with what is legally or morally permissible.¹¹⁸

4. Defense counsel uses a variety of means to carry out the project of engaging the jury in a dialogue.

a. His argument is full of rhetorical questions. Whole paragraphs are nothing but series of questions and answers:

"Were any words heard before, during or after that my client uttered that shows an intent to kill? Did he say during the shooting 'Die.' Did he say, 'I want you . . . dead.' Did he say, 'I'm going to kill you.' Is there any of that shown in the evidence that you have before you to prove an intent to kill? Is there any proof before you that shows that my client actually aimed the gun at . . . [the victim]? There is none. Is there any evidence before you that shows that my client actually pointed the gun at . . . [the victim]? There is none. Is there any evidence that he held it out in a grip so that he could make sure he killed her? There is none. Is there any evidence that shows him . . . getting a [bead] . . . on her There is none. Is there something presented to you that proves an intent to kill so you don't have to speculate to draw that conclusion?

"Is he angry? Yes. Does he have a gun? Absolutely. Does he fire a shot in a small confined space? No doubt. Is he blame worthy? Absolutely."

116. *E.g.*,

"[G]ive this case . . . really the worse [sic] gloss that I think you *can*."

* "You know you *cannot* assume that we intend all the consequences of our actions."

117. *E.g.*,

"[Y]ou may infer. You need not, but one of the ways that you *can* tell what somebody means to do is what they eventually do." * "[The medical examiner] described the path of the wound and you *can* look at the chart if necessary." * "You *can't* put yourself in the defendant's mind."

118. Two of the prosecutor's *can* passages do involve legal permissibility:

"[I]t's only through speculation and hypothesizing that you *can* find anything other than that the defendant . . . intended to kill" * "[T]he Judge will tell you you *can* presume from the defendant's actions what his intent was."

Defense counsel asks a total of sixty-five rhetorical questions in a twenty-one-page argument. By contrast, the prosecutor asks five rhetorical questions in a fifteen-page argument.

b. Defense counsel repeatedly describes himself as engaged in conversation with the jury. The defense argument contains eleven sentences that portray defense counsel as "speaking" or "talking" to the jury, "saying" or "telling" something.¹¹⁹ By contrast, the prosecutor's argument contains four sentences that portray the prosecutor as speaking to the jury.¹²⁰ Defense counsel's peroration begins with the phrase: "[W]hat I'm really asking you to do." The prosecutor's argument contains six sentences in which she is the subject of the verb "ask" and the jury is the indirect object. Five are negative: "I'm not going to ask you to speculate" * "I'm not going to ask you to hypothesize" * "I'm not going to ask you to use your imaginations" * "I'm not asking you to rely completely on that evidence but its [sic] very compelling." * "I'm not going to ask you to hypothesize, to use your imaginations" (Cf.: "No one is asking you to do that.")

c. When defense counsel talks about facts being proved, he repeatedly uses the formulation "proved to you" (the jury); when he talks about evidence that was presented, it was "presented to you." There are twenty-three formulations of this sort; much less often does defense counsel say simply that facts were "proved" or evidence "presented." The prosecutor's argument contains five statements in the form: "[a witness] told you," or "[a witness] testified . . . in front of you," or "we will prove to you"; more frequently she says simply "we have proved," or "the evidence proves," or "there is no question," or "no issue" about certain facts, or "[t]here is no evidence" of facts to support the defense position; or she talks about "what the evidence shows in this case."

d. In the defense argument, the jurors are frequently portrayed as speaking.

— As noted at pages 95-96 above, defense counsel consistently uses "say" to mean "think" when he describes the mental operations of the jury.¹²¹

119. It contains one sentence that portrays the prosecutor as "telling" the jury something. It also contains one sentence saying that the prosecutor "will argue" something and one sentence saying that defense counsel "will argue" something.

120. It contains three sentences that portray defense counsel as speaking to the jury. The prosecutor says once that she "suggests" some point to the jury; she says six times, "I submit to you." Defense counsel never uses these nontalky formulations.

121. Only once in her argument does the prosecutor use the verb "say" with jurors

- The jurors' commitments on voir dire are described as having been spoken to counsel:

"you all *tell* me," or "you all *said* or *said to me*."¹²²

- Defense counsel sometimes puts specific words in the jury's mouth.

"You all said [on voir dire] basically that you would not say at this point, 'Well, wait a second there were two people in that car, . . . [the defendant] and . . . [the victim]. . . . She obviously can't speak. *Let him get up and tell us what really occurred. . . .*'" * "[Y]ou tell us[,] I can hear you all saying, you tell us *how a woman is shot in the chest if it's not intentional murder? If there was no intent to kill, what's the scenario[,] how did it happen?*"

- Or defense counsel poses questions as though the jury were asking them of him and then proceeds to answer them.

"Is he capable of scaring someone with a gun? Yes. Is he a bully? Absolutely[,] and most bullies [sic] are just that, they're bullies [sic]."

as the subject: "Now you may say[,] where is the evidence that he pointed the gun" (On another occasion the verb "say" is associated with a transcendent reasoner who is held out as a model to the jury, but the verb here is not in the active mode: "Does it make sense to say, 'Oh, well[,] maybe he just meant to hurt her.' . . . He wasn't twenty feet away on a sidewalk firing aimlessly at someone, 'Well, maybe you can say he didn't mean to kill the person'")

122. Also:

"[Y]ou *promised* him [the defendant] and you *promised* the Judge that you understood that the law does not give you a right to demand or ask that of David Jones. You cannot ask him to speak"

"I'm going to just hold you to the *promise* that you made to not make me prove to you in any way how it may have occurred"

The prosecutor never uses the words "say," "tell" or "promise" to describe the jurors' commitments on voir dire. When she refers to those commitments, her formulation is "you all *agreed* that we don't have to prove a motive." (Defense counsel once uses the same formulation: "The law is specific that you have *agreed* to uphold.") The prosecutor's only uses of "say" in connection with the jury are collected in note 121 *supra*. She uses the verb "tell" with jurors as the subject only once: "[O]ne of the ways that you can *tell* what somebody means to do is what they eventually do." She never uses the verb "promise" with jurors as the subject.

- The defense argument portrays the jurors as wanting to ask questions; defense counsel reminds them that there are some questions that they are not allowed to ask¹²³ but he encourages others.¹²⁴ He describes the jurors as continuing the dialogue in the jury room.¹²⁵

5. By contrast, the prosecutor's argument employs several related strategies:

The jury is discouraged from taking any active role in the construction of the facts on which its verdict will rest. The facts are something that happened four years ago. The jury's job is to discern those facts by observing their fossils in the evidence. (Concededly, the prosecution bears the burden of proof of the defendant's intent and must prove it by circumstantial evidence. But fossils are the most powerful species of circumstantial evidence.)

Resolving the issue of the defendant's intent is simply a matter of perceiving a reality which certain facts inherently possess and which their fossilized remains in the evidence therefore "prove." Reality does not need to be created. It is already out there, in events.¹²⁶ It is knowable.

123. See the first passage quoted in note 122 *supra*.

124. "But if ther [sic] is no adequate motive . . . , doesn't that make you *question* whether or not . . . [the defendant] had the intent to kill?"

The prosecutor never uses the verbs "ask," "demand" or "question" with jurors as the subject. When she does use the word "question" in connection with the jury, it is as a noun: "the only *question* for you is what did he intend" This usage comes in a passage that has established "question" as synonymous with "issue"; the two words are used interchangeably and imply no active inquiry by the jury. See also the set of indented passages in the middle of page 81 *supra*.

125. See the first indented passage quoted on page 92 *supra*, in which defense counsel says that he will rely on those jurors who value the rule of law and other basic concepts to "talk to" the other members of the jury and "explain to them" why these concepts are so important. The prosecutor never uses the verbs "talk" or "explain" with jurors as the subject.

