

REVIEW ESSAYS

TRIAL ADVOCACY AS LEGAL REASONING— AND LEGAL REALISM

TRIAL ADVOCACY: INFERENCES, ARGUMENTS, AND TRIAL TECHNIQUES.
By Albert J. Moore, Paul Bergman & David A. Binder. St. Paul, MN:
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DARRYL K. BROWN*

For court purposes, what the court thinks about facts is all that matters. Judicially, the facts consist of the reaction of judge or jury to the testimony. [I]t is misleading to talk, as we lawyers do, of a trial court "finding" the facts. The trial court's facts are not "data," not something that is "given"; they are not waiting somewhere, ready made, for the court to discover, to "find." More accurately, they are processed by the trial court - are, so to speak, "made" by it, on the basis of its subjective reactions to the witnesses' stories

—Jerome Frank¹

Courts usually have as much interpretive leeway to construe facts as they do legal rules. It is well recognized that courts can characterize facts in radically different ways to make one rule application rather than another seem appropriate or unavoidable. Interpretation of either facts or law can change the case outcome, and both processes are laden with subjective judgments. Moreover, these two interpretive processes are interdependent. How we construe facts will affect the meaning we give to rules - especially broad standards - and the normative content inherent in applying the language of rules will influence the facts we look for and find.

Scholars and practitioners know more about the complexity and importance of factual interpretation than has traditionally been reflected in law school curricula. Fact development has tremendous utility in practice. It is what many lawyers spend much of their time doing, and it can make or break a case as quickly as a rule interpretation. It is also an analytically complex project that implicates many of the same problems of social contingency and purposive construction that rule interpretation does. In light of this, it is somewhat odd that law schools have traditionally given much more attention to legal analysis than factual analysis. This has gradually

* Associate Professor, Washington & Lee University School of Law. I wrote most of this essay while on the faculty at University of Dayton School of Law, whose support I gratefully acknowledge. I would like to thank my colleague Jim Phemister, who provided helpful comments on an earlier draft of this essay.

1. JEROME FRANK, COURTS ON TRIAL 15-16, 23-24 (1949).

changed in recent years, as schools have developed courses in pre-trial litigation and fact investigation, and have implemented legal process courses of broader scope.

To be sure, the traditional case method has always included some training in the purposive manipulation of fact descriptions to support a particular rule application, especially in relation to appellate cases. However, the purposive description of facts given in appellate cases is only a small part of the task of factual analysis and argument. Many texts used in trial and pre-trial litigation courses focus more on the techniques of gathering and presenting evidence than on conceptual strategies for building a morass of facts into persuasive arguments.

Albert Moore, Paul Bergman and David Binder's new teaching text, *Trial Advocacy: Inferences, Arguments and Trial Techniques*² is a substantial contribution not only to the pedagogical literature of trial advocacy, but also to the teaching of legal reasoning, broadly defined. As I argue below, the conceptual approach Moore, Bergman and Binder (MB&B) offer for trial advocacy could serve an important role in the law school curriculum. First, their text serves to clarify the similarities and interdependence of fact analysis and legal rule analysis. Second, their approach facilitates a critical, anti-formalist understanding of law in a way that could empower new advocates to serve their clients and causes more effectively. MB&B's close study of the advocacy and fact finding process will make legal realists out of most law students, and that realism will make them better lawyers.

I.

ARGUMENT TASKS IN FACTUAL ANALYSIS

Fact analysis presents problems at several levels. For example, problems of missing or unreliable evidence are well known. There may be no witnesses or records of an event. Even if there are witnesses, problems arise when people misperceive or misremember basic facts and events. Recordings, though sometimes more reliable than eyewitness testimony, are always open to interpretation. For some elements, such as a party's mental state, there is usually no direct, unambiguous evidence. In response to these problems, advocates must seek to uncover flaws in faulty evidence, bolster reliable evidence, and find substitutes for unavailable evidence. For non-existent direct evidence (especially in relation to state of mind requirements), advocates can seek circumstantial evidence on which to build arguments. These evidentiary problems and legal challenges have been given substantial attention by social science researchers and trial practice pedagogy for years.³

2. ALBERT J. MOORE, PAUL BERGMAN & DAVID A. BINDER, *TRIAL ADVOCACY: INFERENCES, ARGUMENTS AND TRIAL TECHNIQUES* (1996).

3. For a sample of this social science literature, see REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* (1983).

However, while the existing material does focus on the particular problems posed by circumstantial evidence, the fact that most evidence is circumstantial has been given too little emphasis. Moreover, even direct evidence⁴ requires the consideration of circumstantial evidence, such as that used to assess the credibility of its source.⁵

MB&B use the nature of circumstantial evidence as the conceptual basis for case planning and advocacy preparation. Circumstantial evidence proves a proposition only by virtue of the inferences one draws from it. MB&B remind us that one can draw inferences only by relying upon generalizations that usually are based in social custom, cultural context, or experience-based conclusions about human behavior. The generalizations that a factfinder must employ to draw a desired inference from circumstantial evidence are easily overlooked by advocates, who may assume that the inference they draw from evidence is the only plausible one.⁶ Advocates therefore may insufficiently develop inferential arguments in strategic planning for trial. This is the crux of MB&B's notion of "facts as arguments." Many crucial facts at trial are not uncontrovertable matters of objective proof but instead require interpretation, which advocates can influence.⁷ Because the meaning of circumstantial evidence lies in the inferences one draws from it, advocates must argue for one meaning over another by bolstering the generalizations that support a desired inference and undermining generalizations that lead to competing inferences.

