

TRIAL THEORY AND BLIND POETICS

*Steven Lubet**

Every successful case starts with an act of imagination. Before the first motion is filed and well before the first witness testifies, a lawyer must begin to develop a comprehensive and persuasive story. The story has to be factual and logical, of course, accounting for the known facts and leading to the right conclusion. But it also must do more than that. A winning story must have strong visual qualities that will allow the judge or jury to envision the facts and events as counsel and the witnesses describe them. It also needs to make a powerful moral claim that can convince the decisionmakers that they are doing the right thing.

Conceiving such a story is not simple, and it cannot be done piecemeal. The best approach is holistic rather than incremental—imagining a broad outline and then adjusting and shaping that outline to fit the specific facts as they are discovered. No story is ever set in stone. Even the most compelling story must be constantly revised as the case proceeds, or perhaps even abandoned in light of new information, in favor of an alternative. The key, however, is to imagine the story all at once, as a whole concept, rather than as the combination of distinct parts. That way, each favorable witness, each cross-examination, each item of evidence, and each argument of counsel can be measured for its contribution to the story's impact.

THINKING LIKE A BLIND POET

There is no way to escape the central dilemma of litigation: Memory is visual, but communication is verbal. A witness does not remember events in words, but rather in images that cannot be transferred intact to the fact-finder. Instead, witnesses must first put their recollections into words, in the hope that listeners (judge or jury) will visualize the same scenes with some degree of accuracy. When the language used is artful, it is possible—though far from certain—that the jury will reimagine the events consistently

* Professor of Law and Director of the Program on Advocacy and Professionalism at Northwestern University School of Law. The quotations from Homer are from *THE ILIAD* 2:539–:543, 2:549–:559, 20:469–:475 (Robert Fagles trans., Penguin Classics 1991) (n.d.). *The Music Man*, by Franklin Lacey and Meredith Willson, premiered on Broadway in 1957 and was later made into a film that was nominated for six Academy Awards, including Best Picture, *THE MUSIC MAN* (Warner Bros. 1962). The information on the Bernhard Goetz trial is from GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 1–2, 106–10, 170–97 (1988).

with the witness's own vision. Often, however, there will be gaps in communication, as the listeners interpret the testimony in light of their own background and experiences. To take one mundane example, a witness might refer to a "large boat," thinking of the biggest sailboats on a nearby lake. To a juror who grew up by the ocean, however, a "large boat" might be an automobile ferry that dwarfs the local sailboats. In this case, the lawyer would be sure to have the witness provide a fuller description (if the size of the boat is important), but the possibility of miscommunication can never be eliminated since words can never fully capture the rich complexity of real life.

In short, a jury's comprehension depends on revisualization, and yet this process can never be complete or completely reliable. No matter how many facts are "proven," each juror still will place them in an imagined context that is derived from his or her previous encounters in the world. Every trial, therefore, becomes a battle for imagination, as each side attempts to influence the way that the jurors envision the key events. The goal of a trial lawyer, then, is to use words to evoke the desired visions, which may lead in turn to understanding (and a favorable result).

This is a familiar task in every culture, and not only for lawyers. It is also the work of storytellers and poets (as well as novelists, journalists, and historians), who use language to create a shared understanding of distant, unseen events. Think of the Trojan War, an epic conflict in the dimmest past that still holds a place in the popular imagination. Nearly every image we have from that heroic age—the Greek armies massed on the beach, the towers of Troy, the enrapturing beauty of Helen, the glint of Achilles's shield—derives from the poetry of Homer, who never saw the events he described. So vivid are Homer's descriptions, in fact, that many scholars believe that his blindness is only a legend. But even if he could see, the Trojan War occurred many centuries before Homer's birth, in a land he never visited. Nonetheless, his words still have a strong visual impact after 2800 years. The blind poet's tools included similes, as in this description of the Greek army on the move:

As ravening fire rips through big stands of timber
high on a mountain ridge and the blaze flares miles away,
so from the marching troops the blaze of bronze armor,
splendid and superhuman, flared across the earth,
flashing into the air to hit the skies.

Homer continued, joining simile to metaphor,

So tribe on tribe, pouring out of the ships and shelters,
marched across the Scamander plain and the earth shook,
tremendous thunder from under trampling men and horses
drawing into position down the Scamander meadow flats
breaking into flowers—men by the thousands, numberless
as the leaves and spears that flower forth in spring.

