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ARTICLE

Wait, What?

Harnessing the Power of Distraction or Redirection in Persuasion

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I. The Story

In 2006 the American Bar Association's (ABA) Section on Legal Education and Admission to the Bar formed an Accreditation Policy Task Force to study a transition to use outcomes and assessment to determine accreditation of law schools.[1] Specifically, the Task Force was formed in response to concerns that the ABA accreditation standards in Chapter 3—Program of Legal Education—focused too heavily on input measures, such as the resources devoted to faculty and infrastructure, and should instead be focused more specifically on outcomes, or evidence of student learning.[2]

Three years into the process, a working group submitted draft standards proposing outcomes-based accreditation. In response, many constituencies began to comment on the proposed standards.[3] Early

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1 American Bar Association Section of Legal Education and Admissions to the Bar, *Report of the Outcome Measures Committee* 3 (July 27, 2008), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2008_outcome_measures_committee_final_report.authcheckdam.pdf.

2 *Id.* (considering outcomes such as "whether the law school has fulfilled its goals of imparting certain types of knowledge and enabling students to attain certain types of capacities, as well as achieving whatever other specific mission(s) the law school has adopted").

3 For example, organizations including the Association of Legal Writing Directors (ALWD), the Clinical Legal Education Association (CLEA), and the Society of American Law Teachers (SALT) responded favorably to the issue of outcomes-based accreditation.

comments from supporters expressed continued commitment to outcomes-based assessment, but also expressed concerns that the initial draft standards did not go far enough to truly advance legal education.[4] On the other hand, the American Law Deans' Association (ALDA) comments noted general support for an inquiry into outcomes, but cautioned against overregulation by the ABA. In a July 14, 2010, letter ALDA wrote, "Even in calm economic times, making changes as significant as those proposed to measure student learning outcomes would be exceedingly complicated."[5] These opposing viewpoints were discussed at length on listservs and blogs for roughly two years. It appeared that that legal education was poised to change and the main concern of the academy was how burdensome and expensive a shift to outcomes might be.

During this time, another committee was also at work. A Special Committee on Security of Position was empaneled to consider provisions relating to academic freedom and security of position in Chapter 4 (relating to the Faculty). This committee considered the current standards that keyed security of position to category of faculty, carving out inferior strata for clinical and legal writing faculty. The Committee's initial report was relatively modest. It considered but did not make a recommendation on an "Alternative Approach," which was "drafted along functional lines based on the policies to be fostered rather than by establishing categories of faculty and setting out precise rules related to those categories."[6] In response to this report, the discussion related to faculty standards in Chapter 4 focused on the category-based approach of the current standards, and whether such distinctions were warranted or desirable.

And then an interesting thing happened. The "Alternative Approach," which was specifically characterized by its authors as differing in terms of its emphasis on function and policy, was mischaracterized as one advo-

4 ALWD characterized initial drafts as "an important symbolic step forward." Letter from Mary Garvey Algero, ALWD President, and J. Lyn Entrikin Goering, ALWD President-Elect, to Hulett H. (Bucky) Askew, Consultant on Legal Education, and Dean Don Polden, Chair, ABA Standards Review Comm., *Comprehensive Standards Review—April 2 Open Forum* 6 (Mar. 31, 2011), http://www.alwd.org/wp-content/uploads/2013/03/pdf/alwd-comments-2011-mar.pdf. Similarly, CLEA indicated that, in its view, "the draft diminishes legal education by significantly weakening the professional skills requirement and reduces outcome assessment to an empty promise." Letter from CLEA to ABA Standards Review Comm., *Clinical Legal Education Association's (CLEA) Comments on Outcome Measures to the ABA's Standards Review Committee* 1 (July 1, 2010), http://cleaweb.org/Resources/Documents/CLEA%20outcomes%20comment%20July%202010.pdf.

5 Letter from American Law Deans' Association to Bucky Askew, *Comments on Standards 301-307—Student Learning Outcomes* (July 14, 2010) (copy on file with author).

6 Report of the Special Committee on Security of Position 16 (May 5, 2008), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2008_security_of_position_committee_final_report.authcheckdam.pdf. The Alternative Approach consisted of proposed standards and interpretations that were less prescriptive, giving laws schools more flexibility for methods to ensure academic freedom, to attract and retain quality faculty, and to ensure that faculty continue to have a role in governance over academic matters. *Id.* at 15.

cating the elimination of tenure. A July 15, 2010, document (whose authorship was not entirely clear[7]) titled "Draft, Security of Position, Academic Freedom, and Attract and Retain Faculty," indicated, somewhat alarmingly, that the current standards did not require a system of tenure.[8]

Not surprisingly, the tenure discussion captured the attention of the academy and the focus of discussions regarding standards review shifted from the Chapter 3 outcomes standards toward a robust and, at times, divisive emphasis on Chapter 4 and the elimination of tenure. In fact, putting tenure on the table was the catalyst for extraordinary action across the country, with many law schools passing resolutions in support of retaining tenure.

The standard-review process continued, culminating in 2014. Predictably, given the outpouring of concern, tenure was retained and no changes were made to the standards as they relate to academic freedom and security of position. What is more interesting is what *did* happen with Chapter 3—the Standards Review Committee (SRC) did approve a significant change to the accreditation process, moving to outcomes-based assessment. And, while the specific changes that were passed were not the most extensive considered by the SRC,[9] they seem

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7 In a July 22, 2010, letter from CLEA, Robert R. Kuehn, President, wrote with regard to the July 15, 2010, document,

> [I]t is troubling that this proposal, which raises issues that are fundamental to the structure of legal education, is posted so late that interested persons and organizations cannot provide comments prior to the Committee beginning its deliberations on those issues. It is also troubling that, although it appears to represent the viewpoint of only a single author (we note that the draft, on page 7, is written in the first-person singular and states that it is not endorsed by the subcommittee), this "discussion" document does not provide the Committee with any alternate points of view.

Letter from Robert R. Kuehn, CLEA President, to Donald J. Polden, Chair, Standards Review Comm., and Margaret Martin Barry, Vice-Chair, Standards Review Comm., *Standards Review Committee's July 15, 2010 Draft re Security of Position, Academic Freedom, and Attract and Retain Faculty* 1 (July 22, 2010) (copy on file with author).

8 Draft Memorandum from American Bar Association Section of Legal Education and Admissions to the Bar Standards Review Comm. *Security of Position, Academic Freedom, and Attract and Retain Faculty* (July 15, 2010) (copy on file with author) (stating "the current Standards do not require approved law schools to have tenure earning systems for any or all of their faculty members and this draft retains the current policy").

9 One example of how the original standards became somewhat less rigorous over the course of drafting was in the articulation of assessment of students' learning. An early draft of the assessment standard—then 304—had required "valid" and "reliable" assessment methods. This was later revised to eliminate the terms "valid" and "reliable," resulting in the current articulation under Standard 314 which reads, "A law school shall utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students." Am. Bar. Ass'n *ABA Standards and Rules of Procedure for Approval of Law Schools* (2016-17) 23, https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_standards_chapter3.authcheckdam.pdf; *see also* Letter from Mary Garvey Algero, ALWD President, to Hulett H. (Bucky) Askew, Consultant on to ABA Section of Legal Education & Admissions to the Bar, *Response to the Standards Review Committee* 6 (Sept. 30, 2010), http://www.alwd.org/wp-content/uploads/2013/03/pdf/alwd-comments-outcome-measures-2010-sept.pdf ("We applaud the subcommittee's recognition that both formative and summative assessment methods should be introduced throughout the curriculum, as we have done in legal writing. We note, however, that the current draft omission of 'reliability' and 'validity' requirements found in earlier drafts tends to undermine the value of the outcomes assessment process[.]"); Letter from Richard K. Neumann, Jr., to the Council of the ABA Section of Legal Education and Admissions to the Bar, *Chapter 3 notice and comment Proposed Standards 302, 202, and 314* (Jan. 31, 2014) http://www.alwd.org/wp-content/uploads/2014/02/Chapter-3-Neumann.pdf. Neumann noted, "The original draft required that assessment methods be valid and reliable. Those are terms of art among people who design measurement methods, including tests like the LSAT. A measurement method is considered valid if it accurately measures what it's being used to measure. The method is reliable if it produces consistent

to be more significant than appeared possible during early discussions when most commentary focused on the dire and expensive consequences of outcomes-based assessment. It appeared that the academy had forgotten about that crisis, turning its full attention away from outcomes and instead squarely focusing on the protection of tenure.

II. A Story about the Story

Was tenure a foil, or a red herring? It was certainly a distraction, although not likely an intentional one, but it nonetheless may have affected the final changes to Chapter 3 and outcomes.

To be clear, this is not an article about the ABA, tenure, or outcomes—the story was merely an illustration of distraction at work. This article studies how distraction influences results and whether there is therefore a potential for the intentional use of distraction, or redirection, in advocacy. Of course, with such an inquiry, inevitable questions arise. Can we effectively refer to the concept of *distraction* in the context of advocacy? How might distraction or redirection be deliberately employed to influence results? What sources could be consulted to determine how this phenomenon is effectively employed to guide an audience? If distraction or redirection does influence results (spoiler alert: it does), how might this concept be used in advocacy? Would such uses be ethical?

One article cannot fully answer all of these questions but, with these issues in mind, the purpose of this article is to begin an analysis of the potential role of distraction, misdirection, or redirection in persuasion. Attempting to draw a possible connection between the effective use of misdirection in narrative, psychology and, ultimately, persuasion, the article will traverse varied terrain. Thus, some direction is in order lest the reader be distracted by shifts in focus.

The article first explores the concept of persuasion in story, examining how the concept of narrative realism tolerates the use of misdirection techniques in successful stories. This section is a deep dive into

results when administered by different people at different times measuring different samples." *Id.* at 8. Neumann also challenged another revision from the original standard that resulted in reduced rigor in terms of amount of required assessment, explaining that

> [t]he 2009 draft would have required assessment "systematically and sequentially throughout the course of the student's studies." It also would have required feedback communicated to students individually "throughout their studies about their progress in achieving" specific learning goals.
>
> [**]The 2014 proposed Standard 314 would require none of that. It would only require a school to use both assessment types "in its curriculum" and to "provide meaningful feedback to students" in its curriculum. And proposed Interpretation 314-2 exempts schools from any obligation to use both methods in all courses. It would be enough to use one method per course.

Id. at 10.

narrative theory, but is an attempt to explain how distraction works in narrative, providing an analogous framework for how distraction might work in legal advocacy. Along the same albeit similarly somewhat attenuated line, the article then considers the role of distraction in persuasion, examining psychological theories that demonstrate a positive relationship between the two and that support a plausible foundation for consideration of distraction (which will shortly be recharacterized) in advocacy.

With the backdrop of those studies providing context, the article then turns to a brief examination of techniques used in advocacy that could be characterized as redirection techniques. Finally, the article raises—but does not fully resolve—concerns about the ethical use of misdirection or redirection in advocacy. These inescapable concerns, beyond the scope of this article, certainly warrant a more thorough examination.

To set an appropriate framework for the discussion, terms must be managed. Referring to the discussion of tenure in the ABA story as a *distraction* may have unintended consequences for the foregoing objectives. ***Distraction*** as the term is commonly understood would hardly be viewed an effective strategy in legal advocacy. And yet the psychological studies frame distraction as a potentially powerful component of persuasion. The term ***misdirection*** has sinister and/or pejorative connotations. So, for purposes of avoiding those potentially confusing or misleading impressions, and because effective advocacy does, after all, involve the management of focus and attention, the section on advocacy will, at times, refer to the technique as ***redirection***. Offering a relatively fluid definition, distraction, misdirection, and redirection should be understood throughout as deliberately redirecting the attention of the listener with persuasive intent in mind.