MB&B argue that although we inevitably draw inferences and judgments from facts, these inferences are contestable, and always take place within a specific context. This context, in turn, is informed by the biases of the factfinder. To make a rough analogy to legislation scholarship, in which the theory of dynamic statutory interpretation has developed, we could think of MB&B's approach as one of developing dynamic factual interpretation. Dynamic statutory interpretation denies the descriptive accuracy of foundational approaches to statute application - textual plain meaning, drafters' intent, and statutory purpose - and proposes instead a collection

4. Evidence is direct when only the credibility of its source is at issue; if the source is believed, the evidence proves the factual proposition at issue. See MOORE, BERGMAN & BINDER, *supra* note 2, at 2-3.

5. See *id.* at 3-4, 44-57.

6. This problem demonstrates that advocates, like factfinders, are vulnerable to the "representativeness heuristic." See Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273 (1989); cf. Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law & Economics*, 50 STAN. L. REV. 1471 (1998) (arguing that human behavior is not solely determined by rational self-interest).

7. Further, some facts are in effect *created* for trial to serve the advocate's arguments—created in the sense that they would not exist for the factfinder had the advocate not thought to discover them and devise a means of presenting them at trial. Examples of such created facts include character evidence, certain scientific tests, or expert testimony concerning mental state. In each instance, facts on these topics wouldn't exist but for the choice to seek out evidence and "create" facts by having a test performed or locating a relevant witness.

of interpretive strategies and considerations that carry different weight depending on the context of the rule's application.⁸ Often the plain meaning of a text will control and effectively end the inquiry, but only when other considerations, such as the statute's apparent purpose, the justice of the outcome, and harmony with established public values, point the same way.

Analogously, MB&B emphasize that factfinders must always draw inferences from facts. These inferences are based on socially constructed generalizations, and these generalizations may vary with each factfinder. Indeed, most cases - especially those one prepares for trial, because clear and easy cases usually settle - contain evidence that requires contestable interpretations.⁹ Some generalizations will lend support to a certain inference while others will undermine it and suggest opposing inferences. The process of constructing the meaning of evidence in the context of a particular case is a dynamic, interpretive one. The nature of this process should guide the advocate's strategic planning for trial.

Any number of examples could illustrate this point. Bob is crying.¹⁰ From that one might infer he is sad, because we draw on the generalization that people often cry when sad. Bob's crying alone is weak evidence of his sadness. The context surrounding Bob's crying may support contradictory inferences. What if Bob is cutting onions? What if Bob just received news that his son's biopsy is negative for cancer? (Some people cry when happy.) Or, consider the infamous videotape of Rodney King's beating.¹¹ When we saw it, most of us thought, excessive force. Yet skilled advocates argued successfully for alternate inferences by developing contextual evidence that supported different underlying generalizations.¹² These alternative generalizations included reasonable response to a threat to officer safety and necessary force to subdue a recalcitrant suspect. Even when we have accurate historical data - evidence of crying, or of baton blows - we have nothing meaningful separate from the factfinder's contextual interpretation of that evidence. Thus, the advocate must offer an argument for every relevant piece of circumstantial evidence.¹³ MB&B's book offers invaluable methodologies for consciously constructing such arguments.

8. See WILLIAM N. ESKRIDGE JR., *DYNAMIC STATUTORY INTERPRETATION* 48-80 (1994).

9. Just as a statute's plain meaning settles many cases, some factual propositions will seem to settle some cases given the available evidence. Indeed, even within the range of experiences and perspectives factfinders bring, there may be no persuasive alternative inferences one can draw from a given item of evidence.

10. This example is adapted from MOORE, BERGMAN & BINDER, *supra* note 2, at 5.

11. A copy of the videotape, along with related materials, is available in ROBERT GARCIA, *RIOTS AND REBELLION* (1997) (CD-Rom teaching materials).

12. This is exactly what the officers' defense attorneys were able to do in the state trial. See *infra* notes 47-51 and accompanying text.

13. Some pieces of circumstantial evidence, of course, will be so clear and simple as to require no substantial development. Circumstantial evidence is hardly synonymous with weak or ambiguous evidence. On the other hand, other items will be hotly contested or may lead to less certain inferences. Part of advocacy education is helping students recognize

Consider another example from Trial Advocacy that focuses on a single evidence item. Carson sues Melinda in tort for damage caused by Melinda's car hitting his. Carson alleges that Melinda drove negligently by speeding well in excess of the 35 m.p.h. limit and by not paying attention.¹⁴ MB&B suggest that advocates should first convert abstract legal elements, such as negligence, into factual propositions specific to the case.¹⁵ That is, rather than striving to prove Melinda was negligent, an abstract description that tells us nothing about Melinda's actual conduct, Carson should translate the duty/breach element into something fact-specific, such as Melinda drove excessively fast and inattentively. Thinking in terms of factual propositions, rather than legal elements, clarifies the advocate's task.

Taking the example further, assume Carson discovers that, at the time of the accident, Melinda was late for a business meeting. In the context of this case, that fact is circumstantial evidence, a reason for her speed and inattention.¹⁶ Even if we accept her tardiness as true, this fact does not tell us directly whether she was speeding or inattentive; that is, it does not directly prove a factual proposition at issue. One can draw from such examples the distinction between evidence and facts; evidence may not speak directly or even persuasively to a contested factual proposition. Propositions like speeding and inattentive are inferences we can draw from such evidence as late for a meeting. We do so by implicitly relying on a generalization such as, people who are late for meetings sometimes speed or people who are late are often so concerned about their lateness that they are distracted from their driving. Such generalizations come, of course, from the factfinder's background knowledge of human behavior. How readily any given factfinder will reach for those particular generalizations, and how strong or persuasive they prove to be, will vary with the factfinder's experience and sentiments.¹⁷

Key tasks for the advocate, then, are to identify and strengthen the generalizations that lead to desired inferences, and to undermine generalizations that support damaging inferences. Those tasks guide discovery and trial preparation. In *Carson v. Melinda*, the plaintiff might seek evidence, for example, that the meeting was especially important to defendant's business, that defendant solicited the meeting and had difficulty arranging it; and that she couldn't use her car phone to let anyone know she would be late.¹⁸ MB&B label facts that support generalizations "especially whens."

that more circumstantial evidence fits into the second category than they often initially realize.

