THE TRUTH, THE WHOLE TRUTH & NOTHING BUT THE TRUTH: EXPLORING THE POSSIBILITY OF USING PROPPIAN NARRATIVE AS AN ENTHYMEM IN OPENING STATEMENTS AND CLOSING REMARKS OF CRIMINAL TRIALS

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THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH: EXPLORING THE POSSIBILITY OF USING PROPPIAN NARRATIVE AS AN ENTHYMEME IN OPENING STATEMENTS AND CLOSING REMARKS OF CRIMINAL TRIALS

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ii
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THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH: EXPLORING THE POSSIBILITY OF USING PROPPIAN NARRATIVE AS AN ENTHYMEME IN OPENING STATEMENTS AND CLOSING REMARKS OF CRIMINAL TRIALS

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This rhetorical pilot study investigates the possibility of using the Proppian narrative model in order to better aid attorneys in the creation of opening and closing statements. By examining *The People of the State of California vs. Frankie Joe Prater and Robert Memory*, the author is hoping to ascertain whether or not the steps of this structural model can be seen working currently in the trial system. This is done in an effort to improve attorney communication which is the single biggest complaint against attorneys, and to push the field of communication studies into demonstrating its practical applications.
DEDICATION

This thesis is dedicated to my wife Clara and my family Mark, Camille, Mike, Stacy, Molly, Maggie and Tommi. Thank you for helping me strive to be the best version of myself.
ACKNOWLEDGEMENTS

Considering this may be the only thing I ever write that is bound into a book, forgive my indulging in this section. There is no doubt that without the encouragement and guidance of Jaccie Irwin, this thesis, four years in the making, would still be another four years off. Thank you for being willing to jump into the fray. When it looked like this thesis might be scraped, you were there to breathe fresh life into this idea. For that I am eternally grateful.

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Lastly, to my wife Clara, you are my inspiration. There is no way any of this could have been done without you. I strive to live up to your example and your expectations. And while I may fail to do so, you have set the bar and I am honored to continue reaching for it.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Abstract</th>
<th>iv</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dedication</td>
<td>v</td>
</tr>
<tr>
<td>Acknowledgments</td>
<td>vi</td>
</tr>
</tbody>
</table>

## Chapter

1. A CRY FOR BETTER LEGAL COMMUNICATION | 1
2. LEARNING TO BE A STORYTELLER | 22
3. THE NARRATIVE IS IN THE EYE OF THE BEHOLDER | 47
4. A NEW TYPE OF STORY | 105

References | 120
Chapter 1

A CRY FOR BETTER LEGAL COMMUNICATION

In April of 1967, Warren Burger, a Justice for the Court of Appeals in the District of Columbia, stated at a convention for trial lawyers that, “75% of the lawyers appearing in the courtroom were deficient.” (Burger, 1968, p. 5). According to Justice Burger, the skill level of lawyers was lacking in several fields including preparation, the ability to cross examine a witness, present expert testimony, handle exhibits, frame objections adequately, and argue to a jury (Mauet, 1992 p. 20). Justice Burger’s comments had great impact, and the practice of trial advocacy received a collective boost from law schools, continuing education, and a select group of practicing lawyers. Law schools, in an effort to improve litigators ability within the courtroom, began to teach more courses in trial advocacy. In 1971, the Section of Judicial Administration of the American Bar Association (ABA), the American College of Trial Lawyers and the Association of Trial Lawyers of America came together to create the National Institute for Trial Advocacy (NITA), a center located in Louisville, Colorado. NITA has become a leader in continuing education for trial work. Its faculty is comprised of experienced trial lawyers, judges and professors from law schools. Lastly, seasoned trial attorneys created a certification for trial advocacy experts. The results of this collective effort have been mountains of scholarship within the legal community, simultaneously aimed at enabling new lawyers to navigate the confines of a courtroom and perfecting the ability of all lawyers to persuade twelve people that their version of the facts is true and just.
Despite the abundance of literature available, the legal community still has difficulty in communicating with the lay community. As New York Judge Roger Miner wrote:

If communication is defined as expression that is clearly and easily understood, much of the written and oral expression of the legal profession simply fails to measure up to the definition...Ineffective expression in legal discourse diminishes the service of the bar, impedes the resolution of disputes, retards legal progress and growth, and, ultimately, undermines the rule of law. (Miner, 1989, p. 34).

If the legal community wishes to be more effective, they need to do a better job of interacting with the public, particularly within the courtroom. Consequently, the legal community will benefit from any serious examination of behavior within the courtroom, particularly studies that would address Justice Burger and Judge Miner’s concerns as this study intends to. Furthermore, scholarship that centers on the appropriate role of rhetorical strategy in the American jury system is worthwhile for it addresses the concerns laid out by Montz (2001) and Gagnon (2006) that claim attorneys, given the opportunity, will push the boundaries of what is permissible in court in the attempt to win the case which can lead to reversible error. Lastly, this study will attempt to begin to shore up the crumbling foundation that legal rhetorical strategy, particularly narrative strategy within the courtroom appears to be. For while the use of narrative within the trial is clearly advocated for, the instruction in narrative technique appears to be unfocused. This study proposes to rectify this issue and address the criticism of Justice Burger and Justice Minor by examining the potential effectiveness of Proppian narrative within opening and closing statements of criminal trials.

The intent in pursuing this study is to merge several different yet interrelated realms
of scholarship from within the field of communication studies including rhetorical, narrative and legal communication into a coherent piece of scholarship that examines the potential role of narrative strategy, specifically the use of Propp’s narrative model as could be used in opening statements and closing remarks. This is a case study of a single criminal trial which will suffice as a starting ground for what could potentially be a major contribution to both rhetorical communication and legal communication practicum. This work will further the discussion started by William Bennett (1978; 1979) and Bennett and Feldman (1984) which states that courtrooms are not places of “objective” (1984, p. ix) justice, but halls in which the interpretation of competing narratives will define a very subjective reality. It will do so by seeking an answer to the following questions.

Presuming that Bennett and Feldman are correct and that American criminal trials are “organized around storytelling” (1984, p. 3), what, if any, Proppian narrative structural elements can be observed within the opening statements and closing remarks of criminal trials? And if Proppian narrative structural elements exist, how many elements are missing? And if so, are so many missing that the narrative will fail to constitute an effective enthymeme? In other words, the short term goal of this study is to explore how, if at all, Proppian narrative can be used within an opening statement or the closing remarks of a criminal trial. The long term goal of this study is to build a foundation upon which a continuing education curriculum for attorneys that demonstrates the rhetorically successful use of Proppian narrative within the court could be created.

Justification of Thesis

The list of people that write about narrative and its uses in the courtroom is
extensive. From the legal side comes a litany of work dedicated to making the narrative comply with courtroom rules and etiquette (Burns, 2004; Kadoch, 2000; Roberts Jr., 1999; Snedaker, 1986; Spiecker and Worthington 2003; Voss and Van Dyke, 2001; Whitehead, 1999). From rhetorical studies comes work that discuss the use of narrative in courtroom as an effective tool (Bennett 1978; Bennett, 1992; Bennett, et al, 1984). Given the amount of work that has been written and published on the subject, there is little doubt that the use of narrative is definitely a strategy used and encouraged in the courtroom. However, little of that work discusses the implications for the theatrical aspects of trials or the encouragement of purely rhetorical strategies without thought to truth or justice. In fact, Bennett (1978) and Bennett and Feldman (1984) acknowledges that courtroom rhetoric, to be effective, need not have a great connection with reality. That the “inferential power of stories is evidenced by the comparatively small number of facts needed to transmit an adequate impression in story form of most events or experiences” (Bennett, 1978, p. 4). Roberts Jr. (1999) takes this concept a step further by encouraging attorneys to alter their personas in order to play the role better, and hence to persuade more effectively.

Consequently, opening and closing statements have been greatly scrutinized due to their potential for persuasion. Bennett (1978) while discussing the historical and scientific basis for presenting complex information in a narrative format, explains that despite the many restrictions put in place during a trial to ensure that the information is only factual, narrative can be seen to emerge during opening statements and closing remarks (p. 4). In 1979, Bennett elaborates on this “rough” beginning by explaining that
lawyers will use “story strategies” in an effort to enable jurors to interpret the central action in a more favorable light for their client. The reason this is such a difficult task for attorneys is that trials do not afford them the opportunity to tell one continuous narrative. The necessary conclusion reached is that attorneys are forced to set-up their story strategy in the opening statement and then use evidence to back-up the narrative themes that were earlier suggested. And while some scholarship on this topic has been done within the communication studies field, the vast majority of work concerning narrative in opening and closing statements has been done by legal scholars.

Despite the fact that juries are cautioned that the opening statement does not constitute evidence, it has been argued by scholars that the opening statement may be the best opportunity to actually persuade (Snedaker 1986; Melilli, 2005). Snedaker argues, “every trial contains the elements of a story. By properly developing these story elements, the opening statement may be powerfully persuasive” (Snedaker, 1986, p. 44). This approach to examining opening statements is insightful. Claiming that opening statements are a genre, Snedaker asserts that there are a limited number of rhetorical options available for an attorney, the story being chief among these options. And while Snedaker focuses on three core elements of storytelling form, content and style only form will be key to this study. It is appropriate to point out that while Sneadeker feels the form of the story told in the opening statement “is the key for establishing a perceptual framework into which all subsequent discourse should fit” (Snedaker, 1986, p. 19), there is little discussion that offers any education on how to create such a form which this study aims to do. Melilli expands on Snedaker’s argument that the opening statement can be
used as a persuasive tool. For Melilli, the opportunity to use the opening statement to persuade is vital to success. And while recommending simplicity in the story to be told, he most certainly recommends the use of narrative. The opening statement is a situation that begs for narrative. The rest of the trial will be “fragmented, and to some extent, out of logical sequence” (Melilli, 2005 p. 534). And although not technically evidence, this is the chance to tell the story logically and chronologically, to ease the jury into complex legal issues and to set themes for the trial.

However, even those complex legal issues need to be looked at through the lens of storytelling. As Edelman (2005) explains, story-telling during advocacy offers an interpretive framework for juries. Lawyers are in essence story-tellers who, utilizing this unique perspective of trial as storytelling, can ultimately set themselves up for success. The story-telling model allows the attorney to “construct facts rather than documenting preexisting facts” (Edelman, 2005, p. 113). This is one of the fundamental problems of the trial system and legal education. Inside the courtroom the trial lawyer is presented with an almost impossible dilemma. The courtroom is:

“the stage on which dual versions of the story are presented. The common pedagogical methods of legal education tend to divorce the law student from the fact that lawsuits are stories involving real people. The goal of the predominantly case-based method of legal education is to hone the future lawyer's ability to find the legal flash points in any given set of facts and then to develop arguments based upon legal rules-in other words, to deconstruct the story. The law student is required to present the story within the realm of legal issues and relevant facts. However, upon graduating to the courtroom, the law student is now a lawyer who must persuade a jury that her client's story is the "truer" version. For the lawyer, therefore, thoughts of storytelling emerge only as a psychologically persuasive, linguistic tool” (Kadoch, 2001, p. 73-74).

The lawyer whose primary obligation, now that they have left law school, is to their
client. Mounting a zealous defense is requisite and narrative offers that opportunity.

While the construction of facts may seem counterintuitive to the notion of justice, that presupposes that justice is objective. Our legal system relies on too many human elements to be considered objective. Take for examples jurors, who, as studies have shown, are going to reorganize the facts presented during trial into two separate and competing narratives. These stories will allow the juror to process the information presented more easily, recall data as needed, and serve as a guideline for determining guilt or innocence based on which of the two narratives, that they have created, makes more sense (Pennington & Hastie, 1988, p. 521). The jurors are just one piece of a subjective courtroom reality. Other pieces include, “witnesses conclusions about the situation, the advocates initial perception of the story, the relative story-telling abilities of each attorney, and the fact finders [police/investigators] interpretive abilities, assessment of the competing stories and view of the story-teller” (Edelman, 2005, p. 115). These factors combine to imply, that one, justice that comes from a courtroom appears to be subjective despite the best intentions of all those involved. And two, that story telling seems to have a place in every phase of the trial process.

Writings concerning the narrative style of closing remarks are more abundant. Amsterdam and Hertz (1992) compare two different approaches at narrative strategy as shown in their a break down of closing arguments, used by both prosecution and defense in the 1991 trial of David Jones. (David Jones is not the defendants real name but has been changed by Amsterdam and Hertz for his protection.) Of particular note is the unusual way the defense utilizes a narrative strategy by framing the closing remarks as a
series of ten vignettes rather than use a more traditional chronological narrative strategy. However, the framing, as seen by Amsterdam and Hertz, is really an attempt to make the jury protagonists in a story of acquittal and Jones merely a bit player in that story rather than the lead who has murdered a young woman. The article suggests that framing a narrative in a certain manner will lead to specific conclusions that the jury must reach.

Roberts (1999) writes a how-to guide to writing closing argument titled “The SEC of Closing Argument”; the SEC standing for story, emotion and communication. Story refers to narrative or the particular way in which the facts are delivered to the jury or the form that Amsterdam and Hertz suggest is so important. The term communication in the SEC represents three smaller subsets that all attempt to answer the question “how do I persuade the jury?”: language, point of view, and persuasive technique. When considering language, Roberts recommends that the attorney be strong, speaking in absolutes that are devoid of all qualifiers and legalese. Secondly, the point of view that the narrative is told in will change the tenor of the story and attorney’s must be conscious of this. Unlike Melilli (2005) who recommends that attorney’s speak from a first person stand point, Roberts makes no specific recommendation as to which point of view should be used in any given situation; he implies that it essential that an attorney should be able to speak from first or third person perspectives. Lastly, Roberts lists a number of persuasive speech techniques such as using parallel structure, speaking in refrain, using alliteration, speaking in triples, etc. All of these techniques are geared toward getting the jury to remember specific arguments, in the hope that the more the jury will remember, the better the result for the client. All of this is held together by Emotion, the “E” of the
SEC of closing argument. To Roberts, emotion implies finding a dominant theme through which to tell the story. For example, if the defense were to claim self-defense, then the dominant emotion might be fear. It will be the attorney’s job to make the jury feel that fear. And while the emotion should be felt in the closing, the seeds need to be sown in the opening statement.

Although this is an area where communication studies has played a minor role, it is an area where communication studies research needs to grow. Enrollment for law school continues to rise (Slonim, 2007), the number of lawsuits filed last year rose again for the 10th year in a row, the number of violent crimes continues to rise year after year and so subsequently does the number of criminal cases put on dockets across the country (Willing, 2006) and the legal community still has the critiques of Justices Burger and Miner hanging over them. As such, communication studies is uniquely positioned to offer insight into trial advocacy stemming from the fields expertise in rhetorical criticism and narrative criticism. All lawyers knowingly or unknowingly will utilize these techniques. This thesis is an attempt to gauge the prosecution and defenses use of narrative strategies to see where they have succeeded and where they may improve. However, to understand how narrative strategies are used in such a specific manner, it becomes important to study the history of the communication studies field to see how these theories were crafted and came about.

Only Gagnon (2006) touches indirectly upon the negative consequences of incessantly pushing the legal boundaries in his discussion of the *State of Iowa vs. Graves*. Attorneys may tend to the overstep their bounds in delivering a closing argument which
can lead to reversible appeals (Gagnon, 2006, p. 472). The role of rhetorical strategies and the existence of a new class of Sophists is ultimately a discussion worth having and this pilot study and others like it will hopefully lead to that discussion.

**Why This Pilot Study Should Matter to Communication Studies as a Discipline**

This pilot study offers two different but very valuable opportunities to the discipline of communication studies: (1) It is a chance to shift beyond the boundaries of theoretical knowledge and move into practical application. Narrative theory, persuasion theory, symbolic interactionism, speech criticism and more specifically genre criticism all reside underneath the banner of communication studies. This is an opportunity to take that knowledge and test it in a pilot study to determine if it is in fact applicable to actual courtroom situations. If the study concludes that the Proppian model that is tested is indeed viable, then with further study, this becomes a chance to show what the communication studies discipline can do outside of academia. (2) Communication studies has a long history in dealing with legal practice and legal theory dating back to Aristotle’s *Rhetoric*, Plato’s *Dialogues* and the birth of the discipline. For whatever reason, the discipline has seemingly shifted away from its roots. While rhetoric is still a large part of the discipline, the focus on trial work has been taken over by other and perhaps more specialized disciplines. This pilot study is an opportunity to return to the roots of communication studies. A chance to rediscover who we are.

**Artifact**

To achieve the goals of this study, a criminal trial transcript will be examined: *The People of the State of California vs. Robert Kenneth Memory & Frankie Joe Prater*. A
brief explanation the case will be offered here to later aid in understanding of how narrative strategy was used (Bossi, 2006; Conner, 2006; Mayo 2006).

The People of the State of California vs. Robert Kenneth Memory & Frankie Joe Prater. In 2006, Robert Kenneth Memory and Frankie Joe Prater were tried for the murder of 22 year old Mark Donahue. On November 5th, 2004 Donahue had returned to his childhood home in Stockton. He spent the day catching up with family, as he was currently living in San Jose and attending school there at California State University, San Jose. As day turned to night Donahue went out to see some of his old high school friends. He first went to a bar called the Garlic Brothers for that is where his girlfriend, Natasha Hops, was working. She was busy and so they agreed to meet up later in the evening. Donahue then joined some buddies, Jesse Rajala, Garrett Wyatt, John Skorheim and Brian Kent at the Blackwater Cafe, a local restaurant. When his friends got together, they started drinking some beer, and some of them combined the alcohol with Valium, which is a minor tranquilizer. After drinking for a while, and receiving a call from two more friends from high school, the group decides that they should change venues for Kent and Skorheim who are both 20 and unable to get a drink. The group decides that they should drive to Shakers figuring that they would not carded. It is approximately 11:40 p.m. by the time this group arrives at Shakers.

Meanwhile, another group of men is already in immediate vicinity of Shakers. However, they like Donahue, did not start their night there. These men, Jeremy Miller and Derrick Scott went out that night to get drunk. The two men could accurately be described as blue-collar. They were educated through high school and both worked
construction. As they began their night, they met up with a few friends, Jack Barton, Robert Jones and Gabe Wilson at a bar called the Graduate. While at the Graduate, which is just a few blocks from Shakers, the guys split a pitcher of beer, a few of them order Kamikazes. The night is getting a little expensive and so they migrate down the street to the Shakers parking lot where one of the group has a bottle of Southern Comfort in his truck. At this point they meet up with another pair of gentleman, Clifford Enos, A.K.A. Junior and Justin Hood. Junior, a small man standing at five feet, five inches weighing 140 pounds, could accurately be described as an alcoholic. His goal while drinking is to be drunk, and when drunk, he tends to get into fights. This is common knowledge among his friends. At the time of this trial, Junior was in custody in Tuolumne County on a felony drunk driving charge. This is our second group, Miller, Scott, Barton, Wilson, Jones, Hood and Junior, some of whom are standing in the Shakers parking lot by a pick-up truck drinking Southern Comfort, others of which are inside Shakers having a drink. This takes us to approximately 11:40 p.m. as well.

Still a third group needs to be introduced, Robert Memory and Frankie Joe Prater. The two men are good friends and members of a local motorcycle club called the Jus Brothers. There is much debate throughout the trial as to the nature of the Jus Brothers motorcycle club; whether it is a group of family men and community activists who happen to love riding motorcycles or whether it is a motorcycle gang which prides itself in living outside the law and is a known supporter of the Hell’s Angels. Memory and Prater have yet to come into the story but will shortly.

At 7 p.m. that evening, Rick Bird, his wife Maureen and another couple, the
Garlands, get together and decide to go to Shakers. Once they arrive at Shakers, they meet up with Hans and Sherry Knoepfle who live just three doors down from the bar. Hans and Sherry’s son, Joshua Thrasher, 22 years old, is already at the bar that night with some of his friends, Bill Walker and Keith Tankersly. All three of these young men currently or had previously worked for a company called Arctic Heating and Air, which is a business owned by Defendant Prater. More people keep piling into the bar, which at this point is getting fairly crowded. The seating capacity for this venue is at best 40 to 50 people. Perhaps because the bar is so crowded, perhaps because he is ready to call it a night, Bird at 10 p.m. decides that it is time to leave, but as of that moment, Memory and Prater, members of the Jus Brothers have yet to arrive.

The Jus Brothers are a Stockton offshoot of the Hell’s Angels and exist with the support and blessing of the Hell’s Angels. There is a certain philosophy by which the Jus Brothers try and live their lives: they are different from the public. They are the warriors and they take great pride in their patch, the words Jus Brothers which frame and eagles head, their colors, and each other as long as you are a member in good standing with the group. That is one of the interesting aspects about this group, that makes this motorcycle club subculture so unique. For those things you take so much pride in, your patch, your colors, your brothers, they do not belong to you but to the club. If you are no longer in good standing with the group, then you have to forfeit your patch and your colors. If you have a tattoo with the groups emblem and get kicked out of the group, you have to have the tattoo removed or crossed out per the groups constitution. Sometime after 11:00 p.m., Memory, Prater and Prater’s wife Teresa, ride their two Harley Davidson motorcycles to
Shakers, wearing their leathers, sporting their patch and colors. Now all three groups are in immediate proximity to one and other. Memory, Prater and his wife walk into the bar to have a drink; this is one of their normal hangouts. The crowd that night is rowdy and so the group, after not spending much time there, decides to leave. They head back into the parking lot. Jeremy, Derrick, Junior and friends are having a good time drinking in and around Shakers. Donahue and his old high school chums are still in their cars getting ready to walk into Shakers, and two members of the Jus Brothers are walking toward their bikes.

