Was Colonel Sanders a Terrorist?

An Essay on the Ethical Limits of Applied Legal Storytelling

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I. Introduction

This much we know: stories can change people's minds. Literally hundreds of studies have found that stories are effective narrative tools.[1] No study has found otherwise. Applied Legal Storytelling[2] is a growing field of discourse that explores the power of storytelling in a wide variety of law practice areas.[3] There has been relatively little written about the ethics of legal storytelling.[4] Yet, in talks with colleagues around the country I have been struck by a recurring sense of unease when the

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1 *See* Kendall Haven, *Story Proof: The Science Behind the Startling Power of Story* 4 (Libs. Unlimited 2007).

2 Ruth Anne Robbins first coined the term "applied legal storytelling" as a way to distinguish the exploration of how narrative theory is integral to the practice of law from the broader traditions of law and literature. To explore the basics of applied legal storytelling further, see Ruth Anne Robbins, *An Introduction to Applied Storytelling and to this Symposium*, 14 Leg. Writing 3 (2008) and Brian J. Foley, *Applied Legal Storytelling, Politics, and Factual Realism*, 14 Leg. Writing 17 (2008).

3 *See e.g.* Paula L. Abrams, *We the People and Other Constitutional Tales: Teaching Constitutional Meaning Through Narrative*, 41 The Law Teacher 247 (2007); Stacy Caplow, *Putting the "I" in Wr*t*ing: Drafting an A/Effective Personal Statement to Tell a Winning Refugee Story,* 14 Leg. Writing 249 (2008); Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 Leg. Writing 127 (2008); James Parry Eyster, *Lawyer As Artist: Using Significant Moments and Obtuse Objects to Enhance Advocacy,* 14 Leg. Writing 87 (2008); Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 Leg. Writing 3 (2009); Robert L. Hayman, Jr. & Nancy Levit, *The Tales of White Folk: Doctrine, Narrative, and the Reconstruction of Racial Reality*, 84 Cal. L. Rev. 377 (1996); Ruth Anne Robbins, *Harry Potter, Ruby Slippers, and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey,* 29 Seattle U. L. Rev. 767 (2006); Stephanie A. Vaughan, Persuasion Is an Art . . . But It Is Also an Invaluable Tool in Advocacy, 61 Baylor L. Rev. 635 (2009); Marianne Wesson, *"Remarkable Stratagems and Conspiracies": How Unscrupulous Lawyers and Credulous Judges Created an Exception to the Hearsay Rule*, 76 Fordham L. Rev. 1675 (2007).

4 *See* Steven J. Johansen, *This Is Not the Whole Truth: The Ethics of Telling Stories to Clients*, 38 Ariz. St. L.J. 961 (2006); Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 Geo. J. Leg. Ethics 1 (2000).

conversation turns to Applied Legal Storytelling. We all recognize, perhaps intuitively, that stories are powerful. But the unease comes from a concern that they may be *too* powerful or, perhaps, *inappropriately* powerful. Specifically, questions remain about the ability of storytellers to cross the line from effective and appropriate persuasion to inappropriate manipulation.

This essay explores three characteristics of story that give rise to the concerns that storytelling is unfairly manipulative. To examine these concerns, I consider three stories—two about the law, one about an Irish tour guide. I use these stories to illustrate the three characteristics of story that may raise ethical concerns. There are, undoubtedly, other potential ethical land mines on the road of Applied Legal Storytelling, but I will discuss only these three. My hope is that these stories will encourage others to join in the conversation and that in doing so, we will develop a richer understanding of the appropriate limits of storytelling's power in a legal context.

The first story illustrates that stories do not have to be true to be credible. Narrative coherence and fidelity, not truth, is what makes a story believable.[5] The second story shows how stories are always told from a particular point of view.[6] That necessarily means other points of view are slighted or not told at all. What we leave untold may often be as powerful as the story we tell. If we leave out too much, our story becomes misleading. Finally, the third story examines the ability of story to appeal to emotions as well as to logic.[7] This seems at odds with our traditional concepts of objective, impartial justice. Indeed, it is perhaps this aspect of story—that it allows our emotions to override our objectivity—that creates the most strident objections to its "manipulative" power. Despite these potential pitfalls, I ultimately conclude that Applied Legal Storytelling does not create new ethical dilemmas. Rather, closer inspection of these ethical concerns shows that storytelling is consistent with our existing norms about the ethical practice of law.

This is not to say that Applied Legal Storytelling advocates may sally forth with little regard to ethical limits. As explained in the concluding section, the stories below illustrate a need for caution. While story may not necessitate new ethical guidelines, neither does it exist outside our existing ethical norms.

5 *See* Walter R. Fisher, *Human Communication As Narration: Toward a Philosophy of Reason, Value, and Action* (U. of South Carolina Press 1987); Delia B. Conti, Student Author, *Narrative Theory and the Law: A Rhetorician's Invitation to the Legal Academy*, 39 Duq. L. Rev. 457, 458 (2001).

6 *See* Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 Rutgers L. Rev. 459, 465 (2001).

7 *See* Jonah Lehrer, *How We Decide* 245 (Houghton Mifflin Harcourt 2009).

As we embrace Applied Legal Storytelling, we will be well served to keep our stories cabined within those existing ethical norms. First, stories need not only be persuasive, they must also be honest. That is, the stories lawyers tell must reveal their clients' good faith beliefs. Furthermore, lawyers must recognize that storytelling requires adhering to those ethical duties that keep persuasion in check. Finally, we must remember that stories should not be told for the sole purpose of exploiting their emotional appeal. Rather, we should use stories to combine appeals to emotion *and* reason. It is the ability of story to engage the audience in whole-brain thinking that best justifies its use in the law.

To begin, we need to consider what we mean by "story." Kendall Haven suggests that story is distinguished from other forms of narrative by three characteristics.[8] First, it is character based.[9] Second, that character has a goal.[10] Third, the character must overcome obstacles to achieve that goal.[11] Of course, from this fundamental definition spring several commonly accepted features of story: plot, conflict, point of view, temporal progression,[12] and so forth. All of those features, however, are really consequences of Haven's elements of story structure: character, goal, and obstacles.

With that understanding of story, we turn to the first characteristic of stories that may raise ethical concerns—that stories need not be true to be persuasive. For that, we begin with a story told to me by a cab driver in Belfast.