126. The prosecutor repeatedly uses the phrases "in fact" and "the fact that." Defense counsel never uses the phrase "in fact" and he only once uses the phrase "the fact that":

"I cross-examined her about the fact that she didn't tell the police officers or at least wasn't in the written statement her allegation that Mary had stated, 'No, Dave, don't.' Maybe she did tell the police, maybe she didn't. Maybe that was there, it appears that it was."

Defense counsel's frequent uses of "maybe," "may be," "apparently," and "seems" occur most often when he is discussing the killing and the events and mental states surrounding it. By contrast, the prosecutor's single use of any of these epistemological hedges in connection with the killing scene is a parody of the defense argument: "Does

Indeed, having heard the prosecution's evidence and being capable of using common sense, the jury already "knows" the relevant reality.¹²⁷

it make sense to say, 'Oh, well[,] maybe he just meant to hurt her.'" The prosecutor's other uses of such hedges include, for example: "[t]here are certain things which are not being disputed in this case as I'm sure you just heard and as you probably perceived during the . . . trial," and "[t]here is no issue apparently about the credibility of the witnesses."

127. *E.g.*:

"We all know that [*i.e.*, that there is no question of the defendant's identity as the killer]."

"You know they [the prosecution witnesses] were telling the truth. You know they didn't tailor their testimony."

"You know that . . . they were there with . . . [the victim]. You know that . . . [the victim] had some argument with the defendant You know that they were both in a position to see what they saw. There is no question about whether they might have been mistaken about[,] you know, seeing the defendant with the gun. . . ."

"I mean you know they saw what they saw. . . ."

"You don't have to decide who did that [killed the victim]. We know it was . . . the defendant."

"You can't put yourself in the defendant's mind. But whatever it was[,] the insult . . . or however the defendant perceived that, you know that he was angry and you know he was insulted"

"No, there is no medical or scientific evidence . . . which proves conclusively how far the defendant was from . . . [the victim] when he fired the shot. But you know it was within the confines of a small car. You know must [sic] have been from a few feet away and you also know that in order to hit her in the chest he must have aimed to a certain extent."

"You recall how . . . [the victim] and the defendant were seated"

In all, the prosecutor's argument contains 23 uses of the verb *know* with the jury as its subject. (This contrasts with four such uses in the defense argument, as noted *infra*.) Four of the prosecutor's uses are filled pauses. Four are statements of generic truths. (*E.g.*, "I mean[,] that only happens in the movies. Doesn't happen in real life. I'm sure you all know that.") Fifteen are statements of historical fact. (*E.g.*, "You know and he [the defendant] knows that he had just finished shooting a person in the chest in front of a whole lot of people and he just didn't care, he just walked away.")

For his part, defense counsel never speaks of the events surrounding the shooting as the subject of knowledge. His only uses of the verb "know" in connection with those events are: "Well, who knows?" * "We don't know." * "I don't know." * "I don't know," and four quotations of the testimony of prosecution witnesses that they "don't know" something. He also quotes the witnesses as saying that they couldn't remember, didn't recall, and didn't see aspects of the events, even though he says several times that he is not contesting their credibility. Indeed, he phrases a general concession of their credibility in terms that turn it into a pronouncement of the ultimate unknowability of facts:

"I want to talk to you all about what I see as really a non-issue in this case. And that non-issue is the credibility of Susan Stone and Nancy Gregg."

Defense counsel is perversely trying to distract the jury from that reality—to make it abandon the “search for the truth”—by luring it into an imaginative dialogue which is “an excuse to find doubts.” This kind of imaginative exercise is synonymous with “hypothesis” and “speculation”; the law forbids the jury to hypothesize or speculate. Thus, defense counsel and the jury really have nothing to talk to one another about. Lawyers’ arguments are not evidence and the defense presented no evidence. The prosecutor, who did present evidence, can talk *to* the jury authoritatively about “what the evidence shows in this case” and “how the evidence proves the defendant’s guilt beyond a reasonable doubt.”

6. The prosecutor explicitly criticizes defense counsel for resting his argument on a scenario that “only happens in the movies. Doesn’t happen in real life.” This is a two-pronged attack, condemning both the defense attorney’s tale and the tale teller.¹²⁸ The prosecutor dismisses defense

My position is that they both testified *as best as they could*. . . . That indeed they were both recounting as they described, *as best they could, as best they recalled* the death of a close friend.

“ . . . We didn’t know if they would come in and exaggerate or add details or consciously lie. Well *it appears* that they didn’t.

“ . . . [T]hus she [Nancy] spoke the truth *as best she could* to all of us.”

And later:

“And is it an exact match *the story, not the story, the rendition* of what occurred? Of course not, it happened four years ago.

“If it was an exact match between the two versions then certainly people would believe that there was fabrication or that they had gotten together. Is it exactly what occurred? *I guess not. I guess memory has it’s [sic] failures after four years, but it sounds pretty close.*

“Is there a difference between them in who hears what? Yes. Is there a difference in the sequence, the specific sequence of events? Yeah. There is something different about . . . [facts recited by one witness and the other]. So what. There is a problem, though. Does anyone in that testimony actually tell you how specifically the shooting occurred?”

All told, defense counsel uses the verb *know* with the jury as its subject only four times. Two of these uses are filled pauses; the object of the others is logical or generic truth rather than historical fact:

“You *know* you cannot go [*i.e.*, reason] backwards.”

“You *know* you cannot assume that we intend all the consequences of our actions.”

128. As Erving Goffman has noted:

“Fabrications . . . are subject to a special kind of discrediting. When the . . . party [whom the fabrication is designed to take in] discovers what is up, what was real for him a moment ago is now seen as a deception and is totally destroyed. It collapses. Here ‘real,’ as James suggested, consists of that understanding of what is going on that drives out, that ‘dominates,’ all other understandings.”

counsel's scenario of an intentional killing—a killer with a motive, a carefully aimed weapon, a statement manifesting intent to kill—as the kind of story that could only come out of the Hollywood dream factory; she simultaneously disparages the defense attorney for trying to pass off this celluloid fantasy as legitimate argument.

The prosecutor is right that defense counsel has tapped into a story line immortalized in movies and television shows: the cold-blooded killer who kills for some identifiable motive (hatred, revenge, to eliminate a witness to a previous crime), taking careful aim before firing and preceding or punctuating the killing with some dramatic remark.¹²⁹ The effectiveness of devices like the rhetorical questions with which defense counsel develops his theme of the cold-blooded murderer commonly depends upon predicting accurately and playing to the stereotypical assumptions of one's audience.¹³⁰ Motion pictures and other sources of popular culture (television, best-selling novels, and so forth) offer a window into the stock scripts that are familiar to our culture.¹³¹ By taking

ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* 84-85 (1974). And the fabricator as well as the fabrication is attained:

"The discrediting that occurs may retrospectively and prospectively undermine a linked series of prior occasions and anticipated ones. . . . Indeed, in the United States, the so-called Stalin Trials tend to be seen as a collective whole, a use of a nation's basic legal institutions for the sole purpose of staging a show, a systematic translation of a judicial process into a political display, and this whole is read as discrediting evidence regarding an entire political system."

Id. at 121.

129. *E.g.*, *PATRIOT GAMES* (Paramount 1992); *CAPE FEAR* (Universal 1991 & 1962); *RICOCET* (HBO 1991); *SOMEONE TO WATCH OVER ME* (Columbia 1987).

130. *See, e.g.*, CORBETT, *op. cit. supra* note 17, at 63 (to use enthymemes, an orator "who seeks to persuade a select audience must apprise himself of the generally held opinions of that group"); James C. Raymond, *Enthymemes, Examples, and Rhetorical Method*, in *ESSAYS ON CLASSICAL RHETORIC AND MODERN DISCOURSE* 140, 142 (Robert J. Connors, Lisa S. Ede, & Andrea A. Lunsford eds., 1984) ("[T]he major premise in an ethymeme may be implied rather than expressed because the audience is presumed to know it . . . [and it] may be unproved (or even unprovable) if the audience believes in it."). Although this observation is usually made about enthymemes, it is equally true of rhetorical questions. *See* note 132 *infra*.