14. This example is from MOORE, BERGMAN & BINDER, *supra* note 2, at 23-32.

15. *See id.* at 10-15.

16. Of course, in another case, one that required proof of the proposition that "Melinda was late for a meeting," testimony to that effect would be direct evidence.

17. Put differently, some generalizations, or heuristics, will be more readily "representative," or available, to some people than they are to others. *See* Moore, *supra* note 6 (discussing the "representativeness heuristic" from cognitive psychology research).

18. *See* MOORE, BERGMAN & BINDER, *supra* note 2, at 26-27.

They are facts that make the generalization particularly likely to hold in this instance. Identifying the generalization that supports the inference leads to a careful search for such evidence, which can then be structured into witness examinations. Alternately, one must be aware of "except whens," which are facts suggesting this instance is an exception to which the generalization does not apply.¹⁹ In this case, such facts might be that the meeting was a routine one with the defendant's subordinates at the company on a non-urgent matter, or that she was able to forewarn others of her lateness by car phone.

This approach to trial preparation may seem unexceptional with such a simple example. For most people, some level of sensing the strength or ambiguity of much circumstantial evidence comes intuitively. Students may resist working through in such a conscious, deliberate way what they think they already can do fairly well by instinct. The utility of MB&B's approach, however, and the challenge to aspiring advocates, is to realize that most people can sort through all the varying possibilities of inferences from circumstantial evidence only partially and imperfectly, especially without an express method for doing so. This is particularly true once one has a substantial collection of circumstantial evidence with interlocking inferences, the generalizations from at least some of which are likely to vary considerably with social experience. Most trial lawyers have had the sobering experience of learning that jury or judge interpreted evidence in ways they didn't at all foresee, and yet perhaps could have influenced if they had. Identifying the experientially based generalizations, along with "especially-when's" and "except-whens" that guide such interpretations, is the advocate's best hope to forestall such miscalculations.

II.

FACT ANALYSIS IN CASE NARRATIVE AND RULE CONSTRUCTION

Beyond the level of individual items of evidence directed at individual factual propositions, the factfinder must put together the entire presentation of evidence²⁰ into a coherent and persuasive narrative. We have substantial social science research indicating that factfinders construct trial information into narratives, which put evidence into a recognizable story. That story is shaped by and accords with background assumptions about

19. As opposing counsel, one seeks out "except whens" in order to undermine unfavorable generalizations. *See id.* at 39-41.

20. Factfinders take account not only of information formally denoted as evidence, but also the wealth of social information available at trial. Most obviously, this social information includes indicators of the parties' and witnesses' social, economic, racial and gender identities, revealed by dress, speech patterns, demeanor and other markers. That information may have substantial effects on the inferences that factfinders draw from the presented evidence and on the narratives they construct for the facts revealed at trial.

human behavior, social life and cultural norms.²¹ The use of stories by factfinders, and their persuasive power, is well known to trial attorneys,²² social scientists²³ and legal scholars.²⁴ The difficulty lies in teaching and mastering approaches an advocate can use deliberately to make presentation of an entire case come together in a story that serves her client's interests. MB&B's factual argument pedagogy works on this level as well, though they give it somewhat less attention than analysis of smaller units of evidence.²⁵ (Factual argument strategies generally, though, get considerably more attention than in comparable texts.)²⁶ The organization of evidence into narratives presents the advocate again with the need to identify implicit generalizations and argue inferences from them in a way that will shape the factfinder's social construction of the story to support the legal outcome the advocate seeks.

MB&B explore the way fact-finding occurs at another, related level, where it intersects with rule interpretation and, ultimately, with legal con-

21. See W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* 6 (1981) (explaining that "interpretation of stories requires that teller and listener share a set of norms, assumptions, and experiences"). Consider the following explanation:

Each story will take an activity out of the historical record . . . and provide it with an interpretive context that makes the event meaningful for both the teller and the listener . . . In this fashion, any strip of experience may be reconstructed in numerous ways, to make numerous points, relevant for different audiences.

The interpretive powers of stories take on special significance in the courtroom. The overriding judgmental tasks in a [criminal] trial involve constructing an interpretation for the defendant's alleged activities and determining how that interpretation fits into the set of legal criteria that must be applied . . . [also taking into account] the norms of justice

Id. at 7-8.

22. See THOMAS A. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* 43-44, 376-84 (1992) (explaining the importance of storytelling in trial settings).

23. See BENNETT & FELDMAN, *supra* note 21; HASTIE, PENROD & PENNINGTON, *supra* note 3, at 22-23 (1983) (explaining the "story model" of juror deliberation).

24. See Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994) (arguing that storytelling has long been a part of the lawyer's job); see also Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992) (calling for renewed attention to the role of the lawyer in "translating" her client's story); Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989) (describing the author's experiences communicating clients' stories to factfinders).

25. See, e.g., MOORE, BERGMAN & BINDER, *supra* note 2, at 16-19 (discussing need for evidence lists). In an earlier work, Albert Moore has written on trial preparation strategies that take account of cognitive schema or scripts that factfinders use to sort, assess and make sense of evidence. See Moore, *supra* note 6. Binder and Bergman have also written previously on case planning techniques that emphasize the coherence of discrete evidence items into a coherent story structure and case theory. See DAVID BINDER & PAUL BERGMAN, *FACT INVESTIGATION: FROM HYPOTHESIS TO PROOF* 44-57 & 162-84 (1984) (describing use of "story outlines" and building "alternative factual theories").

