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Citation: 32 UCLA L. Rev. 1 1984-1985

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LAY LAWYERING*

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* Thanks to many friends and strangers who fought over these and related ideas. Special thanks to Alison Anderson and Shelley Levine: You are in this essay, even if my story fails inevitably to illuminate your many insights.

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INTRODUCTION

Lawyering means problem-solving. Problem-solving involves perceiving that the world we would like varies from the world as it is and trying to move the world in the desired direction. Solving human problems sometimes requires changing the physical world or overcoming ourselves, but it also can involve trying to persuade others to act in ways that will change the world into something closer to what we desire. All of us so act when we solve problems; lawyers do no more. We can see lawyers' problem-solving simply as an instance of human problem-solving. To understand lawyering, therefore, we must examine the activity characterized here as "lay lawyering"—the things one person does when he helps another solve a problem.

Since problem-solving of this sort involves persuasion, this essay addresses two questions: How do we persuade other human beings to do as we want? and how shall we go about persuading other human beings to do something if we want to be as effective as possible in our actions? These questions comprehend empirical, instrumental and normative considerations: How do we think about the world, and, in particular, how do we go about deciding to do one thing rather than another? How can we best use what we know about human beings to get others to do what we want? Finally, what are the moral and political implications of all this? While not pretending fully to explore or answer each of these

questions, I do offer some responses in my examination of lay lawyering.

Human beings think about social interaction in story form. We see and understand the world through "stock stories."¹ These stories help us interpret the everyday world with limited information and help us make choices about asserting our own needs and responding to other people. These stock stories embody our deepest human, social and political values. At the same time, they help us carry out the routine activities of life without constantly having to analyze or question what we are doing. When we face choices in life, stock stories help us understand and decide; they also may disguise and distort. To solve a problem through persuasion of another, we therefore must understand and manipulate the stock stories the other person uses in order to tell a plausible and compelling story—one that moves that person to grant the remedy we want.

To understand how and why we use storytelling to solve problems, we must look to our daily living—to concrete, mundane moments of problem-solving. Capturing in thought what we are and what we do in these moments *is* our conception of lay lawyering. Attention to everyday experience provokes the questions that matter: What are our stories? What do they imply? What remedial cultures emerge to resolve conflicting stories about the same situation? How does a lay lawyer go about his work? What does his work say about us and the order we have created?

"Story" in this essay serves two functions. As an empirical statement, it explains how the world actually may operate. As a metaphor, it helps us understand the activity described as lay lawyering. If I am right that we always see the world embedded in and embodying one of several possible stories, your own experience in reading what I have to say will test the "truth" of my version of human problem-solving activity: Does it capture and illuminate the world you have already created?

1. The knowledge structures I have labeled "stock stories" have been variously described as "scripts," "schemas," "frames," and "nuclear scenes." I make no effort in this essay to distinguish between the various usages. The substantial literature about thinking in story form ranges across disciplines. For examples of some of the best sources with which I am acquainted, see K. LEWIN, *A DYNAMIC THEORY OF PERSONALITY* (1935); M. MINSKY, *A FRAMEWORK FOR REPRESENTING KNOWLEDGE* (1974); R. SCHANK & R. ABELSON, *SCRIPTS, PLANS, GOALS AND UNDERSTANDING* (1977); R. BARTHES, *IMAGE-MUSIC-TEXT* (S. Heath trans. 1977); W.J.T. MITCHELL, *ON NARRATIVE* (1980) [hereinafter cited as *ON NARRATIVE*]; D. PORTER, *THE EMERGENCE OF THE PAST: A THEORY OF HISTORICAL EXPLANATION* (1981); J. CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* (1982); V. LEITCH, *DECONSTRUCTIVE CRITICISM: AN ADVANCED INTRODUCTION* (1983); J.F. LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (1984).

New York, New York: A Friday Evening

The Setting: *Son is both "lay lawyer" and particular person. The setting is both the world and Manhattan—a Manhattan both as you may know it and as I've imagined it. Son and Mom are both particular persons and types—we impute to them concerns and values based on their relationship and what we know about them.*

Thursday, his mom's first day ever in Manhattan or on the East Coast—or for that matter anyplace other than California and Arizona—had gone smoothly and well: Friend's posh 86th and Park Avenue place was comfortable, convenient, and, best of all, free (available at no charge) for their five-day visit from L.A. They had dined (it was French), taken in a play ("solid revival," critics said), and tried their best to do what New Yorkers do (Son thought he knew). Mom was pleased with The City and Son was pleased with himself.

Sightseeing and shopping had filled this day's agenda and drinks in "their" living room were occupying their attention when, at 7:30, the phone rang. Another friend (Son had many friends as he was fond of telling Mom and as Mom, of course, was fond of hearing) had one extra ticket to see Pavarotti in a special benefit performance at Carnegie. If Son's Mom wanted to go, said friend, she'd better immediately get to Park Avenue and grab a cab. Show time was 8:00 and, apparently, anyone late would be shut out—best seat in the house (which this was, said friend) or not. Even if all went well Mom would be cutting it close, but she was excited ("he's not Perry Como but . . ."), still dressed and, if Son would wave down the cab for her, willing to give it a shot.

Son thought, "Why not?" He hadn't been able to get "just the right tickets" for Friday night in The City and had figured he and Mom would just hang out—maybe dinner at 11 Vagabondo (Rodney Dangerfield might walk in) and then some music at Chelsea Place (anybody might walk in). But he could always hang alone and, just think, Mom might get to hear *Panis Angelicus*. Son nodded a silent "I'll get you a cab right away," and Mom and Son hustled downstairs.

Park looked busy from what they could see as they approached it, but friend had insisted it was their best bet. "Traffic's not impossible and unoccupied cabs are not infrequent" can only be a vote of confidence in Manhattan, thought Son, but snippish or sniveling comments weren't what Mom needed or wanted to hear. She wanted "Here comes one!" and Son could say this of a cab a block away were it not painfully clear that the gentleman standing a few feet from them had "first-in-time" priority. Yet given the hour, 7:42, and the number of occupied cabs whizzing by, Son knew he had to make a move.

What pleased and bothered Son most about the man, in those few seconds available to consider what it was he was going to say and do, was the gray. Aloof, Olympian Gray Everywhere. At the temples, in the finely trimmed moustache, in the steelishly handsome fortyish eyes, in the custom tailored wool suit, and in the valise, garment bag and attache case by the man's side. All this gray on Park Avenue at 7:42 on Friday evening and, too, priority for the very cab that Mom needed if she was to have even a chance of seeing The Great One.

1. THE STORY AND THE STORYTELLER

A. *Understanding the Problem: The Stock Story*

In the next minute or so, Son must represent Mom. She needs the cab, and he agreed to help her get it. Son perceives a simple—indeed a stock—situation. Mom needs cab, Man is there first, Mom (through Son) must persuade Man to let her have the cab. Son does not appreciate, at least at the conscious level, the intricacy of the situation confronting him. How does Son know that Man is even relevant to his problem? Why does Son perceive his task as persuading Man rather than shoving him into the gutter? How can he believe that he has any possibility of even getting Man's attention, much less persuading this total stranger to do something that he was not planning to do? If persuasion is possible, how can Son have any idea what will persuade Man to give up the cab?

Son need not think of these questions because he has absorbed them into a stock story² about getting a cab in Manhattan. To understand Manhattan and the rest of the world, Son and the rest of us depend heavily on "stock stories," "stock characters" and "stock theories"—knowledge of events, people, objects, and their characteristic relationships organized and represented by a variety of "stock structures."³ Some stock structures result from direct personal experience; others are entirely vicarious. Others still are highly abstract, have little to do with direct personal experience, and may reflect the influence of often-used metaphors.⁴ Together these stock structures form an interpretive network:

2. For a discussion of overlapping stock stories, see R. SCHANK & R. ABELSON, *supra* note 1, at 51-61.

3. For a helpful summary of the past decade's theorizing, see R. NISBETT & L. ROSS, HUMAN INFERENCE, STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 32-41 (1980). *But see* Lotus & Beach, Book Review, 34 STAN. L. REV. 939 (1982) (reviewing R. NISBETT & L. ROSS, *supra*).

4. *See* G. LAKOFF & M. JOHNSON, METAPHORS WE LIVE BY (1980); P. RICOEUR, THE RULE OF METAPHOR (1977); M. POLANYI & H. PROSCH, MEANING 66-81 (1975).

What goes on in Manhattan is never approached as if it were *sui generis*, but rather is seen through these stock structures.⁵ Once the principal features of a given phenomenon suggest a particular stock structure, that structure shapes our expectations and responses. This use of stock structures resolves ambiguity and complements “given” information with much “assumed” information.⁶ Without the advantages of this cognitive system, life in Manhattan—or in Blythe, for that matter—would be difficult to experience or even imagine.

Among the most important stock structures in this interpretative network are those stock stories that capture the various recurring forms of human interaction. Consider grabbing a cab.⁷ To grab a cab Mom did not have to think about what to do and how others would respond. A stock story told her the routine: Walk outside to a street where cabs pass frequently, stand at the edge of the sidewalk, wave to an unoccupied cab coming in your direction, the cab (perhaps swerving radically to get there—it’s Manhattan) picks you up, tell the cabbie the destination, cabbie takes you (most likely on an “entertaining” ride and hopefully by the most direct route) there, pay (and tip or be castigated by) cabbie. Mom did not reflect on her expectations in grabbing cab. Neither did she reflect on the many other routines that in large part comprised her day with Son—from eating breakfast at the local deli to shopping at Bloomingdale’s. Mom might never have gotten beyond the front door if she had to plan each of these social interactions.

The expectations the grab-a-cab story captured for Mom were ruptured, as we know, when Mom and Son noticed Man waiting for the same cab. The rupture of an orderly social routine like grabbing a cab is, however upsetting, a common form of human interaction. To help everyone in Manhattan manage, these ruptured routines are themselves captured by stock narrative

5. See R. NISBETT & L. ROSS, *supra* note 3, at 36. Surprisingly, this interpretive network can prove for some a source of creative frustration. James Joyce wrote his brother Stanislaus on December 15, 1907, complaining about the work that was to become *A PORTRAIT OF THE ARTIST AS A YOUNG MAN*:

This book begins at a railway station like most college stories; there are three companions in it, and a sister who dies by way of pathos. It is the old bag of tricks and a good critic would probably show that I am still struggling even in my stories with the stock figures discarded in Europe half a century ago. . . . I didn’t consciously use stock figures, but I fear that my mind, when I begin to write, runs in the groove of what I’ve read.

Ellmann, *Joyce at 100*, 29 *THE NEW YORK REVIEW OF BOOKS* 58, 62 (Nov. 18, 1982); R. ELLMANN, *JAMES JOYCE* 264 (1982).

6. R. NISBETT & L. ROSS, *supra* note 3, at 29.

7. Or consider eating at a restaurant—more precisely, a coffee shop. R. SCHANK & R. ABELSON, *supra* note 1, at 42–57.

patterns.⁸ Consider a possible dispute over who gets a cab—that form of social relationship near the extreme of those that might arise out of the circumstance confronting Mom and Man wherein both assert a normative claim to the cab.⁹ Grab-a-cab disputes arise daily in Manhattan. Were people in Manhattan forced to treat each of these disputes as unique, Manhattan's pace almost certainly would slow and falter. To maintain their way of life, those in New York have come to treat grab-a-cab disputes through the use of and along the standardized lines reflected in a stock narrative pattern: She or he first-in-time gets the cab.

Just as the grab-a-cab stock story told Mom what to do and how others would respond in the routine, the first-in-time stock story explains to Son why Man is relevant to Mom's problem. Man is relevant because Son not only understands first-in-time, but assumes that Man sees the world through a similar story.¹⁰ First-in-time reflects a consensus among Manhattanites about the way things are done and provides a self-administered mechanism for the settlement of recurrent cab disputes. Most people in Manhattan, were they in Mom's position, would accept Man's right to the cab as the necessary price of ordered communal life. They also would accept that Man has discretion to do whatever he wants with his right to the cab: He can exercise it himself, share it or transfer it to the next person in line for virtually any reason he chooses. New Yorkers might criticize or praise one decision over another, but they characteristically do not dispute what Man does with his right. By communal design, there are no formal criteria by which to judge his decision and there is no forum in which one may even raise the issue. Having acknowledged Man's first-in-time rights, someone in Mom's position can look only to Man for relief that is entirely within his discretion.

If Mom refuses to acknowledge the way things are done in Manhattan, first-in-time loses its effectiveness. But with no forum available to resolve cab disputes (cabbies generally stay clear of

8. For a discussion of interference and distraction "of a script," see R. SCHANK & R. ABELSON, *supra* note 1, at 51-57.

9. The definition of dispute is Richard Abel's. Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 LAW & SOC'Y REV. 217, 225-29 (1973). It may be helpful to keep in mind that "disputes are not things: They are social constructs. Their shapes reflect whatever definition the observer gives to the concept. Moreover, a significant portion of any dispute exists only in the minds of the disputants." Felstiner, Abel & Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming and Claiming*, 15 LAW & SOC'Y REV. 631, 631-32 (1980-81) (footnotes omitted).

10. Son's assumption is, of course, not always right. See S. FISH, *Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes Without Saying, and Other Special Cases*, in S. FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 268-99 (1980) [hereinafter cited as *IS THERE A TEXT?*]. See also *infra* notes 56 & 63.

these hassles) and no time for communal pressures to have any effect, this posture invites disorder (a different order). Mom can create a dispute by challenging or ignoring Manhattan's way of resolving these daily conflicts only at the substantial risk of denying both herself and Man any realistic chance of grabbing a cab. There are, of course, occasions where someone in Mom's position either wishes or is willing to assume this risk. For example, Mom may want to challenge first-in-time (and its underlying moral and political premises) more than she wants to see Pavarotti. Or she may think that denying first-in-time rights is a strategically shrewd opening move for someone with so little bargaining power.¹¹ Yet New York, like any community, operates on the assumption that few will adopt such a stance if they find themselves in Mom's circumstance. If that assumption is wrong, then (we've learned to believe) chaos will spread and the orderly resolution of cab disputes will become an "irrelevant, nostalgic whimsy" until those in Manhattan reach a new consensus.¹² If the assumption is correct, then most likely Mom will accept Man's right to the cab and, looking only to him for relief, acknowledge any denial as final.

In accepting Man's right to the cab, Mom of course accepts a

11. This is not to suggest either that such a move would be effective or that "positional bargaining" is morally or strategically optimal. See, e.g., R. FISHER & W. URY, *GETTING TO YES* (1981).

12. G. GILMORE, *THE AGES OF AMERICAN LAW* 109 (1977). The view, espoused by Gilmore, that law depends on a normative consensus is challenged in C. GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective*, in *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 167, at 216-17 (1983) [hereinafter cited as *LOCAL KNOWLEDGE*] ("If law needs, even 'in a society like our own,' a well-stitched social fabric in order to function, it is not just a nostalgic whimsy, it is through altogether." *Id.* at 217.). Why and how Mom and other Manhattanites are typically disinclined to challenge rules like first-in-time is to be understood through a concretely detailed identification and examination of the mechanisms of persuasion operating in Manhattan. One general hypothesis for these recurring, self-imposed orders runs as follows:

The law acts hegemonically to assure people that their particular consciences can be subordinated—indeed, morally must be subordinated—to the collective judgment of society. It may compel conformity by granting each individual his right of private judgment, but it must deny him the right to take action based on that judgment when in conflict with the general will. Those who would act on their own judgment as against the collective judgment embodied in the law find themselves pressed from the moral question implicit in any particular law to the moral question of obedience to constituted authority. It appears mere egotism and antisocial behavior to attempt to go outside the law unless one is prepared to attack the entire legal system and therefore the consensual framework of the body politic.

E. GENOVESE, ROLL, JORDAN, ROLL: *THE WORLD THE SLAVES MADE* 27-28 (1972) (footnote omitted). See generally A. GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI* (1971).

range of values implicit in the first-in-time stock story.¹³ Yet most likely Mom is unaware of those values. Stock stories reflect values, but only in a very concrete and nonabstract way: Their characters, story lines, and built-in resolutions embody commonly shared cultural views about the way things are and should be done in Manhattan. When we interpret, we are communitarians. We share stock stories reflecting conventions and beliefs that, in turn, may be said to “see” themselves in the circumstances we are always in. Those who see the meaning in Man standing on Park Avenue as cab approaches (including Man, Mom and Son) reflect the power of culture and communal stock stories. Values pervade the stock structures that order daily life. It surely is not happenstance, for instance, that New Yorkers and the rest of us often resort to anecdote, allegory, parable, and the like to communicate “what we have always done,” “what’s right,” and “what matters.” We intuitively solve the problem of “how to translate knowing into telling”¹⁴ by employing forms of communication that mirror our way of knowing.