A. Distraction, Perception, and Storytelling

Studying stories and how they work is fascinating, but can also be frustrating. This work can be particularly difficult for the student of story who is also a writer. As readers, "we are sublimely vulnerable to fiction's effect,"[10] reacting with admiration to particularly effective prose.[11] We read and react differently as writers, responding more actively with text. As writers, '[w]e are not so much recipients [but rather are] coparticipants of a kind, simultaneously confronting and digesting the fictional universe

10 DOUGLAS BAUER, THE STUFF OF FICTION: ADVICE ON CRAFT 2 (2006).

11 *Id.* (noting that when we, as readers, encounter effective prose, "we might think to ourselves, 'Wow. How in the world did he or she do *that*?' But this reaction, as evidenced by the clue in the inflection, is inspired less by a craftsman's curiosity than by sheer, awestruck admiration.").

presented to us and all the while looking for clues to the handiwork."[12] Certainly, as legal writers, we are more keenly interested in techniques associated with effective storytelling because, as we know, stories persuade.

Our discussion of the effect of distraction or misdirection in story might therefore begin with defining story. That, in itself, presents a bit of a dilemma. In *The Law is Made of Stories*, while acknowledging that "[a]mong literary narrative theorists, the precise definition of *story* is still very much in debate,"[13] Stephen Paskey addresses the various ways in which legal storytelling scholars have attempted to define both "story," and "stock story."[14] He asserts that the distinction lies in the details. Arguing that because "[t]he concept of a *stock story* is too valuable to use loosely, [] a more precise definition is needed,"[15] Paskey offers the following: "A stock story is a recurring story template or 'story skeleton,' a model for similar stories that will be told with differing events, entities, and details."[16]

Questioning, however, the "[e]pistemological [l]imits of [d]efinitions,"[17] Linda Edwards cautions that "as a matter of epistemology, definitions are usually constructed by human beings in order to support or advance their own project,"[18] and "[w]hen we try to define a term, we do so from our own rhetorical situation."[19] Because of the "inescapable subjectivity" associated with definitions, Edwards ponders, in contrast with Paskey, "whether the concept [of stock story] is too valuable to use *precisely*."[20]

12 *Id.* Bauer notes that writers, when reading, are "blatant opportunists" who, when encountering a particularly effective passage, evaluate how the writer accomplished this feat. *Id.* at 3. Writers "roll up our sleeves and study the piece, the scene, the passage that has impressed us; we disassemble it, examining its parts to see how they cue and complement one another." *Id.* He does not elevate one frame of reference with the text above another, noting that the writer's experience "is neither preferential nor even—to the degree that it makes the more direct reading experience elusive—desirable," but it is, for writers, inevitable. *Id.* (noting that, for the writer, it is difficult "to push away the craftsman's microscope and look up to find oneself elatedly, uncritically amid a cast of characters and their harkening dilemmas").

13 Stephen Paskey, *The Law is Made of Stories: Erasing the False Dichotomy Between Stories and Legal Rules*, 11 LEGAL COMM. & RHETORIC: JALWD 51, 61 (2014).

14 *Id.* at 70.

15 *Id.*

16 *Id.* Paskey notes, "A stock story, then, is a conventional story type, a story stripped of all but essential details. The key elements of the story—events, entities, and consequences—are stated generally, and are thereby reduced to stock structures (a stock character, for instance) or to an idealized cognitive model." *Id.*

17 Linda H. Edwards, *Speaking of Stories and Law*, 13 LEGAL COMM. & RHETORIC: JALWD 157, 167 (2016).

18 *Id.*

19 *Id.* at 168.

20 *Id.* (emphasis added); *see also id.* at 167 (reinforcing the skepticism "about how well we can analyze important issues by redefining terms and then applying those newly defined terms to the questions of the day").

So, with this debate in mind, I do not attempt to *define* story here, for such an attempt would likely be influenced by my premise that distraction in story likely has an impact on the reader's acceptance of the story itself. Rather, I will offer some characteristics of story that might explain the role of distraction within effective storytelling and therefore reveal to us how distraction works within a complete, coherent, and persuasive narrative.

1. Story as Relationship with Reader

Stories can be viewed as a promise from the writer to the reader. Robert McKee explains, "To tell story is to make a promise: If you give me your concentration, I'll give you surprise followed by the pleasure of discovering life, its pains and joys, at levels and in directions you have never imagined."[21] In making the promise to the reader, the writer also agrees to bring the reader along in revelations, engaging in a partnership of sorts. "The effect of a beautifully turned moment is that filmgoers experience a rush of knowledge *as if they did it for themselves.* In a sense they did. Insight is the audience's reward for paying attention, and a beautifully designed story delivers this pleasure scene after scene."[22]

Another author describes the opening of a story as a contract with the reader.[23] Noting that this contract envisions the writer telling a story, albeit "not necessarily a highly plotted one," but nonetheless told in terms of people and scenes, the writer "promises that there will be an end, just as there is, in front of the reader's eyes, a beginning. And that adds up to a promise of some kind of fictional action—narration, conflict, change, and resolution."[24] This contract then reinforces the expectations the reader has as to the structure of the story.

2. Story as Structure

In *Story Proof: The Science Behind the Startling Power of Story,*[25] Kendall Haven explains that story should be viewed as structure rather than content.[26] Emphasizing the importance of structure and the organization of material, Haven further addresses the manner in which we process story, assuring "that all parts of a narrative or event are connected, and that we can—and must—impose order and common structure on new

21 ROBERT MCKEE, STORY: SUBSTANCE, STRUCTURE, STYLE, AND THE PRINCIPLES OF SCREENWRITING 237 (1999).

22 *Id.* at 237.

23 WILLIAM SLOANE, THE CRAFT OF WRITING 44 (1979).

24 *Id.*

25 KENDALL HAVEN, STORY PROOF: THE SCIENCE BEHIND THE STARTLING POWER OF STORY (2007).

26 *Id.* at 15–16 ("Story is a way of *structuring* information, a system of informational elements that most effectively create the essential context and relevance that engage receivers and enhance memory in the creation of meaning. . . . Story is the framework, not the content hung on that scaffolding.").

narrative information and sequential experience. Another way of saying this is, We require that *It Makes Sense*."[27]

Readers expect order and will fill in information based on expectations.[28] Readers who are actively engaged in story are filling in these details in expectation of the inevitable ending of the story. As one writer notes, endings "must honor the contract [the writer] made with the reader in the opening paragraphs. This doesn't mean the ending must be happy or predictable. But it does mean that the ending must be *inevitable*."[29] So, if the writer has employed redirection techniques such as false protagonists or red herrings, these need to be resolved in a manner that is internally consistent with the narrative.[30] Addressing the "truth" of narrative, James Wood emphasizes internal consistency and plausibility, noting that, for "mimetic *persuasion*[,] . . . it is the artist's task to convince us that this could have happened."[31] Similarly, Robert McKee asserts that "[s]torytelling is the creative demonstration of truth": the "audience must not just understand; it must believe."[32]

Story authors take us on journeys within the story, redirecting our attention between characters and their motives, plots and their subplots.[33] These middle aspects of a story often involve redirection in the form of false protagonists, foils, and red herrings. These must ultimately be resolved effectively in endings. Endings, like beginnings, bring "[e]verything, all of the story's varied motions, down to a particular Something again: a single, crucial action."[34] There must be an identifiable connection between the structural aspects of beginning, middle, and end: "If beginning and end aren't strongly tied, the result will be inconclusive,

27 *Id.* at 34. Haven asserts that "[w]e'll create (mentally invent) what we have to create to make it make sense by using such mental tools as cause-and-effect sequencing, temporal sequencing, centering around a common theme, character analysis, etc." *Id.*

28 Haven notes,

> Our system of filling in around incomplete information with what we most expect is the basis of countless visual tricks and illusions. It is the foundation of magic. You see what you expect to see and are fooled every time by what you didn't see because you never expected it and so never looked for or observed it.

Id. at 39.

29 NANCY LAMB, THE ART AND CRAFT OF STORYTELLING: A COMPREHENSIVE GUIDE TO CLASSIC WRITING TECHNIQUES 88 (2008) (emphasis added); *see also id.* at 89 (stressing that the ending needs "to be the inescapable outcome of plot lines and promises [the writer has] set up throughout the book").

30 As one author cautions, the reader will be dissatisfied "if he hasn't been told about something he wanted to be told about, if the narrative has caused him to ask a question which hasn't been answered . . . ." JOHN BRAINE, WRITING A NOVEL 132 (1974).

31 JAMES WOOD, HOW FICTION *WORKS* 238 (2008).

32 MCKEE, *supra* note 21, at 113.

33 ANSEN DIBELL, PLOT 120 (1998). Tracing the connection between phases of a story, Dibell asserts that "[m]iddles have ups and downs, characters coming and going, intermediate crises." *Id.*

34 *Id.*

unsatisfactory, a letdown, however interesting in itself." [35] However, because the ending "has the whole weight of the story resting on it," it "must reflect the coming to a dynamic stability of all the major forces that produced it."[36] The ending just has to *fit*, which means that any form of misdirection employed in a story must be resolved in a manner that satisfies the expectations of the reader. In other words, the reader has to be persuaded.

3. Story as Persuasion

Stories are persuasive. As Ruth Anne Robbins explains, "stories or narratives . . . are cognitive instruments and also means of argumentation in and of themselves."[37] In order to be persuasive, they must be plausible, or believable within the context of the particular story. In other words, upon concluding a story, the reader must accept the resolution.

a. The Rhetorical Explanation of Acceptability

While persuasive stories should be plausible, they do not have to be realistic. Rather, they have to be constructed so that the reader can make sense of them—the elements of the story have to *hang together*. Steve Johansen clarifies: "[T]he persuasiveness of a story does not turn on its truth. It turns on its narrative rationality—its logical coherence, its correspondence to audience expectations."[38]

Christopher Rideout explains three properties of narrative that comprise narrative rationality: coherence, correspondence, and fidelity.[39] Coherence and correspondence are *formal* properties, meaning "the structural properties of narratives—the internal characteristics of the structure of a given narrative and the way in which those structural parts interact to tell a story persuasively."[40] In contrast, fidelity is a *substantive* property. Fidelity persuades based not upon the structure, but upon the

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35 *Id.* at 123.

36 *Id.*

37 Ruth Anne Robbins, *An Introduction to Applied Storytelling and to This Symposium*, 14 LEGAL WRITING 3, 6 (2008). Robbins explains that because stories are response-shaping, response-reinforcing, and response-changing, they "help us create knowledge, reinforce knowledge, and change existing knowledge and beliefs." *Id.* at 6–7.

38 Steven J. Johansen, *Was Colonel Sanders a Terrorist?: An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ALWD 63, 68 (2010).

39 J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING 53, 55 (2008); *see also* Jennifer Sheppard, *What if the Big Bad Wolf in All Those Fairy Tales Was Just Misunderstood?: Techniques for Maintaining Narrative Rationality While Altering Stock Stories That Are Harmful to Your Client's Case*, 34 HASTINGS COMM. & ENT. L.J. 187 (2012). Sheppard notes that the internal consistency of a narrative "focuses on making sure that the internal elements of the story (such as factual reconstruction, character, setting, plot, etc.) make sense when viewed as a whole and that the story and the evidence presented match up." *Id.* at 189.

40 Rideout, *supra* note 39, at 56.

substantive appeal of the content of the narrative.[41] Formal or structural features of narrative—coherence and correspondence—influence persuasion based upon how well the structural elements of the narrative meet the expectations of the audience. In contrast, fidelity implicates the substance of the story and whether it "comports with what the audience knows of the world based on the audience members' personal experience."[42]

Coherence refers to the consistency and completeness of the story—how accurately it comports with logic and audience expectation.[43] Rideout explains that "narrative coherence can be best understood when it is further broken down into two parts: internal consistency, how well the parts of the story fit together, and completeness, how adequate the sum total of the parts of the story seems."[44] Consistency relates not only to whether the story itself is organized in a consistent manner,[45] but also whether the framework of the story comports with other material the reader is exposed to in building the story.[46] So, for example, "[i]nternal narrative coherence can be conceived primarily in quasi-logical terms. Are the various parts of the story consistent with one another, or do they manifest contradiction?"[47] Completeness, the other quality of coherence, refers to "the extent to which the structure of the story contains all of its expected parts."[48]

Correspondence is the other formal, structural feature of narrative. As a structural feature, correspondence requires the advocate to organize the story in a manner that comports with what is plausible, or

41 *Id.* (explaining that the persuasive appeal of fidelity is not "a matter of the structure of the narrative, but rather as a matter of its content and the particular substantive appeal that the content makes").

