WAYS OF SEEING, WAYS OF JUDGING

Michael E. Tigar

My talk sketches some ideas about a theme on which I have been working for many years. I have been concerned throughout my life in the law with how deciders – judges and juries – see litigants and the issues they bring. Much of my work has involved the so-called "unpopular" client – the outsider. But when we think about it, most litigants are different from the judge, lawyer and jury. They are poorer, richer, of different race, religion or ethnicity, with different problems than we have faced. Yet we are to to judge them if we are judges, decide the "facts" if we are jurors, or tell their stories if we represent them. If the ideas in my talk interest you, here are some other sources to consult. These are things I have read and written along the path. This is, of course – like life itself – a work in progress.

These ideas deal with how we see and interact with the diverse and different people around us. They are not, therefore, simply about judging and lawyering. Indeed, most of the sources below deal with disciplines different from the law, or with aspects of law-related topics that ought to concern all of us as members of civil society.

I

MONET

I came to the image of Monet fairly recently. My wife and I were at the Musée Marmottan in Paris and we looked at Monet's work and his own art collection. It struck me that he had painted the "same thing" several times, yet of course each canvas was different. I also observed that he was a superb draftsman, yet he elided details of the scene in order to convey its essential character. So I wrote that trial lawyers are or should be impressionists. Of course, trial judges and jurors should be as well, seeking the essential point, but I was writing for lawyers.

Tigar, Nine Principles of Litigation and Life 141 (2009).

II

THE IDEA OF DOUBLE CONSCIOUSNESS

Then, in 2010 I was an expert witness before the Inter-American Comission on Human Rights in the case of Orlando Cordia Hall. Mr. Hall, an African-American, was condemned to death in a federal court in Fort Worth, Texas. His appointed counsel did not begin a serious mitigation investigation into his troubled family background until voir dire had begun in his case. I believe his counsel was constitutionally ineffective. I gave an affidavit to that effect in the post-trial litigation, but the federal courts denied relief. The case then went to the Inter-American Commission. I have included some excerpts from my testimony and affidavit before the Commission as Appendix A.

Note that I cite W.E.B. DuBois. DuBois, in his iconic 1903 work The Souls of Black Folk, described the sense that African Americans have of being subject to a "double consciousness" – of being "American" and "Negro." He was talking about the consciousness that African-Americans have of their own circumstance. But it occurred to me that those who judge, decide, or represent anyone whose life experiences are different from his or her own must also cultivate this double consciousness. As my presentation to the Commission says, the litigant-client is abundantly human, but has characteristics that are different from our own human experience. We must understand these in a compassionate way, remembering that pity is the near-enemy of compassion and is something quite different.

As I considered these issues, I thought again of Monet. When we judge, or represent, someone who is different, we must look to what is essential and yet honor what is different. And isn't this what Monet was doing, particularly in his earlier work? So I went looking to see if anyone had expressed this idea? Thanks to the internet, I found Ian Hacking.

The social philosopher Ian Hacking, in his book Mad Travelers: Reflections on the Reality of

Transient Mental Illness (1998), uses the term double consciousness to characterize Monet's having painted the "same" scene in series of paintings of trains, a train station, a bridge, a cathedral and so on.

So now I at least had my dinner speech topic surrounded.

III

WHERE DID THESE IDEAS COME FROM?

It then occurred to me that, as a trial lawyer and teacher about the process of trial, I had been working on these issues for a long time. Indeed, if you want a dramatic instance of how a shift in perspective changes the whole story, look at the Vioxx litigation. I wrote an essay comparing two trials – one in which Merck won and another that they lost. See my essay in Trial Stories 399 (Tigar & Davis eds.)(2008), published by Foundation Press and available in most law libraries these days, as well as on Amazon as a book or a Kindle download. There is much in that book that illustrates my theme, and some great essays about iconic trials.

In short, I was like Moliere's character who said, "Par ma foi! Il y a plus de quarante ans que je dis de la prose sans que j'en susse rien." My goodness, for forty years, I have been speaking prose without knowing it!

Also, I had been impressed by the Biblical injunctions concerning strangers:

- Exodus 22:21: Thou shalt neither vex a stranger, nor oppress him: for ye were strangers in the land of Egypt.
- Exodus 23:9: Also thou shalt not oppress a stranger: for ye know the heart of a stranger, seeing ye were strangers in the land of Egypt.
- Leviticus 19:34: But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself; for ye were strangers in the land of Egypt.
- Deuteronomy 10:19: Love ye therefore the stranger: for ye were strangers in the land of Egypt.

We – lawyers, judges and sometimes jurors – suffer from hubris. We are tempted to feel superior to those involved in the process of seeking justice. We are smarter, better educated, and so on. And so, I sometimes recall the words that G.K. Chesterton put in the mouth of Father Brown: "One sees great things from the valley; only small things from the peak." It is in a story, The Hammer of God, about a vicar who looked down on people, at first literally and then in all other ways.

For many years, I have been recommending the work of Roland Barthes to colleagues and students in the United States and Europe. I have been particularly taken with his essay about a French homicide trial in which the defendant had no idea of the words, concepts and events of his own trial and yet was treated as the fully-responsible author of his acts and assumed intentions. The essay is in the collection Mythologies, which is available in English and in French under the same title. In the French edition, the essay is Dominici ou le Triomphe de la Litterature. As I wrote in an essay on the way we treat juvenile defendants:

> The French essayist Roland Barthes has written brilliantly about this objectification of the defendant. The criminal law system "judges man as a 'conscience' without being embarrassed by previously having described him as an object." Or, more tellingly:
>
> > Periodically, a trial, and not necessarily a fictional one as in Camus' The Stranger, reminds you that Justice is always ready to lend you a spare brain, in order to condemn you without remorse, or in the manner of Corneille, to paint you not as you are but as you must be.
> >
> > Or in the original:
> >
> > Périodiquement, quelque procès, et pas forcement fictif comme celui de l'Etranger, vient

> vous rappeler qu'elle est toujours disposée à vous prêter un cerveau de rechange pour vous condamner sans remords. . . .

