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TAKING A MULLIGAN: THE SPECIAL CHALLENGES OF NARRATIVE CREATION IN THE POST-CONVICTION CONTEXT

DONALD R. CASTER* AND BRIAN C. HOWE**

INTRODUCTION

"History is written by the victors" is a common phrase used to describe the sentiment that the victorious party to a conflict will have the power to write the history of that conflict. In the courtroom, however, the opposite of that causal relationship exists: the party who can successfully create the most compelling history of the litigated dispute will emerge as the victor. In this Essay, we discuss the myriad impacts of race and racism on the criminal justice system in the United States. First, we address the structural advantages afforded to the prosecutor in the American criminal justice system. The primary advantage is that the prosecution presents its case first and is able to construct the narrative that will dominate a trial. We also address how the structural advantages may serve to distort the facts of a case and how this distortion may remain in effect even through the appellate phases of litigation. Finally, we examine the challenges faced by post-conviction counsel in replacing the existing narrative with a new one that creates a compelling case for relief. The creation of a provable, alternative narrative is particularly important for a defendant in post-conviction proceedings due to the deference afforded by reviewing courts to an underlying criminal judgment. Indeed, the history of a particular litigation may be a crucial part of the new narrative. The need to excise the current narrative and begin again must be made clear to a reviewing court.

I. RACE, NARRATIVE CREATION, AND THE CRIMINAL JUSTICE SYSTEM

Any real understanding of the workings of the American criminal justice system must include an understanding of the impact of race on that system. Racial disparities in the criminal justice system are well-documented and understood. Black men are two to three times more likely to be arrested during

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their lifetimes than white men.[1] Once arrested, black men are more likely to be charged than white men.[2] Several studies have demonstrated that race plays a significant role in sentencing.[3] Racial disparities are particularly acute in capital cases.[4] And, race does not impact only the selection of and results for defendants. While national statistics are sparse, a recent study of California prosecutors' offices found that whites are "heavily overrepresented" among California prosecutors.[5] The study, conducted by researchers at the Stanford Criminal Justice Center, utilized self-reported data from district attorneys' offices in fifty-two California counties, which comprise about ninety-eight percent of California's population.[6] Data obtained from the district attorneys were then compared against United States Census data.[7] California does not appear to be an outlier when compared with the rest of the United States: only eight percent of Assistant United States Attorneys are black.[8] The lack of diversity among America's prosecutors can hardly be surprising: as of the most recent Census in 2010, whites accounted for eighty-eight percent of attorneys across the country.[9] The significance of racial disparities in prosecutors' offices becomes even larger in light of recent scholarship that emphasizes the role individual prosecutors play in creating or addressing systemic problems.[10] Mass incarceration, a phenomenon that has

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1. William Y. Chin, *Racial Cumulative Disadvantage: The Cumulative Effects of Racial Bias at Multiple Decision Points in the Criminal Justice System*, 6 WAKE FOREST J.L. & POL'Y 441, 444 (2016).

2. *See, e.g.*, Jesse J. Norris, *The Earned Release Revolution: Early Assessments and State-Level Strategies*, 95 MARQ. L. REV. 1551, 1628 (2012) ("After all, whites and blacks use illegal drugs at the same rates, yet African-Americans are many times more likely to be stopped, searched, arrested, charged, convicted, and sentenced to prison for drug crimes.").

3. *See* Chin, *supra* note 1, at 445–46 (citing studies showing the impact of the sentencing judge's race, the defendant's complexion, and the defendant's race on sentencing).

4. *See* Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUS. L. REV. 807, 811–12 (2008) ("The current research suggests that the race of the defendant and victim are both pivotal in the capital of capital punishment: death was more likely to be imposed against black defendants than white defendants, and death was more likely to be imposed on behalf of white victims than black victims.").

5. KATHERINE J. BIES ET AL., STANFORD CRIMINAL JUSTICE CTR., STUCK IN THE '70S: THE DEMOGRAPHICS OF CALIFORNIA PROSECUTORS 10 (2015), https://law.stanford.edu/wp-content/uploads/2015/04/Stuck-in-the-70s-Final-Report.pdf.

6. *Id.* at 8.

7. *Id.* at 9.

8. *Id.* at 8–9.

9. AM. BAR ASS'N, LAWYER DEMOGRAPHICS (2015), https://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.authcheckdam.pdf.

10. *See, e.g.*, SUJA A. THOMAS, THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES 147–48 (2016) (arguing prosecutors are responsible for increased reliance on guilty pleas rather than jury trials for disposition of criminal cases); Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 203 (2007) ("Unwarranted

captured the attention of America's political class recently, also has a racial component.[11]

Race also plays less obvious roles in the criminal justice system. A growing body of scientific evidence points to the inaccuracy of eyewitness identifications, particularly by those who attempt to identify the perpetrator of a crime when that perpetrator is a stranger of a different race.[12] Additionally, race can infest a prosecutor's use of peremptory challenges in ways that cannot come to light until years after the fact.[13] When everything that is known about how race and racism influence the criminal justice system is taken together, a conclusion emerges: the system is "drastically broken."[14]

This is the backdrop, then, against which the creation of narratives in the criminal justice system must be understood. To talk about narrative creation in the criminal justice system is to talk about stories told disproportionately about black people, but told predominantly by white people. This is why defense counsel must make use of the opportunity afforded in the post-conviction context to "take a mulligan"—to redo what the criminal justice system has done in a way that is fair to a defendant and that offers a story free of racial and structural frames and biases.

II. NARRATIVE CREATION IN A CRIMINAL TRIAL

The importance of legal storytelling during a criminal trial is well-documented.[15] Bar journals—aimed at practitioners—are replete with articles about how best to persuade through narrative creation at trial.[16] Defense attorneys are expected to develop a narrative in their preparation for trial: "Developing a theory of the case that encompasses the best interests of the client

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racial disparities cannot be eliminated without the active participation of prosecutors."); John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1239, 1240–41 (2012) (arguing that individual prosecutors are responsible for increased rates of incarceration).

11. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS 187–89 (rev. ed. 2012).

12. *See generally* John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207, 210 (2001).

13. Foster v. Chatman, 136 S. Ct. 1737, 1755 (2016) (reversing a nearly thirty-year-old conviction after prosecutors' voir dire notes showing evidence of racial bias in jury selection were discovered).