II. Was Colonel Sanders a Terrorist?

A few years ago, my family and I visited Northern Ireland. Having survived the terror of the Carrick-A-Rede Bridge,[13] *we were interested in learning a bit about the "troubles" and so we took a Black Cab tour of the city. Among the most interesting sights on the tour were the murals painted on building walls in both the Catholic and Protestant neighborhoods. Our driver explained the significance of each of these murals, from the one of Bobby Sands to one with the peculiar combination of Queen Elizabeth and heavily armed Protestant vigilantes. But he saved the most surprising one for last.*

"I bet you're wondering about the mural at the end of the road." Indeed we were. For there, in the midst of the most troubled Protestant neigh-

8 Haven, *supra* n. 1, at 79.

9 *Id.*

10 *Id.*

11 *Id.*

12 That is, stories have a beginning, middle, and end.

13 The Carrick-A-Rede Bridge is a popular, dramatic, and when the wind blows, terrifying, tourist stop in County Antrim, Northern Ireland.

borhood along Shankill Road, was a mural with two soldiers holding automatic weapons and the somewhat intimidating greeting:

Welcome to the UFF Heartland
Shankill Road
Quis Separabit[14]

This, by itself was not extraordinary. What got our attention was the image of Colonel Sanders peering over the mural—for this mural was on the side of a KFC store! We became even more intrigued when our driver told us the story behind that particular mural:

> *Colonel Sanders was a soldier in World War I. For reasons long since lost, he ended up in Belfast in 1918. Now this was the time of the Irish Rebellion, and there was a lot of tension between the rebels and loyalists. Anyway, Colonel Sanders (of course, he was just Harlan Sanders back then) became sick with fever and went to a hospital for help. However, he was apparently strongly anti-Catholic and refused to be treated by a Catholic doctor and left the hospital in a state of near delirium. Not far from the hospital, he collapsed on the street. As it happened, he was discovered by a nurse—a Protestant nurse. This kind woman gathered her sons to help her carry this fallen soldier to their small home where, for three weeks, she slowly nursed him back to health.*
>
> *Forever grateful for the kind treatment he received, Colonel Sanders never forgot the kindness he was shown by this nurse. For the rest of his life, he became an ardent supporter of the Protestant cause. When the troubles started heating up again in the 70s, Sanders donated hundreds of thousands of dollars to the UDA. In fact, until he died, he promised to support the UDA. And so he did.*

I must admit this story caught me by surprise. Despite my interest in Irish history, I had never heard this side of Colonel Sanders before. I was quite surprised that the genteel chicken seller in the white suit had also been a zealous supporter of one of the most violent terrorist organizations in the Western world. As I was mulling over the consequences of that revelation, our driver admitted what few storytellers will:

14 "Who will separate us?" This is the motto of the Ulster Freedom Fighters, the militant branch of a Protestant paramilitary organization, the Ulster Defense Association, or UDA.

> *"Now that story is a lie. I told you that story to show you how easy it is for misinformation to spread. People will believe anything if you tell a good story. In Belfast, both sides have a lot of stories to tell."*[15]

My Belfast tour guide illustrated our first characteristic of stories that causes concern in the legal context. To be believable, stories must have narrative coherence and fidelity, that is, they should have the quality of narrative rationality that Chris Rideout has written about.[16] That is, they have to make sense—they have to unfold in a logical way; characters have to act in ways that correspond with our expectations.[17] Simply put, stories need to fit into the listener's understanding of the way the world, or at least the world of the story, acts. But what stories do not have to be is true. Fiction can be believable, and the truth can seem implausible, or downright impossible. Indeed, in the real world, people do not always act to achieve a particular goal. Events do not necessarily happen in a logical order, fit together, or necessarily advance our real life story. In real life, things happen that make no sense. For example, consider what happens when someone leaves her keys on her dresser when she heads for work. In a story, that act happens for a reason—the character may be unable to open her office door—leading to an unexpected change in the day's unfolding. In real life, it may make no difference at all. She may have to ask someone to let her into her office, and that will be that. The day just goes on.

I have told the Belfast story dozens of times. Almost every time I tell the story, the punch line catches the listener by surprise. Even though my listeners have known about Colonel Sanders their entire lives, they believe the story; they believe that he might have supported a terrorist organization even though that claim is completely false and contrary to everything they might have ever heard about Colonel Sanders.[18] Still, the story makes sense. The characters acted as we would expect them to act. The storyteller seemed credible.

15 I was hesitant to tell this story for fear that it too would perpetuate a myth about Belfast. Contrary to common perceptions, Belfast is a beautiful and vibrant city. Despite its troubled past, it is also a very safe place to visit. Indeed, all of Northern Ireland is most welcoming to visitors and well worth the trip.

16 J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 Leg. Writing 53, 55 (2008).

17 *See id.* at 67.

18 The only person who flat out did not believe this story was the late Debbie Parker—who had extensive experience with Irish tour guides. Before I even told her the punch line, Debbie smiled and said, "Oh, you can't trust anything an Irish tour guide says! They'll tell you anything to make a good story." This of course proves the point: the believability of a story turns not on its truth, but on its narrative coherence—whether the characters act as we expect. Debbie saw that part of the charm of Irish tour guides was their ability to tell fanciful stories; most other folks expect those stories to be true.

The point here is not that stories are necessarily false. Nor that stories are always fictitious. Rather, it is that the persuasiveness of a story does not turn on its truth. It turns on its narrative rationality—its logical coherence, its correspondence to audience expectations. This is problematic in a legal context because we want listeners, be they juries, judges, clients, or even opposing parties, to be influenced by the truth. In the legal context, truth matters. If stories can persuade whether they're true or not, that's not good. If lawyers tell stories that are coherent but false, they cross the line from persuasion to manipulation.

To be sure, there are contexts where the truth of a story really doesn't matter. Parables are generally works of fiction, but they are valuable and appropriate teaching tools. Of course, when we tell a parable, our listener knows that the story is not really true. But consider the following story that I tell my first-year Legal Writing students:

A $1500 suit walks into the Court of Appeals followed closely by a $400 suit. The $1500 suit gets up to begin his oral argument, while the $400 suit sits at counsel table, shuffling through stacks of papers. The $1500 suit opens his argument by explaining the holding of the case that is central to his argument. One of the judges interrupts him: "Excuse me counselor, but that case has been overruled." The $1500 suit, without skipping a beat, says, "One moment, your honor" and calmly turns to the $400 suit: "You're fired." He then turns back to the bench and continues with his argument.

I tell this story to make an important point: senior lawyers rely on junior lawyers to pay attention to details, including updating cases. My students learn (I hope!) that they always need to update their authorities and if they don't, there can be severe consequences for them.