The bartender at Shakers that night was a young lady named Jamie Whipp. Whipp claims that just before the violence occurred that night, Junior comes up and tells her that “There’s gonna be a fight.” Now Junior was too drunk to remember saying this but does not deny that it was said. After all, he does have a history of getting drunk and getting into fights. After saying this, Junior goes outside to the parking lot where he immediately gets into a verbal altercation with Memory. As Junior is yelling, Memory reaches into his vest for something and Prater walks back to his motorcycle and pulls out a Mag-Lite.

As Memory is reaching into his vest, Derrick Scott, who is sitting inside Shakers sees his friend Junior dive behind a car and his other friend Jeremy Miller now screaming at Prater and his wife. Miller is yelling at the two to “Get the fuck out of here. Get the fuck out of here or we will beat your ass!” Miller, standing six foot five inches weighing in at 240 pounds, is not a small man so Scott rushes out to stand next to the much smaller Junior who had been yelling at Memory. Memory however did not pull out a gun or a knife from his vest. He pulled out a phone and is talking to the Sergeant of Arms, Eddie
Nieves, of the Jus Brothers. After Memory hangs up, he pulls a 12 inch crescent wrench from his vest. At this point Scott begins to yell at Memory, “Get on you fucking bike and go or we’ll kick your ass!” Memory does not get on the bike and go but begins to swing at Scott with the crescent wrench. And so two armed members of the Jus Brothers motorcycle club begin to fight with seven unarmed men, Miller, Scott, Barton, Wilson, Jones, Hood and Junior.

After taking two or three swings at Scott with the crescent wrench, Memory all of a sudden changes directions and charges at Miller, who was screaming at Prater. Prater meanwhile begins running at a man who is not affiliated with the first group. Suddenly, there is a crack, a loud thunk as the Mag-Lite comes crashing down on the head of the unknown participant. After a second shot to the head with the Mag-Lite, the unknown man, who is fairly large standing around 6 foot four weighing 215 pounds begins to fight back. They go to the ground and begin wrestling. Prater continues to swing the Mag-Lite, the unknown participant begins to throw punches. People watching in the crowd begin scream “knife!” Memory meanwhile is squared up with Miller. As Miller rears back to throw a punch, Memory quickly reaches out and stabs Miller right under the left arm with a previously unseen folding 4-inch buck knife. Meanwhile Scott, who has seen Miller get stabbed looks across the street to see two men rushing at him and so sets himself to take on the two new combatants. Just then he felt a thud in his back, and as he was falling to the ground, he realized that he had been stabbed by Memory. The wound to Scott is not fatal but has certainly knocked him down. He tries to get a sense of his surroundings. Scott notes that he has been stabbed, Miller to has been severely wounded,
the knife wound had apparently punctured his lung, and the unknown gentleman who had been hit over the head with the Mag-Lite was attempting and failing to get up from the pool of his own blood that now surrounded him. The gentleman that could not push himself up was Mark Donahue, who had been beaten over the head with a Mag-Lite, severely fracturing his skull, he had most of his teeth knocked out, his thumb nearly sliced off and finally he had been stabbed in the chest.

After the melee had died down, Prater, his wife Teresa, and Memory hopped onto their bikes and drove off. Their was plenty of communication that night with other members of the Jus Brother motorcycle club, but none of the members of the club managed to phone the police, even after the All Points Bulletin went out calling for information regarding the fight. A week later, after the police, based on the evidence of the bartender and bar owner, were narrowing down their suspect list to the Jus Brothers motorcycle club did Memory and Prater step forward and say that they were involved in the fight, and begin to offer an explanation of self-defense.

**Justification of artifact selection.** The People of the State of California vs. Robert Memory and Frankie Joe Prater was selected for several significant reasons: (1) The list of case facts for this particular trial are incredibly long; the facts are comprised of the testimony of over 56 witnesses. Because this trial offers such great depth of fact, the attorneys will need to be especially proficient at creating narrative. In other words, the attorneys, while working with over one hundred pages of fact, still must construct narratives that are significantly different. It is a great example of story telling skill: (2) Prater and Memory, the defendants in this trial, each have their own representation and
because they chose not to be represented by a single attorney, there is more artifact to investigate. Instead of their being two opening statements and two closing remarks, there is three of each. The third opening and closing statement offer another opportunity to test whether the Proppian model is viable for crafting legal speech: (3) Each attorney within the trial has a unique voice and storytelling ability and if three attorneys with different abilities all use this model intuitively, then it becomes an endorsement for the Proppian model to be further studied: (4) As a murder trial, the time and effort spent on defending and prosecuting the case is more extensive than it would be for a trial in which a less violent charge was alleged, and due to the notoriety surrounding the case, the attorneys who chose to take on this assignment were seasoned and had greater reputations. This makes for greater trial work and greater narratives: (5) The case study, being built largely on the work of Bennett and Feldman, offers a different regional setting. The cases that Bennett and Feldman observed and subsequently examined were all from the Pacific Northwest, Seattle, WA in particular. It is possible that the findings of those initial studies would not be consistent across different regions of the United States. The case from this study takes place in central California and so offers work a different region of the country: (6) Trial transcripts, while available to the public, are incredibly expensive. This case, along with several other potential cases, were offered at no cost. Therefore, the availability of this extensive transcript was ideal for study.

**Justification of Method**

Several narrative models were considered for analyzing the selected trial transcripts. Certain structures lend themselves to certain genres of narrative better than
others. Labov and Waletzky (1968) for instance, created their model to examine everyday speech. While this is very useful under certain circumstances, courtroom narrative is far from everyday speech.

In choosing Propp’s model, several others have been excluded. This in no way was done to slight the works of Frye, Campbell, Chomsky, Bremond, Levi-Struass, Labov and Waletzky or any other great narrative scholars. Propp was selected for several reasons: (1) his work on the Dramatise Personae is very structured and extensive. Propp’s 31 step structure serves as a firm guide for all stories from inception to conclusion leaving no room for variation of function in the narrative. The a strict story structure creates definite markers to search for in the examination of narrative: (2) Bennett (1978) and Bennett and Feldman (1984) in their seminal works discuss Propp and his story structure: (3) Propp (1984) acknowledges that this structure can work as a type of narrative enthymeme. If the story is set-up properly, it can miss segments and still work as an effective rhetorical tool. This, Bennett claims, is the reality of practicing law. Stories will not be told in their entirety due to the constraints of the judicial rules and procedures. For these reasons, Propp’s syntagmatic structure is ideal for examining the narrative used in courtrooms.

Chapter Breakdown

This initial chapter breaks down the inspiration that led to this study; the communication difficulties that surround the legal process and in particular the communication that occurs during criminal trials. As Justice Burger and Justice Miner discuss, the communication process within the courtroom is challenging and despite
attempts to improve the advocacy education available to today's attorneys, the process still is far from complete. There is also a greatly abbreviated description of the case itself. There is also a justification offered about the artifact selected. Lastly, there is a justification for the selection of Propp’s model to use in breaking down the narrative. Propp’s model has long been influential in discussing folklore but has been expanded upon more recently and this study is another step in that direction.

Chapter two will contain an extensive literature review focusing on rhetoric, identification, narrative, Proppian narrative, the enthymeme and Proppian narrative as an enthymeme and lastly legal narrative. Rhetoric and studies on persuasion are at the heart of this study and all trial work. Any discussion that centers on persuasion first needs a firm grounding in rhetoric. From rhetorical studies and new rhetorical models emerges Burke’s writings on identification. How, according to Burke, identification works as persuasion. That we as symbol-reading animals are most likely to be moved by that which we identify with. This is particularly true of narrative which brings about the next shift in literature. All discussion about narrative must begin with Fisher’s narrative paradigm. The paradigm as explained by Fisher serves as a model for all human communication. From here, the focus will narrow even further to the Proppian narrative model. This will include an extensive description of Propp’s syntagmatic structure model for examining folklore with emphasis placed on how the model is applicable to trial narratives. At this point, it is critical to shift to the enthymeme which has morphed into a device that allows incomplete information to still be considered influential. In this sense, the enthymeme can be considered the earliest circumstantial evidence and is key to
understanding how a complicated story model such as Propp’s can be used in this setting. From the enthymeme, this chapter will shift to a discussion about narrative theory as is used in a legal context. Particular attention will be paid to the works of Bennett (1978; 1979) and Bennett & Feldman (1984) whose work is seminal in understanding the trial process as narrative. But also key to this section will be the emerging hole in the literature that fails to adequately provide structure to narrative. While it will become clear that narrative is encouraged within legal circles, the knowledge of how to create persuasive narrative is obviously missing and that is where Propp can enter.

Chapter 3 will be an analysis of *The People of the State of California vs. Robert Kenneth Memory & Frankie Joe Prater*. The analysis will begin with the opening statement of Assistant District Attorney Kevin Mayo. That will be followed by analysis of the defense attorney Eric Conner’s opening statements which will be followed by the analysis of defense attorney Vittoria Bossi’s opening statement. Following the analysis of Bossi’s opening statement will be the analysis of Assistant District Attorney Mayo’s closing remarks, which will be followed by the analysis of Conner’s and Bossi’s closing remarks.

Chapter 4 will offer conclusions about the study, with a broader discussion of the new class of Sophists and suggestions for future research. If the analysis shows that the Proppian model offers a workable model for trial attorneys to use as they compose their opening statements and closing remarks, then it will call for a larger study with a greater breadth of trials to be examined. If the study reveals a story model that is too rigid to be viable in courtroom, a better model of narrative should be found and the study
re-attempted. A workable narrative model(s) that offers guidance to attorneys exists and hopefully this study confirms that the Proppian model is that feasible choice.
Chapter 2
LEARNING TO BE A STORYTELLER

The fields of communication studies and law have been intertwined dating back to Plato and Aristotle (Aristotle, 1946). Today’s American trial format is at least partly based on similar structures presented by Plato in his *Dialogues* (van Eemeren, Grootendorst, and Snoeck, & Henkemans, 1996). This is formed around the pervading belief that if a person is sworn to be honest and then asked about events that are in dispute, eventually the truth will come out regardless of the situation. People will be persuaded by your honesty, by your ethos, logos, and pathos. It is the foundation of modern rhetorical studies.

**Rhetorical Criticism**

Herbert Wicheln’s (1924) essay “The Literary Criticism of Oratory” largely shaped traditional criticism for forty years, as this piece was an attempt to clearly establish the telos of the modern study of rhetoric. Leaping off from Smith (1909), a critic of literary critic’s, Wicheln defined three points which the critic must always address: “There is the date, and the author, and the work” (p. 15). Wicheln surmised that literary critics, depending on the order of point emphasis, would be drawn to certain questions regarding what the literature is comprised of. Oratory critics would conversely need to focus on the rhetorical, rather than the poetic. Wicheln’s borrows his definition of rhetoric from Baldwin who defines rhetoric as “the composition of ideas, the other [poetics] is the composition of images” (Baldwin, 1924, p. 134). Rhetorical criticism would focus on the influence of the orator, not in a historical sense but rather an immediate one, which would
allow the critic to capture the mood and immediate history of the audience. The rhetorical critic in this sense is unique, like the soldier, “he has an art of his own which is the source of his power” (Wicheln, 1925, p. 26). The rhetorical critic’s power is that of engaging oratory and understanding the work and the audience.

Wicheln’s work was soon taken up by others and greatly expanded upon. Ernest Wrage’s *Public Address: A Study in Social and Intellectual History* (1947) expanded Wicheln’s theories about rhetorical criticism to a much larger, more cultural level. While Wicheln focused on “the influence of the period” (Wicheln, 1925, p. 25) Wrage sought to discuss the larger lasting effects. By studying oratory, knowledge may be obtained “about the growth of ideas, their currency and vitality, their modifications under the impress of social requirements, and their eclipse by other ideas with different values” (Wrage, 1947, p. 30). Rather than attempting to build a history of skilled orators, Wrage would construct a history of ideas and compare those ideas throughout history. Wayland Parrish (1954) also expanded upon Wicheln’s rhetorical theory, believing that the audience reaction to a speaker alone was not enough to judge the quality of a speech. Parrish concluded that critics of oratory need to be “concerned with the interpretation of speeches, with the analysis of their content, structure method; and, concerned at the same time with judgement or evaluation of their excellences and defects” (p. 37). An audience, largely comprised of individuals untrained in rhetorical criticism, would be unable to effectively judge a speech. The qualified critic must have a judicious temperament, a thirst for truth and be well versed in both speech and rhetoric. In other words, the critic needs to be well educated for “in criticism we interpret and evaluate a speech in terms of
its effect upon an audience of qualified listeners” (Parrish 1954, p. 41). An uneducated audience will be unable to properly interpret a speech and will need to rely on others to interpret and explain for them.

In 1965, Edwin Black wrote *A Rhetorical Criticism: A Study in Method*; a book that looks back at the previous forty years of rhetorical criticism and accuses its practitioners of being lazy and unimaginative, and further suggests that because of a reliance on neo-Aristotilian criticism, there are critics who find themselves trapped in a cycle that will continue to produce uninspired work:

The neo-Aristotelians ignore the impact of the discourse on rhetorical conventions, its capacity for disposing and audience to expect certain ways of arguing and certain kinds of justifications in later discourses that they encounter, even on different subjects. Similarly, the neo-Aristotelian critics do not account for the influence of the discourse on its author: the future commitments it makes for him, rhetorically and ideologically; the choices it closes to him, rhetorically and ideologically; the public image it portrays to which he must adjust. (p.35)

Black’s work challenged neo-Aristotelian criticism by examining great speeches that must necessarily be deemed as failures according to the standards set by Aristotle in *The Rhetoric*. To be guided by a theory that would make a critic dismiss great work as trivial because that theory demands it, is to limit the potential of the rhetorical studies. Black’s work cannot be understated; the entire field began to rethink its models for examining and judging speech and many scholars stood up to advance new theories.

**Attempts at a new rhetorical paradigm.** In the wake of Black’s controversial text, scholars have attempted to advance theories that might replace Wichelns’s neo-Aristotelian approach to rhetorical criticism. Bitzer (1968) postulates that the situation dictates the rhetorical discourse that occurs. Each speaker should be judged, not on
motive, personal history, or style, but rather on how well the discourse fits into the particular situation for which it is delivered. In Rosenfield’s (1968) *The Anatomy of Critical Discourse*, he attempts to redefine the rhetorical critics model for judging oratory by listing specific variables (Source, Message, Environment and Critic). He argues that these variables are present in all discourse and then, depending upon the combination of variables, the rhetorician will determine what type of critic they are. For example, the rhetorician who focuses on the M-C variables “will conceive of himself as a kind of sensitive instrument, and his analysis will be comprised primarily of reports of his own reactions to the work apart from any impact the work may have had on any particular public” (Rosenfield, 1968, p. 75). While M-C relationship or message critic relationship, is just one of many different possible combinations of variables, no one combination should be preferred above another. Each should be used as the situation dictates, in essence creating a different type of critic for each situation. In 1970 Black then argues that orators should be judged morally and it is the critic’s role to do so. In presenting a speech, the speaker puts forward a personality that is more than their true personality. That is to say the persona put forth by the presenter is not their real persona but one constructed for that specific setting. Furthermore, “the critic can see...what the rhetor would have his real auditor become. What the critic can find projected by the discourse is the image of a man...This condition makes moral judgement possible” (Black, 1970 p. 90). The critic’s role is then to sit in moral judgement of the second persona.

Despite the many efforts of Bitzer, Black, and Rosenfield, these new paradigms did not rapidly increase in influence. With no real overarching premise, rhetorical studies
was destined to flounder. However from Kenneth Burke, a man originally outside of the discipline of communication studies, although he was quickly adopted by it, there came the next important rhetorical model. His model is important to the examination of trial activity for several reasons: (1) The seminal work that examines narrative and courtrooms, by Bennett and Feldman (1984), uses the Dramatistic model to make sense of trial work; (2) Fisher relies upon the Dramatistic model to explain the “Narrative Paradigm” and the role of narrative in the courtroom setting is the basis for this project; (3) Trials have the potential to greatly alter the lives of their participants. They are the source of tremendous drama with potentially life altering outcomes. The opportunity for persuasion is great and Burke’s explanation of human motivation is extensive. For these reasons, the Dramatistic Model needs to be addressed.

**Dramatism and Identification**

Kenneth Burke is the father of modern dramatism and dramatistic criticism, and his model has been used extensively to examine and understand oratory. Unlike his predecessors in rhetorical criticism, Burke felt that “the main ideal of criticism...is to use all that there is to use” (1969a, p. 23). This means going beyond the text or artifact if, according to Burke, genuine criticism is to be written. The rhetorical critic needs to move beyond examining the life of the rhetor, the time, the place, the ongoing events surrounding the orator as the critic must always be aware that the “circumstances alter occasion” (Burke 1973, p. 138). To that end, “critical and imaginative works [speeches, prose, etc.] are answers to questions posed by the situation in which they arose” (Burke, 1973, p. 1). This means that the work produced during that specific time period is a
stylized strategic response to ongoing events. Bearing this in mind, the pertinent questions shift from what was the time and place like? Or who was the man when the speech was presented? (This is in essence the work of historians or biographers) The questions shift to what were the symbols of the authority of the day? Did the speaker embrace or reject those symbols? Did the audience? “What were the sociological problems rising out of this rejection-versus-acceptance situation? What attitudinal words may be said to name these situations realistically?” (Holland, 1953, p. 449). Now armed with this knowledge, the critic will be able to answer questions about identification.

Identification is a major theme throughout Burke’s writing and because it represents (1) a shift from traditional criticism, and (2) can clearly be seen in narratives presented by both the prosecution and defense during the trial of the People of the State of California vs. Robert Kenneth Memory & Frankie Joe Prater, it needs to be elaborated upon. “Traditionally, the key term for rhetoric is not ‘identification but persuasion’...Our treatment, in terms of identification, is decidedly not meant as a substitute for the sound traditional approach” (Burke, 1969b, p. xiv) of persuasion. Hochmuth (1952) elaborates upon this point, noting that Burke redirects rhetorical criticism rather than dismiss it entirely. Burke’s concept of identification is more than just persuasion, for persuasion is a conscious act that people engage in. On the other hand, while identification at its simplest level can certainly be regarded in a similar vein as persuasion, it can also be seen as an unconscious act. “Identification can also be an ‘end’ as ‘when people earnestly yearn to identify themselves with some group or other. They are not necessarily acted upon by a conscious external agent but may act upon themselves to this end” (Hochmuth,
You persuade a man only insofar as you can talk his language by speech, gesture, tonality, order, image, attitude, idea, identifying your ways with his...The rhetorician may have to change an audience’s opinion in one respect; but he can succeed only insofar as he yields to that audience’s opinions in other respects. (Burke, 1969b, p. 55)

Where persuasion is a one-way street, an external agent acting upon an individual/group, identification implies interaction by all parties involved. This notion of interaction is a major departure from earlier criticism. It also has a direct connection to trial work and jury persuasion. The defense attorneys for Memory & Prater, strain to make the jury “identify” with their clients; conversely the prosecution makes an effort to separate these men from society characterizing them as criminals and members of a gang.

The model of identification/persuasion is that of human drama, hence the term dramatism. And above all else, “drama requires conflict” (Burke, 1961, p. 130). Courtrooms are where conflicts are resolved, further justifying the use of Dramatistic principles in the examination of trial activity. Additionally, attorneys trying to persuade within courtrooms have been shown and are often encouraged to take a narrative approach (Kennedy, 2006). As mentioned previously, Walter Fisher in his creation of the “narrative paradigm” relies upon Burke’s Dramatistic rational. For these reasons, and because as MacIntyre claims, “man is in his actions and practice...essentially a storytelling animal” (MacIntyre, 1981, p. 201), the use of narrative as a communication model need to be further addressed.

The Narrative Paradigm

In “Toward a Logic of Good Reasons” (Fisher, 1978), Walter Fisher makes
several claims that will eventually lead to his creation of the “narrative paradigm.” Chief among those claims is that “rhetorical communication is as laden with values as it is with what we usually call reason. Humans as rhetorical beings are as much valuing as they are reasoning animals” (Fisher, 1978, p. 376). This statement is a launching point for the narrative paradigm for if all communication can be seen as rhetoric, then all communication is laden with the values of the rhetor. Any attempt to create speech or literature is an attempt to expunge values. The second claim underlies the attempt to define what are “good reasons.” Fisher defines good reasons as “those elements that provide warrants for accepting or adhering to the advice fostered by any form of communication that can be considered rhetorical” (Fisher, 1978, p. 378). This concept or assumption begins to allow for all forms of communication to weighed and judged, including human drama (Fisher, 1978, p. 378). In other words, good logic and good reasoning need not be bound by the rules and forms of argumentation. Good reason and good logic can and should be applied to all forms of communication (Fisher, 1985), including narrative. This idea is central to Fisher’s view in the creation of the Narrative form. People or as they might be called, narrators of their own story, will use good logic and good reason without using a specific form; in other words all people are narrators who in all speech have the potential to persuade.

Fisher is hardly the first to examine the role of narration for this ground has been well mapped within the literary circle. However, Fisher’s paradigm is applied to more than fictional works. The idea of story narration is applied to everyday communication.

By narration, I [Fisher] refer to a theory of symbolic actions--words and/or deeds-
that have sequence and meaning for those who live, create, or interpret them. The narrative perspective, therefore, has relevance to real as well as fictive worlds, to stories of living and to stories of the imagination. (Fisher, 1984, p. 241)

“Stories” in the narrative paradigm, become the mode of communication. Children relate to and learn from parents through stories (Hall, D. & Langellier, K., 1988); our illnesses are communicated through narrative (Frank, 1995; Adelman and Frey, 1997; Hawkings, 1993; Clark 1998); the American jury system relies on narrative (Bennett, 1978; Bennett, 1992; Bennett & Edelman 1985; Bennett & Feldman, 1981; Sunwolf, 1999a); and the educational system regularly relies on narrative (Bruner, 1986; Kirkwood, 1983; Kirkwood, 1985; Sunwolf, 1999b, Wanner, 1994). Through narrative, communities are formed, relationships maintained and justice administered through the judicial system. Because the narrative model has been applied to so many different areas of study, a fuller understanding is necessary.