131. *See, e.g.*, JOSEPH W. REED, *AMERICAN SCENARIOS: THE USES OF FILM GENRE* 5-6 (1989) ("[H]ow we see ourselves, what we think of us, what we think our world is like, how we think it works, all come from the movies (and now from television as well)."); JAMES W. CAREY, *Taking Culture Seriously*, in *MEDIA, MYTHS, AND NARRATIVES: TELEVISION AND THE PRESS* 8, 14 (1988) ("[T]he popular arts . . . [are], by definition, close to the hard surfaces of life . . . and a relatively direct apprehension of the world of their makers and users."); *see also* note 135 *infra*. For further discussion of stock scripts and their workings, *see* note 146 *infra*.

these stock scripts into account, an advocate can prompt his or her audience to supply the "right" answers to the syllogisms that s/he sets up.¹³²

Thus, it is not surprising that the prosecutor, after faulting defense counsel for relying on a movie script, taps into two such scripts herself. First, she counters defense counsel's arguments about the absence of any proof of motive by drawing on the story, commonly featured in news reports as well as motion pictures, of the killer so disdainful of human life that s/he will kill for the slightest provocation or imagined slight.¹³³ "What we have proved," the prosecutor says, "through the insulting conversation that was overheard by Nancy and Susan, . . . is a motive[; it] may not be a motive that you would act on, may not be a motive that a reasonable person would act on, but it was a motive that the defendant acted on." And again:

"[W]hether you understand the nature of that insult or not really isn't at issue here. But there is no question that the defendant felt insulted and I'm sure you all know that people have been killed for less."

Second, the prosecutor alludes to the oft-told story of the "mad dog killer,"¹³⁴ portraying the defendant as having "killed a person he intended to kill in front of people to show that he was a big, you know, he was a big man."

Like her attack on defense counsel's tale, the prosecutor's attack on the teller evokes stock scripts. By characterizing defense counsel's arguments as not just wrong but Hollywood hype, the prosecutor

132. As rhetoricians have explained, the deductive logic of an enthymeme must draw upon "a body of accepted opinions . . . [or] 'truths' which have never really been demonstrated but in which the people have faith, almost to the point of accepting them as self-evident." CORBETT, *op. cit. supra* note 17, at 63; *see also* note 130 *supra*. By the same token, a rhetorical question cannot serve its intended function—of "inducing the audience to make the appropriate response," *id.* at 445—unless it rests upon a logic and a way of thinking about the world that the audience will find compelling. *Cf.* RICHARD RIEKE & RANDALL K. STUTMAN, *COMMUNICATION IN LEGAL ADVOCACY* 211-12 (1990) (describing empirical studies that indicate that rhetorical questions are more effective than affirmative statements when used to present a "persuasive message" but that the opposite may be true when rhetorical questions are used to present "weak" messages).

133. *E.g.*, James C. McKinley, Jr., *Queens Youth Fatally Shot in Fight over Moped: Are Youngsters in High Crime Areas Losing Respect for Life?*, N.Y. TIMES, Aug. 3, 1990, at B1; *BOYZ 'N THE HOOD* (Columbia 1991); *COLORS* (Orion 1988).

134. *E.g.*, *SCARFACE* (Universal 1983 & Howard Hughes 1932); *THE PUBLIC ENEMY* (Warner Brothers 1931). *See generally* CARLOS CLARENS, *CRIME MOVIES: FROM GRIFFITH TO THE GODFATHER AND BEYOND* (1980).

implicitly asks the jury to view her opponent through the stock script of the amoral, opportunistic defense attorney who will stop at nothing to "get the client off."¹³⁵ In this, she acts upon the insight of the classical rhetoricians that a speaker's credibility depends upon the audience viewing him or her as a person of "good will" and "good character."¹³⁶ Once defense counsel has been cast in the role of the con artist, the jury is more likely to view his arguments skeptically; what might otherwise have seemed deft argumentation may be transformed into unfair manipulation.¹³⁷

The most effective way for defense counsel to avoid being cast in this role is to persuade the jury to apply a different, more favorable stock

135. E.g., *TRUE BELIEVER* (Columbia 1989); *ANATOMY OF A MURDER* (Columbia 1959); *THE MOUTHPIECE* (Warner Brothers 1932); see also Anthony Chase, *Lawyers and Popular Culture: A Review of Mass Media Portrayals of American Attorneys*, 1986 AMER. B. FOUND. RES. J. 281, 287 (describing the "characterization [in some films and television shows] of the defense attorney as [someone] who dangerously subjects the community to grave risk (by getting thugs and crazies 'off')"). In recent years, legal commentators have begun to pay closer attention to portrayals of lawyers in movies, television shows, best sellers, and other sources of popular culture, see, e.g., *id.*; Lawrence Friedman, *Law, Lawyers and Popular Culture*, 98 YALE L.J. 1579 (1989); Stephen Gillers, *Taking L.A. Law More Seriously*, 98 YALE L.J. 1607 (1989); Stewart Macaulay, *Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports*, 21 LAW & SOC'Y REV. 185 (1987); Richard A. Posner, *The Depiction of Law in The Bonfire of the Vanities*, 98 YALE L.J. 1653 (1989); Steven D. Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police as Television Heroes*, 42 U. MIAMI L. REV. 229 (1987), as well as in literature, see generally Robert Weisberg, *The Law Literature Enterprise*, 1 YALE J. L. & HUMAN. 1 (1988). Commentators disagree as to what such portrayals of lawyers can teach us. While some maintain that popular depictions of lawyers and the legal system influence public perceptions and attitudes, see e.g., Gillers, *supra*, at 1622; Macaulay, *supra*, at 185-86; Stark, *supra*, at 230, others suggest that they merely "reflect rather than . . . influence the popular understanding," Posner, *supra*, at 1660; see also Friedman, *supra*, at 1598. Regardless of which view is correct—or whether literary and popular depictions of lawyers and the legal system both reflect and affect cultural attitudes—such depictions are valuable resources for the practicing lawyer and for those who study and teach the art of lawyering.

136. E.g., ARISTOTLE, *op. cit. supra* note 15, bk. 2, ch. 1, at 91-92 (explaining that speakers must "give the right impression of . . . [themselves and] evince a certain character," for otherwise they will be regarded as "untrustworthy in what they say or advise"); I CICERO, *op. cit. supra* note 15, bk. II, ch. XLIII, at 329 (advising speakers to employ "particular types of thought and diction . . . [and] delivery . . . [that will make them] appear upright, well-bred and virtuous men"); see also note 15 *supra* and accompanying text.

137. See GOFFMAN, *op. cit. supra* note 128, at 121:

"When a mark tumbles to what has been happening in the Big Con and sees things for what they are, he sees that a whole sequence of . . . [actions by the Con artist] involve a concerted fabrication."

script.¹³⁸ There are screen images that portray defense lawyers in a better light. The earliest and most enduring image is the one popularized by Erle Stanley Gardner's "Perry Mason": the crusader who fights nobly on behalf of an innocent client (or at least a client whom s/he reasonably believes to be innocent).¹³⁹ Also admirable is the image of the defender as paladin: the defense attorney who, although a "hired gun," achieves a higher nobility and morality by performing his or her professional duty in a scrupulously conscientious manner.¹⁴⁰

Often, a defense attorney's task is to navigate successfully among these stock scripts, encouraging the jury to think in terms of either the Perry Mason or the paladin script and avoiding the image of the con artist.