42 Sheppard, *supra* note 39, at 202. Sheppard explains that narrative fidelity seems similar to narrative correspondence, but the two differ in terms of focus: "narrative fidelity assesses the substance of the story, whereas narrative correspondence matches the structural elements of the client's story with those of the stock story that has been triggered." *Id.* at 201–02; *see also* Rideout, *supra* note 39, at 69–78. Rideout distinguishes "narrative probability," having "to do with whether an audience finds that a story is coherent," from "narrative fidelity," which "has to do with 'whether or not the stories they experience ring true with the stories they know to be true in their lives.'" *Id.* at 69–70 (citations omitted).

43 Rideout, *supra* note 39, at 63–66.

44 *Id.* at 64.

45 *Id.* at 65.

46 *Id.* at 64 (noting that internal consistency is extended "beyond the story framework itself; the framework must also be consistent with the credible evidence that is being presented and around which the juror is building the story").

47 *Id.* (citations omitted).

48 *Id.* at 65. Rideout explains that the "need for completeness extends to the inferences that a jury is willing to make. . . . [A] jury, in making inferential steps in the construction of a story, will refer to other cognitive models—narrative scripts—for guidance." *Id.*

49 "What 'could' happen is determined, not by the decision makers' undertaking an empirical assessment of actual events, but rather by their looking to a store of background knowledge about these kinds of narratives—to a set of stock stories." *Id.* at 66 (emphasizing that "[t]he narrative is plausible, and persuasive, to the extent that it bears a structural correspondence to one of these stock scripts or stories, not to the extent that it 'really happened'").

what could happen, rather than what actually took place.[49] Rideout refers to "'external factual plausibility,' a matter of the story's satisfying the decisionmaker's sense that it 'could . . . have happened that way.'"[50]

Fidelity, the third property of narrative, relies on *communal validity*, "'a validity within the public horizon of the community with which the judging subject identifies.'"[51] The appeal of fidelity is not simply a matter of accuracy or realism, but is dependent on the judgment of the audience.[52] "Narrative fidelity is based on the audience's personal evaluation of the plausibility of the story [and is] measured by the extent to which the story is consistent with the audience's expectations and experience."[53]

Thus, the structural elements of a story (setting, plot, and character), and the substance and culmination of the story have to be plausible in order for the story to be persuasive, or even engaging.[54] Narrative is a form of human comprehension,[55] and a process by which individuals reconcile expectations.[56] If "[t]he launching pad of narrative is breach, a violation of expectations, disequilibrium [and the] landing pad of narrative is balance, the reestablishment of equilibrium,"[57] how can techniques of misdirection function appropriately within story? Mightn't these types of techniques instead interfere with a story's coherence or completeness, or its fidelity? We turn to that discussion in the following sections.

b. The Engagement Explanation of Acceptability

Psychological studies on the impact and importance of narrative often focus on narrative engagement. These studies explain how an audience is able to navigate misdirection in narrative such as plot twists and false protagonists. Not unlike the rhetorical explanations, these studies emphasize that such disruptions are tolerated only to the degree that the audience is still able to *make sense* of the narrative.

50 *Id.* (citations omitted).

51 *Id.* at 74 (citations omitted).

52 *Id.* at 67.

53 Sheppard, *supra* note 39, at 200–01.

54 *See* section A(3)(b) and accompanying notes *infra*.

55 Ty Alper, Anthony G. Amsterdam, Todd E. Edelman, Randy Hertz, Rachel Shapiro Janger, Jennifer McAllister-Nevins, Sonya Rudenstine & Robin Walker-Sterling, *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1, 5 (noting that narrative is "'a primary and irreducible form of human comprehension,' humankind's basic tool for giving meaning to experience or observation for understanding what is going on").

56 *Id.* at 6 ("[T]he narrative process is specialized for reconciling our expectations about the normal, proper course of life with deviations from it.").

57 *Id.*

Focusing on the concept of engagement, a "number of constructs describe different aspects of engaging with a narrative, such as *transportation, identification, presence,* and *flow*."[58] Other terms associated with narrative engagement include "*absorption,* and *entrancement*."[59] In attempting to measure engagement in story, Rick Busselle and Helena Bilandzic focused on the concept of realism in story and its relationship to engagement.[60] They assert that it is possible that stories that are perceived to be true are likely to be engaging, but that it is also possible that the engagement we have with story creates the sense that the story is plausible.[61] "In either case, it is remarkable that the power of narrative is not diminished by readers' or viewers' knowledge that the story is invented. On the contrary, successful stories—those that engage us most—often are both fictional and unrealistic."[62]

These researchers focused a study on two types of perceived realism.[63] The first was *external realism,* or "the extent to which stories or their components are similar to the actual world."[64] The second focus returns us to Rideout's examination of *narrative realism,* or "plausibility and coherence within the narrative."[65] Noting that the interpretation of the story by the audience is realized not only by the presentation of material itself, but by the inferences made by the audience based upon that material,[66] the researchers explain that "the story is 'the imaginary construct we create progressively and retroactively . . . the developing result of picking up narrative cues, applying schemata, and framing and testing hypotheses.'"[67]

58 Rick Busselle & Helena Bilandzic, *Measuring Narrative Engagement,* 12 MEDIA PSYCHOL. 321, 321–22 (2009).

59 Rick Busselle & Helena Bilandzic, *Fictionality and Perceived Realism in Experiencing Stories: A Model of Narrative Comprehension and Engagement,* 18 COMM. THEORY 255, 255 (2008).

60 *Id.*

61 *Id.* at 256 (noting that it is "plausible that stories we consider authentic and true to life are most engaging . . . [b]ut, it is also plausible that engagement with a story leaves us with a sense that the story was authentic").

62 *Id.*

63 *Id.*

64 *Id.* at 256. This aspect might be likened to the rhetorical discussion of fidelity, *supra* sec. A(3)(a) and accompanying notes.

65 *Id.* This aspect might be likened to the rhetorical discussion of coherence and correspondence, *supra* sec. A(3)(a) and accompanying notes.

66 *Id.* at 257 ("Psychologists distinguish between the text on the page and the construction, performance, or realization of the story in the mind of the reader.").

67 *Id.* (citations omitted). Thus, "'the reader becomes the writer of his or her own version of the story' [and this] conception of narrative processing positions the audience member as an active participant and defines reading or viewing as an active process that occurs online and in real time as the audience member constructs or realizes the story from the text." *Id.* (citations omitted).

One essential component of audience engagement in a narrative is perceived realism, both external and internal. Literal external realism is not imperative because "[w]hen we enter into a fictional world, or let the fictional world enter into our imaginations, we do not 'willingly suspend our disbelief.'" [68] In fact, as readers engaged with fiction, we "do not *suspend a critical faculty*, but rather [we] *exercise a creative faculty*."[69]

With respect to internal realism, "audience members are concerned with coherence and logic within a particular fictional context."[70] Busselle and Bilandzic assert that "two interrelated activities are central to processing: coherence and explanation."[71] Coherence focuses on creating a model in which materials such as actions and events make sense.[72] Explanation focuses on explaining "*why* the explicit actions, events and states occur."[73] An audience loses engagement when a narrative is incoherent or unexplainable.[74] Experiments demonstrate that "audience members begin to question or counterargue if a narrative becomes incoherent or unexplainable."[75] This study of engagement—focusing on junctures where the audience's engagement is disrupted, leading to counterargument—informs persuasion in story and may also lend itself to an examination of how persuasion works in advocacy.

Busselle and Bilandzic assert that narrative comprehension and engagement require a shift by audience members "into the fictional world [,] [positioning] themselves within the mental models of the story [and enabling] them to experience the story from the inside and to assume the point of view implied by the story."[76] Audience members use several structures to make sense of the narrative, including the text itself, schemas, and real world knowledge.[77] Perceived inconsistency between

68 *Id.* at 264. By this I mean that the external realism of stories is not dependent on their correspondence with the way the world *actually* works. In fact, "[f]ictionality is not a problem for consumers of fiction. Within our mental models approach, we conceptualize the information that a story is fictional as part of the mental model that viewers create from a narrative." *Id.* at 266. The "willing suspension of disbelief" originated with Samuel Taylor Coleridge. See his *Biographia Literaria*, ch. XIV (1817), https://www.gutenberg.org/files/6081/6081-h/6081-h.htm.

69 *Id.* at 265 (citations omitted); *see also id.* (noting that the audience does "not actively suspend disbelief— [it] actively [creates] belief.").

70 *Id.* at 270.

71 *Id.* (citations omitted).

72 *Id.*

73 *Id.* (including "for example, how actions fit with the traits and motives of characters") (internal quotations omitted).

74 *Id.*

75 *Id.* (citing studies that manipulate consistency and which showed that reading slows "apparently because inconsistencies interfered with comprehension").

76 *Id.* at 272.

77 *Id.* at 273.

these structures, including questions about a narrative's fictionality, external realism or internal realism, "may prompt spontaneous evaluations of realness and subsequent disengagement from a narrative."[78]

Ruling out fictionality as a source of questioning,[79] Busselle and Bilandzic focus on disruptions prompted by potential inconsistencies in external or narrative realism. They suggest that a violation of both external and internal realism "result[s] from an inconsistency between the mental models that represent the narrative, general knowledge structures, and incoming narrative information [and that these] inconsistencies prompt negative cognitions, interfere with the processing of the narrative, and inhibit the sense of being lost in the narrative."[80] When the reader encounters these inconsistencies, flow is disrupted as the reader engages in realism evaluation and counter-arguing.[81]

The foregoing underscores that when audience members' engagement with the text is undisturbed, readers are actively processing information, filling in gaps as they go. "There is . . . wide agreement that, during narrative processing, people construct a dynamic situation model of the story in which causal relations between events and situational actions of characters are central."[82] Studying the impact of surprising or novel information on viewers' level of narrative engagement, "[r]esearchers have extensively investigated the brains' response to the introduction of novel sensory information during information processing and termed it the

78 *Id.* The authors explain that deviations from real-world realism (external realism) that are not explained in the narrative cause the audience to disengage. They cite anachronistic errors like the use of cell phones in a 1960s-situated plot. *Id.* at 269. Violations of internal realism that interfere with engagement are characterized as internal inconsistencies with respect to objects (such as referring to an item as blue and then later red), or with respect to character traits (such as a vegetarian character described eating meat). *Id.* at 270. Either type of deviation or disruption interferes with audience engagement with the narrative:

> As in counterarguing provoked by violations of external realism, negative cognitions caused by violations of narrative realism disrupt the construction of the mental model and lower the experience of transportation. In the same way, identification is interrupted because the viewer or reader is drawn from the story world and forced to think about the story from a more distanced perspective.

Id. at 271.

79 The authors note that fictionality is not typically a source of disruption for the audience because "knowledge of fictionality is integrated into the mental models of the narrative but normally remains tacit during the narrative experience. In fact, tacit knowledge about a narrative's fictionality prepares the viewer or reader for a possible need to extend the story world logic." *Id.* at 273.

80 *Id.* at 256 (further proposing that "observed inconsistencies undermine a narrative's potential to entertain, persuade, or enlighten").

81 *Id.* at 273 ("When inconsistencies are observed, negative online cognitions about a narrative's realness disrupt the flow of constructing a mental model from a narrative and will reduce the phenomenological experience of transportation.").