The narrative paradigm is more complicated than people telling stories to one another, although telling stories is certainly part of being a “story-telling animal” (Fisher, 1984). The paradigm presupposes: (1) that humans are essentially storytellers; (2) good reasons are the paradigmatic mode of human decision making and communication; (3) “the production and practice of good reasons is ruled by matters of history, biography, culture, and character;” (p. 7)(4) Stories will “ring true” the more coherent the narrative and the more closely it relates to the audience’s past experiences; and (5) Life will be full of stories that each individual will choose from in order to live a life of continual recreation.

Each of the aforementioned presumptions contribute to narratives told at trial and this
will be demonstrated as each presumption is explained, for, although some are apparently 
simple, they all warrant a brief explanation.

The first presumption that humans are essentially storytellers is key to the narrative 
paradigm and is explained by through Fisher’s metaphor of humans as “Homo narrans” 
(Fisher, 1984, p. 6). The narrative perspective becomes a master metaphor for setting the 
plot of human experience. All accounting (theoretical explanation or argument) or 
recounting (history, biography, or autobiography) of human action thus takes place 
through narrative. This is particularly true of argument created during trial. Through 
these narratives, truth about the human condition will reveal itself. Symbols will be 
created and relayed through story. The second presumption, as noted above, describes 
why argument does not have to be tied to a rational structure. The motivation for 
accepting any rhetorical message must be done on the assumption of good reasons, for if 
the reasons or logic were poor, people would reject the message (Fisher, 1987a, p. 106). 
This indicates that the argument created does not have to be syllogistic, perfect in its 
structure. The argument created is by its nature more enthymatic. This is ideal for the 
broken up structure of trial narrative. Bennett and Feldman (1984) point out that 
attorneys, while exhibiting a narrative strategy, are victim to the trial rules and format 
which does not allow for a continuous narrative. They must rely on jurors filling in the 
gaps which Propp, a narrative structuralist who believes that all narrative will follow a 
very specific format, asserts is done due the consistency of narrative (Propp, 1968). The 
third presumption is an explanation of why not all stories/good reasons are equally good. 
People are guided by culture, history, personal history, and individual character. While
the reasons may be good to one group, they are not necessarily good for another. This relates back to Burke’s theme of “identification” which is crucial in narrative strategy when attempting to persuade jurors. The fourth presumption explains what Fisher would title “narrative rationality.” Not only will the story need to be coherent (flow logically from one point to the next) but in order for the audience to relate to the narrative, it will in some way need to relate to the audience’s prior experiences. This clearly has ramifications for trial work, again in terms of identification, but also in terms of syllogistic logic vs. enthymematic logic. This is why Fisher (1985, 1987b, 1994) discusses the traditional acceptable forms of logic and how those forms would be, not irrelevant per se, but less vital within the narrative paradigm. A story for example, although it needs to be logical, need not follow a syllogistic structure to be effective as a persuasive tool. Trial work similarly will not be syllogistically structured. Trials and trial narratives, like the enthymeme, cannot absolutely determine the facts, only determine a likely outcome. Lastly, life is not static. The narratives that comprise our rational world are continually changing, as are we. As we change, so do the stories that guide us; and while those stories are changing, so is the personal recounting of each of our lives. And so in effect, it is possible to measure each of our lives, not only through the stories that we tell, but also through the changes within those stories over time.

It should be clear that the narrative paradigm, Burke’s identification, and the enthymeme are all critical to the construction and interpretation of trial narrative. Fisher’s paradigm provides a solid base for other narrative theorists to build from. In particular the narrative paradigm helps translate works like Vladimir Propp’s *Morphology*
of the Folktale (1968) from the realms of fictional scholarship to the non-fictional world of courtroom drama. However a firmer grasp of Propp’s methods are necessary if they are to be applied to a specific case.

The morphology of folklore. Vladimir Propp wrote Morphology of the Folktale. When translated to English in the 1950’s, the work became a seminal piece for examining the role of storytelling. Unlike Levi-Strauss (1955) who was writing about the paradigmatic structure of folklore which examines polar opposites and attempts to mediate the two, Propp was writing about the syntagmatic structure of fairy tales. The syntagmatic structure does not directly search for meaning beyond the fairy tale. It was not originally created to answer questions about society at large. The syntagmatic structure breaks down the structure of narratives (Propp, 1984; 2002) looking for the function and the action of the dramatis personae or as they are more commonly know the characters of the story. By determining the function of the characters, it becomes possible to break all fairy tales down to several smaller more workable categories. Within these categories of “dramatis personae”, there is surprisingly little variation of story. All fairy tales, despite their vast array of characters vary little, if at all, in the function of those characters. Propp examined over 100 different Russian fairy tales and found that there are four rules that are true about the functions of every fairy tale:

Functions of characters serve as stable constant elements in a tale, independent of how and by whom the are fulfilled. They constitute the fundamental components of a tale; (2) The number of functions known to the fairy tale is limited; (3) The sequence of functions is always identical; (4) All fairy tales are of one type in regard to their structure. (Propp, 1968, p. 21-23)

Propp’s structure of fairy tales has been applied to narratives told within the modern work
force (Gabriel, 2000), to modern cinema (Villela-Minnerly, L. & Markin, R. 1987), and to television (Foss-Snowden, 2007). The results have been amazingly consistent, as in story after story, these functions remain consistent, hence our stories remain consistent. As illustrated by the usage of the synatgmatic structure, Propp’s ideas are hardly stagnant. In Theory and History of Folklore (1984), Propp addresses concerns that the syntagmatic structure has nothing to do with reality, expanding upon his original premise of not searching for meaning beyond the story itself. Folk tales, with their tendency to the bizarre, may appear to have no connection to reality but that does not mean there is no connection. “Folklore, like any other art, derives from reality” (Propp, 1984, p. 38). The folk artist sets goals of representing reality. And despite an authors or creators intention, because folklore is derived from reality, it reflects the reality of that specific time. This has great implications for narrative told at trial. Stories offer a certain reflection of reality, which speaks ultimately to the goal of attorney’s; weaving a story around the agreed upon case facts.

Assuming that all of Propp’s structural rules are true, this means that fairy tales can only end in so many ways. Furthermore, someone who knows how to tell a story will set-up that narrative in such a way that it will have to end with a certain conclusion. Propp and other narrative structuralists (Raglan, 1936; Campbell, 1949) have been criticized for creating a system that seemingly will fit everything, rather than creating a method that tells the reader something insightful about the culture in which it was created. (Martin, 1986; Apo, 1980). However, even Martin admits that Propp and other narrative structuralists “provide a...starting point for an analysis of narrative structure.
Since we can recount briefly what happened in a story...when asked...there is good reason to suspect that a plot, like a sentence, has a structure that we intuitively apprehend” (p. 94). And in that statement lies the true value of Propp’s work. If we are intuitively aware of what is going to happen within the story, it does not need to be told verbatim. The implications are that if a narrative is set-up in an appropriate way, the audience will know the outcome without having to be told and will fill in the blank if necessary. This is particularly relevant to trial work where a straight narrative is impossible. It will be hindered by procedural rules and interruptions from competing narratives. However if, as Propp suggests, the story can work as a type of enthymeme, then the story structure need not be absolutely complete. Given Martin and Propp’s suggestion narrative will still persuade despite the fact that it may be incomplete, it becomes necessary to briefly review the enthymeme.

**Enthymeme**

In *The Rhetoric*, Aristotle claims that the enthymeme is the “substance of rhetorical persuasion” (Aristotle, 1946, p. 15). And yet a firm definition of enthymeme is not forthcoming in the rest of *The Rhetoric* (Ross, 1949, p. 409). There is great debate amongst rhetorical scholars on the exact definition of enthymeme. Lance Cooper’s (1932) claim is to not know exactly what an enthymeme is, but rather to show examples of good oratory and explain that these works are persuasive so they must be enthymematic. Charles Baldwin (1924) is much more specific, assuring his audience that the enthymeme is not inferior to the syllogism, only different. Baldwin further distinguishes between the syllogism and the enthymeme by claiming that “abstract
Deduction is summed up in the syllogism; concrete deduction in the enthymeme” (Baldwin, 1924, p. 13). Edward Cope (1867) and Thomas De Quincey (1890) agree that the enthymeme is based in probabilities rather than certainty. James McBurney (1936) concurs with Cope and De Quincey that the enthymeme is based in probabilities but adds that proof is not a requisite with the enthymeme and that it is “formally deficient” (McBurney, 1936, p. 65). Based on the works of these men, a researcher is likely to think that an enthymeme is a concrete deduction, based in probability, that is formally deficient and does not require scientific proof. These definitions are clearly at odds with each other and with Aristotle. It also further complicates the use of enthymematic logic in trials without an exact definition.

Bitzer (1959) points out that these definitions are often correct, but not always. The enthymeme is likely to be based on probabilities, to be seen as formally deficient as compared to the syllogism, however, it is not always the case, and as such absolute claims cannot and should not be made. Bitzer outlines the discrepancies between the definitions given for the enthymeme. The enthymeme is a variation of the syllogism, diverging in particular from the dialectic and demonstrative forms of the syllogism; (2) The difference between the syllogism and the enthymeme cannot be based on probabilities for there are enthymemes based on the “inevitable and invariable” (Aristotle, 1946, p. 1356b), and there are scientific syllogisms based on the probabilities; (3) The essential difference between the syllogism and the enthymeme cannot be found in formal deficiency, for as previously discussed, there are some enthymemes based on absolutes. However, that is somewhat irrelevant because many enthymemes which are
“formally deficient” still end up proving correct. Lastly, (4) the essential difference between the syllogism and the enthymeme cannot be its concreteness, for it is not a constant quality.

The enthymeme Bitzer suggests is a unique class of rhetorical syllogism, vastly different from the demonstrative syllogism, and different but similar to the dialectic syllogism. If the enthymeme is to be categorized as an incomplete syllogism, “that is a syllogism having one or more suppressed premises” (Bitzer, 1959, p. 407), then it needs to be made clear that the omitted premises are left out intentionally so that the audience may insert their own opinions and conclusions. An enthymeme is then seen as a joint venture between rhetor and audience. This definition is applicable to the way narrative is used in courtrooms. Attorney’s being restricted in the speech that is permissible, are forced to give incomplete variations of events that occurred and rely on jurors to fill in the blanks. Furthermore, this definition of the enthymeme aligns itself with Propp’s synatgmatic structure model of storytelling and audience interpretation. These themes having aligned themselves, it becomes necessary to examine the literature concerning legal communication and narrative.

**Legal Communication and Narrative**

Given the obvious relationship between communication and law, it would be easy to assume that the literature examining this association would be abundant. However, as of the 1970’s, this was not the case. Anapol (1970) notes this saying:

Given Aristotle’s classic definition of Rhetoric...one might expect to find an extensive literature revolving around the relationship between rhetoric and law. The fact is no such literature exists in English and while rhetorical sources which
mention law and legal concepts may be found as well as vice versa, there does not appear to be a single twentieth century treatment in English of the relationship between rhetoric and law. (p. 12)

This is not to suggest the subject is without precedent (Rice, 1961; Strother, 1961; Weiss, 1959) but the subject, given its great importance is relatively untouched. Anapol argued that the multiple disciplines within the legal community would benefit from a refresher on their classical roots (Anapol, 1970, p. 18). Wiethoff (1984) reiterates this point suggesting that law is essentially the practice of persuasion. 30 years previously, Constans and Dickey (1954) pointed out that they myriad of tasks that a lawyer must preform (select a jury, persuasive speaking, handle and cross-examine witnesses, interpret witness testimony in a favorable light, qualify experts, use opening and closing arguments, etc.) are all skills that require a knowledge of rhetorical principals. There was and continues to be a call for the necessity or training in rhetorical principles within the legal community (Malton, 1982; McBath, 1961; Mills, 1976; Nobles, 1985).

In attempting to make sense of the reality within in the courtroom, several different approaches have been taken. Hample (1979) uses the Burke’s dramatistic model in order to help understand the complexities of the courtroom drama. Continuing on this theme, Ritter (1985) uses Burke’s Pentad to examine the perjury trials of Alger Hiss. Taking his cue from Assistant Attorney General under Franklin Delano Roosevelt, Thurman Arnold, Ritter claims that trials are akin to ancient morality plays. The courtroom is the stage upon which the plays will symbolically unfold. Furthering the notion of courtrooms as akin to morality plays, Stein (1977) claims:

If thoughtfully arranged, the trial may parallel a morality play...The play divided
itself into three parts: first the prologue, then the play itself, and finally the epilogue. You see the similarity with the pattern of a jury trial. You tell them what you are going to do. You do it. You tell them what you did. The prologue states how vice is overcome by virtue. Then the play itself takes place and virtue does overcome vice. In the epilogue, the narrator comes on stage and announces that vice has been overcome by virtue (p.23).

The intelligent lawyer needs to look at trial work not as an opportunity to get justice done, but as an opportunity to put on a staged show.

Although Bennett does not see the courthouse as a stage and the trial as a morality play per se, he clearly sees the courtroom as a center for rhetoric, drama and narrative, (Bennett, 1978; 1979; Bennett & Feldman 1981). Juror’s are asked to comprehend potentially incredibly complicated events presented to them in a disjointed fashion. Furthermore, there are “informational, situational and social demands on communication and judgement [to make] jurors produce verdicts with the aid of little formal training or guidance” (Bennett, 1978, p. 1). Bennett determined that in order to make sense of the pressures and the information presented, narrative is the most effective delivery system: “[Stories] permit us to translate out impressions of a distant event into a form that will allow the listener...to grasp its significance. The story form also aids the listener in drawing certain conclusions” (Bennett, 1978, p. 3) The narrative form can answer questions about plausibility; whether one story makes more sense than another; whether that story in some way connects with the listener. The story also allows conclusions to be made with relatively little rational evidence. People, within the narrative context are able to make leaps to fill in the story where information is absent. It is in this sense a narrative enthymeme. Propp makes similar claims in *Morphology* about fairy tales. If the story is
properly set-up, people are able to connect the dots about what should happen next, even if the information is not available.

By giving the jury a narrative structure, the jury, during deliberation, will be able to elicit certain themes that will allow people of differing backgrounds to reach a consensus. As a model for testing the viability of the narrative structure, Bennett (1978; 1979) employs Burke’s Pentad (1969a). What ultimately came out of this work is the notion that the actual facts of any case have less to do with the outcome of the trial compared to the attorney’s ability to rhetorically create an acceptable story that shows their client in a favorable light.

Bennett and Feldman’s (1984) work is much more extensive. It clearly defines the roles of both prosecution and defense in regards to their positions as narrators. The prosecutions burden is to create a tight, well-woven narrative that delivers a consistent theme and complete explanation of the events in question. The defense meanwhile is expected to create reasonable doubt and may do so by choosing one of three possible strategies: (1) “Challenge” which will point out the missing elements in the prosecutions narrative; (2) “Redefinition” which is a reinterpretation of the facts presented to allow for a different outcome; (3) “Reconstruction” which tells an entirely different story that is ideally more plausible than that of the prosecution. While the first two strategies challenge the narrative created by the prosecution, the third strategy, Reconstruction, deals with the construction of narrative and hence becomes relevant for this study.

One of the major difficulties of the narrative approach to trial work is that neither side is granted the appropriate format for telling a complete narrative. “The rules of
Evidence and testimony in criminal trials place some obvious limits on storytelling” (Bennett, 1978, p. 4). This might seem to be a set-back to a study such as this however, this is far from the case. Even in these little segments of trial, narrative can be seen to emerge (Bennett, 1978; Chaberski, 1973; Kennebeck, 1973; Timothy, 1974).

Furthermore, multiple studies done starting as early as the 1940’s have all reached a similar conclusion, “that despite judges instructions to the contrary, many jurors form tentative verdict preferences early in the trial” (MacCoun, 1989, p. 1046). Given this, it becomes more important that a proper structure is set in place as early as possible. A similar conclusion can be inferred from Holstein’s (1985) research examining juror decision making process. The more ambiguity that exists within a case will allow for culturally different jurors to interpret the facts differently. And so the goal of every attorney when speaking to a jury should be to make the message as clear as possible. “If a lawyer would start by telling a story to the jury, rather than constructing a theory of the case, he would tend to leave out all the legalese and abstract theories of law that tend to confuse a jury” (Roberts Jr., 1999, p. 204). The point is that a lawyer who delivers a story to the jury will serve his or her client infinitely better than a lawyer who is determined to appear professional and speak in legalese.

Today’s lawyer must realize that the modern jury pool is changing. By the year 2000 41% of those eligible to serve on a jury will be from “Generation X,” people who were born between 1961-1981, while Baby Boomer’s who were born between 1943-1960 will make up 32% of the eligible jury pool and Seniors, those born before 1943, will only make up 27% of the jury pool (Hamlin, 2001, p. 9). This then has great implications in
regards to how an attorney needs to deal with juries. Hamlin suggests that the amount of television that Generation Xer’s watch (about 22,000 hours by the time they are 18) changes the rules of communication (Hamlin, 2001, p. 11). Television has made its viewers passive, and inattentive, and because of a lack of continuity, stories need to be kept brief. This is an audience who is able to tune out information that does not appeal directly to them. Hamlin (2001) suggests that at most, attorneys are going to have between 60 and 90 seconds to gain the interest of the jury (p. 13). And Hamlin’s recommendation for gaining that attention is to “Tell a Story!...Humanize the event, putting people and actions as well as motives into it” (p. 13).

Hamlin’s suggestion is not at all out of line with current thinking within the legal community. Publications within the legal community do nothing but illustrate this point. Ohlbaum, in writing about a rapidly expanding legal curriculum of trial advocacy, lists 10 steps to jury persuasion: Comprehensiveness, Theme, Consistency, Plausibility, Legal Structure, Accountability, Congeniality, Simplicity, Community, and Flexibility. And while none of these steps is titled narrative or storytelling, they are almost all elements of good storytelling. In addition, Ohlbaum’s first step, comprehensiveness or case theory, is described as “a story line on which all the pieces of a case are consonant” (Ohlbaum, 1993, p. 19). All subsequent steps are essentially dependent upon or are just window dressing for the story which is the key to persuasion. Ogborn, offering a slightly different take suggests that the best way for attorney’s to put juries at ease is through storytelling. Jurors today are faced with a potential information overload. That overload is likely to induce anxiety which will widen the gap between what jurors understand and what they
think they understand. In an effort to simplify information, Ogborn (1995) suggests storytelling which is part of our “primordial genes” (p. 82). The story will put the facts into a workable context which should enable the jury to make a value judgement. The well-told story will in essence summarize the significant events, transfer critical information, cause a visceral feeling, and persuade the juror to one side of the argument. Lubet (1993) expands that storytelling, in the context of a trial, can be extremely effective if the story meets several criteria:

“(1) It is told about people who have reasons for the way they act; (2) it accounts for or explains all of the known or undeniable facts; (3) it is told by credible witnesses; (4) it is supported by details; (5) it accords with common sense and contains no implausible elements; and (6) it is organized in a way that makes each succeeding fact increasingly more likely.” (p. 1)

An attorney will need to deal with the constraints of a courtroom setting (i.e. admissibility of evidence, proving of negligence in tort cases, ethical obligations of honesty, etc.) while creating the best possible narrative to meet the restrictions presented. Lempert (1991) believes that storytelling infiltrates every aspect of the jury trial, from voir dire to opening statements to questioning to cross-examining to closing remarks. The crucial decision the attorney must make is in deciding what the best way to present the information. Should the attorney try to adhere to a strict chronological timeline or can a different story model be used?

The story model that is used during trial is a matter of some delicacy. Sherwin (1994) advocates for a story model he calls the affirmative postmodern story. The affirmative postmodern story is one that “employs postmodern storytelling techniques, but...closes around a coherent meaning.” (Sherwin, 1994, p. 72). This story model
assumes a savvy jury in tune with the symbols of the day; symbols that point to fragmented and distrusting cultural audience. However this cultural group will still respond to deep seeded archetypes of truth and justice on an individual level. In explaining his reasons for choosing the affirmative postmodern story, Sherwin discusses a unique case, that of Randall Dale Adams who was convicted of shooting a Dallas police officer, Robert Wood in 1976. Adams’s conviction was overturned 12 years later after a film “The Thin Blue Line” told the story of Adams conviction with a different story model than that used at trial. Errol Morris, director of “The Thin Blue Line” uses a combination of what Sherwin calls a causal-linear frame model and a postmodern frame model of storytelling. Morris model of storytelling relies on the viewer having a firm grasp of the unwritten rules that govern human belief and understanding. In other words, Morris counts on the viewer knowing what unchecked power and corruption are and counts on the viewer having a certain distrust of unchecked authority.

Sherwin’s overarching premise is that the best possible choice of story model is the affirmative postmodern because it accounts for a culture that is becoming more cynical while still playing on classical themes that hold appeal. While Sherwin’s work is flawed in that he does not seem to seriously take into account the constraints of courtroom procedure while praising Morris’s film, he does bring up an interesting point. The choice of story model is critical to the story’s success. In essence, it is the skill of the storyteller, or in this case the lawyer, that will win a case rather than facts. Powell (2001) and Spence (1995) agree with this sentiment. Powell claims that “the magic spell of a good story is actually cast by the storyteller. Casting this spell is an art that excellent trial
lawyers use in every trial” (Powell, 2001, p. 90). According to Powell, the attorney needs to focus on six different ideas while creating a narrative: (1) Identify the Humanity of the Story; (2) Identify the Emotions of the Story; (3) Identify the Character Traits of the People Involved; (4) Identify the Structure of the Story; (5) Identify Details That Help Listeners Visualize the Story; and lastly (6) Internalize the Story. Spence’s view is largely the same. That we as humans are storytellers by nature, that through story’s we learn best. The courtroom then is not place to abandon what we as humans do and love best, stories. In preparing a story, Spence recommends that the lawyer asks him/herself the following questions:

“(1) What do we want? (2) What is the principal argument that supports us? (3) Why should we win what we want? That is, what facts, what reasons, what justice exists to support the thesis? and lastly (4) What is the story that best makes all of the above arguments?” (Spence, 1995, p. 76)

All of these steps are designed to help write compelling narrative because the narrative will help the jury visualize the event, it will force those twelve sitting in the jury box to humanize the event, to get involved with the trial. As Powell puts it, “Most juries...are filled with ordinary people who love a good story, but cannot shoot a mental movie on their own. They need a storyteller” (Powell, 2001, p. 104). The attorney who makes the best mental movie for the jury has the best opportunity to get the verdict that they want.