138. See GOFFMAN, *op. cit. supra* note 128, at 159:

"[B]ecause a keying [that gives rise to a particular interpretation of an activity] is already a mock-up of untransformed activity . . . , the *retransformation* of this result into a rekeying . . . would seem to require less work than that entailed in the original transformation. Whatever it is that makes untransformed activity vulnerable to transformation makes transformations even more vulnerable to retransformations"

139. The character of "Perry Mason" is of course best known because of the popular T.V. series (which aired in first-run episodes from 1957 to 1966) and more recent television movies. The character had a loyal following even before the T.V. series, as a result of Gardner's "Perry Mason" books (the first of which was published in 1933) and a radio series that ran from 1943 to 1955. See BRIAN KELLEHER & DIANA MERRILL, *THE PERRY MASON TV SHOW BOOK* (1987). Other portrayals of the defender as noble crusader can be found in movies such as *SUSPECT* (Tri-Star 1987), *LEGAL EAGLES* (Universal 1986), *TO KILL A MOCKINGBIRD* (Universal 1962), and *WITNESS FOR THE PROSECUTION* (United Artists 1957), and television series such as *L.A. Law* (NBC 1986-present), *Judd for the Defense* (ABC 1967-1969), and *The Defenders* (CBS 1961-1965); see also Chase, note 135 *supra*, at 282-83. For our present purposes, it matters little whether the client is actually innocent (as in the classic Perry Mason story) or is someone whom the lawyer reasonably believed to be innocent (as in *Witness for the Prosecution*); under either scenario, the defense lawyer emerges as a person of noble character, rightfully concerned with protecting the innocent. Of course, the former script has additional implications for a juror's willingness to believe in the defendant's innocence; but as we point out in note 142 *infra*, *Jones* was not a case in which defense counsel tried or could have tried to depict his client as innocent in the Perry Mason sense.

140. E.g., *PRESUMED INNOCENT* (Warner Brothers 1990); *BREAKER MORANT* (South Australian Film Corp. 1980); *THE CAINE MUTINY* (Columbia 1954); *L.A. Law* (NBC 1986-present); see also Chase, note 135 *supra*, at 282-83. For typical portrayals of the paladin in his or her usual incarnation as mercenary warrior, see, e.g., *THE SEVEN SAMURAI* (Toho 1954); *THE MAGNIFICENT SEVEN* (United Artists 1960); *STAR WARS* (20th Century Fox 1977); and the television series *Have Gun, Will Travel* (CBS 1957-1963); see also FRANK MCCONNELL, *STORYTELLING AND MYTHMAKING: IMAGES FROM FILM AND LITERATURE* 142-43 (1979) (discussing the archetype of the "gunfighter . . . [who] tries to sustain the personal ethics of his professional knight-errantry").

In *Jones*, several aspects of the defense argument which we have already mentioned have the effect of placing defense counsel squarely within the stock script of the paladin. First, counsel uses the Aristotelian Proem to establish himself in the jurors' eyes as a professional who is committed to follow the rule of law. Second, counsel's heavy reliance on rhetorical questions helps to refute the negative con-artist script. Con artists are notorious for their manipulative use of speech ("fast-talk," "doubletalk," "sweettalk"). By asking questions instead of making assertions, counsel fosters the impression that he wants the jurors to think through the issues on their own and to use their independent judgment. Third, by repeatedly conceding that his client's conduct—even under the defense theory of the facts—was reprehensible, defense counsel demonstrates that he is neither a bleeding-heart apologist for his client's misdeeds nor a trickster trying to conceal unpalatable facts with smoke and mirrors. ("Look, in no way am I telling you to ignore the result. In no way am I telling you to ignore the fact that she was shot in the chest where her heart was.") He is able, as a result, to cast himself in the role of legal technician, required by the law to focus on a very narrow question of mens rea and performing that task in an appropriately professional manner. Fourth, counsel takes pains to read directly and extensively from the trial transcript of the testimony of the prosecution witnesses. Six or seven minutes of his argument is devoted to straightforward reading. How, then, can it be doubted that his facts and he are straightforward?¹⁴¹ Finally, defense counsel presents the myth of the Hero performatively, implicitly encouraging the jurors to view themselves in that role rather than explicitly exhorting them to play the role. Counsel thereby limits the risk that the jurors will perceive him (or that the prosecutor will be able to portray him) as trying to manipulate the jury.

In addition to using the stock script of the paladin defensively to guard against a prosecutorial attack, counsel uses it affirmatively. The same story line that enables him to assume the *persona* of the paladin also

141. Like other strategies, this one serves more than one function. Because the witnesses were prevented by the personal knowledge rule from testifying to anything explicitly relating to the defendant's mental state, counsel's direct quotation of their testimonies as the means for presenting "the evidence that I think exists in this case" enables him to describe the evidence without a single word referring to mentation. His argument before and after this review of the evidence is full of words about intent, *see* pages 73-75 *supra* and accompanying notes; yet not one word about intent appears from beginning to end of his description of the testimony. It is as though he was saying: *The prosecutor and I will have a lot to say to you about intent, and you will have to concern yourselves with intent as the central issue in this trial, but the evidence shows absolutely nothing on the subject of the defendant's intent.* Like other powerful messages conveyed by the structure of counsel's argument, this one remains unstated and therefore invulnerable to the raking-over it would get if stated.

enables him to cast the jurors in the role of the Quest Hero. Disciplined obedience to duty is the soul of it.¹⁴²

V. CONCLUDING OBSERVATIONS

Please recall again the factual issue framed for the jury's decision by the law of New York in the *Jones* trial: whether David Jones intended to kill Mary Smith. Recall also the evidence and the posture of the parties regarding the evidence. All of the testimony indicated that Jones had fired one shot from a handgun during a loud argument with Smith in the back seat of a parked car; this shot entered Smith's chest, pierced her heart, and killed her; Jones fled. Defense counsel did not dispute that these events were proved; the prosecutor did not assert that any additional relevant events were shown.

In this state of the record, the prosecutor could be expected to argue that people do not shoot others in the heart at close range unless they intend to kill them. She so argued. Defense counsel could be expected to argue that the possibility of other unexcluded but evidentially unidentified explanations for the shooting left a reasonable doubt. He so argued. At the logical level, these two arguments were pretty much everything the lawyers said in closing. Logically, there was little more for them to say.

But their closings also drew upon resources other than logic. Notwithstanding their complete agreement about the events before, during, and after the shooting of Mary Smith, the lawyers told completely different stories, with completely different plots, completely different themes, completely different narrative structures. They evoked different stock scripts. They used different metaphors and different grammars. Despite their acceptance of the same legal and logical canons—or perhaps because of it—they created different worlds that gave those canons different meanings.

142. By casting the jury in the role of paladin, counsel also averts the risk that the jury might apply a very different (and, from his perspective, problematic) stock script. One of the few current stock scripts for *jurors* is that of *TWELVE ANGRY MEN* (United Artists 1957) and *SUSPECT* (Tri-Star 1987): the crusading juror, fighting to exonerate a falsely accused defendant. (There are not many alternative images because courtroom dramas usually treat jurors as ciphers, moving them off-stage at the very moment when they would naturally have a speaking part—during the jury deliberations. This is also largely true of literature, although there are a few notable exceptions. See Emily Stipes Watts, *From American Literature*, in *THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW* 161 (Rita James Simon ed., 1975).) In a case like *Jones*, where the defendant obviously was not “innocent,” defense counsel could not afford to allow the jurors to approach the case with a crusader mentality. Jones's only hope lay in the jurors curbing their zeal and dispassionately applying the reasonable doubt principle. Thus, counsel had to persuade the jurors to see themselves in the role of paladin rather than crusading juror.

