SOME OFF-THE-CUFF REMARKS ABOUT LAWYERS AS STORYTELLERS

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The following is a transcript of Jeremiah Donovan's presentation at Lawyers as Storytellers & Storytellers as Lawyers: An Interdisciplinary Symposium Exploring the Use of Storytelling in the Practice of Law. This address followed Philip Meyer's presentation on the techniques employed by Donovan during a closing argument.

There was in yesterday's newspaper a wonderful example of lawyers telling stories. It appeared in the *Far Side*.[1] Now before relying on the *Far Side*, I must tell you that I asked Lisa Birmingham, an editor on *Vermont Law Review*, if it was appropriate, before such a panel of distinguished journalists, attorneys, and judges, as well as a highly qualified and knowledgeable audience such as this, to rely on a *Far Side* cartoon to illustrate a point. Ms. Birmingham assured me that you would eat this up.

In this *Far Side*, we are in a courtroom. In the witness box is a monkey and at the defendant's table is a weasel. The lawyer who is cross-examining is asking the monkey: "Well, sir, my client says that *he* wasn't having any fun, and that you just kept chasing him and chasing him around this little [mulberry] bush—and *that's* when he decided to pop you one."[2] Now, you know that the cross-examining lawyer's version of reality was actually found to be the true version of reality by the jury in this case. The jury was asked in an interrogatory to deliver a special verdict. As you have known from the time you were children the verdict was: "All around the mulberry bush the monkey chased the weasel. The monkey thought t'was all in fun, pop goes the weasel." The jury bought that vision of reality.

I suppose, as I think about it, this was a compromise verdict. While the jury did decide that the monkey thought "t'was all in fun," it did not specifically find that the weasel wasn't having any

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1. Gary Larson, *The Far Side*, BURLINGTON FREE PRESS, Nov. 4, 1993, § D (Magazine), at 16.

2. *Id.*

fun. So, the jury did not find the weasel's version of reality totally credible. This analysis of the monkey and the weasel may, however, be an example of lawyers' analytic abilities getting in the way of a good story.

What I want to do is talk a little bit about the way in which trial lawyers tell stories. First, I will talk about the final argument in the Failla case,[3] which Professor Meyer analyzed in this symposium.[4] Furthermore, I will also describe what goes on in the mind of a trial lawyer when he is trying to prepare an argument like that in the Failla case. The second thing that I will talk about is how storytelling form actually meets some of my own needs in making final arguments. Finally, I will discuss some of the limitations on a lawyer's storytelling in final argument and during trial.

First, with respect to the Failla trial, let me tell you a little bit about what I was doing when I was making the final argument. I had several audiences that I had to talk to, and each of them was crucial to my client's well-being. In fact, the audience that was most crucial to my client's well-being was not the jury. However, the jury obviously was my immediate audience, it was to them that I was talking, it was to them that my argument was pitched, and it was them who I was trying to persuade.

My second most important audience was the judge, since there was realistically little or no hope for a complete acquittal for Louis Failla. The Government described Louis as the oral historian of the Connecticut mob. The Federal Bureau of Investigation ("FBI") placed a bug inside of Louis's Cadillac. He had reached that stage in his life where he liked to reminisce and reflect. He spent much of his life driving around in that Cadillac with a friend from boyhood—Jack Farrell, a character right out of Damon Runyon.[5] Farrell could do card tricks. He was what is

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3. United States v. Bianco, No. H-90-18 (AHN) (D. Conn. July 16, 1991) (transcript of argument of Jeremiah Donovan on behalf of Louis Failla).

4. *See* Philip N. Meyer, *"Desperate for Love": Cinematic Influences upon a Defendant's Closing Argument to a Jury*, 18 VT. L. REV. 721 (1994).

5. Damon Runyon was an "American journalist, author, and film writer and producer, whose slick and racy Broadway characters provided the inspiration for Frank Loesser's musical *Guys and Dolls*." ENCYCLOPEDIA AMERICANA 870 (International ed. 1986); *see also* GUYS AND DOLLS (Frank Music Corp. 1950). He also worked as a screenwriter in Hollywood. Runyon's scripts included *Lady for a Day*, *Little Miss Marker*, and *A Slight Case of Murder*. ENCYCLOPEDIA AMERICANA, *supra*, at 870; LADY FOR A DAY (Voyager Co. 1933); LITTLE MISS MARKER (Famous Music Corp. 1934); A SLIGHT CASE OF MURDER (Dramatists Play Service 1935).

called a "mechanic." A mechanic is someone who runs illegal card and dice games. One of the charges against Louis was that he was running an illegal card and dice game in New York City. Jack was crucial to that game.

