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Stephanie Weinstein

*Jackson Lewis LLP*

Arthur Wolfson

*United States Department of Labor*

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# Toward a Due Process of Narrative: Before You Lock My Love Away, Please Let Me Testify<sup>1</sup>

Stephanie Weinstein\* & Arthur Wolfson\*\*

## I. INTRODUCTION

*Stories, parables, chronicles, and narratives are powerful means for destroying mindset – the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place. These matters are rarely focused on. They are like eye glasses we have worn a long time. There are nearly invisible; we use them to scan and interpret the world and only rarely examine them for themselves.<sup>2</sup>*

This paper focuses on a sampling of such stories, all relating

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\* Associate, Jackson Lewis LLP. J.D. University of Pittsburgh School of Law (2005); B.A. University of Michigan, with distinction (2001). I am grateful to Amit Patel for his continuing support and inspiration.

\*\* Law Clerk, The Honorable Richard A. Morgan, Office of Administrative Law Judges, United States Department of Labor. J.D. University of Pittsburgh School of Law (2005); B.A. College of William & Mary (1999).

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1. COMMON, *Testify, on BE* (Geffen Records 2005).

2. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea For Narrative*, 87 MICH. L. REV. 2411, 2413 (1989).

to a single event and interwoven among each other. Part II presents three competing narratives intrinsic to the criminal justice system—that of the defendant, the victim, and the prosecutor.<sup>3</sup> In Part II we describe each narrative. We delve into the societal forces that drive each narrative in Part III. Part IV provides a brief description of narrative theory. Part V concludes by exploring the idea of a meta-narrative, a hypothetical due process of narrative. That is, which narrative wins out and how does that narrative do so? Is there one “truer” narrative?

## II. THREE COMPETING NARRATIVES

As Richard Delgado observed in his famous article, “A Plea for Narrative,” we can describe the same object or event in many ways.<sup>4</sup> Moreover, “[w]e participate in creating what we see in the very act of describing it.”<sup>5</sup>

The story that we relate may be a familiar one—the much publicized story of Marcus Dixon, a high school football star. His case created protests from jurors, attention from national media, including the Oprah Winfrey show, and scrutiny of the laws that come with required minimum sentences. His trial also presented the classic case of “he said/she said,” with two teenagers at the center of the controversy and three distinct accounts of the same set of events. This clash of narratives was especially acute because it took place in the course of a loaded race trial. The defendant strenuously asserted that the young woman led him on and that the state was prepared to sell him down the river because of who he was. The victim, by contrast, maintained that a violent black male had violated her pristine white virginity, while the prosecutor proceeded on the theory that we needed to get such dangerous criminals in check. Consider these narratives in further detail.

### A. *Defendant’s Narrative*

Marcus Dixon, an 18-year-old African American high school

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3. A large part of the narrative and societal forces that drive it is a partly fictional embellishment of actual events, based upon the authors’ speculations and imaginations.

4. Delgado, *supra* note 2, at 2416.

5. *Id.*

senior in Georgia, a star football player with a 3.96-grade point average and a full scholarship to attend Vanderbilt University, had it all.<sup>6</sup> On February 10, 2003, he met a girl, a sophomore classmate in a home economics class, after school and arranged to visit her in a classroom trailer where she was working as a student custodian.<sup>7</sup> The two flirted a little and had consensual sex on a table in the back of a classroom.<sup>8</sup> The two planned the assignation ahead of time. Marcus knew the girl, thought highly of her—that she was smart, laid-back, but very talkative, friendly and flirty with him.<sup>9</sup> She loved to joke around with him. She seemed very sweet until “things went down;” after that, it was as if she was a totally different person. As a black male teenager, he had experienced racism first hand, but he never thought that being with a white girl was that big of a deal. His white adoptive parents taught him from a young age to see people, not color. But now he thinks differently. Maybe things went a little too far, but there is no way that this should have landed him in prison. And it would not have, he believes, if he was not a black guy with a white girl in a small southern town populated with overzealous adults out to get him.

### B. *Victim's Narrative*

The girl felt that Marcus Dixon's flirtations were just that, that they were not going to lead to anything physical. After all, she is a religious Caucasian girl who is fearful of her father's opinion of her. She liked Marcus, but never wanted to have sex with him. She was just playing around, but never wanted things to go so far. That is why she told the school counselor and then agreed to see a doctor.<sup>10</sup> A sexual assault examination of her found possible signs of force.<sup>11</sup> She was physically injured and emotionally torn apart. She sued the school for \$5 million, claiming that it did not properly punish Marcus for his previous

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6. The Associated Press, *Star Football Player Nearing Last Chance for Freedom*, [http://www.accessnorthga.com/news/ap\\_newfullstory.asp?ID=29199](http://www.accessnorthga.com/news/ap_newfullstory.asp?ID=29199) (last visited Jan. 13, 2005).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

offenses or report them to the police.<sup>12</sup> And Marcus's scholarship to Vanderbilt has been revoked. But all of that is little consolation because her life will never be the same.