26. See, e.g., MAUET, *supra* note 22, at 380-82, 400-04, 408-10, (limiting treatment of trial strategy).

clusions regarding liability. One aspect of story construction requires putting events in a framework that suggests allocation of responsibility. Views about responsibility are shaped significantly by legal rules that govern the case; the factfinder tries to make sense of the evidence in light of the legal decision to be made about civil liability or criminal guilt.²⁷ MB&B develop the most important aspect of this intersection of factual and legal analysis especially well. They label as "normative elements" the broad legal standards - such as reasonableness, materiality, excessive force, or just cause - to which courts must give content in light of the specific facts of a case.²⁸

MB&B's also move beyond these elements, allowing students to examine the ways in which the factfinder's narrative will take shape in light of social norms of responsibility and appropriate conduct that may not be identical to those in legal rules.²⁹ When these norms are not in harmony, the factfinder will have to resolve the conflict, which may yield an opportunity for advocates to urge broader or stricter rule applications, or alternate views of events.³⁰ This level of factual argument closely resembles the purposive construction of facts familiar from studying appellate cases.³¹

As an example, consider the facts of the torts chestnut, *Palsgraf v. Long Island R. Co.*³² The defendant's employee, a train guard, helps a passenger to board a moving train. In the process, the passenger's package is dislodged from his arm and drops to the platform. Containing fireworks, it explodes, startling the crowd on the platform and - somehow - tipping over scales some distance down the platform, which fall onto Ms. Palsgraf, injuring her.³³ The problem for plaintiff is often discussed as one of proximate cause.³⁴ Even if the employee breached a duty of care in helping the passenger onto a moving train, and even if he in fact caused the package to fall

27. See BENNETT & FELDMAN, *supra* note 21, at 10.

28. See MOORE, BERGMAN & BINDER, *supra* note 2, at 58-59 ("An element's normative standard is one that requires a factfinder to act as the 'conscience of the community' and evaluate the appropriateness of a party's conduct in the light of surrounding circumstances.").

29. This is especially true for juries, which often do not receive instructions giving them governing rules until the close of evidence, at which point most jurors have formed at least a preliminary story-framework for the evidence.

30. There has been interesting research in recent years on the degree to which popular sentiments on imposing liability match legal standards. See PAUL ROBINSON & JOHN DARLEY, *JUSTICE, LIABILITY AND BLAME* (1995) (comparing lay views of justice with those embodied in legal rules); NORMAN FINKEL, *COMMONSENSE JUSTICE* (1995) (examining the relationship of "commonsense justice" to enshrined legal rules).

31. See, e.g., KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 39 (1930, 1973) ("[A]lthough the outcome in the case may be (and commonly is) a function of the rule laid down, the rule laid down may be (and commonly is) a function of the outcomes of the case - partly sought for, shaped and phrased for the purpose of justifying the result desired.").

32. 162 N.E. 99 (N.Y. 1928).

33. *Id.* at 99.

34. See, e.g., RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 512 (1995); MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES* 366 (6th ed. 1996) (both reprinting *Palsgraf* in chapters on proximate cause).

and thereby explode, the toppling of the scales seems too remote an effect of that conduct to be the basis of liability. Alternatively, one can formulate the case as a foreseeability problem in defining the defendant's duty. The duty of care runs only to reasonably foreseeable risks, and it's hard to argue that in helping a passenger onto a moving train one should foresee the risk either of the scales tipping over several yards away or, for that matter, any other risks to waiting passengers well down the platform.

Thus structured, the facts present the plaintiff with an uphill battle. But a creative advocate might increase Ms. Palsgraf's chances of recovery substantially by arguing the facts - not the parameters of duty or causation doctrines - differently.³⁵ She might allege that the railroad was negligent not only in the employee's conduct with regard to helping the passenger aboard, but primarily by placing on its platform heavy scales that were unstable or inadequately secured. The plaintiff seeks to invoke some generalization such as, top-heavy scales that are not bolted to the floor sometimes topple, especially in areas frequented by jostling crowds, rumbling trains and occasional explosions. If the facts are viewed primarily as a problem of carelessness with the scales, which could have been toppled by any number of things - a fireworks explosion being only one - rather than a problem of the guard's carelessness in aiding the passenger aboard, the event becomes much easier for a plaintiff to formulate as factual propositions meeting traditional negligence and causation elements. Causation seems less remote, and the harm seems more foreseeable in relation to the duty. The legal question of duty, in fact, changes from whether the railroad had a duty to Ms. Palsgraf with regard to its employee's conduct to whether it had a duty to secure the scales.³⁶ This example demonstrates the contingency of legal analysis on factual argument, and shows why advocates must strategically evaluate multiple possibilities for factual construction.

As mentioned above, this intersection of fact-finding with rule interpretation is somewhat familiar from traditional case analysis.³⁷ First year law students learn to consciously build facts into narratives of responsibility that more readily fit dominant constructions of doctrine. What close study of factual argument adds, however, is an understanding of what makes a

35. I rely substantially here on Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, in PERSPECTIVES ON TORT LAW 45, 68 (Robert L. Rabin ed., 4th ed. 1995) (discussing *Palsgraf*).

36. It is hard to say that Judge Cardozo would have voted the other way if presented with this argument. A key premise of Moore, Binder & Bergman's text is the realist observation that the persuasive force of factual arguments is partly a function of the factfinder's perspective, so even this redescription may not have fit within Cardozo's views of the limits of duty. See, e.g. MOORE, BINDER & BERGMAN, *supra* note 2, at 15-16. For a discussion of the contingency of what counts as "proof" on social context and the factfinder's vantage point, see Kimberlé Crenshaw & Gary Peller, *Reel Time/Real Justice*, 70 DENV. U. L. REV. 283, 291-93 (1993).