B. *Solving the Problem: Storytelling*

The grab-a-cab and first-in-time stories identify the problem confronting Son and Mom, imply a specific solution and, perhaps most importantly, suggest a framework for thinking generally about solving problems. The specific solution entails persuading Man to relinquish his prior claim on the cab. The framework suggests that most problem-solving involves identifying a relevant audience and, by telling a story that compels the desired result, persuading that audience to grant the remedy sought.¹⁵

The stories exist: They reduce complexity and accommodate conflicting values. They are shared: They allow us to live in the same world. They inform us about appropriate forms of social

13. See *infra* note 52 and accompanying text.

14. White, *The Value of Narrativity in the Representation of Reality*, in *ON NARRATIVE*, *supra* note 1, at 1.

15. Someone undoubtedly will object to my characterization and insist instead that Son should be described as in search of a “rule” that supersedes first-in-time. On this view, “first-in-time” and similar “rules” do not characterize a situation but rather they prescribe certain consequences that flow from application of ordering mechanisms. It is difficult to know what to make of this view. What informs a New Yorker that a particular circumstance lends itself to the invocation of first-in-time (or of any “rule,” for that matter) unless it is a stock story giving life and range to the disembodied expression? The stock story drives the critical, even if often unarticulated, question “What happened?,” measures the immediate circumstance from behind the scenes, and ultimately defines the boundaries of the rule. See, e.g., L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (2d ed. 1958). Why then the persistence of rule-focused conceptions? Perhaps rules better respond to our concern for universality, neutrality and predictability. Stories tell us that we can only (though we need not) aspire to these conditions; rules help us believe our aspirations are realizable.

interaction: Conflicting claims to scarce resources (cabs on Friday night in Manhattan) are to be resolved peacefully, not by force, and with due regard for communally acknowledged "rights" (first-in-time gets the cab).¹⁶

Since stories accommodate the limited cognitive capabilities of human beings and incorporate the shared or dominant values of a given society, they represent the most comprehensible and persuasive form of human communication. Thus, if Son wants to persuade Man to give Mom the cab despite Man's acknowledged first-in-time claim to it, Son's best shot will be to tell Man a story that both explains Mom's situation and presents a compelling reason why Man should grant the desired remedy.¹⁷ A story will best capture in limited scope all that is involved in Man's relationship with Mom. And an artfully told story may lead Man to see the world in a way which allows if not compels him to grant Mom the cab.

If Son intuitively knows how to operate in a world defined by stock stories, why should he (or you for that matter) take the time to dissect the persuasion process? The answer, most immediately for Son, is that he will be a better storyteller if he consciously understands the process that governs our decision-making. The answer, for you, is that an exploration of the notion of story and the process of storytelling can illuminate the connections between how we perceive the world, how we persuade others, and how we make difficult choices—choices that accommodate complicated political and social values and yet allow us to carry on daily without regularly being aware that such values are implicated. Yet comprehending these connections may be precisely what many want to avoid. Stories and storytelling de-emphasize the logical and resurrect the emotive and intuitive. And they acknowledge, perhaps to an uncomfortable degree, that we can only aspire to be neutral, certain and in control.¹⁸ Because they tell us so much

16. While appropriateness in social interaction is of course culturally defined, (see N. ELIAS, *THE HISTORY OF MANNERS* (1978)), stories are thought by many to outdistance other discourse forms in communicating across cultural boundaries:

We may not be able fully to comprehend specific thought patterns of another culture, but we have relatively less difficulty *understanding* a story coming from another culture, however exotic that culture may appear to us. As Barthes says, "[N]arrative . . . is translatable without fundamental damage" in a way that a lyric poem or a philosophical discourse is not.

White, *supra* note 14, at 2-3.

17. What is compelling depends of course on Man's needs and concerns. See *infra* section II B 2.

18. These aspirations and the stance toward the world from which they issue are thought by some to constitute male consciousness. See, e.g., *NEW FRENCH FEMINISMS: AN ANTHOLOGY* (E. Marks & I. de Courtivron eds. 1980); MacKinnon, *Femi-*

about how we think, stories and storytelling may tell many too much about what we do and what we are.

C. *Responsible Storytelling*

A representative like Son translates and, if necessary, transforms the story that a person like Mom is living (her needs and concerns) into a story that an audience like Man can identify, believe and find compelling. The translation or transformation typically is necessary because the rest of the world can know only from the outside the story any individual is living. For the rest of the world we are only what we are perceived to be. At the same time, for each of us the rest of the world is, in some ways, a "foreign land": We do not know it as well or in the same way as we know ourselves and we are not quite certain how we appear to those who inhabit it. We know ourselves only from the inside; it is hard to step back and see ourselves and our problem as a story. We *are*—from our point of view existence overrides interpretation.

Most of the time we do not need to know others as we know ourselves nor need we focus consciously on how we appear to others. We are inattentive not because we do not care but because we can manage without knowing. One does not have to be Jung to order a knish or to buy a Knicks ticket at the Garden. As our needs become less trivial or less likely to be satisfied, however, and the required response by others more complicated or demanding or at least more dependent on who we are, it is less easy to manage without thinking about how others perceive us and how they may respond to what they perceive. At these moments and for better or worse, we regularly turn to others for help, perhaps only iterating that others inevitably help us become ourselves.

A representative like Son generally is both necessary and better able than a person like Mom to bridge the gap between being something and being perceived as something. As an outsider, he too must interpret; he cannot even deal with the person he represents until he gives her an identity of some kind. In a literal sense, someone like Son can re-present us to ourselves: "This is how you look to the world." At the same time, perhaps through a story well told, he can re-present us to the world as we would have ourselves understood: "This is what she is (what she means to you) and the story she is living." Ideally, a representative can make sense out of the chaos of our conflicting feelings, thoughts and

nism, Marxism, Method, and the State: An Agenda for Theory, in *WOMEN, GENDER & SCHOLARSHIP* 227, 250 (E. Abel & E. Abel eds. 1983).

wishes, and bring order to that existence both for ourselves and for others.

Determining who a person like Mom is and what she wants is dauntingly difficult, however. Even if a representative like Son resists making simplistic claims to objective reality and uncontradicted attitudes,¹⁹ he may not be capable of being truly curious about Mom. Can he hear her? Profoundly empathize with stories she lives? Understand how she would have herself understood? I think not yet (nor perhaps ever). Trying to be insistently situational, searching, and concrete in learning about Mom helps.²⁰ But any claim a representative like Son may make to knowing someone like Mom is morally justifiable only if he simultaneously admits that he cannot have a conversation with her which he does not monopolize in the deepest sense.

The impossibility of unmonopolized conversation might itself be reason for Mom either to represent herself or to retreat into silence. Either course may express an understandable urge to shout "This is who I am!"²¹ But presuming that asking Son for help signals Mom's present rejection of these two options, Son and Mom together must try to have the very conversations they cannot now imagine: flawed, struggling efforts to overcome themselves even as they try to persuade someone like Man to change the world.

However earnestly Son may try to understand the story Mom is living, he cannot permit himself to become merely the faithful representative of the thoughts of Mom "the creator." For if presupposing that a representative like Son can have a profoundly empathetic conversation with someone like Mom is arrogant and tyrannical, then idealizing *mimetic* representation is naive and cowardly.²² Mom turned to Son for help, not to have him mindlessly repeat her version of her story. To help Mom solve her

19. Son might have gained his resistance from, among others, the following sources: F. NIETZSCHE, *THE GENEALOGY OF MORALS* (reissued 1969); J. PIAGET, *PLAY, DREAMS AND IMITATION IN CHILDHOOD* (1962); E. O'NEILL, *MOON FOR THE MISBEGOTTEN* (1952); M. FOUCAULT, *MADNESS & CIVILIZATION* (1965); T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

20. See R. RORTY, *THE CONSEQUENCES OF PRAGMATISM* 160-75 (1982). For work in this spirit about professional lawyering, see D. BINDER & S. PRIDE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT CENTERED APPROACH* (1977).

21. In so shouting, Mom would join certain French and American feminists. See *supra* note 18. The separation and even solipsism potentially implied have not gone unnoticed or unchallenged by other feminists. See, e.g., Griffin, *The Way of All Ideology*, in *FEMINIST THEORY—A CRITIQUE OF IDEOLOGY* 273-92 (1982); Keller, *Feminism and Science*, in *WOMEN, GENDER & SCHOLARSHIP*, *supra* note 18, at 109-22. The monopolized conversation also explains, in part, the relationship between Latinos and Latino lawyers. See Lopez, *Foreword: Latinos and Latino-Lawyers*, 6 *CHICANO L. REV.* 1 (1983).

22. Jacques Derrida explores the need to move beyond simple imitation in art

problem, Son must be the foe of that concrete life he seeks empathetically to comprehend and re-present. He must care enough to confront Mom, to challenge her understanding of her problem and the solution she seeks. To do so, Son paradoxically must draw on his very separateness from Mom, the same separateness that inhibits even his best efforts truly to know the story she is living. Son must risk his fragile relationship with Mom if together they are to fulfill it: Profound empathy and opposition are one.

Drawing on his separateness in confronting Mom foreshadows Son's obligation autonomously to create in re-presenting Mom to the world. To be sure, Son is not free to create as he pleases; he cannot conceive of himself as Mark Twain or Gabriel García Márquez. Mom's needs must be his primary concerns. Indeed, Son will not be judged to have represented well, much less imaginatively, unless his storytelling responds to Mom's needs. Son's best work is instrumental. At the same time, he must resist simple imitation and reproduction. That is not to imply that Son must be self-important in creating Mom's story, nor that he need necessarily change Mom's version morally to affirm his obligation to her. But Son must preserve and fill his own creative space even as he and Mom aspire to an inseparability of understanding.

To be successful, a representative like Son additionally must appreciate the inevitability of prediction in his work. Even intuitive storytelling by Son requires some prediction about how Man interprets.²³ If we were to ask Son how he arrived at a particular prediction (after explaining why we think he must have made one), he likely would tell us, "Under the circumstances I felt" What would follow would be some combination, in Son's mind's eye, of intuitive and rational explanation about why Man is most likely to respond best to a particular kind of pitch. Even beneath the response "I guessed," we likely would find some form of prediction analysis, however inchoate and uncritical. What we are least likely to discover, I suspect, is that Son created a particular story on the basis of a purely random conclusion about how Man interprets.

If this is true and if Son is responsibly to re-present Mom, then it falls upon him to approach prediction in something other than haphazard fashion. He must treat how Man interprets as knowable—a difficult question to be sure but, unlike a mystery, capable of being studied and understood.²⁴ More specifically, Son

and in life in his enigmatic essay, *The Theater of Cruelty and the Closure of Representation*, in J. DERRIDA, *WRITING AND DIFFERENCE* 232 (1978).

23. All storytelling requires prediction. See *infra* notes 65 & 66 and accompanying text.

24. For a more elaborate explanation of the need to idealize, see N. CHOMSKY, *RULES AND REPRESENTATIONS* 3-46 (1980).

must concern himself not only with solving Mom's immediate problem, but with the methodology for dealing with problems of this sort. Son must be willing to fashion explanatory principles that may entail, particularly at the outset, appreciable conceptualization.

Successful storytelling, of course, requires that Son understand more than the basic nature of prediction. Son must also make do. It is 7:42; there is Gray on Park Avenue to be persuaded; there is best seat for Mom Pavarotti Carnegie if before eight; and there are the inevitable limitations arising from who Son and Mom are and how good they are at their roles. Son may not have chosen these conditions or this material but, in effect, he has been commissioned to work with what is—or at least with what appears to be. He might not, as we shall see, make use of what is—in present form or at all. But he must take what is into account, whatever he finally decides to do.

Son also must take into account that not all imaginable stories are legitimate. "Otherwise they'll find your bloated body floating in the East River," is, after all, a compelling story. Similarly, "Mom's mother just had a heart attack at Carnegie, and pleaded, through the paramedic, to have her daughter by her side," is not without considerable merit as a potential pitch. While threats and lies violate no rules of form, they normally are considered objectionable by most in Manhattan. So constraining persuasion as a power strategy in part defines the world Son and Man share. Yet Son would be naive not to realize that there is a fine line between threats and legitimate pressure and between lies and fairly disguised truth. He also would be unimaginative not to apprehend that threats and lies not only are rational in form but, if included within the range of legitimacy, greatly enhance Son's chances of telling a plausible and compelling story.

Son, like most of us, usually can distinguish threats from persuasive pressure and lies from artistic license and, like most of us, will abide by the convention. But, again like most of us, he will not avoid every move that might result in pressure or misimpression, nor will he always relieve pressure or correct misimpression that Man, accurately or inaccurately, perceives. This does not mean that all lawyering is lying, but it may mean that all lying is lawyering.²⁵ In any event, Son's behavior in representing Mom is worth exploring precisely because it is realistic, not because it of-

25. This aphorism borrows from Arthur Leff's work. A. LEFF, *SWINDLING AND SELLING* 110-11 (1976). Much about effective instrumental storytelling can be learned, I am convinced, by examining the persuasive strategies of some of the better liars one encounters—in my experience, heroin addicts and drug smugglers.

fers a solution to what may be normatively appropriate in a given circumstance.

II. THE NATURE OF THE AUDIENCE

A representative like Son must be able not only to comprehend his relationship to someone like Mom and the constraints on his storytelling, but to understand the nature of his audience. The storyteller must tell a story depicting his client's circumstance as one that normally would compel the audience to grant the desired remedy. Put differently, the storyteller always must say to the audience, "This is that which normally compels you to do what I've asked." This "principal pitch" is the story's heart and central rhetorical structure.

The grab-a-cab/first-in-time story identifies Man as Son's relevant audience on Friday night in Manhattan. Principal pitch then sensibly presupposes that Son's story lives only through Man's interpretation of it. The same can be said of the relationship between the story and each audience who perceives it. Man differs only because he alone has the power to grant the remedy sought.²⁶ Son's story, therefore, must speak to the human condition of Man and not other audiences. And while most of what Son knows about Man will be based on his knowledge of human beings generally, he must also, to the extent possible, address Man's special needs and values. Son's effectiveness as a storyteller thus will depend most often and most critically on his understanding the process through which Man ascribes meaning to the story told.

A. *How Man Sees and Interprets the World*

1. Man's Processing Methodology and Tendencies

Man inadvertently reveals certain judgmental tendencies in coping with the world. Whenever he responds, Man depends on what first comes to mind, on what is available.²⁷ He judges frequency, probability, and causality on the basis of the most easily generated information.²⁸ If Man is from Manhattan, the information most easily generated reflects what New Yorkers are exposed to, pay attention to and are likely to store. So if Man, for example, is asked to estimate the number of Americans mugged each

26. In some situations more than one audience may have the power to grant the remedy sought, *see infra* Part III, and, in others, even presently unknown audiences may affect or even grant the remedy. *See infra* Part IV.

27. Tversky & Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 *COGNITIVE PSYCHOLOGY* 207 (1973).

28. For a concise and useful summary of the "availability heuristic," see R. NISBETT & L. ROSS, *supra* note 3, at 18-23.

year or the number of great basketball players who hail from New York, his response likely will be biased by available information. Living in Manhattan skews one's judgment about life—but so does living in Blythe or Columbus, Indiana. Man is not unaware, even if he is from Manhattan, that available information sometimes must be discounted.²⁹ He might not, for example, automatically use George Steinbrenner as the archetypal character in responding to the question, "How many baseball owners are jerky, overbearing, fatuous fat cats?" Nonetheless, Man generally tends to rely on easily generated stock structures without systematic or critical assessment.

Man processes nearly every "what is" by comparing and contrasting it with his available stock structures—by making likeness judgments.³⁰ "This" Manhattan happening is like "that" stock structure if a limited number of representative features of the happening³¹ parallel closely enough for Man's purposes features of the stock structure. The number of features Man brings into focus reflects his limited processing capacity; the rich and complex properties of any happening must be reduced to a small number of "units" because that is all Man can handle at any one time.³² Through likeness judgments, Man is able to arrange the world in terms of basic yet sufficiently flexible categories.