### C. *Prosecutor's Narrative*

Leigh Patterson, the district attorney for Floyd County, has a difficult job. She must apply the law that she believes the facts dictate. Her experience has not prepared her for a case where the emotions run so high. After careful deliberation, Patterson attempts to charge Dixon with the most serious crime she can—rape.<sup>13</sup> She contends that if such things happened to a bride on her wedding day there would not be a marriage the next day.<sup>14</sup> Patterson argues that Marcus Dixon had a history of minor sex offenses in school before the rape accusation.<sup>15</sup> She tells the jury that he once exposed himself to a girl in class and, on another occasion, put his hand down a girl's pants.<sup>16</sup> The jury acquits Dixon of the rape, battery, assault, and false imprisonment charges, but finds him guilty of statutory rape and aggravated child molestation.<sup>17</sup> In order to avoid a misdemeanor charge under Georgia's statutory rape law, teenagers who engage in sexual intercourse must be no less than three years apart in age and one must be more than sixteen years old.<sup>18</sup> The punishment for aggravated child molestation is a ten-year mandatory sentence.<sup>19</sup>

### III. SOCIETAL FORCES THAT DRIVE EACH NARRATIVE

In analyzing these narratives, it is important to note the societal forces that drive each one.

The defendant's background, race, upbringing, and mental illness all contribute to how the criminal justice system treats him. Societal forces always play a large part in the defendant's narrative. In Marcus Dixon's case, his race at least partially

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12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

determines his narrative. He wonders why he is being put through such things and why the community, judge, and jury do not believe his story, because in his mind it is the truth. Because Marcus was a young black man in a white community, the community automatically had a feeling that he would do something wrong. Images of black criminality occur against a background of sky-high incarceration rates of young black males.<sup>20</sup> If this had happened in a predominantly black community, the black defendant would have been more readily believed over the white victim.

Every crime creates at least two victims: society, which suffers a violation of its laws, and the actual victim, who suffers an injury to her person or property.<sup>21</sup> The actual, physical victim takes on the role of witness for the prosecution.<sup>22</sup> The criminal justice system fails to grant victims of crimes any more prominent role in the dispensation of criminal justice.<sup>23</sup> Because victims do not participate directly in the criminal justice system, they may suffer a "second victimization" at the hands of the very system designed to perform justice on their behalf.<sup>24</sup> Many victims show their dissatisfaction by removing themselves from that system and refusing to testify.<sup>25</sup> This victim does not. Her whiteness assures the jury that she is telling the truth.

The prosecutor is a public servant. Her duty is to seek justice for the victim, the victim's family, the community, the justice system, and all of society.<sup>26</sup> Prosecutors seek to convict with zeal, placing the responsibility to protect the rights of the

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20. See William J. Sabol, *Crime Control and Common Sense Assumptions Underlying the Expansion of the Prison Population*, THE URBAN INSTITUTE (May 1, 1999), available at <http://www.urban.org/publications/410405> (last visited Jan. 13, 2006).

21. Karen L. Kennard, Comment, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 CALIF. L. REV. 417, 417 (1989).

22. *Id.*

23. *Id.* This is arguably shortsighted because the continued functioning of the criminal justice system depends on victim cooperation in reporting offenses and in assisting in the prosecution of crimes.

24. *Id.*

25. *Id.*

26. Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1310 (2002).

accused on the defense counsel.<sup>27</sup> But the prosecutor must act with reasoned judgment. While emotion drives the other two parties, the prosecutor rationally seeks the singular legal answer to the complex problem. In the end, the prosecutor represents the interests of the state in delivering justice. Because the community in which Marcus Dixon lives is an all-white one, the prosecutor, who is white, may also feel pressure to protect the majority of constituents who vote for her.

#### IV. NARRATIVE THEORY

Richard Delgado and Jean Stefancic have pioneered the use of narrative in law and legal scholarship.<sup>28</sup> The narrative paradigm they posit comprises a host of stories competing for attention. Often, the two stories are a majoritarian tale and a counterstory.<sup>29</sup> Each story typifies the outlook of a group with a clearly defined set of experiences and interests.<sup>30</sup> Upon repeated telling, each becomes a constructed reality for the storyteller and his or her group.<sup>31</sup>

The first part of the narrative paradigm is the majoritarian tale. This is generally the story of the dominant group.<sup>32</sup> It evolves into the majoritarian tale when it becomes the constructed reality for not only the group that tells it, but also society at large. Upon repeated telling, the majoritarian tale often becomes bound up with socially acceptable norms, conventions, and understandings.<sup>33</sup> As such, the story often goes unquestioned. However, in probably its most important teaching, narrative theory considers these presumed truths to be nothing more than stories.

The second part of the narrative paradigm is the counterstory. While there can only be one majoritarian tale, a given situation

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27. *Id.* at 1311.

28. See e.g., Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929 (1991); Richard Delgado & Jean Stefancic, *Imposition*, 35 WM. & MARY L. REV. 1025, 1029 (1994).