I first heard this story from Mary Beth Beazley.[19] I suspect, but don't know, that it is apocryphal. But whether it's true or not really doesn't matter in this context. It makes its point. If it is not true, but my students believe it to be true, no real harm is done. I doubt that if my students learned it was not true, they would reject its lesson or think less of me.[20]

Of course, if we are telling stories to juries, or judges, or clients,[21] truth matters. In most legal contexts, the truth matters as much as the

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20 Nonetheless, just to be clear with my students, I tell them that I don't know if the story is true or not.

21 Johansen, *supra* n. 4, at 984–92.

narrative coherence. I suspect even the most cynical litigator would agree that presenting a well-spun, but utterly false, story to a jury crosses an ethical line. Even in the context of criminal defense, where we permit lawyers to encourage juries to draw false inferences, we don't allow out and out lies.[22] We don't knowingly allow criminal defendants to tell false stories in their defense, no matter how convincing those stories may be.[23] Thus, the nature of stories—that they need not be true to be persuasive—may create ethical concerns that other forms of narrative do not.[24]

Solving the narrative coherence problem, however, does not require significant ethical limitations on storytelling beyond the existing ethical norms of our profession. First, though a lawyer *may* be able to use stories to create persuasive but untruthful evidence, she is certainly not *required* to do so. Surely, stories that reflect the truth may also be narratively coherent.

Truth is, of course, a slippery thing. Very often in legal disputes, parties honestly disagree as to what the truth of the matter really is. In such cases, stories can help explain the conflicting points of view. They may also show the shared common ground, thereby narrowing the scope of the dispute. Thus, where the truth is honestly at issue, stories, honestly told, are useful tools for finding just resolution. This does raise a host of ethical questions: May a lawyer tell his client's story even if the lawyer doesn't believe it? Does a lawyer have an obligation to investigate his client's story before presenting it? When we present a story from a particular point of view, may we ignore facts that are contrary to that point of view? These and many other questions are raised whenever we try to give defined form to the mushy concepts of "truth" and "justice." How we answer these questions is beyond the scope of this essay. But I suggest that how we answer these questions does not change in the context of Applied Legal Storytelling.

The narrative coherence problem is perhaps best kept in check if lawyers remember that stories, like all persuasive tools, should be used to promote only the client's legitimate interests. Just because a narratively coherent lie may be effective doesn't make it appropriate. Some may argue that relying on the ethical compass of lawyers is an insufficient brake on the exploitation of narrative coherence. But such reliance is not the sole check. We have a number of ways to counter the overzealous lawyer who refuses to let truth get in the way of his good story.

22 Model R. Prof. Conduct 3.3(a) (ABA 2009).

23 *See id.*

24 For the distinction between story and other forms of narrative, see Haven, *supra* n. 1, at 79–80.

The very nature of the adversarial system protects against efforts to deceive. Of course, all parties are able to present their own stories. Opposing counsel may expose the weakness of a narratively coherent, but false, story through cross-examination or closing argument. Existing prohibitions against lying[25] provide considerable restraints on efforts to abuse the power of story. But, like virtually all of our ethical principles, the best check on abuse is every lawyer's interest in protecting her reputation as an advocate who can be trusted. The vitality of our ethical rules depends on the self-regulating nature of our profession. Keeping the narrative coherence problem in check is no different.[26]

We now turn to a related problem: stories are told from a point of view. This necessarily means we are not getting the "whole truth" in a story, but only one perspective on it. To illustrate this potential problem, we turn to the story of Michael Nifong and the Duke Lacrosse Case.

III. One Story, Two Viewpoints

Michael Nifong's Viewpoint[27]

Early on the morning of March 14, 2006, a young woman named Crystal Magnum reported to the Durham, North Carolina Police Department that she had been raped by three men during a party at a house near the Duke University campus. The police investigation revealed that the residents of the house where the rape allegedly occurred were captains of the Duke lacrosse team and that most of the attendees at the party were members of the team.

Michael Nifong was the newly appointed District Attorney of the Fourteenth Prosecutorial District in Durham County. When he learned of the case on March 24, he recognized that it could draw significant public attention. He decided to handle the case himself rather than having an Assistant District Attorney handle the case as would be the usual procedure.

25 *See e.g. id.*

26 That said, a coherent but false story may be more problematic than other kinds of deceptive evidence. For example, George Lakoff posits that even when presented with evidence that contradicts our stock stories, we tend to remember our stories and dismiss the conflicting evidence: "Suppose a fact is inconsistent with the frames and metaphors in your brain that define common sense. Then the frame or metaphor will stay, and the fact will be ignored. For facts to make sense they must fit existing frames and metaphors in the brain." George Lakoff, *Whose Freedom? The Battle over America's Most Important Idea* 13 (Farrar, Straus & Giroux 2006).

27 This story is based upon the Amended Findings of Fact, Conclusions of Law and Order of Discipline from the disciplinary case brought against Michael Nifong. Amend. Findings Fact, Conclusions Law & Or. Disc., *North Carolina State Bar v. Nifong,* 06 DHC 35 (2007) (available at http://www.ncbar.gov/Nifong%20Final%20Order.pdf).

Nifong recognized that this would be a difficult case. The victim's statements contained some inconsistencies. The defendants were college students who came from wealthy families with resources to hire excellent lawyers. More importantly, the victim was black and the defendants were white. Racial tensions were high in Durham, exacerbated by the socio-economic divide between the local African-American community and the privileged, mostly white, student body at Duke. Furthermore, the lacrosse team, consisting mostly of northern, white players on scholarship, seemed to epitomize the worst of the elite, privileged Duke community.

Aware of the potential explosiveness of the case, Nifong was quick to gain control of the story. Over the next few weeks, Nifong spoke frequently with both the local and national media. The story he told captured the nation's attention. The Duke Lacrosse Case, as it was soon called, was a shocking story: rich, privileged, out-of-control college students had gang-raped a young African-American single mother, seemingly for no other reason than that they had hired her as an exotic dancer for their party.

Nifong was a masterful storyteller. He developed the character of the antagonists, the defendants and their teammates:

> *"The lacrosse team, clearly, has not been fully cooperative in the investigation. . . . I think that their silence is a result of advice of counsel. . . . If it's not the way it's been reported, then why are they so unwilling to tell us what, in their own words, did take place that night?"*[28]

> *"And one would wonder why one needs an attorney if one was not charged and had not done anything wrong."*[29]

> *"It seems a shame that they are not willing to violate this seeming sacred sense of loyalty to team for loyalty to community."*[30]

Although respect for the victim's privacy limited Nifong's comments about her, he was clear to point out the nature of the attack:

> *"There is evidence of trauma in the victim's vaginal area that was noted when she was examined by a nurse at the hospital."*[31]

28 *Id.* at ¶ 22.