All of the aforementioned studies advocate the use of narrative in trials, however none of them offer firm instruction in the use of narrative. At best they offer general questions that the barrister should ask themselves before beginning to create a trial narrative. At worst, the studies describe a category or story model that merely purposes
the use of symbols. What so many of these works has stressed, Mauet (1992), Olhbaum (1993), and Kadoch (2000) in particular, is that while courtroom advocacy education is expanding, it is far from good or even competent. Many attorney’s are fleeing the private sector for the public (Public Defenders office, District Attorney’s office, Attorney General’s Office, etc.) in order to get the trial experience they need in an effort to prop themselves up in the private sector. For the public sector is where the bulk of courtroom advocacy work occurs. This study will examine opening and closing statements from three different criminal trials utilizing Propp’s syntagmatic structure model of the folk tale. Propp’s structure as previously mentioned, is exceptionally detailed; far more so than any of the previously mentioned studies coming out of legal and legal communication scholarship. The purpose of this research is to determine if so rigid a structure will be able to function as an effective enthymeme in such a rigidly controlled environment. And while details about the crimes that occurred will be discussed it is in no way the purpose of this research to pass judgement upon the attorneys or their clients. If Propp’s structure does work as an effective enthymeme, then the legal community will have an effective educational tool with which to instruct future and practicing attorney’s. If it does not work, then that would go a long way in explaining the generally vague nature of instruction of storytelling within the legal community.
Chapter 3

THE NARRATIVE IS IN THE EYE OF THE BEHOLDER

The following chapter is an analytical break down of the opening and closing statements in the case of *The people of the State of California vs. Robert Kenneth Memory and Frankie Joe Prater*. Each opening and closing statement will be broken down according to Propp’s 31 functions of the dramatis function. Those functions, which can be found in the *Morphology of the Folktale* (1968, p. 25-65), are listed here in brief:

<table>
<thead>
<tr>
<th>Function</th>
<th>Description</th>
</tr>
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<tbody>
<tr>
<td>I</td>
<td>One of the members of the family absents himself from home</td>
</tr>
<tr>
<td>II</td>
<td>An interdiction is addressed to the hero</td>
</tr>
<tr>
<td>III</td>
<td>The interdiction is violated</td>
</tr>
<tr>
<td>IV</td>
<td>The villain makes an attempt at reconnaissance</td>
</tr>
<tr>
<td>V</td>
<td>The villain receives information about his victim</td>
</tr>
<tr>
<td>VI</td>
<td>The villain attempts to deceive his victim in order to take possession of him or his belongings</td>
</tr>
<tr>
<td>VII</td>
<td>The victim submits to the deception and thereby unwittingly helps his enemy</td>
</tr>
<tr>
<td>VIII</td>
<td>The villain causes harm or injury to a member of the family</td>
</tr>
<tr>
<td>IX</td>
<td>Misfortune or lack is made known; the hero is approached with a request or command; he is allowed to go or is dispatched</td>
</tr>
<tr>
<td>X</td>
<td>The Seeker agrees to or decides upon a counteraction</td>
</tr>
<tr>
<td>XI</td>
<td>The hero leaves home</td>
</tr>
<tr>
<td>XII</td>
<td>The hero is tested, interrogated, attacked, etc., which prepares the way for his receiving either a magical agent or helper</td>
</tr>
<tr>
<td>XIII</td>
<td>The hero reacts to the actions of the future donor</td>
</tr>
<tr>
<td>XIV</td>
<td>The hero acquires the use of a magical agent</td>
</tr>
<tr>
<td>XV</td>
<td>The hero is transferred, delivered, or led to the whereabouts of an object of search</td>
</tr>
<tr>
<td>XVI</td>
<td>The hero and the villain join in direct combat</td>
</tr>
<tr>
<td>XVII</td>
<td>The hero is branded</td>
</tr>
<tr>
<td>XVIII</td>
<td>The villain is defeated</td>
</tr>
<tr>
<td>XIX</td>
<td>The initial misfortune or lack is liquidated</td>
</tr>
</tbody>
</table>
Function XX: The hero returns
Function XXI: The hero is pursued
Function XXII: The hero is rescued from pursuit
Function XXIII: The hero arrives home or in another country unrecognized
Function XXIV: A false hero presents unfounded claims
Function XXV: A difficult task is proposed to the hero
Function XXVI: The difficult task is resolved
Function XXVII: The hero is recognized
Function XXVIII: The false hero is exposed
Function XXIX: The villain is punished
Function XXX: The hero is given a new appearance
Function XXXI: The hero is married and ascends the throne

In trying to ascertain whether or not the Proppian storytelling model can serve as a viable enthymeme for the courtroom setting, each of the six narratives told (three opening statements and three closing statements) will be decoded according to the aforementioned functions. If the model is viable, these functions should be seen throughout each narrative. That being said, the reason this model is potentially viable is because in order for the narrative to make sense to the audience, or in this case the jury, not every function needs be present. If the narrative is set-up correctly, the audience will be able to determine who the false hero is (function XXVIII) and ultimately how that villain is punished (function XXX), without being explicitly told as courtroom procedure forbids. If these functions are largely absent and when present, are not in the proper order, then the Proppian model can be dismissed, written off as impractical.

The breakdown of the courtroom narrative will proceed in a chronological order, that is to say, the first narrative analyzed will be the opening statement of the prosecutor, Assistant District Attorney Kevin Mayo, followed by the opening statement of Defense
Attorney Eric Conner who is representing Frankie Joe Prater. That will be followed by the opening statement of Defense Attorney Vittoria Bossi, who is representing Kenneth Memory. After the opening statements, closing statements will be analyzed in the same order: Mayo, Conner, and then Bossi.

The People of the State of California vs. Robert Kenneth Memory and Frankie Joe Prater

Assistant District Attorney Kevin Mayo’s opening statement. No story can be told without first setting the stage. Propp describes this “initial situation” as a place where family members may be introduced, a location will often be given, etc. While this initial setting is not technically a “function” according to Propp, it is still important in setting the tone of the story. Assistant District Attorney (A.D.A.) Kevin Mayo’s sets his stage in a non-traditional manner for folk tales, but what appears to be a common method for courtroom trials. He thanks the jury for their time, patience, and then begins to lay out what constitutes an opening statement. A.D.A. Mayo explains how what he is saying, “is not evidence. But it’s what I [he] expects the evidence to show” (Mayo, 2006a, p. 345). While A.D.A. Mayo’s initial setting may be optimal for a trial, it does not make for great storytelling. The players are not introduced, the tone set is already one of legal jargon rather than drama.

It is not until the seventh line of the third page of A.D.A. Mayo’s opening statement, that he launches into the first function of the dramatis function. During the initial function, function I, one of the members of the family absents himself from the home; death is an extreme form of absence. This is where A.D.A. Mayo begins. “On
November 5th, 2004, at 11:50 in the evening, a young man by the name of Mark Donahue was stabbed and killed” (Mayo, 2006a, p. 347). The purpose of this first function in tales is to create a sense of loss, whether that be from a parent or child gone missing or the death of a loved one. A.D.A. Mayo makes every effort to make this loss felt. He discusses the victims family, his parents Steve and Sharon, and his sister Lisa. He mentions the college that he was attending, San Jose State, and then he describes how Donahue was discovered that night, “basically...in the gutter, lying in the street” (Mayo, 2006a, p. 347). The first function of the story is complete by describing the sense of loss.

Function II of the Proppian model is closely linked with function III. Function II states that an interdiction or rule is given and function III finds the hero violating that interdiction. In the case of Mark Donahue, function II is implied as it is the first part of the necessary enthymeme of courtroom rhetoric. It is part of the courtroom rules of opening statements that anything said cannot be argument, but must be a fact that will be proven later as speculation is not allowed. And so to say that Donahue and his friends should not have gone to Shakers because it is a less than reputable establishment that is the frequent hangout of a branch of the Hell’s Angel’s would not be permissible in court. Instead, A.D.A. Mayo describes the pub in somewhat more realistic terms: “It’s not a very big bar. Pretty much nondescript. It has a small parking lot in the front...At the times Shakers was owned by a person named Bill Johnson...he no longer has anything to do with Shakers...he’s in bankruptcy” (Mayo, 2006a, p. 348). Without saying so directly, Mayo has managed to describe Shakers in unappealing manner with an owner who has been pushed out in disgrace. This is clearly not a place that the average citizen
would want their child hanging out at. And Donahue violates that interdiction, and function III is demonstrated, by to Shakers and he pays the price with his life.

Function IV requires that the villain makes an attempt at reconnaissance but the altercation took place in a location already familiar to the assailants with unknown combatants. Additionally the phrase “makes an attempt at reconnaissance” implies a conscious act; in this case there was no conscious effort to go and get information. However, that does not mean that information was not forthcoming about the victim. Function V states that the villain will find information about his victim. That is indeed the case here. There are many instances where the prosecution describes the scene and constantly talks about height and weight of those involved in the melee. Even the number of people involved in the fight is information that causes the defendants to go and reach for their weapons: knives, a wrench, and a Mag-Lite, which is a brand of flashlight made from aluminum, is approximately 15 inches in length and weighs approximately one pound.

In this case the villains never really attempt to deceive their victims, which is function VI and so function VII, the victim submits to the deception and thereby unwittingly helps his enemy, is not possible. There is no trickery involved. Rather the defendants and the victims, with the exception of Donahue, make it quite clear that they know what they are getting into. No one is backing away from this fight and all sides actually appear eager to participate. Enos, one of the group that instigated the fight, was reported saying to the bartender earlier that, “There’s going to be a fight” (Mayo, 2006a, p. 354). Deception and or trickery are not issues that come into play.
Function VIII, the villain causes harm or injury to a member of a family, is another function skipped here due to courtroom rules. Past “bad acts” are not admitted unless it constitutes a clear pattern of behavior that is relevant to the trial, (i.e., a defendant’s intent, plan, motive or modus operandi), however, that does not stop the prosecution from describing the defendants as people who are likely to have caused harm in the past.

“These defendants are members of what they refer to as an outlaw motorcycle group called the Jus Brothers...[In order to become a member of the Jus Brothers] you have to be a supporter of the Hell’s Angels” (Mayo, 2006a, p. 351-352). A.D.A. Mayo then discusses how the Jus Brothers consider themselves part of the “1%” of motorcycle gangs that are warriors. The use of the phrase “1%” is a reference to the American Motorcycle Association’s (A.M.A.) claim that only one percent of all motorcycle riders are violent outlaws. Motorcycle groups who have wished to identify as living outside the law after the A.M.A.’s statement in 1947, have called themselves one percenters. The terms “outlaw motorcycle group” and “Hell’s Angels” do not specifically mean a person has done anything to harm another, yet the implication is that many families have been torn apart due to the violent reputation that the Hell’s Angels and other motorcycle gangs have earned.

According to Proppian narrative theory, it is at this point that the hero should begin to become more directly involved in the story. Functions IX-XV all involve the hero’s journey that leads them to deal with the situation:

Function IX: Misfortune or lack is made known; The hero is approached with a request or a command; he is allowed to go or is dispatched.
Function X: The Seeker [hero] agrees to or decides upon a counteraction.
Function XI: The hero leaves home.
Function XII: The hero is tested, interrogated, attacked, etc. which prepares the way for his receiving a magical agent or helper.
Function XIII: The hero reacts to the actions of a future donor.
Function XIV: The hero acquires the use of a magical agent.
Function XV: The hero is transferred, delivered, or led to the whereabouts of an object of search. (Propp, 1968, p. 36-51)

However, it is at this point that the story really begins to diverge from the Proppian format because a hero has not been anointed by the prosecutor. None of the groups discussed up to this point have the potential to be a hero. The first group mentioned is Mark Donahue and friends who has broken the unspoken edict not to go to “scary” bars. The next group is the band of villains, Defendants Memory and Prater. The only potential heroes that have been introduced into the story at this point are Derrick Scott, Jeremy Miller and company. This group is certainly trying to stand up against the villains, but they are fighting for their own reasons. They were not summoned for help, they picked the fight. There is no noble cause for the fight and the potential heroes are not tested and so they cannot receive a magical ability that will later aid them in their struggles. Certainly there is potential for a hero character in this narrative, but the prosecutor has not set-up the story in this manner. Both the jury and Assistant District Attorney Kevin Mayo have the potential to be heroes. They are all people who could be described as fighting for Justice: A.D.A. Mayo is actively seeking to put alleged criminals behind bars; the jury is tasked with that same responsibility.

In function XVI, the hero and the villain will join in direct combat. As previously discussed, the only potential hero(es) are Miller, Scott and co. As such, it fall upon them to take on the villains. The fight starts in earnest a little after 11:40 p.m. Derrick Scott is
sitting in Shakers when he looks out the front door and sees his friend Jeremy Miller yelling at a biker; the biker is reciprocating. Scott goes out front to help his friend and it turns out Miller is yelling at the defendant Frank Prater and Clifford Enos is yelling at Robert Memory. As Enos is yelling at Memory, Memory takes out his cell phone and calls Eddie Nieves, the Sergeant at Arms of the Jus Brothers. Scott goes to join the smaller Enos as Memory hangs up the phone and pulls out a crescent wrench. Scott tells Memory to “get on your fucking bike and go, we’ll kick your ass” (Mayo, 2006a, p. 356). Memory does not go but takes “a swing at him [Scott] with the crescent wrench” (Mayo, 2006a, p. 356). After taking a few swipes at Scott with the crescent wrench, Memory changes tactics and runs after Miller who was shouting at Prater. Prater meanwhile runs at another individual “and then...he’s hitting him over the head with this Mag-Lite...two large, hard cracks” before the unknown man, Donahue, who had received the blows pulls Prater to the ground.

At this time Memory and Miller are squared off with one another. As Miller reaches back to punch Memory, “Memory came around the side and stabbed him right under the left arm,” (Mayo, 2006a, p. 357) puncturing his lung. Simultaneously, Scott sees two men running toward the group from across the street and is convinced that he is going to have to take on these two newcomers. He squares up to do so when he says he feels “a large-- a hard thud in my back and I’m stabbed in the back...he describes it as a...folding-type buck knife, about four inches long” (Mayo, 2006a, p. 357). The stabbing and resulting scars are important for in Proppian narrative, function XVII states that the hero is branded. The scars are necessary to later on prove that it is really they who were
the ones who fought.

It might seem difficult to declare a victory for the potential heroes who have both beenstabbed while the defendants have fled and so difficult to declare that function XVIII has been completed. Scott is taken to San Joaquin General Hospital where he spends five days recovering from his punctured lung. Miller is taken to St. Joseph’s hospital and is treated quickly but has health difficulties for another month due to infections stemming from the wound. But this non-victory is described by Propp as the negative form of function XVIII. The negative form is typically associated with a type of shame. For example, if a group of warriors go out to fight, one may hide while the others are victorious. Although this melee did not feature members hiding while others fought, there is still the element of shame associated with the entire thing. Not only does the fight feel needless, but they did not walk away with any sort honor attached to their scars. However, even in the negative form, function XVIII states the villain will be defeated. While Prater and Memory may have won the fight in the conventional sense, they had to flee. The defendants did not achieve their goals that night; instead they had to run.

It is again at this point that the Proppian story structure becomes muddled in the case of this trial. Without a real hero the rest of the stories functions all become nonsensical. The hero cannot return to the place he came from (function XX), nor will the hero be pursued (function XXI), nor will the hero need to be rescued (function XXII), etc. While most of the, functions XIX - XXXI cannot be accounted for in its current format, two more need to be mentioned. Function XXIV states that a false hero presents an
unfounded claim. A.D.A. Mayo touches directly upon this point. After the fight at Shakers that night, the police requested on local news coverage that night that anyone with any information function forward. While people at the bar provided what information they could, enough to give police a push in the direction of the Jus Brothers, no arrests were immediately made. A week after the murder of Mark Donahue and the stabbing of Scott and Miller, Memory and Prater stepped forward and said that they were the two involved in the fight. Memory’s and Prater’s stories are tales of “self-defense” (Mayo, 2006a, p. 358). This claim aligns perfectly with function XXIV. A.D.A. Mayo naturally assumes that the claim is false and the rest of his opening statement is dedicated to proving this fact. But in the process of doing so he is attempting to fulfill function XXVIII himself, the false hero or villain is exposed.

The enthymeme in this instance is not nearly effective as it could be because there are four different groups who all assume the role of hero at some point during A.D.A. Mayo’s opening. The first person who fulfills the role of hero is Mark Donahue who is given an assumed interdiction which he violates. However, Donahue is also the family member that absents himself and so he cannot be the hero. The second hero(es) are Miller and Scott who take on the villains and mange to drive them off after they are branded. The third group who act like the heroes are Prater and Memory who returned home after their battle (function XX). Memory and Prater were most definitely pursued (function XXI), they were hidden and kept safe by their friends and families for the week preceding their voluntary surrender (function XXII). They were given a new appearance (function XXIX). Lastly, A.D.A. Mayo assumes the role of hero as he attempts to
unmask the false heroes, as he tries to punish the villains (function XXX). A lack of consistency in role assignment diminishes the effectiveness of the narrative/enthymeme.

**Opening Statement of Eric Conner, Attorney for Frankie Prater.** Connor, like A.D.A Mayo, attempts to set the initial situation by describing what the evidence will show. That the “defendants acted in lawful self-defense against a drunken mob, for a fight that they had no provocation of, that they were attacked simply because they looked different” (Conner, 2006a, p. 372). The setting of this initial situation is prolonged as Connor tries to describe the life of Frankie Prater, a Stockton, California native who owns his business, Arctic Heating & Air. He employs as many as 80 people at a time, pays huge tax bills and has made a lasting contribution to the Stockton, California community, etc. While the description of Prater’s life can be seen as a deviation from the typical fairy tale, this is Connor’s attempt to make his audience identify with the defendant. Prater is an “everyman” in this version of the story. He is someone who has succeeded in every sense, building a business from the ground up, employing 80 people, never taking vacation, working hard and raising his three daughters. He is hardly the type of man who gets into a fight unprovoked.

This description also sets up function I of the dramatis function: the loss of a family member. The loss of a family member does not always have to mean death as is the case in A.D.A. Mayo’s opening statement as sometimes the loss of a family member just means that they are out of the picture. The loss, as it is used by Connor, is effective as it references themes of the American dream and family struggles; a person pulling himself up by his bootstraps, making a life for himself and struggling to be there for his family.
Function II, the interdiction, is both a reverse interdiction and an enthymeme; it also ties into the theme of family struggles. Prater has dedicated so much time to his business that he has had to sacrifice his relationship with his family. While he has always been there financially for his family, he been unable to always be there physically, but Prater is determined to remedy that. In recent years, “he’s hired people to run the business and began to take on other interests he’s neglected over the years” (Conner, 2006a, p. 373). While a specific rule has not been given and so cannot be violated, Prater clearly feels that his time has been misspent. His family was neglected as was his personal life, but now that he has rectified this situation, he has time with his family, time for himself, and this it turns out is how he became interested in motorcycles and the Jus Brothers.

While the Prater family is busy taking dance lessons and planning a vacation to Hawaii, the villains should be committing some reconnaissance. Function IV is never really accounted for by Conner. Like A.D.A. Mayo, Connor suffers for not having clearly defined roles. The hero of his story, Prater, has been described as a victim to this point rather than a hero. He is a victim of his own success and work ethic, he who has for so many years missed his family growing up, and he now is a victim of fate, for when he takes an outside interest in motorcycles, he winds up in a killing a man, albeit in self-defense. What is clear though is that he is not the hero that he could have been because he is too tragic to be a folk lore hero. Meanwhile the villains of the story, Miller, Scott, Enos and company are Just now being introduced. That in and of itself is not a problem as this should be the villains first appearance, but they are described as “a group of large
obviously intoxicated young men...all of these individuals are large, over six feet tall. Most of them are well over 200 pounds” (Connor, 2006a, p. 377). However, being large, young and intoxicated is hardly the work of villains snooping around for information. Function IV ideally introduces the villains in the middle of a sinister act. That is not the case here.

Clifford Enos, a member of the “group of large obviously intoxicated young men” fulfills the function VI of the dramatis personae (the villain attempts to deceive his victim in order to take possession of him or his belongings) by jeering at the Prater family as they leave Shakers. Shakers has become a bit too boisterous for Prater and his family so he suggests that they go. Enos, Scott, Miller and company follow the group out and Miller shouts out to Prater, “Have a white night.” Enos begins to shout the same thing at Memory. Memory, according to Connor, takes the bait and responds which fulfills function VII (the victim submits to the deception and thereby unwittingly helps his enemy), “What? What did you say?” (Connor, 2006a, p. 378). That response provides the opening that the villains are looking for. Enos functions in closer to Memory and says, “What, you want some shit?” (Connor, 2006a, p. 378). Meanwhile Miller who is confronting Prater shouts, “I’ll fight you, I’ll fight you right now, right here out in the street” (Connor, 2006a, p. 378). Prater knows that he has made a mistake by even coming to this bar tonight and makes one last attempt to try and talk his way out of the situation. Simultaneously cries of “Okieville” and “Have a white night” fill the background. The crowd surrounding the bikers continues to grow to about 15 people, none looking to break up the fight and most looking like they want to do harm to Prater and company.
It is here that the story departs in a major way from the Proppian form. Function VIII is fulfilled, the villain causes harm or injury to a member of the family, but this function is combined with function XVI, the hero and the villain join in direct combat. The functions that are missing (Functions IX-XV) are all due to the fact that clear roles have not been assigned. Prater and Memory, in this telling of the story are both victim and hero and both are necessary parts to the narrative. The victim will need a hero to save them. The victim is the hero’s reason for being, but a hero would not have found himself in this situation in the first place. Playing both parts is contradictory to storytelling logic. However it is during function XVI, the battle between the hero and the villain, that Prater’s role as the hero and his wife’s role as the victim becomes more clearly defined.