37. See LLEWELLYN, *supra* note 31, at 39 (discussing the inextricable connection between facts and legal rules); EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 2-8 (1948) (exploring the relationship between general rules and specific facts).

narrative persuasive to a factfinder as a believable story, as distinct from making it simply a story that (if believed) facilitates a given rule application. MB&B provide a methodology for advocates to develop and implement that awareness of the building blocks of persuasive argument.

The intersection of rule and fact analysis occurs not only at the level of an overall narrative of the case, but also at the more specific level we first outlined: the small bundles of evidence that speak to single elements. In an important sense, one cannot find facts without first drawing from an interpretation of the legal rule what facts the rule requires for liability. Consider fact-finding about a criminal defendant's mental state. Given the range of mental conditions that exist well short of insanity, a defendant may know he is pulling a metal lever with his finger that is attached to a larger metal apparatus, and yet not know he is shooting a gun, much less killing someone.³⁸ The factual determination of the defendant's mental state depends on a conclusion about her knowledge of legal and linguistic categories that define and describe her conduct. The advocate, then, builds an argument about the fact of the party's mental state that takes account of the legal rule's definition of relevant conduct and the nature (or level) of the accompanying mental state. The rule's definition, in turn, depends upon the factual or linguistic content we give to the term.

This point is equally evident with rules of causation in tort law.³⁹ Causation is explicitly a policy construct that serves to assign or relieve one of liability in a world - as every law student learns in the first semester - in which no injury has a single, unambiguous cause.⁴⁰ Did the defendant's

38. The example is borrowed from Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 662-63 (1984), which offers an insightful discussion of the interdependence of fact determinations and rule interpretations. I discuss this intersection of fact-finding and rule application in the context of jury decision making in Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199 (1998).

39. See J.M. Balkin, *The Rhetoric of Responsibility*, 76 VA. L. REV. 197, 210 (1990): Terms like "responsibility" or "injury" require a context in which to be understood and used. To the extent that we can vary this context, or rather our description of this context, we can vary the meaning of these terms. Indeed, I would go further and argue that without a grounding in a particular set of social assumptions, legal concepts like "responsibility," "harm," and "injury" threaten to become empty. By varying our assumptions we can produce radically different conclusions about who is harming whom, what is the relevant injury, and who is ultimately responsible for the injury.

Cf. LEVI, *supra* note 37, at 62-89 (discussing how facts can be characterized differently to involve or not to involve commerce among the states, thereby affecting application of the commerce clause).

40. See, e.g., Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972) (offering influential observations on the victim's contribution to causes of accidents); H.L.A. HART & A.M. HONORÉ, *CAUSATION IN THE LAW* 64-78(1959)(arguing that injuries are consequences of many effects); FOWLER V. HARPER & FLEMING JAMES, JR., 2 THE LAW OF TORTS § 20.2(1956)(arguing that no injury results from a single cause).

DES cause the plaintiff's cancer?⁴¹ The legal concept of causation has meaning only by carrying implicit factual scenarios that will count as cause - say, that DES is shown to increase substantially the risk of some cancers, and the plaintiff has that sort of cancer (though plaintiff cannot prove she would have cancer but for the drug).⁴² Advocates must clarify the sort of implicit factual narratives that give legal rules content in order to build arguments in light of them - or to identify new factual arguments that redefine or extend the meaning of rules.

Constructing factual arguments for circumstantial evidence, even in more pedestrian cases, can be especially difficult when they implicate generalizations connected to race, class or gender differences. Consider a client who is a passenger in another person's car at night. A gun is found under the front passenger seat where the client is sitting, and the client is charged with carrying a concealed weapon. The client insists he was merely accepting a ride from the driver, whom he knew only by a nickname and only in passing; he had never before been in the car. Reactions to the plausibility of that story will vary widely depending on the factfinder's social experience. To many people - such as middle-class suburbanites who have always had cars, rarely ride with people they don't know well, and know few people who ever have - the story will sound suspicious. They will instinctively employ generalizations such as, people rarely accept rides from people they barely know, especially at night. To undermine that generalization and demonstrate the plausibility of the story, the advocate must

41. See *Sindell v. Abbott Lab.*, 607 P.2d 924(1980)(allowing for imposition of liability despite direct link between drug marketed by defendant-manufacturers and that taken by plaintiff-consumers). *Sindell* is often reprinted in torts casebooks. See, e.g., Vincent R. Johnson & Alan Gunn, *STUDIES IN AMERICAN TORT LAW* 350 (1994).

42. Similarly, did the defendant's failure to keep life preservers on its ship *cause* the drowning death of the passenger who fell overboard? Compare *Kirincich v. Standard Dredging Co.*, 112 F.2d 163 (3d Cir. 1940) (reversing a directed verdict for a defendant who kept no life preserver on its dredge) with *New York Cent. R.R. Co. v. Grimstad*, 264 F. 334 (2d Cir. 1920) (directing a verdict for defendant who kept no life preserver on its barge). Balkin offers an insightful discussion of characterizing facts to reach causation decisions in these cases. He describes the *Grimstad* court's adoption of a version of the facts that characterize defendant's responsibility narrowly, discounting any connection between the absence of a life preserver and the plaintiff's drowning. See Balkin, *supra* note 39, at 212-16.