29 *Id.* at ¶ 24.

30 *Id*. at ¶ 35.

31 Amend. Compl. at ¶ 56, *North Carolina State Bar v. Nifong,* 06 DHC 35 (Jan. 24, 2007) (available at http://news.findlaw.com/nytimes/docs/duke/ncbnifong12407cmp33.html).

> *"Somebody had an arm around her like this, which she then had to struggle with in order to be able to breathe . . . . She was struggling just to be able to breathe."* [32]
>
> *"I am convinced there was a rape, yes sir."* [33]
>
> *"I am satisfied that she was sexually assaulted at this residence."* [34]

Having developed the characters of this narrative, Nifong was also deliberate in developing the conflict of the narrative—and it was something far more serious than a college party that got out of control:

> *"In this case, where you have the act of rape—essentially a gang rape—is bad enough in and of itself, but when it's made with racial epithets against the victim, I mean, it's just absolutely unconscionable. . . . The contempt that was shown for the victim, based on her race was totally abhorrent. It adds another layer of reprehensibleness, to a crime that is already reprehensible."* [35]
>
> *"What happened here was one of the worst things that's happened since I have become District Attorney. . . . When I looked at what happened, I was appalled. I think that most people in this community are appalled."* [36]

Nifong, intentionally or not, had done a masterful job of setting the narrative of this legal story. The story became a graphic metaphor for the racial tensions that still divide this country. And the story resonated within the university. The university suspended the rest of the team's season and fired its coach.[37] The national media reported that allegations of the sexual assault surprised few at Duke.[38] Candlelight vigils were held on campus. Tensions grew in Durham to the point that students were reluctant to leave campus out of fear of violent attacks.[39] Throughout all the extensive

32 Amend. Findings Fact, Conclusions Law & Or. Disc., *supra* n. 27, at ¶ 37.

33 Amend. Compl., *supra* n. 31, at ¶ 84.

34 *Id*. at ¶ 100.

35 Amend. Findings Fact, Conclusions Law & Or. Disc., *supra* n. 27, at ¶ 29.

36 *Id.* at ¶ 33.

37 Viv Bernstein & Joe Drape, *Rape Allegation Against Athletes Is Roiling Duke*, N.Y. Times A1 (Mar. 29, 2006).

38 Warren St. John & Joe Drape, *A Team's Troubles Shock Few At Duke*, N.Y. Times D1 (Apr. 1, 2006).

39 Juliet Macur, *With City On Edge, Duke Students Retreat*, N.Y. Times B4 (Apr. 2, 2006).

reporting, the story remained the same: this was a vicious attack by privileged, elitist, white, out-of-control college boys against a poor, African-American woman.

Of course, the media was careful to acknowledge that no one had been convicted of a crime. Indeed, for several weeks, no one was even charged with a crime. But that was just a detail—and a detail that did not derail the underlying narrative. The story rang so true, had such resonance, fit so well with our stock stories about class and race, that such details were easily set aside. Indeed, the *New York Times* rather subtly suggested that the only people to support the lacrosse players were those with similarly flawed character: "But at Shooters Saloon, a bar where young women dance in a cage above the dance floor, Kenny Morrison, a junior from Kentucky, said the lacrosse players were being treated unfairly."[40] That the only defender of the accused was a young man who frequented strip bars with women in cages only reinforced Nifong's narrative, suggesting that those who questioned the story were themselves of questionable character.

Because a story is told from a point of view, it necessarily excludes other points of view. Certainly, in the adversarial system we expect other parties to present those other points of views. Thus Nifong acted ethically when he chose to tell the story from the point of view of the alleged victim. He also placed the story in the broader context of Durham's racial tensions as viewed from the perspective of the African-American community. And he defined his role in the story as the hero—the crusading prosecutor unafraid to take on the rich and powerful in defense of an innocent victim. But in creating these points of view, he left out critical parts of the story—parts of the story that, as prosecutor, he had a duty to tell. When his story is told from a different perspective, his character quickly changes from hero to villain.

Another Point of View[41]

Michael Nifong was worried. He had recently been appointed District Attorney and faced a tough election in November. Then, in March of that year, a case came across his desk that, if handled correctly, could all but assure his reelection. A young African-American woman claimed to have been gang-raped by three Duke lacrosse players.

There were just a couple of problems.

40 St. John & Drape, *supra* n. 38.

41 This story, like the one before it, is based upon the Amended Findings of Facts, Conclusions of Law and Order of Discipline in the Nifong disciplinary case. *See supra* n. 27.

First, the police officers investigating the case explained that there were a number of weaknesses in the case. The victim, a stripper, had changed her story several times. The other stripper at the party disputed the victim's claim of an assault. The stripper had been unable to identify her attackers in two photo arrays. Furthermore, the three captains of the lacrosse team had cooperated with the police and had denied that the attack occurred. These facts would make the case a lot harder to win. As Nifong graphically explained to the investigating police, "[Y]ou know, we're fucked."[42]

Of course, thanks to modern technology, DNA evidence can overcome inconsistencies in a victim's stories. Forty-six of the forty-seven lacrosse team members submitted DNA samples.[43] *Unfortunately for Nifong, the DNA test revealed no semen, blood, or saliva on items in the rape kit that matched the accused lacrosse players. Undaunted, Nifong then obtained a court order to submit the rape kit and the players' DNA samples to additional testing by a private company, DNA Security. The results of those test showed that DNA from multiple males had been found on items in the rape kit and that all forty-six players were excluded as possible contributors of this DNA because none of their DNA were matches for the DNA found on items in the rape kit.*

One might have expected Nifong to back off from his prior statements about the Duke lacrosse team. One might have expected him to report that the DNA results showed that the players were no longer suspects. One might have expected him to at least disclose the results of the DNA tests to the players and the court.