When Jack and Louis would drive in the Cadillac Louis would never simply say, "Jack, let's meet at Stella's at six." Rather he would always elaborate, "Jack, lets meet at Stella's at six. You know, it was in the basement of Stella's that so-and-so got made. I was there. Yeah, and you know who else was there?" Then Louis would go through all the codefendants, describing various events in which each of them had participated at Stella's.

One of the problems with the trial was that the codefendants had to sit and listen to the tapes of Louis's and Jack's discussions of them. This evidence was simply killing them. The Government in this case sought to present a picture of the mob as a monolithic, highly structured entity, as is pictured in the *Godfather* movies.[6] My picture of the mob had to be considerably different. I portrayed the mob as a group of individual wise guys who get together and rake in a pot, then constantly change alliances. This was crucial technically, because my defense was that Louis's activities were not mob activities, nor were they in furtherance of a RICO enterprise.[7]

My picture was crucial with respect to one of my audiences, the trial judge. The judge, I think, shared the Government's view of the mob, and the judge also viewed Louis Failla as being per se evil, since Louis was a part of the mob. The place I did succeed in final argument was, I think, with the judge. The judge, in part, did buy my picture of Louis Failla. If you look at the sentence imposed on Louis, and analyze it against the background of the complex federal sentencing guidelines, the judge did not seem to add anything to Louis's sentence for the conspiracy to murder Tito Morales, although the jury had convicted him of conspiracy.[8] I believe the judge was persuaded to accept our alternate version of reality, at least with respect to the Morales conspiracy.

The third audience I spoke to was Louis Failla's family. I had to persuade the Failla family that Louis did not conspire to kill

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6. *See* THE GODFATHER (Paramount Pictures 1972); THE GODFATHER, PART II (Paramount Pictures 1974); THE GODFATHER, PART III (Paramount Pictures 1990).

7. *See generally* 18 U.S.C. §§ 1961-1968 (1988 & Supp. IV 1992).

8. *See* United States v. Bianco, No. H-90-18 (AHN) (D. Conn. July 16, 1991).

the father of his own grandson. They were an important audience. The family was all there, they were all ambivalent about it, and I persuaded them, I won that jury. Of course, the family was predisposed to believe me, in the same way the jury was predisposed to wanting to convict all these mob guys.

The fourth audience, the codefendants, was my most important audience. Louis Failla had been shunned from this alleged organization. He lived in abject terror of a man named Billy Grasso, who was undoubtedly the most evil man who ever walked the shores of the Connecticut River. For years and years and years Louis lived in terror, and he often spoke about this in his tapes. It was important for me to create an image for the jury of Louis lying awake at night with a gun under his pillow waiting for Grasso to come. Grasso was the kind of man who would say: "I got a hole dug for ya', and I'm gonna' stick ya' in the hole and I'm gonna have your hand stickin' above the hole, so every day when I walk by ya' I can kick the hand as I walk by." When Billy Grasso would say those things, he had in his eyes a look of blankness that made you know that he already had four or five hands sticking up in his collection, and he probably drove out every day just to kick the hands.

Louis had been shunned by Grasso. Professor Meyer's *Desperate for Love* is a good title for Louis's experience.[9] The tape-recorded evidence revealed that Louis's connection with this alleged organization was much like the connection some of my aunts have with the Church. His family was important to him and his friends were important to him. But what gave meaning to his life, what caused this huge outpouring of terribly incriminating reflections, was his contact with the organization alleged in the indictment.

It was terribly embarrassing for Louis to be represented by me, an appointed attorney. The others were famous attorneys brought in from Boston and New York. It was terrifically important to Louis that I give a performance which would not denigrate him in the eyes of his codefendants. In that I think I succeeded because nobody else had a law review article written about him.

Another thing I wanted to do in final argument was to help the other defendants in their defenses. One of those cases

9. *See* Meyer, *supra* note 4.

involved the murder of Billy Grasso. By emphasizing Grasso's evil I could help the other defendants. As I have said, one of my most crucial audiences was the codefendants, and I think I helped Louis out with them.