The recognition of this phenomenon raises interesting questions. One wonders, most immediately and practically, whether the creation of these different worlds in closing arguments has any effect upon the jury's reactions to a case. If so, what effects, and under what conditions? These are subjects that would lend themselves to study through empirical research techniques like those developed to examine other aspects of jurors' thinking;¹⁴³ but, so far as we are aware, little such study has yet been done.¹⁴⁴

143. These include interviews of actual jurors in the tradition pioneered by Harry Kalven and Hans Zeisel in the Chicago Jury Study, *see, e.g.*, HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966); William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1 (1987-1988); John M. Conley & William M. O'Barr, *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L.J. 1375, and trial simulations, *see, e.g.*, INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING (Reid Hastie ed., 1993); REID HASTIE, STEVEN D. PENROD, & NANCY PENNINGTON, INSIDE THE JURY (1983); Claudia L. Cowan, William C. Thompson, & Phoebe C. Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984); William C. Thompson, Claudia L. Cowan, Phoebe C. Ellsworth, & Joan C. Harrington, *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95 (1984); Neil Vidmar, *Effects of Decision Alternatives on the Verdicts and Social Perceptions of Simulated Jurors*, 22 J. PERSONALITY & SOC. PSYCHOL. 211 (1972). Hans Zeisel, the dean of all jury studies, was still developing innovative approaches to both of these techniques at the time of his death in 1992; he reported (in personal communications) finding judges increasingly willing to permit the interviewing of actual trial jurors; and he noted that the expanding practice of videotaping "real" trials has created new possibilities for studying both "real" jurors' reactions to a case and the reactions of experimental jurors to realistic and controlled trial simulations. If we follow his ideas along this line—for which, among many other things, we are deeply indebted to him—we can project experimental designs in which substantial numbers of simulated jurors attend trials that are identical in all respects other than the closing arguments (using a single videotape of the pre-argument trial proceedings and the judge's instructions, together with a common voir dire for the experimental subjects), while the closing arguments are systematically varied to isolate the aspects that one wants to study.

144. Although there have been a few efforts to study the effects of lawyers' arguments on jurors, *see, e.g.*, Michael G. Parkinson, *Verbal Behavior and Courtroom Success*, 30 COMM. EDUC. 22 (1981), very little is yet known about the subject, *see, e.g.*, RIEKE & STUTMAN, *op. cit. supra* note 132, at 203 (noting that empirical "research findings in the area [of closing arguments] are thin"); RONALD J. MATLON, *OPENING STATEMENTS AND CLOSING ARGUMENTS: A RESEARCH REVIEW* 65-68 (Oct. 10-13, 1991) (paper presented at the convention of the American Society of Trial Consultants, San Francisco, CA) (on file with the *New York Law School Law Review*) (concluding that empirical research on opening statements and closing arguments has been "scanty," *id.* at 67, and that "much remains to be done," *id.* at 3); WALTER F. ABBOTT, *FLORA*

A second level of questions has to do with the nature of the processes through which the lawyer's closing arguments might affect the jurors' reactions. If the kinds of stories, tropes, and linguistic devices that we have found exemplified in the *Jones* arguments influence jurors' cognition, *how* does this happen? A considerable body of theoretical work from a number of disciplines is potentially relevant here. The ways in which narratives and myths shape people's interpretations of experience have been the subject of varied, richly polyphonous theorizing.¹⁴⁵ So have the

HALL, & ELIZABETH LINVILLE, JURY RESEARCH: A REVIEW AND BIBLIOGRAPHY 180-201 (1993). The most ambitious and thoughtful analysis of lawyer's courtroom storytelling that we have found focuses upon the presentation of evidence and contains nothing about jurors' reactions to lawyers' arguments. See BENNETT & FELDMAN, *op. cit. supra* note 4. See also JACKSON, *op. cit. supra* note 5, at 61-88 (discussing Bennett's & Feldman's theories of courtroom storytelling).

145. Louis Mink observes that "narrative is a primary cognitive instrument—an instrument rivaled, in fact, only by theory and by metaphor as irreducible ways of making the flux of experience comprehensible." Louis Mink, *Narrative Form as a Cognitive Instrument*, in THE WRITING OF HISTORY: LITERARY FORM AND HISTORICAL UNDERSTANDING 129, 131 (Robert H. Canary & Henry Kozicki eds., 1978). He notes that "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." *Id.* at 133. Jerome Bruner develops both of these points with characteristic penetration and learning in JEROME BRUNER, ACTUAL MINDS, POSSIBLE WORLDS (1986) and JEROME BRUNER, ACTS OF MEANING (1990). Bruner documents the extent to which young children are literally swaddled in narratives told by their caretakers. See *id.* at 83-84. He suggests that "[n]arrative structure is . . . inherent in the praxis of social interaction before it achieves linguistic expression . . . [and that] it is a 'push' to construct narrative that determines the order of priority in which grammatical forms are mastered by the young child." *Id.* at 77; see also *id.* at 68-80, 90. "[A] protolinguistic grasp of folk psychology is well in place as a feature of *praxis* before the child is able to express or comprehend the same matters by language." *Id.* at 74; see also *id.* at 79, 89-94. By "folk psychology," Bruner refers to "a system by which people organize their experience in, knowledge about, and transactions with the social world." *Id.* at 35. "[I]ts organizing principle is narrative rather than conceptual." *Id.* Bruner speaks with particular pertinence to our present subject when he theorizes that, "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 . . ." *Id.* at 47; see also *id.* at 39-40, 67, 81-86, 95-97. "The function of the story is to find an intentional state that mitigates or at least makes comprehensible a deviation from a canonical cultural pattern." *Id.* at 49-50. Cf. Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making*, in HASTIE, *op. cit. supra* note 143, at 192.

Bruner's ideas are paralleled by those of Victor Turner, who sees the "social drama" as "the social ground of many types of 'narrative.'" Turner, *supra* note 111, at

141. The social drama is "a spontaneous unit of social process and a fact of everyone's experience in every human society." *Id.* at 145; *see also id.* at 154, 163-64. It has "four phases[:] . . . breach, crisis, redress, and *either* reintegration *or* recognition of schism." *Id.* at 145. The social drama grounds not only narrative but also ritual and the elaborations of ritual that constitute a culture's ceremonies (including theater and religion) and its redressive or reconciliative processes (including adjudication). *See id.* at 146-47, 151-54; *see also* VICTOR TURNER, *DRAMAS, FIELDS, AND METAPHORS: SYMBOLIC ACTION IN HUMAN SOCIETY* (1974); VICTOR TURNER, *FROM RITUAL TO THEATRE: THE HUMAN SERIOUSNESS OF PLAY* 9-15, 24-30, 61-87, 106-12 (1982). Turner thus deepens and broadens Malinowski's insights into primitive myth,

"which is not an explanation in satisfaction of a scientific interest, but a narrative resurrection of a primeval reality, told in satisfaction of deep religious wants, moral cravings, social submissions, assertions, even practical requirements. Myth fulfills in primitive culture an indispensable function: it expresses, enhances and codifies belief; it safeguards and enforces morality; it vouches for the efficiency of ritual and contains practical rules for the guidance of man."

BRONISLAW MALINOWSKI, *Myth in Primitive Psychology*, in *MAGIC, SCIENCE AND RELIGION, AND OTHER ESSAYS* 101 (Doubleday Anchor 1955).

The connectedness of myth and language is a central thesis in the work of Ernst Cassirer. *See* ERNST CASSIRER, *THE PHILOSOPHY OF SYMBOLIC FORMS* (Ralph Manheim trans., 1955); ERNST CASSIRER, *LANGUAGE AND MYTH* (Susanne K. Langer trans., 1946). Cassirer argued that

"[w]hat holds these two kinds of conception, the linguistic and the mythical, together in one category, and opposes both of them to the form of logical thought, is the fact that they both seem to reveal the same sort of intellectual apprehension, which runs counter to that of our theoretical thought processes. The aim of theoretical thinking . . . is primarily to deliver the contents of sensory or intuitive experience from the isolation in which they originally occur. . . . Mythical thinking . . . comes to rest in the immediate experience; the sensible present is so great that everything else dwindles before it."

Id. at 31-32; *see also id.* at 57-58, 88. Mircea Eliade takes a narrower view of myth but also emphasizes the immediacy of mythical experience. In archaic societies, he writes, "one 'lives' the myth, in the sense that one is seized by the sacred, exalting power of the events recollected or reenacted.

. . . [O]ne ceases to exist in the everyday world and enters a transfigured, aural world impregnated with the Supernaturals' presence. What is involved is not a commemoration of mythical events but a reiteration of them."