Nifong did none of these things. Instead, he directed Brian Meehan, the doctor who did the DNA testing, to prepare a very carefully written report including only some of the results of the testing. Specifically, that incomplete tests on two fingernails found in the trash of one of the players were consistent with the DNA of two unindicted players and that DNA from the vaginal swab was consistent with the victim's boyfriend's DNA profile. The report did not disclose that the indicted players were scientifically excluded as matches for any of the DNA found. It also did not disclose the existence of DNA from multiple unidentified males on rape kit items. Nifong provided this incomplete report to the defendants and the court and told

42 Amend. Findings Fact, Conclusions Law & Or. Disc., *supra* n. 27, at ¶ 15.

43 The only player not to submit a DNA sample was the lone African-American on the team. He was not asked to submit a sample because the victim alleged that her attackers were white.

the court that "[t]he State is not aware of additional material or information which may be exculpatory."[44]

Over the course of the next several months, Nifong refused to provide either the defendants or the court with the complete DNA results. He continued to deny having any exculpatory evidence. Despite Nifong's attempt to hide the DNA evidence, the case began to unravel. In December 2006, the doctor who conducted the DNA testing testified at a Motion To Compel Discovery hearing that his report did not include all the results of his testing. Shortly thereafter, Nifong recused himself, and the North Carolina Attorney General took over the case. On April 11, 2007, more than a year after the alleged rape, the Attorney General declared that the indicted players were innocent of all charges, and the charges were dismissed.

While the charges against the lacrosse players were dismissed, Nifong did not fare so well. The North Carolina State Bar accused him of numerous violations of the North Carolina Revised Rules of Professional Conduct. On July 24, 2007, Nifong was disbarred.

The professional misconduct case against Michael Nifong was not difficult—at least once the Bar made its findings of facts. Nifong clearly violated several ethical rules. Perhaps most importantly, he lost sight of his duty as a prosecutor to see that justice is done.[45] This duty includes disclosing exculpatory evidence to the defense.[46] Nifong should have disclosed all of the DNA evidence to the defense, including the fact that Dr. Meehan had conclusively ruled that none of the DNA found in the rape kit could be linked to any of the accused players. Of course, none of those facts fit with the story he chose to tell. They were clearly inconsistent with his story's point of view.

On one level, the obvious and egregious nature of Nifong's misconduct makes his case uninteresting. His conduct so clearly fell below the ethical floor that it does little to help define where that floor might be. When one uses story as part of an overall strategy that includes lying to judges, withholding evidence, and inflaming the passion of the public, it seems safe to assume that one will be sanctioned. It was not that Nifong told his story from a point of view that caused his ethical downfall. It was that he was utterly dishonest in telling that story.

44 Amend. Compl., *supra* n. 31, at ¶ 230.

45 Model R. Prof. Conduct 3.8 (ABA 2009).

46 *Id.*

But what if Michael Nifong had not so clearly lost his moral compass? Let us assume, for the moment, that the DNA evidence was inconclusive—that it showed the lacrosse players had had sex with Crystal Magnum, but that they insisted that the sex was consensual. If the known facts were not so clear, would it have been appropriate for Nifong to tell the story as he did? Would it have been ethical to pursue this prosecution through the victim's story? In the broader context of the racial tensions in Durham? Or would such a strategy have been unfairly prejudicial?

Is it enough to say that the adversarial system protects against the distortion that comes from telling a story from only one point of view? At least to a point, this must surely be the case. Those parties with opposing points of view also have the opportunity to tell their story. So long as a lawyer keeps her story within the bounds of good faith—that is, so long as the story that she tells is consistent with her client's perception of the matter—then we should trust the adversarial system to see that the various points of view get told.

Nifong acted unethically not because he told a story from a particular point of view, but because the story he told was simply false. Of course, telling that story to the media instead of to a jury, withholding exculpatory evidence, and lying to the court all fell below the ethical floor—even if the story had been premised on a good faith belief that it reflected reality, as he later suggested that it had been.[47]

In fact, it is at least arguable that telling a client's story from the client's point of view is precisely the point of the adversarial system. This is especially so for those with outsider stories that differ from the point of view of the judge and jury. That a point of view is unsettling, or even inflammatory, is no reason to abandon it. For it is those most unsettling (and unfamiliar) points of view that the legal audience most needs to hear to assure that it understands the *whole* story.

That point, however, is based on a very important, and perhaps unwarranted, assumption that all parties are playing on a level playing field. Keeping the persuasive power of storytelling in proper check requires a level playing field. Story, like any persuasive tool, becomes far more powerful, with a greater likelihood of being abused, when only one party has access to that tool. For example, in the Duke lacrosse case, the defendants were able to hire excellent lawyers who were able to spend the resources necessary to challenge the accusations brought against the defendants. Had they, like many criminal defendants, been forced to rely on the limited resources of overworked public defenders, they may not have been able to overcome Nifong's zealous conduct. Certainly the

47 Amend. Findings Fact, Conclusions Law & Or. Disc., *supra* n. 27, at ¶ 50.

limitation of access to quality legal services raises many ethical concerns. And story, in the hands of lawyers with far greater resources than their opponents, can lead to unjust results. However, that is not a problem limited to storytelling. Equal access to legal services is an issue beyond the scope of this essay. Thus, to isolate the ethical limits of story, we will assume we live in a world where parties have access to equally skilled lawyers.

This is not to say that there is no lesson to be learned from the Nifong case. Nifong saw that he had a great story to tell. He had a sympathetic victim; he had abusive villains; he had a narrative that mirrored a broader social issue that was consistent with his audience's stock stories. What he didn't have were the facts to support his story. What he lost sight of was his duty to see justice done and the ethical obligations that go along with that duty.

Nifong, as a prosecutor, was more constrained by ethical obligations than a lawyer operating in the civil context. In the civil setting, it may be easier for a lawyer to rationalize distorting a client's story beyond the limits of good faith. That ethical lines are less brightly drawn, however, is no excuse for crossing them. In any context, a good story is not carte blanche to abandon our ethical standards.

We now turn to the final, and for many, the most troubling aspect of storytelling: stories appeal to our emotions. The law, however, is supposed to function in the objective, emotionally neutral domain of reason. To illustrate this dilemma, we turn to another legal story—that of the first Vioxx litigation.

IV. All Hat, No Cattle[48]

Merck Pharmaceuticals had marketed Vioxx as a pain reliever beginning in 1999. By 2004, Merck reported that 84 million people had used the prescription drug. However, also in that year, it became known that Vioxx doubled the risk of heart attacks. At that point, Merck voluntarily pulled Vioxx from the market. In the aftermath of the disclosures linking Vioxx to increased risk of heart attacks, Merck faced potentially tens of thousands of lawsuits.[49] *In the summer of 2005, the first Vioxx lawsuit went to trial.*

48 This is the story of the trial in *Ernst v. Merck*, 2008 WL 2201769 (2008), *rev'd*, 296 S.W. 3d 81 (Tex. App. 2009). Unless otherwise noted, it is based on Roger Parloff, *Stark Choices at the First Vioxx Trial*, Fortune (July 15, 2005) (available at http://www.sociablemedia.com/PDF/fortune_jul_15_05.pdf). It reflects, therefore, Mr. Parloff's point of view. Others, including the people involved in the case, may well have a different point of view of the events described.