14. Stephen J. Fortunato Jr., *Judges, Racism, and the Problem of Actual Innocence*, 57 ME. L. REV. 481, 482–83 (2005).

15. *See* Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301, 1304 (1995) (noting that "[l]egal storytelling enmeshes narrative tension or dissonance in the conventions of advocacy").

16. *See, e.g.*, Jeffrey D. Jackson, *For Effective Persuasion, Don't Neglect the Narrative*, J. KAN. B. ASS'N, Apr. 2015, at 12, 12; Heather J. E. Simmons, *Practical Magic: How the Ancient Art of Storytelling Can Make Us Better Lawyers*, MICH. B.J., Aug. 2015, at 52, 52; Sunwolf, *Talking Story in Trial: The Power of Narrative Persuasion*, CHAMPION, Oct. 2000, at 26, 26.

and the realities of the client's situation will help counsel evaluate various choices throughout representation . . . ."[17]

The use of narratives in trials is not a recent phenomenon, and its long history is well-documented in legal scholarship.[18] As at least one scholar has pointed out, however, that narrative creation does not necessarily assist the trier of fact in reaching a just or correct outcome:

> [T]he persuasiveness of a story does not turn on its truth. It turns on its narrative rationality—its logical coherence, its correspondence to audience expectations. 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.[19]

The potential of a false narrative to persuade a factfinder can be particularly problematic in the criminal setting. A factually untrue narrative that is accepted by a jury or judge results in a wrongful conviction.[20]

The widespread understanding of the importance of narrative creation should be of interest. After all, no formal rule requires a prosecutor (or defense attorney) to utilize storytelling to secure a conviction (or an acquittal). To convict a defendant, the prosecution must establish all of the elements of the charged offense beyond a reasonable doubt.[21] Neither criminal procedural rules nor evidentiary rules speak of storytelling. Instead, telling a story is the method by which the prosecution meets its constitutional burden, and the procedural and evidentiary rules establish limits on the prosecution's storytelling methods.

Because the law focuses only on the prosecution's burden, and not that how to practically meet—and combat—this burden through the creation of a narrative, the American criminal justice system gives the prosecution significant advantages in creating a dominant trial narrative. In jurisdictions where

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17. NAT'L LEGAL AID & DEF. ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION 61 (1995); *see also, e.g.*, Anthony Natale, Theory and Themes/Storytelling 4 (unpublished manuscript) (Jan. 8, 2015) (on file with authors) (defining "theory of the case" as "a positive, affirmative statement as to what really occurred and what the law directs should happen to an individual who has been accused in this particular situation").

18. *See, e.g.*, Robert A. Ferguson, *Story and Transcription in the Trial of John Brown*, 6 YALE J.L. & HUMAN. 37 (1994).

19. Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 LEGAL COMM. & RHETORIC 63, 68 (2010).

20. Ralph Grunewald, *The Narrative of Innocence, or, Lost Stories*, 25 L. & LITERATURE 366, 368–69 (2013).

21. *In re* Winship, 397 U.S. 358, 361–62 (1970).

voir dire is conducted by counsel rather than the bench, for example, the prosecution is the first to address prospective jurors. The prosecution is the first to deliver an opening statement. The prosecution puts on its witnesses first, before the defense is able to call witnesses who may provide compelling, defense-friendly narratives, such as an alibi or a justification. In many jurisdictions, the prosecution delivers the first closing argument and is entitled to speak to the jury last through rebuttal. In addition to all of these significant advantages, the prosecution controls the timing of when the case goes to trial and the preparatory advantages inherent in holding those reins. The defense, on the other hand, must scramble to construct its narrative in the time between the initiation of charges and the beginning of a trial.

Despite the formal burden placed on the prosecution, the practical impact of giving the prosecution the upper hand in narrative creation may pose an impossible challenge for defense counsel:

> Unaware of narrative dynamics, jurors are susceptible to dramatizing elements that are introduced in court and to constructing their stories from case-specific information acquired at trial and their expectations about what makes a complete story. What reasons, for example, exist to shave a beard? Kevin Byrd, who was wrongfully convicted of a rape, shaved his goatee the day before he got arrested. He claimed that he simply got tired of it, but the prosecutor contextualized this event differently: the defendant changed his facial features. In court, this element became "dramatic" although it was simply a random coincidence. If a prior conviction is introduced in court, it can have the same dramatic effect. The defendant is portrayed as a specific "type," as someone who typically commits crimes (even if these crimes are unrelated to the one in question). The jury is not equipped to disregard this kind of information.[22]

Despite the importance of narrative creation in persuading a jury, the decision to engage in legal storytelling is not an automatic one for defense counsel. Defense counsel must weigh the decision to tell a client's story in the most persuasive manner possible alongside several other factors, often overlooked in the scholarly literature. For example, counsel must consider whether the factfinder is a judge or a jury, the identity of the factfinder, the skills of the assigned prosecutor, the viability of the defendant's narrative,

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22. Grunewald, *supra* note 20, at 380 (footnotes omitted) (citing John H. Blume, *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense* (Cornell Legal Studies Research Paper No 06-042, 2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=942653).

and the witnesses on each side.[23] And, defense counsel should consider how his or her storytelling efforts at trial may play out on appeal.[24] Many of these considerations are also important to prosecutors, who are also striving to craft a narrative.[25]

A stark picture of the criminal justice system thus emerges. A defendant is disproportionately likely to be a person of color. Prosecuting decisions, however, are probably going to be in the hands of white people. Should a defendant decide to risk a trial,[26] he will face a prosecution team that has already crafted a narrative. Once the trial begins, the prosecution team will have several built-in advantages in selling its story to the trier of fact. In particular, the prosecution sells its story first, providing the opportunity for that narrative to become embedded in the jury's or judge's consciousness. And while defense counsel will (or should) understand the persuasive value of narratives and the value in crafting a counter-narrative that tells the defendant's story, other considerations may force him to forego such a strategy. Against such a backdrop, it can hardly be surprising that wrongful convictions—stemming from the acceptance of a false narrative—are increasingly common.[27] A criminal trial is structured in such a way as to favor the perpetuation of the prosecution's narrative. And even if that narrative is based on distorted evidence, it can be difficult, if not impossible, to un-tell, given the structural restraints of a criminal trial.