That essay appears as "What Are We Doing to the Children: An Essay in Juvenile (In)justice, 7 Ohio St. J. Crim. L. 849 (2010). You can find it on line. The treatment of juveniles in the criminal law is of course a dramatic example of failing to have this "double consciousness" of which I speak. I recommend the essay to you.

Looking back at my earlier work, I also note that I worked with notions of symbolism in trials in a slightly different setting. Were I to rewrite that work today, I would make explicit reference to the ideas that I am sharing in the dinner speech. As Appendix B I have attached an article I did in 1999 in Litigation magazine that touches on these issues.

I have also found help in Mikal Hogan, Four Skills of Cultural Diversity Competence: A Process for Understanding and Practice (3d ed. 2007). Professor Hogan teaches in Los Angeles. Her book is part of a program for teaching cross-cultural understanding.

IV

BRINGING IT HOME

As a lawyer, I have had many "homes." The federal courts in general and this one in particular have been home to me. The Los Angeles area is my home: I was born and grew up here.

Federal judges almost uniform in their condemnation of the Sentencing Guidelines, and not always for the reasons that the Supreme Court used in striking them down. The Guidelines were and still are an example of single consciousness, of a Procrustean view of human experience.

I first appeared as a lawyer in this court representing a young Mexican-American charged with draft evasion. That experience is chronicled in Tigar, Fighting Injustice 134 (2002). That was an experience in double consciousness in many ways.

But closer to home was the late Robert Takasugi, whose life and approach to judging illustrate some of the things I have been saying. As a tribute to him said:

> Judge Takasugi never forgot the experience of internment. "I was a consequence of history," he said in 2007, accepting a public service award from the U.C.L.A. alumni association. "In 1942, as an 11-year-old child born in Tacoma, Wash., I became a prisoner of war imprisoned in an American-style concentration camp by the country of my birth. I vividly recall the military guard towers manned by armed soldiers surrounding the perimeter of the high-fenced walls which separated us from the free world. There were no formal charges, no right to face and confront the accusers, nor a right to a trial or hearing. Imprisonment was based on the accident of ancestry. From this unfortunate history, a lesson should have been learned that under our Constitution, a truly free government must dedicate its powers to and for the people, and that our representatives must adopt this commitment with integrity as a nondelegable duty and responsibility."

Judge Takasugi brought this insight to bear even when considering the cases of the most outcast and "other" of litigants – those said to be involved in terrorism. From his life experience, his impressionist approach to justice, and his understanding of double consciousness, we can all learn a great deal.

APPENDIX A
EXCERPTS FROM TESTIMONY AND AFFIDAVIT IN THE HALL CASE

From my testimony, October 25, 2010: In exhorting jurors to impose death, prosecutors must try to make them feel that doing so is just and right. At bottom, the prosecutor asks each juror to endorse with her name an order directing the State to tie down a human being and put poison in his veins until he is dead. Most jurors will not take that step unless they are convinced that this particular human -- the defendant -- has become the "other," the not-human, unfit to remain in human society.

Capital defense attorneys sometimes speak of "humanizing" the defendant, a phrasing that reflects the dominant cultural narrative that regards crime as an evil act by an autonomous individual. No defendant needs "humanizing," as he is quite human already. I would say instead that defense counsel's task is to *reclaim* and *assert* the defendant's humanity *in its fullness*. Counsel must lead the jurors not simply in pursuit of some sensible understanding of how the defendant could have come to commit murder, but also so that they come to see the defendant as more than just the author of his crime – as a person with strengths and frailties, and whose life has value that makes it worth sparing.

Mr. Hall's trial attorneys carried with them the attitudes and experiences of the *dominant culture*: they were Anglo men, educated professionals, in positions of authority, commanding respect. But those very traits separated them sharply from Mr. Hall, an African-American man who emerged from poverty and deprivation, raised in a turbulent household in a racially striated community, his opportunities for self-transformation constrained by a culture marked by generations of loss and hopelessness. Trial counsel were part of the same dominant culture reflected in the court and jury, and they did almost nothing to overcome their lack of information.

To put this issue in context, it is well to reflect that this is a commision on "human" rights. The American Declaration reflects the historical truth that the struggle of the Americas has largely been that of indigenous and minority peoples against the dominant culture. Every State in the Americas was at one time a colony. Particularly with respect to the African-Americans who were brought to the Americas as slaves, the Commission has commendably recognized the special obligations of member states. The papers before you cite some of these efforts.

The lawyer's role in bridging the gap between her client and the "deciders" in the dominant culture has been recognized as fundamental for centuries. In my own work, I have documented this concern going back to the 13th Century in the work of Philippe de Beaumanoir, and one finds a discussion of the issue as early as the Roman satirist Petronius, in the *Satyricon*. The Commission has recognized counsel's obligation in, for example, the Castillo case that arose in Cuba.

Applying these principles to the present case, Mr. Hall's trial attorneys had a duty to pursue a far-reaching investigation into their client's character and background not simply because a long-settled consensus in our professional community requires it – as reflected in the guidelines adopted since 1989 by the American Bar Association regarding the proper defense of capital cases, which the Commission has acknowledged in its earlier decisions – but because the *audience* to which they would *appeal* for Mr. Hall's life, the jury, was likely to be as different from Mr. Hall as counsel themselves. Reasonably competent counsel in 1994 would have anticipated the need to assemble every piece of evidence that might persuade a single juror to turn towards life as a result of having seen Mr. Hall's humanity "up close" and in rich, anecdotal detail. That is even more true where, as here, the jury was all-white.