Translating the *Grimstad* court's opinion into Moore, Binder & Bergman's approach to factual argument, we can say that the court has accepted a generalization such as, *ship employees who fall overboard often drown even when the ship has life preservers, especially when they did know how to swim, or the preserver may not have been thrown accurately or in time, or grasping the preserver doesn't guarantee prevention of drowning*. In contrast, the *Kirincich* court arguably worked from another generalization bolstered by other "especially whens." Perhaps the court relied on something like, *people at risk of drowning often are saved when tossed life preservers, especially when they can swim, even a little, and the instinct of self-preservation is strong enough to overcome lack of skill, and a drowning man typically comes to the surface and clutches what he finds*.

educate the factfinder about the client's social context.⁴³ The advocate might inform the factfinder that in the client's low income African American community, it is not unusual to know some acquaintances only by nickname. Moreover, the advocate could point out that since fewer people own cars and public transportation is often inadequate, a broad custom of offering to and accepting rides from casual acquaintances has developed in the client's community.

Such conflicts of personal experience and community custom reveal the challenge of identifying the range of background generalizations that give facts their meaning. The lawyer must know the client and her community sufficiently well to recognize and understand the social practices and context that underlie her story, which may be difficult when the context is different from the lawyer's own experience.⁴⁴ Then, the advocate must innovate factual presentations that educate factfinders on those social practices - testimony, for example, that the client has no car, has often accepted such rides - and thereby convince them of favorable generalizations from which to draw inferences.⁴⁵ Such generalizations (and the "especially whens" or "except whens" that bolster or undermine them) may be "grounded in a factfinder's everyday experience,"⁴⁶ but they may also be sufficiently beyond it, meaning that the advocate must educate with factual argument.

Even seemingly compelling evidence - evidence for which the generalizations seem obvious and irrefutable - can be radically recontextualized to take advantage of factfinders' social perspectives.⁴⁷ Consider the defense strategy in the criminal case against the police officers who beat motorist Rodney King. The videotape of that beating was widely publicized and was broadly taken as compelling evidence that the officers used excessive force

43. See generally PAUL HARRIS, *BLACK RAGE CONFRONTS THE LAW* 45-56, 190-92 (1997) (relating methods employed by attorneys to communicate the effects of racism to juries).

44. LLEWELLYN, *supra* note 31, at 23 (describing a good lawyer as one who "knows not only the rules of law, knows not only what these rules mean in terms of predicting what the courts will do, but knows, in addition, the life of the community, the needs and practices of his client—knows, in a word, the *working situation* which he is called upon to shape").

45. While the extended case files in Moore, Binder & Bergman's book don't raise such cross-cultural issues in depth, the authors' awareness of those issues is made clear by more limited examples and discussions. See MOORE, BERGMAN & BINDER, *supra* note 2, at 15-16, 21, 33, 80-89, 232-33; see also HARRIS, *supra* note 43, at 198 (emphasizing the need in "black rage" defenses, to base strategy on "concrete racism suffered by the particular defendant" so that "social reality is thrust into the courtroom").

46. MOORE, BERGMAN & BINDER, *supra* note 2, at 27.

47. One may need to contextualize evidence in a wide variety of settings beyond those dealing with cross-cultural difficulties. For a discussion of the use of expert testimony on syndromes to provide context to explain defendants' behavior, see Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461 (1996). For a more general discussion of social framework evidence, see Neil J. Vidmar & Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, 52 L. & CONTEMP. PROBS. 133 (1989).

against King. Even for white observers with no direct experience with police violence or the civil rights movement, no context seemed possible in which the videotaped assault was justified or excusable. Yet the defense had to create such a context.

To do this, defense attorneys disaggregated the videotape into a long series of individual photos that could be examined in isolation.⁴⁸ Based on this disaggregation, each photo could be interpreted within a narrative centering on whether King was at the moment compliant or resistant and whether officers used approved strategies of restraint at each separate moment.⁴⁹ The defense disconnected the video from an interpretation of multiple white officers repeatedly assaulting an unarmed black man lying or kneeling on the ground, which had implicitly evoked comparisons to images of oppressive white responses to civil rights struggles. The defense team instead contextualized each frame of the scene alongside factual argument about a dangerous, resistant suspect whose body at times was "cocked," creating a context of concern for officer safety. This concern was encompassed in language about official police guidelines for use of violent force. In addition, the defense broadened the factual context to include non-video evidence of King's earlier resistance.⁵⁰

Disaggregating the videotape into a series of isolated photos that could then be dissected in light of the defense argument effectively drew on the social perspectives of the jurors who, though perhaps not initially inclined to view the scene in that manner, were more amenable to that factual argument than other factfinders (with different social backgrounds) likely would have been.⁵¹

One can find an equally creative factual argument in a case stemming from the riots following the first acquittal of the police officers who beat Rodney King. The case of Damian Williams and Henry Watson, charged with beating motorist Reginald Denny, posed a comparable challenge for defense attorneys. Attorneys for Williams and Watson built a strategy to

48. This "disaggregation" analysis of the King beating trial relies on an excellent, more extensive development in Crenshaw & Peller, *supra* note 36, at 285-86. See generally BENNETT & FELDMAN, *supra* note 21, at 7-8 (noting that "any strip of experience may be reconstructed in numerous ways, to make numerous points, relevant for different audiences").

49. See Crenshaw & Peller, *supra* note 36, at 285.

50. One can easily formulate this strategy with Moore, Binder & Bergman's methodology of generalizations, "especially whens," and "except whens": *Multiple baton strikes to a man lying on the ground sometimes constitutes excessive force*, the state would argue, *especially when the man is unarmed and surrounded by several armed police officers*. The defense may respond, *except when the man has resisted violently for several minutes, and retains the ability to get up and resist again, and appears to be unusually strong perhaps due to drugs, and the force used is sanctioned by police policy manuals*.