The armies massing . . . crowding thick-and-fast
 as the swarms of flies seething over the shepherds' stalls
 in the first spring days when the buckets flood with milk—
 so many long-haired Achaeans swarmed across the plain
 to confront the Trojans, fired to smash their lines.

Even today, when few have ever seen a shepherd's stall or buckets flooded with milk, we are able to comprehend the impressive might of the Greek army, whose bronze armor lit the heavens.

Allusion, however, is not the only way to make a point. When it came to the carnage of the battle, Homer often switched to close description, as when Achilles killed a nameless Trojan,

Just as he shot past the matchless runner Achilles
 speared him square in the back where his war-belt clasped,
 straight on through went the point and out the navel,
 down on his knees he dropped—
 screaming shrill as the world went black before him—
 clutched his bowels to his body, hunched and sank.

Now the mental image is nearly indelible. We cannot avoid thinking about the fleeing Trojan runner frantically grabbing at his own intestines, as he doubles over and falls to the ground.

Trial lawyers, in their own way, are all blind poets, relying primarily on words to convey the reality of events and situations they have never actually observed. While no contemporary lawyer is likely to achieve Homeric eloquence, the lesson is clear. Visualization is the key to persuasion.

FRAMING THE STORY

There is much more to persuasion than even the most well-drawn word-picture. The images have to tell a powerful story, and the story must lead—from a lawyer's perspective—to the right conclusion. Alas, the standard conception of jury decisionmaking is almost completely wrong, and any lawyer who follows it is likely to tell a confusing and disjointed story. According to the courts, jurors receive information in a linear fashion—first one discrete fact, then another and another—and they are therefore instructed to withhold final judgment until the very end of the case. In reality, people reach conclusions much more quickly, making some preliminary decisions almost immediately. Psychologists and cognition scientists refer to this phenomenon as “scripting” or “framing,” meaning that an individual inevitably attempts to make sense of new information by fitting it into his or her preexisting knowledge base through the use of familiar reference points. To take the simplest of examples, suppose that a witness testified about the robbery of a hardware store. Before hearing another word, each juror would begin to imagine a familiar hardware store setting, with checkout aisles, a customer service counter, and the various plumbing, tool, and electrical departments. The image would be refined by additional testimony,

perhaps describing the store as either a big-box chain or a local mom-and-pop operation. But even then the jurors would continue the process of instant framing. To a suburban juror, even a neighborhood store would probably have a parking lot, which might lead to a conclusion about the location of a getaway car. In other words, new information is quickly harmonized with existing knowledge, which allows us to make sense of our world. While “jumping to conclusions” is often disparaged, especially by judges, it is actually hardwired in our genetic code. A simple thought experiment proves the point.

Think back to the origins of humanity, when our earliest hominid ancestors first walked upright on the plains of East Africa. Imagine one such individual—we can call her Lucy—who is out on her daily hunt for roots and berries. She spies a lithe and tawny animal in the distance, with a shaggy mane and a long tale. “Hmm,” she might say to herself. “That looks very much like the creature that ate my cousin last week.” At this point, Lucy’s neuro-pathways might take her in either of two directions. Under the traditional, judicial model, she would withhold judgment and investigate further. “Let’s not be hasty,” she would figure. “I’d better get closer to make sure.” Even if the beast roared and flashed its fangs, the incrementalist proto-human still would try to accumulate more information before taking precipitous action. That approach is obviously an evolutionary dead-end. Investigating a saber-tooth tiger would lead to a speedy demise, and conclusion-reserving hominids would not live long enough to reproduce. Thus, if there ever was such an inherent disposition, the forces of natural selection would surely have eliminated it en route to the development of *Homo sapiens*.

In contrast, conclusion-jumping hominids would have headed for the figurative hills at the first sight of anything that resembled a carnivorous quadruped, thereby increasing their chances of survival and procreation. The knack for quick decisionmaking would have been passed along from generation to generation, resulting in the framing phenomenon that is still observable today.