This two-month trial provided an enormous amount of material to work from. If you listen to the tapes used in this trial, you would say to yourself, "This is not real life—this was written by a radio writer." The FBI intercepted a mob initiation ceremony, but it sounded as if it had been written for radio. It was responsorial, much like the old Latin mass, "Io voglio . . . io voglio . . . entrare . . . entrare . . . in questo orginazione . . . in questo orginazione." It sounded like a Latin prayer. When they burned the picture of the saint you could hear the crackling of the fire on tape. I mean, this ceremony has been handed down from sixteenth century Sicily so you expect it to be dramatic. However, what was equally dramatic was all the activity surrounding it. Afterwards, after all the cleaning up and goodbyes, you hear the steps of the final participant going to the door, the door squeaks open, and then, to the empty room, you hear someone say, "No one will ever know what went on here today—except for us and the fucking Holy Ghost." Then you hear the door slam, and you imagine fifty FBI agents in the surveillance van shouting, "Hurray!" Louis and Jack would reminisce not only about all the things that got the other defendants in trouble at trial, but also about their young days. These included some of the most wonderfully tender but obscene reminiscences about adolescent life such as going out on dates in the late 1930s and early 1940s. They were just wonderful pieces of evidence.

This extraordinary evidence caused a divorcement between reality and what was portrayed in the course of the trial, between what happened in the real world and the evidence that the jury saw. Professor Sherwin talked earlier today about taking a videotape, computerizing it, and looking at it over and over and over until the reality begins to change. In this trial that is exactly what happened. The evidence was so dramatic and so interesting that one got the sense that these things did not take place in the real world at all and that Billy Grasso was a character rather than a real dead person.

This struck me most strongly after the Government introduced an exhibit of a board with about a hundred human bones mounted on it. These tiny little bones, some of them, but not all, were alleged to be the remains of some poor guy who had the

indiscretion to engage in an affair with the wife of an unindicted codefendant on the lam. After the bones were introduced, I walked by the clerk's table one day where the bones were laying underneath all the other exhibits; videotapes, papers, documents, and boxes on top of this fellow's bones. Nobody had any sense whatsoever that these were once a man.

One of the corporeal acts of mercy is to bury the dead. I got a plastic bag, covered the bones, and put them in a corner of the courtroom. I realized at this point that nobody was thinking of reality, nobody was thinking, "These are a person's bones." They were props in a drama. That realization helped me with my final argument because I could make that argument into a story, something that sounded like a movie plot.

Let me talk about what I do in final arguments, and how I utilize the tripartite structure which Professor Meyer described.[10] It's true, the structure is there, but that may be because of my own needs, rather than being a method that I have set up to sway the jury. My arguments all come in three parts because I always do them without notes. Always thinking of juries in a certain way, I talk to them like I'm talking to you. I try to think of my audience in a way that it is going to make me more effective as a speaker.

When arguing before an appellate court, I think of myself as a first-year law student who has reached the point in first year where you think that you actually know what you're doing. You're full of moxie and vinegar, and you're ready to debate the *big issues*. I think of the appellate court as being comprised of third-year students. They know more than you do, but they studied the subject you're talking about two years ago. You have to display to them some respect since they are two years ahead of you, but they're still only third-year students. Picturing my audience in that way helps me in arguing before appellate courts. Rather than being terrified, I can engage in respectful, but not fawning, colloquies with the judges.

When I talk to juries in my closing argument I think back to my bachelor days, and the jury is my date. We just saw a movie and we're drinking coffee and talking about the movie. I talk about the trial as if it were the film we saw. "Do you remember the part where Sonny Castagno was testifying? Remember he

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10. *See id.* at 725-40.

said . . . ." As I do this, I talk directly to a particular juror. It doesn't seem to embarrass the juror. "Remember the part where Sonny Castagno said that he was going to give Jackie Johns a call that night? Do you know why that was so important? Do you know why? Did you follow it? Well, wait a second, before I get to that, let's talk about something else," and then I'll talk about something else. Now the jurors are dying to know why I think what Castagno said was so important. At the end, when I finally come back to it, they will be all ears.

These final arguments always have three parts, just as my talk to you today has three parts, because final arguments must be very carefully structured. The problem is, if you are not talking from notes it is hard to keep the structure of the argument in your mind. But if they always have three parts, you will always know where you are. So if you get carried away at some point, you nevertheless remember, "I'm still in part two."

Professor Meyer finds my storytelling cinematic.[11] I never thought or realized that it was cinematic, however, I now see that he is right. I don't necessarily tell the story chronologically, rather I tell portions of the story or simply a dramatic segment of the story in order to illustrate a point. What happens once I begin telling the story is that I can relax since I know it. I've just watched the movie, and spent the last two months trying this case. The little details that I need to make the story vivid, to make the story come alive, are those details I've struggled with for the last two months to get in through my witnesses or through cross-examination of the Government's witnesses. Since these things are fresh in my mind I can relax during the course of retelling the story. I notice that juries tend to relax as well: they sit back and seem to enjoy the story that I'm retelling. After all, they've just seen the movie too.