49 *See* Frank M. McClellan, *The Vioxx Litigation: A Critical Look at Trial Tactics, the Tort System, and the Roles of Lawyers in Mass Tort Litigation*, 57 DePaul L. Rev. 509, 514 (2008).

This first case, Ernst v. Merck, drew considerable national attention.[50] *Some speculated that it was a fairly good case for Merck and that it would send a signal as to the wisdom of Merck's strategy of never settling any Vioxx case—of taking every one of potentially tens of thousands of cases to trial. After the first trial—the one in which Merck seemed to be on solid ground—that strategy would be severely tested.*

W. Mark Lanier, the plaintiff's lawyer, set the tone for the trial in his opening statement. He identified the central characters of his client's story. He focused first on his client's deceased husband, Bob Ernst. Ernst was the picture of health. He ran marathons, competed in bike races, and was happily married. Ernst did suffer from arthritis pain in his hands. His doctor prescribed Vioxx for the pain. Seven or eight months later, Bob Ernst suffered a fatal heart attack.

On the other hand, there was Merck. Merck was at one time a very well-respected company. But that changed in 1994 when Roy Gilmartin became CEO. Gilmartin was consumed with the bottom line. What was profitable was good. Furthermore, by 2000, Merck had a problem—its most profitable drugs were about to lose their patent-protected exclusivity. Merck needed a new, highly profitable drug. Vioxx was to be that drug, and so Merck rushed it to market, concealing potential dangers and fixing its test studies—all in the name of the bottom line. This case was a battle between a fit, active, happy 59-year-old man and the profit-driven giant corporation whose pursuit of greater profits ultimately killed him.

Merck's lawyer, David C. Kiernan, presented the case quite differently. He had logic and reason on his side, and presented the case methodically. Merck had tested the drug and received FDA approval. It told the FDA and the public of any known risks. It pulled the drug from the market out of an abundance of caution. Kiernan also highlighted a key to the case: the coroner who did the autopsy on Ernst concluded that he suffered from hardening of the arteries and that his heart attack was a result of arrhythmia. But there was no evidence that Vioxx caused arrhythmia. Rather, the only danger posed by Vioxx was of sudden heart attacks brought on by a blood clot (thrombosis).

Lanier told a story; he developed characters: the innocent Ernst, struck down in the prime of life; and the money-grabbing Merck, more concerned

50 *See e.g.* Alex Berenson, *First Vioxx Suit: Entryway Into a Legal Labyrinth?* N.Y. Times C1 (July 11, 2005) (available at http://www.nytimes.com/2005/07/11/business/11vioxx.html); Daren Fonda, *Big Pharma's Bitter Pill*, Time Magazine (Aug. 22, 2005) (available at http://www.time.com/time/magazine/article/0,9171,1096503,00.html); Kevin McCoy, *Merck to Face First Vioxx Trial Before Texas Jury Next Month,* USA Today (June 29, 2005) (available at http://www.usatoday.com/money/industries/health/drugs/2005-06-29-vioxx-cover-usat_x.htm).

with profit than safety. On the other hand, Kiernan presented scientific evidence showing the link between Vioxx and heart attacks was no greater than similar links between heart attacks and other drugs, including ibuprofen. He showed that Ernst died from arrhythmia—and that taking Vioxx presented no known increased risk of arrhythmia. Based on reason, Merck would seem to have the stronger case. But while Lanier was weaving a compelling story, Kiernan talked of "NSAIDS" and "coxibs" and "cardio-thromboembolic" events. He relied on corporate documents full of similar medical jargon. He failed to develop the story of his client.

The jury verdict in *Ernst v. Merck* caught many by surprise—a plaintiff's verdict for $253 million, including $229 million in punitive damages.[51] Merck's defense—that there was no evidence that Vioxx caused Ernst's death—seemed sound. It was reasonable and logical. At trial, it was also stunningly unsuccessful.

Lanier's success with the jury did not continue when the case came before the Court of Appeals, which vacated the jury's award and granted a defense verdict.[52] The case ultimately turned on Lanier's inability to establish a causal link between Ernst's heart attack and his ingestion of Vioxx. Both parties agreed that Vioxx posed a risk only for blood clots that could cause a myocardial infarction—that is, a sudden heart attack unrelated to chronic heart disease. However, Dr. Maria Araneta, the medical examiner who performed the autopsy, concluded that Ernst died of a cardiac arrhythmia as a result of chronic heart disease. She found no blood clot. The autopsy thus showed that there was no evidence to link Ernst's death to Vioxx. However, at the trial, Dr. Araneta testified that it was possible that Ernst died of a blood clot that was dissipated during CPR. In light of extensive evidence to the contrary, the Court of Appeals rejected this theory as mere "speculation" and set aside the entire jury verdict.

Is the *Ernst* trial an example of story's appeal to emotion overwhelming the jury's ability to reason fairly? Did Lanier go too far and—by his patent appeal to emotion, made effective by his use of story—unfairly manipulate the jury?

At first blush, this seems like a perfect example of storytelling run amok. Lanier had a very sympathetic client. The opposing party was anything but. Lanier effectively used stories to exploit this unbalanced

51 Texas law required a considerable reduction of the punitive damages; ultimately the trial court awarded Carol Ernst $26.1 million in total damages. *Merck,* 296 S.W.3d at 81.

52 *Id.*

starting point. That is, he persuaded the jury to ignore Merck's rational, "objective" evidence regarding causation. Instead, the jury seemed to accept Lanier's story's two-pronged emotional appeal—an innocent person died, and a greedy drug company ignored potential safety concerns to make greater profits, never mind the difficulty of linking the two causally. The jury was so taken in by Lanier's story that it failed to realize the causal link between the innocent death and the evil money grabbing had not been established.

Deeper reflection, however, reveals several factors that may counterbalance this potential abuse of storytelling. First, of course, is the adversarial system itself. Certainly Kiernan had the opportunity to counter Lanier's story. That he chose to do so by presenting a less compelling story does not make Lanier's story inappropriate or manipulative. Certainly if Lanier's story crossed an ethical line, Kiernan had the opportunity to present evidence that would expose the story's flaws.