The modern world is not the dangerous place that it was in the age of *Australopithecus* when our cognitive reactions first evolved, but we still can see evidence of the framing impulse all around us, in matters great and small. One of the best examples in popular culture comes from the musical comedy *The Music Man*. Professor Harold Hill (in truth, a slick traveling salesman), arrives in the naïve town of River City, Iowa, determined to make a bundle by selling band instruments to the unwary rubes. Unfortunately for him, the local citizens have no particular interest in horns and flutes, so Hill first has to convince them that they need to establish a boys’ band. Well, he explains, the young men of River City are in great jeopardy, virtually on the verge of delinquency, because a pool hall had recently opened in town. “My friends, ya got trouble,” he warns them. “[W]ith a capital T and that rhymes with P and that stands for *pool*!”

In Hill's narrative, the pool hall becomes a story frame, evoking images of degeneracy and crime. It is a dark, smoky, and disreputable place where children are in constant danger of being lured into lives of dissolution and worse. Only a wholesome, healthy alternative can save them. Yes, that is what they need. A marching band!

The story works because of its imagery. The frame successfully raises the fears of the townsfolk who are ready to assume the wickedness of a pool hall. But what would have happened if Hill had tried a different frame? "Ya got trouble, with a capital T and that rhymes with B and that stands for billiards." He would have gone home broke, unable to sell a single trumpet or trombone, because a billiard parlor—formal, well-lighted, genteel—just does not conjure the same sense of foreboding as the pool hall.

Frame theory provides many powerful tools for litigators. Most important is the understanding that the story itself, conceived as a whole, is far more meaningful than any of its constituent facts. Jurors do not accumulate facts in order to arrive at a story, just as Lucy could not survive by slowly adding up facts—yellow mane, feline crouch, gleaming incisors—before eventually concluding that she stood face-to-face with a predator. Instead, jurors begin to imagine a story almost immediately, interpreting subsequent facts to fit into the familiar frame.

The conclusion-jumping nature of jurors explains, in turn, many of the proven techniques of trial advocacy. For example, most lawyers recognize the need to "start strong" by putting the most important information near the beginning of every argument and witness examination. The usual rationale offered for this technique (sometimes called the concept of "primacy") is that jurors best remember those things that they hear first. In fact, frame theory tells us that primacy is even more crucial than conventional thinking would suggest. Those initial facts will not merely be retained by jurors; they also will strongly influence the way that subsequent information is received.

THEORIES OF THE CASE

Every case needs a theory, but some are better than others.

An adequate "theory of the case" might be described as a short, persuasive summary of the facts, explaining exactly "what happened" from the perspective of the lawyer's client. At a bare minimum, every successful trial theory must be logical and simple. A logical theory is based on a solid evidentiary foundation that, along with reasonable inferences, leads naturally to the intended result. A simple theory rests on uncontested facts (or the fewest possible contested facts), while appealing to common sense or everyday experience.

In a routine commercial case, for example, the plaintiff's theory might be that the defendant accepted delivery of certain goods but failed to pay for them. The defendant's theory might be that the merchandise was defective.

Both of these theories meet the basic test. They are coherent and simple, and they support the desired legal conclusion. In combination, the competing theories provide a satisfactory outline of the case, making the issues clear and understandable. The seller plans to prove the existence of a contract and its breach by the buyer, who received the goods but refused to pay. The theory is logical because its premise (delivery) leads squarely to the conclusion (obligation to pay). Likewise, the theory is simple because it is consistent with common experience; everyone understands the need to pay for what you get. The defense theory—basically the mirror image of the plaintiff's case—is equally feasible. The factual cornerstone of the case (a defect in the goods) directly supports the buyer's position (non-payment), which is immediately comprehensible by anyone who has ever been stuck with a bum product.

Of course, each side will have to confront the other's contentions, and that is where basic factual theories tend to fall short. Although a theory may cogently explain "what happened," that explanation alone is seldom enough to win a case since most trials involve additional issues such as motivation, intent, interpretation, or "meeting of the minds." The crucial issue in our hypothetical commercial case is not whether the goods were delivered, or whether the defendant paid, or even whether the items were damaged or unusable. The real question is *why* the buyer accepted delivery. The seller will surely insist that the items were accepted because there was nothing wrong with them, while the buyer will claim that there was a latent or imperceptible, but nonetheless serious, defect. A winning theory, therefore, will have to address the buyer's conduct, and probably her state of mind, at the moment of delivery.

There are two possible ways to articulate a "state of mind" theory. The first approach is incremental, relying on specific facts that imply a particular conclusion. Using this technique in our commercial case, the plaintiff might contend that the buyer's loading dock was crowded on the day of delivery and that the receiving clerk declined an offer to inspect the goods, insisting instead on signing the receipt before the truck driver unloaded the cargo. Thus, the buyer waived any right to object to the condition of the shipment.