III. THE NARRATIVE ON APPEAL

Once a defendant is convicted, the chances that he can successfully defeat the prosecution's narrative on appeal become even slimmer. This is because significant structural barriers are imposed to protect the narrative that prevails at trial. Should a defendant challenge a trial court's decision to admit or exclude evidence, for instance, he will need to establish that the trial court abused its discretion.[28] A defendant who argues to an appellate court that the

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23. Todd A. Berger, *A Trial Attorney's Dilemma: How Storytelling as a Trial Strategy Can Impact a Criminal Defendant's Successful Appellate Review*, 4 DREXEL L. REV. 297, 318 (2012).

24. *Id.*

25. *See generally* JOHN BOBO, THE BEST STORY WINS (AND OTHER ADVICE FOR NEW PROSECUTORS) (2010).

26. While not the subject of this Essay, the decision to go to trial itself is both fraught with consequences and increasingly rare. *See, e.g.*, Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/.

27. *See* NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2015 1 (2016), https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf (noting that 2015 saw a "record number" of exonerations in the United States).

28. *See, e.g.*, United States v. Guerrier, 428 F.3d 76, 79 (1st Cir. 2005); People v. Waidla, 996 P.2d 46, 61 (Cal. 2000); People v. Powell, 55 N.E.3d 435, 440 (N.Y. 2016) (citing People v. Schulz 829 N.E.2d 1192, 1197 (N.Y. 2005)).

prosecution's narrative was supported by evidence sufficient to challenge a conviction faces an even more difficult challenge in most jurisdictions. Consider this recent description of what a defendant must do to successfully challenge the sufficiency of the evidence against him on direct appeal from a federal conviction:

> Any challenge to the sufficiency of the evidence comes with "a heavy, indeed, nearly insurmountable, burden." To prevail, [a defendant] "must convince us that even after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found him guilty beyond a reasonable doubt."[29]

The task is no less onerous in most state appellate systems, where a trial court will similarly review the facts in the light most favorable to the prosecution.[30] Should a defendant convicted in state court seek federal review of his conviction through a petition for a writ of habeas corpus, federal law makes challenging his conviction even more difficult. A federal court is bound to accept the factual findings of a state court unless the proceedings in state court "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[31] In deciding whether a state court's factual determination was "unreasonable," the habeas court is bound by the factual record as it existed at the time of the state court adjudication.[32]

Given the structural barriers to the presentation of a defense-friendly narrative on appeal, the manner in which appellate courts interpret the trial record is predictable. Judges write their opinions to support what is, more

29. United States v. Dessart, 823 F.3d 395, 403 (7th Cir. 2016) (citation omitted) (quoting United States v. Warren, 593 F.3d 540, 546 (7th Cir. 2010)).

30. *See, e.g.*, State v. Williams, 652 N.E.2d 721, 732 (Ohio 1995) (noting that "when a defendant challenges the legal sufficiency of the state's evidence, 'the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt'" (first quoting State v. Jenks, 574 N.E.2d 492, 494 (Ohio 1991), *superseded by constitutional amendment as recognized in* State v. Smith, 684 N.E.2d 668 (Ohio 1997); and then citing State v. Waddy, 588 N.E.2d 819, 825 (Ohio 1992)).

31. 28 U.S.C. § 2254(d)(2) (2012).

32. In *Cullen v. Pinholster*, the Supreme Court barred the expansion of the state court record in habeas proceedings:

> We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time—*i.e.*, the record before the state court.

563 U.S. 170, 181–82 (2011).

often than not, their ultimate conclusion: that the lower court should be affirmed. In the criminal context, that means deferring substantially to the trial court's and prosecution's framing of a case. Two examples—one made famous by popular culture, the other noted by a late Supreme Court Justice—aptly illustrate the point.

In late 2015, the documentary series *Making a Murderer*[33] ignited the passions—and furies—of not just legal practitioners and jurists, but the general public. The series, released on the online streaming service Netflix, told the story of how Steven Avery and Brendan Dassey were convicted of the murder of Teresa Halbach.[34] By the time he was charged with that murder, Avery had a history with the criminal justice system; in 1985, he was convicted of rape, only to be freed based on the results of DNA testing eighteen years later.[35] Avery returned to the same community in which he grew up—the same community in which he was wrongly convicted of rape and whose police department he sued following his exoneration.[36]

In affirming Avery's murder conviction, the Wisconsin Court of Appeals explains matter-of-factly why he was a suspect:

> Halbach's clients included Auto Trader magazine. In the morning of October 31, 2005, Steven Avery called Auto Trader magazine to arrange for Halbach to photograph a vehicle at the salvage yard. Halbach had taken photos of vehicles at the Avery salvage yard on five prior occasions. At the time of her disappearance, it was believed that Halbach was last seen taking photos at Avery's Auto Salvage.[37]

Indeed, the court leaves little room for doubt that the prosecution presented a strong case against Avery:

> During the course of the search, the police found, among other things, burned bone fragments, including skull fragments, in and around a burn pit behind Avery's garage with DNA consistent with that of Halbach; blood in the front area of Halbach's vehicle that was later determined to have come from Avery; blood in the cargo area of the vehicle that was later determined to have come from Halbach; and remnants of a cell phone, Palm Pilot and camera in a burn barrel in Avery's yard of the same models owned by Halbach. While conducting a sixth search of Avery's trailer on November 8,

33. *Making a Murderer* (Netflix Dec. 18, 2015).

34. Jethro Nededog, *Everything You Need to Know from "Making a Murderer" if You Don't Want to Spend 10 Hours Watching*, BUSINESS INSIDER (Jan. 14, 2016, 3:01 PM), http://www.businessinsider.com/netflix-making-a-murderer-recap-2016-1.