MIRCEA ELIADE, *MYTH AND REALITY* 19 (Willard R. Trask trans., 1963). Through this reiteration, human beings understand what they are and how they came to be that way. "Myths . . . narrate not only the origin of the World . . . but also all the primordial events in consequence of which man became what he is today—mortal, sexed, organized in a society, obliged to work in order to live, and working in accordance with certain rules." *Id.* at 11. *See also* Mircea Eliade, *Myths and Mythical Thought*, in ALEXANDER ELIOT, *THE UNIVERSAL MYTHS* 14, 28 (Meridian 1990), describing an Osage postnatal ritual whose function is to "validate . . . [the newborn child's] existence by announcing

ways in which stock scripts and other prototypes organize thinking.¹⁴⁶ So

that it conforms with the mythical paradigms."

"Myth assures man that what he is about to do *has already been done*, in other words, it helps him to overcome doubts as to the result of his undertaking. There is no reason to hesitate before setting out on a sea voyage, because the mythical Hero has already made it in a fabulous Time. All that is needed is to follow his example."

ELIADE, *MYTH AND REALITY* *op. cit. supra*, at 141. Although Eliade insists upon the difference between the experience of life in archaic societies and in modern societies pervaded by "desacralization," see MIRCEA ELIADE, *THE SACRED AND THE PROFANE: THE NATURE OF RELIGION* 13 (Willard R. Trask trans., 1959), he acknowledges that "[s]ome forms of 'mythical behavior' still survive in our day," ELIADE, *MYTH AND REALITY* *op. cit. supra*, at 181; see also MIRCEA ELIADE, *IMAGES AND SYMBOLS* 10-21 (Philip Mairet trans., Princeton Paperback 1991), and he gives as an example the experience of a reader of the detective novel (see ELIADE, *MYTH AND REALITY*, *op. cit. supra*, at 185):

"On the one hand, the reader witnesses the exemplary struggle between Good and Evil, between the Hero (=the Detective) and the criminal (the modern incarnation of the Demon). On the other, through an unconscious process of projection and identification, he takes part in the mystery and the drama and has the feeling that he is personally involved in a paradigmatic—that is, a dangerous, 'heroic'—action."

There is, of course, a broad range of other conceptions of the means through which narratives and myths may "operate in men's minds without their being aware of the fact," 1 CLAUDE LÉVI-STRAUSS, *MYTHOLOGICAL* [THE RAW AND THE COOKED] 12 (John Weightman & Doreen Weightman trans., 1983), from Lévi-Strauss's "constraining structures," *id.* at 10, through Carl Jung's "archetypes," see, e.g., CARL G. JUNG, *Approaching the Unconscious*, in JUNG, *op. cit. supra* note 23, at 56-94, and Joseph Campbell's version of the archetype: the "inherited image," see 1 JOSEPH CAMPBELL, *THE MASKS OF GOD* [PRIMITIVE MYTHOLOGY] 30-49 (Penguin Books 1976), and so forth.

146. In the terminology of Schank and Abelson, a *script* is a stereotyped sequence of events which is familiar to the individual in a culture and guides his or her interpretation of experience. See ROGER C. SCHANK & ROBERT P. ABELSON, *SCRIPTS, PLANS, GOALS, AND UNDERSTANDING: AN INQUIRY INTO HUMAN KNOWLEDGE STRUCTURES* (1977); Roger C. Schank, *Language and Memory*, 4 *COGNITIVE SCI.* 243 (1980). A range of cognate concepts—*prototypes, frames, schema, cultural models*, etc.—are elaborated in the essays collected in HOLLAND & QUINN, *op. cit. supra* note 63, and are surveyed in the book's introductory chapter, see Naomi Quinn & Dorothy Holland, *Culture and Cognition*, in *id.* at 3, 20:

"The papers in this volume illustrate how our knowledge is organized in culturally standardized and hence familiar event sequences that tell, for example, how marriage goes . . . ; or how anger is engendered, experienced, and expressed . . . ; or what to expect in a relationship between two young adults of opposite gender . . . ; or that wishes give rise to intentions and intentions to actions These 'stories' include prototypical events, prototypical roles for actors, prototypical entities, and more. They invoke, in effect, whole worlds in which things work, actors perform, and events unfold

in a simplified and wholly expectable manner. These events are chained together by shared assumptions about causality, both physical and psychological, as Abelson's characterization of scripts suggests."

For example, Geoffrey White observes that "[n]arrative comprehension frequently proceeds by using existing knowledge structures to process new information and draw inferences about the social and moral implications of what is said; in other words, to get the point." Geoffrey M. White, *Proverbs and Cultural Models: An American Psychology of Problem Solving*, in HOLLAND & QUINN *op. cit.* *supra* note 63, at 151, 152.

"Proverbs are . . . used to pick out and communicate salient aspects of a social situation in terms of prior knowledge about similar situations. As in the use of metaphor generally, uncertain or ambiguous events can thus be understood and evaluated in terms of existing models of social experience.

...

Proverbs function as effective communicative devices because they set up the listener to draw . . . practical inferences by expressing one or more key propositions embedded in a cultural model with known entailments. By instantiating certain elements of an existing model, other, related propositions are invoked through inference."

Id. at 154-55; *see also id.* at 161-69.

Erving Goffman has suggested that it is not merely the interpretation but what is interpreted that is "shot through with various framings and their various realms." GOFFMAN, *op. cit.* *supra* note 128, at 561.

"[I]n many cases, what the individual does in . . . life, he does in relationship to cultural standards established for the doing and for the social role that is built up out of such doings. . . . The associated lore itself draws from the moral traditions of the community as found in folk tales, characters in novels, advertisements, myth, movie stars and their famous roles, the Bible, and other sources of exemplary representation."

Id. at 562.

Coming at the matter from a semiotic perspective, Roland Barthes made a similar point in several important essays:

"[T]he closed logic which structures a sequence is indissolubly linked to its name: any function which inaugurates a *seduction*, say, prescribes upon its appearance, in the name which it produces, the whole process of seduction that we have learned from all the narratives which have formed in us the language of the narrative."

BARTHES, *op. cit.* *supra* note 21, at 115; *see also* ROLAND BARTHES, *The Sequences of Action*, in THE SEMIOTIC CHALLENGE 136, 140-42 (Richard Howard trans., 1988):

"We must further know how we can constitute these sequences, how we decide that an action belongs to one sequence and not to another. As a matter of fact, this constitution of the sequence is closely linked to its nomination; and, conversely, its analysis is linked to the unfolding of the name which has been found for it: it is because I can spontaneously subsume various actions such as *leaving*, *traveling*, *arriving*, *remaining* under the general name *Journey*, that the sequence assumes consistency and is individualized (sets itself in opposition to other sequences, other names); conversely, it is because a certain practical experience convinces me that under the term *Appointment* is

have the workings of metaphor.¹⁴⁷ And so, lately, have the semiotic codes

arranged ordinarily a series of actions such as *proposing, accepting, honoring* that, this term having been in one way or another suggested to me by the text, I am entitled to observe, specifically, its sequential schema; to release the sequences (from the signifying mass of the text, whose heteroclit character we have mentioned) is to classify actions under a generic name (*Appointment, Journey, Excursion, Murder, etc.*); to analyze these sequences is to unfold this generic name into its component parts. . . .

"[T]o read a narrative is in effect (by the rushing rhythm of reading) to organize it in fragments of structures, it is to tend toward names which 'summarize' more or less the profuse sequence of notations, it is to proceed within oneself, at the very moment when one 'devours' the story, to nominal adjustments, it is constantly to tame the novelty of what one is reading by known names, proceeding from the vast anterior code of reading; it is because in myself, very rapidly, certain indices produce the name *Murder* that my reception of the tale is effectively a *reading*, and not the simple perception of phrases whose linguistic meaning I would understand, but not the narrative meaning"

Cf. MICHAEL RIFFATERRE, *FICTIONAL TRUTH* 3-4 (1990):

"[The indicators of coherent motivation] reflect the . . . prevailing ideology or ideologies that may be mobilized in assessing a situation or individual behavior. These mental frames of reference, however, are not just habits of thought; they constitute potential ministories, ready to unfold when needed and ready for reference when alluded to. The action *having a drink* or just the idea of a drink, in any narrative or indeed any conceptualization, depends on the availability of a verbal sequence: ordering and obtaining the drink . . . [etc.] Parallel to this narrative unit are valorizations with their own ready-made sequences, such as conviviality, including the option of the bartender as conscience-director, versus solitary soaking-up, etc., etc."