As I complete each section in my three part structure I always tell an anecdote which has nothing to do with the case itself, but which illustrates some important contention that I'm making. This is another cinematic thing that I do, though I didn't realize it, until Professor Meyer said it was.[12] Remember the witness shown earlier today in the documentary *The Thin Blue Line*.[13] While she was talking, the director spliced in pictures

11. *Id.* at 740-42.

12. *Id.*

13. *See* THE THIN BLUE LINE (Third Floor Productions 1988).

from old movies so you could see what was truly in her thoughts. That's what these stories do for me.

Let me give you an example from the Failla trial. One of the important points I was trying to make with respect to the character of Louis Failla was he was a bragger who exaggerates. I had to make that point strongly enough to persuade the jury, because if they believed everything Louis Failla said on tape, they had to convict him on all counts. If he had been bragging, if he's *desperate for love*, then you can take a look at what was really happening rather than what Louis said was happening.[14] To illustrate that point, I relied upon the classic Irish story of O'Toole. Do you all know that story? See, it is so important for me to get the jury to nod and react like you did. So I said to the jury, "You all know that story?"

Before I tell the story, Professor Meyer talks about the "hook" at the beginning of the argument.[15] That hook is not meant for the jury, it is meant for me. In order to talk with the jury in the way I want, I have to sense that they like me and are listening to me. The hook is meant to get a nod or at least give me the sense that the jury is sitting back and saying this is going to be kind of fun. This is why I work so hard on the hook to the argument.

The O'Toole story was part of my hook to the jury. You have to imagine that I have a nice jury rail right here. You also need to think of a working class bar in Dublin. Everybody's sitting and having a good time. All of a sudden this big, huge fellow—I mean enormous—walks in and says, "Alright, where's O'Toole?" Everybody looks down into their beer because they don't want to be mistaken for O'Toole. Finally, way in the back, a little old guy, about seventy-five-years-old, weighing maybe 110 pounds, gets up and says, "I'm O'Toole. What's it to ya'?" The big guy picks up O'Toole, puts him on the bar, runs him down the bar, bottles hitting him on the head, throws him on the ground, kicks him twice, picks him up, throws him through a plate glass window, walks out the door, picks him up again, throws him back through the other plate glass window and walks off. All the patrons look at this bloody mess on the ground, worried that the man is dead. All of a sudden, the little guy lifts up his head and says, "I sure pulled a fast one on that big fella'—I'm not O'Toole at all!"

You would have heard, if you had gone to this trial, tape after

14. *See* Meyer, *supra* note 4.

15. *Id.* at 725-28.

tape of Louis Failla saying, "I'm gonna' be the capo for Connecticut! I've done this . . . I got the biggest this or that, I'm this . . . I'm that . . . ." But remember, "I'm not O'Toole at all!" He is not O'Toole at all! When you get to the portion of the argument in which you have to explain some terrible tape of Louis saying, "I'm going to do this and do that," you just rewind the tape and remind the jury, "He's not O'Toole at all." One of the most difficult things for me in preparing a final argument is to choose good stories that illustrate the points I am making.

One of the other things the stories do is give me an opportunity to relax in the middle of the argument. As I've told these stories many, many times before, it is comforting to find these old friends in the midst of a speech which I have never given before and will never give again, barring, of course, a reversal on appeal.

A final argument is not like a politician's stump speech, which has been given twenty times before, with an introductory paragraph and an ending paragraph tailored for the occasion. A final argument is a speech given only once in the course of your life. It is created and practiced the night before; you sit down and go through the trial, pulling out all the details from the case to give the trial a real textual analysis. I remember my spouse asked me the night before one final argument what I planned to do. I told her, "I thought that I would engage in 'hermaneutics.'" She responded, "You have a final argument to make tomorrow, you don't have time for that." Hermaneutics is a new word I learned this morning, you know how they say if you use a word three times . . . .

The Failla argument was tough. Most final arguments last thirty to forty-five minutes. The Failla argument was two and one-half hours. It is difficult to stand up and talk in front of people for that long while keeping their attention.