35. *Id.*

36. *Id.*

37. State v. Avery, 804 N.W.2d 216, 220 (Wis. Ct. App. 2011).

> officers discovered the key to Halbach's vehicle in Avery's bedroom. The key was later determined to have Avery's DNA on it. In a search conducted in March 2006, after Avery had been charged, police recovered a nearly intact bullet and bullet fragments from Avery's garage that came from a rifle found in Avery's trailer and contained DNA belonging to Halbach.[38]

Making a Murderer, though, provides a different story. In the fourth installment of the series, we learn that only Avery's DNA was present on Halbach's keys.[39] One would have expected that, since the keys originally belonged to Halbach, her DNA would be present on the keys as well.[40] Moreover, the provenance of the keys is questionable because the police searched Avery's house several times before finding the keys underneath a pair of shoes in Avery's bedroom.[41] The officer who found the keys was from the department that was being sued by Avery, despite the conflict of interest his involvement would seem to pose.[42]

Even if one discounts the discovery of Halbach's keys, certainly the presence of Avery's blood in Halbach's car is strong, circumstantial evidence of guilt. Except that this evidence, too, may have its own story. Avery's trial attorneys learned that a vial of Avery's blood—which had been collected and preserved in connection with his wrongful conviction for rape—may have been subject to tampering.[43] The vial's lid had a small, syringe-sized hole.[44]

Eliminate the keys and Avery's blood, however, and strong evidence of guilt arguably remains. The victim's car was found on Avery's sprawling property regardless of what was inside of that car.[45] Interestingly enough, however, the car is also the subject of a subplot. Two days before the car was "discovered" by volunteers searching the area for evidence pertaining to Halbach's whereabouts, a police officer—again, from the department being sued by Avery—called into police dispatch with the license plate number of that car.[46] When he was told by a dispatcher the car belonged to Halbach, he immediately replied, "'99 Toyota, right?"[47] At trial, he was unable to explain how he knew the make of Halbach's car.[48]

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38. *Id.* at 221.
39. Nededog, *supra* note 34.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*

The presence of a bullet with Halbach's DNA in Avery's garage, nonetheless, posits a compelling argument for Avery's guilt. That argument is weakened, however, by critical, additional information: the bullet was found only on the fifth search of Avery's garage—discovered by, of course, a member of the law enforcement agency being sued by Avery—and the forensic scientist who tested the bullet for DNA contaminated the sample with her own DNA.[49]

The appellate decision affirming Avery's conviction neglects to emphasize facts that, as depicted in *Making a Murderer*, cumulatively form a narrative supporting reasonable doubt, if not outright innocence.[50] The appellate court does not mention that one of the principal agencies responsible for investigating the crime had previously been responsible for wrongfully convicting Avery and was being sued for it.[51] It leaves out questions about how evidence was found.[52] It offers no hint that the defense argued that some evidence may have been planted, and other evidence may have been subject to shoddy forensic testing.[53] Instead, the appellate court tells a narrative that leads to the legal conclusion it ultimately reaches: Avery was guilty of the murder of Teresa Halbach.[54]

For many, *Making a Murderer* was a lesson about the injustice present in the American criminal justice system.[55] But for both the legal profession and the academy, it should be a primer on the importance of narrative. Overall, very few facts were presented in the documentary that were not presented to the jury. But based on accounts in the popular press, the reaction to the series was overwhelmingly sympathetic to Avery, a convicted murderer.[56]

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49. *Id.*

50. *Making a Murderer* devotees will no doubt notice other facts depicted in the show that are not mentioned by the Wisconsin Court of Appeals. The authors have not sought to provide an exhaustive list of all such facts, but merely a representative one.

51. Nededog, *supra* note 34.

52. *Id.*

53. *Id.*

54. State v. Avery, 804 N.W.2d 216, 242 (Wis. Ct. App. 2011).

55. To be sure, *Making a Murderer* has its share of critics, who believed the series told its story unfairly. *E.g.*, Samantha Grossman, *Here's What Was Left out of* Making a Murderer, TIME (Jan. 5, 2016), http://time.com/4167699/netflix-making-a-murderer-evidence-left-out/; Daniel Victor, Making A Murderer *Left out Crucial Facts, Prosecutor Says*, N.Y. TIMES (Jan. 5, 2016), http://www.nytimes.com/2016/01/05/arts/television/ken-kratz-making-a-murderer.html?_r=0.

56. *See, e.g.*, June Thomas, *What Really Makes* Making a Murderer *So Good? There's No Narrator.*, SLATE (Dec. 30, 2015, 8:02 AM), http://www.slate.com/blogs/browbeat/2015/12/30/what_really_makes_making_a_murderer_so_good_unlike_serial_and_the_jinx_there.html (noting that the show convinced the author, a "woman and a cat lover," to "side with an accused murderer/rapist whose rap sheet involves mistreatment of a cat"); German Lopez, *Netflix's* Making a Murderer *Exposes Flaws that Go Far Beyond Steven Avery's Trial*, VOX (Jan. 15, 2016, 9:30 AM), http://www.vox.com/2016/1/12/10755690/netflix-making-a-murderer-avery-guilty ("Netflix's *Making a Murderer* has, for many, led to just one question: Is Steven Avery innocent?").

The reaction provoked by *Making a Murderer* is at least partially caused by the manner in which its producers chose to tell the story of Avery's conviction. Unlike most crime procedurals—both fictional and nonfictional—the producers were embedded with the defense team rather than the prosecution. By the time the account of Avery's trial began, the audience may have been predisposed to be sympathetic towards Avery, as the series recounts his wrongful conviction and the nearly two decades he spent in prison for a crime he did not commit.[57] Ultimately, *Making a Murderer* presents a criminal trial in a very different way than the American public is used to seeing one. It tells Avery's story in the way that defense counsel might have if he or she could alter the structure of a trial. In the documentary, portions of the direct testimony of government witnesses are immediately followed by the relevant, corresponding portions of their cross-examination.[58] When the documentary presents the testimony of a key government witness, it follows that testimony immediately with the contradictory testimony of a defense witness.[59] During normal trials, however, the jury waits hours or days (and in some notable cases, weeks or even months) between hearing a government witness and hearing a defense witness with a contrary opinion. Ultimately, *Making a Murderer* is an excellent demonstration that the manner in which facts are assembled can be even more persuasive than the facts themselves.

The narrative of the Avery trial may be more easily unraveled and rewoven than many criminal prosecutions, as the two co-defendants and the victim all were white. Long-standing, institutionalized racial biases against black defendants present in many criminal trials thus played no part in the Avery case. Nonetheless, the documentary is a quintessential illustration of the power of the structural advantages of the prosecuting team in American criminal trials.

The case of Henry Lee McCollum also shows the impact that prosecution-friendly narratives can have throughout the criminal justice system. McCollum, a black man, was convicted of rape and murder and sentenced to death.[60] The Supreme Court of North Carolina summarized the trial evidence:

> The defendant, Henry Lee McCollum, gave a statement to law enforcement officers on 28 September 1983. In this statement, the defendant McCollum said that he saw Sabrina Buie and Darrell Suber come out of Suber's house at approximately 9:30 p.m. on 24 September 1983. McCollum, Chris Brown, Louis Moore and Leon Brown joined Sabrina Buie and Darrell Suber, and the group then

57. *Making a Murderer* (Netflix Dec. 18, 2015).
58. *Id.*
59. *Id.*
60. State v. McCollum, 433 S.E.2d 144, 148 (N.C. 1993).