Of course, one may argue that the emotional story of a healthy, fit man who died suddenly of a heart attack is far more compelling than the rational story of a corporate giant's safety compliance efforts. But Merck certainly had a compelling story to tell as well. After the verdict, one of the leading Vioxx defense lawyers, Ted Frank, provided the basis for a very compelling defense of Merck and Vioxx:

> This verdict is bad news for all of us, and some of us will die prematurely because the lawsuit deterred the research and development of life-saving drugs.
>
> And Vioxx was one such life-saving drug. The painkillers that it replaced (and is now replaced by) cause their own health problems, and current medical thinking is that, for at least some people, Vioxx would be a safer as well as a more effective pain-killer than aspirin, despite what we now know to be the latter's better cardioprotective profile. But Merck can't collect $26 million from each person whose life they save, even if it were possible to point to a particular Alvy Singer of Hypothetical City, Iowa, who didn't die of aspirin-related complications because he was taking Vioxx.[53]

If Kiernan had tried to tell this story—that Merck was the hero in this story; that Vioxx saved far more lives than it ended; that the world is a more dangerous place without Vioxx and other drugs that may never make it to market—it might have resonated more effectively with the jury. Stories are particularly effective in opening one's audience to an outsider

53 Ted Frank, *Ernst v. Merck—One More View,* Medical Progress Today (Sept. 1, 2005) (available at http://www.aei.org/article/23166).

perspective.[54] Ironically, in this case, it was the corporate giant that was the "outsider" to the jury's world. Perhaps if Kiernan had focused his story on the struggles of the characters of Merck's story, he would have achieved a different result. In any event, the existing ethical limits of litigation provide significant safeguards against the potentially overreaching power of story.

But there may be a more important response to the charge that stories exploit emotions at the expense of objective, rational thought. It is almost axiomatic that justice demands impartiality and that impartiality is best met through objective, rational thinking. Though we permit lawyers to appeal to a jury's emotions to a degree, such appeals are tolerated, not praised. Furthermore, we expect judges, especially appellate judges, not to be persuaded by emotional appeals; judges are expected to make decisions based solely on reason.[55] That we recognize judges sometimes fail to meet this expectation does not diminish the aspirational goal of reasoned decision making. However, contemporary developments in cognitive science and neuropsychology suggest this aspiration is neither realistic nor desirable. There is evidence that reason, without emotion, leads to poor decision making, particularly on important decisions about complex matters.[56] We are more likely to make wise decisions when the rational parts of our brain, i.e., the frontal cortex, work in concert with the emotional parts of our brain.[57] A story illustrates this point.

Neuroscientist Antonio Damasio tells a compelling story of his patient, Elliot.[58] Elliot had a tumor removed from his frontal orbital cortex, the part of the brain that connects the rational frontal cortex to the emotional parts of the mid-brain. As a result, Elliot suffered no loss of IQ. But he no longer was able to connect emotions to rational thought. His frontal cortex still functioned, but emotion no longer played a part in his decision making. One might expect that Elliot would become the perfect "juror," able to make decisions based solely on reason—a Spock-like judge, uninfluenced by emotional appeals. In fact, Elliot became unable to make even the simplest decisions. Damasio would ask him to choose a day for their next appointment, and Elliot would spend hours evaluating the

54 *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411, 2425–26 (1988); Leslie Espinoza Garvey, *The Race Card: Dealing With Domestic Violence in the Courts,* 11 Am. U. J. Gender Soc. Policy & L. 287, 304–05 (2003).

55 *See e.g.* Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 32 (Thomson West 2008) ("Good judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities, including most especially their emotions.").

56 *See* Lehrer, *supra* n. 7, at 245.

57 *See id.* at 240.

58 *See* Antonio R. Damasio, *Descartes' Error: Emotion, Reason, and the Human Brain* (Putnam 1994).

reasons for choosing Tuesday over Thursday, but never be able to assess the choices and make a decision. Tragically, when Elliot was no longer able to connect his rational thought to his emotions, this previously very successful and happy man was no longer able to hold a steady job. His wife and children eventually left him. His life essentially fell apart.

The lesson to be learned from Elliot is not that we should reject reason. Rather, it is that in the pursuit of wise decision making, we should not fear emotions. In fact, our brains work best when we engage in "whole-brain" thinking—when our rational frontal cortex works in concert with our emotional neural centers.[59] This is what happens when we hear stories. Thus, stories are not only more interesting, more memorable, and more persuasive than other narrative forms. They also engage our brain in a way that is more likely to lead to good decisions. When we make decisions based on a combination of reason and emotion, we reach better decisions than when we rely on reason alone.

Of course, encouraging whole-brain thinking and explaining how story can promote it are two different things. Strategies for developing effective legal stories that find the right combination of emotion and reason are beyond the scope of this article. However, a brief illustration of the concept may be helpful. Massimo Piattelli-Palmarini examined many mistakes in reasoning that appear to be nearly universal.[60] To illustrate one of these reasoning mistakes, Piattelli-Palmarini examined syllogisms:

> Given the premises:
>
> *All Ruritanians are rich;*
> *John is a Ruritanian.*
>
> None of us will hesitate to come to the conclusion:
>
> *John is Rich.*
>
> Even quite young children can cope with this sort of elementary syllogism.
>
> Only a bit more difficult is the following:
>
> Given the premises:
>
> *No fruit-picker is a sailor;*
> *All Ruritanians are fruit-pickers.*

59 *See* Lehrer, *supra* n. 7, at 248–49.

60 Massimo Piattelli-Palmarini, *Inevitable Illusions: How Mistakes of Reason Rule Our Minds* (Massimo Piattelli-Palmarini & Keith Botsford trans., John Wiley & Sons 1994).

One can logically deduce that:
No Ruritanian is a sailor.

Now try the following one on some of your most intelligent friends:

All members of the cabinet are thieves;
No composer is a member of the cabinet.

What logical conclusion can we draw from this?[61] Piattelli-Palmarini goes on to note that intelligent people are unlikely to make the obvious logical errors such as "No composer is a thief" or "No thief is a composer." Rather, most will conclude that no logical deduction can be drawn from these two premises.[62] That conclusion is wrong.

Now, let's set these premises in a simple, indeed silly, story:

The King is very concerned. His kingdom is awash in thieves. In fact, he has just learned that all members of his royal cabinet are thieves. He also knows that no court composer is a member of his cabinet. To regain the trust of the citizenry, he is considering ordering the imprisonment of all thieves. However, if he does so, the powerful musicians' union will protest, claiming that everyone who was arrested was a composer. Does the King have a logical response?