I don't claim to be a member of any cinematic school of trial attorneys, although if I tell you my ideal final argument, you will laugh, because it comes from a movie. It is the great final argument delivered by Gregory Peck in *To Kill a Mockingbird.*[16] There is nothing flashy about his oratory, Gregory Peck simply exudes such a sense of common decency that you cannot help but be carried away by his argument. It is ironic that my ideal final argument comes from a movie since I disclaim using cinematic

16. *See* TO KILL A MOCKINGBIRD (MCA 1945).

techniques, except those adopted inadvertently.

One of the most interesting considerations for lawyer-storytellers involves the limitations on these storytelling techniques. You are not writing on a clean slate. There are facts you have to answer and incriminating tapes to which you have to respond. The first limitation in my final argument is that in order to be good I really have to believe the argument. I really *don't* believe Louis Failla intended to kill his Tito Morales. He was just putting them off by saying he was going to do all of this stuff to Tito. I really *don't* think Louis was engaged in the enterprise of a crime family when he was running the gambling casino and doing other things, and in order to be a good storyteller, I have to persuade myself of that.

In consequence, what I find myself doing frequently is ignoring things that I should not ignore. I shut off a critical portion of my brain so that my heart can be a full advocate for the defendant. This is a big danger for a trial lawyer.

The second limitation is an ethical limitation. This is one of the most interesting and problematic limitations for a trial lawyer, especially for someone who does criminal or divorce law day after day after day. In order to tell you about this limitation, I need to use an illustration from a great scene in the novel *Anatomy of a Murder*.[17]

The defense attorney goes to see a defendant who was just arrested for murder. The initial interview consists of the lawyer saying:

> I am going to try to get you out on bond, and I do not want you to tell me anything about the facts of the case right now. I'm going to get the State's investigative reports and then I will talk with you. Right now, just tell me a little bit of background, about your ties to the community, jobs, financial situation, and things like that.[18]

The attorney then came back for the second interview, the crucial one. He says:

> I've had the opportunity to read the State's investiga-

17. ROBERT TRAVER, ANATOMY OF A MURDER (1983).

18. *Id.* at 24.

> tive reports, and I want to talk to you and give you some legal advice concerning the law of murder. In our State, we have four defenses to murder. The first is, I didn't do it. But since you shot the guy in a bar with fifty patrons present, I do not think that is an available defense. The second defense is, I did it in self defense. Since these same fifty patrons are all going to testify that you shot him three times in the back, I do not think this is an available defense either. The third defense is insanity. You have no record of mental instability. You seem pretty normal to me right now. I don't think that is a viable defense. I do not think that we are going to be able to find a psychiatrist to say you are insane. The fourth defense is called temporary insanity.[19]

The defense attorney continued,

> Let me tell you about temporary insanity. Temporary insanity means that you were faced with an emotional situation that was so turbulent, so traumatic, that you could not conform your behavior to the requirements of law. Usually it happens after some startling revelation. In fact, a lot of people who have been tried and acquitted on the basis of temporary insanity have said that they could not even remember the events in question, they proceeded in a sort of fog and have just the vaguest of recollections about what happened. Now I want you to tell me what happened.[20]

The client responded, "I do not know, it was sort of like a fog."[21]

The problem with storytelling is that in reviewing the police investigative reports you get a plausible defendant's story in mind. As you want so much to tell the story, you may not only ignore contrary pieces of evidence that ought to be considered, but you will also influence your client, your client's friends and relatives, and your other witnesses to tell the story in a way that is most helpful to you. I suppose much of that is proper, but there is a line somewhere, and if you cross over that line you are no

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19. *See id.* at 35-46.
20. *Id.* at 45-46.
21. *Id.* at 47-49.

longer effectively advocating for your client as a storyteller, but you are evading your responsibility as a finder of truth. This is a line that all law students, I am sure, as practicing attorneys will face sometime during the course of their careers.

As lawyers, we are storytellers. We learn by storytelling. In law school, we read classic stories and the greatest of these stories are those in which there is some ambiguity. I really can't define the doctrine of proximate cause, but I sure remember the firecrackers and the scale falling down on Mrs. Palsgraf.[22] I have not done many tort cases in which a preexisting physical condition was an issue, but I sure do remember the kid in school that kicked the kid with the brittle bones.[23] We learn through storytelling. When you meet with practicing lawyers they do little other than tell each other stories. It is really a wonderful profession. Lawyers take the raw material of human emotions and human events, with all of their ambiguities and complications, and mold them within ethical and factual limitations into compelling stories, and it's really, really fun.

22. *See* Palsgraf v. Long Island R. Co., 162 N.E. 99 (1928).

23. *See* Vosburg v. Putney, 50 N.W. 403 (1891).