82 Freya Sukalla, Heather Shoenberger & Paul D. Bolls, *Surprise! An Investigation of Orienting Responses to Test Assumptions of Narrative Processing*, 43 COMM. RES. 844, 846 (2016); *see also id.* at 845 (describing study focusing "on how viewers' level of narrative engagement influences processing of narrative content that follows a surprising plot turn in the program by recording psychophysiological indicators of the orienting response—a temporary, unconscious increase in attention allocated to processing media content").

orienting response (OR) or 'what is it' response."[83] Narrative redirection in the form of plot twists or other aspects of a narrative that appear inconsistent with prior information[84] have been shown to elicit an OR.[85] As the plot unfolds, the audience must continually process events. In response to a surprising event, such as a plot twist or revelation of an unexpected character trait, the audience must "reassess its current story model[,] [which] requires additional cognitive resources allocated to changing the mental representation of the story to *make sense of* the surprising content."[86]

Thus, as the audience actively attempts to make sense of the narrative, assessing consistency within the narrative appears to be an essential component of the persuasive effect of narrative. Researchers have identified several characteristics of perceived realism in narrative, including narrative consistency.[87] "Narrative consistency is the degree to which a story and its elements are judged to be congruent and coherent, and without contradictions."[88] In a study focusing on how these characteristics affect narrative persuasion, perceived narrative consistency was shown to directly predict message evaluation, "defined as the assessment of 'persuasive potential' of the message [or] [c]olloquially, . . . how good a story is."[89] Narrative consistency influences how a message is evaluated and, in turn, how persuasive it is.[90]

83 *Id.* at 847.

84 *Id.* (hypothesizing that "a sudden discontinuity or surprising turn in a narrative drama plot line introduces novel information in a similar manner as structural changes in video . . . will elicit an OR").

85 *Id.* at 856.

86 *Id.* at 846 (citations omitted) (emphasis added). The researchers explain,

> The protagonist or other character of interest has done something that contradicts his prior actions, and thus, in the case of our study, the viewer is signaled to process information more carefully, updating the event nodes that could include updates to the protagonist index (information about the protagonist and his goals), or the causal index (information about events that are causally related. Surprise structures have been shown to result in slower reading times, signaling an increased focusing of attention and deeper information processing of the relevant events. In fact, even the mismatch of a stereotype to actual events such as the introduction of a female in a traditionally male role (e.g., plumber) may slow reading or intensify information processing.

Id. (citations omitted).

87 Hyunyi Cho, Lijiang Shen & Kari Wilson, *Perceived Realism: Dimensions and Roles in Narrative Persuasion*, 41 COMM. RES. 828, 830 (2014). Additional characteristics include "plausibility, typicality, factuality, . . . and perceptual quality." *Id.*

88 *Id.* at 832.

89 *Id.* at 835 (citations omitted). The researchers concluded that "narrative consistency and perceptual quality directly predicted message evaluation. Narrative consistency and perceptual quality may be concerned more with the characteristics of the narrative itself, whereas the dimensions of plausibility, typicality, and factuality may be concerned more with the narrative's connection to reality." *Id.* at 845.

90 *Id.* at 836 ("Narrative consistency may also foretell the quality of the narrative [because] . . . structural coherence of a narrative is one of the criteria that the audience employs to evaluate whether the narrative has 'good reasons,' which then provides assurance for adhering to the advice offered in the narrative.").

4. What Storytelling Suggests about the Role of Distraction in Persuasion

There is a tremendous amount of scholarship addressing the role of storytelling in persuasion.[91] The foregoing suggests that, to use distraction in persuasion in storytelling, it is critical to maintain coherence and correspondence. An engaged audience will navigate distractions such as plot twists and false protagonists only if the writer is able to bring them to a plausible conclusion. This is because, after all, our audience must make sense of the story. As advocates, we should therefore ensure that any intentional redirection technique employed in advocacy be evaluated as to whether it will lead the decisionmaker to a result that, within the context of the dispute, makes sense.[92]

B. Distraction, Influence, and Psychology

In addition to the narrative studies, psychological studies reinforce the role of distraction in persuasion. The reader will note yet another incarnation of our distraction terminology in the psychological studies involving both ***disruption***[93] and ***fear*** as forms of redirection.[94]

1. Psychological Studies Exploring the Role of Distraction in Persuasion

There is also support for distraction or redirection as a successful persuasive technique in psychology. Milton Erickson developed the confusion technique to overcome resistance to hypnosis.[95] Using "confusion techniques, including non sequiturs, syntactical violations, inhibition of motoric expression, interruption of cues correlated with counter arguing (such as glancing up into the left), and even interruption of a handshake," Erickson was able to demonstrate that, by engaging the conscious mind, he could divert "it from maintaining the resistance to the hypnotic suggestion."[96] In fact, "[h]e observed that confusion was likely to increase compliance with whatever suggestion immediately followed."[97]

Another disruption technique used to demonstrate compliance with requests is known as the pique technique.[98] In the first study on this technique, researchers asked subjects for money using either traditional

91 *See, e.g.*, J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 LEGAL COMM. & RHETORIC: JALWD 247 (2015).

92 Of course, the technique should also be evaluated in the context of ethical and professional considerations, discussed briefly *infra*.

93 *See infra* section B (1) (a) and accompanying notes regarding Disrupt-and-Reframe Theory.

94 *See infra* section B (1) b) and accompanying notes regarding Fear-then-Relief Theory.

95 Barbara Price Davis & Eric S. Knowles, *A Disrupt-then-Reframe Technique of Social Influence*, 76 J. OF PERSONALITY & SOC. PSYCHOL. 192, 192 (1999).

96 *Id.*

97 *Id.*

98 Nicolas Guéguen, Sébastien Meineri, Alexandre Pascual & Fabien Girandola, *The Pique Then Reframe Technique: Replication and Extension of the Pique Technique*, 32 COMM. RES. REP. 143, 143 (2015).

requests such as asking them for "some change," or unusual pique requests, such as asking for "37 cents."[99] In that study as well as others, the research revealed a positive effect of the pique request not only on compliance with the request itself, but on the amount the subject agreed to give in response to the request.[100] Researchers theorized that the "pique technique was effective to increase compliance because the unusual request disrupts the script of refusal activated when a solicitor asks for money. The authors also argued that the pique technique could have aroused the participant's curiosity and focused his/her attention on the unusual request."[101] In a subsequent study, a "reframe" in the form of an explanation for the request or a reason to comply was added after the disruptive request.[102] Adding the reframe, researchers found that the technique resulted in participants giving even more money.[103] The researchers concluded that the reframe acted as a legitimization for the request, or "an opposing argument against the script of refusal that is probably activated when a stranger in a street asks someone for money."[104]

Building on this research, two related areas of inquiry demonstrate how distracting an individual may make her more receptive to a message. The first, disrupt-then-reframe, seems to work at a cognitive level. The second, fear-then-relief, seems to work on a more emotional level.

a. Disrupt then Reframe

The disrupt-then-reframe technique (DTR) was identified in 1999 by psychologists Barbara Price Davis and Eric S. Knowles. Davis and Knowles demonstrated that an individual "can substantially increase the likelihood that a target will comply with a request if confusing phrasing or language is added to the pitch (disrupt) and is followed immediately by a reason to comply with the request (reframe)."[105] Their original study involved the sale of notecards by individuals who claimed to be associated with a nonprofit organization. After a general introduction, a prospective buyer was asked whether he or she wanted to know the price. In test conditions, a disrupting phrase was inserted, such as stating the price of an item in pennies rather than dollars.[106] In another series of studies, cupcakes were referred to as half cakes as a disruption in a charity bake sale study.[107] Other researchers told prospective survey takers that the survey

99 *Id.* at 144.

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.* at 146.

104 *Id.* (citations omitted).

105 Christopher J. Carpenter & Franklin J. Boster, *A Meta-Analysis of the Effectiveness of the Disrupt-Then-Reframe Compliance Gaining Technique*, 22 COMM. REP. 55, 55 (2009).

106 *Id.* at 56.

107 *Id.*

would take about 420 seconds to complete.[108] These studies found the likelihood of either purchasing the goods or completing the survey to be one-and-a-half to two times more likely in DTR than in control conditions."[109]

The effectiveness of the DTR technique has been explained in the context of another series of studies on social cognition known as "Action Identification Theory." This theory posits that when people perform certain actions, they actually identify what they are doing on a continuum, "from matter-of-fact reasoning up to abstract contemplation."[110] Action identification theorists posit that individuals typically identify their actions at higher levels of abstraction, reverting to the identification at lower levels when disrupted.[111] So, for example, when the price of an item is stated in pennies rather than dollars, the audience's perception is shifted from an abstract identification level directed, for example, at the motive of the seller, to a more specific level of the detail of the offer.[112] The "[s]udden clarification of the 'odd bit' (e.g., giving the price in dollars, or the duration of a telephone survey in minutes) enables the subject to recapture the sense of control and[,] consequently, return to the higher level of action identification, which is preferred in typical, everyday conditions."[113] It appears to be that, in the moment of distraction, disruption of cognitive functioning makes the subject susceptible to a simple and explicit request.[114] Other theories to explain the effectiveness

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108 Dariusz Dolinski & Katarzyna Szczucka, *Emotional Disrupt-then-Reframe Technique of Social Influence*, 43 J. OF APPLIED SOC. PSYCH. 2031, 2032 (2013).

109 Bob M. Fennis, Enny H.H.J. Das & Ad Th.H. Pruyn, *"If You Can't Dazzle Them with Brilliance, Baffle Them with Nonsense:" Extending the impact of the disrupt-then-reframe technique of social influence*, 14 J. CONSUMER PSYCHOL. 280, 288 (2004).

110 Dolinski & Szczucka, *supra* note 108, at 2032.

111 *Id.* The authors explain,

> A man painting a wall can be thinking about the way he is covering the wall with new paint, but he can also be thinking that he is redecorating his daughter's room or that he is tinkering. According to the authors of the action identification theory, people usually tend to identify their actions at the higher (abstract) level ("I'm redecorating a room," "I'm tinkering"); low-level identification of the action ("I'm putting on a new layer of paint") occurs in exceptional conditions—like the situation when something unexpected happens that disrupts their control over the current action. In our example with wall painting, the man would shift to the low-level interpretation of his action if, for instance, the wall was difficult to paint evenly because of stains. Shifting to the lower, matter-of-fact level of specific details of the action allows us to regain the lost control over what we are doing.

Id.

112 *Id.*

113 *Id.*

114 *Id.* ("The unique state of the subject's mind, resulting from a double shift from one level of action identification to another within a very short time, makes the subject lose his or her normal orientation and disrupts to a certain extent his or her cognitive functions. In this peculiar moment of disorganization, the subject becomes susceptible to simple and explicit argumentation . . . .").

of DTR focus on how the disruption interferes with the subject's tendency to counter-argue[115] or to evaluate the request.[116]

b. *Fear then Relief*

The DTR technique has been described as a cognitive phenomenon.[117] Following up on the research involving how a cognitive disruption can impact receptiveness, researchers explored how to employ emotional disruption and reframing, a technique known as fear-then-relief (FTR).[118]

The FTR studies involved a variety of scenarios. In one study, high-school students were asked to participate in a laboratory study. While waiting for the study to begin, they were sorted into the three groups: fear, FTR, and control. The fear group was told they would be given electric shock.[119] The FTR group was initially informed they would be given shocks, but were then told they would be in a different experiment.[120] The control group was not subject to any initial procedure.[121] After these expectations were created, during a waiting period before the experiments were supposed to begin, each participant was asked to join a charity action.[122] The FTR was more likely to join the charity action (75% participation rate) than the control group, who participated at a 52.5% rate, and the fear group, who participated at a 37.5% rate.[123]

Another study induced fear and then relief in a parking situation. A paper matching the appearance of a parking ticket was placed either on a windshield or door.[124] The control group found shampoo advertisements on their doors, prompting no fear.[125] The fear group found parking tickets on their windshields and the FTR group found advertisements on their

115 Fennis, Das & Pruyn, *supra* note 109, at 289 ("[B]y gently confusing the consumer, the DTR sows the seeds of compliance by reducing rejection responses and fostering mindless acceptance through heuristic processing of the reframe and of any other congruence-based persuasion technique present in this influence setting.").