From my post-hearing affidavit:

The prosecutor, as I noted, is trying to convince the jury that this defendant is the "other," unfit to live in human society. Defense counsel must present evidence and argument that makes the human connection between the jurors and the accused. The lawyer representing Orlando Hall – or any

"Orlando Hall" – must convey both the universal message that the jury and the defendant share a common humanity, while painting the particular struggle of this black American who grew up in this particular way, in this particular place, under these specific conditions. Only thus can counsel help the jury avoid what Du Bois described a century ago: the majority society's reflexive tendency to measure the African-American soul "by the tape of a world that looks on in amused contempt and pity." W.E.B. Du Bois, THE SOULS OF BLACK FOLK (1903).

For millennia, lawyers have understood how different cultures and experiences shape expectations and conduct. One important thread of legal development in the West is how to accommodate the strands of continuity, diversity, and change. The Roman legal tradition, and later the canon law, sought such accommodation through restatements, "institutes" and collections of commentary. Indeed, Roman law in the classical period sought to accommodate the differing legal traditions of the various peoples within the Empire as part of a *ius gentium*, or law of all peoples, administered by a *praetor peregrinus* appointed to that task. The common law tradition moved differently, but faced the same challenges. Such institutions as the "personality of laws," which prevailed in Europe for centuries, reflected this aspect of lawyers' work. The competing secular, religious, feudal and royal jurisdictions also showed us how social, cultural and political differences may operate in civil society. This historic role of lawyers forms an important shared tradition. I have discussed this at some length in my book LAW AND THE RISE OF CAPITALISM (1977).

With specific reference to advocacy on behalf of the accused, in the earliest records we have, we see a developing idea of presenting a "stranger" to the deciders. The stranger may be someone who lives in the same community as the jurors, but whose profession, race or other characteristics set him apart from them. See my discussion of Cicero's *Pro Murena* in my book PERSUASION: THE LITIGATOR'S ART (1999) at 21. This issue has been brilliantly captured in Roland Barthes' essay *Dominici ou la Triomphe de la Litterature*, discussed in PERSUASION at 4-5, and contained in Roland Barthes, MYTHOLOGIES (Editions de Seuil 1957) at 50. I do not dwell at length on this history, for modern developments shed more light on the topic. It is worth noting that Philippe de Beaumanoir, in 1283, remarked in his treatise *Coutumes de Beauvaisis*, of the gap between the life experiences and modes of expression of the common man versus the lawyer, and the latter's need to seek to understand his client's situation. The Church canonized Ivo of Brittany – St. Ives (1253-1303) – in 1347 because he was a relentless advocate for the poor.

Let me turn, however, to the developments since World War II, which show an international consensus that is reflected in *opinio juris*, state practice, international custom, and relevant treaties. To save time, I refer to my colleague Richard J. Wilson's magnificent book DEFENSE IN INTERNATIONAL CRIMINAL PROCEEDINGS: CASES, MATERIALS AND COMMENTARY (2006) (Michael Bohlander and Roman Boed, co-editors), particularly Chapter 2, "Procedural Safeguards for the Defense in International Human Rights Law." Professor Wilson traces relevant history and notes the role and responsibilities of counsel from the Nuremburg tribunals, through the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. He also discusses the American Declaration, and reminds us of the issues that Petitioner confronts in this hearing. One should also review the sentiments in Chapter 1 of the book, by Michael Bohlander, reminding us of the special dangers when a person on trial is regarded as a "stranger," the "other." See also my discussion in PERSUASION at 25-27.

APPENDIX B

***25** THE POWER OF MYTH: JUSTICE, SIGNS, AND SYMBOLS IN THE CRIMINAL TRIAL
Michael E. Tigar

We all use imagery in trials. To persuade, we have a theory that involves the use of symbols. As we deploy these symbols, we often--and deliberately--tap into powerful myths that have taken root in social consciousness.

One need not be a litigator to use and understand signs, signifiers, and what is signified; nor must one be a litigator to understand the power of myth. But signs and signifiers surely play a role in all litigation. The central notion of contract, "a deal is a deal," for example, is more powerful an image than is suggested by the rhetoric of offer and acceptance.

Words are signs. So are statues, flags--and gestures, as Nelson Rockefeller taught us all. Paintings and drawings are signs. My former sister-in-law teaches art, and some of her students say, "I paint for my own pleasure, it really doesn't matter to me what I'm doing, I'm the next Jackson Pollock." Pollock, as you may recall, did paintings that looked, in John Berger's words, as though they were done on the inside walls of his mind. "No," she says to the students, "you are condemned to signify whether you like it or not, because as soon as your work is exhibited, other people are going to regard it and come to conclusions about what you might have meant."

"Condemned to signify": in court, our words, our gestures, even our dress, are viewed as having meaning. Observers who are seeking a result transform our behavior. They often transform it against our will and despite our best efforts. The hallmark of the litigator is to understand the process by which what is signified is interpreted by those who are watching. And perhaps the best way to understand the process is to focus on one narrow aspect of it-- here, the jury trial, and particularly a criminal jury trial.