51. Note that this analysis suggests that the jury was not simply irrational, but may have been lawless, entering a nullification verdict for officers it knew to be guilty. Once we recognize that facts have meaning only in relation to context and that their contextualization is contestable, it becomes much more difficult to sort out irrational or lawless decisions from decisions based on good faith acceptance of factual (or legal) argument.

raise doubts about the defendants' state of mind during the beating, which was, like the beating of King, captured on video. The defense attorneys emphasized the mob context in which the defendants' actions occurred, throwing doubt on their clients' premeditation and specific intent. An expert witness for the defense described the phenomenon of mob psychology and mass hysteria, which helped support the argument that the defendants "were so consumed with emotions that they could not have rationally been entertaining the type of reflective thought which gives rise to specific intent to kill or to disfigure."⁵²

The defense argument successfully urged jurors to view the defendants' acts - and the motivations behind the riot in which they occurred - in a broader context of "[j]ustice [as it] exists in the real world," rather than in "isolation."⁵³ In a manner comparable to the defense strategy in the King trial, the defense set the issue of proof of discrete legal elements (premeditation and specific intent) and of discrete facts (defendants' actions in assaulting Denny) within a broader context of facts that altered the normative interpretation of events and the meaning of legal elements.⁵⁴

From such examples we can see that the advocate's task is to build each item of evidence into a factual argument that narrates the entire story of the case. She must do so in a manner that either evokes or dispels norms of responsibility from interpretations of the applicable law (and, to varying degrees, from social norms that may conflict with law.)⁵⁵

52. HARRIS, *supra* note 43, at 187 (quoting Williams' attorney Edi M.O. Faal's closing argument).

53. *Id.* at 188.

54. See generally *id.* at 184-89 (offering a broader analysis of the defense strategy as an example of "black rage" defenses). Harris' book documents several "black rage" defense strategies in criminal trials that successfully recontextualize cases that involve seemingly clear, simple facts. More specifically, these strategies place issues such as a defendant's intent or sanity within a frequently overlooked context of institutionalized racism endured by the client. That evidence and argument helps explain the defendant's conduct, revises views regarding state of mind and culpability, and sometimes serves the client-defendant's goals of neither "blaming racism" for her actions nor asserting that she was insane. See *id.* at 36-56 (describing use of "black rage" defense in a bank robbery prosecution in which the client had these goals, noting the strategy was to "argue that racism is a major factor in the equation that causes a person to strike out," and explaining that this approach "has the potential to open people's eyes to the powerful impact of environment," while "blam[ing] racism . . . points a finger at others for one's failings and results in closing people's eyes to social reality"); see also *id.* at 81-111 (recounting acquittal of James Johnson on murder charges via a "black rage" defense).

55. The need to weave a coherent story that either evokes or dispels norms of responsibility is especially pressing in cases involving normative elements. Recall again the discussion of the facts in *Palsgraf*. One can easily imagine a trial preparation session, employing the Moore, Binder & Bergman approach, that debates relevant generalizations such as, *guards trying help passengers onto departing trains sometimes carelessly jerk them by the arm, especially when passengers frequently tip guards who get them on departing trains*. More specific fact-based information would also form part of the factual argument. In *Palsgraf*, for example, such elements would include information that the guard had recently been reprimanded for not getting all passengers on his car before departure. Yet the trees still will not make up a forest. Persuasive argument on individual items of evidence or small

Examples of factual argument in cases like the King and Denny assault trials demonstrate the incisive conceptual bite that the teaching of case planning and trial advocacy can contain. Even the form of evidence that seems most objective - videotape - has meaning only within a specific social context. Cases as unambiguous as a bank robbery with no issue of mistaken identity can leave liability decisions contingent upon factual arguments emphasizing social context. The advocate must be a perceptive student of culture and society to unpack and manipulate the social contexts that make seemingly incontrovertible evidence become contingent and vulnerable to contradictory interpretations.

In the process of discovering the contestability of even the most compelling evidence, students absorb a critique of formalism. Factual meaning, like legal meaning, is not self-determined. MB&B's approach also demonstrates to aspiring advocates the challenge of factual (as well as legal) analysis. The advocate unable to see possibilities of recontextualizing the "objective" King videotape into a narrative of reasonable use of self-protective force by police almost surely loses that case. The attorney who knows so little about her impoverished client's community that she disbelieves the defendant's story of accepting a nighttime car ride from a vague acquaintance won't know to pursue evidence recontextualizing that story into entirely plausible conduct.

At the level of constructing broader narratives, there are recurrent patterns of factual arguments advocates can learn to look for and develop. Professors Jack Balkin⁵⁶ and Mark Kelman⁵⁷ have identified such structures in both civil and criminal contexts. One can observe, for example, that narratives of factual causation tend to favor defendants if they narrowly describe the probability of harm, whereas plaintiffs favor broad characterizations of probability.⁵⁸ The well known ability of attorneys and courts to manipulate foreseeability analysis in proximate cause findings similarly can be described via relatively recurrent descriptive strategies. Emphasizing great detail and specificity tends to make a chain of events seem less likely. In contrast, plaintiffs strive to describe events in more

groups of evidence must fit together into a whole narrative that persuasively argues for the client's case—say, liability for the Long Island Railroad. Thus, advocates need also to structure the broad view of the facts as a whole into a persuasive argument. For *Palsgraf*, advocates also need to consider alternative arguments at the level of the entire narrative—as noted above, this would include the defendant's attempt to define the case as one about defective scales rather than one about the employee's conduct.

56. See Balkin, *supra* note 39, at 198 (arguing that each litigant "recharacterizes the facts to support its position" and to "creat[e] a coherent portrait out of the raw materials of experience," and noting that the "styles of characterization and recharacterization recur in legal discourse in relatively standard and predictable forms that can be catalogued and analyzed").

57. See Mark Kelman, *Interpretive Construction in Substantive Criminal Law*, 33 STAN. L. REV. 591, 593-94, 600-11 (1981)(examining the role of "interpretive constructs" in criminal cases).