116 Carpenter & Boster, *supra* note 105, at 60.

117 Dolinski & Szczucka, *supra* note 108, at 2032. "The DTR technique is strictly cognitive in nature: The subject, hearing simple argumentation during the short state of their cognitive disorganization, becomes more inclined to fulfill the requests made to her or him. In the relevant literature, empirical evidence can be found proving that compliance can be successfully induced not only during a momentary state of cognitive disorganization, but also under emotional disorganization." *Id.* at 2032–33.

118 *Id.* at 2033.

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.* (The charity action was supposed to be for an orphanage.).

123 *Id.*

124 *Id.*

125 *Id.*

windshields.[126] Drivers who experienced FTR were significantly more likely to subsequently complete a questionnaire (62%) that those who continued to experience fear (8%) or the control group (38%).[127]

The researchers explain the effectiveness of FTR in the context of the disruption. Fear redirects our attention on the source of the fear. When the source is withdrawn, "people may experience a short-lasting state of disorientation and may function automatically and mindlessly, reacting with ready behavioral models (scripts) assimilated in the past."[128] This "sudden and unexpected occurrence, which derails the subject from the normal way of functioning, disrupts the promptness of the subject's reactions, and in consequence, makes the subject susceptible to external requests or suggestions"[129] connects FTR with DTR. One significant difference initially existed between the two approaches, however. In order to be effective, the DTR "requires also an extra argument to make the subject comply with the request. This simple additional argument plays the role of a ready-to-take instruction for what to do next."[130] Early studies conducted using FTR included no additional argument to induce compliance; rather, submission was "based solely on the sudden withdrawal of the source of strong emotions."[131]

In a follow-up study, researchers concluded that an additional argument did encourage compliance for FTR participants. "This suggests that this additional element has an impact on compliance only when the person undergoes the specific moment of emotional disorganization, and does not work when the person is in an emotionally neutral state (which was demonstrated in all three studies) or under the emotion of fear."[132]

126 *Id.*

127 *Id.* In this study it is noteworthy that positive emotion levels had no impact on compliance. All participants were evaluated for positive and negative emotions. *Id.* Not surprisingly, the drivers who received a ticket experienced higher negative emotions than the other groups. *Id.* However, there was no significant disparity among groups for positive emotions. *Id.* "These results show that increased compliance achieved in the 'fear-then-relief' conditions cannot be explained by the fact that people relieved from fear experience positive emotions, as these emotions were not any stronger in the 'fear-then-relief' condition than in the control group." *Id.*

128 *Id.* (citations omitted).

129 *Id.* at 2034. The researchers explain "the role of the affective system as the primary mechanism that acts in a generalized manner":

> Feeling certain emotions entails the simultaneous activation of memory structures and cognition as well as sharpens the perception. . . . [P]ossible emotional disorganization . . . can [also] occur under conditions where a positive emotional state is suddenly replaced by a negative state (e.g., when an aversive stimulus appears suddenly and unexpectedly). In this state of disorganization, the subject tends to assess reality in a very specific and often inadequate way, making inaccurate interpretations of the surrounding events. Although the mental representations that appear under such conditions are cognitive, their very genesis remains emotional.

Id.

130 *Id.*

131 *Id.*

132 *Id.* at 2039.

Dolinski and Szczucka emphasize, however, that while the additional argument increased compliance, it was not a necessary component for compliance in FTR, as it is in DTR. To explain this difference, the researchers assert that a "person's disorganization in the case of a sudden relief from experienced fear is much more intense than the cognitive disorganization resulting from a sudden change of the action identification level."[133]

Schema and frames, similar to those employed when individuals read stories, may also partially explain the phenomenon. In FTR, with no opportunity to evaluate the situation, individuals "tend to use the ready and automatic schemes of action that they gained through prior experience ('when you are asked politely to do a small favor, you should agree to fulfill it')."[134] "The verbal argument then works in the same way as the heuristic action indication, based on the generalization of previous experience. However, it works more decisively. In the cognitive DTR, the possibilities of a person's adequate judgment of the situation are probably higher than in the state of emotional disruption."[135]

2. What the Psychological Studies Suggest about the Role of Distraction in Persuasion

As these psychological studies suggest, a person may be more receptive to a request when distracted in part because s/he is trying to return to a higher level of processing and cannot do so until s/he makes sense of the disrupting prompt. Advocates who seek to employ redirection techniques should therefore be aware that the timing of redirection and a request for action, together with the ethical considerations associated with the use of distraction, should be considered.

C. Distraction and Equilibrium

In light of the foregoing, is there now a way to reconcile the efficacy of redirection in story, redirection in psychology, and redirection in persuasion? While the effect of redirection in narrative and in the psychology of persuasion differs, there does appear to be some similarity, as well. That similarity appears to hinge on equilibrium, or resolving uncertainty. Coherence and narrative realism in story—essential for the reader's belief in the ultimate resolution—depend on the story's coming

133 *Id.* ("Human behavior triggered by emotions is more rigidly defined than behavior triggered by cognitive processes. The former behavior is also triggered more automatically, immediately, and unconditionally—without any delay option.").

134 *Id.* (citations omitted). "The external verbal argument in support of fulfilling the request, which shows the persons the right direction of their actions and eventually makes them compliant, in fact, only more convincingly confirms the scheme of action the persons have already developed on their own." *Id.*

135 *Id.*

together in a plausible way, notwithstanding redirection techniques throughout the story. Similarly, cognitive and emotional distraction in DTR and FTR, respectively, work, in part, because of our innate desire to regain equilibrium, or control. So, for example, when an individual's cognitive or emotional equilibrium is disrupted, attention is shifted from abstract identification to specific details.[136] The shift causes the subject to try to regain control of the content and, when the reframe clarifies the situation for the subject, the subject can return to a higher level of identification.[137] It is within that return to equilibrium that the subject is more susceptible to acquiescence.[138]

D. Distraction (Redirection) in Advocacy

To the extent that research demonstrates a positive relationship between distraction or redirection and persuasion, is there a role for distraction in advocacy? In this section I propose that advocates may indeed be using redirection techniques in some areas, even if these techniques are not labelled as such. If that is the case, can the lessons of storytelling and psychological research help refine the ways in which advocates use redirection (within ethical limits), or help us better understand its impact? Persuasion in advocacy depends on the audience's accepting the story told by the advocate. If we recognize the audience's propensity for equilibrium, how would redirection facilitate such resolution? And, if redirection techniques are persuasive in certain contexts, is the use of such techniques ethical?

Recalling the foundational distinctions set forth at the beginning of this article, some clarification regarding distraction, misdirection, and redirection in advocacy are also in order. To that end, John W. Cooley differentiates between lies, or "intentionally deceptive statements,"[139] and other ways to manage information. Viewed in this manner, "'deceiving is the business of persuasion aided by the art of selective display,' and it is effected by two principal behaviors: hiding the real and showing the false."[140] And these choices that advocates make as to what to reveal or

136 *Id.* at 2032 ("When it comes to the disruption of a typical, everyday action that we would normally identify on a higher level (e.g., the price is given in cents instead of dollars, or the time of a survey—in seconds instead of minutes), our attention is shifted from the abstract action identification level (e.g., 'What are the seller's possible motives in trying to sell me these products?') to the level of specific details of the action (e.g., 'What was it they have just said to me?')").

137 *Id.*

138 *Id.* at 2039.

139 John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 LOY. U. CHI. L.J. 1, 10 (1997).

140 *Id.* (citations omitted). Deception, Cooley notes, can be active or passive and can be achieved in the following ways: "by either causing or permitting (1) the acquisition of a false belief; (2) the continuation of a false belief; (3) the cessation of believing something true; or (4) the inability to believe something that is true." *Id.* at 10–11.

emphasize are choices that orient the audience's focus or attention. They can therefore be used to redirect the attention to a persuasive result. The following represent some advocacy devices that rely, in part, on redirection.

1. Redirection in Criminal-Defense Tactics

a. Confusing the Issue or the Story

Lawyers for criminal defendants may employ forms of redirection in representation. "Conventional wisdom dictates that although criminal defense lawyers may pursue a variety of different trial tactics, three reliable strategies stand out: 'If you've got the facts on your side, argue the facts to the jury. If you've got the law on your side, argue the law to the judge. If you've got neither, confuse the issue with other parties.'"[141] Because the job of defense counsel is to convince the decision maker of reasonable doubt, such representation might rely on a form of misdirection. Richard K. Sherwin explored the use of narrative in a criminal trial, beginning by emphasizing that "[p]eople prefer stories neat," and "stories are supposed to make sense."[142] "The trouble with having one's stories neat, however, is that they tend to leave things out—the things that make a story messy, hard to keep in mind."[143] But, because a good story can't "trail off, or break up, or have another story poke its nose in,"[144] the advocate must make choices about what details to include, and how to include them.

As a result, the advocate makes choices, and "[t]hat's the story [the advocate is] telling. It could have been otherwise, but it isn't. The story told, in order to be told, represses other possibilities."[145] Misdirection techniques employed by defense counsel to create doubt might include keeping relevant material out of consideration, confusing witnesses, or redirecting the flow of the argument.[146] So, for example, an attorney representing a defendant in a rape trial might redirect the jury's attention to the victim's past sexual behavior.

Legitimation studies confirm the efficacy of these redirection tactics. For example, researchers have shown that legitimation, a form of

141 Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39, 67–68 (1994) (citation omitted).

142 *Id.* at 40–41.

143 *Id.* at 40.

144 *Id.* at 41.

145 *Id.*

146 *Id.* at 45 ("Many techniques of the effective advocate . . . include techniques for keeping relevant information out, for trapping or confusing witnesses, for 'laundering' the facts, for diverting attention or interrupting the flow of argument, and for exploiting means of non-rational persuasion.") (citing WILLIAM TWINING, RETHINKING EVIDENCE: EXPLORATORY ESSAYS 22 (1990)).

persuasion, is sustained to a degree by keeping attention diverted from certain topics and focused on others.[147] In fact, studies demonstrate "that a focus on *attacks on the legitimacy of others* might be especially effective in diverting attention away from questions about one's *own* legitimacy."[148] These researchers explore the persuasive effect of framing, which of course involves management of attention, finding that

> Contrary to the norms of most scientific or scholarly disciplines, which are generally seen as involving a good-faith search for answers and explanations, what we are suggesting here is that the arena of politics may generally have become one where *it is far more important to activate the salient questions than to offer answers*—partly because, . . . "[i]f they can get you asking the wrong questions, they don't have to worry about the answers."[149]

Sherwin explains the objective of defense counsel who seeks to confuse the issue: effectively to undermine the plausibility of the story offered by the prosecution and therefore to interfere with the coherence of the story offered by the prosecutor. This type of redirection strategy "attempts to attack the prosecutor's history, impeach the credibility of the state's witnesses, and deconstruct the linear narrative that the prosecutor offers, breaking it up until it is transformed into a nonsensical, incredible tale too full of inconsistencies and loose ends to withstand the onslaught of reasonable doubt."[150] This method of distracting is explicit, asking the decisionmaker to explicitly focus on something other than the actions of the defendant, effectively distracting the decisionmaker from a focus on the defendant. The following strategy is a more implicit form of redirection.

b. Redirecting the Role of the Jury

Anthony G. Amsterdam and Randy Hertz explored the closing arguments in one criminal case from a forensic, rhetorical, narrative, and

147 William R. Freudenburg & Margarita Alario, *Weapons of Mass Distraction: Magicianship, Misdirection, and the Dark Side of Legitimation*, 22 SOC. F. 146, 158 (2007).

148 *Id.*

149 *Id.* at 159.