We know that sometimes our attempt to signify fails. In the first case in which I was on the trial team (as the most junior member), the defendant was charged with under-reporting his income. Boris Kostelanetz, the brilliant tax lawyer, was co-counsel with Edward Bennett Williams. Kostelanetz put on his partner Jules Ritholz as an expert witness to explain to the jury the difference between capital gains, which would be taxed at one rate, and ordinary income, which would be taxed at a higher rate. Kostelanetz queried Ritholz for half a day about capital gains and ordinary income. The next morning, the marshal reported that when two jurors were speaking to each other on the way out of the courtroom, one asked, "Who in the hell is Captain Gaines?" The other answered, "Well, I think he's going to testify tomorrow."

That should tell us that our efforts to signify, the intended object of those efforts, and the unity of the efforts and the object--in what the French essayist and social critic Roland Barthes would call a sign--do not always come together as intended. But that does not mean that we should abandon those efforts. Perhaps it means that we need to understand what we are doing--using symbols to teach and persuade.

To illustrate how we can use symbols as elements of persuasion, I will use the terms "words," "text," and "signifier" interchangeably to refer to the primary unit of communication. That primary unit of communication is the tool we use to attain the three keys of our presentations as advocates. What we do in trial must be, first, provable; second, material; and third, evocative.

Provability has two elements. The first is that the evidence exists. We do not see facts in litigation. We see evidence, archeological specimens, of facts. We see witnesses who recount some version of what they saw in the past. We see a document that may or may not mean something. Or we see an object, like a gun, that is attached to a testifier and has no more significance than the testifier can give it.

As we consider what is provable, we are bound by the rules that pertain to truth and ethics. The evidence must bear some relationship to what really or plausibly happened or could have happened. The rules of ethics do not bind us to present only true evidence: we all understand that witnesses we present in good faith could be mistaken. They could have misremembered, or misperceived, or misstated. They could be biased, or, without our consciously being aware of it, they could even be attempting to purvey a false story. But within the realm of what is provable, we understand an obligation to ***26** seek the truth and to limit our presentation to what is plausibly presentable as the truth.

Provability means something more, however, than simple fidelity to some plausible vision of what happened. The rules of evidence, most obviously those concerning relevance, mediate provability. I might find evidence that I think logically relates to my case, but the rules of relevancy may say that it is not admissible.

Among the most common of such rules is the limitation on the presentation of so-called "other crimes evidence." A great deal of a defendant's past bad conduct is admissible. But under Federal Rule of Evidence 404(b) and its state counterparts, there are limits. No matter how relevant we might think it that a defendant has a criminal record or has committed criminal acts in the past, the rules restrict the use of such evidence. The rules mediate and restrain what is provable in an ethical or truth-seeking sense.

Many rules perform these functions: rules about authenticity, about original writings as opposed to secondary evidence, about hearsay, and about privilege. Sometimes, these rules bar the admission of evidence and prevent jurors from hearing it at all. Sometimes, however, these rules will not be applied to keep evidence away from jurors entirely, but to instruct jurors--those who will receive these words, this text, these signifiers--about what to do with them. That is, the rules may limit the jurors as to what may permissibly be signified by the evidence they hear.

For example, a statement other than by the witness while testifying is hearsay if offered for the truth of a matter asserted. In a classic supermarket slip and fall case, can a witness testify that the supermarket loud speaker system was blaring the fact that there was a "ketchup spill in aisle six" when the accident occurred? That statement is probably not admissible as tending to show that there was ketchup on the floor. But it might be admitted to show that a warning was given. So if the evidence comes in--and it might not--the jurors will be instructed, "Members of the jury, you can hear this sign, this set of signifiers, but you can only permit it to signify that a warning was given; that is all you are permitted to take from it."

Of course the lawyer who wants that evidence before the jury will say, "Yes, your honor, please do give that limiting instruction, and let it in." And on one level, it makes sense to admit the evidence as signifying one thing but not another. Stanley Fish, the great rhetorician, has taught us that any reader of any text can determine what the text means to her and that any such reading is valid for that reader.

Jurors no doubt have the capacity or power to give the text any of a number of meanings, including that embodied in the judge's limiting instruction.

Whether they will follow that instruction may be a different story. The Supreme Court has at times honored Justice Jackson's insight that all lawyers know that juror obedience to limiting instructions is unmitigated fiction. The Court has therefore put limits on the extent to which we may attribute to judges this magical power of instructing jurors not to take from the signifier any more significance than the law permits. In trials, as in life itself, some signifiers are so powerful that their significance cannot be blunted or altered.

Posting Signs

Of course, as we choose from among the signifiers that are provable in these two senses, we must remember that there are two sides to the case. As we consider what signifiers are going to be used, what might be signified, and how they might unite into some sign or set of signs, our adversary is doing the same thing; as we try to post our sign, our adversary is trying to post other signs with the same or other signifiers. And we must also keep in mind this concept of door opening--that is, some evidence that our adversary might want to use will not be admissible unless we get things started. Once we say, for example, "My defendant is a person of good character," we empower our adversary to bring in all sorts of otherwise inadmissible signifiers about the defendant's past conduct.

This leads to the second key to our presentation, materiality. Every law student learns the difference between relevancy and materiality. Relevancy in the rules of evidence and in general parlance is the tendency of an item of evidence to prove a disputed proposition. Materiality tells us what propositions are legitimately in dispute.

Here is an example from a California case, People v. Gorshen. Gorshen was a longshoreman. He was 56 years old. He worked on the docks in San Francisco. His walking boss, O'Leary, insulted him and called him a name suggesting that Gorshen was deficient in matters of manhood. Gorshen was, in fact, sexually disturbed and worried about declining sexual power. These words pushed a button. And so did O'Leary, who also punched and kicked Gorshen so hard that stitches were necessary to close the wound.