The actions of Teresa Prater that evening directly led to the start of the physical altercation. She went to Shakers that night with her husband and friends to relax before she and Frankie left for Hawaii. She is watching the scene unfold before her, standing near Prater’s Harley, hearing her husband being threatened. It at this point that a third group (Mark Donahue and friends) begins to merge with the first two. There is some confusion regarding this group’s intention. The newest group is either working their way into the inner ring to get a better view of the fight, perhaps even to participate, or they are trying to squeeze their way past a growing crowd to the bar. Either way, Mark Donahue gets close to Teresa, within a few feet, and she yells out at him, “Hey, don’t get involved” (Connor, 2006a, p. 381). Mark responds violently, grabbing her by both her arms and saying, “Bitch, you don’t even know me, I’ll kick your fucking ass right now!” (Connor,
2006a, p. 381). Teresa cries out, “Frankie!” and Prater looks over to see his wife being manhandled, then tossed aside. Donahue then charges Prater while Miller sees his opportunity to attack Prater from behind. Donahue gets there first and Prater takes careful aim and splits his head open with one swift blow from his Mag-Lite. The blow however does not stop Donahue so Prater hits him again. Prater is then tackled from behind by Miller. Prater’s head hits the ground and he loses consciousness while the mob kicks his motionless body. While the unconscious Prater lay on the ground, Donahue climbs on top of him and begins punching him in the face. It is then that Prater regains consciousness and reaches for the flashlight laying on the ground nearby. Donahue punches him again and knocks Prater’s retainer into the back of his throat. He begins to choke.

While Prater is simultaneously is lying on the ground having just been awoken from an unconscious state, chocking on his retainer, and is being punched in the face by Donahue and kicked by the angry horde, Prater reaches into his pocket and pulls out a “four-inch Crenshaw knife” (Connor, 2006a, p. 383). He flips the blade out and screams, “Get the fuck off me” (Connor, 2006a, p. 383). Donahue does not get off but sees the blade and reaches for it. The blade nearly slices his hand in two before it goes into his chest, and suddenly Donahue is bleeding profusely. He jumps off of Prater and begins to run back towards his car. He makes it almost 20 yards before he crashes down into the pavement, shattering his teeth as he hits the pavement. In the interim, Teresa is being threatened by Enos who is threatening to slit her throat, but Prater crawls back up and gets in between the two, telling Teresa to get back on the bike. Still holding the knife, he
hops on to the Harley after her and they tear off into the night.

The description of this small riot makes up the majority of Conner’s opening statement, as the narrative ends here. But it is important to point out that this description makes certain things clearer. Prater is the hero. Despite his status as victim early on, Prater has performed heroic feats. This may sound like it has a ring of sarcasm, but it is truly Herculean to fight your way out of those circumstances. His hero status is further confirmed by the scars that accompanied the battle. His battle scars are the mark of the hero as is pointed out by function XVII. And the villain is defeated in open combat (function XVIII), and while not all of the villains were vanquished, only Donahue having been killed, several others were severely wounded.

But knowing that Prater is the hero and his wife the victim proves problematic. The role of hero has certain expectations attached to it. The hero will fight proudly, bravely and all will know his name (Function XVIII). Prater hid for more than a week before he and Memory came forward with this story. The hero will balance the scales of Justice after battle (Function XIX), but this does not happen. The hero will ride off into the sunset, but Prater, although he did ride out of the scene, did not go off into the proverbial eden to reign over a new kingdom. This narrative is missing one third of the story model because Connor decided to end his opening after the fight and we know nothing more of the hero’s life. Despite the problems of role assignment, this story could work as an effective enthymemetic narrative if not for the narrative told by Mayo previously. Mayo’s narrative accounts for that last third of the story with the activities that follow the battle as all fairy tales must. Because Mayo gave a version of what happened after the
battle, Conner’s narrative appears all the more flawed.

**Opening Statement of Vittoria Bossi, Attorney for Robert Memory.** Bossi is placed in a difficult storytelling situation. She is the third teller of a story that has already been told twice. Her version cannot differentiate too greatly from Conner’s or else the defense will appear to be inconsistent. Knowing what a difficult situation she is in, Bossi acknowledges these problems to the jury first. “And now I have to speak last. And you’ve heard everything. Well, you’ve heard a lot. So you’re already kind of caught up. And I don’t want to repeat or plow already plowed fields” (Bossi, 2006a, p. 394). After this acknowledgment, Bossi opens like Mayo and Conner, by thanking the jury for their time and effort.

Then Bossi immediately begins to paint a picture of the man Robert Memory. She is using what would typically be time for setting the initial situation to expound on the many positive characteristics of Memory. He is a single dad raising an 11 year old girl by himself. He is a blue collar construction worker but having recently finished building the library annex at University of Pacific, Stockton, showing that he cares about community issues as well. Yes he is a member of the Jus Brothers motorcycle club but so far, the Jus Brothers have been horribly misrepresented. No they do not support the Hell’s Angel’s. Rather it is a group dedicated to giving back to the community. Bossi first met members of the Jus Brothers motorcycle club when they did a toy run at the Walton School for handicapped children. It is the goal of the Jus Brothers to, “make sure every handicapped child gets a present at Christmas” (Bossi, 2006a, p. 394). As previously discussed, it is not at all unusual for the initial setting to be used as an
opportunity to introduce the main players, but that is not what Bossi is doing. She is only speaking about her client and is doing so to get the jury to identify with him. Memory is a blue-collar, single-father, who spends his free time giving toys to handicapped children. Bossi wants that to be the person that the jury understands, not the Robert Memory who has several arrests and convictions on his record.

The introduction to Bossi’s narrative is cracked; it struggles to find cohesion jumping whole sets of functions including the first (one of the member of the family absents him or herself from home). There is no mention of loss. Without discussion of Mark Donahue early on, which is consciously avoided, or some other profound loss early on in the narrative, it of course begs the question of why we are telling this story in the first place?

The narrative does not really begin until Bossi begins to introduce the rest of the players, which she does on the periphery of the battle scene (function XVI), but even then, the narrative comes in short, choppy, inconsistent bits. Some of the characters are introduced with physical descriptions; “Derrick Scott is a big boy...about 300 pounds” (Bossi, 2006a, p. 397). Others are introduced with a sentence or two describing his activities that night; “We have Jack Barton. Jack Barton makes a statement, “I knew my boys were gonna get into it and I was gonna back ‘em up” (Bossi, 2006a, p. 397). The point is that each character that is introduced takes us to a slightly different part of the narrative without regard for a chronological timeline which is critical for Proppian structure.

Bossi’s claim that she does not wish to rehash the narrative seems to leave her in an
impossible situation. Beginning Just before the fight, there are some details that she wishes to explain to the jury, however, she is hindered by this earlier claim. The consequence being that nothing really flows together. The structure is fatally broken.

Like Conner, Bossi also struggles because of not defining roles. The only perspective hero in this narrative is the victim, but the victim has had nothing taken from him. The hero has not been given a rule that they have violated. These are things that need to have happened in order to advance the story in the Proppian model and there has been no opportunity in the narrative told by Bossi. In fact, the only way of identifying the hero is that he fought against the villain, Clifford Enos, the only character who has been defined so far. However, Enos the villain, has done none of the things typically associated with villains, as there has been no reconnaissance and hence, he has received no information about his victim. Still it is clear from his actions that Enos is the instigator of the fracas.

Where this story starts to become recognizable is after the fight. After the battle, the hero leaves the scene (Function XX), which Memory does, flying off on his motorcycle. As he speeds off, he drops the knife that he had during the fight. Memory is concerned about this group of attackers following him as he peels off (Function XXI, the hero is pursued), so he deviates from his normal route (Function XXII, the hero is rescued from pursuit) and goes to a friends house, Mr. Bird. He eventually goes home to his daughter and crawls into bed. The next morning he gets the paper to discover that his adventure has made the front page of the paper, but the facts are incorrect (Function XXIV, A False Hero presents unfounded claims).
It’s a murder, it’s already a murder. It’s a murder and there are people—it’s attempted murder, it’s in the paper. Monday morning his friends that weren’t even at the bar are arrested, front page news, the bikers have committed murder. These people weren’t even there, they were home watching television (Bossi, 2006a, p. 405).

However, the story ends in an unsatisfactory way; that is to say the story ends with a promise for the story to continue. “You’re gonna get the whole story and you’re gonna be the judge of what it all means” (Bossi, 2006a, p. 406). The hero is once again turned into the victim, having to be put on trial, rather than being the champion who rides off into the sunset. In truth this ending has potential to be great depending on role assignment, but the hero in the story cannot be Memory as Bossi has made him out to be. The hero needs to be the jury itself. If the jury is the hero, the trial then becomes the difficult test that they need to pass (function XXV). Once they pronounce the verdict they will have officially anointed a hero and a villain (functions XXVI, XXVII & XXVIII). The jury will have punished the villain (function XXX), in Bossi’s case, ADA Mayo, and the hero will presumably ride off into the sunset.

**Assistant District Attorney Kevin Mayo’s Closing Argument.** As discussed previously, the purpose of the initial situation is to set the stage, to inform the reader of some of the basic facts that are necessary to get the story started. In A.D.A. Mayo’s closing, the initial situation lasts 26 pages and consists of explaining exactly what each count brought against the defendants means and why only his explanation, his narrative should be believed:

*Count 1:* A violation of California Penal Code 187 (Murder) for taking the life of Mark Donahue. An additional enhancement of violating California Penal Code 12022 (b),
which is use of a deadly weapon, is included. In the case of Prater and Memory, the deadly weapons include a knife, a Mag-Lite and a crescent wrench.

**Count 2:** Both defendants are charged with a violation of California Penal Code 188 (Attempted Murder) for attempting to take the life of Jeremy Miller. An additional enhancement of violating California Penal Code 12022 (b), which is use of a deadly weapon, is included in the charge against both defendants. Memory also faces a charge of violating California Penal Code 12022.7, which means he inflicted great bodily injury during the commission of a crime.

**Count 3:** Both defendants are charged with a violation of California Penal Code 188 (Attempted Murder) for attempting to take the life of Derrick Scott. An additional enhancement of violating California Penal Code 12022 (b), which is use of a deadly weapon, is included in the charge against both defendants. Both defendants face a charge of violating California Penal Code 12022.7, which means he inflicted great bodily injury during the commission of a crime, in regards to Mr. Scott.

**Count 4:** Both defendants are charged with a violation of California Penal Code 245 (assault with a deadly weapon) as it pertains to Jeremy Miller. Those weapons are a knife, a Mag-Lite and a crescent wrench. Prater and Memory are both charged with additional enhancements 12022 (b) and 12022.7.

**Count 5:** Both defendants are charged with a violation of California Penal Code 245 (assault with a deadly weapon) as it pertains to Derrick Scott. Those weapons are a knife, a Mag-Lite and a crescent wrench. Prater and Memory are both charged with additional enhancements 12022 (b) and 12022.7.
After this 26 page initial situation, the story picks up right where it should. “We’re here because a young man named Mark Donahue was killed on November 5th, 2004. He was killed by this defendant, Frank Prater. He was killed with a knife. And he was left--he was left lying in the gutter” (Mayo, 2006b, p. 3901). This loss propels the rest of the story forward. There is also mention of the harms done to Miller and Scott but they detract from the Proppian narrative quality that should be achieved in function I, the absence of a family member. To make that loss feel more palpable, Mayo would be wise to discuss specifically what they lost, not just the fact that they were stabbed. Talk about the loss of blood, talk about the loss of income, but loss needs to be pushed here.

Mayo next lays down his interdiction and the violation of that interdiction:

“And we know Jeremy Miller, Derrick Scott, Junior Enos, Jack Barton, Justin Hood and a few of their--they’re [sic] guys that were at a bar called Shakers. And they had too much to drink. There’s no question they had too much to drink. And there’s nothing about their behavior any of us should appreciate. They were drinking at a bar” (Mayo, 2006b, p. 3901).

The interdiction, although not specifically stated, clearly is that you should not drink to excess and this rule was broken. There is also a subtle interdiction against the bar Shakers as well. These young men were drinking, there but they were also drinking elsewhere before. The only reason to mention the bar by name is to point out the corrupting influence of the location. Clearly going to the now bankrupt bar was also a violation of the interdiction laid down. It is worth noting that the interdiction should be delivered to the hero and the hero should violate this rule. This is interesting because it puts Miller, Scott, Enos, Barton, Hood and company in the category of hero. This is, to say the least unusual, because all sides seem to agree that had it not been for the actions
of Miller, Scott, Enos, Barton, Hood and company that night, this whole situation could have been avoided. That hardly seems the work of heroes.

Right on cue according the Proppian rules of narrative, the villains show up. However, function IV and V that move the story forward are for the villain to commit reconnaissance and receive information about the victim. The victim in this story is Donahue who has yet to enter into the narrative, hence, it is impossible to receive information about him. Mayo tries to create victims that suffered that night other than Donahue. Those victims are not specific people but rather a sense of personal freedom. The way Prater and Donahue are described, it is as if they did not just arrive but took over the space: “We know these defendants showed up in their Jus Brothers’ clothes, showed up on their motorcycles. So what happens?...These defendants go out and they decide they are gonna smoke some weed” (Mayo, 2006b, p. 3901). The victims start to turn into more than Just one person, but are all those people around the group who have to put up with their thoughtless behavior. The victims are all the law abiding citizens that have agreed to live by a certain set of rules, and those people are being harmed by the behavior demonstrated so far (function VIII Villain harms member of the family).

Now the narrative cuts to function XVI, the hero and the villain join in direct combat. Functions IX-XV are omitted because, like Mayo’s opening, the traditional hero role has not yet been assigned. With a traditional hero, certain behaviors are expected and the Proppian story model accounts for this, however, in the story of a drunken melee turned murderous affair, there are no real heroes to speak of. Instead there are victims and villains. The hero would traditionally jump through a number of hoops in order to
establish their legacy. In this instance, all of those functions are omitted and instead we
jump to the moments leading up to the fray:

“We’ve got yelling going back and forth...Scott tells you while this yelling is
going on, Defendant Memory is on--on the phone talking...Brian Shirk [another
witness] tells you he sees Defendant Prater with a Mag-Lite...Defendant Memory
gets off the phone and he pulled out a crescent wrench that he Just happened to
have in his coat pocket...They are backing each other...They are Jus Brothers with
their little pride and respect for their patch and whatever else they are into”
(Mayo, 2006b, p. 3903-3904).

And the fight begins in earnest. Defendant Memory swings the crescent wrench at Scott.
Prater stands between the mob and his bike, tapping the Mag-Lite against the palm of his
hand. It is at this moment that Donahue walks into the crowd. He gets near the front to
better see the action and is pushed from behind by others jostling to see the melee.
Donahue is bumped from behind and stumbles into Teresa Prater. Teresa feels threatened
and so she pushes him. He throws his hands up and says, “What the F__., I’m not part of
this” (Mayo, 2006b, p. 3905). Teresa screams for Frankie, who up until this point, is still
standing there, tapping his Mag-Lite in his hand, but when Teresa screams, “He runs
right at Mark...Mark tries to get out of the way. Brian tells you...he tried to move, get out
of the way...And he [Prater] hits him [Donahue]. He hits him hard” (Mayo, 2006b, p.
3905). The blow from the Mag-Lite fractured Donahue’s skull.

After the Mag-Lite split his skull, Donahue began to fight back. He grabbed Prater
and the pair went to the ground wrestling. Despite what must have been immense pain
from the head wound, Donahue was holding his own in the fight; he goes swing for
swing, blow for blow with Prater. Then Prater, while on the ground, “pulls out a knife
and stabs him in the heart” (Mayo, 2006b, p.3907). Donahue does not die instantly and
from all reports he is not even sure what has happened until the knife is pulled out of his chest. He sees another blow is about to come and so he sticks his hands out to try and stop the blade from entering his chest; the blade rips through his hand. Prater twists it and the effect is gruesome. Donahue gets up and stumbles into the street. He falls into the gutter where Richard Contreras, a bystander, tries to stop the bleeding: “He sees Mark with his teeth missing, sees him bleeding out of his...chest...He’s putting his hands on his chest trying to save his life...it didn’t work” (Mayo, 2006b, p. 3908). Prater yells at his wife to get on the bike. He hops on and they speed out of the parking lot.

Meanwhile Memory is swinging his wrench at Scott. Scott continues to back up until he finally runs a different direction away from Memory. Memory then turns his attention to the one person still yelling, Jeremy Miller. Miller is rearing back to swing at Memory. The defendant pulls out a knife and stabs Miller, “sticks him in the side” (Mayo, 2006b, p. 3909). Scott who had taken off running started to head across the street toward the car wash. But he stops in his tracks as he sees two men running toward him from the car wash. As he wonders what direction to turn, he is stabbed in the back. The paramedic who testified described the location of the wound as the “kill zone” (Mayo, 2006b, p. 3909). Memory then hops onto his bike and rides off to Bird’s house.

The stab wounds and subsequent scars are important to the Proppian story structure. They mark the recipients as heroes which is the next function in the narrative order. The function that follows the hero being branded is the villain is defeated (Function XVIII). However, it is hard to call this battle a defeat for Prater and Memory. As A.D.A. Mayo puts it, “What’s their injuries? A few scratches on Prater’s face. Memory says he had,
what, his face was swollen? And they had to stay in bed all day Saturday” (Mayo, 2006b, p. 3910). On the surface this was not a defeat for Prater and Memory, but in the grand scheme of things, this was clearly a defeat. Despite their beating up the drunken mob, they lost their turf, their hangout. A group who prides themselves on standing and facing any challenge had to run. Despite losses by the other side, this cannot be viewed as a victory by Prater and Memory.

Functions XIX-XXIII again all relate to the hero. But as previously discussed, no one in this situation really fits the mold of hero. Function XIV, although it too deals with a hero character, can be seen throughout the rest of ADA Mayo’s closing argument. Function XXIV explains that a false hero will present unfounded claims. After discussing the fracas, Mayo then explains the many false and unfounded claims of Prater and Memory who claim that they were only defending themselves. Memory claims that Enos, after dancing around, yelling “Have a white night,” goes and gets a knife and starts waving it around, sticking it near his face. Scott has a heavy cable and has been swinging it near the bikes earlier and now towards Memory, but “nobody else except for the people associated with them [Jus Brothers]” (Mayo, 2006b, p. 3911) saw a cable or a knife. Everyone saw a crescent wrench.

Memory then claims that while jousting with Enos, he was backpedalling, trying to get away from the action, when he was hit in the head from behind causing him to drop his crescent wrench. Without a weapon, he tries to run, making his way out of the parking lot, but Memory did not make it very far. He was grabbed from behind by Miller and Barton who proceeded to pin his hands behind his head and beat him mercilessly.
Enos rejoins the fray at this point with his knife. He goes to stab Memory who twists away. The stabbing motion, however, has already begun and does not stop because Memory twisted away. The knife goes plunging into Miller’s side. With Miller stabbed, Memory is able to get away from Barton. He tries to run again, but this time he runs into Scott who is swinging his cable. The flying cable hits Memory in the head, knocking him down again. When he is on the ground, he reaches into his pocket and gets out his:

“Stanley Utility Knife...and because he’s a good guy, even though this guy [Scott] is trying to kill him...he decides he’s Just going to try and stab him in the arm. And he stabs him, goes for his arm, but he misses and gets him in the back. That’s the defendant’s [Memory] story” (Mayo, 2006b, p. 3913-3914).

At this point, Memory decides to run again; he finally is able to get on his bike and flee. “He [Memory] knows he’s not going to get a fair shake from the police” (Mayo, 2006, p. 3914) so he is left with no choice but to run. Sadly the knife that was used to stab Scott was dropped somewhere between Alpine and I-5, never to be found. He goes over to Rick Bird’s house, where despite the incredible events that Just occurred, Memory barely mentions the fight; says he was jumped and might need someone to watch his daughter for a while. He makes no mention of stabbing two people, stays mute on the subject of a massive police search. That is the story that Memory wants the jury to believe, but it is not realistic to believe that a Stanley Utility Knife, no matter how sharp or strongly wielded, could cause so much damage. Nor is it realistic to believe that not one person, other than those associated with the Jus Brothers, saw the weapons described by Memory or that a person would stay silent after being engaged in such a violent conflict. These are all false claims, at least according to Mayo, made by the false hero Memory.
A.D.A. Mayo then proceeds to point out the false claims that Prater makes. Prater’s narrative begins with him and his friends smoking pot out in front of Shakers, going back into the bar only to discover a boisterous group of young men singing karaoke. Prater and company decide that the noise is too much and so they are going to call it a night. As they leave the bar, the rowdy group follows them out the door and begin to threaten them. Junior Enos is dancing around with his knife, lunging at Memory, coming toward Prater, jabbing the knife toward his stomach. While this is going on, while the crowd grows larger and more rowdy, Prater calmly pulls out a Mag-Lite from his motorcycle. Just then, Mark Donahue, according to Teresa Prater, makes his move. He lunges into the throng near Teresa, who responds, “in a soft voice, not a loud voice, she says, ‘Stay out of this.’...She’s got a man with a knife at her husband’s stomach” (Mayo, 2006b, p. 3917) and she softly, politely asks this new assailant to stay out of this. Donahue, according to Prater, does not comply with Teresa’s wishes and changes directions mid-lunge. He grabs Teresa, saying, “Bitch, I’ll kick your fucking ass too” (Mayo, 2006b, p. 3917). Donahue, a large man, picks up Teresa and begins to shake her. He starts tossing her like a rag doll, eventually tossing her into a truck. When this happens, that is when she calls out “Frankie.” Prater meanwhile, sees his wife being threatened, and he responds to this situation by yelling, “Hey, hey, that’s not nice” (Mayo, 2006b, p. 3918).