29. R. NISBETT & L. ROSS, *supra* note 3, at 23.

30. The most enlightening work on what I have labeled "likeness judgments" is that of Amos Tversky. Tversky, *Features of Similarity*, 84 *PSYCHOLOGICAL REV.* 327 (1977). While the account in the text draws primarily on Professor Tversky's work, my thinking has undoubtedly been shaped by the work of others on intimately related concepts. See generally L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (2d ed. 1953); K. LLEWELLYN, *THE COMMON LAW TRADITION* (1960); Rosch, *On the Internal Structure of Perceptual and Semantic Categories*, in T.E. MOORE, *COGNITIVE DEVELOPMENT AND THE ACQUISITION OF LANGUAGE* 111-44 (1973); Rosch, *Cognitive Reference Points*, 7 *COGNITIVE PSYCHOLOGY* 532 (1975); Rosch & Mervis, *Family Resemblances: Studies in the Internal Structure of Categories*, 7 *COGNITIVE PSYCHOLOGY* 573 (1975); Rosch, Mervis, Gray, Johnson & Boyes-Braem, *Basic Objects in Natural Categories*, 8 *COGNITIVE PSYCHOLOGY* 382 (1976); G. LAKOFF & M. JOHNSON, *supra* note 4; E. SMITH & D. MEDIN, *CATEGORIES AND CONCEPTS* (1981).

31. Tversky sees the representation of stimuli, such as a Manhattan happening or any object, as a collection of features. He characterizes this collection as the product of a prior process of extraction and compilation:

[O]ur total data base concerning a particular object (e.g., a person, a country, or a piece of furniture) is generally rich in content and complex in form. It includes appearance, function, relation to other objects, and any other property of the object that can be deduced from our general knowledge of the world. When faced with a particular task (e.g., identification or similarity assessment) we extract and compile from our data base a limited list of relevant features on the basis of which we perform the required task.

Tversky, *supra* note 30, at 329.

32. See Miller, *The Magic Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information*, 63 *PSYCHOLOGICAL REV.* 81 (1956); Simon, *How Big is a Chunk?*, 183 *SCIENCE* 482 (1974).

Which features Man brings into focus depends upon what is being compared and the purpose in making the comparison. Different properties of a happening appear relevant when comparing the happening to different stock structures.³³ For example, different properties of a Dodger-Yankee Series Game in Yankee Stadium become focal depending on whether one compares the happening to war or to the Bronx Zoo. And, by using different explicit or assumed instructions, incongruent features of the same happening seem germane when comparing the happening to the same stock structure.³⁴ For example, features accented when drawing out similarities between the New York subway and "The Wild Mouse" at Coney Island differ from those underscored when making distinctions between the two "rides." While both common and distinctive features matter in all comparisons, Man naturally focuses more on the features that are common when assessing similarity and more on the features that are distinct when assessing differences.³⁵

That Man shifts which features are brought into focus indicates that likeness is not a rigid concept. A stock structure is not defined by a set of necessary and sufficient features; it may be as open-ended as one's purposes in using it to understand the world.³⁶ Hence, "tree" encompasses a eucalyptus, a decision-making model, and Wayne "Tree" Rollins. In reciprocal fashion, a happening is not always understood as "like" only one or a limited number of stock structures, and often takes on a new and important meaning when matched with a seemingly unrelated stock structure.³⁷ Much was learned about dolphins by comparing them to humans and not just to sharks.

To accommodate this open-endedness, Man employs a system of qualifiers.³⁸ Qualifiers demonstrate the likeness of a happening and a stock structure both by admitting the imperfection of the match and at the same time by insisting strenuously (though often implicitly) on the significant similarity. If Man's thought processes were monitored as he assimilated into stock structures what goes on in Manhattan, one would encounter variations of the following theme: "This happening is *essentially* like that stock

33. Tversky, *supra* note 30, at 340.

34. *Id.*

35. *Id.* at 339.

36. For a similar argument regarding our use of metaphors, see G. LAKOFF & M. JOHNSON, *supra* note 4, at 115-25.

37. Tversky, *supra* note 30, at 349.

38. These qualifiers are often referred to as hedges. See Lakoff, *Hedges: A Study in Meaning Criteria and the Logic of Fuzzy Concepts*, in 4 CONTEMPORARY RESEARCH IN PHILOSOPHICAL LOGIC AND LINGUISTIC SEMANTICS 221-71 (D. Hockney, W. Harper, B. Freed eds. 1975).

structure.” “This happening is *nearly* like that stock structure.” “This happening is *loosely speaking* like that stock structure.” “This happening is in an *odd sense* like that stock structure.” Almost inevitably, qualifiers push the match by upplaying some features, downplaying others and hiding yet others. In this sense, qualifiers compose a system of likeness statements that allow Man flexibility in determining whether features of “what is” match features of a stock structure closely enough to allow “what is” to be comprehended and organized.

Likeness depends not only on how closely relevant features correspond, but on how any two items are represented to or grouped for Man. Man is more apt to conclude that Van Patten is like McEnroe than that McEnroe is like Van Patten and that Brooklyn’s Avenue T Deli’s french fries are like Nathan’s than that Nathan’s are like the Avenue T Deli’s despite the fact that, in each instance, features parallel equally in both directions. The detectable asymmetry in Man’s judgment at least tends to be consistent: Likeness is far more apt to be found when the less distinguished item is compared to the more distinguished than when the converse comparison is made.³⁹

What distinguishes McEnroe (and the McEnroes of this world) is, in part, that his features are striking: They attract and hold Man’s attention and excite Man’s imagination.⁴⁰ Man’s preference for the more distinguished in making likeness judgments is but a specific instance of his overall tendency to be impressed with concrete, emotionally stirring and readily available information. Man generally seems to find Capote’s portrayal of a homicide more memorable than a coroner’s, a friend’s suicide more recollectible than a stranger’s, and witnessing mayhem more unforgettable than an eyewitness’s account. Given Man’s processing equipment, information that is more striking presents more units of information more easily and more diversely encoded, is better able to arouse preexisting stock structures, and is more likely to be rehearsed and therefore recalled.⁴¹ Hence, Man is likely to give striking information more weight upon encountering it, and is more likely to store, remember and later retrieve the same striking information.

McEnroe is more distinguished than Van Patten because his features are not only more striking but serve better to categorize the set of items presumably suggested in comparing him and Van Patten.⁴² Far more tennis players are categorized by comparison

39. Tversky, *supra* note 30, at 333–35.

40. R. NISBETT & L. ROSS, *supra* note 3, at 45–51.

41. R. NISBETT & L. ROSS, *supra* note 3, at 51–55.

42. Tversky, *supra* note 30, at 344.

with McEnroe's features than Van Patten's; in other words, the prevalence of classifications based on McEnroe's features determines his categorical significance. Categorical significance is, however, highly sensitive to context or changes in grouping. Were Man, for example, asked to match Dean Paul Martin with either McEnroe or Van Patten, Van Patten's features would probably acquire noteworthy categorical significance. Likeness is the basis for the categories that help Man structure the world and yet, at the same time, is influenced, with some predictability, by the given context.⁴³

2. The World According to Man

While the world may appear to Man to be an unmediated reflection of "what is," it is at every moment made and not found.⁴⁴ We think we find the world; instead we make it ourselves. Stock structures create their own image; they search for themselves in the world and, finding something sufficiently like them, tell Man that they are what he sees and what the world is. In so operating, Man uses stock structures to give meaning to his every circumstance by reducing the complexity of all that exists. In order that something might be understood, most of reality is disregarded. What is conceived of and described as the real world is itself a fabrication.

When Man fabricates his world, he does not interpret in a two-step process. One does not first see the world raw and then search for the right stock structure. To be in a circumstance (as Man always is) is already to have fabricated; there is meaning at every turn.⁴⁵ That Man might attribute very little to the fact that a woman and Man are approaching him as he is waiting for his cab on Park Avenue does not mean that he has not interpreted their approach in the circumstance. "I hadn't given them any thought"

43. Tversky, *supra* note 30, at 344.

44. The concept of a world made and not found, as I conceive it here, borrows generally not only from developments in artificial intelligence and psychology, but from the related and often parallel developments in educational, literary, historical, political, and social theory. See, e.g., R. KEGAN, *THE EVOLVING SELF* (1982); Rumelhart, *Understanding and Summarizing Brief Stories*, in *BASIC PROCESSES IN READING: PERCEPTION AND COMPREHENSION* (1976) (D. LaBerge & S. J. Samuels eds. 1977); N. GOODMAN, *WAYS OF WORLDMAKING* (1978); P. ROSE, *PARALLEL LIVES* (1983); D. PORTER, *supra* note 1; M. FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* (1978); N. CHODROW, *THE REPRODUCTION OF MOTHERING* (1978); D. DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE* (1976); R. D. LAING, *THE POLITICS OF THE FAMILY AND OTHER ESSAYS* (1969); D. REISS, *THE FAMILY'S CONSTRUCTION OF REALITY* (1981).

45. Stanley Fish has made this point in a number of provocative essays. See, e.g., S. FISH, *How To Do Things with Austin and Searle: Speech-Act Theory and Literary Criticism*, in *IS THERE A TEXT?*, *supra* note 10, at 197-245.

or "I didn't even notice them" is, however diffuse and seemingly neutral, as much an interpretation of his social relationship with Mom and Son as will be his more focused and seemingly more biased response once Son has begun his story (for example, "After my day, I can't believe they're telling this sob story for a cab!"). One interpretation merely substitutes itself for another. Put differently, one stock story in Man's repertoire substitutes itself for another; the new story fabricates for Man an interpretation of the social relationship that substitutes for the one previously held. Everything Man experiences is understood within a circumstance, and to be in a circumstance is already to be in the possession of or possessed by some available stock story.⁴⁶ Man cannot escape making meaning.

While Man always is living in his own version of the circumstance, at the same time he always is assessing competing versions in the making. For example, while Man might now attribute very little to the fact that Mom and Son are approaching him as he is waiting for his cab on Park Avenue, he is simultaneously assessing other unfolding versions of his relationship to them. "Are they walking up to me?" "Do they need help?" "Do they need directions?" "Do they think they're going to grab my cab?" "Are they, like everyone else, just walking by?" While the exact course of this assessment cannot be charted, cognitive limitations require Man to fix his attention on one of a number of competing versions in order to give meaning to what is happening in the circumstance. In a very real sense, Man must make a finding of facts in order to have a reality. And he will do so by choosing from among the competing versions in the same way that he processes everything else—by making likeness judgments. A version from Man's repertoire of stock structures will see something sufficiently like itself in one of the competing versions, will declare what facts exist, and will produce for Man his reality.⁴⁷

The likeness judgments that Man makes in assessing the competing narrative versions of reality in the making are themselves influenced by the fact that Man is at every moment living in a story he believes is real. The in-place fabrication simultaneously enables and restricts Man's vision. Through the fabrication will pass everything that is produced and understood (objects, events, social relationships and utterances about them all) and that is assessed as interesting or not, revealing or not, and, most critically,

46. See S. FISH, *Is There a Text in This Class?*, in *IS THERE A TEXT?*, *supra* note 10, at 303-21.

47. Cf. Rumelhart, *supra* note 44 (The process of understanding a passage consists in finding a schema which will account for it.). See also M. WARNOCK, *IMAGINATION* 131-95 (1976).

true or not. Anything "claiming" to be true, to itself be reality, will be evaluated by the facts as Man's present reality has declared them *to be* (the present finding of facts) and as other versions of reality in Man's repertoire—as seen through the in-place version's eyes—declare that they *can be* (other plausible findings of fact). Thus, if the dynamic interplay of likeness and context summons another version of reality from Man's repertoire, inevitably the substitution will occur through the in-place version—through the very version of reality for which it will be a replacement. The substitute version will be deemed true not because it is in accord with or "makes sense" according to the absolute facts of an extra-circumstantial world, but because it makes sense according to an inevitably circumstantial finding of facts made by Man's in-place version of reality.⁴⁸

3. How Man Sees Others

At the moment, the most important finding of fact Man must make involves Mom and Son: Who are they and what is their relationship to him? Man's selection of an unfolding version not only will take place through the in-place fabrication but may also, in large part, be the product of the story Man already is living. If, as we have assumed, Man and Mom are occupying the same world, one in which cabs are perceived as scarce resources and in which disputes over cabs are resolved by first-in-time, then Man is likely to see Mom as a potential competitor about to assert a competing claim to the cab. At this point, Man's version of Mom and Son is therefore likely to be, "Do they think they're going to grab my cab?" That version incorporates both the notion of Man's and Mom's claims as conflicting ones, and the notion that Man has the superior claim—that it is, indeed, "his" cab.

What may not be apparent to Man (or to any of us) is that to live in a world defined by a stock story is to have made choices, conscious or not, about a range of values. Our image of human relationships, for example, both expresses and reflects these choices. To see others as competitors for scarce resources and to perceive our relationship to them as involving the resolution of conflicting rights and claims is to define a world imbued with certain values.⁴⁹ People in conflict are seen as "opponents in a contest of rights,"⁵⁰ and those conflicts are resolved best by relying

48. "[T]he truth [what will and will not be accepted as true] is not a matter of a special relationship it bears to the world (the world does not impose it on us) but of a special relationship it bears to its users." S. FISH, *supra* note 45, at 241.

49. How we see others and how we relate to them are, of course, not the only values implicitly chosen in living the first-in-time story. Certain fundamental notions of property and equality, to mention only two obvious examples, also are implicated.

50. The phrase is Carol Gilligan's. C. GILLIGAN, IN *A DIFFERENT VOICE* 30

upon a mode of thinking that strives for rational and blind impartiality. Competing claims to a cab inevitably are assertions of individual rights that claimants can order satisfactorily if not optimally by casting them in impersonal terms and, within a natural and ascertainable hierarchy of values, subjecting them to the conventions of rationality.

While stock stories like first in time clearly reflect and promote this image of relationships, competing versions of human interaction exist. These competing stock stories and structures define disputes as arising from conflicting responsibilities rather than from conflicting rights and as requiring for their resolution a mode of thinking that is contextual and narrative rather than formal and abstract. They focus on relationships as they extend over time, on the ethic of care that is an implicit aspect of those relationships, and on communication as the mode of conflict resolution.⁵¹ People with stock stories and structures cast in this imagery likely would view Man's and Mom's conflict over cab, for example, as arising from a failure by each party to understand the story the other party is living. Perhaps they would reject an ordering device like first-in-time and in its place substitute a stock story that emphasized a willingness to talk and to accept ensuing obligations—perhaps even to share the cab. In this story, an increased awareness of the connection between the parties in conflict ideally would generate a recognition of responsibility, a perception of the need for a response.

Man's and Mom's acceptance of first-in-time does not necessarily imply their acceptance in all circumstances of the "rights" image of human relationships.⁵² All in Manhattan want cab disputes resolved quickly and predictably. Given the ample supply of cabs, their general fungibility and each individual's more or less equal crack at being first-in-time, the first-in-time story may satisfy even one with a strong "responsibility conception" of human relationships. But the story that captures and governs cab disputes in Manhattan could have been otherwise, and the fact that the story evolved as it did tells us something about Manhattan, ourselves and, therefore, Man.

(1982). Professor Gilligan's work helped clarify and shape the articulation of what I describe as the "responsibility conception." See also N. NODDINGS, *CARING: A FEMINE APPROACH TO ETHICS & MORAL EDUCATION* (1984).

51. See, e.g., R. BURT, *TAKING CARE OF STRANGERS* 124-43 (1979). See generally C. GILLIGAN, *supra* note 50, at 27-32.

52. I do not mean to suggest either that stories necessarily reflect only one conception or the other, or that people have only one type of story in their stock repertoires. Nor do I pretend to sort through whether a responsibility conception is necessarily, can be, or should be "right-less"—now, for a while or forever.

B. *What Man Needs to See*

1. Room for Participation in Man's Meaning-Making Process

Just as Man always makes meaning, the meaning he makes always depends. We interpret from our own set of conventions and values. The meanings we ascribe to a circumstance or to an interaction in a circumstance will reflect those properties of our conventions and values captured by our repertoire of stock structures. But, as the dynamic interplay between likeness and context underscores, interpretation is neither abstract nor deductive. How Man, waiting for a cab on Park Avenue, interprets a man and woman approaching him may depend not only upon what is available in his repertoire of stock structures, but also upon which features of the circumstance or the interaction within the circumstance are upplayed, downplayed and hidden, and upon how such accentuation is accomplished. What meaning Man will see in the circumstance (or which stock story will suggest a range of meanings for Man) is the product of a socially interactive process that is regularly influenced.⁵³

While most influences come unprompted and uncalculated, other people can plan them to elicit a particular meaning in the interpreter. There is room, in other words, for others to participate instrumentally in Man's meaning-giving process. And Man's processing methodologies and tendencies suggest that the participation can be enormously creative and influential. Son, for example, is not limited to transforming what he has to work with into something like a predesignated and already in-place stock structure; he has the freedom to influence the very stock structure that will preside over its own fulfillment in the interpretive process. So long as there is among Man's stock stories one that reflects the conventions and beliefs that allow him to give his interaction with Mom and Son the meaning Mom intends, Son may be able to supplant Man's first interpretation of the interaction with one that Son desires. The meaning Man makes not only can depend on Son, but may be constituted by Son's work.