Gorshen went home, got a gun, and returned to work. In the presence of the police--who had been called because of Gorshen's threats--he shot O'Leary dead. The prosecutors charged Gorshen with premeditated murder. There was no question that Gorshen intended to kill O'Leary, and the crime could hardly be voluntary manslaughter because Gorshen brooded on the matter so long that there was no sudden passion.

The California Supreme Court held that psychiatric evidence ***27** was admissible because it illuminated the different mental states required for first-degree premeditated murder and second-degree malice aforethought murder. The issue was one of materiality and not relevancy. In some abstract sense, psychiatric evidence surely helps us understand why people do things. But the way that psychiatrists pose the question of mental condition may or may not fit the legal categories of the criminal law under the name of mens rea.

Indeed, in the years since Gorshen was decided in 1959, the law has changed dramatically. After the

Hinckley case, in which the young man who shot President Reagan was found not guilty by reason of insanity, federal and state law has shifted. Evidence of the defendant's mental condition is not material unless it meets new and stricter criteria.

The distinction between Gorshen and these more recent cases illustrates one of the most important uses of the concept of materiality--to foreclose evidence of mental condition. In the criminal law, the categories of intent are narrow and fundamentally false. Using the Model Penal Code four-part division, adopted by most states and used by federal courts as well, those categories are purposeful, knowing, reckless, and negligent. We use these terms, and the concept of mens rea, to claim that we do not punish the evil-doing hand unless it was actuated by the evil-meaning mind (to paraphrase Justice Jackson again). And yet the law today rejects, as immaterial, insights based upon centuries of professional understanding about human motivations. If we are to convince a jury to consider all aspects of a defendant's character, we must do so despite the limits materiality places on our evidence. And that is no small task.

The Obstacle of Materiality

Consider the case of a defendant raised in a ghetto, the victim of racial persecution from birth, who, in an explosion of rage, commits a crime. Evidence of his upbringing and background--of all the reasons why that explosion of rage may have occurred--will not usually be admissible except on the issue of punishment, or unless the defendant is willing to shoulder the burden of proving insanity. This evidence will not usually be admissible on the issue of whether the defendant's behavior was purposeful, knowing, reckless, or negligent.

By the same token, if a defendant is raised in an environment of drugs, guns, and money and commits an offense of narcotics sales, evidence of his upbringing will not be admissible. A Holocaust survivor who experiences trigger reactions--not admissible. It is no different in our courtrooms today than it was in that Daumier cartoon of the well-fed judge confronting a defendant charged with stealing bread. Says the judge, "You were hungry? You were hungry? I'm hungry three times a day, but I don't steal because of that!"

We find this artificiality throughout the law, but it is most obvious in the criminal trial. A criminal law system needs a set of concepts about intent in order to justify itself. We cannot, so theory goes, punish anyone--give them their just deserts--unless we can prove by the requisite standard that their conduct was in some measure the product of their free will. And so, because we understand that social conditions of black rage or of being raised in the ghetto or of being a Holocaust survivor may very well interfere with our practical freedom to make choices, we simply declare the evidence immaterial, all in the interest of maintaining the fiction.

Roland Barthes, the brilliant French essayist and social critic, wrote an essay about a famous French homicide case. Dominici, a French farmer, was charged with killing an Englishman. Dominici did not even understand the simple words of the charges against him. But his actions could be portrayed as meeting the statutory standard of intentional murder, and so he was condemned to die.

As I wrote in Persuasion: The Litigator's Art:

If you make a habit of defending underdogs, the system is always ready to lend you an ideology, the better to deny your client justice without the slightest regret. This is a paraphrase of one of Roland

Barthes' most trenchant observations, in his essay on criminal justice, "Dominici, or the Triumph of Literature," collected in the book Mythologies. Barthes writes, characterizing the Kantian "as if":

> ... That is, the system that calls itself Justice is always willing to tend you a spare brain, in order to condemn you without remorse, and in the manner of Corneille, to paint you as you must be and not as you are.
>
> We treat the accused, no matter how poor and deprived of understanding, as though he were the conscious and willing author of his acts.

This Kantian idea, this myth of will, fulfills itself by barring evidence. Thus, through the interposition of materiality, the law falsifies both the common understanding of words like "intent" and what our admittedly imperfect science can tell us.

The rules of materiality shut off proof of a defendant's true condition by pretending that intent is universal. A Kantian idea of will deforms our reading of texts, words, and signifiers. A sign--evidence of the defendant's upbringing, for example--is permitted to have only one meaning, and all evidence that might tend to sustain or further some other meaning is immaterial.

What do we do when the rules of materiality are used in this way? We find another way to project our signs, knowing their power, while denying that they can have any meaning other than the law allows. The criminal law is what it does and not what it says, as Jerome Frank reminded us. That observation can be significant in more than one way.

Let me illustrate. A few years ago, anti-apartheid demonstrators invoked the defense of necessity. They claimed that they were taking the only possible steps to prevent complicity in an unlawful and barbaric social system. They had little hope of sustaining that defense within its strict limits. But invoking the defense permitted them to deploy the powerful signs of anti-apartheid rhetoric, and perhaps thereby to convince triers of fact and law to excuse them on other grounds.

A battered spouse who kills her batterer may not be able to sustain a contention that she acted upon a sudden quarrel in the heat of passion. But evidence of the battering may convince a jury to figure out how to give her justice, regardless of legal categories. This invocation of signifiers for something beyond their officially permitted meaning is inherent in our criminal justice system.

Beyond the criminal law, we all use signifiers in our daily lives in ways that overleap accepted meaning. Indeed, in everyday life, some signifiers are so powerful that explanation will not drown their message. Trial lawyers had better understand such things if they are to control the messages being sent in the courtroom.