Bruner speaks of the processes through which "[t]he illusion . . . [is] created by skillful narrative that . . . a story 'is as it is' and needs no interpretation." Bruner, *supra* note 19, at 9. One of these is what he calls "narrative banalization." That is, we can take a narrative as so socially conventional, so well known, so in keeping with the canon, that we can assign it to some well-rehearsed and virtually automatic interpretive routine." *Id.* "Breaches of the canonical, like the scripts breached, are often highly conventional and are strongly influenced by narrative traditions. Such breaches are readily recognizable as familiar human plights—the betrayed wife, the cuckolded husband, the fleeced innocent, and so on." *Id.* at 12. "[A] story that requires a 'betrayal' as one of its constituent functions can convert an ordinarily mundane event into something that seems compellingly like a betrayal." *Id.* at 13-14.

147. Paul Ricoeur reviews earlier theories and expounds his own in his classic treatise, *RICOEUR, op. cit. supra* note 112. See also SHELDON SACKS, *ON METAPHOR* (1979). A powerful new illumination has been cast on the subject by the works of George Lakoff with Mark Johnson and others. *LAKOFF & JOHNSON, op. cit. supra* note 112; *GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* (1987); *GEORGE LAKOFF & MARK TURNER, MORE THAN COOL REASON: A FIELD GUIDE TO POETIC METAPHOR* (1989). They emphasize that

that, in the telling of a story, create "a grammatical framework engineered to ensure proper interpretation."¹⁴⁸

A third level of questions has to do with the nature of the processes through which the lawyers themselves *produce* the sort of argumentation that we have detected in *Jones*: thickly textured tales in which the lawyer's explicit logical reasoning is backed by the implicit sending of additional messages, strikingly harmonious, mediated by the multiple devices of narration, allusion and linguistic coding. It is hardly plausible to suppose that all of these communicative strategies are employed deliberately, or even deliberately. The defense lawyer in *Jones* may or may not have consciously chosen to structure his argument as a prototypical Hero's Quest; it is much less likely that he consciously chose to use his SPEAKING IS THINKING metaphor; it is almost inconceivable that he consciously chose to use each of implicit focalizations, dialogic speech acts, dependent and independent sentence constructions, verb tenses, and so forth that he put together with such remarkable consistency and mutually reinforcing interplay. As Claude Lévi-Strauss has pointed out, "It is the same with myths as with language: the individual who conscientiously applied phonological and grammatical laws in his speech, supposing he possessed the necessary knowledge and virtuosity to do so, would . . . lose the thread of his ideas almost immediately."¹⁴⁹

So how did he do it? Is the process involved akin to the workings of a computer program: once the lawyer chose the overall message that he

"many aspects of our experience cannot be clearly delineated in terms of the naturally emergent dimensions of our experience. This is typically the case for human emotions, abstract concepts, mental activity, time, work, human institutions, social practices, etc., and even for physical objects that have no inherent boundaries or orientations. Though most of these can be *experienced* directly, none of them can be fully comprehended on their own terms. Instead, we must understand them in terms of other entities and experiences, typically other *kinds* of entities and experiences.

". . . [M]ost of our indirect understanding involves understanding *one kind* of entity or experience in terms of *another kind*—that is, understanding via metaphor."

LAKOFF & JOHNSON, *op. cit. supra* note 112, at 177-178.

148. RIFFATERRE, *op. cit. supra* note 146, at 12.

"Instead of looking for the rules that govern narrative structures," Riffaterre's approach is to "look for the rules that govern their textual actualization and, consequently, those rules that govern the way literary discourse functions as communication. . . . [Those rules] alone can explain how the text guides the reader toward a correct interpretation." RIFFATERRE, *op. cit. supra* note 57, at 158-159; cf. MICHAEL S. TOOLAN, *NARRATIVE: A CRITICAL LINGUISTIC INTRODUCTION* 33-39 (1988).

149. 1 LÉVI-STRAUSS, *op. cit. supra* note 145, at 11.

wanted to send to the jury, all of the subroutines for sending that he had evolved throughout the course of his professional and personal life went "on line" and sent accordingly? Is there something here akin to the wisdom of the Zen masters who, after the most intensive preparation and discipline, are enabled to pass beyond a conscious concentration on technique and achieve the spontaneity of oneness with their art?¹⁵⁰

We do not know the answers to these questions. We are thinking about them, and we hope this article may intrigue others to think about them also and to share their thoughts with us. That has been its primary objective.

Such thinking is work for scholars who are interested in understanding the complicated processes through which trials construct the reality which they are authorized by law to announce. It is also, we think, work for practicing lawyers and for those who educate lawyers for practice. To be sure, we have just said that we doubt any lawyer's ability to consciously mobilize all of the linguistic strategies that we found exemplified in the *Jones* arguments—themselves a small sample of the vast range of linguistic strategies that the lawyers might have used. But this is not to say that conscious attention to the nature of these strategies is impractical.

While perhaps not conscious, many of the strategies would seem to be at least preconscious: they are susceptible to being thought about and thereby modified. Let us close with a single example from the *Jones* trial.

As we have seen, the prosecutor's argument—like defense counsel's—was remarkably self-consistent. There was, however, one quite striking exception. Despite the prosecutor's mobilization of all of the resources of language to portray David Jones's mental state as an activity

150. See EUGEN HERRIGEL, *ZEN IN THE ART OF ARCHERY* 38-41 (R.F.C. Hull trans., Vintage 1989):

"[I]f he is to fit himself self-effacingly into the creative process, the practice of the art must have the way smoothed for it. For if, in his self-immersion, he saw himself faced with a situation into which he could not leap instinctively, he would first have to bring it to consciousness. He would then enter again into all the relationships from which he had detached himself; he would be like one wakened, who considers his program for the day, but not like an Awakened One who lives and works in the primordial state.

" . . . [This is] why the technically learnable part of . . . [archery] must be practiced to the point of repletion. If everything depends on the archer's becoming purposeless and effacing himself in the event, then its outward realization must occur automatically, in no further need of the controlling or reflecting intelligence.

" . . . The pupil . . . discover[s] in the course of years that forms which he perfectly masters no longer oppress but liberate."

See also *id.* at 71-78; D.T. Suzuki, *Lectures on Zen Buddhism*, in ERICH FROMM, D.T. SUZUKI, & RICHARD DE MARTINO, *ZEN BUDDHISM & PSYCHOANALYSIS* 1, 19-22 (1960).

that was simply part of the whole historical sequence of activities leading to the violent death of Mary Smith, the prosecutor somehow got herself into (to mix a metaphor) a *container* metaphor for mind. She repeatedly says things like:

"[T]hey [the prosecution witnesses] told you about something which frankly they probably would rather put *out* of their minds"

"[T]here is no question *in* there [sic] minds that he was the one that shot her."

"You don't have to put yourself *in* the defendant's mind and decide"

"You can't put yourself *in* the defendant's mind."

"[Y]ou can't go *into* the defendant's mind and decide what exactly was going *through* it at the time he fired that shot."

"[S]cience hasn't invented the instrument which can look *into* someone's head and tell us all what they mean or what their intent is."

This was understandable, certainly. In the first place, the MIND IS A CONTAINER metaphor is such a common structuring metaphor for English speakers¹⁵¹ that it would have come naturally to anyone's lips. In the second place, the trial judge's instructions to the jury, which the prosecutor may have anticipated, used the metaphor.¹⁵² Lawyers in closing

151. The ubiquitousness of the metaphor is evident:

What do you have *in* mind?