The problem with this theory is that the defendant will tell a diametrically different but equally plausible story—perhaps claiming that the driver demanded a signature before agreeing to unload the truck.

A more persuasive theory, therefore, would actually be more result-oriented and less incremental. The plaintiff might explain that the defendant runs a high-volume, low-margin retail store. Her business model depends on getting products quickly onto the shelves, for rapid turnover, because she has almost no storage capacity. The owner works almost exclusively in the "front of the house," leaving receiving and stocking to minimum wage employees. Based on these facts, the picture emerges of a business in which the inspection of incoming goods is, at best, a low prior-

ity. The shipping clerk, poorly supervised and overwhelmed by a heavy workload, was more interested in unloading the truck than inspecting the shipment. In this framework, the plaintiff's posited incremental facts become increasingly believable.

In brief, a successful theory will not merely use facts to build a story. Rather, it will tell a story that makes sense of the facts. Here is an example of this phenomenon at work:

On December 22, 1984, a reclusive technician named Bernhard Goetz entered a subway car in New York City. He was soon confronted by four young African-American men, who either asked for or demanded money. Instead of complying, Goetz pulled an illegal revolver from his pocket and shot the four youths, gravely wounding each of them. Goetz quickly fled the train, but he later turned himself in to police in New Hampshire, where he gave a lengthy videotaped statement. The story of the "subway gunman" made headlines around the world. To some, Goetz was a dangerous racist, who took random vengeance on four innocent (or nearly innocent) teenagers while recklessly endangering everyone else in the subway car. To others, he was a heroic vigilante, standing up to predators at a time when the New York City police seemed helpless in the face of a mounting crime wave.

Goetz was indicted on charges of attempted murder, assault, reckless endangerment, and criminal possession of a firearm. Brought to trial in a Manhattan courtroom, he predictably pled self-defense, claiming that he reasonably believed that he was the victim of a forcible robbery. At the time, mugging was an incessant problem on New York City's transit system, so Goetz's claim was likely to resonate with a jury of Manhattanites.

But there was—literally—a huge gap in his story. After he had already shot all four of the young men, Goetz saw one of them, Darrell Cabey, lying on the subway floor. Walking over to him, Goetz said, "You seem to be [doing] okay, here's another," and fired one more round, severing Cabey's spinal cord and rendering him a paraplegic. This act, the prosecutor argued, could not possibly have come in self-defense. There was too much time—in fact, there was a pause—between the alleged robbery and the final shot. So even if the confrontation began with Goetz as a victim, it ended with him in the self-assigned role of a cold-blooded hit man. Defense witnesses, however, testified that there had been no pause in the shooting but rather that Goetz fired five times in quick succession. Therein lay the difference between innocence and guilt. If all five shots had been in response to an attempted robbery, then the claim of self defense was plausible and Goetz might be acquitted. If there had been a gap in the firing, however, then the shooting of Cabey was, in legal terms, a separate transaction for which Goetz had no defense.

Recognizing that the time gap, or lack of one, was crucial to their case, the prosecution took a cumulative approach, attempting to use the interruption in the shooting to establish the theory that Goetz was the aggressor.

The matter probably seemed incontrovertible, since Goetz had admitted the pause when he gave his videotaped statement to the New Hampshire police. In contrast, the defense began with their overall story and worked backwards toward the facts. In the defense narrative, Bernhard Goetz was purely a victim, terrorized by thugs in New York. The four “young men” on the train were, in fact, violent predators, all of whom had criminal records. One of the four, James Ramseur, recently had been convicted for rape and sodomy of a pregnant woman and was serving an eight year prison sentence. All of them had menaced Goetz, surrounding him as they demanded money. The looming threat caused the meek technician to panic and to fire all five shots on “automatic pilot.”

While the prosecution theory was based on a single, precise factual question, defense counsel made the alleged “pause” a much smaller part of a much larger story. In the big picture, Goetz’s fearful reactions were made to seem reasonable—in which case the conclusion followed that he fired all five shots without interruption.

The jury, in fact, dismissed Goetz’s confession—that he deliberately stood over Cabey and shot him a second time—as the product of stress and confusion. The inconvenient fact did not fit the broader theory, so the jury simply disregarded it.

As all blind poets know, stories win every time.