An example: I bring you a rose. That is the signifier. I ***28** bring you the rose to signify my passion for you. The rose and my passion are united; the rose becomes a sign--a sign of passion, to use another of Roland Barthes's examples. "But," says the judge or some other authority figure, "we permit no passion here. You are not permitted to express your passion in this place!" "Very well," I say. "I bring you a rose as a sign of my respect for the rose-growing season." Or, I say, "I present my rose to signify Platonic friendship and not the Plato of the Symposium and certainly not the part of the Symposium that dealt with Aristophanes."

And the rose sits on the desk. Everybody knows that I was consumed with passion at the moment that

I presented it. My rose is too powerful. It overleaps the bounds that the law seeks to put up. The signifier transcends official efforts to shut off the message.

What does the rose tell us of our criminal case? In my criminal trial, I am permitted by way of background to present the defendant's past. I can bring out all the facts about his or her upbringing. To overcome objections, I often say that I am only trying to provide information that relates to the official, Model Penal Code elements of intent.

If I am doing my job well and this evidence is powerful, the jurors will understand what to do with it. My evidence is, like my rose, a signifier that will not be limited by narrowing constructions. The signifier becomes a sign that may help the jurors mediate the law's rigor.

When I cross-examine an informer, I can point out how many years in the penitentiary his purchased testimony has spared him. The jurors may consider this in assessing whether to believe him. But they may also recoil from convicting the defendant on all the charges, figuring that his conduct does not merit so severe a sentence. They may do this even though the judge tells them that potential punishment is none of their business.

As Professor Robert Ferguson has observed, sometimes we use powerful signifiers to influence an audience beyond the courtroom. Sit-in demonstrators in the 1960s knew that they would be convicted, and they had only slightly more hope of winning on appeal. But in the courtroom they used powerful symbols about justice to speak to those in the community outside.

When John Brown was put on trial for raiding the arsenal at Harper's Ferry, he masterfully used the rules to exclude evidence of his bankruptcy, of his mental instability, of the fact that he was a crazy old man who had an abusive family relationship with those whom he had gotten to assist him. Instead, he made a symbol of himself and his acts. He knew he would lose and would be hanged. But he also hoped that his intended audience beyond the courtroom would see what his acts and his trial signified and take from them a sign. He succeeded. He became, in the poet's words, "old John Brown, whose name rings loud a thousand years." He triumphed over materiality.

Now to the third part. Our signifiers, and what we wish to signify, and the sign we wish the hearer to draw, must be evocative. In selecting our signifiers, we must understand that we are engaged with the jurors in a process whereby their socially determined consciousness determines the impact of what we say and do. We want to evoke in the audience what we wish to signify, to invoke a certain character to our actions.

We have choices, like the hapless lover portrayed by Jacques Brel in the song: "Je vous ai apporté les bonbons. Parce que les fleurs, ça est périssable," which translates to "I have brought you bonbons because flowers are perishable." What is signified is the same as if I had brought you flowers, but I chose candy. As Brel sings the song, he pleads that the candy be seen as the same as flowers. He has a chance to succeed. Candy and flowers may well be interchangeable signifiers in our culture. It is not like explaining a sundial to a bat.

In making our own choices, we must understand that some signifiers are very culture-specific. They are different for different people. After Batson v. Kentucky and its progeny, the jury pool is increasingly diverse.

[By the way, that is one reason why diversity in law schools is a good idea, for it helps prepare lawyers to deal with deciders who increasingly represent a broad spectrum of cultural experience. For instance, we would not, without some thought, invoke overtly Christian imagery to a jury drawn from a community known for religious diversity.]

In a court-martial for sodomy, where the "jury" was lieutenant-colonels and colonels and the accused was an officer charged with consensual lesbian sex off-base with a civilian, one could not ask the officers to stand up for gay rights. But one could hold up the tattered remnants of the civilian accusers' story--after vigorous cross-examination--and ask whether a distinguished military career should be ended by crediting the ***29** rantings of ill-motivated civilians. And it was right to remind the "jury" that when it becomes easy to make this sort of charge, the private lives of all would be open to inquiry.

The sign we want the jury to see is based upon a set of precepts shared by both the accused and those sitting in judgment. For a civilian jury, the interplay of civilian jealousy and military solidarity might have no meaning. But in the socially determined consciousness of these deciders, it clearly did.

Finding a symbolic level at which the accused and the jury share something is the first step in developing a case theory. This is a process of abstraction. At the simplest level, they would not share a delight in crime but might all feel that anyone accused must be acquitted unless honorably obtained evidence proves guilt beyond a reasonable doubt. Abstraction, or generalization if you will, is a key element in choosing and using signifiers.

To use yet another metaphor, choosing our signifiers is like mining ore. We can only mine what is there, and our ability to shape a story is a fire in the crucible where the ore becomes gold. We are not inventing, we are discovering and shaping.

As we read in First Corinthians,

> And even when things without life giving sound, whether pipe or harp, except they give a distinction in the sounds, how shall it be known what is piped or harped? For if the trumpet give an uncertain sound, who shall prepare himself to the battle?

There it is, in the magisterial words of the King James Version, "things without life giving sound." The signifiers, the raw pieces of evidence, they are "things without life giving sound." Our job is to point them toward what we wish to signify, so that the jurors will take signs from them.

As we make these choices, recognizing that neither language nor culture is universal, we seek to appropriate the broadest, most deeply shared social ideas for our side. These deeply shared ideas are dominant social myths--not in the sense that they are false, but in the sense that they fulfill the role that myth played in ancient society. Here again, writers like Roland Barthes have much to teach us.