You are *out* of your mind.

She is *full* of ideas.

He flipped his *lid*.

They were *brimming* with ideas.

My mind is *dry*.

He is an *empty-headed* fool.

It is one of a wide range of container metaphors, see LAKOFF & JOHNSON, *op. cit. supra* note 112, at 29-32, 58, which, in turn, are but an example of the human tendency to "conceptualize the nonphysical *in terms of* the physical—that is, we conceptualize the less clearly delineated in terms of the more clearly delineated," *id.* at 59. The MIND IS A CONTAINER metaphor is consistent with the conduit metaphor for language, in which LINGUISTIC EXPRESSIONS ARE CONTAINERS and communication is sending. *Id.* at 10-13. Because it is often invisible to the user and exerts a powerful force in structuring the user's thought and discourse, it can raise hob with legal argumentation. See Steve Winter's criticism of Stanley Fish in Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639, 649-64 (1990).

152. See note 3 *supra* ("certainly can't look *into* a person's mind to see what he was thinking"). We cannot determine from the trial transcript whether, at the time of her

argument often do well to encapsulate phrases that they know the judge will charge, either to obtain the support of the judge's authority for their own reasoning if the phrase is helpful or to set unhelpful phrases in the least hurtful context for damage-control purposes.¹⁵³

However, it seems to us that this particular metaphor was just about the worst way that the prosecutor could have talked about mental states generally and the defendant's intent particularly. To the extent that the jury's deliberations were modeled as an effort to peer into a container (the mind) from the outside and discern a solid object (the specific intent to kill) inside, the defendant had every advantage. The walls of the container are notoriously opaque (a point that defense counsel emphasized by repeated use of a KNOWLEDGE-IS-LIGHT/IGNORANCE-IS-DARK metaphor)¹⁵⁴ and the criterion for satisfactory discernment is the daunting beyond-a-reasonable-doubt rule (which defense counsel belabored).

We would guess that the prosecutor fell into this trap simply for want of attending to the metaphoric quality of language. The prosecutor probably never realized that phrases like "in the defendant's mind" *are* only metaphors, that there are other metaphors for mind, and that it would have been to her advantage either to seek one or to avoid metaphors entirely in this connection.

Once these things are realized—once the trap is seen—a bit of additional thought is necessary to avoid it. One says: "There must be alternative metaphors available to a prosecutor; the job is to rev up one's mind to think about them. Or is it 'tool up one's mind'?" *Hmmmm*. What *about* the MIND IS A MACHINE metaphor?

I can't get my mind to WORK right this morning.
He has a SCREW loose.
That really started my WHEELS spinning.
His mind went into high GEAR.
She has a HIGH POWERED mind.

argument, the prosecutor knew the exact language that the judge planned to use in charging the jury. This portion of the judge's charge deviated from the New York pattern jury instructions, *see* note 158 *infra*, but may have been in the judge's personal charge book. It was not discussed between the lawyers and the judge in any recorded colloquy settling the instructions.

153. *See, e.g.*, 3 AMSTERDAM, *op. cit. supra* note 7, § 447, at 266.

154. *E.g.*:

"And if at the end you decided that something was not clarified for you, if you decided that ambiguities in the evidence still remain, that you would in no way hold us responsible for clarifying these ambiguities for you and you would in no way expect us . . . to make up for the lack of clarity which could still exist at the end of this case."

He had a mental BREAKDOWN.
They kept CRANKING OUT ideas.

The MIND IS A MACHINE metaphor is consistent with the familiar IDEAS ARE PRODUCTS metaphor.¹⁵⁵ It offered a viable alternative to the prosecutor in *Jones*, since it is about as commonplace as the MIND IS A CONTAINER metaphor¹⁵⁶ and has very different entailments.¹⁵⁷ Also, the MACHINE metaphor, like the CONTAINER metaphor, was reflected in the judge's instructions.¹⁵⁸

As soon as one begins to fish for alternative conceptualizations, of course, additional ideas will start to swim into one's mind. So, what *about* the MIND IS A FLUID metaphor?

That's a mind-curdling thought.
I *sank* into a reverie.
Her mind *runs deep*; she's a *profound* thinker.
She is *level-headed*—*cool*, *calm*, and collected.
My mind *froze*.
Let's wait until our thinking *gels*.
She is *clear-headed*; her ideas are not *muddy*.

155. See LAKOFF & JOHNSON, *op. cit. supra* note 112, at 47.

156. See D'Andrade, *supra* note 63, at 116:

"[T]he folk model has two different ways of regarding the mind—as a collection of 'internal states' versus a set of 'internal processes.' . . . Thus, the mind is treated both as a *container* that is in various states and conditions, thereby having large number [sic] of potentialities simultaneously, and also as a *processor* engaged in carrying out certain operations, thereby limited to a small number of concurrent actions."

157. See LAKOFF & JOHNSON, *op. cit. supra* note 112, at 28: "The MACHINE metaphor gives us a conception of the mind as having an on-off state, a level of efficiency, a productive capacity, an internal mechanism, a source of energy, and an operating condition."

158. See note 3 *supra* ("[i]ntent is the secret *operation* of the mind"). The New York pattern jury instructions use this metaphor twice and do not use the container metaphor:

"What a defendant intends is of course an *operation* of the mind. A jury, even if present at the time of the commission of the crime, cannot examine the invisible *operation* of a person's mind."

1 COMMITTEE ON CRIMINAL JURY INSTRUCTIONS, CRIMINAL JURY INSTRUCTIONS—NEW YORK, at CJI 9.31 (1983) (emphasis added). We cannot know whether, if the prosecutor had attempted to get the judge to give this pattern instruction instead of the one he did give, he would have been amenable.

The MIND IS A FLUID metaphor has particular potential here because it can be conjoined with useful FLUID metaphors for emotion—"he shot her in cold blood"—that play well for the prosecution.

There are other metaphors for mind but our circuits are becoming overloaded, so we'll stop with these. The point is not that the prosecutor should have used any one of them, but that a bit of brainstorming about the various ways in which one can talk about the mind might prove useful to you if you are a prosecutor in a similar situation. Exploring a range of ideas can sometimes get us out of a rut. It can expand our mental horizons, as it were. It can make our minds more fertile, sprout the seeds of new ideas, make them grow. It can help to break the chains that too often bind our thinking as well as its expression. It can enable us to spin out different lines of thought, perhaps even whole new webs of ideas.¹⁵⁹

159. We are not suggesting that the only way in which the prosecutor might have avoided using the MIND IS A CONTAINER metaphor is to use others. She might instead have framed her argument in straightforward subject/verb/object sentences of action in which the concept of intentionality was conveyed by adverbs: "The issue is whether, when the defendant killed Mary Smith, he did it intentionally or unintentionally." This or that "shows that he deliberately killed her" or "purposely shot her to death." She might have used subject/verb/object sentences of mentation in which the concept of intentionality was conveyed by the verbs themselves: "The issue is whether he intended to kill her." This or that "shows that he wanted her dead" or "intended to take her life." She might have used verbal copulas to connect "intent" with the specific intent that had to be proved: "The issue is whether his intent was to kill her or just to shoot a gun at her at close range without killing her." This or that "shows that his intent was to kill her." We have noted at pages 73-75 *supra* that the use of noun formulations was, in general, less consistent with the prosecutor's overall argument than verb formulations. However, the kinds of noun formulations described here have the virtue of implicitly predicating that the defendant had *some* intention while asking the jury to consider only *what* that intention was. They are thus consistent with the fundamental tenets of a folk psychology that is "about human agents doing things on the basis of their beliefs and desires, striving for goals, meeting obstacles which they best or which best them, all of this extended over time." JEROME BRUNER, *ACTS OF MEANING* 42-43 (1990). And such a folk psychology was, of course, the prosecutor's pigeon in *Jones*. See note 87 *supra* and accompanying text.