Mayo continues to point out false claims in Prater’s story; that after Prater swings the Mag-Lite at a bull-rushing Donahue (Prater is not sure that he even made contact), he gets tackled to the ground, which breaks the strap on his motorcycle helmet and subsequently leads to him smacking his head on the concrete and going unconscious.
“Of course, we didn’t get--we didn’t get pictures of this injury, the one on the back of the head. They sit around Sunday taking pictures of the injuries, but they didn’t show us the pictures of the back of the head. We don’t know if he got a concussion because he never went to the doctor” (Mayo, 2006, p. 3918).

While unconscious, nine people, according to Teresa, continue to beat on Prater; they are punching, kicking, stomping. Prater’s temporary unconsciousness wears off and he wakes to find Miller, one of the men who tackled Prater, sitting on top of him, punching him. Miller climbs off and Donahue gets on top of Prater, his knees on Prater’s chest, and begins to wail upon him. “Hits him like a sledgehammer...We didn’t get pictures of the bruises on his chest. Six-foot-four, two-hundred-fifteen pounds, and knees on his chest hitting him like a sledgehammer while other people are kicking...and hitting him” (Mayo, 2006b, p. 3919) and there are no pictures of the bruising the next day.

Prater is dying. The life is being beaten out of him by nine people. He reaches for the Mag-Lite, which has dropped near by, but Miller, who is currently engaged with Memory sees this attempt and kicks the giant flashlight away.

“So while this man is getting beaten like this...he’s able to...get his hand in his right pants pocket, pull out a knife, flip open the blade...This is miraculous...He thinks he’s dying. But he doesn’t want to kill Mark Donahue. Just like Mike Memory doesn’t want to kill Derrick Scott when he hit him with that cable because these are good guys. All he wants to do is show him the knife. Here. Look” (Mayo, 2006b, p. 3919).

Mark sees the knife though and gets the wrong idea. He thinks he is going to be stabbed with it so he grabs the knife and tries to push the blade downward into Prater. But Donahue does not grab the handle of the knife or Prater’s hand, he grabs the knife by the blade, pushing the blade through his own hand. Despite piercing his own hand with the knife, Donahue is able to start pushing the blade toward Prater. Prater twists the knife,
which accounts for how horribly mangled Donahue’s hand was, and Donahue slumps, falling downward onto the upright blade. The defendant does not even know that he stabbed Donahue. The knife, which according to Prater is a two-inch blade, goes four inches into Donahue’s chest. Donahue, realizing he has been stabbed, panics. He gets up off of Prater and begins to run. He makes it out of the parking lot only to collapse into the gutter. He falls face first, his teeth take the direct impact from the fall and four of them are jarred loose.

Meanwhile Prater grabs his wife and says, “let’s get out of here” (Mayo, 2006b, p. 3920). Unfortunately, the pair are met by Enos who has a knife in his hand. He tells Teresa, “I’ll slit your throat, bitch” as he jabs the knife toward her face (Mayo, 2006b, p. 3920). Prater is once again confronted with a life or death situation, but instead of fighting this time, Teresa and Frank hop onto their motorcycle and ride away. The Prater’s go home to their family with all thoughts of vacation wiped away. Prater does not call the police to say that he, his wife and friend were assaulted, to say that he may have stabbed a man in self-defense. Frankie Just wants to be with family. He stays in bed all day Saturday recuperating, and on Sunday, he drives out to Rick Bird’s house, the location Memory went after the fight. And like Memory, the pair do not discuss the events of Friday night. Rick Bird testifies that, “he came by to look at my trophies. Came with his wife and kids. I didn’t see anything wrong with him” (Mayo, 2006b, p. 3921). There is no talk of a fight, apparently no signs of one either as Prater seems to have made a miraculous recovery.

A.D.A. Mayo goes to great efforts to point out the many errant claims of the false
heroes, a continuation of function XXIV. Memory told tales of weapons that no one else saw, of wielding a Stanley Utility Knife that could not possibly have been the weapon used, and of riding to a friend’s house immediately after the fight only to not discuss it. Prater’s tale, even more fantastic than Memory’s, includes politely asking a man who is beating up his wife to stop, being awoken from unconsciousness by being punched in the head, managing to pull out a knife from his pants pocket while being stomped, kicked and punched by nine other people with the intent of only showing the knife to his main assailant, the assailant falling downward onto the two-inch blade which plunges four inches into the assailant’s chest, ignoring another very real threat to his wife and himself made by Enos, and like Memory, riding to a friend’s house (Rick Bird) only to not talk about what happened. All of these are unfounded claims made by false heroes (function XXIV).

In traditional folklore, a difficult task will be proposed to the real hero in order to determine if that person is in fact the hero (function XXV), and like in traditional folk-tale, a difficult task is now proposed in A.D.A. Mayo’s narrative. “What’s believable? You [the jury] have to make the assessments. It’s your job. You assess witness credibility” (Mayo, 2006b, p. 3922). Again, A.D.A. Mayo puts this task to the jury several pages later: “I put on Jus Brothers for you Just so you could see what Jus Brothers are about. You’re going to have to make an assessment on them…Are they all about good?” (Mayo, 2006b, p. 3925). He does this a third and final time seven pages later: “I wish it was a perfect world where everybody we put on the witness stand, nobody would lie and it would be easy to tell what
happened. But it’s not. And you’ve got to figure this out” (Mayo, 2006b, p. 3932). The
jury is being asked to determine whose story should be believed. Should the jury believe
Prater and Memory, members of the Jus Brothers motorcycle club, a one percent club,
who they claim that they were forced into this awful situation? Or should the jury believe
the story of A.D.A. Mayo who claims that Prater and Memory escalated the situation by
bringing out weapons when they could have rode away? This is a difficult task.

This strays from the traditional story structure somewhat in that the jury, a group
who has been uninvolved with the story to this point, now is being asked to function in
and play the role of hero. What makes this situation even more strange is that the hero in
this instance cannot fail. Whether they vote guilty or not, they will ultimately complete
the task that A.D.A. Mayo has set before them. To make this situation conform more to
the traditional Proppian formula, A.D.A. Mayo could phrase the challenge in such a way
that to vote guilty is to succeed, to vote not guilty is to fail. However, if A.D.A. Mayo
were to phrase the challenge in this manner, he would be crossing the line of courtroom
etiquette. Despite the great leeway that attorney’s are given in closing remarks, to claim
that the jury would fail if they did not convict the defendants would cross the line.
Instead, Mayo’s story creates this feeling, creates this challenge. To vote guilty is to vote
for Justice, to say that Mark Donahue’s death will not go unavenged; to vote not guilty is
to let these two thugs, two members of a motorcycle gang go free and act as if the life of
Donahue meant nothing. A.D.A. Mayo sums it up in this manner:

“I don’t know why people kill people. You--you see the stupidest things, you’ll
see, you know, one guy will build a fence one foot on another guy’s property;
some guy wants some other guy’s drugs; you know, a mother doesn’t like her
son-in-law. I don’t know why...But I do know—I know Mark Donahue did not get a trial, nobody gave him a chance. And that’s a fact” (Mayo 2006b, p. 3932).

With the jury acting as hero, the story will forever be incomplete. But with the enthymeme already set, the conclusion of the story should follow the Proppian model. The task was set (function XXV) and the task will be resolved when the jury concludes deliberations (function XXVI). The jury will pronounce judgement, either proclaiming themselves the hero by voting guilty, or proclaiming that Prater and Memory were the heroes by voting them not guilty (function XXVII The hero is recognized and function XXVIII, The false hero or villain is exposed). In folklore, the hero will then be given a new appearance (function XXIX), which in this instance does not happen. The villains will then be punished (function XXX) and if the jury is persuaded by A.D.A. Mayo’s narrative enthymeme, the villains will be sent to jail. Lastly, the hero will be married and ascend the throne. Obviously, no one will get married at the end of this tale and no one will be anointed King or Queen, but the theme behind this final function, justice, peace and harmony will still be achieved with a guilty verdict. Mark Donahue will be avenged as much as society permits and justice will have prevailed.

**Closing Remarks of Eric Conner, Attorney for Frankie Prater.** Compared to A.D.A. Mayo, Conner’s setting of the initial scene is extremely brief. Conner does not delve into great legal depths. Rather he opens by asking the jury, “Has anybody made up their minds yet?” (Conner, 2006b, p. 3933), but from this point on, Conner’s closing narrative begins to echo Mayo’s in that they both play on themes of justice. This is in fact where Conner opens. “Justice is...that version of the facts that is the closest to the
truth. One truth is that a young man is dead. And it is tragic when people are struck
down in the prime of life” (Conner, 2006b, p. 3933). Conner’s early pronouncement of
the death of Mark Donahue completes the first function of the dramatis personae, the
absence or loss of a family member.

Function II, a rule or interdiction is given, in this instance, implicitly. Needing to
account for Donahue’s death, Conner begins to tell a different tale that had different rules
that were broken: “That situation [the fight] could have easily been avoided. He didn’t
have to die. He had many choices. But he made all the wrong ones” (Conner, 2006b, p.
3933). The blame for Donahue’s death has been shifted to Donahue and the first rule,
although unspoken, has already been set and violated: Make good choices. This rule is
more general than those typically given in fairy tales. Typically interdictions take a much
more specific form. “You dare not look into this closet,” or “Take care of your little
brother, do not venture forth from the courtyard” (Propp, 1968, p. 26). Although very
general, the rule “make good choices” fulfills the requirements for a Proppian structure.
Furthermore, because the rule is so general, it makes the audience consider not just one,
but all of the poor choices made by Donahue that night: drinking to excess, mixing
alcohol with recreational drugs, jumping into the middle of a fight, etc. Making good
choices is not the only rule that is violated, as Conner gives another interdiction which is
do not hate. “This incident is the result of hatred. Hate is a very dangerous emotion.
Once hate is instilled in someone, they view people differently...Frank Prater, Robert
Memory and Teresa Prater were the objects of such hatred” (Conner, 2006b, p. 3933-
3934). Like the previous rule given, this one serves to shift blame away from the
defendants and on to those who would hate indiscriminately (i.e. Derrick Scott, Jeremy Miller and Junior Enos), and clearly both of these rules were violated.

At this point of the story the villains should be making their first appearance, attempting to commit some reconnaissance. Although the villains are not mentioned by name, their first appearance is made at this point. “The people that were in that bar that night [Scott, Miller, Enos, etc.] were spoiling for a fight for hours. It was gonna happen. They were attempting to provoke a fight in the four hours preceding the arrival of Frank, Rob, and Teresa” (Conner, 2006b, p. 3934). The villains in Conner’s story even make some attempt at reconnaissance, albeit the reconnaissance is implied. The audience learns that another patron of the bar that night overheard this group laying out their plans earlier. “See the fuckin’ bikers down at the end, we’re going to get them out of the bar” (Conner, 2006b, p. 3934). Although the term spying or reconnaissance is never used, it is clear the the group has been sitting and gathering information; waiting for the perfect opportunity to strike. When Frank, Rob, and Teresa walked in, this group of villains had their opportunity. It needs to be noted that while it is clear that the group of young drunkards are the villain in this particular narrative, there is another villain who also appears at this point of Conner’s narrative, A.D.A. Mayo. Conner points out on three separate occasions how “wickedly overcharged” this case is (Conner, 2006b, p. 3939), but it is not Just that Mayo is being malicious in his prosecution of the defendants, he is also suborning perjury: “The prosecution in this case has only presented the obviously false testimony of a number of witnesses calculated to lead you to believe that there really was not danger in Shakers parking lot on November 5th 2004” (Conner, 2006b, p.
The greatest threat to the hero of this story may turn out to be A.D.A. Mayo, rather than the mob that attacked Prater and Memory that night.

This is a unique storytelling venue in that: (1) parts of this story will have already been told in the opening; (2) remembering those parts will be vital to the understanding of the story being told now; (3) the audience heard a narrative that directly contradicts the narrative that Conner is now telling; and (4) the audience will not be allowed to hear the story in its entirety. Knowing that these challenges exist in this style of storytelling, the narrator, or attorney will have to make several choices. Conner’s choices in his closing, to this point, have followed the Proppian structure perfectly. However, the story begins to veer greatly off the structure at this point. The villain should at this point attempt to deceive the hero, (Function VI) and the hero should submit to that deception which will give the villain exactly what they want (Function VII). According to the reconnaissance done earlier though, the goal of the villains is to get into a fight, to drive the bikers off. The deception then should be done with that goal in mind. Except that Conner offers no such deception in his closing, at least not at this point. The strength of the Proppian structure is “that one function develops out of another with logic and artistic necessity” (Propp, 1968, p. 64). Missing one function is not a crucial misfunction, even several, but starting with the sixth function, Conner begins to go wildly out of order which upsets the storytelling model.

In the closing, as stated previously, there is no mention of the deception attempted by the villains. That being the case, the jury is forced to recall Conner’s opening in which he describes Enos calling out “Have a White Knight.” This is Just a ploy by Enos
to get the Memory’s attention, which of course works because Memory walks away from his bike toward Enos and asks him to clarify what he said. Perhaps Conner did not want to repeat part of the story already told in the opening or perhaps he was counting on the jury remembering exactly what was said that instigated the fight. But this function is omitted in the closing hence the next function, function VIII, the villain causes harm to a member of the family must be omitted as well. In fact, Conner jumps right from the introduction of the villain (function V) to the confrontation between hero and villain (function XVI).

Conner goes right to the battle scene in order to talk about what self defense entails and why it should apply to his client. He contends that any reasonable person, put into this situation would necessarily reach the same conclusion; that there would be no talking your way out. This situation necessitated the use of violent, even deadly force. “They [Miller, Scott, Enos & company] all went outside, they were going to use their superior numbers, size, and strength to attack and beat up Rob Memory and Frank Prater, people they dehumanized through hatred” (Conner, 2006b, p. 3937). Starting with the group of villains tailing Memory and Prater outside, Conner begins to point out why the escalation to deadly force was required; why this pair had to fight back in such a violent manner. “Would you rather have a flashlight or ten of your friends to back you up?” (Conner, 2006b, p. 3937). “Talk about substantial or significant injury. Great bodily injuries includes loss of consciousness, bone fracture” (Conner, 2006b, p. 3937). All of these were injuries suffered by the defendant Frank Prater. “If you have been faced with twenty people that have threatened to ‘beat your ass,’ it’s reasonable under the
circumstances. You don’t have to take the beating” (Conner, 2006b, p. 3938). “But if the act of stabbing or hitting with the flashlight was done out of fear, and the fear was of great bodily injury or death, there’s no crime” (Conner, 2006b, p. 3939).

“How was Frank Prater to know that he [Donahue] wasn’t with them...They acted as a team. They assisted each other in bringing him to the ground. Mark Donahue decided he wanted to help. He decided as an adult that he wanted to get involved. He got into the mix with disregard for the consequences” (Conner, 2006b, p. 3940).

“You pull out a Mag-Lite or a crescent wrench in reasonable defense because you believe...you’re about to suffer great bodily injury at the hands of these freaks, and you brandish that weapon to make them think twice” (Conner, 2006b, p. 3941). “Adequate provocation reduces murder to manslaughter. If you believe that Mark Donahue, that his manhandling of Teresa Prater was advocated to provoke Frank Prater, and he acted out of the influence of this passion alone...murder is out the window” (Conner, 2006b, p. 3943). The fight scene in this story is not told in a chronological narrative. Conner is continuously jumping from moment to moment in an effort to prove that at each point his client was acting in self-defense. The beginning of the fight scene starts with the villains following the Prater’s and Memory outside, but then the fight leaps to Prater’s injuries, then back to before the conflict actually began, then to the use of deadly force, then back to the brandishing of weapons, then back to the moment before Prater hit Donahue with his flashlight. While the Proppian model does allow for the omission of steps, the strength of the model lies in the chronological manner in which it is told. The style in which Conner tells this portion of the narrative becomes less effective due to the non-chronological order in which it is told.
The fight scene in particular becomes so muddled that it is difficult to follow. This confusion is compounded because Conner is jumping so many functions of the Proppian story model. While Conner tells the tale of the fight, (Function XVI and XVII), he simultaneously tries to discredit the claims of a false hero (Function XXIV), ADA Mayo. Mayo’s claims that the defendants committed one count of murder, two counts of attempted murder, and two counts of assault with a deadly weapon. And so during the middle of the fight scene, Conner interjects his legal arguments that directly contradict the claims made by Mayo. “In order to convict them of murder, you have to find they had...express intent to kill, or implied in that they had an intentional act that they knew was dangerous to human life” (Conner, 2006b, p. 3938-3939). While what Conner is saying is absolutely true, it still breaks the narrative, making the story harder to follow and ultimately less effective. The prior example is Just one of several instances of Conner breaking the narrative with legal argument in order to contradict the claims of Mayo.

“Attempted murder is the same way. This case is so wickedly overcharged. Attempted murder requires intent to kill. Now while Rob Memory is getting pounded, do you think he’s thinking I’m going to kill these guys, I’m going to kill the first one, the second one, the third one, the fourth one?...It’s not credible or reasonable when faced with a group like this” (Conner, 2006b, p. 3939).

Conner continues this tact as he goes through all of the charges. “If...Prater believed that Mark Donahue was attacking his wife, and he overreacted by hitting...Donahue with the flashlight, causing his death...then that is an imperfect self-defense, but that is also manslaughter. Murder is out the window” (Conner, 2006b, p. 3943). While it is important in both the Proppian narrative structure and in the legal setting to discredit
what the opposing counsel or false hero has said, the fact that the narrative is being told so much so out of order hinders the effectiveness of the narrative.

Function XVII, which states that the hero will be marked during the combat with the villain, is discussed at the appropriate stage and Conner makes sure to inform the jury that his heroes were scarred. Like Conner does with the description of the fight, the physical injuries are all presented in a way that would justify self-defense. First, Teresa Prater’s injuries and potential injuries are discussed. “Great bodily injury can be inflicted upon Teresa by emotional or physical shock to her system. We heard the evidence, the uncontroverted evidence of vasovagal syndrome” (Conner, 2006b, p. 3946). Vasovagal syndrome is characterized by blood draining from the brain when the brain stem is triggered, as is likely to happen during times of emotional or physical stress. Frank Prater knew that his wife suffered from vasovagal syndrome and, “believes she would be subject to deadly force, not only by rendered unconscious by virtue of a medical syndrome, but also when she’s unconscious on the ground these people mean to do them harm” (Conner, 2006b, p. 3947). Consequently, when Prater sees Teresa being accosted by Donahue, being picked-up and tossed like a rag doll into the back of a pick-up truck where her thigh slams into a ball-hitch, it was reasonable that Frank would, “act quickly and rashly because he’s being faced by a large group of people who have threatened to and eventually do beat his ass” (Conner, 2006b, p. 3947). His attempt to help his wife escape a worse fate are derailed by the the group attacking, but her thigh bruise combined with Teresa’s vasovagal syndrome account for why Prater had to go on the offensive with Mark Donahue. Prater’s injuries to this point have not been discussed in as much detail;
they certainly exist according to defense stories: Unconsciousness resulting being tackled to the ground; being punched so hard as to make his bridgework slide back into his throat and start choking him (Conner, 2006b, p. 3971). But the defense admits, or rather admits through omission, that there has not really been any evidence presented that demonstrates that the heroes, outside of Teresa Prater who feels more like a helpless victim than a hero, were scarred in any manner. The hero has to be branded according to the Proppian model and these heroes are not. Conner tries to account for this. “The prosecution will have you believe that because the defendants have no savage cuts on them or debilitating injuries, that it wasn’t self-defense” (Conner, 2006b, p. 3949), but the purpose of self-defense is to try and avoid those types of injuries. In other words, they were successful enough in defense of themselves that they were able to avoid any permanent scars or injuries; that they were successful in defense of themselves should in no way discount the self-defense theory. While Conner is correct from a legal standpoint, that the defendants were not branded is problematic for the story model. The scar signifies, not only the trials that the hero has gone through, but marks the individual as a hero. To not have the scar means that this individual cannot be the hero.

Conner continues throughout his entire closing to jump back and forth between descriptions of the fight, which are attempts to Justify self-defense, to discounting the claims of the false hero (A.D.A. Mayo) which again, are presented in a manner which will Justify self-defense. Once again, beginning with the group trailing Prater and Memory out of the bar and ending with Prater killing Memory, Conner begins to retell the narrative a second time. He goes into more detail about the actual death of Donahue.
“Mr. Prater’s testimony was that he had opened he knife...pulls it from his pants, flipped it out...And he says, ‘Get off of me, get the fuck off of me.’ Now it’s at this point that Mark Donahue makes the fateful decision to grab or try to get a hold of the knife with his hand...If you remember Frank Prater’s testimony, he [Donahue] grabs the blade and attempts to force it back into his chest...When he grabs this, obviously Mark Donahue didn’t realize the blade was pointed up...He grabbed him with his right hand and was struggling with the knife and the blade goes in at the eight to two o’clock angle with the sharpened edge up. There’s no other logical explanation for this undisputed forensics” (Conner, 2006b, p. 3972-3973).