2. What Man Finds Compellingly Appropriate

Before diving headfirst into participating in Man's meaning-making process, Son should first have some defined notion of what meaning he would have Man make. The meaning Son would have Man make is, of course, the "this is that" or principal pitch of the story. In other words, the meaning must be that

53. See, e.g., Tversky & Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981).

which makes Man feel that Man wants to or has to let Mom immediately take a cab to Carnegie.

Consider a story with a straightforward principal pitch—Son, for example, explaining just how much Mom wants to see Pavarotti. If this brief, unadorned tale is the “that” which moves Man to grant the remedy, it may mean that Man values Mom’s desire to see the great Pavarotti over his own intended use of the cab. It also may mean, however, that while Man detests both Pavarotti and people who adore him, he abhors even more feeling like a stingy jerk. It may even mean that, unknown to Mom, Man will win a coincidental and preexisting wager with a third person if he lets Mom immediately take the cab to Carnegie. Or it may mean almost anything and even have little to do with why Mom wants the cab.

Fortunately, Man need not share Mom’s love of Pavarotti or any other of Mom’s values in order for Son to create a successful story line. Man need feel only that letting Mom immediately take cab to Carnegie is necessary to realize a gain or to avoid a loss relative to his own value system. That is, given Man’s repertoire of stock stories (which of course captures and reflects his value system), he only need find the story “Mom sees Pavarotti” more compelling than the story “Man gets this cab” for Son to have succeeded. Moreover, Man’s gain or loss may be at any point along a value continuum that ranges from, at one end, the purely economic to, at the other end, the purely ethical. Along this continuum, Man must have some priority, some sense of the compellingly appropriate, that Son can exploit. While Man may not find anything compellingly appropriate, Son must operate on the assumption that such a story exists. And if, relative to Man’s own value system, a gain can be realized or a loss avoided in letting Mom take the cab immediately to Carnegie, then Man should *want* Son accurately to determine what would move him.

3. Getting Inside Man’s World

Of course, Son stands at a peculiar disadvantage in trying to discover what Man finds compellingly appropriate. Having had no previous experience with Man, Son hardly can know what pleases or bothers Man and what, in turn, he can exploit by participating in Man’s meaning-making process. While previous experience, like full communication, would in most instances facilitate the discovery of what an audience like Man will find compellingly appropriate, Son is not without his resources. He shares with Man (as he will with most audiences) stock structures, a circumstance,

and reality.⁵⁴

Always in a circumstance, Man's interpretive system interacts with features of that circumstance to fashion a version of the world for Man to have in place. Man speaks to himself, thinks and evaluates unavoidably from within his own fabrication; he is a player in as well as a reader of his fiction. Whatever makes Man feel that he wants or has to let Mom immediately take cab to Carnegie is to be found through the story Man is now living, and either in that very story or in some other story Man is capable of living in that circumstance. In different terms, what Man finds compellingly appropriate will be captured by and reflected in some stock story, suggested by, in or through the circumstance as the story Man is now living defines it, and will be found among the stock structures in Man's repertoire.⁵⁵

While Man inevitably must declare his own reality and assess what is compelling (as he must assess what is real) according to his own finding of facts, typically he is not the only player in his fic-

54. Where there is little prior or background information and where there is no communication, the circumstance is not only all there is but apparently, at least for two people trying to coordinate their expectations, a wealth of valuable information. Consider the better than random chance that two people have of finding one another at Aqueduct Park after failing to arrange a meeting place on their first outing. A powerful explanation often offered for this success is that the circumstance reveals a solution that both parties, impelled by the dominant need to coordinate, can look for, recognize, and accept. T. SCHELLING, *THE STRATEGY OF CONFLICT* 53-80 (1960). The solution may be "only" conspicuous or, in addition, connote some normative implication. Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 651-53 (1976). Whatever the force, there can be said to exist something in the circumstance that each "knows" the other will find compellingly appropriate and that therefore may be described as circumstantially operative authority.

But where there is little prior or background information and where there is no communication, how does each person know? How is it that two people can see in the circumstance the same solution to their coordination problem? The answer, I think, is that they apparently share stock structures—categories of understanding that incorporate communal beliefs constituting their consciousness and informing their judgment. The dynamic interplay between likeness and context at Aqueduct operates to trigger in both parties' minds (with better than random chances) the same stock story that, in turn, will see itself in the circumstance.

This is anything but unusual. People who share a culture often see the same thing in a circumstance. See C. GEERTZ, *Common Sense as a Cultural System*, in *LOCAL KNOWLEDGE*, *supra* note 12, at 73. This is precisely how Man, Mom and Son all know that Man is standing on the sidewalk waiting for cab and that, with respect to Mom, Man has first-in-time priority. So long as Man is in a circumstance (and, remember, he always is), the circumstance can never be silent. Certain matters will always speak for themselves because some stock structure always is in place.

55. Something like this conception underlies, I think, and may help explain not only the "cynic's" view of the "obvious" focus for agreement (T. SCHELLING, *supra* note 54, at 68), but also the coupled notions of "situation sense" and "immanent law" that shaped so much of Karl Llewellyn's work. S. MENTSHIKOFF & I. STOTZKY, *THE THEORY AND CRAFT OF AMERICAN LAW* 342-43 (1981).

tion. We share, for the most part, the fictions that we live in and by. More precisely, we share stock structures that see themselves in the circumstances we are always in and help us declare our shared realities. That is why we can talk about a man on a street named Park Avenue, in a city named New York, and report about activities that have particular significance. And, more to the point, that is exactly how Man, Mom and Son all know that Man is standing on the sidewalk waiting for a cab and that, with respect to Mom, Man has first-in-time priority.⁵⁶ They share a circumstance and have all given it a meaning that reflects a shared and in-place stock story: They are playing in the same fiction, living in the same story, inside the other's world.

What seems compelling to the storyteller impersonating the audience is, in such a shared circumstance, likely to be found compelling by the audience. Of course, this may not be true. That Son shares some or even a great many stock structures with Man does not imply that he will be able to determine the "that" which will move Man. Man is, after all, different from Son—he is Olympian Gray. Sharing a reality and a circumstance does not compensate for having too little information about the particular audience, nor does it make Son capable of predicting what will convince Man.⁵⁷ But in the circumstance it seems that the best Son can do is to search for a stock story suggested by and in the shared circumstance on the assumption that he and his audience are not only living the same story but moved by the same concerns.

C. *Telling the Story*

1. The Remedial Ceremony

The story Man, Mom and Son are living in is, of course, the

56. The setting I have created—in which, by hypothesis, it was "painfully clear" to Son that Man was waiting for a cab with first-in-time expectations—perhaps obscures the importance of determining the story the audience is living. Such questions as "Are you waiting for a cab?" and "Where are you going?" are of significant conceptual and practical significance in ascertaining Man's needs and the social relationship Son may help constitute.

57. Son, if he is like the rest of us, may tend to predict what Man finds compellingly appropriate by relying excessively on what Professors Tversky and Kahneman describe as the "representativeness heuristic." Kahneman & Tversky, *On The Psychology of Prediction*, 80 *PSYCHOLOGICAL REV.* 237-38 (1973). Son intuitively will predict (select and order) outcomes "by the degree to which the outcomes represent the essential features of the evidence." *Id.* For an analysis of this heuristic in trials, see Saks & Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 *LAW AND SOC'Y REV.* 123, 132-37 (1980-81). Nietzsche's view, too, informs our understanding: "The calculability of an event does not reside in the fact that a rule is adhered to, or that a necessity is obeyed, or that a law of causality has been projected by us into every event: it resides in the recurrence of 'identical cases.'" F. NIETZSCHE, *THE WILL TO POWER* 296-97 (1967).

grab-a-cab/first-in-time story. Accepting Man's first-in-time priority, Son and Mom must look to Man for a decision that is entirely within his discretion. Deciding what to do in this form of social relationship is not only a more frequent but a more open-ended task than deciding a dispute. As alternatives to or in combination with the normative claims that characterize a dispute, Son and Mom must consider whether they are willing to invoke, and Man whether he is willing to be moved by, any of various appeals to interest.⁵⁸ Man also must decide the very nature of their interaction. That is, Man must decide whether to listen at all to Son and Mom and, more generally, how the remedial ceremony will be structured.⁵⁹

The ethical judgments and utility calculations that such decisions demand would, without narrative patterns, likely overwhelm Mom and Man. But Son, Mom, Man, and others in New York often are able to make these decisions sensibly because stock stories shape expectations and responses. The stories embody "what is or isn't done" and "what's in it that's worth it" and suggest how the ruptured routine should be concluded.

In the end, however, these stock stories, like all stock stories, do not simply describe but constitute the social relationship. Requesting a remedy from another is, in any culture, a "ceremony enjoined by custom."⁶⁰ Certain conventions govern the ceremony and stipulate the procedure by which the culture fixes its values. Those conventions are themselves captured in stock stories like grab-a-cab/first-in-time. While in theory Man's discretion is unlimited, he must submit to the governing conventions and values if he is truly to live the story. Like Mom in accepting his first-in-time right, Man must acknowledge Son's and Mom's right to seek a remedy or else be willing to risk social chaos.

While in theory independent of Mom and of any social mechanism that would force his hand, Man is led by the grab-a-cab/first-in-time story at least to listen to Son and Mom. Other audiences perhaps may have more power than this in-place stock story to get Man to pay attention to Son and Mom. Man's friends or business associates, for example, may care whether Man listens to Son and ultimately accommodates Mom's needs, and Man, in turn, may care a great deal that his friends or associates care. These other audiences might even be willing (in response to Son's well-told stories) to exercise their attention-getting power over

58. See, e.g., Eisenberg, *supra* note 54, at 665-68.

59. This substantial but not unbridled discretion follows from consensus reflected in the first-in-time story. See *supra* note 10 and accompanying text.

60. Professor Fish employs this phrase in a somewhat broader sense to describe Coriolanus' refusal to submit to the system of rules by which the state's business is conducted. S. FISH, *supra* note 45, at 201-02.

Man; but given Mom's immediate needs, their response would come too late. Son and Mom therefore must rely on Man's willingness to submit to the governing conventions and values. Even strangers are entitled to a hearing in certain shared circumstances.

If the force of convention does not compel Man and other audiences are unavailable, there is no assurance that Son can get Man's attention. That it may be in Man's rational self-interest to collaborate with Son and Mom (remember, "Mom sees Pavarotti" may trump "man gets cab" in Man's value system) does not mean that in every instance Man will listen to them. The possibility of gain does not always outweigh one's disinclination to listen to others. In fact, at the extreme, Man's understanding of first-in-time priority may lead him to try to destroy all communication, thereby depriving Son of information that would help determine what Man finds compellingly appropriate.⁶¹

Without underestimating the importance of full communication, Son's way of thinking about his job *should* remain the same even if Man tries to absent himself from the narrative transaction. A storyteller like Son always makes assumptions about his audience. Whether writing fiction or participating in a face-to-face transaction, a storyteller originally shapes the narrative on the basis of the anticipated and imagined "proddings and promptings"⁶² of the audience: "What happened next?" "Why is that important?" "Get to the point." A storyteller, in other words, must impersonate his audience in advance. Ideally, in a situation like that facing Son, the storyteller can reform original assumptions on the basis of feedback from the audience as the transaction unfolds. But even if Man cuts off much desirable information, Son simply is forced to rely more heavily on his original "impersonations" of Man's response to the narrative.⁶³ Man's potential unwillingness to listen may make central to Son's story some narrative response to the imagined prodding "Why should I listen?"; it should not, however, compel Son to adopt a new or modified conception of what he must do to coordinate complementary interests. With or without Man's attention, Son's job is to discover, invoke and help Man accept through Son's story line, and the social relationship it helps create, something that makes letting Mom take cab immediately to Carnegie (at least appear to) serve Man's own interests.

61. Cf. T. SCHELLING, *supra* note 54, at 59.

62. Smith, *Narrative Versions, Narrative Theories*, in ON NARRATIVE, *supra* note 1, at 209, 230.

63. *Id.* Central among the assumptions Son may wish to test are those about the story Son presumes Man is now living—"Are you waiting for the cab?" types of questions. See *supra* note 56.

2. Persuading Man: Why a Story?

If some narrative imagery of his relationship ultimately will shape what Man decides is the right or optimal thing to do, Son's presentation to Man should track these dynamics. To put it more directly, Son should tell a story from among those in Man's repertoire that is sufficiently compelling in the circumstance to create for Man a world compatible with Mom's interests.

So long as Man thinks in terms of stock stories, this way of persuading him has a chance to succeed. Because stories can accommodate both norm-grounded claims and appeals to interest, this form of persuasion is not by its nature likely to rely upon a principal pitch that, in any given circumstance, diverges entirely from what Man finds compelling. Moreover, addressing Man in story form better insures the inclusion of the subtleties of personal relationships that may prove telling. Stories can capture not only diverse but otherwise hard to articulate reasons for particular responses to social relationships. A circumstance that resists reduction into some authoritative and unambiguous proposition may be persuasively expressed in all its complexity in a well-told story.

3. A Story That Man Will Adopt

Even to consider letting Mom take the cab immediately to Carnegie, Man must hear a story he is capable of understanding as Son intends it to be understood. Intelligibility demands that Son tell a story that Man can see and hear as one of his own stock stories. While Son's tellable stories need not mirror Man's stock stories (remember that likeness is not a set of necessary and sufficient features), the stories' conceptual range and detail are nonetheless substantially circumscribed.

What we know about how Man interprets implies how one communicates an intended meaning. Son must tell a story enough like what he predicts is a compelling stock story for Man to see one of his stock stories in the circumstance and, if necessary, substitute it for the stock story already in place. Ultimately Son, like any good storyteller, must preserve, delete, isolate, and link foreground features in accordance with the particular occasion and purpose for telling the story and in response to what is known about Man's processing methodology and tendencies. To do that most effectively, Son must understand what it means to tell a story that Man would be willing to adopt as his own version of his relationship to Mom in the circumstance.

For self-interested reasons alone, Man is inclined to adopt a story only if he can believe it true or at least plausible. It is not so much that Man is committed to the truth (though he may be). More to the point, Man can only confidently determine whether

granting a remedy is necessary to realize a gain or avoid a loss relative to his own value system if he believes that he knows what is happening in the circumstance. Any story Son tells therefore must make sense according to the facts as Man has already declared them to be in the circumstance and as Man is capable of declaring them to be through the in-place finding of facts.

By contrast, what Son finds real or true in the circumstance is only relevant to the extent that it simultaneously facilitates and restricts his accurate assessment of what Man thinks makes sense in the circumstance. Unlike the rest of us who can afford most often to be "self-centered," Son cannot write off any peculiar reality that Man may make in the circumstance. He must try to assess what is likely to be credible through whatever fiction Man is living. If Man's reality is radically offbeat and more information is not readily available to Son about the repertoire of stock structures that allow Man to make his findings of fact, then assessing whether Man is likely to find a story credible becomes increasingly probabilistic. It's difficult for Son to figure "what makes sense to Man" if Man's stock stories are unknown and unpredictable.

To Son's advantage, most people live in the same fiction and find credible the same facts and stories. To be sure, in a relationship like Man's and Mom's the standards of credibility are always both internal to the circumstance and established by and through Man's finding of facts. But often they are shared by those who, like Son, apparently share with Man a circumstance. What makes sense to the storyteller anticipating and impersonating the audience is, therefore, likely to make sense to the audience. This, of course, may not be true, but in the circumstance it seems the best that Son can do. Sometimes Son will have no choice but to assume that he and his audience are inhabiting the same reality.