150 Sherwin, *supra* note 141, at 68. Sherwin distinguishes between historical narration, whose focus is on the past, and historical deconstruction, whose focus is not the present. Because a historical narrative account is "temporally closed," it can be accepted in a "Makes sense to me. That must've been the way it happened" manner. *Id.* In contrast, a "good deconstruction, by introducing hesitation, emphasizes and dilates the present moment of doubt. ('Hey, wait a minute. First he said it was 10 p.m., then he said midnight. He must be lying.') The believable history is what already happened; the deconstructed history is what happens in the courtroom." *Id.*

151 Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y. L. SCH. L. REV. 55, 104 (1992).

dialogic perspective.[151] Their evaluation of defense counsel's strategy emphasizes that defense counsel seeks to engage in a "dialogue" with the jury but one which, by necessity, must be "imaginative."[152]

In this particular criminal trial, the prosecution presented all of the evidence while the defense offered none.[153] If, in the view of the jury, the truth is based on the evidence, and not some construction of the facts by the jury, the prosecution enjoys an advantage.[154] "If the jury takes the evidence at face value, a murder verdict is assured. Imaginative pursuit of alternative meanings is required to derail that train. Defense counsel wants to stimulate the pursuit; the prosecutor wants to suppress it."[155] So, defense counsel opted for a narrative structure involving "*the jury* as protagonist and the courtroom as its setting."[156]

As the protagonists, the jurors had to solve the riddle of the trial. In closing argument counsel emphasized, "[I]f you just look at the evidence, the lack of evidence and don't make any irrational leaps or bounds . . . [,] you can't find proof beyond a reasonable doubt that my client intended to cause the death. The ambiguity remains."[157] Cast in their role of making sense of the evidence, counsel draws jury members implicitly into this "imaginative dialogue," with counsel "while *explicitly* insisting that [the jury] 'stick to the facts.'"[158] "[T]he notion that the jury has an active role to play in the creation of facts" must be embedded subtly in the minds of the jurors because "the notion is at war with powerful legal and folk-cultural conceptions of 'facts' as objective realities."[159] The misdirection of attention is effective, because it enables the jury to make sense of the

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152 *Id.* at 76. The authors explain,

> But defense counsel cannot explicitly invite the jury to be imaginative, for at least three reasons.
>
> First, the judge will charge the jury that it is not permitted to "speculate," so defense counsel cannot allow what he is doing to be perceived as asking the jury to speculate.
>
> Second, the common image of defense counsel in a criminal case includes the con-artist (smoke-and-mirrors) stereotype and the "Officer Krupke" stereotype. Defense counsel must avoid the appearances of being either a trickster or a peddler of psychological soft stuff.
>
> Third, the judge will charge the jury that the prosecution bears the burden of proving every element of the crime beyond a reasonable doubt. Defense counsel cannot afford to forfeit the benefit that this standard of proof, as applied to the elusive element of intent to kill, confers on the defense.

Id.

153 *Id.* at 75.

154 *Id.* ("So long as meaning, reality, truth are conceived as immutable, inherent properties of 'the facts,' to be found in the evidence and not constructed out of it, the prosecutor has a big advantage.").

155 *Id.* at 75–76.

156 *Id.* at 64.

157 *Id.* at 64–65.

158 *Id.* at 76.

159 *Id.* ("To counter those conceptions, defense counsel must proceed by immersing the jury in a different and more compelling reality—the reality of the trial in which they are actors, the reality of the dialogic process, which assigns meaning to events.").

narrative and "permits the defendant's activity in killing the victim—an activity that defense counsel is not denying and can hardly tuck under the rug—to be fitted into the narrative without becoming the dominant action of the tale."[160]

c. *Offering a False Defense*

One final form of misdirection employed in defense advocacy is that of the "false defense," or the tactic of "discrediting a truthful witness on cross-examination and later during closing argument."[161] Todd Berger explores several types of false defense tactics, including false-story cross examination, false-implication closing argument, "evidence-reflects" closing argument, and false-story closing argument.[162] Each of these rely on a form of redirection.

In *false-story* cross examination, defense counsel asks the witness, whom defense counsel knows to be testifying truthfully, "a series of questions in which defense counsel knows that the underlying factual predicate on which the question is based is false."[163] Defense counsel expects the witness to answer in the negative, denying the implication of the question.[164] "As a result, the questions asked on cross-examination amount to nothing more than innuendo the defense attorney knows to be false . . . [allowing] the defense attorney to present the full theory of defense as an alternative story to the one being offered by the prosecution."[165] It is therefore designed to misdirect the jury's attention from the story offered by the prosecution.

In the *false-implication* closing argument, the defense counsel does not explicitly make false statements to the jury.[166] "Importantly, this includes not telling the jury that the defendant is innocent but merely that the defendant is not guilty."[167] However, "the jury is presented with an alternative explanation that exculpates the defendant without the trial attorney affirmatively telling the jury something he knows to be false [allowing the jury] to draw false inferences from true facts and to evaluate the evidence through the prism of reasonable doubt."[168]

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160 *Id.* at 66.

161 Todd A. Berger, *The Ethical Limits of Discrediting the Truthful Witness: How Modern Ethics Rules Fail to Prevent Truthful Witnesses from Being Discredited Through Unethical Means*, 99 MARQ. L. REV. 283, 285 (2015).

162 *Id.* at 303, 305, 307, 308.

163 *Id.* at 303.

164 *Id.*

165 *Id.* 303–04

166 *Id.* at 305.

167 *Id.*

168 *Id.* at 306 ("As a result, the theory of defense is only implied—it is never actually stated.").

Turning to the *evidence-reflecting* closing argument, Berger explains that the advocate must be sure to "use a qualifying phrase when asking the jury to expressly draw an inference that the lawyer knows to be untrue."[169] By using qualifying statements, "the lawyer is not expressly vouching for an alternative version of events to the one presented by the state, but merely stating that the evidence technically reflects such a possibility."[170]

Finally, in the *false-story* closing argument, defense counsel "asks the jury to draw false inferences from true facts"; "in doing so, the attorney phrases that argument through a series of explicit statements that he knows to be false, without the use of any qualifying language. This includes affirmatively stating that the defendant is actually innocent of the crime charged."[171] Berger explains that while each of these closing arguments strategies attempt to provide alternative versions of the facts, the false-story technique is characterized as such because it is told in story form, as opposed to "suggesting to the jury in a series of carefully worded and qualified statements asking the jury to draw certain inferences." [172]

The ethics of these techniques are clearly worth examining and are explored further below.[173] Berger first reinforces the role of narrative in using these types of tactics. Because "'we are typically able to doubt an explanation only when we are persuaded, at least provisionally, of an alternative explanation[,] the effective defender cannot simply protest that the prosecution has not made its case. Rather, she must introduce and embellish plausible alternatives to the prosecutor's explanations.'"[174]

2. Redirection by Framing—The Reptile Strategy

The manner in which an advocate frames or reframes an issue may provide an opportunity for mis- or redirection. One example is the "reptile strategy." This technique, advanced by trial attorney Don Keenan and trial consultant David Ball in their book *Reptile: The 2009 Manual of the Plaintiff's Revolution*,[175] is a form of misdirection strategy typically employed by

169 *Id.* at 307.

170 *Id.* Berger explains that

> when making this type of closing argument, the lawyer need not preface every statement by qualifying it first with "the evidence reflects." The lawyer can, of course, still continue to make the types of statements that are used in the false implication closing argument that are technically true and only imply the theory of defense. In this regard, the evidence-reflects type of argument is really a modified version of the false-implication closing argument.

Id.

171 *Id.* at 308.

172 *Id.*

173 *See infra* sec. E. Berger, too, does explore such ethical questions. Berger, *supra* note 161, at 309–62.

174 *Id.* at 338. (citing David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1760 (1993)).

175 DAVID BALL & DON C. KEENAN, REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION (2009).

plaintiffs' counsel. This tactic involves invoking the fear of the decisionmaker—typically the jury—to advance the position of the plaintiff. "The 'reptile theory' seeks to pit the jury against the defendants by making the jury feel that the defendants' actions and products threaten themselves, their families, and their societies."[176] This is a tactic often used in medical-malpractice claims and seeks to redirect the jury's attention from a focused consideration of the conduct of the defendant vis-à-vis the plaintiff to a more widespread fear that the defendant's violation of some safety standard threatens the very safety of the community.[177]

Of course, savvy defense counsel have formulated their own redirection tactics to respond to the reptile strategy. One such tactic involves redirecting the jury's understanding of its role in processing the evidence.[178] The reptile strategy asks jurors to use their decision-making authority to right some threatened wrong committed by the defendant, and may imply a low threshold of proof required of plaintiffs' counsel.[179] A defensive technique might therefore be to redirect the jury's understanding of its deliberative role. Because studies have shown that jurors generally take their deliberative role seriously,[180] defense lawyers combat the reptile strategy by emphasizing the "obligation jurors undertook when swearing the oath of service, elevating the value of what they are about to do as a group over the particulars of the themes, emotions, and the plaintiff's call to action. In a sense, it is a competing call to action by and for the defense."[181] This can be accomplished by providing the jury with a verdict graphic, redirecting its attention to specific deliberative prompts and away from the simple call to action strategy employed by the plaintiff.[182]

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176 Michael Crist, *Mass Tort Mania, The Effect of Saturation Advertising on Claims, Courts, and Memories*, 59 DRI FOR DEF., Apr. 2017, at 54.

177 David C. Marshall, *Legal Herpetology: Lizards and Snakes in the Courtroom*, 55 DRI FOR DEF., Apr. 2013, at 64 ("[T]he lawyer using this strategy must show a jury how the dangers presented by a defendant extend beyond the facts of a case and affect the surrounding community so the entire case boils down to community safety versus danger.") (citation omitted).

178 Theodore O. Prosise & Peter Ehrlichman, *How Defendants Can Combat the 'Reptile Strategy' (and Its Ilk)*, INSIDE COUNSEL BREAKING NEWS, Oct. 9, 2015.

179 *Id.* (suggesting the reptile strategy implies a "presumption shift and 'low bar' of proof implied by plaintiff's counsel (e.g., the 'scale' metaphor used to portray to a jury that only a feather of evidence is needed to meet the burden and tip the scale in their client's favor)").

180 Leah Sprain & John Gastil, *What Does It Mean to Deliberate? An Interpretative Account of Jurors' Expressed Deliberative Rules and Premises*, 61 COMM. Q. 51, (2013) ("[Jurors] believe deliberation should be rigorous and democratic [and] actively consider information.").

181 Prosise & Ehrlichman, *supra* note 178.

182 *Id.* "The 'verdict map' can guide the 'directionality' of the deliberative process. A step-by-step graphic of each question, a few key instructions, and several anchoring pieces of evidence can allow jurors to impose calm order on deliberations. This helps combat the 'reptile' or the general plaintiff 'call to action.'"

3. Redirection by Fear—Mutt and Jeff

Another form of redirection employs the "good cop–bad cop" or "Mutt and Jeff" routine of questioning. This is an example of distraction that may be employed in negotiations[183] and police interrogations.[184] In a negotiation example, the good cop garners favor with the opposing side by appearing receptive to an offer and, when an accord appears imminent, the bad cop summarily rejects the offer as insufficient.[185] In response to the predictable frustration of the opposing party, the good cop steps back in to suggest that modest, additional accommodations might resolve the situation.[186]

This technique is also employed in police interrogations and such use has been the subject of a significant amount of scholarship exploring how the technique can be misused by police to elicit false confessions.[187] Variations of the good cop–bad cop routine exist in police interrogations of defendants, ranging from the conveyance of false and intimating incriminations to the less-deceptive use of an empathetic followed by aggressive interrogator.[188] These techniques, while varied, share the misdirection or distraction element and have been used for centuries.[189] In fact, they form the basis for the efficacy of distraction in persuasion fear-then-relief studies explored earlier.[190]

4. Redirection by Confusion—Bullshit

Another persuasive strategy involving redirection is what Harry Frankfurt characterized as "bullshit."[191] Frankfurt distinguishes bullshit from deliberate misrepresentation, noting that the truth is unimportant to the bullshitter. "A person who lies is thereby responding to the truth, and he is to that extent respectful of it. When an honest man speaks, he says only what he believes to be true; and for the liar, it is correspondingly indispensable that he considers his statements to be false."[192] A bullshitter need not attend to truth:

183 Charles B. Craver, *Classic Negotiation Techniques*, 52 IDAHO L. REV. 425, 454 (2016).

184 Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 MICH. L. REV. 1168, 1169–70 (2001).