Pulling out the knife was Justified, as Conner explains, because Prater believed that he was likely to suffer great bodily injury from the mob. Further more, he was concerned for his wife who has a long history with vasovagal syndrome. This version of the narrative explains why Prater, “had...to do something. It was very likely that once Teresa Prater was subjected to the emotional stress of seeing her husband beaten, that she could lose consciousness and be at the mercy of the angry mob” (Conner, 2006b, p. 3974). The description of the combat follows the pattern that Conner set for himself earlier, each moment of the fight is further Justification for self-defense. The same is true of the refutation of the false claims laid out by A.D.A. Mayo. Each time Conner challenges the statements made by Mayo, it is done with the goal of furthering the self-defense theme. “The defense witnesses will testify as you expect any credible witness to testify. They didn’t have any trouble remembering where they were during each stage of the incident...They didn’t have to continuously rely upon such phrases as I don’t remember” (Conner, 2006b, p. 3974), as prosecution witnesses did. Each person, as Conner explains, does their best to get through an unreasonable situation.

The story whether told the first or second time, still suffers from a feeling of
incompleteness. While A.D.A. Mayo works hard to set-up the closing enthymeme, of explaining what Justice will be at the end of the case, Conner continues to hammer away at A.D.A. Mayo’s case, knowing that he has the burden of proof. Clearly he is not as interested in presenting a different story, but driving home the point that the prosecution did not make a prima facia case. The Proppian narrative model is at best, used sparingly. Some of the functions are there in the story, but after the first five functions, Conner forces the jury to omit so many functions the story as enthymeme loses its forward momentum, becomes less effective. The later functions that are discussed are done in a jumbled way, all are mixed together rather than each function being born out of the preceding function.

**Closing Remarks of Vittoria Bossi, Attorney for Robert Memory.** Bossi’s initial setting is much more similar to A.D.A. Mayo’s than Conner’s in that she first discusses matters of law. She does not introduce the main character’s or talk about the story’s setting but rather she places herself and the jury into the story. “Unfortunately, I think that the weight, in this particular case will follow you into the jury room. Because I think you’re going to have some very difficult decisions to make” (Bossi, 2006b, p. 3982). This introduction to the narrative has great potential because already Bossi is setting up the jury as the group with power, the group that could be the hero. However, the Proppian model does not typically allow for the hero to be introduced so early. The hero makes his or her appearance much later into the story. Bossi moves on from her introduction of the hero and begins to talk about the rule of law and how it should be applied in this situation. “Throughout the trial...we raised the issue of self-defense. And
the issue of self-defense, whether uneventably used or reasonably used, negates murder” (Bossi, 2006b, p. 3983). In other words, if the jury believes at all that Memory and Prater were trying to leave, that they were bullied into the situation and fought only to defend themselves and their loved ones, then the jury must accept that the pair are not guilty of murder or attempted murder.

Typically in Proppian narrative, functions II and III are paired, but in Bossi’s closing remarks, the first three functions are intertwined. In giving instructions to the jury, Bossi, simultaneously discusses a member of the family absenting him or herself, talks about an interdiction and how that interdiction was broken. “You don’t Monday-night-quarter-back...because nobody wanted the outcome. Nobody wanted Mark Donahue to lose his life that night. These people didn’t want to be here [Memory and Prater]. They don’t want their world torn apart and to be upside down” (Bossi, 2006b, p. 3984). In this statement, Mark Donahue is introduced and his death is acknowledged. The interdiction in this case is interesting in that it is not a specific rule as is typically given. Rather the whole situation is looked upon as something to regret. Clearly the rule you should not kill anyone was violated but the implication of Bossi’s statement is far greater. There were many rules broken that night that Bossi could be referencing: do not drink to excess, do not do drugs (as both parties were said to do that night), do not pick fights, maybe even avoid bars where this sort of behavior is known to happen. Whatever rule you pick, it was violated.

Bossi moves right from this statement to function IV of the Proppian narrative, the villain makes an attempt at reconnaissance. There are issues with this particular
function as there are with functions V and VI. The purpose of function number IV is that
the villain should be sneaking around, gathering information, looking to harm the victims
in the future. It lets the audience know that trouble is at hand, what sort of trouble to
expect and who will be to blame. But in this instance, Bossi’s narrative never really
touches on any reconnaissance. Without talk of reconnaissance, there can be no
information gained by the villain (function V), nor can the villain then use that
information to deceive the victim (function VI). Conner did mention in his opening that
Enos was calling out to the Memory and Prater, trying to get them to stop walking toward
their bikes. This could certainly count as deception but it goes unmentioned by Bossi,
however, this could be an intentional oversight. This is the fourth time the jury as heard
this tale from the perspective of the defendants and Bossi has stated that she is, “not
going to recap all of the evidence. Mr. Conner and I didn’t review what each other was
going to talk about so I don’t want to waste your time” (Bossi, 2006b, p. 3985). If the
omission of this function was intentional, Bossi will be counting on the previous narrative
enthymeme being effective and the jury remembering the deceitful provocation that was
given.

It is at this point of the narrative that each has begun to omit several functions, not
because the story dictates this, but because there is not a hero that has been assigned.
Functions IX-XV all deal with the development of the hero. The way the defense has
been telling the narrative there is not much potential for a hero. Clearly there are villains
and clearly there are victims, but no one to right the wrongs that were done. Bossi’s
narrative, however, unlike Conner’s, has the potential for a hero. She discussed the jury
briefly earlier, how they would have a several weighty decisions to make and that those
decisions would alter lives. If the jury were introduced at this point in the story, their role
discussed here, the magical path that they all took to reach this place, then a hero exists
that can potentially save the day.

Instead Bossi continues to try and discredit the villains of the story, Scott, Miller,
Barton and in particular Enos. Bossi talks about Enos’ long history of drunken violence.
Enos, just one week previously tried to pick a fight at the same bar, but was scared off
when the would be victim pulled out a gun. Bossi takes that previous incident and
explains that the previous incident was motive that lead to the altercation which the
defendants are being charged with. “It’s pretty telling that Clifford Enos didn’t bring a
knife the week before when a knife an gun were pulled on him...Chances were he was
bringing a knife this night when he was going to go with his buddies” (Bossi, 2006b, p.
3985). Barton’s character is then discussed: “Moments after the police arrived, Jack
Barton gone [sic] lying about the actions of the motorcyclists. And he says immediately,
‘the motorcyclists rode up to the bar and they started calling people out, Hey
motherfuckers‘ and stabbing them” (Bossi, 2006b, p. 3985). This information sharing is
unique in that it comes at roughly the right spot for information gathering by the villain
(function VI) and instead function VI has been inverted. The jury, or potential heroes,
are being given information about the villains.

Leaping forward in the narrative, Bossi begins to describe the altercation between
the defendants and the drunken mob (function XVI). Like Conner, Bossi’s narrative
concerning the fight does not proceed in a chronological manner. She begins with the
conclusion of the fight and then jumps around to different points, again like Conner, using each moment in the fight to try and prove why the prosecutions case is false (a combination of function XVI and XXIV).

“Three puncture wounds on three different people when you’re trying to defend yourself does not show malice...This is not a dragging of the knife to inflict the most damage that shows malice. If you’re trying to disarm somebody that is coming at you after your glasses have been knocked off and you can’t see very well, and you swing out and you have a puncture wound, that does not show intent to kill. And you need intent to kill for attempted murder” (Bossi, 2006b, p. 3987).

Then Bossi, jumps back to the beginning of the fight in order to show that the defense was adequately provoked into attacking. “Miller said, yeah, we were threatening to kick their ass. And, yeah, we were threatening to knock over those bikes...And he also said when the biker got the Mag-Lite, yeah, he might have been acting in self-defense” (Bossi, 2006b, p. 3987-3988). If the defendants acted without malice and were acting in self-defense, then the murder it is impossible for these men to have committed murder or attempted murder.

While Bossi is leaping around the fight scene (function XVI), she does something unique in regards to the Proppian storytelling model as she changes both the location of the fight scene and the villain during the middle of her narrative. Immediately following the discussion of Miller’s testimony, the jury is taken from the riot in the parking lot of Shaker’s to a different fight with a different and more powerful villain. The narrative returns to the courtroom and the new villain is A.D.A Mayo. Bossi starts this transition by delving into A.D.A. Mayo’s claim that the Jus Brother’s are an outlaw motorcycle gang. A.D.A. Mayo’s description of the club is far from accurate, according to Bossi.
The Jus Brothers are not villains or criminals:

“Rob and Frank were only members of that club for one year before this incident occurred. And they were law-abiding citizens for many more years...But...the cross examination of Bob Riley and Eddie Nieves and other Jus Brothers would have you believe that somehow Robert Memory and Frank Prater are responsible for all the criminal actions of a hundred men in a motorcycle club” (Bossi, 2006b, p. 3988-3989).

The constant inference by A.D.A Mayo that all things associated with the club are somehow illegal, is false. The Jus Brothers have every right to raise money for defense costs and to use their houses as collateral for bail. Those two gestures are the actions of friends and families, not only outlaw motorcycle gangs. Bossi up to this point, despite the change in scenery and villain, has been following the pattern set by Conner of talking about the fight (function XVI) and then showing how A.D.A. Mayo’s claim’s are false (function XXIV), but now Bossi begins to go on the offensive, not Just disputing the claims made by A.D.A. Mayo, but pointing out hypocrisy in his logic. “When the Sheriff of San Joaquin County was on trial. He had a defense $1000-a-plate dinner and the district attorney of San Joaquin showed up to that. There is nothing wrong with those actions” (Bossi, 2006b, p. 3989). Those actions referring to the behavior of the Sheriff, the D.A. of San Joaquin County, or the actions taken by the Jus Brothers.

While lambasting the prosecution may be considered a stretch for function XXIV, Bossi while continuing the offensive, seems to transition beyond the narrative model all together. She tries to tie her case into bigger themes of America. The “Constitution guarantees us...the right to be innocent until proven guilt”[sic] beyond a reasonable doubt. And these are troubled times in America. And we are at war in places in the
world. Don’t judge these men for exercising their rights” (Bossi, 2006b, p. 3989). Her narrative loses its momentum when she goes off on this sort of tangent. Bossi is of course correct that defendants should be considered innocent until proven guilty, should not be punished for seeking council or for associating with whomever they choose because those are rights that are protected by the Constitution. But making these points without incorporating them into the narrative that has been created just makes the narrative lose focus. It works against the purpose of the Dramatis Personae.

Bossi then jumps back to the courtroom fight scene and begins to recreate the trial from the beginning, with the intent of showing why his narrative is false (function XVI and XXIV). She is pushing the jury to focus on A.D.A. Mayo’s skills as a lawyer because, as she puts it, “you’ve got to separate the wheat from the calf when you go in that jury room. You’ve got to separate the gamesmanship. And you’ve got to separate the facts” (Bossi, 2006, p. 3990). Bossi in a sense is conceding that A.D.A. Mayo’s case makes sense, that his narrative works, but the reason for that is not because his story is the truth, but because he set-up the trial to work that way. His witnesses got to review copies of their statements to the police, her witnesses were not granted the same opportunity and that accounts for the inconsistencies in defense witness testimony compared to prosecution witness testimony. A.D.A. Mayo’s gamesmanship could be seen during voir dire when he dismissed two individuals who had minor violations or convictions on their records (one for three traffic tickets and the other for a conviction of playing his music too loudly. “What were the People afraid of?” Bossi asks the jury.

“What were the People afraid that there wasn’t going to be a mainstream opinion here? Who
did we leave on the jury? People married to district attorneys, correctional officers. People that defense attorney’s wouldn’t want…” (Bossi, 2006b, p. 3990-3991). Bossi’s point is that A.D.A. Mayo tried to pick a jury that was comprised entirely of people that would be sympathetic to his argument, not people who would look at the case rationally. Conversely, Bossi and Conner looked at the jury pool and said it does not matter who gets selected because ultimately, “we understand the law that you have the right to self-defense when confronted by superior numbers, when you haven’t started anything, and when you’re trying to go home” (Bossi, 2006b, p. 3991). The way that Bossi describes this narrative seems to combine functions XVI and XXIV. It also draws parallels between the actual fight where Mark Donahue was killed and the courtroom narrative. In both cases it is a determined antagonist who pushes the issue, who has lied about the facts in order to get what they want. The further implication is that the hero in this situation, the jury, will be too smart to be blinded by the tricks of A.D.A. Mayo. The acknowledgement of this inevitable failure is a sign that the heroes (Prater, Memory & Bossi) have already won the battle (Function XVIII).

There is an issue created when fighting this metaphorical battle, in that it cannot be won at this stage according to the Proppian model. The combat between the heroes and the villain will result in several things happening: (1) the hero will be branded (function XVII); (2) the hero will win the battle (function XVIII); (3) the hero will leave (function XX); the hero is pursued and saved (functions XXI and XXII); (4) a false hero will present a false claim (function XXIV); (5) there will be a difficult task assigned to the hero (function XXV); (6) upon completion of that task the hero will be recognized
(functions XXVI and XXVII); (7) the false hero is exposed (function XXVIII); and lastly
(8) the villain is punished (function XXX). The more Bossi continues to push this
metaphorical battle between her and A.D.A Mayo, the more she intertwines the
chronological timelines, the more she makes the ending she desires impossible. Her
battle with A.D.A. Mayo is necessary, but the bulk of it has already been told before the
actual fight between the motorcyclists and the drunken rabble. The Proppian structure
works best if the chronological timeline is followed because each function is a necessary
occurrence based on previous functions. To skip out of chronological order as much as
Bossi has is poor storytelling. Again, it needs to be acknowledged that this may be a
conscious decision based on the fact that Conner, Prater’s defense attorney, has already
told this tale. Bossi may feel that the jury already understands what happens during this
portion, but that begs the question of why keep returning to fight if only in small
portions?

At this point, the narrative returns to the Shaker’s parking lot melee (function XVI).
As was done previously, Bossi does not tell the tale in a chronological order. She
continues to jump from witness descriptions after the fight was over and back to the
narrative about the fight itself. Bossi begins with Bill Johnson, the owner of Shaker’s
telling police details after the fight: where the glasses landed when they were knocked off
Praters head, that Clifford Enos had a knife, that Enos was a “hothead troublemaker that
got thrown out of this bar for fighting a week before” (Bossi, 2006b, p. 3993-3994), that
after the fight, Enos went and found a change of clothing. Bossi continues with post-
fight discussion as she recalls the testimony of Josh Thrasher, an employee of Prater who
was in the bar that night, who says the of the beating of Frank Prater, “It was nothing I’d ever want to go through” (Bossi, 2006b, p. 3994). The narrative then goes back to the beginning of the fight scene, although Bossi still continues to try and frame the conversation through witness statements rather than simply telling the story. “Jamie Whipp [the bartender] also says that...Rob was trying to get to his bike but Enos was always in his face. He was immediately in his face and he couldn’t” get to the bike (Bossi, 2006b, p. 3995). Frank Prater is able to move his motorcycle out to the middle of the parking lot before he is stopped. And a crowd starts to build around the two men. Riley Cox, a bar patron, tries to tell Frank to, “get on his bike and ride.’ But...the crowd was closing in on him faster and faster. And there may have been a moment he could have done that, but then that moment was passed” (Bossi, 2006b, p. 3995). Cox also admits to seeing Prater with a Mag-Lite, that he pulled it out as the crowd grew larger and that is the real problem. As the crowd grows, the defendants feel more threatened. They do not know who is on their side, who is against them. “We’re not talking about baseball teams. We’re not talking about people in uniform. We’re talking about a dark bar at night, almost midnight. You already have seven to ten people giving you shit and another group arrives” (Bossi, 2006b, p. 3995-3996). Bossi argues that, given the ever increasing crowd size, that, “it is reasonable to assume that all those people are meaning ill will to you. It’s unreasonable to assume otherwise” (Bossi, 2006b, p. 3996). The build up to the actual fight has occurred and that is when Bossi decides to go to a different part of the narrative once again.

The tale then jumps to police testimony after the fact. Officer Hendricks,
“described the scene as chaotic,” and that Clifford Enos, “was still difficult because of his alcohol consumption and agitated state” (Bossi, 2006b, p. 3997). Officer McDonald commented on the crime scene, saying it was uncontrolled and despite the arrival of the police, the bar still stayed open until 1:30 a.m. that morning. Officer Hutto, recalled his questioning of Enos after the fight. “‘People said that you were threatening to knock over the bikes, could you have said that?’ Clifford goes, ‘No, but I thought about it. And some of my other friends thought about it too’” (Bossi, 2006b, p. 3999). Bossi’s focus then shifts to Enos and another mini-retelling of the fight scene (function XVI) based on his testimony. Enos said to the bikers “Have a nice night” not “Have a white night”. He admits to charging after Memory when Memory responded to the “Have a nice/white night” comment but not before and he admits the sarcastic remark was made to get a reaction, one he did not plan to back away from. Enos “never saw the other biker with the Mag-Lite...Didn’t hear the words of anybody yelling. And, of course, did not hear the bikers begging to be allowed to leave” (Bossi, 2006b, p. 4000). Enos also doesn’t recall Memory being there after a certain point, nor does he recall anyone getting hit with a weapon. However, Enos is prone to “blackouts when he couldn’t explain certain parts of his testimony” (Bossi, 2006b, p. 4000). Retelling the fight scene in this manner is done to discredit Enos, to demonstrate that he cannot recall the details of the case, to prove how out of it he was. This manner of retelling also places emphasis on witness testimony. In constantly citing witnesses, Bossi hopes to make everyone’s credibility an issue. She wants the jury to not only identify with her client, but the people who support that version of the story, (i.e. Police Officers Hendricks, McDonald and Hutto).
Bossi uses a similar tactic with Jackie Barton, Derrick Scott, Jeremy Miller all members of the drunken group that instigated the altercation (function XVI) and Mark Donahue. According to Bossi, Barton initially lied to the police about how the bikers just drove up and started calling people out. He was less than truthful, at first, about how he threatened Prater and Memory. Barton was a large man, pushing 400 pounds, drunk from a combination of Southern Comfort and gin who was making violent threats to the motorcyclists. Scott is also a big man, around 240 pounds. Miller who is six foot five inches tall, weighing approximately 250 pounds, was also making threats. Additionally, Miller has a history of violence, as he had a criminal weapons charge pending at the time of the incident. Put those things together and it is perfectly reasonable for Prater and Memory to feel threatened, to feel as if they are, “going to sustain serious bodily injury at that moment” (Bossi, 2006b, p. 4002). Combine that threat with the threat made to Teresa Prater by Mark Donahue, and a brawl was inevitable. According to the testimony of Brian Shirk, a friend of Donahue, “‘Mark gets pushed and he starts yelling.’ His exact words: ‘She cowered, she really cowered, like almost started to crouch down, and she started yelling for the guy that had the Mag-Lite’” (Bossi, 2006b, p. 4005). Prater had to go on the offensive. Meanwhile, Memory seemed to swinging his crescent wrench, not to hit anyone, but again, according to Shirk, “to keep people at bay” (Bossi, 2006b, p. 4005).

Once again, Bossi’s narrative ends prematurely, before the fight is finished. She instead tries to make a comparison between this case and a similar death that occurred at Arco Arena in Sacramento, CA. We have another mini-narrative here, but the same rules
apply to this narrative that apply to the larger narrative being told. The scene opens with a death (function I), proceeds to a, “man who is drinking and loud and argumentative” (Bossi, 2006b, p. 4009) breaking the rules of polite society, (functions II and III). A car shows up and there is a violent altercation between the drunk man and the passengers of the other vehicle (functions V-VIII, function XVI). Like the Prater/Memory case, function IV does not occur, there is no reconnaissance, but the villain makes an appearance, manages to get the other car to pull over, picks a fight and eventually does harm to the other party, although, he himself is killed in the process. The men who crushed the drunken bankers head on the concrete (functions XVII and XVIII) go home (function XX). There is an investigation (function XXI) and a false hero, the banker’s family, present unfounded truths, accusing the other men involved in the altercation of aggressively pursing the banker after the game (function XXIV). The men involved in the fight get attorney’s and defend themselves (function XXV). The Sacramento D.A.’s office decides that the banker was the aggressor that night and opts not to press charges (function XXVI, the task is resolved). The men are recognized as innocent (function XXVII), the family is exposed (function XXVIII) and Justice is served (function XXXI). Even without a defined hero, which accounts for the gap between functions IX-XV, this mini-story manages to be nearly complete. Furthermore, it is much more effective given that it is told in a chronological timeline, each function growing out of the previous. Bossi makes another analogy that follows the same pattern. A police officer, shoots a man for threatening said officer with a wooden stake. There is an investigation and the officer was found to be provoked and in danger of serious bodily harm. Another mini-
story, the same rules still apply.

Bossi finishes with a final story, that of Henry Sweet, a Chicago native in 1925. He and his entire family were charged with murder after a member of an all white mob was killed while accosting Sweet and his family as they moved into a home in an all-white neighborhood. Quoting much of the closing argument from the defense attorney in that case, Clarence Darrow, Bossi tries to complete the narrative by using the Sweet analogy to show what Justice should be. Henry Sweet, a black man who later admitted to fatally shooting Leon Breiner, was found not guilty by an all white jury. Darrow argued that:

“This isn’t a case of a man who trespasses upon the ground of some other man and is killed. It is the case of an unlawful mob, which in itself is a crime, a mob bent on mischief, a mob that has no rights. They are too dangerous. It is like fire. One man may do something. Two will do much more. And three will do three times as much. A crowd will do something that no man has ever dreamed of doing. The law recognizes it. And it is the duty of every man, I don’t care who he is, to disperse that mob. A mob is a criminal combination of itself. There presence is enough. You do not need to wait until it spreads. It is there. It is enough” (Bossi, 2006b, 4013-4014).