Clearly, the King has a logical response. We know that at least some of the thieves (i.e., the cabinet members) are not composers. But when relying on logic alone—only considering the two premises—most intelligent people will not find that logical conclusion. When we combine the premises into a story—that is, in the context of a character with a goal and conflict—we see the logical conclusion rather easily. Whole-brain thinking has thus led to a better-reasoned result.

Recent developments in neuroscience and cognitive science raise interesting implications for the law. There is objective, rational evidence to show that objective, emotion-free decisions are sometimes less sound than decisions based on a combination of reason and emotion. Despite this, some of us irrationally (and perhaps ironically) cling to the notion that legal decisions are best based on reason alone. It may be time to abandon this paradoxical perspective and embrace story for what it is: a powerful tool for whole-brain thinking. When we use story to persuade, we are

61 *Id.* at 37–38.

62 *Id.* at 38.

effective because we are enabling our audience to make *better* decisions by engaging both the rational and emotional parts of their brains. Thus, the emotional appeal of stories, when offered in concert with logical reason, does not create an ethical problem. Rather, it *improves* legal decision making.

V. Conclusion

Though humans have used stories for more than 100,000 years,[63] the discipline of Applied Legal Storytelling is still in its infancy. It is good that as the discipline develops, we question its ethical limits. This initial review, however, suggests that at least some of the unique characteristics of story create few unique ethical problems. A lawyer who chooses to use stories to persuade may look to the same ethical principles to which she has always looked.

Not long ago, I was discussing these ideas with a recent law school graduate. I was struggling with trying to define how far a lawyer may go in "bending" a client's story without falling beneath the ethical floor. She offered a concise and insightful solution: "It's simple. *Don't lie.* If you were presenting statistical evidence instead of a story, you could choose which statistics to present, but you couldn't change the statistics. Isn't it the same with stories?" My young friend has it right. Stories, like statistics or other persuasive tools, can be abused. But that potential for abuse does not make storytelling any less legitimate than the truism that "liars can figure" makes the use of statistical evidence illegitimate. Rather, it suggests that storytelling lawyers should not let the unique characteristics of story demagnetize their ethical compass. The three stories presented here suggest three ethical principles for storytelling:

1. Don't lie. No kidding. My Belfast tour guide avoided this ethical pitfall by admitting that his story was a lie. Lawyers usually don't. We all know that the truth is a slippery thing. Indeed, many legal disputes arise because parties have different understandings of what is true and what is not. But when it comes to storytelling, we must keep in mind that to be persuasive, a story must be believable. But to be ethical, it must also be honest. That is, the story we tell must honestly be our client's story. We may use our storytelling skills to make the story compelling, coherent, and consistent with our audience's expectations. But it must remain true to our client's honestly held beliefs about the dispute. When we create a story

63 *See* Steven Pinker, *The Language Instinct* 363–64 (Perennial Classic 2000).

that is inconsistent with our client's honest beliefs, we fall below the ethical floor.

2. Remember your other ethical duties. Michael Nifong could be the poster child for storytelling gone wrong. But he did not get disbarred because he used the power of storytelling in a racially charged, high-profile case. He was not disbarred because he told his story from only one point of view. Rather, he was disbarred because he ignored his other ethical obligations. He ignored his duty to see justice done. He ignored his duty to provide the defense with exculpatory evidence. He ignored his duty to avoid prejudicial pretrial publicity. It was these ethical shortcomings, not his decision to tell a compelling story, that got him into trouble.

There are, of course, any number of ethical duties that could be implicated in storytelling, including the duty to keep client confidences,[64] the duty of candor to a tribunal,[65] and the duty to be truthful to third parties.[66] Obviously, storytelling does not relieve us of these duties. To paraphrase an old saw, we must never let a story get in the way of good lawyering.

3. The story may enhance, but not replace, legal analysis. There is no doubt that stories appeal to our emotions. That is a key source of their persuasive power. But emotional appeal alone is not enough to justify a legal argument. We persuade most effectively when we appeal to both reason and emotion.

The Texas Court of Appeals found that Mark Lanier's case against Merck, no matter how compelling the story, lacked an essential causal element and therefore set aside the jury verdict. Although the merit of that conclusion was, I think, debatable, what is more important is that Lanier, in bringing the lawsuit and in telling the story, believed he had established that causal element. But what if he agreed with the court that the causal link could not be shown? Would it have been ethical to hide that critical flaw by telling a compelling story in the hopes that the jury (and, ultimately, the court) would be so distracted by the story so that it would ignore the fatal gap in the case? I think not. If Lanier (or more accurately, his *client)* believed that there was no causal link between Vioxx and Ernst's death, then it would have been unethical to use the power of story to try to convince a jury otherwise.

This leaves us to rely heavily on lawyers' self-regulation to prevent the abuse of storytelling. Given the slippery nature of both legal rules and

64 Model R. Prof. Conduct 1.6 (ABA 2009).

65 Model R. Prof. Conduct 3.3 (ABA 2009).

66 Model R. Prof. Conduct 4.1 (ABA 2009).

"facts," one may wonder if our current ethical rules are up to the task. But experience has shown that when it comes to ethical standards, finding appropriate bright lines can be difficult. This is especially so when we try to regulate acts that require the exercise of judgment. Thus, it is relatively easy to have a bright line rule prohibiting the commingling of a lawyer's money with her clients'. It is far more problematic to establish a bright line for what claims a lawyer may bring, when she may breach a client's confidence, or what stories she may present. In these situations, we are better served by less definite standards that necessarily depend on self-regulating by individual lawyers. As we do with many ethical concerns, we must recognize that while a few lawyers may abuse the use of storytelling, the great majority of lawyers will recognize the ethical limits and stay within the bounds of ethical standards the legal community has set for itself.

Stories are an important persuasive tool. They can illustrate an outsider's point of view. They can make difficult, abstract concepts concrete. They can put seemingly unsolvable conflicts into a perspective that aids resolution. But they are not ends in themselves. Legal stories, no matter how emotionally powerful on their own, must connect to logical legal argument. A carpenter who swings a hammer to frame a house uses a powerful tool that makes her house building more effective. When she swings that same hammer for nothing but the sake of swinging the hammer, it becomes nothing more than a dangerous blunt instrument.

Lawyers have been telling stories for a long time. The Applied Legal Storytelling movement seeks to explore why those stories are effective and how lawyers can make them even more so. It is understandable that we would approach this powerful tool with some concern for ethical abuses. However, perhaps because lawyers have told stories for so long, our existing ethical norms seem well suited to protect against potential abuses. So long as we maintain our ethical compass, we need not fear the power of story leading us, or the profession, astray.