185 Craver, *supra* note 183, at 454.

186 *Id.* ("[T]he reasonable partner assuages their feelings and suggests that if some additional concessions were made, she could probably induce her seemingly irrational partner to accept the new terms.").

187 *See, e.g.*, Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 627 (1979).

188 *Id.* at 625–28.

189 Dolinski & Szczucka, *supra* note 108, at 2033. The authors note that the "*bad cop–good cop* interrogation procedure was in fact used as long ago as the Middle Ages, to make women admit they were witches, and also in the Soviet Union, particularly under the rule of Stalin—to make people admit they were enemies to the working class." *Id.* (citations omitted).

190 *See supra* section B(1)(b).

191 HARRY G. FRANKFURT, ON BULLSHIT (2005).

192 *Id.* at 55–56.

> For the bullshitter, however, all these bets are off: he is neither on the side of the true nor on the side of the false. His eye is not on the facts at all, as the eyes of the honest man and of the liar are, except insofar as they may be pertinent to his interest in getting away with what he says. He does not care whether the things he says describe reality correctly. He just picks them out, or makes them up, to suit his purpose.[193]

The bullshitter makes statements untethered to truth which, in many instances, can confuse the listener and enable the bullshitter to persuade. Matthew L.M. Fletcher asserts that lawyers are, at times, bullshitters, noting that "[w]hile it is well established that lawyers may not lie to their clients, it is not well established whether counsel can bullshit their potential and active clients."[194] Fletcher asserts that lawyers bullshit clients when they make representations that they not only *cannot* verify to be true, but likely *could* not verify to be true.[195] Fletcher provides several examples, including a representation to a prospective client that the lawyer is more likely to prevail on an appeal than another lawyer, or a representation to the court that there will be widespread and significant consequences of a ruling.[196] He notes, "If at the moment an attorney makes these representations, he or she does not know if the representations are true, or even likely to be true (and in most instances here the lawyer simply cannot know), then the lawyer is bullshitting."[197]

Bullshitting is a form of redirection because the objective of the bullshitter is to distract the listener from the truth. The bullshitter may not be actively lying, but is obscuring the truth. "[I]n the typical case, the bullshitter is strongly connected to the truth via a desire to obscure a specific part of it."[198] Indeed, the bullshitter likely has an agenda: "the bullshitter acts with the goal not simply of hiding or muting the truth but also of using these tactics to alter the listener's behavior in some way . . . ."[199] In this respect, bullshitting can be viewed as a persuasive strategy involving redirection.

193 *Id.* at 56.

194 Matthew L.M. Fletcher, *Bullshit and the Tribal Client*, 2015 MICH. ST. L. REV. 1435, 1436 (2015).

195 *Id.*

196 *Id.*

197 *Id.*

198 Sara Bernal, *Bullshit and Personality*, *in* BULLSHIT AND PHILOSOPHY 63, 64 (Gary L. Hardcastle & George A. Reisch eds., 2006) ("This desire may be more or less conscious. The bullshitter may have that part of the truth in mind clearly or fuzzily, or it may be in some mental compartment to which she has no immediate conscious access.").

199 Andrew E. Taslitz, *Bullshitting the People: The Criminal Procedure Implications of a Scatalogical Term*, 39 TEX. TECH L. REV. 1383, 1385 (2007) ("[T]he bullshitter may act with varying levels of awareness of what he is doing, sometimes suppressing, or even being entirely consciously unaware of, his troubling dance with factuality.").

5. Redirection by Erroneous Reasoning—Informal Fallacies

The use of informal fallacies in legal advocacy is another form of mis- or redirection. "[F]allacies are mistakes in reasoning that involve ambiguity and vagueness. A fallacy can be a type of error in an argument, a type of error in reasoning (such as arguing, defining, and explaining), a false belief, or a rhetorical technique that causes any of these errors."[200] Fallacies can be formal, involving technical errors in the structure of an argument, or informal, involving "the content (and possibly the intent) of the reasoning."[201] "Informal fallacies can be grouped under four headings: (1) fallacies of relevance; (2) fallacies of defective induction; (3) fallacies of presumption; and (4) fallacies of ambiguity."[202] Arguments based on fallacies of relevance include ad hominem attacks, or arguments designed to redirect attention from a central argument and toward an attack on the opposing party or counsel.[203] Arguments that are based on emotional appeal, such as pity, fear, or terror, are similarly fallacies of relevance whose objective is to redirect attention from facts and logic to emotional appeals.[204]

In a fallacy of defective induction, premises, while possibly relevant, are too weak to support the conclusion. "A classic example of this is an appeal to ignorance (*argumentum ad ignoratiam*), when it is argued that a proposition is true on the ground that it has not been proved false, or when it is argued that a proposition is false because it has not been proved true."[205] Plaintiffs in toxic-exposure cases make arguments based on defective induction when "they argue that because there is no known safe dose of a product, the product is defective and caused the injury at

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200 Cory S. Clements, *Perception and Persuasion in Legal Argumentation: Using Informal Fallacies and Cognitive Biases to Win the War of Words*, 2013 B.Y.U. L. REV. 319, 332 (2013).

201 *Id.* at 333. Informal fallacies appear to be accurate but are "'flawed in their reasoning or construction.' And from a psychology perspective, 'a fallacy is often defined as a mistake in reasoning used for deceptive purposes.' While this certainly is not categorically true of all informal fallacies, 'many of the informal fallacies are often used in the manipulation of opinion.'" *Id.* (citations omitted).

202 Frank C. Woodside III & Jacqueline R. Sheridan, *Responding to Table Pounding: Defense Through the Exposure of Fallacies*, 58 DRI FOR DEF., Sept. 2016, at 63.

203 *Id.*

204 *See, e.g.*, G. Fred Metos, *Appellate Advocacy: Logic and Argument*, 23 CHAMPION, Mar. 1999, at 33 (explaining arguments based on force, pity, or group passion); *see also* Brett G. Scharffs, *The Character of Legal Reasoning*, 61 WASH & LEE L. REV. 733, 778–80 (2004). Scharffs explores the ethical implications of the use of informal fallacies in legal argumentation:

> Consider the following abbreviated list of informal fallacies that logicians condemn, each of which is commonplace in the law: the appeal to pity, the fallacy of complex question, the fallacy of special pleading, the red herring, the slippery slope argument, the straw man fallacy, fallacies of personal attack (such as the genetic fallacy, *ad hominem* arguments, and the fallacy of poisoning the well), the appeal to terror, fear, or force, and the appeal to authority or prestige.

Id.

205 Woodside and Sheridan, *supra* note 202, at 63.

issue."[206] Again, this is an argument involving a form of redirection insofar as "it also attempts to shift the burden of proof to the defendant. Just because there is no 'known' safe dose does not mean that there is no 'actual' safe dose."[207]

An example of an argument using redirection based on a fallacy of presumption is the complex-question fallacy. "The complex question fallacy (*plurium interrogationum*) involves two unrelated points that are combined and treated as a single proposition. Through the improper use of the word 'and,' the listener is encouraged to accept or reject two separate propositions when really only one proposition is acceptable."[208] A frequently used example is the question, "Have you stopped beating your wife?"[209] If the answer is "yes" it suggests the responder did beat his wife in the past, but no longer does.[210] If the response is "no" it suggests the responder still beats his wife.[211] "The complex question argues by asking a question in such a way as to presuppose the truth of some assumption buried in that question—an assumption which may or may not be true."[212]

6. Redirection in Mediation

One author explores the use of redirection—deception, in his terms[213]—in caucused mediation.[214] John W. Cooley asserts that "[c]onsensual deception is the essence of caucused mediation."[215] This is true, he argues, for three reasons. First, because the mediator has an obligation not to disclose confidential information, neither party to a mediation knows what information, if any, has been disclosed to the mediator.[216] "In this respect, each party in a mediation is an actual or potential victim of constant deception regarding confidential information—granted, agreed deception—but nonetheless deception."[217]

Second, because the bargaining strategies of the parties and the mediator are "layered and interlaced," they create "an environment rich in gamesmanship and intrigue."[218] The mediator is then in the business of managing information, or controlling the direction of attention. This results in a likelihood that mediators will use "deceptive behaviors because

206 *Id.* at 66 ("This argument constitutes an appeal to ignorance by attempting to avoid the dose–response requirements of toxicology and epidemiology . . . .").

207 *Id.*

208 *Id.*

209 *Id.*

210 *Id.*

211 *Id.*

212 *Id.* ("More appropriately, one should first ask: 'Have you ever beaten your wife?' If an affirmative response results, a second question may be asked: 'Have you stopped?'").

213 Yes, I know, another iteration, but stay with me, Reader, for Cooley's emphasis on a term I have tried to sidestep is addressed clearly and effectively above the line, so to speak.

214 Cooley, *supra* note 139, at 6 (citations omitted).

215 *Id.* at 5.

216 *Id.*

217 *Id.* at 5–6.

218 *Id.* at 6.

they are the conductors—the orchestrators—of an information system specially designed for each dispute, a system with ambiguously defined or, in some situations undefined, disclosure rules in which mediators are the chief information officers with near-absolute control."[219] "A third reason for the presence of deception in mediation is that the information system manipulated by mediators in any dispute context is itself imperfect."[220]

Comparing the techniques of the mediator to those of the magician, Cooley then outlines several misdirection strategies employed in mediation. Using the magician's technique of "appearance,"[221] mediators may "use statistical data and graphs to lure other mediation participants (audience members) into believing that they should draw certain conclusions from a given set of data."[222] For example, mediators can employ techniques like the selective use of data,[223] artful presentation of data to suggest expansibility,[224] and careful selection of the frame of reference to redirect attention and perception about data[225] relevant to the mediation. Cooley further observes the use of persuasive but false counterarguments employed in mediation, such as the red herring,[226] the "where there's smoke there's fire" arguments,[227] and the "if it ain't broke, don't fix it" arguments.[228] Mediators can also employ mis– or redirection techniques to control the overarching focus of the mediation through strategies such as confusion,[229] diversion,[230] distraction,[231] and specific

219 *Id.*

220 *Id.*

221 *Id.* at 24 ("An appearance, or a production, is an effect in which the result is the materialization of something or someone.") (citation omitted).

222 *Id.*

223 *Id.* at 25.

224 *Id.* at 26 ("The trick of using big numbers instead of percentages, in certain circumstances, can create the appearance of enhanced size.").

225 *Id.* at 29 ("The concept of frame of reference is often a crucial ingredient in deception employed to produce a desired appearance.").

226 *Id.* at 31 ("Magicians make a solid argument disappear by drawing the audience's exclusive attention to a side issue. In doing so, they employ a type of misdirection.").

227 *Id.* at 32–33 ("In order to distract the audience's attention from an original unpalatable proposal, the magician may create a feeling of alarm in the audience by directing its attention to a situation which may erupt into a much larger problem.").

228 *Id.* at 33 ("To make a solid, innovative proposal for improvement disappear, magicians may misdirect the audience's attention to the apparent security of the status quo, despite knowing that such security will be of brief duration.").

229 *Id.* at 75. Cooley explains,

> In a multiple issue case, mediators might use the misdirection stratagem of confusion to accomplish their ends by spending most of the mediation session on one or two tough issues. Near the end of the session, when they have achieved agreement on one or both of the tough issues, they then call the parties' attention to the twelve or so incidental issues that were not previously addressed and say something such as "we'd better work these out now or you'll have to work them out on your own without me." Fearing that deadlocks on the small issues might scuttle the overall settlement, and not wanting to spend more money to take another day in mediation, the parties begin resolving the multiple small issues with a mediator's assistance. The mediator makes little effort to

direction.[232] All of these strategies involve some form of mis- or redirection, and many are quite effective.[233]

E. Ethical Questions

Of course, on its face, the use of misdirection in advocacy—if viewed as active deception—raises serious potential ethical concerns. Lawyers are expected to be truthful and not engage in deception. As noted earlier, many of these potential issues are beyond the scope of this article and worthy of further consideration. Nonetheless, some shall be noted here.