Sweet’s trial and acquittal are the last third of the narrative that Bossi want to tell. The hero (Sweet) is unrecognized as a hero and must stand trial for protecting his family (function XXIII). A false hero, the prosecution, presents unfounded claims that he acted in error, shooting into the mob (function XXIV). The jury is forced to decide whether or not Sweet had the right to preemptively defend himself and his family (function XXV). The jury decides that these, “men [the Sweet family] did not need to wait until the house was beaten down about their heads. They didn’t need to wait until every window was broken. And they didn’t need to wait longer for that mob to grow more inflame” (Bossi,
2006b, p. 4014). The jury decides to acquit Henry Sweet (function XXVI). The prosecution and the mob are exposed as the real villains in the situation (function XXVIII) and Henry Sweet’s actions are Justified; he is the real hero (function XXVII). The mob must accept that Sweet and his family have every right to live where they want (function XXX). Justice is served (function XXXI).

The three analogies (the Arco Arena incident, the officer involved shooting, and the Sweet trial) are meant to serve as function XXIV. All three mini-narratives refute the claim that this incident was not self-defense; that violent preemptive self-defense is not permissible. As Darrow put it:

“I can’t understand the psychology of a mob. And neither can anybody else. We know it is unreasoning. We know it is filled with hatred. We know it is cruel. We know it has no heart, no soul, no pity. We know it is as cruel as brave. And no man has the duty to stop and dicker while waiting for a mob” (Bossi, p. 2006b, 4016).

Bossi then proposes a difficult task to the jury (function XXV). She asks the jury “to return verdicts of not guilty Just as the jury did in 1925” (Bossi, 2006b, p. 4016). The rest of the enthymeme is set. The difficult task has been proposed to the jury. If they found Bossi’s narrative compelling, then they will return a verdict of not guilty (function XXVI), Prater and Memory will be recognized as heroes (function XXVII), the prosecution and the members of the drunken mob will be seen as villains (function XXVIII). The behavior of A.D.A. Mayo, Clifford Enos, Derrick Scott and Jeremy Miller will now all come under closer scrutiny. A civil suit could easily be made against the three leaders of the mob, and if the case is “wickedly overcharged” as Conner and Bossi have claimed, A.D.A. Mayo may face repercussions (function XXX). Lastly, Justice will
prevail, Prater and Memory will be able to ride off into the sunset free men (function XXXI).

**Summary of Chapter 3**

Each of the opening and closing statements in the case of *The People of the State of California vs. Robert Memory and Frankie Joe Prater*, has been decoded according to Propp’s functions of the dramatis personae. The opening statements proceed the closing remarks and are decoded in the order they were presented at trial: A.D.A. Mayo, followed by defense attorney Conner, followed by defense attorney Bossi. Each of the opening and closing statements exhibits numerous functions of the dramatis personae, although they are occasionally told out of order.
Chapter 4

A NEW TYPE OF STORY

The Proppian analysis of The People of the State of California vs. Kenneth Memory and Frankie Joe Prater yielded several interesting conclusions. First, the Proppian model is definitely viable as a tool for teaching and delivering opening and closing statement in criminal trials. Second, the role of the hero character is confusing and needs to be more clearly defined. When this model is taught as a tool for delivering opening and closing statements, extra attention will need to be given to the exact function of the hero; because the hero is so important, his or her role will need to be emphasized. Third, the definition of the initial situation which is a minor step in Propp’s work, will need to be expanded to account for the legal setting. Fourth, in order to make this model more relevant to the legal community, several steps will need to be modified slightly. While these steps remain an important part of the story model and will not be eliminated from the model, they should be renamed to reflect how they will function within the legal community. The result of this slight alteration will be a new Proppian narrative model that will be accessible to the legal community; a model that should be embraced because it embodies what so many journal articles advocate: that lawyers should “tell a story” (Hamlin, 2001, p. 13).

After discussion about the findings that the research has yielded, the chapter will shift focus to the limitations of the study. This model, which appears promising after a single case study, will need to be used to examine many more trials to determine if it is as
viable as it initially appears. A variety of criminal cases will need to be examined from a
variety of locations across a variety of times. Additionally, because of the focus of this
study on opening and closing statements, aspects of this trial where the model was likely
used and a better understanding of the model could be helpful to attorneys, were ignored.
Following the research limitations section, the chapter will switch focus to where this
research is headed. Ultimately the goal of this research is to be able to create a
continuing education class for attorneys based on the Proppian model.

A Viable Tool

The Proppian model is definitely a viable tool for teaching courtroom rhetoric. In
all six versions of the narrative, the functions listed by Propp in The Morphology of the
Folktale can be seen governing the telling of the story. All six narratives include an
initial setting although what the initial setting entails varies greatly between the
narratives. Five out of the six narratives immediately jump from the initial setting to
function I, a member of the family member absents himself. The only instance where
this is not the case is where Bossi, the defense attorney for Memory, is forced to follow
Conner, the defense attorney for Prater, but the pair are forced into a unique situation.
Their narratives cannot vary too greatly for fear that inconstancies in the defenses version
of events will make the prosecution’s version seem more likely. Knowing that, Bossi
relies on the narrative told by Conner to inform the jury about certain facts. From
function I, the attorneys glide into functions II and III, the giving of an interdiction and
the subsequent breaking of that rule.

Function IV-VIII, the villain makes an attempt at reconnaissance, the villain
receives information about his victim, the villain attempts to deceive his victim, the victim submits to the deception and the villain causes harm or injury are the first steps that any attorney explicitly skips, however the spirit of the functions still exist in each narrative. These steps serve to introduce the villain to the audience and to provide details about how sinister the antagonist is. And while the villains, Prater and Memory or Donahue, Enos, Miller and Scott, depending on the narrative being told, are not seen skulking around looking for information, they are all introduced at this point of the story as they should be, and their faults, the things that would make them sinister, are explained to the jury. Prater and Memory are one percenters who are seeking violence; Donahue, a drug abuser who was quick to physically confront a fragile and helpless woman Teresa Prater; Enos, Scott and Miller are drunkards who are also seeking violence. These steps although not stated explicitly in most instances, still exist as part of the narrative enthymeme.

Functions IX-XV, XX-XXIII, and XXV-XXXI revolve around the quest of the hero. The hero role is vitally important to the Proppian narrative structure and how these steps are used, more importantly how they can be used will be discussed in depth later in the chapter.

More time is spent discussing function XVI, the hero and villain engage in direct combat, than any other. Descriptions of the fight between the three groups are extensive. During the attorney’s description of the fight, function XVII, the hero is branded, is demonstrated in every instance but one, again Bossi relying on the tale told previously by Conner. Donahue, Miller and Scott end up with scars from the various knife wounds and
Prater sustains broken teeth. After the hero is branded, function XVIII dictates that the villain will be defeated which either physically happens or symbolically in each tale told. Furthermore, the act of the villain fleeing or being defeated in battle fulfills function XIX, the initial misfortune is liquidated. That is not the case in every tale but the fight in this instance, although likely the result of too much alcohol, was a push between two groups over territory and pride. The villains flee the territory in one tale and every group is humbled by this experience. The imbalance is restored.

Besides descriptions of the fight (function XVI), the attorneys discuss function XXIV, a false hero presents unfounded claims, more than any other. This is particularly prevalent in the closing statements of each attorney. In fact, function XXIV it could be argued is the heart of the judicial system. A person stands accused of a crime and if that person should choose to plead not guilty, a situation is created where two different versions of events will be offered. The versions will not be compatible and the jury will have to determine who is the hero, and who is the false hero; who is spreading lies and who is telling the truth.

As these steps appear in all six narratives being told, it is clear that the Proppian model has potential to be used as a tool for creating persuasive courtroom rhetoric. The model is a way to account for human behavior in a manner familiar to the jury and gives the prosecution and defense a chance to fulfill their legal duties by offering an effective counsel.

Is Anyone a Hero?

The hero plays a critical role in the Proppian narrative structure. The story needs a
hero character(s) for the hero is directly involved with 21 of the possible 31 functions:

Function II: An interdiction is addressed to the hero
Function III: The interdiction is violated
Function IX: Misfortune or lack is made known; the hero is approached with a request or command; he is allowed to go or is dispatched
Function X: The seeker agrees to or decides upon counteraction
Function XI: The hero leaves home
Function XII: The hero is tested, interrogated, attacked, etc., which prepares the way for his receiving either a magical agent or helper
Function XIII: The hero reacts to the actions of the future donor
Function XIV: The hero acquires the use of a magical agent
Function XV: The hero is transferred, delivered or led to the whereabouts of an object of search
Function XVI: The hero and villain join in direct combat
Function XVII: The hero is branded
Function XVIII: The villain is defeated
Function XX: The hero returns to his homeland or back to the country where the request was initially made
Function XXI: The hero is pursued
Function XXII: Rescue of the hero from pursuit
Function XXIII: The hero, unrecognized, arrives home or in another country
Function XXV: A difficult task is proposed to the hero
Function XXVI: The task is resolved
Function XXVII: The hero is recognized
Function XXIX: The hero is given a new appearance
Function XXXI: The hero is married and ascends the throne

Within each narrative of The People of the State of California vs. Memory and Prater, several characters end up playing the role of hero, completing the aforementioned functions. The lack of consistency makes the narrative enthymeme less effective. The hero should act as a symbol of what is right and good; the hero needs to be a character the audience knows that they can look up to. With so many characters playing this role part time, the jury is left without a clear hero. This is further emphasized as several of the hero functions (IX-XV, XX-XXIII, and XXV-XXXI) were either omitted or told out of
order within the trial.

The lack of a hero is a serious problem but one that can be overcome if the attorney engages in a two hero strategy, with one of the heroes being the jury or idea of justice. The idea of making the jury a hero character in the story is promising for three reasons: (1) It aligns the heroes, bands them together. If the jury is aligned with a defendant, if they can start to identify him or her as a fellow hero, they will be far more likely to be sympathetic. Conversely, if the jury begins to identify with the prosecution, then the jury are far more likely to be unsympathetic to the defendants. (2) As is originally suggested by Amsterdam and Hertz (1992), if the jury is the hero, this will allow the defense attorney to shift the focus away from the event that brought everyone to the courthouse. The story becomes about the trial. It is the story of a jury seeking justice rather than the story of a biker gang and a murdered student. (3) This strategy allows the attorney to touch more directly upon several of the steps function that were omitted during the opening and closing statements of A.D.A. Mayo, and Defense Attorneys Conner and Bossi. If the jury is a hero character, then so many of the comments made during the trial make perfect sense. They only have to be rearranged slightly to make them fall in chronological order.

Functions IX-XV were all omitted during the trial because no hero character had been established. But if the jury is the hero and the trial is the story, then receiving the jury summons fulfills function IX, the hero is approached with a request or command for help. If you are a member of the jury, going through voir dire fulfills functions X-XV, the hero or seeker decides upon an action (to participate, function X); the jury leaves their
normal routine of work and home to participate (function XI, the hero leaves home); the jury is subjected to all sorts of questions about their beliefs during voir dire (function XII, the hero is tested, interrogated, attacked, etc., which prepares the way for his receiving either a magical agent or helper); the potential jury pool will be whittled down until only the acceptable candidates remain. Those who made it through this process have already started to form opinions about the attorneys who have asked them questions and the judge who oversees the whole process, (function XIII, the hero reacts to the actions of the future donor); the judge gives the jurors very specific instructions about what they should be doing and what will and will not be allowed (function XIV, the hero acquires the use of a magical agent); and finally the trial can begin (function XV, the hero is transferred, delivered or led to the whereabouts of an object of search). If the narrative is about a trial, and not about a fight in front of a bar and the jury is one of two hero characters, then these steps, which are interspersed throughout each attorneys narrative currently, can be bundled and placed in the correct chronological order to make for a more effective rhetorical narrative.

Furthermore, the jury as hero works for functions XXV-XXXI as well. With the jury as a hero, the closing of the trial fits much better into the Proppian narrative and accounts for statements made by A.D.A. Mayo and Bossi. This is seen particularly at the end of the closing statement. The jury will be asked to do something very difficult, decide upon the guilt or innocence of the accused (function XXV, A difficult task is proposed to the hero); the jury will deliberate and come up with a solution (function XXVI, the task is resolved); the jury will either proclaim the defendants guilty or not
guilty (function XXVII, the hero is recognized and function XXVIII, the false hero will be exposed); the guilty will be punished or if the defendant is found not guilty, those that accused him or her are at risk for legal retribution (function XXX, the villain is punished); and finally the defendant will either get to walk away a free man, or the jury will walk away, knowing that they have sent a dangerous villain to prison. Either way justice will be served which fulfills the spirit of the final step (function XXXI, the hero is married and ascends the throne).

**The Expanding Initial Situation**

The description of the initial setting in *The Morphology of Folklore* represents little more than a footnote; the initial setting although important, does not warrant being counted as a function. As Propp (1968) explains the initial situation in its entirety, “A tale usually begins with some sort of initial situation. The members of the family are enumerated, or the future hero (e.g., a soldier) is simply introduced by mention of his name or indication of his status” (p. 25). However, as discovered in the case study, the initial situation is far more expansive in the opening and closing statements. In particular, this is an opportunity to introduce matters of law and begin to cull support for certain characters.

The purpose of the initial situation, outside of introducing the players, is to set the scene. In folklore, this can be done by describing the location, the atmosphere or climate in which the story will take place, etc. Usually this is done briefly: in a dark forest...in a haunted land, etc. But the situation within the courtroom, while less magical, is slightly more complicated. The initial situation in the courtroom can be used as a chance to
explain the complicated matters of law. In this case study, A.D.A. Mayo uses this opening moment to explain the charges levied against Prater and Memory. He further uses this situation to explain why the law requires that these charges be brought about. Similarly, Conner and Bossi use the initial situation to explain the laws that govern self-defense. While a brief introduction of setting may at first glance seem different than an explanation of law, they both serve a similar purpose, that is to set the mood and prepare the audience for the rest of the tale. The initial situation in both cases provides the audience with necessary information in order that they may better understand the tale about to be told.

The initial situation is also an opportunity to introduce all members of the hero party. The hero party will consist of the jury whose virtues will be praised, and then one character who the attorney will want the jury to identify with. In Propp’s model, the character introduced is mentioned briefly (e.g. a papa bear, a mama bear and a baby bear will...). In this expanded initial situation, the characters are given more depth up front. The added depth is aimed at creating a bond between the jury and the hero character. This is done in every opening statement and closing remark. A.D.A. Mayo mentions Donahue right away, his youth, his girlfriend, his educational background, etc. Conner talks about Prater, a pillar of the Stockton community, a man who pulled himself up by his bootstraps, a family man etc. Bossi after thanking the jury, introduces Memory, a single father whose mother abandoned them both. The expanded initial situation differs from Propp’s description only in length, not purpose served. The dual purpose of setting the scene and introducing the characters are still present in this expanded version, it is
just a deeper version of both.

A New Model

The Proppian model, in order to be taught as a rhetorical strategy to lawyers, needs to be altered slightly. The spirit of the steps will be kept in tact, only cosmetic changes should be made in order to make the purpose of the functions more clear to the attorneys who will be using them. Not all functions will be altered. The following is an updated version of the functions of the dramatis personae that maintains the essence of the original Proppian model:

Function I: Expanded initial setting, introduce hero party (jury plus additional character) and what have been deemed matters of law
Function II: Loss of a family member
Function III: An interdiction is given, although not necessarily to the hero
Function IV: The interdiction is violated
Function V: The villain is introduced
Function VI: The villain engages the victim/hero
Function VII: The victim responds
Function VIII: The altercation begins
Function IX: The jury’s journey begins; they were summoned to the courthouse
Function X: The jury member decides on a course of action; they are going to participate, going to do their best
Function XI: The jury leaves home; likely to go unsaid unless special circumstances dictate
Function XII: The jury will be tested; Voir Dire.
Function XIII: The jury will begin to form opinions, both during voir dire and as the trial unfolds
Function XIV: The judge will give the jury special instructions, preparing them for this test
Function XV: The trial commences; the initial narrative recommences
Function XVI: The hero and villain join in direct combat
Function XVII: The hero is branded
Function XVIII: The villain is defeated
Function XIX: Justice is temporarily served
Function XX: The hero leaves the scene
Function XXI: The hero (either jury or alternate hero character) is pursued
Function XXII: The hero is rescued
Function XXIII: The hero arrives in court unrecognized
Function XXIV: Opposing counsel will deliver false claims of a false hero
Function XXV: The jury is asked to determine who the real hero is
Function XXVI: The jury deliberates and comes to a conclusion
Function XXVII: The hero is recognized
Function XXVIII: The false hero is exposed
Function XXIX: The hero is relieved
Function XXX: The villain is punished
Function XXXI: Justice is served

This trial format, while adhering to the spirit of the original Proppian model, is more suitable for trial work. It takes rhetorical strategies already used by attorneys, such as thanking the jury for their time and effort, and weaves it into a narrative model that Propp, Bennett and Feldman argue is ultimately persuasive.

While this model is capable of working for either prosecution or defense attorneys, it may be more useful to prosecutors than defense attorneys. This is due to the larger number of possible options that defense attorneys have when presenting a contrasting theory. This model works for prosecution because, if the narrative is told properly, then the state will have met its burden of proof. It will explain that the defendant did, on a certain day at a specific location, knowingly or accidentally, acted in a certain way that caused harm to another person (Bennett and Feldman, 1984, p. 95). Conversely, the defense is not saddled with the same burdens and so do not necessarily need an entire narrative in order to be effective. If the defense is able to prove that the defendant was, for example, at another place during the commission of the crime, then no additional narrative is needed. However, if the defense should choose to tell a competing narrative,
then the Proppian model will be equally effective.

**Research Limitations**

The chief limitation of this study is the scope it has taken. While the Proppian model appears effective after having examined one case, many more cases will need to be analyzed before firmer conclusions can be reached. *People vs. Memory and Prater* offers a good starting point, but case facts can vary wildly. Knowing how different case facts can be, it is difficult to reach absolute conclusions. The results of this study, while shedding light on how Proppian narrative can be used in a murder trial, raises questions about how consistent those results will be. Will another murder case, one where judicial notice was not reached about the death of the victim, demonstrate similar results? Would these same results be seen in other cases that featured different types of violent crime? Of non-violent crime? What about civil cases? Ultimately more cases will need to be examined to determine if the tendencies seen here in the Memory and Prater trial will be consistent.

Furthermore, the scope of this study is even limited within the one case. The terms of this study dictated that only opening and closing statements would be analyzed but there are several aspects of this case where the Proppian model may be seen more acutely than it is in the opening and the closing statements: the prosecutions rebuttal of the defenses closing, witness questioning and cross-examination, voir dire. Bennett and Feldman (1984) argue narrative permeates every aspect of trial work, not just the opening and closing statements. In fact it is Bennett’s conclusion that narrative is so effective because, though a narrative may be broken up and told out of order or with pieces
missing, it still allows the jury to recall facts and to make sense of complicated and out of the ordinary information. The trial format necessarily fractured which prevents a narrative from being told in its whole. This study analyzed opening and closing remarks because they represent the best opportunity to tell a narrative in its entirety. But if Bennett and Feldman are correct and the same narrative is interwoven throughout the entire trial, then all elements within the trial should be analyzed. If these functions appear in the questioning of witnesses, within voir dire, within the prosecutions rebuttal of the defense’s closing statement, then it is a greater endorsement of the Proppian model to be taught to attorneys.

**Future Research Directions**

The problems of this case study need to be addressed, the scope needs to be broadened. Research should be expanded. For organizational purposes, research should continue with more violent crime before switching to civil but ultimately this research will need to cover all manner of the American trial system. Murder trials are by their very nature dramatic with grave punishments depending on the outcome; it is exceedingly likely that the functions of the dramatis personae will be seen in these types of trials. Research would then shift to other sorts of criminal trials, both violent and non-violent. It will be fascinating to determine whether the same sort of preparation goes into a trial where the circumstances are ultimately less grave and less time is given for preparation. Lesser criminal charges are typically afforded less time for preparation and if the Proppian model is used in these instances, it may be due to the fact that the structure is intuitive. This would certainly add to the credibility of the Proppian model.
Next the research would need to shift away from the Northern California region. Bennett and Feldman in their seminal study made a point of noting that, “throughout our year of observation, we were careful not to be distracted by ‘local customs’ (rules and practices specific to a particular court or court system)” (Bennett and Feldman, 1984, p. 11). While the goals of learning how the jury follows the proceeding, participates within the system and how the jury “does justice” are all worthy of study, they are all potentially influenced by local behaviors. The same is potentially true of the Proppian model and the region of Northern California. Cases will need to be examined from all regions of the country to see if the results of this case study are consistent.

If the results are reasonably consistent across the country and consistent across criminal trials, then the potential exists to expand this work from the academic community to the legal community. The model, as altered previously in chapter 4, can and should be taught to the ever increasing world of litigators. Initially it could be taught very effectively as a continuing education class. Attorneys are required to continue their legal education past law school in order to keep their license valid. This sort of class, while unique in its content, is not at all out of line compared to existing continuing education classes currently taught which focus on legal writing, public persuasive speaking etc. If the model is consistently applicable, this class could serve to better the practice of trial attorneys which would address the concerns of Supreme Court Justices Miner and Burger making this entire endeavor worthwhile.

Communication Studies has an Opportunity to Reach out to the Legal Community
According to the California Bar Association, between 2003 and 2008 (the last years the data was available), there were 68,939 complaints filed against attorneys (2008 Report on the State Bar of California Discipline System, 2009, p. 3). Of those almost 69,000 complaints, just over 35% of them fell into the category of performance. Activities included in that category are “failure to perform and failure to communicate” (2008 Report on the State Bar of California Discipline System, 2009, p. 3). By far and away, the biggest complaint that clients have about their attorneys is that they are unable to effectively communicate. This complaint echoes the words of Justices Burger and Miner who have noted for the past 30 years that attorneys are unable to effectively communicate, both in and out of the courtroom. This pilot study can hopefully lead to more studies like it which can eventually lead to a better education for attorneys, provided by the people who founded their discipline, the field of communication studies.
REFERENCES