4. Offering and Defending Interpretations of the Story Told

Simply telling a story that makes sense may constitute complete and successful participation in Man's meaning-making process. Transforming Man's and Mom's interaction into a story line with defined characters that makes sense in the circumstance may be the best argument for Man giving a particular meaning to his relationship with Mom and reaching a particular conclusion. Some version of reality from among Man's repertoire can enter such a story and thereafter achieve its own realization⁶⁴—from the declaration of finding of facts through a seemingly "inevitable"

64. S. FISH, *How to Recognize a Poem When You See One*, in *IS THERE A TEXT?*, *supra* note 10, at 326.

closure.⁶⁵

Indeed, one can imagine a culture where storytelling would be the only act of persuasion customarily allowed or thought necessary to instrumental participation in ceremonies where one seeks a remedy from another.⁶⁶ The only debate in such a culture's remedy-seeking ceremonies would be over what the facts are—stories competing with one another for adoption by the audience as its finding of facts in the circumstance. Once the audience made its finding of facts, the meaning of the ending to the conflict or dispute would be anticipated and shared by all concerned. The story would tell it all.

But in most cultures we know, people talk about the meaning of the stories they tell and live by—both as speculative matter and in ceremonies where one is seeking a remedy from another.⁶⁷ Talking about what a story means inevitably creates room for rival interpretations; debate extends beyond what the facts are to what the facts as found mean. Just as rival stories argue to an audience with remedy-giving power that "this is the circumstance that should lead you to grant the remedy sought," rival interpretations argue that "this is the meaning that you should give to the finding of facts and that should lead you to a particular conclusion." And just as a storyteller will upplay, downplay or hide particular features in telling a story that he hopes makes sense, so too will the storyteller emphasize, de-emphasize or obscure certain factual features in asserting that a particular meaning should be given to facts as found. In trying to convince an audience to adopt a particular meaning and arrive at a particular conclusion, both forms of persuasion rely upon and try to exploit what we know about likeness judgments and the way we interpret. In other words, debate over what the finding of facts means and debate over what the finding of facts is share an internal structure that echoes and is allegiant to the way we capture and make meaning.

As much as the two forms of persuasion share, they are often conceived of and treated quite differently in the remedy-seeking ceremonies of many cultures. What the facts are is thought to be a

65. We often feel that certain stories must end in a particular way. The ending seems "inevitable" because closure is itself imposed by commonly shared conventions and values captured in concrete terms in a shared and in-place stock story. This operation of our stock stories invites perversion. Like an audience at a Wagner opera, we can be made to feel that we have freely chosen that which has been made technically inevitable by a master manipulator.

66. For a detailed description of such a world that might have existed, see J. AUEL, *THE CLAN OF THE CAVE BEAR* (1980).

67. It is noteworthy that people also talk about the meaning of rules, typically by employing stories in one form or another. See, e.g., W. KLEIN, *BUSINESS ORGANIZATION AND FINANCE* (1980); see also C. GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective*, in *LOCAL KNOWLEDGE*, *supra* note 12, at 167.

matter of demonstration, not persuasion. The historical reconstruction that makes up much of storytelling is considered more trustworthy if it simply presents the facts without any instrumental or predetermined direction.⁶⁸ We can find the true and real world, says the convention, and we simply should report it in the story. Despite both occasional reminders that this convention embraces a cognitive impossibility and open acknowledgements that it is often at odds with the instrumental nature of remedy-seeking stories, most cultures abide by and even exalt the pretense that what happened can be found and reported without bias. In contrast, what facts as found mean is a matter openly to be debated, often in the most explicitly self-serving fashion. While perhaps a storyteller optimally would like to tell a story that seems to demonstrate a single, self-evident and inescapable meaning, he customarily is allowed and encouraged to persuade an audience of the appropriateness of a particular (and not coincidentally self-interested) interpretation. What is—what was “demonstrated” to be in and through the story—must be assigned a meaning, and it is usually thought to be to the advantage of all concerned to allow self-interested advocacy to that end.

While debate over what the facts mean (argument) is encouraged to be more explicitly persuasive than debate over what the facts are (storytelling), argument as an act of persuasion is constrained in most cultures in a way that storytelling is not. Argument is, by and large, allowed to appeal primarily to values that are already conventionally acceptable. Most cultures allow people in remedy-seeking ceremonies to talk in explicit terms about only certain features of the stories they tell and live by. What is permissible varies from ceremony to ceremony within a culture and changes as a culture's conventions and values evolve over time. But at any point in time and in any of a culture's ceremonies, an instrumental storyteller generally may draw out and underscore in explicit terms only those meanings that the culture has in the past determined can be debated and relied upon openly.⁶⁹ If in remedy-seeking ceremonies making meaning through likeness judgments is by its nature a process tied to tradition, argu-

68. Consider the scholarly debate over nineteenth-century tort law and the economy. See, e.g., L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 409-27 (1973); M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 67-108 (1977); G. WHITE, *TORT LAW IN AMERICA* (1980); POSNER, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); SCHWARTZ, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L. J. 1717 (1981).

69. Whenever an instrumental storyteller fails to remain within the conventional boundaries, understandably the response can be intense and complex. See, e.g., BERMEI, *An Unsettling Criminal Defense: Pre-Menstrual Syndrome Argument Does Women a Disservice*, L.A. Times, Jan. 11, 1983, pt. 2, at 5, col. 4.

ment is by custom generally that process's most conservative act of persuasion.

By contrast, stories by their very nature can appeal to what is, by convention, still taboo in a culture. Because facts themselves capture and reflect values, what cannot be argued explicitly can be sneaked into a story. Indeed, the genius of storytelling as an act of persuasion is that it buries argument in the facts.⁷⁰ Stories can thereby circumvent the existing constraints on the meaning that can be given to the facts as found. Put differently, relevance is for story a much looser standard than it is for argument. If argument tames a story by underscoring conventionally acceptable meanings, stories may be said simultaneously to turn loose and make available meanings as yet formally "illegitimate" to proffer and defend explicitly. However formally taboo, these meanings are *not* in fact insignificant to understanding and explaining previous conclusions drawn by audiences in similar circumstances and to persuading the immediate audience of a meaning that will lead to the remedy sought. What a story means is what an audience "holds" that it means in the circumstance, and it may be the story (with all its potential meanings) or the argument that best explains the holding.⁷¹

The dichotomy between story and argument should not be cast too boldly. At times and in particular cultural ceremonies, story and argument merge. "This is what happened" may be nearly the equivalent of "This is the meaning."⁷² And, in all ceremonies, people often argue in explicit propositional terms about which competing story makes most sense in the circumstance (for example, "What you think happened can't be true . . ."), just as argument about what the facts as found mean is often cast in conditional narrative forms ("Imagine the following variation of the facts . . ."). That story and argument can at times be nearly equivalent acts of persuasion in remedy-seeking ceremonies and that both are often employed in the process of determining both what the facts are and what the facts mean does not detract, how-

70. Justice Cardozo's appreciation of storytelling led, I think, to his being described as "one of the best case lawyers who ever lived" and as one who "was accustomed to hide his light under a bushel." G. GILMORE, *supra* note 12, at 75. The kind of facts Cardozo was willing to acknowledge and employ in his storytelling is, in part, the focus of John Noonan's insightful work. J. NOONAN, *PERSONS AND MASKS OF THE LAW* 111-51 (1976).

71. While this is not the place for an extended discussion, the point made in the text obviously bears a relationship to efforts to describe what professional lawyers mean when they talk about what a case holds. *See, e.g.*, E. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1948).

72. For a short and spirited debate on what constitutes narrative, compare Smith, *supra* note 62, with Chatman, *Reply to Barbara Hernstein Smith*, in *ON NARRATIVE*, *supra* note 1, at 258.

ever, from the customarily drawn distinction in function. If the ostensible purpose of instrumental storytelling is to "demonstrate" to the audience that this is what happened, the purpose of argument over possible and proffered interpretations is to persuade the audience that this is what the happening means in the circumstance. And if compared to argument story can seek to persuade only with considerable circumspection, it can also do so with greater license about what meaning should be given to the facts as found.

While storytelling and argument together provide a complementary means for participating in an audience's meaning-making process, our deployment of these two forms of persuasion sounds very much like hypocrisy. And it may be. What one claims are the facts in and through a story is never an unbiased report of the world;⁷³ what one explicitly argues the facts mean is not always all that (or actually what) one intends the audience to understand as the real meaning.⁷⁴ Yet in some ways hypocrisy is necessary to civilized life. In describing civilization as the result of sublimating our basic drives, perhaps Freud underestimated the affirmative need for order, stability, shared meaning, and convention. Even if all we consider true or real is a fabrication, we have to believe that some story reports the world as it is in order to take the next step. And even if stories do more arguing than we openly admit and appeal to values that we deny—at least insofar as we do not allow explicit arguments to invoke them—it may be that these conventions are necessary to accommodate our individual and collective needs. Through argument we affirm conventionally acceptable and often aspirational values, and we establish broad social norms that operate over time. We often wish to endorse values that we cannot live up to because we think they are necessary as ideals for a civilized society. To live communally, we all need to know what is legitimate behavior.

At the same time, we perceive the need to make room for communities within communities, for exceptional responsibilities and needs, and for the evolution of conventionally acceptable values. Perhaps we also sense the need to hear and to remind ourselves that, whatever our aspirations, we have continuing human wants and fears and angers. Through stories we acknowledge human variety and weakness. If arguments speak to and about the rational person, stories speak to and about the whole (emo-

73. Some in law recognized this early. J. FRANK, COURTS ON TRIAL 14-26, 32-33 (1949).

74. Contradictions in rhetorical modes may not be conscious or acknowledged. See generally M. FOUCAULT, THE HISTORY OF SEXUALITY (1978); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

tional, irrational, mystical, needing, loving, hating, and rational) person. We use both stories and arguments as we do because we need them. If our conventional deployment of story and argument in remedy-seeking ceremonies is often beguiling, that may be necessary if a civilized culture is to make room for our need to idealize and to be. In short, we pretend because we must.

And at some level we recognize our pretense. There is widespread evidence of a general appreciation for the distinct yet complementary functions of story and argument. In day-to-day living, many of us seem able to recognize that how and in what form one argues about what the facts are often diverges from how and in what form one argues about what the facts mean. We know that typically we must at least appear simply to be reporting the world while at the same time we are free to argue about what it all means. Many also seem to sense that the facts themselves and not some explicitly stated argument will argue best about what meaning to give to the facts as found. We may be trying to remind ourselves of these conventions when we repeat in quite different circumstances aphorisms like "less is more" and "better left unsaid."⁷⁵

The distinction between story and argument defines, in part, our response to certain literary genres. Greek tragedy, for example, characteristically pits the acceptable and legitimate meanings of life (those that can be talked about and debated explicitly) against those that are still taboo and illegitimate (those that by contemporary convention can be talked about and debated only through the story line). Both professional and lay storytellers play off what they know or sense to be conventionally acceptable and taboo, both in substance and in form. In turn, audiences often respond as they are expected to respond because they are aware that the storyteller is playing with the hypocrisy that through convention governs meaning-making in a complex civilization.

This general appreciation aside, the nature of story and argument as meaning-making acts of persuasion in remedy-seeking ceremonies is for most of us a matter that, like the fabricated nature of our reality, seldom arouses much conscious deliberation. We seem able to muddle through life without paying much attention to these distinctions and thus apparently feel little need to demand of ourselves more than what we already intuit. While Son too generally could manage to get by on his intuition alone, Son as instrumental storyteller cannot responsibly afford to bypass whatever advantage may be offered by a conscious appreciation

75. "An aphorism, properly stamped and molded, has not been 'deciphered' when it has simply been read; rather one has then to begin its *exegesis*, for which is required an art of *exegesis*." F. NIETZSCHE, *supra* note 19, at 23.

and investigation of the customary distinction between story and argument drawn by a culture in any of its remedy-seeking ceremonies.⁷⁶

The customs that enjoin the use of story and argument in approaching Man on Mom's behalf are, in part, revealed by the very nature of the remedial ceremony. Remember there are no formal criteria by which to judge Man's response to Mom's request (through Son) and there is no forum in which to raise the issue. Man's discretion would thus seem to extend not only to what he decides to do with his right to the cab but also to what he decides is the appropriate use of story and argument as acts of persuasion in the remedial ceremony over which he presides. To the extent that all we know about Man suggests that he understands and perhaps shares Manhattan's values and conventions, it may be sensible for Son to assume that he can talk to Man about whatever he can otherwise say to anyone in Manhattan (nearly everything?). Stated differently, in requesting that Mom be allowed immediately to take the cab to Carnegie, Son may assume that he can argue explicitly (if he so chooses) about what the facts as found mean without fear of appealing to what is, by convention, taboo. If this is true, however, it will be because Man's repertoire of stock structures reflects a communal sense of what the remedial ceremony should look like, not because Man must accept what New Yorkers by consensus define to be the appropriate use of argument. Man is by custom free to fashion a remedial ceremony to his liking and free to decide what distinctions, if any, are to be made between the complementary acts of persuasion—story and argument.

5. The Politics of Storytelling

If the stories Man lives by helpfully guide Son to a repertoire of tellable stories, they also may deeply disquiet Son, Mom, or both. Son may not be willing to tell the kind of story capable of compelling Man, and Mom may not be willing to have certain stories told about her even if Son is willing to tell them.⁷⁷ What would they think about a compelling story that, for example, characterized Mom as an "irrational old female—you know the kind, mister (fraternity smirk)?" Should Son feel obligated to Mom to tell this or any other story Man can see and be moved by? Should

76. Understanding the use of story and argument may lead a responsible instrumental storyteller, the person represented, or both to a decision not to abide by the customary distinction or not to participate in the ceremony at all. See *infra* notes 77-78 and accompanying text.

77. What may be characterized as "the price of intelligibility" often underlies, I think, the reluctance of Chicanos, and perhaps other cultural or oppressed groups, to tell and have told about them stories that the law will hear.

Son feel free to tell any story he predicts will work without first seeking permission from Mom? Is Mom willing to subordinate her individuality in order to become a stock character marketable to an audience with relevant remedial power? Moreover, that the stories Man lives by may disfigure storytellers like Son and claimants like Mom raises broader normative questions. Whenever in particular types of social relationships certain classes of people are as a matter of course in the position of being able to grant or deny the remedy sought, the outcome of the conflicts or disputes will undoubtedly reflect the composition of those with remedy-giving power.⁷⁸ While this should not be surprising in view of all we know about the only way we make meaning, the systematic imposition of one class' set of conventions and values on others dramatizes a central question in a democratic society: Whose stock stories do we live by?

Without pretending to address, much less answer, these normative questions, the point is that Son's and Mom's participation in Man's meaning-making process is at every moment and in every dimension a political act. The existence and nature of the ceremony and its governing conventions reflect cultural values. By participating in the ceremony, one is declaring herself or himself to be part of an acceptable culture. This is no less true for Son than it is for Mom. In acknowledging Man's first-in-time priority and remedy-giving power, both are at least publicly specifying that the culture that ordained this ceremony to be governed by the stories Man lives by is generally worth maintaining. This is inevitably the price of seeking a remedy through any of the ceremonies a culture makes available.

III. A SPECIAL AUDIENCE: THE INTERVENOR

A. *The Cabbie Can Decide: Living In a Different Story*

The setting: *Back to Park Avenue, 7:42 p.m., Manhattan, Mom, Son and Man, but in a different, more arbitrarily imagined, world.*

Unlike the original story our players were living, this story supposes that cabbie, if made to, can and must decide whether Mom or Man gets the cab. If first-in-time fails satisfactorily to resolve the conflicting claims to the cab in the intended self-administered way, cabbie has been made available as an intervenor. Parties with conflicting claims to her cab may assert publicly their

78. See, e.g., Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982) (commenting on Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982)). The point in the text is not intended to suggest that the rulers will not in part and by design bend to the demands of the ruled. See, e.g., E. GENOVESE, *supra* note 12, at 25-75.

normative claims for her to resolve. The parties may not, however, invoke (as Son may for Mom in approaching Man) nor may cabbie consider (as Man may in assessing Son's pitch for Mom) appeals to interest. Bribes of any sort are out.

Suppose too, suspending disbelief, that everyone in New York accepts without objection that what cabbie says goes. There is no higher authority than cabbie, no system for the review of her decisions. She is the coercive system. While no formal rules govern her decision or decision-making process, certain "ceremonial customs" enjoin cabbie to decide cab disputes on the basis of a "there must be a winner and winner takes all" resolution. And, of course, commonly shared stock stories and structures like first-in-time operate in the way I have described. Otherwise, everything remains the same. Or does it?