> went to a "little red house near the ballpark." The five males tried to convince Sabrina to have sexual intercourse with them, but she refused. Two of the males went to a store and purchased some beer. When they returned, the males discussed having sexual intercourse with Sabrina. Louis Moore refused to participate and left.
>
> The four remaining males and Sabrina then walked across a soybean field and sat in some bushes where they drank beer. Suber stated that he was going to have sexual intercourse with Sabrina. At this point, the defendant McCollum grabbed Sabrina's right arm and Leon Brown grabbed her left arm. Eleven-year-old Sabrina then began to yell, "Mommy, Mommy" and "Please don't do it. Stop." Suber then raped Sabrina while the defendant and Brown held her arms. Subsequently, each man raped Sabrina while the others held her. Leon Brown then sodomized the child while Chris Brown held her.
>
> After the men had raped and sodomized Sabrina, Suber said "we got to do something because she'll go uptown and tell the cops we raped her. We got to kill her to keep her from telling the cops on us." The defendant McCollum grabbed Sabrina's right arm while Leon Brown grabbed her left arm. Chris Brown knelt over Sabrina's head and pushed her panties down her throat with a stick while Leon Brown and the defendant held her down. After determining that the child was dead, the defendant and Chris Brown dragged her body away to a bean field to hide it from view.[61]

What about McCollum's narrative? How did that fit into the court's rendering of the facts? The court simply stated, "[o]ther evidence introduced at trial is discussed at other points in this opinion where pertinent to the issues raised by the defendant."[62] Absent from the court's factual summary is that McCollum, nineteen years old at the time, was interrogated for five hours without an attorney present and while his mother was not permitted to see him.[63] Moreover, McCollum recanted his confession at trial, and two of the men mentioned in his confession were never prosecuted.[64]

Shortly after the North Carolina Supreme Court affirmed McCollum's conviction, another defendant sentenced to death in a wholly unrelated case from a different part of the county sought a writ of certiorari from the United

61. *Id.* at 149.

62. *Id.*

63. Jonathan M. Katz & Erik Eckholm, *DNA Evidence Clears Two Men in 1983 Murder*, N.Y. TIMES (Sept. 2, 2014), https://www.nytimes.com/2014/09/03/us/2-convicted-in-1983-north-carolina-murder-freed-after-dna-tests.html.

64. *Id.*

States Supreme Court following the denial of his own petition for a writ of habeas corpus.[65] The Court denied certiorari, provoking a dissent from Justice Harry Blackmun. He argued that "despite the effort of the States and courts to devise legal formulas and procedural rules . . . the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake."[66]

Justice Antonin Scalia elected to pen a concurrence responding to Justice Blackmun, apparently seeking to legitimatize the death penalty as an institution.[67] In so doing, he chose the *McCollum* case to illustrate the utility and fairness of the death penalty, arguing that, in light of McCollum's conduct, any argument that the Eighth Amendment forbade the execution of American citizens should be viewed as foreclosed:

> How enviable a quiet death by lethal injection compared with [McCollum's crime]! If the people conclude that such more brutal deaths may be deterred by capital punishment; indeed, if they merely conclude that justice requires such brutal deaths to be avenged by capital punishment; the creation of false, untextual, and unhistorical contradictions within "the Court's Eighth Amendment jurisprudence" should not prevent them.[68]

It is not hard to imagine why Justice Scalia chose the rape and murder of Sabrina Buie to justify the death penalty. The crime was particularly brutal and was recounted with chilling detail by the North Carolina Supreme Court; the brevity with which McCollum's narrative was treated, though, should be equally chilling.[69]

Twenty more years would pass before the world would learn that what McCollum had always claimed was true: the prosecution's narrative was false, and McCollum was innocent. In 2014, DNA evidence exonerated McCollum and his co-defendant, implicating instead a man who lived just a block from where Sabrina's body was found.[70]

Together, the *McCollum* and *Avery* cases illustrate just how powerful prosecution-friendly narratives can become once adopted by an appellate court. Indeed, the narrative employed against McCollum was so persuasive it was adopted as a justification for the imposition of the death penalty in an unconnected case. Given the power of carefully woven and reinforced prosecutorial narratives, retelling the story in a defense-friendly way will prove to be no easy task.

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65. Callins v. Collins, 510 U.S. 1141, 1141 (1994), *denying cert to* 988 F.2d 269 (5th Cir. 1993).

66. *Id.* at 1144 (Blackmun, J., dissenting).

67. *Id.* at 1141 (Scalia, J., concurring).

68. *Id.* at 1143.

69. State v. McCollum, 433 S.E.2d 144, 149 (N.C. 1993).

70. Katz & Eckholm, *supra* note 63.

IV. DEFENSE COUNSEL'S ROLE IN RETELLING THE NARRATIVE FOLLOWING A CONVICTION

A post-conviction narrative will inherently challenge and contradict the existing narrative of the crime. It must also incorporate some piece of new evidence, demonstrate its importance to the narrative, and do so in a way that is credible and compelling.[71] How can litigators present this new evidence in a way that maximizes its credibility in the story without confusing or muddling the narrative and without being overcome by the bias "baked in" to the already-established narrative of guilt?

The worst way to do this might be the simplest—merely add the new evidence to the established narrative, like a footnote or a postscript. Our natural bias is to interpret new information in light of the already established narrative.[72] This "curse of knowledge" not only colors our view of the facts, but it also encourages us to be overly confident in the conviction and underestimate the impact of new evidence.[73] People become wedded to their first impressions, known as "initial anchor values" in cognitive psychology literature.[74] Adding new information—especially new information that contradicts the ultimate conclusion of the narrative—can feel especially foreign or jarring when tacked on to the known, polished story. It may also appear convenient or incredible, like an unconvincing *deus ex machina* in fiction.

For new evidence to find its proper place in the narrative, the established story must be broken down and reframed to incorporate the new evidence naturally. Doing so will not only counter the preexisting bias against the defendant but can also produce a genuinely compelling story in the defendant's favor. Specifically, at least some of the inherent bias baked into the existing narrative can be overcome by, first, returning to primary sources when possible, second, broadening the narrative perspective and, finally, shifting the center of gravity of the story to the new evidence.