Linda Berger explores ethical questions relating to the creation of false inferences in cross examination and closing arguments.[234] Noting primary ethical sources including the ABA Model Rules of Professional Conduct Model Rule 3.4(e), which prohibits a lawyer from "allud[ing] to any matter . . . that will not be supported by admissible evidence,"[235] and *Restatement (Third) of the Law Governing Lawyers* section 107(2), Berger concludes that the false-implication and evidence-reflecting closing arguments are ethically permissible.[236] This is because both forms of closing argument "only ask the jury to draw reasonable inferences based entirely on the existence of admissible evidence, without ever explicitly telling the jury something the defense attorney knows to be untrue."[237]

In contrast, Berger concludes that the false-story cross examination and closing argument are unethical. The false-story cross examination technique is unethical "because the defense attorney's questions are not premised on a good faith basis. Instead, defense counsel knows that he is

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> sort or organize the issues, which induces the parties in their state of "disarray, turmoil, and disorder," to deal with the issues hastily, to make reasonable concessions, and to consent quickly to tradeoffs.

Id.

230 *Id.* at 75–76 (explaining the technique of reorienting focus from the legal to emotional conflicts).

231 *Id.* at 77–78 (explaining the use of the paradox).

232 *Id.* at 78–80 (explaining the mediator's control of issue selection).

233 Cooley also does an excellent job exploring the ethics of these strategies in light of the obligations imposed on lawyers regarding truthfulness. He makes many interesting observations about how the ethics rules apply to lawyer–negotiators, mediator advocates, and mediators, emphasizing the somewhat uncharted territory involving acceptable behavior in each of these roles. This article, in turn, raises but does not fully respond to questions regarding the ethics of redirection techniques and, specifically, the ethical use of such techniques in different representational settings. Those questions are set forth *infra* in section E.

234 Berger, *supra* note 161, at 311.

235 *Id.* at 311. "While Model Rule 3.4(e) does not use the actual words 'good faith basis,' or specifically reference cross-examination, commentators and courts have generally viewed Model Rule 3.4(e) as requiring a good faith basis for the questions asked on cross-examination." *Id.*

236 *Id.* at 315.

237 *Id.* "Even though these types of closing arguments attempt to create a false impression by asking the jury to draw a series of knowingly false inferences concerning the witness's version of events," they remain within ethical limits because they "present the jury with an alternative version of events, without technically asserting the truth of those alternatives." *Id.*

planting a version of events in the jury's mind by forcing the witness to deny the answer suggested by each question."[238] Similarly, the false-story closing argument is unethical because, "in addition to explicitly stating the client's innocence, the false-story closing argument . . . involves a host of other explicit statements the trial attorney knows to be untrue."[239] This type of closing argument, which relies on knowingly false statements, violates the ethical prohibitions against making false statements[240] and "engaging in conduct that involves 'dishonesty, fraud, deceit or misrepresentation,'"[241] and the prohibition against "conduct that is prejudicial to the administration of justice."[242]

Cooley also explores the ethics of misdirection or redirection techniques in mediation. He observes that evaluating the ethical use depends upon the player, noting that there are no ethical rules applicable to mediators themselves[243] and that "[i]n relation to lawyers representing clients in negotiation, there is a wide chasm dividing expert opinion on the applicable standard of truthfulness."[244] On one extreme is absolute truth,[245] and on the other is the view that "misleading the other side is the very essence of negotiation and is all part of the game."[246] Cooley notes that defining ethical conduct in negotiations is complicated for several reasons, including the "numerous excuses and justification lawyers typically marshal for lying in negotiation," and the varied conventional strategies employed in negotiations that "rely for the effectiveness on techniques of timed disclosure, partial disclosure, nondisclosure, and overstated and understated disclosures of information—all of which involve degrees of deception."[247] Cooley argues that because "the present ethical norms for lawyers do little more than proscribe fraud in nego-

238 *Id.* at 314.

239 *Id.* at 321–22.

240 *Id.* at 321–22 ("Model Rule 3.3(a)(1), Restatement section 120 and ABA Standard 4–7.7 all prohibit defense counsel from making false statements to the judge or jury.").

241 *Id.* at 322 (referring to Model Rule 8.4(c)).

242 *Id.* (referring to Model Rule 8.4(d)).

243 Cooley, *supra* note 139, at 94 ("[M]ediators—lawyers and non-lawyers—currently have no specific formal guidance regarding how truthful they must be in conducting mediations. It is unclear what kinds of mediator deception are ethically acceptable.").

244 *Id.* at 95.

245 *Id.* at 95–96 (exploring "two 'precepts to guide a lawyer's conduct in negotiations: (1) 'The lawyer must act honestly and in good faith, and (2) 'The lawyer may not accept a result that is unconscionably unfair to the other party.'").

246 *Id.* at 96 (internal quotation omitted).

247 John W. Cooley, *Defining the Ethical Limits of Acceptable Deception in Mediation*, 4 PEPP. DISP. RESOL. L.J. 263, 268 (2004) (citations omitted) ("'Puffing'—a type of deception—is generally thought to be within the permissible limits of a lawyer's ethical conduct in negotiation, yet even with puffing, at some mysterious, undefined point the line may be crossed and 'the lack of competing inferences makes the statement a lie.'").

tiation—or, at most, they proscribe only very serious, harmful misrepresentations of material fact made through a lawyer's false verbal or written statement, affirmation, or silence,"[248] efforts should be made to develop rules that are consistent with the underlying "game" of mediation.[249]

Scholars have considered the ethics of the Mutt and Jeff routine, particularly in police interrogations.[250] While deception in police interrogation clearly raises ethical concerns,[251] the use of the Mutt and Jeff routine that does not employ deception but merely capitalizes on the fear-then-relief phenomena (in instances in which such use does not elicit a false confession) is less clear. Addressing the debate about the potentially coercive nature of interrogations, one author distinguishes between confessions prompted by "offensive governmental conduct" and those which simply result from the use of persuasive techniques, concluding that "in some circumstances, [interrogators] should be allowed to express false sympathy for the suspect, blame the victim, play on the suspect's religious feelings, reveal incriminating evidence that in fact exists, confront the suspect with inconsistent statements, and more."[252]

Ethical concerns are also complex when viewed through the unique position occupied by criminal-defense counsel. In *Seeking the Truth Versus Telling the Truth at the Boundaries of the Law: Misdirection, Lying, and "Lying with an Explanation*,"[253] W. William Hodes references "Justice White's famous dictum in *United States v. Wade*, that defense counsel has been assigned 'a different mission' in our system, one that

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248 *Id.* at 269–70.

249 *Id.* at 274–77. Cooley identifies several criteria that must be considered in fashioning rules, including the observation that the rules must be "compatible with the game's nature and purpose," "comprehensible, reasonable, and fair," and "capable of compliance by all of the game's players in all situations." *Id.* at 274. Further, the rules "must not significantly interfere with the means by which the players can accomplish the game's purpose." *Id.* at 275. *But see* Buzz Tarlow, *In Defense of Lying: The Ethics of Deception in Mediation,* 11 NO. 2 J. AM. C. CONSTR. LAW. 1 (2017) (asserting that "[w]hile some would propose a more defined set of ethical rules, practitioners should consider whether such rules would comport with mediation's role in our legal system as an alternative to trial. The generally desired outcomes of mediation may be halted if more limitations were placed on lawyers' and mediators' behavior.").

250 *See* Magid, *supra* note 184, at 1169 ("Commentators have sought to show that deception causes many false confessions and, thus, the wrongful convictions of many innocent persons.").

251 *See, e.g.,* Margaret L. Paris, *Trust, Lies and Interrogation,* 3 VA. J. SOC. POL'Y & L. 3, 9 (1995) (advocating that interrogators should be prohibited from lying in interrogations).

252 Albert W. Alschuler, *Constraint and Confession,* 74 DENV. U. L. REV. 957, 973 (1997).

253 W. William Hodes, *Seeking the Truth versus Telling the Truth at the Boundaries of the Law: Misdirection, Lying, and "Lying with an Explanation*," 44 S. TEX. L. REV. 53 (2002). Hodes elaborates:

> One of the most brutal clashes between competing values is that between "truth" and "justice," with implications for the very nature of the legal system itself. Finding the truth and then resolving disputes on the basis of that truth ranks very highly in our value system. But so does achieving justice, even though justice as Peter defines it will often be purchased at Paul's expense, and even though some of the truth is frequently obscured or even sacrificed along the way. And, of course, the elusive and essentially fatuous concept of "the whole truth" is always lost in the fog of adversarial combat.

Id. at 57–58.

does not include an 'obligation to ascertain or present the truth.'"[254] Hodes notes that "while lawyers must tell the truth, they are not required to seek the truth or to aid in the search. Instead, they are often required by their roles to work to obscure inconvenient truths and to prevent the truth from coming out."[255]

III. Conclusion

We have navigated quite a bit of ground, exploring how distraction can be tolerated in narrative and how psychological studies explain the persuasive effect of distraction. With regard to narrative, distraction only *works* when the audience can nonetheless make sense of things. Coherence requires the story to hang together in terms of character and plot. Misdirection is accepted—even enjoyed—when the story remains plausible within its own framework. The psychological studies also suggest that trying to make sense of things during a distraction makes a target more susceptible to a prompt, and that therefore persuasion is facilitated during a disruption.

In light of these studies, advocates might consider how redirection tactics could be effectively employed, but should also be cautious about their appropriate and ethical use. For example, psychological studies demonstrate that redirection or distraction affects a subject's responsiveness to a request in real time. This suggests that redirection tactics may have more influence in real-time advocacy settings, such as a mediation or closing argument. Storytelling experts might assert that the efficacy of such use in written advocacy is less clear. Redirection strategies involved in argument construction in written advocacy, such as the use of informal fallacies or reframing of issues, should be carefully considered in this setting as the audience has more time to evaluate, process, and react to argumentation. In this context, therefore, misdirection techniques may be more apparent and less effective.

Moreover, while the ethical implications of the use of misdirection in advocacy are far-reaching and beyond the scope of this article, they are certainly worthy of further evaluation. Lawyers are prohibited from misrepresenting or misleading, and terms such as misdirection and

254 *Id.* at 69. White explains that defense counsel, having been assigned "a different mission" and under "no comparable obligation to ascertain or present the truth," may therefore "present nothing, even if he knows what the truth is." United States v. Wade, 388 U.S. 218, 256–57 (1967). White concludes, "In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth." *Id.* at 258.

255 Hodes *supra* note 253, at 60–61.

distraction certainly connote notions of misrepresentation, the management of terms notwithstanding. However, there are certainly some forms of argumentation that rely on redirecting the attention of the decisionmaker. The ethical line for many of these is somewhat blurry and advocates should therefore carefully consider strategies and context. This is particularly true in light of Hodes' conclusion that "[a]n ethical and professional lawyer must live close to the bounds of law—yet the bounds of law are not only elusive, but can shift without a great deal of warning."[256]

Oh, and what about outcomes and tenure? I suggested at the beginning of this journey that the introduction of tenure into the discussion of the standards-review process was, in all likelihood, an unintentional distraction. Does storytelling help explain why the ultimate adoption of outcomes standards made sense to the academy? Can the result be explained in the context of psychological studies, such that the cognitive and emotional distraction of tenure made the academy more receptive to the adoption of outcomes standards? Or were the outcomes standards simply passed because the academy's attention was so focused on tenure that it stopped resisting so emphatically to assessment? Perhaps a bit of each were at work.

256 *Id.* at 78.

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ARTICLES & ESSAYS

Telling Tales: The Transactional Lawyer as Storyteller

Susan M. Chesler & Karen J. Sneddon