In helping Mom try to satisfy her needs, Son now has available at least two audiences with direct remedy-granting power—Man and cabbie. Each audience presides by custom over its own remedy-seeking ceremony and has the power independently to let Mom immediately take the cab to Carnegie. That each audience has independent remedy-granting power does not mean that the remedial ceremonies are not deeply interrelated. In fact, Son should appreciate even without knowing more that with cabbie around, Mom's relationship to Man is, from the outset, differently constituted than the relationship that existed when Man alone had remedy-granting power.

1. Why a Different Setting and Why This Additional Audience?

Man and cabbie are of course only two of a large number of possible audiences for Son. Man, as a principal character in the story Son and Mom are living, is obviously a relevant audience. Cabbie represents a somewhat different kind of audience—one with little personal stake in Son's story but with a recurring professional role in similar stories.⁷⁹ As such, cabbie is almost at the opposite end from Man of the spectrum of possible audiences. (Man's business associates, for example, or passers-by, might represent intermediate audiences, somewhat detached from the story, but with a personal rather than professional interest in it.) Man has a strong personal interest in the outcome of Son's story, but little stake in how the story compares with or modifies the general repertoire of cab stories. Cabbie has little personal concern with the specific outcome, but a general concern with the cab repertoire. The hypothetical constraints on cabbie's decision-making

79. For somewhat different perspectives on the role of the intervenor, see Abel, *supra* note 9, at 244-51; Eisenberg, *supra* note 54, at 655-60.

power underscore this distinction, exaggerating the differences between Man and cabbie and audiences, but permitting a clearer demonstration of how storytelling operates across the entire spectrum of possible audiences.

Cabbie is, however, neither "court" nor "arbitrator" nor any other familiar intervenor in disguise. That she bears a resemblance to these other third-party decision-makers is, to be sure, not unintentional; but, at least in Western culture, some resemblance also may be unavoidable. People like cabbie are everywhere in the stories we live. Cabbie is as she is to reflect this ubiquity and to illustrate, in specific and perhaps hyperbolic detail, the influence of "cabbies" on the problem-solving of lay lawyers and on our lives.

2. A New Relationship With Man

No longer independent of Mom and any social mechanism that might force his hand, Man now must pay attention to Son or risk that his diminished participation in either of the remedial processes ultimately may lead to his interests being ignored entirely. Cabbie's attention-getting power derives from her direct remedial power. She can coerce Man to do what he might be unwilling to do, and she can exercise this coercion with or without his attention to (and, a fortiori, active participation in) the meaning-making remedial process she presides over. But cabbie's attention-getting power derives, too, from her availability. While other audiences perhaps have the power to get Man's attention, they are not immediately available; none of these audiences can serve, as does cabbie, as an effective attention-getter for Son.

Moreover, with cabbie around, any story Son tells no longer lives only through Man's interpretation of it. Cabbie's interpretation of any story told matters too. If you make cabbie make meaning, cabbie has the last say. While it may not be in Mom's best interest to force cabbie to make meaning, cabbie's interpretation shadows all that Son does in shaping Man's and Mom's personal relationship. From the time he first agrees to represent Mom, Son will operate in the shadow of a single question: "What is cabbie likely to do if forced to decide this dispute?" The answer to that question depends, of course, on how cabbie establishes meaning in the midst of a dispute—in a circumstance wherein both Man and Mom (through Son) are asserting normative claims to the cab. Since so much depends directly and indirectly on cabbie's interpretive process, we first will turn our attention to how cabbie decides.

B. *How Cabbie Establishes Meaning in the Midst of a Dispute: The Remedial Culture*

Like all of us, cabbie interprets from her own set of conventions and values. The meaning she can ascribe to a circumstance or to an interaction within a circumstance will reflect those conventions and values.⁸⁰ More precisely, cabbie always possesses or is possessed by some stock story that she sees in the circumstance, and that tells her what she sees and what the world is and means. Through this in-place interpretation will pass everything that is produced and understood. In other words, the meaning cabbie makes in the circumstances is both enabled and restricted by the meaning she already has made. Of course, most of the stock stories cabbie draws upon in making everyday meaning will be shared by those with whom she shares a culture. Stated differently, the meaning cabbie is capable of making in processing the world reveals her communitarian nature.

Cabbie's communitarian nature, generally in evidence when making everyday meaning, specially circumscribes the meaning she is capable of making as intervenor. The remedial ceremony over which cabbie presides reflects, like Man's first-in-time rights and remedial power, the general consensus of those in Manhattan about how and by whom disputes over cabs are to be resolved. To the extent that her assumption of the intervenor's role indicates a commitment to the ceremonial structure and the customs that enjoin it, cabbie's repertoire of stock stories will reflect over time her acquiescence in the appropriateness of a particular kind of decision-making and particular types of decisions. Cabbie will come to believe that in her ceremonial role as intervenor she can make only certain kinds of meaning—a belief inevitably reflecting the customs which by community consensus define her status.⁸¹

Cabbie's belief is neither fanciful nor entirely self-imposed. Many in Manhattan already hold beliefs similar to that which cabbie absorbs and maintains—beliefs inevitably reflecting their own initial customary injunctions, the beliefs other cabbies hold about the meaning they are capable of making as intervenors and too, in time, cabbie's own belief about the meaning she is capable of making in her ceremonial role. These reciprocal and harmonious beliefs offer support to one another and together constitute an

80. "We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own." B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 13 (1921).

81. This theme, though typically stated in different terms, may be found in the work of a diverse group of legal scholars. See, e.g., K. LLEWELLYN, *supra* note 30; Fuller, *The Forms and Limits of Adjudication*, 92 *HARV. L. REV.* 353 (1978); Gabel & Feinman, *Contract Law as Ideology*, in *THE POLITICS OF LAW* 172 (D. Kairys ed. 1982).

image of how and what meaning is and ought to be made in resolving cab disputes. Even if these beliefs are not completely articulated or held by all members of the Manhattan community, the image is enormously influential and, in fact, is reflected in what can only be described as a special remedial culture.

Rooted in Manhattan's larger culture and reflecting and daily sharing the larger culture's values and conventions, the remedial ceremony nonetheless generates over time its own internal set of values and conventions. All remedial ceremonies in Manhattan are distinct subcultures of the larger culture and, inevitably, each of these subcultures espouses norms and modes of behavior that may exist in the larger culture, though often with less prominence or pervasiveness. It should come as no surprise that, like any other culture, the remedial ceremony has its own vocabulary and customs. Nor should it be surprising, in view of the communal way we make meaning, that cabbie's repertoire of stock structures will capture and reflect the remedial culture's values and conventions. If in the circumstance, Son is to tell a story that makes sense and that employs story and arguments to offer and defend a compellingly appropriate meaning, he must understand how the remedial culture's conventions and values specially circumscribe the meaning cabbie is capable of making when resolving cab disputes.

1. A Conventional Definition for What Truly Happened

Consider first how cabbie determines what happened. Like all intervenors, cabbie never arrives on a circumstance "fixed and found" but rather encounters a diversity of narrative versions of the circumstance "in the making."⁸² While a versionless version of what happened—the whole truth—is unknowable, cabbie's authority as an intervenor and the ceremony's legitimacy as a means of resolving cab disputes nonetheless depends, in part, upon the extent to which cabbie is perceived as always attending to a true account of the past.⁸³ Custom demands that intervenors at least appear to be objective—a custom reinforced by a sub-articulated sense that the adopted version of what happened often leads directly, if not inexorably, to what ought to be. While enjoining cabbie to select the most credible version of what happened, the ceremonial obligation offers no guidance on how to do so. Left to her own devices, cabbie finds the truth in cab disputes in the same way she and the rest of us regularly find the "truth" in declaring our reality. She will evaluate any narrative version of the circum-

82. See generally N. GOODMAN, *supra* note 44.

83. In an essay on convention and law, Stephen Yeazell makes this same point about judges. See Yeazell, *Convention, Fiction and Law*, XIII NEW LIBRARY HISTORY 89, 95 (1981).

stance according to the facts as cabbie's present reality has declared them to be (the present finding of facts) and as other versions of reality in cabbie's repertoire declare that they can be (other plausible findings of fact).

Under the best conditions, this is a skewed and only partially reliable methodology for determining the past. Things do not get any better when the disputants, generally the two primary sources of information, are telling self-interested and sometimes even shamelessly distorted versions of what happened and when neither adequate time nor resources is available to check their stories.⁸⁴ Yet ceremonial custom does not allow cabbie to say "I just don't know" or "I can't decide." Cabbie must decide on the basis of what truly happened.

To manage the inevitable tension between what custom dictates and what conditions allow, there emerges over time a conventional definition for what truly happened. While the precise features of that definition will vary from culture to culture and from remedial ceremony to remedial ceremony, it typically equates truth with what the intervenor and finder of fact labels as truth. In the case of cabbie, the conventional definition demands of all in Manhattan a willingness to engage in interactive self-delusion. Consider the dynamics. Cabbie is customarily enjoined to decide only how the dispute should be resolved—who gets the cab. She need not publicly specify her finding of facts, and her decision about what happened always is made alone and immunized from formal review. The same customs that grant her this leeway also dictate, however, that her authority and the cere-

84. Alison Anderson passed along the following UPI story with the notation, "File under 'The High Price of Plausibility.'"

San Jose Man Denies Insurance Fraud. SAN JOSE (UPI)—A man accused of staging a phony car accident to bilk insurance companies out of \$200,000 and hacking off his left foot to make the crash look more convincing has pleaded not guilty to insurance fraud charges.

Robert Yarrington, 47, was ordered held in the county jail on \$100,000 bail and told to appear in Municipal Court for a pretrial hearing Oct. 5 on charges of grand theft and conspiracy to commit fraud. His friend, Bruce Kraft, 29, San Jose, pleaded not guilty to the same charges and was ordered held on \$100,000 bail.

Police said the men staged a pickup truck-motorcycle accident in the Santa Cruz Mountains three years ago, using their own vehicles. Yarrington had a former girlfriend, Connie Martinez, 47, hack off his left foot with a hatchet to make the macabre insurance fraud more convincing, officers said.

They collected more than \$200,000 from several insurance companies.

Yarrington's foot was nearly severed and was later amputated at a hospital. He was subsequently fitted with an artificial leg.

Police said Miss Martinez, who was not charged, admitted the scam when her conscience began to bother her.

L.A. Daily Journal, Sept. 24, 1982, § 1, at 2.

mony's legitimacy continue only so long as the general consensus in Manhattan perceives that she is unbiasedly attending to the truth in arriving at her conclusions. Aware of the precarious status that the ceremony's structure affords her, cabbie may tend to downplay the amount of doubt she has about her decision and to conceal from the public the process that led to her finding of facts. She may also, in a perhaps less than conscious attempt to bolster her public accountability, find as true not what she thinks makes most sense, but what she assesses that a substantial number of those who live in Manhattan would recognize as true in the circumstance.

The community, itself not unaware of cabbie's precarious status, will in turn allow, if not encourage, cabbie's efforts to appear not only objective but capable of ascertaining something at least quite near what truly happened. Just as cabbie operates behind the conventional definition of truth to protect her authority, the community (at least a general consensus of those in Manhattan) operates behind the same conventional definition to protect the legitimacy of a less than ideal but very necessary remedial ceremony and its own belief that the ceremony works through cabbie in a normatively defensible fashion. All in Manhattan feed on the conventional definition of truth in ways that shape both their behavior and consequently the meaning they are collectively capable of making through cabbie in the ceremony designed to resolve recurrent cab disputes.

2. The Conventionally Familiar: A Reliable Indicator of What Cabbie Finds Compellingly Appropriate

Consider too the meaning cabbie gives to what happened. Having been urged by the conventional definition of truth to rush with perhaps exaggerated confidence to make her finding of facts, cabbie already may have determined what meaning she will make and the outcome of the dispute. Transforming Man's and Mom's interaction into a story line with defined characters may be for cabbie the best argument for adopting a particular meaning and a particular ending; cabbie's finding of facts may even be the aftermath of an interpretation for which it is supposedly a basis.⁸⁵ At the very least, as a consequence of the conventional definition of truth, the meaning-making process may be less deliberative and more conservative than the ceremonial structure otherwise might imply. Rushing to make a confident finding of facts forces cabbie to rely on her existing repertoire of stock structures and, inescapably, on the meanings that they capture and reflect. Unusual sto-

85. See *supra* notes 57, 65 and accompanying text.

ries told by disputants (or by the circumstance itself) are not easily processed when there is neither time nor room for doubt or for further reflection and investigation. It is difficult, for example, to determine whether unusual stories make sense because their uncommon features require more of cabbie's capacity to make likeness judgments than the conventional definition of truth comfortably allows.⁸⁶ By necessity, cabbie thus looks with great frequency for familiar story patterns that can be identified readily by her existing repertoire of stock stories as making sense and that will then, not coincidentally, be given a familiar meaning. What cabbie finds compellingly appropriate will have the look of something that has before been found compellingly appropriate.

Those in Manhattan, particularly those who often take cabs, come to expect and anticipate cabbie's exaggerated reliance on the familiar. And what they can expect they like. Familiar meanings are knowable; all in a community can shape expectations and behavior accordingly.⁸⁷ Even if individual members in the community (and, conceivably, even if the consensus) would not, if given a fresh start, establish particular familiar meanings in resolving particular cab disputes, the very fact that these meanings have been made so often and are so familiar becomes in time a deeply entrenched cultural value. The value of "This is the way we do things in Manhattan" tends to support at the deepest level the customarily acceptable values and conventions reflected in cabbie's familiar and repeated decisions. And along with cabbie, those in Manhattan justify their exaggerated reliance on the familiar and the existing and on their own collective allegiance to the norm that likes should be treated alike.⁸⁸

The community's trust in cabbie's cognitive reliance on the familiar is not lost on cabbie. She knows that members of the community like the familiar; she does too. She knows, too, that her authority rests, in part, on seldom surprising those in Manhattan with the meaning she gives to what happened. Cabbie's appreciation of the conventionally defined familiar reinforces any tendency toward the familiar that the conventional definition of truth may have already underscored. If, in deciding what hap-

86. Unusual stories are not only more difficult to believe but may also make it more difficult to determine a clear winner who takes all.

87. There is no such thing as a sense of causality, as Kant thinks. One is surprised, one is disturbed, one desires something familiar to hold on to—As soon as we are shown something old in the new, we are calmed. The supposed instinct for causality is only fear of the unfamiliar and the attempt to discover something familiar in it—a search, not for causes, but for the familiar.

F. NIETZSCHE, *supra* note 57, at 297.

88. See generally Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982); Karst, *Why Equality Matters*, 17 GA. L. REV. 245 (1983).

pened, she strays too far from the conventionally familiar story line and in so doing reaches conventionally unfamiliar conclusions with implicitly unfamiliar or even taboo meanings, she endangers her authority and the remedial culture's legitimacy.⁸⁹ In other words, cabbie is pressured by the conventionally familiar to find compellingly appropriate what has before been found compellingly appropriate. Even if this pressure does not drive cabbie always to avoid unusual stories or taboo meanings, it subtly may influence her to assess whether findings of fact that she might elsewhere make or meanings she might otherwise give to what happened are near enough to what a substantial number of those who live in Manhattan would recognize as sufficiently like the familiar in the circumstance. If uncertainty exists, the conventional understanding of the familiar may drive her toward a more comfortably familiar finding of facts and, in turn, a more comfortably familiar meaning.

The community, again not unaware of the pressures on cabbie, will play on cabbie's tendency to do things the way they have always been done in Manhattan. Those in the community who find themselves in cab disputes typically will tell familiar stories that invoke familiar meanings through cabbie's existing repertoire of stock structures. They even will go so far⁹⁰ as to mask what really happened and who they really are for the sake of helping cabbie abide by the conventional definition of the familiar: Real stories will emerge as something more like an existing stock story, and a real person will be portrayed as something more like a stock character.⁹¹ Normally undertaken for purely self-interested reasons (cabbie is more likely to decide for you if she can comfortably identify and understand the story you tell as a familiar one), such translations and transformations inevitably reinforce the convention that generated their telling in the first place. When there is uncertainty about what normative meaning should be established through cabbie in a cab dispute, all in Manhattan typically pursue the familiar.

89. Moving too quickly away from the familiar is scary even if otherwise justified and, for this reason alone, often will be avoided.

90. Mom and Son would perhaps go this far with Man, too, but they know far less about Man and his remedial ceremony than they do about cabbie and hers.