A. Shifting Narratives in Fiction

The problem of how best to add new, contradictory information to an established story is not unique to post-conviction litigation. Changing a reader's mind about a pre-existing narrative is, in effect, the idea behind a

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71. *See, e.g.*, State v. Petro, 76 N.E.2d 370 (1947) (noting that new evidence must provide a "strong probability that the newly discovered evidence will result in a different verdict").

72. Kevin Jon Heller, *The Cognitive Psychology of Mens Rea*, 99 J. CRIM. L. & CRIMINOLOGY 317, 331–32 (2009).

73. *Id.* at 332; *see* Nicholas Epley & Thomas Gilovich, *The Anchoring-and-Adjustment Heuristic: Why the Adjustments Are Insufficient*, 17 PSYCHOL. SCI. 311, 316 (2006) (finding that "people adjust insufficiently from an initial anchor value because they stop adjusting once their adjustments fall within an implicit range of plausible values").

74. Epley & Gilovich, *supra* note 73, at 316.

"changeover" in film.[75] In a "changeover," additional information is presented at the end of the narrative that casts the foundation of the entire story preceding it in a new light.[76] An effective twist in a fictional novel or film requires an author to actually *create* the "curse of knowledge" bias in a reader, only to counter it later.[77] This technique introduces new evidence in a way that is powerful and memorable, what one creative writing scholar has called the "poetics of surprise."[78]

Countering the curse of knowledge, whether in fiction or a post-conviction narrative, requires telling the initial story with care. The narrative of the investigation and conviction "must include elements early on that are endowed with some significance that will only be visible later."[79] In fiction, this involves subtle hints and foreshadowing about the twist to come. In the post-conviction narrative, this involves finding and highlighting facts about the original investigation and conviction that are especially important to the new evidence—creating a negative space in that initial narrative that can be filled by new evidence.

Popular fiction provides multiple examples of how powerful this technique can be. In the film *The Sixth Sense*, the plot primarily centers on the relationship between Bruce Willis's character, Dr. Malcolm Crowe, and a young boy he is treating.[80] However, significant screen time is spent on a secondary plot involving what appears to be a strained relationship between Dr. Crowe and his wife. The two are not speaking to each other. She silently picks up the check at an anniversary dinner. Several times we see the wife emotionally upset. Several times we see her comforted by another man when she is in pain. The film lingers on these moments to the point that Dr. Crowe's marital problems become a significant subplot to the film.[81]

In fact, the entire subplot was a highly effective way to call attention to a specific part of Dr. Crowe's story that the screenwriter knew would look different with new information. As the audience (and Dr. Crowe himself) learns that Dr. Crowe is dead, the film flashes back to the scenes of marital strife, which allow the audience to absorb the subplot in a completely new light. Dr. Crowe's wife's apparent coldness is the result of the fact that she

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75. *Cf.* Seth A. Friedman, *Cloaked Classification: The Misdirection Film and Generic Duplicity*, 58 J. FILM & VIDEO 16, 19–21 (2006) (identifying the revelation of Tyler Durden's character in the movie *Fight Club* as being the imagined alter ego of the narrator as an example of "changeover").

76. *Id.*

77. Vera Tobin, *Cognitive Bias and the Poetics of Surprise*, 18 LANGUAGE & LITERATURE 155, 157 (2009).

78. *Id.* at 168.

79. *Id.* at 157.

80. THE SIXTH SENSE (Hollywood Pictures 1999).

81. *Id.*

cannot see or interact with him. Her tears are not for the state of her marriage, but for Dr. Crowe's death. The voice of the boy is recalled, reminding Crowe that dead people do not know they are dead. The scales fall from the viewer's eyes.

As exciting as post-conviction cases can be, they will rarely have such a cinematic reveal. Still, the same basic storytelling principles apply. Newly discovered evidence will necessarily contradict some of the evidence presented at trial. More precisely, what it contradicts is a *specific interpretation* of that evidence. A good post-conviction narrative will tell the story of the investigation and conviction in a way such that the new evidence can snap into place in the story, recasting what readers initially believed was irrelevant or damning evidence. This means first deconstructing the prior narrative and re-evaluating the full landscape upon which it was built.

B. Deconstructing the Existing Narrative

As discussed above, the existing trial record is likely a result of at least some intentional bias and filtering.[82] Trial testimony is prepared and intentionally crafted by attorneys with a specific narrative in mind. A few dozen pages of testimony will rarely capture the full scope of information contained in an extensive investigation. And, depending on discovery practices in place at the time, the defense may not have had access to direct evidence that could have been used to impeach a State's witness at trial. Gaining access to the original police reports and witness statements is essential to recognizing and filtering out bias that may have crept into the trial.

In fact, leaving aside intentional bias, second-hand summaries should never be relied upon as a foundation for post-conviction narratives. Insofar as the truth is contained in the entire record, it cannot be presented on its face without summarizing and editing for content. No matter how pure an author's intentions, any decision about which facts to include and which to exclude must reflect a point of view about the overall narrative. Relying on a second-hand summary, however, increases the risk of innocently omitting critical facts that only look important in hindsight.

It is easy to find real-world examples of how summarization can bias a narrative. In 1975, three black men—Ricky Jackson, Kwame Ajamu, and Wiley Bridgeman—were convicted of the murder of a white salesman in Cleveland, Ohio.[83] The case was based largely on testimony from a single

82. *See supra* Part II.