Barthes divides communication into three parts. He speaks of words, objects, and gestures as signifiers. He speaks of significance, or what is signified: for example, the rose signifies my passion. And then he speaks of the combination, the coming together of the rose and my intended meaning as a sign. Apart from any particular meaning, the rose is a semi-universal symbol of passion--or at least of high regard. Because of the ubiquity of the rose-as-sign, we may even see the rose as a part of our social mythology.

Barthes says "myths steal language." I would not go so far. Myths appropriate signs. "Appropriate" is a nonjudgmental word, because you can appropriate a sign or symbol for your own benefit and the doing of it can be either good or bad. It can be stealing or not stealing. It can be legitimate or illegitimate. It is what we do in trials--we appropriate signs and use them as tools of influence.

A trial is full of myths. We say to the jury, "John Jones, the banker." We are calling up a socially determined image of bankers. Ben Stein's book The View from Sunset Boulevard argued persuasively just how much our image of professions and issues is shaped by the media. Can anyone say "emergency room doctor" without most people thinking of a television series? The jurors' view of almost every profession is the product of cultural myths.

One of Roland Barthes's brilliant essays is about a magazine photo of the writer Andrè Gide on vacation in Africa. There is Gide sitting on a boat going down the Congo River. He is editing, writing. The myth of the writer: false worker and false vacationer. The writer, unlike the ordinary worker, is always a writer no matter what time of day, just as Louis XIV was always king, even when seated on the chaise percée.

Consider also Charlie Chaplin, about whom Barthes has an essay that came to mind as I was speaking with a friend about Roberto Benigni's movie Life Is Beautiful. In the movie, Benigni is a Jew. He lives in Italy before the Second World War. He owns a bookstore. He is married to a non-Jew, and they have a young boy. One day, Benigni and the boy are scooped up and put on a train bound for a concentration camp. His wife says, "Put me on the train too." In the end, Benigni's character perishes at the hands of fascists, but the wife and boy are spared.

A friend said of the movie, "It trivializes the Holocaust" because it has a light-hearted edge. I replied, "Not to me." One could just as well say that Chaplin's film Modern Times trivialized the plight of the exploited, alienated worker. Modern Times does not have the graphic detail of Marx's chapter on the working day in Volume 1 of Das Kapital. But it certainly makes a powerful point. So with Life Is Beautiful. For me, Benigni has appropriated language-- powerfully--to evoke a series of myths about justice, compassion, and struggle.

Using Myths

When we say that myths appropriate language, we are sometimes saying that they place image above reality. Consider the case of President Clinton. One of my colleagues suggested towards the end of 1998 that President Clinton should have given the reins of power to Vice-President Gore as acting President, so that President Clinton could deal with impeachment issues. President Clinton did not do that. And it would have been unwise for him to do so. After all, his most eloquent defense was to exercise the myth of his office as president: to be seen as important, to be seen as elected and elected twice, to be seen to be supported, to be seen to be repentant, to be seen to be prayerful, to be seen to be powerful.

Another kind of myth, one we often see in criminal trials, is that of the personal epiphany. Informer-witnesses recount their change of heart. In penalty phases of capital trials, the defendant may recount his or her own transformation. This personal transformation may be of the kind that William James described in his book The Varieties of Religious Experience.

Years ago, I represented Fernando Chavez, the son of farm worker leader Cesar Chavez. Fernando had refused induction into the United States Army, claiming that the local draft board had wrongly held that he was not a conscientious objector. Fernando took the stand. He told of a telephone call ***30** from his mother while he was away at college. His mother said, "You've got to come home, Fernando. Your father is going to do another fast as a protest. This time, the doctor says it is dangerous to his health. Come and talk him out of it." Fernando went home to Delano, California, and went walking with Cesar in the fields near their home. When they came back from their walk, Cesar was still on his fast, and Fernando had become a pacifist.

As Fernando described this walk and this talk, he began to cry. And as he did, it touched the sense that all people have, no matter what religion they happen to profess in our society, of the possibility of such conversions, such epiphanies. As Fernando wept, all the jurors began to cry, regardless of their political sympathies. And that was repeated again when Cesar, his father, took the stand and described the same event.

Equality is another powerful mythic concept. It is the ideal that Atticus Finch invoked in To Kill a Mockingbird. We invoke it in almost every criminal case. Sometimes we deploy the Biblical reminder that "ye were strangers in Egypt," and sometimes a more direct image. In the trial of Terry Nichols for the Oklahoma City federal bombing, I said (borrowing from my mentor Edward Bennett Williams):

> More than 30 years ago, I went to Washington, D.C., for the first time. And the very first public building I ever saw was the building of the Supreme Court of the United States. And I saw there where it said "Equal Justice Under Law." And that means rich or poor, or neighbor or stranger, or a tax protester or not, or somebody who is different from us or not.
>
> And wouldn't it be terrible if ... it was thought by anybody that the fitting memory, a fitting memorial to the 168 who died would be to go there one dark night and chop those words off where they are on the lintel above the Supreme Court of the United States?

Then there is the myth of solidarity. It is the most dangerous and yet I think the most powerful. Bertolt Brecht wrote a poem, "All of Us or None." But he did not mean everybody or nobody. He meant "all of us oppressed anti-fascists" must stand against "them," or else none of "us" would be left standing. In the court martial case I discussed above, we invoked the solidarity of soldiers. We invoked it against the privacy-invaders, against the lying civilians. We invoked the myth of solidarity.