91. Equal protection claims, as they typically are litigated, perhaps best illustrate this point in the law. It is important to note, however, that a remedial ceremony more interested in stock characters than real people may be, at some times for all of us and at all times for some of us, desirable and comforting. Being described and even treated as stock characters may permit us to hide personal features and feelings we may not want exposed.

3. The Conventional Form of Meaning: Certain Meaning in Certain Terms

Meaning itself has a conventional form in this special remedial culture which, in turn, has a separable effect on the meaning that all in Manhattan feel cabbie must make in resolving cab disputes. The remedial ceremony over which cabbie presides is a "there must be a winner and winner takes all" Manhattan ritual that forces cabbie to conceive of the meaning she can make in a particular and predesignated way: Cabbie may not express doubt either about what happened or about what what happened means. Typically it will not do for cabbie, for example, to declare that she cannot comfortably resolve the normative claims in this fashion or to adjudge that the disputants must "split the difference."⁹² Cabbie must answer the question who gets the cab and, therefore, must declare that certain meaning can be established in the dispute.

Any remedial ceremony that claims, however impliedly, always to produce certain meaning in the face of competing normative claims can do so only by denying the uncertainty that often accompanies choosing from among competing meanings. Occasionally a story adopted by an intervenor like cabbie can demonstrate a single, self-evident meaning that can be truly and comfortably expressed through an answer to the question who wins. Far more typically, however, the story adopted by the intervenor will suggest more than a single meaning, none of which may appear more normatively compelling than another. Rather than invite cabbie's repeated admissions of moral indecision in these circumstances, the remedial ceremony makes cabbie declare a winner and treats the answer as implying the meaning that ought to have been made in the dispute. Lest this conventional interpretation of what ought to happen be too often attacked, custom enjoins that there be no formal review of the meaning established: What cabbie says goes. The ceremony manages legitimate irresolution both by compelling cabbie to ignore doubt and by insisting that, so long as the convention of what is familiar is not too often or too severely compromised, all in Manhattan abide by (even if they do not believe in) the meaning established.

Any remedial ceremony that claims, again however impliedly, always to produce through its process a just winner takes all resolution can do so only by denying, in addition to uncertainty, that moral conflict often is defined in terms that are incompatible with this form of meaning. For example, a winner takes all resolution typically requires that disputes be defined in terms

92. Yeazell, *supra* note 83, at 95.

of conflicting rights and be resolved according to a logic that is formal and abstract. People are thus enjoined to talk—through stories and arguments—about a particular form of meaning in a particular kind of way. More specifically, all who participate in the process of making meaning through and in the remedial ceremony must employ stories and arguments to separate claims from human interaction and to measure one claim against the other employing a hierarchical ordering of values. The fairness claimed by and necessary to the continuation of the ceremony is met if rational people can perceive why it is that one asserted right to the cab must take primacy over another asserted right. Translating the human situation into impersonal competing claims lends itself to the appearance of objectivity and to a widely shared conviction that, however difficult some disputes are to decide, it is fair to say that there is a winner who should take all.

For those who define people in moral conflict “as opponents in a contest of rights” and who pursue resolution of such conflicts according to a mode of thinking that strives for rational and blind impartiality,⁹³ this conception of meaning is both sensible and compelling. These people naturally tell (as disputants) or adopt (as cabbies) stories and make or find persuasive arguments that define disputes over cabs in terms that are compatible with the remedial ceremony’s conception of moral conflict. They perceive the logic of the remedial ceremony’s form of making meaning because the ceremony’s assumptions and conventions coincide with and reinforce their own. Put differently, their stock stories about normative conflict are constituted in terms harmonious with, if not mirrored by, the stock stories in the remedial ceremony’s repertoire.

For those with a responsibility conception of conflict, the remedial ceremony’s winner-takes-all form of making meaning is, however, neither natural nor sensible. Ideally, these people would eschew stories and arguments intended to convince an intervenor to see the world in one particular way and one party as a winner who takes all. Instead, they would encourage each party to describe as completely as possible his or her perspective in order to help the intervenor and both parties understand the relationship. Then, if necessary, the intervenor, acting like a marriage counselor, would make a detailed finding of facts that would provide the parties with insights into their relationship and perhaps with possible solutions to their conflict. But because the responsibility conception reflects a deeply held conviction that the resolution of the conflict will follow from its presentation as a compelling narrative, parties in an ideal remedial ceremony would be en-

93. See *supra* notes 49–52 and accompanying text.

couraged both to agree on meanings and implications of the intervenor's "story judgment" and to work out their own solutions through a process of harmonious accommodation.

The "there must be a winner and winner takes all" remedial ceremony is not equipped to accommodate or respond to this responsibility conception of normative conflict. The ceremony is designed to process relatively skeletal and superficial stories about the relationship ("I got here first"), not detailed descriptions of the parties' view of the dispute ("I think if he cared he at least could share"). The ceremony cannot handle candor, confusion, conflict and all. This is partly intentional: People in Manhattan want cab disputes resolved quickly and predictably. Stories and arguments that define claims in terms of conflicting rights typically do not require the intervenor to understand the relationship in the same time-consuming way that would be demanded were she to conceive of the dispute in terms of conflicting responsibilities.

Even if speed were not a practical concern, a "there must be a winner and winner takes all" ceremony by convention could not allow the intervenor to get inside the relationship in the way the responsibility conception demands. An intimate understanding of the relationship often would make a winner-takes-all decision too racking to reach; too frequently conceptual and ethical confusion would ensue. "How can I declare a winner who takes all," the intervenor would implore, "when the ethic of care and communication demands a much different-looking resolution?" Moreover, the intervenor's very efforts to understand the relationship likely would endanger the ceremony's legitimacy. The image of the objective intervenor depends in large part on the perception that the meanings implicit in her decisions are allegiant to the norm that equals should be treated alike.⁹⁴ People are "equal," however, only in terms of abstract statements of rights—not in terms of qualities, needs and relationships.⁹⁵ The distance between intervenor and parties that results from the ceremony's demand for skeletal stories about stock (rather than real) people and relationships allows the intervenor comfortably to abide by the equality principle. Were the intervenor to attempt to get to know and understand real people, real relationships and the real story, she would compromise the distance that now enables her to treat or at least to be perceived as treating equals alike. Legitimate intimacy is, in matters of fairness, too easily confused with corruption.⁹⁶

94. See, e.g., Eisenberg, *supra* note 54, 656-57.

95. See generally Westen, *supra* note 88. For a penetrating discussion of this point in a related context see Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103 (1983).

96. John Noonan speculates that Justice Cardozo's lack of interest in the real identities of the people in *Palsgraf* was due, in part, to his desire to distance himself

For a ceremony ideally to accommodate the responsibility conception of moral conflict, Manhattanites might have to abandon their commitment to treating equals alike—at least as the principle of equal treatment is conventionally defined.

The remedial ceremony manages the uneasiness between these two different ways of seeing and defining moral conflict typically by compelling cabbie and all in Manhattan to suppress one in favor of the other. All who make meaning through cabbie in a cab dispute must translate and transform their stories and arguments into terms that are compatible with a rights conception. Those who find themselves in cab disputes and who do not think about justice in these terms will find the ceremonial experience frustrating and confusing. Their failure to cast their viewpoint in the conventional imagery typically will result in their stories and arguments being treated as unintelligible if not unintelligent, the product of muddled thinking and an underdeveloped sense of justice.⁹⁷ They may even find the remedial ceremony a source of considerable fear and despair. With its emphasis on winning and impersonal stories and characters, the ceremony's way of making meaning through cabbie may appear to legitimate an ethic of unconcern.⁹⁸

The ceremony's suppression of the responsibility conception and its narrative and contextual mode of thinking is not entirely successful. There are, for example, relationships that resist facile transformation despite ceremonial demand. Those which are neither ignored nor forced into terms of competing rights are quietly accommodated. A limited number of stock stories familiar to those most active in the remedial culture thus undoubtedly reflect, although perhaps in some disguised fashion, a concern for caring relationships and communication,⁹⁹ just as certain other stock sto-

from his father, Albert Cardozo, who resigned from the bench after a legislative committee had recommended his impeachment for corruption in the days when Boss Tweed ruled Tammany: "In his [Justice Cardozo's] court was to be only A or B." J. NOONAN, *supra* note 70, at 143-44. One wonders whether Justice Cardozo would have acted differently as, for example, a trial court judge forced to learn about Mrs. Palsgraf and her life.

97. See, e.g., C. GILLIGAN, *supra* note 50, at 24-32.

98. The inability or unwillingness to cast one's viewpoint in the conventional imagery may explain, in part, the negative response of many students to learning about litigation.

99. Some perceive *Hoffman v. Red Owl Stores*, 26 Wis. 2d 683, 133 N.W.2d 267 (1965), as such a stock story in American contract law: "The strict nineteenth-century requirement of bargain was rejected in favor of a broader standard of social obligation more expressive of the realities of the late-capitalist economy. . . . [The principles underlying *Hoffman*] embody the ethic of cooperation and coordination reflective of the modern society." Gabel & Feinman, *supra* note 81, at 180. See also *Local 1330, United Steel Workers v. United States Steel Corp.*, 631 F.2d 1264 (6th Cir. 1980).

ries might be interpreted as reflecting a mixed imagery of moral conflict.¹⁰⁰ Nevertheless, the vast majority of those stock stories and structures that comprise and in part define the remedial culture are aimed at rationally working out the primacy of rights in conflict in a cab dispute and not at working through communication to arrive at an understanding of the responsibilities that inhere in a relationship well understood.

There are, too, "renegade" cabbies who solicit stories and arguments cast in the imagery of connectedness and care and who encourage the parties in a dispute to reach some resolution other than winner takes all. Education, tradition, professionalism, and community pressure, however, naturally tend to limit their number and influence. Even if these cabbies serve in certain eras as symbols of a different way of thinking about justice in cab disputes,¹⁰¹ they will at the same time serve as reminders to all in Manhattan of the remedial culture's tolerance and flexibility. So understood, their presence and activities relieve as much pressure as they may create.¹⁰²

Apart from these "failures" to suppress the responsibility conception, the remedial ceremony's commitment to a rational and unbiased mode of thinking inevitably is compromised in at least one pervasive and unacknowledged way. Closure that may appear morally and rationally self-evident can, as the result of how cabbie and the rest of us interpret, be the handiwork of other hard-to-detect influences. The ethically significant ceremonial decisions, what happened and what what happened means, are at all times affected by the availability of stock stories, by the formulation of the likeness decision, and by the dynamic interplay between likeness and context.¹⁰³ Cabbie's interpretive process is, in other words, more insistently and inevitably contextual and relative than either the ceremony publicly admits or the convention of rationality typically allows.

Moreover, the ceremonial acts of persuasion allow, if they do not encourage, the manipulation and exploitation of cabbie's

100. For such a view of American contract law, see Kennedy, *supra* note 74, at 1713-37.

101. Duncan Kennedy describes Judge Skelly Wright as an important actor "in a symbolic representation of the conflict of commitments . . . at work on the indispensable task of imagining an altruistic order." Kennedy, *supra* note 74, at 1777-78.

102. While in no sense a criticism of Judge Wright or inconsistent with the symbolic role Kennedy appropriately accords Judge Wright, Arthur Leff's treatment of unconscionability may be taken, in part, as making the same point about such judges and our response to them. Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349 (1970). *But see* Helstad & Skilton, *Protection of the Installment Buyer of Goods Under the Uniform Commercial Code*, 65 MICH. L. REV. 1465, 1480 (1967).

103. *See supra* notes 30-48 and accompanying text.

processing methodologies and tendencies. Stories and arguments share an internal structure, a "this is that which should lead you to declare me the winner" principal theme; they echo the way cabbie captures and makes meaning and, therefore, facilitate the upplaying, downplaying and obscuring of circumstantial features. By burying arguments in facts that capture and reflect values, stories can appeal covertly to what is substantively and procedurally taboo in the remedial culture. While stories are perhaps of little advantage when approaching a man with both first-in-time rights and discretion to fashion a remedial ceremony to his liking, they can play a significant role in relatively conservative cultures like cabbie's that often rely on familiar values in resolving disputes.¹⁰⁴ So long as they appear only to report the world, stories can circumvent the ceremony's commitment to a rational way of thinking. At the same time, arguments about what the facts as found should mean can, so long as they appeal to values that are conventionally acceptable in the remedial culture, be boldly self-interested. While such arguments need not conflict with a fair and fairly determined resolution of the winner who takes all, they can conceal or give way to exaggeration and deception and, in so doing, imperceptibly bias cabbie's decisionmaking process.

While the remedial ceremony has not managed entirely to suppress the responsibility conception nor to filter out the biases that inevitably accompany our meaning-making processes, one should not underestimate the ceremony's general success in forcing Manhattanites to conceive of the meaning cabbie is capable of making in a particular predesignated way. This success insures that the ceremony provides, in accordance with the consensus' mandate, a reliable means by which to achieve a clear-cut determination of who should prevail in a cab dispute. Order is achieved, however, only by compelling all involved in a cab dispute before cabbie to ignore uncertainty and, at least publicly if not at the deepest level, to think and talk about justice in particular terms and in a particular way. Considering the limited nature of our excavation of cabbie's remedial ceremony, one wonders just how high a price people in Manhattan pay for this order.

4. Getting Inside Cabbie's World

There is in Manhattan no organized system designed to gather and sort cabbie's repertoire of stock stories. Son does not have the advantage of a West's Digest System or a LEXIS to discover and thereafter interpret narrative precedents that would help him predict how cabbie is likely to decide this dispute. In

104. See, e.g., D. BINDER & P. BERGMAN, *FACT INVESTIGATION* (1984).

representing Mom before cabbie, Son must evaluate the persuasiveness of all conceivable stories and arguments without the help available to other storytellers in other circumstances.

Son of course is not without his resources. He shares with cabbie (as he shared with Man in the LEXIS-less world where only Man could grant Mom her remedy) stock stories, a circumstance and a reality.¹⁰⁵ Of considerable value in getting inside the world of any audience, these resources can help a storyteller like Son anticipate what an intervenor like cabbie will find compellingly appropriate. The stock stories that appear in the circumstances over which cabbie presides and that permit cabbie to establish meaning in the midst of a dispute are designed not to surprise. They are cast in particular terms, talk about justice in a particular and limited way, and in all matters are exceedingly allegiant to the past and the familiar. They are, in other words, thought to do their job acceptably well precisely because they are knowable and lead cabbie to make generally predictable meaning.

While typically more predictable than the actions of less constrained audiences, what cabbie is likely to do if forced to resolve Mom's and Man's dispute is at the same time and for the same reasons relatively inaccessible to someone like Son. The stringent and impoverished stock stories that govern meaning-making in cab disputes are by their nature meant for "locals." They abstract—often in very crude and reduced form—only some of the features of human stories that one might conceivably identify as mattering in disputes over cabs. In so doing, these simplified, even caricatured, stock stories accommodate a wide degree of shared meaning among those in Manhattan and thereby establish standards of behavior that are administrable, comprehensible and applicable to many diverse situations.

Certain abstracted features of these stock stories appear predictable enough, to be sure, even by one who has never been in Manhattan, much less in a cab. First-in-time, for example, isolates features that matter in many cultures—so much so that we tend to think of these features as commonsensical and not cultural.¹⁰⁶ But other features isolated and made prominent in cabbie's repertoire of stock structures effectively will avoid prediction by all but those very familiar with taking cabs in Manhattan—in short, those locals who know the cultural game. The role and prominence of these features in resolving cab disputes appear to the unacculturated as unexpected, arbitrary, and even anomalous as the rules of stickball seem to a kid who grew up playing hard-

105. See *supra* notes 54–57 and accompanying text. That stock stories are shared reflects that Son may have learned about cabbie's world by riding in cabs.

106. See C. GEERTZ, *supra* note 54.

ball on the local diamonds of East L.A. The fact that the games have so much in common may itself cause one initially to overlook that what matters in playing each game can be idiosyncratic and even irrational.¹⁰⁷ If Son does not know well the remedial culture surrounding cab disputes, he cannot possibly anticipate everything that over time has become conventionally acceptable—which stories are tellable, which arguments makeable, and which meanings familiar enough to be compelling. Living in the same story with cabbie provides more information to an instrumental storyteller like Son than does living in the same story with a less constrained audience, but only if one knows the remedial culture. Perhaps at Mom's expense, Son's representation will test his knowledge of what New Yorkers do when they dispute as well as when they play.