83. State v. Jackson, No. 36181, 1977 WL 201428, at *2 (Ohio Ct. App. May 26, 1977). At the time of the trial, Kwame Ajamu's legal name was Ronnie Bridgeman. Maurice Possley, *Ricky Jackson*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=4553 (lasted updated April 11, 2016). After the trial, he changed his name. *Id.*

witness, thirteen-year-old Eddie Vernon ("Vernon").[84] All three defendants were sentenced to death.[85] Vernon's recantation, almost forty years later, ultimately resulted in the exoneration of all three men.[86]

On direct appeal of their decision, the appellate court devoted fourteen paragraphs to the State's case, detailing testimony from over a dozen State's witnesses. The sole description of the defense came in a single paragraph at the end: "The defense offered many witnesses who contradicted parts of Eddie Vernon's story. An alibi was also presented. At the close of all the evidence, the defense again moved for acquittal. The motion was denied."[87]

In fact, these "many witnesses" included several schoolchildren who confirmed that Vernon was on the school bus with them when the shooting happened, not on the sidewalk mere feet from the shooting as Vernon had testified.[88] Jackson's alibi consisted of multiple people who confirmed that neither he nor his co-defendants were anywhere near the shooting when it happened.[89] At least one other witness, Karen Smith, had seen the actual shooters loitering at the scene just before the shooting.[90] Smith confirmed that the men she saw were not any of the three co-defendants.[91]

Given this evidence, the appellate summary might be seen as some kind of intentional effort to skew the evidence against Jackson. And as described above, we know today that race almost certainly played a role in Jackson's conviction and sentence.[92] There is, however, a less nefarious explanation. The main strategy of Jackson's attorneys on direct appeal was to attack the sufficiency of the evidence against him.[93] In evaluating that claim, the court was required to weigh evidence in a light most favorable to the State, and had an obligation *not* to consider defense witnesses in deciding whether the State had presented a bare, prima facie case.[94] The context of the claims framed the appellate court's story. An appellate court's summary of the facts has its

84. Possley, *supra* note 83.

85. *Id*.

86. *Ohio Man Ricky Jackson, Exonerated After 39 Years in Prison, Sues Police*, NBC NEWS (May 19, 2015, 5:30 PM), http://www.nbcnews.com/news/us-news/ohio-man-ricky-jackson-exonerated-after-39-years-prison-sues-n361531.

87. *Jackson*, 1977 WL 201428, at *2.

88. Transcript of Record at 784, 843–44, State v. Jackson, No. CR-75-020436-B (Ohio Ct. Common Pleas, Crim. Div., Aug. 11, 1975).

89. *Id.* at 914–21, 951–71, 1104–10.

90. *Id.* at 701–03.

91. *Id*. at 735–36; Kyle Swenson, *What the Boy Saw*, CLEVELAND SCENE (June 8, 2011), http://www.clevescene.com/cleveland/what-the-boy-saw/Content?oid=2598138.

92. *See supra* note 1.

93. State v. Jackson, No. 36181, 1977 WL 201428, at *2 (Ohio Ct. App. May 26, 1977).

94. State v. DeHass, 227 N.E.2d 212, 213 (Ohio 1967); *see also* Jackson v. Virginia, 443 U.S. 307, 319–20 (1979).

own purpose, which, intentionally or not, may not always include a complete and fair description of the *entire* trial.

Nor can a full picture of the actual crime be found in the trial record. The record does not reflect the strong leads against other unrelated suspects, nor could it capture those suspects' lengthy criminal histories after Jackson's conviction.[95] Trial testimony struggles at times to capture the predictable way that Eddie Vernon's story evolved over time, eliminating previous inconsistencies and incorporating information learned by police from other sources.[96] All of these facts are found in primary sources—either recorded observations in police reports or direct witness statements. Sometimes these facts do not make it to trial as the result of intentional trial strategy. Other times facts might have been withheld by the State or simply missed by defense counsel. In Jackson's case, the police file was disclosed to defense counsel *during* trial, and counsel did not receive an extension to investigate alternate suspects, questions regarding Vernon's credibility, and tunnel vision in the police investigation.[97] Whatever the circumstances of trial, a successful and accurate post-conviction narrative requires knowing and understanding these original sources whenever possible.

At first, returning to original sources might (and should) seem like a step backward in terms of clarity. Getting closer to original sources will necessarily blur and confuse the narrative of the crime. Primary sources are often messy and inconsistent in minor or major ways. They may show witness testimony evolving over time. They may show police attitudes and theories evolving over time. Various facts and statements may be frustratingly ambiguous or open to multiple interpretations. The narrative might become unwieldy and meandering in ways that might not always be helpful to the defendant.

But among that rubble are the cornerstones of the new story. The most important kind of facts for the credibility of the new narrative are those which may have seemed insignificant at the time the prior narrative was created, but which might take on new significance in light of new evidence. These are the lynchpins of the new story and will help frame not only the crime itself, but the investigation and conviction as well.

C. Broadening the Narrative Perspective

The narrative created by an appellate court is the first "post-conviction" narrative and often the starting point for future courts as to what happened.

95. Swenson, *supra* note 91.
96. *Id.*
97. Transcript of Record, *supra* note 88, at 362–63, 378.

An appellate court will focus on the trial record, and it will present the narrative in those terms. Witness *A* testified to this, and Witness *B* testified to that. In a post-conviction context, however, this narrative—how the conviction happened—must be a part of the story itself. Therefore, the narrative has to take a broader perspective. Instead of simply recounting witnesses, a potential structure might be something like the following:

1. Description of the investigation.
2. Description of the trial and conviction.
3. Revelation of new evidence.

All of these narratives orbit the central crime. But beneath the surface must be a story about how the narrative—specifically, the false narrative—was created during trial. The focus is not only on "what happened" in the original crime. It must also be on how police purported to discover "what happened." It must be about how information was added or subtracted for trial, about what story the jury heard, and finally how and why that story was incomplete.[98]

With so many competing and often conflicting narratives, finding a single appropriate perspective can be difficult. Nonetheless, a post-conviction narrative should avoid the temptation to divine what "actually happened" in a third-person, omniscient sense. A play-by-play narrative of the crime—based on a defense theory or defendant's alibi, and without explicitly referencing factual sources—can come across as either confusing or phony.[99] Police and prosecutors are quick, of course, to tell a jury the story of what "actually happened" in the crime. But one of the major themes of a post-conviction narrative is that one should be suspicious of these attempts. The only story that can accurately be told about what "actually happened" leading up to the conviction is what actually happened in terms of the investigation and trial. Not only will this present a less biased view of the crime, but it will often provide a more accurate picture of how an investigation and prosecution may have gone wrong.

For similar reasons, aggressively attacking the State's narrative during its introduction may also backfire. Of course, in many wrongful conviction

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98. DOUGLAS H. YARN, GEORGIA ALTERNATIVE DISPUTE RESOLUTION PRACTICE & PROCEDURES § 5:8, Westlaw (database updated May 2016) ("Employing an 'outsider's view,' or a generalized view more prone to see decisions in their context of similarity with other situations, can provide the basis for comparisons that may reveal the existence of bias . . . .").