In death penalty cases, prosecutors invoke this myth regularly and with dramatic results. Think of what a capital case juror is being asked to do. One will not sign a piece of paper that requires the state to take a human, strap him to a gurney and put poison in his veins until he is dead unless one is convinced that this particular human has somehow become the "other," the not-human. And so prosecutors use, with the Supreme Court's blessing, words like "dog" and "cur" and "animal" because they understand solidarity. The more polite defenders of the death penalty, like some Supreme Court Justices, say the same thing by opining that there is a social contract, the breach of which will place you outside--very, very far outside.

The myth of solidarity, as a tool of influence, can be good or malignant in its effects. We can see the excesses committed in its name--in Kosovo, Ireland, Palestine, and in our major cities. Solidarity can short-circuit reason, for as Shimon Peres said of a political adversary, "We would all prefer to remember than to think."

There is, however, a countervailing myth to use when solidarity is invoked as a means of stirring passions for vengeance. That counterweight might be called an aspect of equality, but is better seen as transcendence. We want the jurors to think beyond the result in a particular case, to think about what principles of judgment ought to guide not just this result but all of human society. We try to help them understand that both they and the defendant are now living in this human society, along with all potential accusers and all potential defendants. Transcendence is abstraction taken to a plane of socially determined myth.

The Oklahoma City Summation

In the penalty phase of the Nichols case, I struggled with this idea of transcendence, in the wake of more than 50 witnesses who described their ordeals in emotional and graphic terms. The government cried out for a death penalty on behalf of those victims. Here is what I said:

I feel now, when I think about that evidence, as though I'm standing before you and trying to sweep back a tide of anger and grief and vengeance. And I'm given pause by the fact that I feel that way, and I wonder if sometimes you might feel that way. But when I think that, then I think also of the instructions that the Judge is going to give you, because those instructions, as we contemplate this tide of anger and grief and vengeance, can get us all to higher ground, because the instructions will tell you that neither anger nor grief nor vengeance can ever be a part of a decision reached in a case of this kind.

I am, when I say this, not attacking these victims. We know their sacrifice. But we know that with the centuries of our civilization piled so high that we have come a very long way from justice based on vengeance and blood feuds.

This trial was moved from Oklahoma City because, I submit to you, it was thought that even the neighbors of those who lost so much would not do to sit in judgment. And to them, therefore, we can only say when we hear their grief and their anger and their desire for vengeance, "Bless those in need of healing."

But when I talk about this process, I want to say that I believe something else. And I don't want to say it in an effort to reach into a place that I'm not entitled to be but to share with you some thoughts about a concept of justice, to share with you some thoughts that suggest that if you come to this point you would turn your face towards the future and not towards the past.

Later in the summation, after talking about the evidence and the judge's instructions, I said:

But, of course, even then, an eye for an eye, conscience of the community? Well, the words do appear, I know, in the Old Testament. They appear at a time when God is instructing the people of Israel about a system of blood feud and vengeance. But later on even at that time when a court was convened to decide who should live and who should die, called a Sanhedrin, it was decided that a judgment of death could only be pronounced in the Temple. And so the Sanhedrin stopped meeting in the Temple.

And why? Because in the earliest stages of the development ***70** of our cultural tradition, it was recognized that when the law in its solemn majesty directs that life be taken, that can be crueler than deliberate vengeance because it teaches, because it is a voice that comes from a place that is at war with a reasoned and compassionate system of social organization.

I suggest to you that the government wants to drag you back to a time of vengeance. I suggest to you that the FBI agent who said to Lana Padilla on the 21st of April, 1995, before a jot of evidence was in his hand, "Those two guys are going to fry," symbolized a rush to judgment that is at war with what the conscience of the community ought to do and ought to think about. I submit to you that to surrender

your deliberations to vengeance is to turn your back on lessons that we have all learned with great difficulty and a great deal of pain.

Nobody knows the depths of human suffering more than those who have been systematic victims of terror; and yet in country after country, judicial systems are saying that in each case, the individual decision must triumph over our sense of anger....

Well, I've gone through the form and I've gone through the instructions. And if I've said anything that makes you think that I'm trying to tell you what you've already decided or what you ought to think in terms of your deepest convictions, please disregard it.

...

When I concluded my earlier summation, I walked over to Terry Nichols and said. "This is my brother." And the prosecutor got up and reminded all of us, thinking that he would remind me, that there were brothers and sisters and mothers and fathers all killed in Oklahoma City. Of course, when I said, "This is my brother," I wasn't denying the reality of that. I hope I was saying something else. I was talking about a tradition that goes back thousands of years, talking about a particular incident, as a matter of fact. You may remember--most of us learned it I think when we were young--the story of Joseph's older brothers, Joseph of the many-colored coat, now the "Technicolor Dream Coat" in the MTV version. And they were jealous of him, cast him into a pit thinking he would die, and then sold him into slavery. And years later, Joseph turns out to become a judicial officer of the pharaoh, and it happens that he is in a position to judge his brothers. And his brother Judah is pleading for the life or for the liberty of the younger brother, Benjamin; and Joseph sends all the other people out of the room and announces, "I am Joseph, your brother." That was the story, that was the idea that I was trying to get across; that in that moment, in that moment of judgment, addressing the very human being, his older brother Judah, who had put his life at risk and then sold him into slavery, he reached out, because even in that moment of judgment he could understand that this is a human process and that what we all share looks to the future and not to the past.

Members of the jury, we ask you, we suggest to you, that under the law, your judgment should be that this case go back to Judge Matsch and that he reach the just and appropriate sentence under the law and under the verdict that you've already reached.

I won't have a chance to respond to what the prosecutor says, but I know that after your 41 hours of deliberations on the earlier phase, you're all very, very accustomed to thinking of everything that could be thought.

My brother is in your hands.