29. Delgado, *supra* note 2, at 2418.

30. Jane Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 263 (1994).

31. Delgado, *supra* note 2, at 2416-17.

32. *Id.* at 2412.

33. Richard Delgado, *On Telling Stories in School: A Reply to Farber & Sherry*, 46 VAND. L. REV. 665, 666 (1993).

can lead to one or more counterstories. The counterstory is a different account of the same set of facts that the majoritarian tale explains. However, it is often put forth by a different group and often highlights different events, sequences, and is told with a different tone.<sup>34</sup> However, it is important to note that the main purpose of the counterstory is not to be the voice of an underrepresented group.<sup>35</sup> Rather, it is to challenge the presumed truth of the majoritarian tale. In doing so, the counterstory serves two purposes: (1) It unmaskes the majoritarian tale as merely a story, and not unqualified truth; and, (2) It shows that if the common assumptions of a given context are susceptible to question, normative change within that context is indeed possible.

#### V. DUE PROCESS OF NARRATIVE

Narrative theory provides a basis for determining which of the three narratives will control in a criminal sentencing proceeding. We start, at the outset, with the baseline point that one of the three aforementioned narratives wins out. We say it “wins out” for two reasons: (1) On a theoretical level, the controlling narrative becomes the constructed reality for the context of the case; and (2) From a practical perspective, it will go a long way in determining the case’s ultimate outcome.<sup>36</sup>

In considering narrative theory, a three-step process should determine which narrative controls. This is our proposed “due process of narrative.” As a point of qualification, it is important to note that “due process of narrative” does not function as a perfect science, but rather as a multi-faceted continuum. We recognize that each case is different, and, correspondingly, different factors will bear differently on each outcome.

Nevertheless, we offer the framework that follows. First, the participants in any courtroom drama must narrowly define the context of the situation. The Marcus Dixon case provides an example. What is the context? Teenage sex? Interracial sex? Interracial sex in a small Southern town? How we define the context will guide the resolution of the next two steps.

Second, what are the societal norms and expectations for the

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34. Delgado, *supra* note 2, at 2425.

35. Delgado, *supra* note 33, at 670-71.

36. See Baron, *supra* note 30, at 268; Delgado, *supra* note 2, at 2314-15.

time and place within the given context? It is here that the importance of defining the context proves to be most significant. Indeed, while teenage sex may be treated lightly as the product of youthful curiosity, interracial sex carries much more societal baggage. In considering the social norms and expectations, we may look to unspoken mores and also other narratives that thrive in the context. When we apply socially held expectations to the facts of our situation, we get the majoritarian tale. The other narratives, accordingly, become counterstories.

The third step is then to apply the narrative paradigm. Recall that the purpose of the counterstory is to impeach the presumed truth of the majoritarian tale.<sup>37</sup> In criminal sentencing, both counterstories operate in this manner. They do not compete with the majoritarian tale “head on,” but rather attempt to undermine its presumed truth. If either, or both, of the counterstories is unable to do so, the majoritarian tale will control the criminal sentencing proceeding. However, if either is able to do so, then the majoritarian tale is displaced and either is capable of controlling. The counterstory that is most responsible for displacing the majoritarian tale will likely be able to control the criminal sentencing process.

It would thus seem that the closer the counterstory aligns with the majoritarian tale, the greater the chance the counterstory has of becoming the controlling narrative. To elaborate, even if the counterstory is successful in impeaching the presumed truth of the majoritarian tale, that alone does not render the counterstory the dominant narrative. It must be adopted in the criminal sentencing proceeding for this to occur. And it must do so in the context of those cultural norms and expectations that gave rise to the majoritarian tale in the first place. Viewed in this light, the narrative paradigm would seem to offer scant prospects for a judge or jury seeking to render a final result.

But due process of narrative need not play out in such a mechanical way, for human discretion plays a key role in criminal sentencing.<sup>38</sup> Whether it is the judge, jury, prosecutor, or

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37. Delgado, *supra* note 33, at 670-71.

38. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 150-52 (7th ed., 2001).

legislator, an adjudicator with a role in every criminal sentencing proceeding has the power to wield great discretion.<sup>39</sup> These actors have the power to use the lessons of narrative for the betterment of the system. And when they use that discretion to take account of a socially unpopular or emotionally charged counterstory—one that may stray far from the majoritarian tale—they make the narrative paradigm that much more effective. Indeed, they allow us a broader array of tools for challenging assumptions and understanding what is real. For example, in the Marcus Dixon case, narrative fairness would require that the sentencing authority consider the town's fears, the victim's need for safety, and the defendant's desire to continue a promising young life. It would also account for the forces that drive each. By giving due weight to each narrative, sentencing would proceed from a fuller and fairer perspective and possibly lead to a wider array of outcomes. Thus, while the narrative paradigm appears to consist of little more than an abstract set of rules, due process of narrative regulates how real people apply those rules in actual situations. By forcing ourselves to attend to due process of narrative, we do ourselves, and society, a favor because only through the clash of stories will we be able to improve the meta-narrative of the trial and our understanding of society.

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39. *Id.*