99. Because of heuristics related to anchoring, "judgments tend to be excessively influenced by an initial impression, perspective, or value." Epley & Gilovich, *supra* note 73, at 311. The initial "impression, perspective, or value" of the reader is not the one presented by the author after the conviction—the initial impression will come from the *a priori* assumption, post-conviction, that the inmate has been convicted and is likely guilty.

cases, there may be fairly obvious problems with the original conviction.[100] But the focus of the initial story should not be an authentic presentation of the crime; it should be an authentic presentation of the investigation and conviction. Even audiences who may not be familiar with the facts of this particular case "know" *something* about it; they "know" that multiple actors, including a jury, have evaluated this evidence and found guilt beyond a reasonable doubt. They may "know" the frequency of meritorious motions for post-conviction relief is low.[101] This knowledge is the foundation on which the defendant's new story will (or won't) be understood.[102] A defendant was arrested, tried, and convicted, presumably by actors who were neither evil nor grossly incompetent at every stage. If the narrative is presented in a way such that the audience cannot understand why police arrested the suspect or how a jury could have possibly convicted the defendant, the narrative might seem jarring and suspicious, and it might be rejected as unconvincing.

It is important to note that adopting a broader perspective does not necessarily mean telling the same story multiple times. One of the most common mistakes law students make in wrangling with multiple narratives, however, is to recount each stage of the conviction from multiple perspectives in their entirety. First, they might try to describe the basic facts of the crime from a kind of third-person, omniscient perspective. Then they might describe the investigation, necessarily repeating many of the earlier facts as police purport to discover "what happened." Then, they might give a full description of the trial, where the same facts are often repeated a third time in the course of describing trial testimony. These narratives are often presented unsympathetically, sometimes interspersed with the new evidence that is the subject of the motion in order to challenge the narrative at each step.

Repeating the chronology of the crime multiple times is poor storytelling and a particularly poor way to counter the inherent biases against a defendant. Readers are likely to lose focus over the course of multiple retellings. Subtle differences in each narrative become difficult to remember and track. Multiple complete retellings of the crime make it hard to remember where certain pieces of information first cropped up or how various actors came to the conclusions they did. Worse, once a reader is told a particular story, they may be overconfident that they fully understood it,[103] and they

100. Recognition and resistance of the "'official' but unsatisfying" explanation may, to some extent, be culturally ingrained. Friedman, *supra* note 75, at 24.

101. State v. Nichols, 463 N.E.2d 375, 378 (Ohio 1984) ("We are mindful that commentators have viewed the evolution of postconviction relief in Ohio as having created a virtually futile review process.").

102. *See* Epley & Gilovich, *supra* note 73, at 311 ("This anchoring-and-adjustment heuristic is assumed to underlie many intuitive judgments . . ." and "explain[s] why judgments tend to be excessively influenced by an initial impression, perspective or value.").

103. *Id.* at 312–13 (discussing the effects of "anchoring").

may be more likely to skim a lengthy retelling of that story. Leaving key facts to the second or third full retelling of the crime means that those facts are likely to be lost in the mix.

A more effective and coherent narrative, where possible, should use one single perspective to introduce the core facts of the crime and then focus only on key themes in or differences between the other perspectives as they arise. Facts should be introduced as they were discovered, with particular attention paid to how police and the jury reached a conclusion of guilt, and foreshadowing the impact of the new evidence that will be introduced later.

For example, in a typical post-conviction case, almost all of the core facts of a crime can be told from the perspective of the investigation and pretrial interviews. This story can use citations to the trial record but should try to be faithful to the perspective and chronology of the investigation as it actually unfolded. Again, this is often easier if the writer has gone beyond the trial record to police reports and other contemporaneously created records.

With this background, the narrative of the trial can be narrower. Trial is rarely about actual fact-finding, but instead about how each side marshals its facts to create its story. Thus, the trial narrative should not be a retelling of the crime—it is a story about the narratives themselves. The description of trial can be brief, with a broader perspective about each side's arguments. Retelling of facts should be limited to specifying which facts presented at trial differed greatly from the investigation. Opening and closing arguments, in particular, are invaluable sources for each side's story—for discovering what each side wanted to—and was able to—tell the jury about what the facts meant.

D. Introducing New Evidence Naturally in the Narrative

With a proper lead-up, the new evidence can be introduced at the conclusion of the narrative, without hyperbole, and with just brief reminders of how it impacts the story. This evidence should assimilate into the narrative naturally, and its impact should be as apparent as possible. Of course, part of the effect of the twist is that it gains value from a reconsideration of the earlier facts,[104] and the impact of the new evidence can be analyzed at length in the body of the brief. But introducing the new evidence should not require fully retelling its place in the story. If it does, then either the initial story was not properly set up, or the new evidence is simply not very strong. As Tobin puts it:

> The rule for this effect [in fiction] is that the 'solution' or revelation should seem, in hindsight, to fit naturally with the information otherwise presented. Conveniently, our curse of knowledge bias

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104. Tobin, *supra* note 77, at 168.

> encourages this very interpretation. Provided that the revelation seems reasonable, consistent, and appropriate enough that the reader can accept it as a plausible outcome of or explanation for the previously narrated events, the curse of knowledge will enhance the effect, making the revelation seem retroactively obvious and inevitable. It can make a good-enough fit feel exactly right.[105]

Introducing new evidence properly can help take control of the cognitive biases that unfairly disadvantage criminal defendants and present a more accurate and compelling post-conviction narrative.

V. CONCLUSION

A defendant charged with a crime who wants to create the predominant narrative faces several challenges. Racial biases may pose an initial hurdle to the creation of a persuasive story. The defendant's efforts will be opposed by a prosecution team that controlled the timing of the initiation of charges and was thus able to settle on a narrative before litigation. At trial, the prosecution team has several other structural advantages, including the ability to present its narrative first, forcing the defense team to wait to respond until the story may have already been accepted as true by the trier of fact. These advantages carry on into appeals, where a reviewing court bases its decision on a record that is the product of the prosecution team's inherent narrative-creating advantages. In the post-conviction context, defense counsel must make special efforts, including the intentional discarding of earlier narratives, the use of a single perspective to introduce core facts of a case, and the careful weaving of newly available evidence into the narrative, to unravel the prosecution's narrative and intentionally rebuild it around a complete version of the facts. In this way, the defense can untell the prosecution's story, undoing the acceptance of a false narrative and, hopefully, reversing a wrongful conviction.

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105. *Id*. at 168–69.