58. See Balkin, *supra* note 39, at 212-20.

general or abstract terms, employing broader descriptions of harm and causal factors.⁵⁹ One may also narrowly construe relevant time frames, which tends to disjoin them from surrounding events.⁶⁰ (Recall the defense presentation of the videotape in the King beating trial.)⁶¹

These factual characterization techniques, often implicitly employed but not often emphasized in doctrinal courses, can be developed with MB&B's strategies of identifying generalizations and supporting "especially whens" (or oppositional "except whens"). In addition to the utility of this approach for planning factual arguments, it facilitates an anti-formalist critique. By demonstrating the dependence of rule application on prior factual construction, MB&B's pedagogy reveals that factual construction can depend more on the social goals of the advocate and the ideological context of fact finding than on any objective basis for constructing facts one ("correct" or "real") way over another ("wrong") way.

III. CONCLUSION

By dedicating fully one-third of the text to their factual characterization approach, MB&B's Trial Advocacy embodies a unique approach to the trial practice course. Trial advocacy teachers know that the mock-trial format of the course works well for teaching both traditional evidence and professional ethics, and instructors could easily spend the bulk of the course on those topics. Likewise, the well-developed array of trial techniques and strategies, instrumentalist tools drawn from social science research and developed in practitioner literature, could easily consume the

59. Returning again to *Palsgraf*, the defendant will emphasize every detail in a bizarre chain of events to make the harm seem exceedingly improbable: helping a passenger led to dropping a package, which improbably contained fireworks, which exploded on impact, which caused scales yards away to topple because they just happened to be shaky, and Ms. Palsgraf just happened to be nearby at that precise moment.

60. See Balkin, *supra* note 39, at 228-29; Kelman, *supra* note 57, at 593-94, 600-16, 637-42.

61. One must still consider whether a narrow time frame and disconnection from surrounding events serves a client's argument. Balkin suggests that narrow time frames tend to favor civil defendants. See Balkin, *supra* note 39, at 228-229. He cites *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959), in which a narrow construction relieves the defendant of liability because the general rule imposes no duty to rescue and, narrowly viewed, defendant merely stood by while plaintiff's decedent drowned. A broader time frame that connects that moment to surrounding ones, however, reveals that the defendant created the hazardous body of water in which plaintiff drowned, by "urging, enticing, taunting and inveigling" him to jump in. See *id.* at 344.

Alternately, narrow time frames may disfavor criminal defendants. A woman employing a battered-woman-syndrome defense to the murder of her husband does not want the focus solely on the moment she shot him while he posed no immediate threat. She will offer a broader time frame that includes his prior threats and acts and likely future ones, and her exhaustion of other options. See, e.g., Jody Armour, *Just Desserts: Narrative, Perspective, Choice, and Blame*, 57 U. PITT. L. REV. 525, 527-28 (1996) (asserting the necessity of broadening both the scope and time frame of narrative in women's self-defense work).

time allotted for a typical course. MB&B's book suggests a different emphasis, one that integrates the course conceptually into the law school curriculum and into legal education's agenda of teaching legal analysis.⁶²

The dynamic and contingent nature of fact-finding and its interdependence with rule construction highlights the value of an integrated curriculum in which faculty can link more deliberately the connections between traditional classroom courses and traditional skills courses. Moore, Bergman and Binder's *Trial Advocacy* demonstrates that, properly conceived, the trial practice course can be a key site for the study of the interdependence of factual and legal analysis. The approach is different from traditional courses, which take students from the facts up to the rules, so to speak, rather than from the rules down to the facts.

From this method, one finds that factual context (that is, the meaning of facts, and to a lesser extent to their existence for purposes of adjudication) is as contingent as the commands of legal rules studied through appellate opinions. The practice of advocacy, particularly factual argument, confirms pragmatism: there is no historical fact separate from arguments that persuade us. Or, more precisely, there are no facts that have any practical effect, especially in the legal system, unless we are persuaded by socially contingent argument to believe them.⁶³

62. Moore, Binder & Bergman's *TRIAL ADVOCACY* also provides a strong basis for critical examination of the adversary system, a discussion that can be pursued only to a limited degree in a typical trial practice course. Advocacy students often confront the enduring question: why can we limit witnesses' answers on cross-exam, in a manner that keeps witnesses from revealing the whole truth and thus allows us to create impressions of half-truth? See Steven Lubet, *What We Should Teach (But Don't) When We Teach Trial Advocacy*, 37 J. LEGAL EDUC. 123, 127 (1987) ("[A]dvocacy skills . . . equip the lawyer to lead and to mislead . . . and to persuade without regard to the underlying value of the position in question. These skills, if taught in a value-free vacuum, neither advance justice nor contribute to any other social goal."); see also Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966) (offering a version of this question as one of the "three hardest"). Moore, Binder & Bergman's factual argument method implies one answer: counsel can limit witnesses because witness examinations are designed to be opportunities for *argument*, not complete revelations of objective truth. At least as a general matter (holding aside any particular choices about presenting individual evidence that may be ethically problematic), advocates are justified in structuring witness examinations as arguments because the adversary system seems most reliable when counsel and parties present competing factual arguments. That rationale may also help explain decisions such as *United States v. Saenz*, 134 F.3d 697 (57th Cir. 1998) and *United States v. Tilghman*, 134 F.3d 414 (D.C. Cir. 1998), which restrict trial judges' questioning of witnesses and, implicitly, suggest different arguments from those that counsel offer.

63. We must remember that historical facts may still have other, social consequences even when they do not prevail in court, as in the "fact" (to many people) that O.J. Simpson murdered his ex-wife. That fact has had considerable effects on Simpson's professional and personal life despite its having failed to persuade in criminal court. Even so, that fact is also a case-in-point for the proposition that facts exist only because we are persuaded by arguments, typically made through inferences drawn from circumstantial evidence.