C. *Working These Two Audiences: A Tough Act for the Storyteller*

In helping Mom try to satisfy her needs, Son has available at least two audiences with direct remedy-granting power: Man and cabbie. By custom, each audience presides over its own remedy-seeking ceremony and has the power independently to let Mom take the cab to Carnegie. That each audience has independent remedy-granting power does not mean that the remedial ceremonies are not deeply interrelated. Man and Mom are still trying to realize a gain or avoid a loss relative to their respective value systems, but Son no longer needs to rely exclusively on Man's allegiance to convention (even a stranger is entitled to a hearing in certain shared circumstances) or recognition of the rational need to collaborate (one cannot otherwise determine what is in one's best interest) to get Man to listen. Cabbie's coercive power and availability compel Man and Mom to reach a mutually satisfactory resolution or subject themselves to the intervenor's final word on the matter.

While providing good reason for both Man and Mom to listen to the story the other is living,¹⁰⁸ cabbie's remedial ceremony ironically tends to undermine the otherwise relatively free operation of the remedial ceremony over which Man presides. The possibility of an intervenor like cabbie making meaning forces Son and Man to keep in mind the persuasiveness of their respective

107. For a fascinating account of mistaking one "game" for another see M. BEVIER, *POLITICS BACKSTAGE* 84-103 (1979).

108. As Professor Eisenberg has underscored, the minimax principle (that each side will choose a strategy minimizing the other side's maximum possible gain) alone will give rise to a preference for a "nonbinary" process. Eisenberg, *supra* note 54, at 660 n.63.

and perhaps soon to be competing "there must be a winner and winner takes all" stories and arguments. When by general consensus an available audience has the last say, it is wise to predict what the audience would do if forced to resolve the dispute. What cabbie is likely to do in part defines what is in one's best interest to do while one remains outside of cabbie's jurisdiction.

However natural and well advised, keeping one eye on what an intervenor like cabbie is apt to decide badly distracts instrumental storytellers and the people they represent¹⁰⁹ from conceiving of social relationships like Man's and Mom's in terms other than those which define cabbie's remedial ceremony. The distraction is in part cognitive. Stories and arguments cast in the imagery favored by cabbie are exceedingly distinguished. They talk about moral conflict in terms of competing rights and about its resolution in terms of winning and losing all; they are like the stuff of legend, ballad and myth. As such, they attract and hold our attention, excite our imagination, and (often by drastically reducing the number of relevant features) categorize a great many diverse relationships. Once in place they are, therefore, tough to dislodge. They are seen everywhere—even in a remedial ceremony like the one over which Man presides where stories and arguments cast in different imagery are intended by general consensus to have substantial operating room in giving meaning to a relationship like Man's and Mom's. "There must be a winner and winner takes all" stories and arguments are, in other words, disproportionately available, powerful and flexible stock structures that can easily and doggedly dominate a storyteller's interpretive process.

The distraction, particularly when it is most persistent and absorbing, is also emotional. Once seriously entertained for purposes of predicting what an intervenor like cabbie would do if forced to resolve a dispute like Man's and Mom's, these winner-takes-all stock stories tend manfully to reinforce the already substantial preoccupation with cabbie's imagery of the social interaction and, ultimately, to drive the sides "irreconcilably apart."¹¹⁰ The anticipation of participating in a highly competitive winner-takes-all ceremony can transform the remedial ceremony over which Man presides into a scrimmage. Each side tries out on the other some or all (depending on one's sense of strategy) of the cabbie-oriented stories and arguments; if the other side does not concede, one is at least more likely to be "ceremony-ready." Even

109. Whether the instrumental storyteller or the person represented is more distracted varies from circumstance to circumstance.

110. Eisenberg, *supra* note 54, at 660; R. FISHER & W. URY, *supra* note 11, at 5-7, 30-33.

if Man's remedial ceremony is not turned into a scrimmage, the preoccupation with "there-must-be-a-winner and winner-takes-all" stock structures tends to exaggerate perceived need for posturing, the tendency to substitute deliberately or unconsciously a rights in competition position for a "these are my interests in wanting to take the cab" self-examination and disclosure. In such circumstances the story the other person is living can become irrelevant and even a matter for disdain, perhaps demonstrating yet again that "a significant portion of any dispute exists only in the minds of the disputants."¹¹¹

The consequence of this distraction for the parties is often unfortunate. Where some mutually advantageous outcome (say, sharing the cab) was once a possibility, it may no longer do for one who feels the need to be declared the winner or to have the other declared the loser. Apart from disserving the parties' interests, the distraction impairs the integrity of Man's remedial ceremony and, in so doing, frustrates the general consensus. Realizing at some level that the remedial culture which governs cabbie's ceremony permits only certain meaning in certain terms, those in Manhattan accommodate other meanings in terms of other imagery by encouraging or at least allowing people to work through conflict before cabbie arrives on the scene.¹¹² To the extent parties and their representatives conceive of relationships primarily through winner takes all stories and arguments, they focus in exaggerated fashion on conflicting interests and are unable or unwilling to imagine, identify or agree upon complementary interests and outcomes. If, without a powerful and available intervenor, Man's and Mom's relationship as defined by first-in-time was too resistant to redefinition, it is now with cabbie around perhaps too sensitive and too likely to be transformed into a winner takes all dispute even without anyone wanting or intending that relationship. Rather than encouraging people to talk and work through conflict, cabbie's ceremonial culture defines in its own image both ceremonies like Man's and relationships like Man's and Mom's.

IV. ANTICIPATING AUDIENCES AND PROBLEMS AND SOLUTIONS: PLANNING THROUGH AND WITH STORIES (OR "STORYTELLING ACCORDING TO SON")

The setting: *Roll back the reel. We're back in friend's place, Manhattan, Mom and Son but not yet Man because it's only about*

111. Felstiner, Abel & Sarat, *supra* note 9, at 632.

112. Cabbie herself may create certain informal procedures to accommodate other meanings in terms of other imagery. She is limited, however, by the need to maintain her ceremony's legitimacy. *See supra* notes 94-96 and accompanying text.

7:33—or just after Son received the call from his other friend with Pavarotti tickets and Mom’s go-ahead to give it a shot. The outside world remains the same as it is in the story where cabbie can decide. All that has changed, perhaps asking again that you suspend disbelief, is that Son now represents Mom from within his own version of the lay lawyering conception this essay has developed and that we and his friends in Manhattan are privy to his thoughts.

“Put out of your mind the image of the unprepared son fumbling to try to satisfy his mom’s needs. That image is fiction, at least as a description of me, and unbecoming to boot. I’m proud of the way I’ve thought through both how to resolve and how to avoid conflict; what others apparently perceive almost pejoratively as good intuitive thinking is the product of particularly self-conscious and disciplined work. Cheryl Miller doesn’t run a fast-break without drawing on a wealth of catalogued information about the game of basketball and about the general and even idiosyncratic tendencies of the people she is playing with and against (whether or not she conceives of or describes it that way), and I take my job of helping Mom every bit as seriously as Miller does hers. But why should I care what others think? In fact, so long as others continue to treat lightly the questions surrounding what I do when representing Mom, I’ll perhaps have some advantage. As one who takes representing others seriously, I’ll take all the breaks I can get.

“And I sure could use a break now. Grabbing a cab on Park Avenue at this time on a Friday evening is an iffy thing; even if we are successful, the traffic might do us in. We knew this might happen though. Well, what we really knew was that something like this might happen. In fact, we planned for it. But as it turns out, perhaps our response won’t do. Mom knows she may not get to Carnegie in time to see Pavarotti. Still, I don’t know that we would have done anything differently. . . .

“Once Mom agreed to take me up on my offer to vacation in Manhattan, I tried to help her sort out her needs and her wishes. Having some sense of how Mom would like to live in Manhattan, I then had to examine the stories that capture and govern life there and define Manhattan as it is. Based on my understanding of the relationship between Manhattan as it is, Manhattan as Mom would like it and Manhattan’s stock stories, I then described for Mom the choices available to assist her in achieving her goals while avoiding conflict or at least minimizing the chance of unsuccessful outcomes to conflicts. Like all good planners, I explained to her what we might do at and from that time either to avoid having to deal with future audiences or to increase our chances of persuading future audiences.

“Take transportation. Stock stories told me orderly and ruptured routines for getting around in Manhattan. With Mom’s needs and concerns in mind, I used those stories to help identify potentially relevant audiences, problems (situations Mom might want changed) and possible solutions (ways of meeting her desires). Some transportation needs were easily met. Mom didn’t want to have to wait around J.F.K. after taking the ‘red-eye’ and wanted to get to my friend’s place at 86th and Park Avenue as quickly as possible. We were both satisfied, however, that at 6 A.M. a large number of cabs were available in front of the terminal and that the fare, while high (we estimated about \$25 if we beat some of Thursday morning’s traffic), was plenty worth it. Manhattan as it is captured and governed by a subset of grab-a-cab stories was a predictable Manhattan that Mom would like. Getting from the airport to 86th and Park presented no problems; the situation as it would be would do. Given Mom’s needs and wishes, our planning was complete.

“Other of Mom’s transportation needs were not as easily nor as certainly met by Manhattan as it is. In fact, that’s why we’re in our present fix. Getting anywhere in Manhattan on a moment’s notice concerned Mom as she planned her vacation. She knew that certain of my friends might have theatre, concert or game tickets available at the last second, and she wanted to take advantage of all there was to do in New York. Manhattan’s grab-a-cab stories strongly suggested that quickly grabbing a cab, particularly at a busy time, was not always possible or certain. One had to anticipate such things as occupied cabs whizzing by, other people waiting with conventionally superior claims, and cabbies who might find other claimants’ stories more plausible and compelling. Manhattan as it is was not the Manhattan Mom would like; there was a type of transportation situation that Mom wanted changed.

“Solving this or any problem through planning typically involves either doing something that eliminates the need to have to persuade potential audiences (claimants and cabbies, for example) or creating stories that will appeal to certain audiences (again claimants, cabbies and perhaps others) who will or may become relevant in attaining certain goals. But Mom didn’t want me to do those things that would have then provided her with resources she may have needed in the future so that she wouldn’t later have to persuade someone to give them to her. A limo, she said, was out of the question. Even if she could afford it, she ‘wouldn’t feel right in it.’ Renting a car was a possibility. Friend’s 86th and Park Avenue place had a garage (unfortunately, he didn’t own a car) and we could park it there for the duration and a fee. But Mom thought it wouldn’t be worth the price for the number of times we might have to make a quick dash to get somewhere. And

unless we were in a rush, Mom said she would rather walk or take a bus or a cab (New York's subways didn't intrigue her). Of course the thought of paying for the car myself and surprising Mom crossed my mind. But I knew how upset she'd be over that solution. It was less a question of who put out the money and more a matter of whether it was worth it. Knowing she would have transportation at a certain cost came at a price Mom was unwilling to pay.¹¹³

"So there we were. Mom didn't want me to do those things that would have her, while in Manhattan, living in a story in which at least certain audiences and problems would be irrelevant to her rush transportation needs. Did I agree with her choices? Probably not. But part of the reality a lay lawyer must deal with is not only what stories someone like Mom is willing to have told about her, but what stories she is willing to live into the future. Mom had, in effect, eliminated certain stories from our planning repertoire. She had decided that what best suited her needs was not to tie things down, but rather to be prepared to tell the most compelling story to any number of relevant audiences in the event that she had to get somewhere in Manhattan on a moment's notice. So that's what I helped her to do: Create stories running into the future which would satisfy future known and unknown audiences.

"Some stories were easy to imagine and create. The audiences were identifiable and well known, the remedial culture accessible and intelligible, and compelling stories familiar and tellable on Mom's behalf. For example, our family has yet another friend who owns a car and lives a couple of buildings away on 86th. While she uses the car daily and does not regularly lend it out, I am confident from all that I have been able to learn that she would be willing to lend it to us for an hour or even an evening if she were in and had no need for it. All that she needs to see and hear is an old friend (Mom) with a short-term need (Mom's enjoyment) who is with someone who has driven in Manhattan before (I had) and is insured (I am). Easier still was preparing ourselves to telephone for a cab to come to pick us up. We determined the cab companies with the quickest response time to 86th and Park Avenue (and other parts of Manhattan for that matter) and even now have their telephone numbers and the read-

113. In addition to incurring fixed costs, having a car available might create the possibility of having to live some undesirable and unfavorable stories. Mom might, for example, feel compelled to use "her" car even when parking problems in Manhattan make a cab more convenient. Mom also might have to fend off people either asking to borrow the car or asking for a ride.

ily ascertained, form-like and mechanically tellable stories ready to go.

“The difficulty has not been preparing to tell either story (that required, as it often does, thoroughness and care in discovering and meeting certain story features more than any striking creativity), but accepting that the stories, however compelling, might never be told at all or at least to an audience who could effectively respond. And that’s exactly what we face now at 7:33 on a Friday evening. The story for friend is ready to go, but friend and her car are not around. We ran into her this morning on our way out and she mentioned that she was driving down to Atlantic City and wouldn’t be back until Saturday afternoon. And given 7:33 and our best information, it’s unlikely that any cab company would get a cab here in time for Mom to get to Carnegie. Unless an audience is available with time to respond, even the most predictably compelling stories will not be of much help.

“So it’s down to Park Avenue accompanied by both the stories we anticipated we might have to tell and a resolve to avoid conflict if possible. These stories have been tougher to imagine and to create because there was simply too much that we didn’t know and couldn’t find out.¹¹⁴ What kind of a person might we encounter waiting with first-in-time rights to a cab that Mom needs badly?¹¹⁵ What kind of remedial ceremony might that person create? It is true, of course, that we have been able to learn a great deal about cabbies and the remedial ceremonies over which they preside. And we have created stories and arguments in terms of the winner-takes-all conception that predictably dominates that process of resolving cab disputes. But even this planning was done only in the most general way and whether or not, for example, the stories we tell are plausible and compelling to any particular circumstance is uncertain.

“Still it does help considerably to know and understand the operation of the stories that govern life here in Manhattan. Obviously Manhattan’s stock stories tell us now that such things as being first-in-time matter a great deal in helping Mom satisfy her needs—perhaps even without the necessity of conflict or dispute. Simple? I suppose. But the basis of most good planning often looks simple to one who understands the world as it is. Perhaps of greater importance, understanding Manhattan’s stock stories and how to work with them helped Mom to understand the choices available to her in shaping and controlling her future. Mom may

114. Since they arrived in Manhattan, Son and Mom may have practiced some stories on cabbies and, given the feedback, may now be better at anticipating and impersonating cabbies. See *supra* notes 62-63 and accompanying text.

115. Of course, the world of people who take cabs in Manhattan is limited.

be disappointed if we can't grab a timely cab, but she at least knows that this was a risk that she chose to assume."¹¹⁶

* * * *

Bothered by "Storytelling According to Son," one of Son's friends responds.

"What a story. It's all so neat. You're in such command. And so cocksure. You've translated an aspect of what we are and what we do into morally acceptable and technically useful information. But haven't you lost something in the process? Are you so wise? So clever?

"I'd like to talk to Mom. Your know-how orders her world. But this order may do violence to Mom's experience of life; after all, we all are so often inadvertently tyrannical. You may be right about the quality of your representation, but whether or not Mom's voice has been heard is hardly obvious. I want to hear Mom even if I know that in some way I too will monopolize conversation with her. But are we to abandon conversation altogether in our effort to learn about and understand one another? And even if in this conversation I question her convictions, mustn't it happen? I'd be no friend not to disturb her understanding as well as your self-satisfaction.

"So obviously I need to talk to you too. You've grasped much of Manhattan. But you've accepted it on its own terms. God knows I do too. And so apparently do cabbie and Mom—I think(?). But must we? Must we inevitably repeat ourselves? Our own voices—Mom's, yours, mine—always seem outsiders to 'getting it done.' Yet aren't we becoming only what we are? And it bothers me that what you can't grasp easily about Manhattan—what we are and what we do—you abandon. You can't fear doubting that much? Searching only for easy knowledge is as fatal as searching for absolute knowledge. Somehow we've got to stop denying who we are. Right here. Right now.

"I could go on and on, but maybe you've heard all this before. The old lament—'What can we know, what can we do?' I don't even mean to be coming down so hard on you; I'm probably most upset with myself. What you've learned about lay lawyering is certainly better than nothing. And it is a place to begin. It opens up some space.

"But it is still not right. What an aspiration, huh? Anyway, let's talk."

116. See Sagoff, *On Markets For Risk*, 41 MD. L. REV. 755, 760-64 (1982).