Recasting Behavior: An Essay for Beginning Law Students

Robert H. Heidt
Indiana University Maurer School of Law, heidt@indiana.edu

Follow this and additional works at: http://www.repository.law.indiana.edu/facpub

Part of the Legal Education Commons, Legal Profession Commons, and the Torts Commons

Recommended Citation
http://www.repository.law.indiana.edu/facpub/901

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.
ESSAY

RECASTING BEHAVIOR: AN ESSAY FOR BEGINNING LAW STUDENTS†

Robert Heidt *

INTRODUCTION

Mr. Projectionist, roll the film please:
Fade In

Five people walk into an open and uncrowded public park in the afternoon. One sets a stepstool on a pathway, ascends the stepstool, and begins to criticize U.S. foreign policy and to urge listeners to resist that policy. A small crowd gathers. Shouts hostile to the person on the stepstool emerge from the crowd. Shouts hostile to those shouts emerge from others in the crowd. A policeman on the scene arrests the person on the stepstool, directs her to a police car, and drives her away.

Dissolve

What did we just see? How do we describe what the person on the stepstool did?

To her attorney, she merely exercised her constitutionally protected right to free speech. All she did was talk. She didn’t hit, touch, or threaten. She didn’t even use “fighting words.” If any crimes or civil violations occurred, they were the illegal arrest committed by the police who should have protected, rather than arrested her, and the assaults and emotional distress torts committed by anyone in the crowd who threatened or outrageously insulted her.

To the prosecutors, she breached the peace, incited to riot, and engaged in disorderly conduct in violation of a local ordinance, a federal statute, and a state statute, respectively. She may also have obstructed a public right of way, committed a public nuisance, and participated in an unlawful assembly. Because she came in a group,

† Copyright © 1988, University of Pittsburgh Law Review.
* Charles L. Whistler Professor of Law, Indiana University (Bloomington).
1. See Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (“‘[F]ighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace” are not protected by the first amendment).
she probably also violated the separate laws against conspiring to commit these offenses. Alternatively, she may have only attempted each offense. A more ambitious prosecutor might describe her comments about the need for each person to resist our foreign policy as "soliciting" a crime, say for example, a violation of the draft registration law.\(^2\) An even more ambitious prosecutor might say she conspired to, and attempted to, overthrow the government.

A passerby accidentally injured when the crowd dispersed, or when the crowd's presence blocked the pathway, would describe what she did differently. To the passerby, she negligently caused physical injury.\(^3\) After all, by foreseeably gathering the crowd, she increased the risk that the passerby would suffer the injury he did. Likewise, a listener intentionally injured by a member of the crowd might describe her conduct as negligent use of language which foreseeably angered the one who struck him.\(^4\) To a passerby frightened by the scene and by the shouts, but not physically injured, she committed the tort of negligent infliction of emotional distress.\(^5\) A listener indirectly referred to and criticized by her remarks might describe her behavior as slander or, failing that, intentional infliction of emotional distress.

These examples barely scratch the surface of the possible descriptions of what the woman in the park did. If she was profane, she may be guilty of obscenity. If she called for a strike, she may have committed an unfair labor practice. If she called for a boycott, she may have conspired to restrain trade. If she spoke loudly, she may have violated a noise ordinance. If she or her friends handed out leaflets, we may describe what she did as littering. Depending on the earlier or later actions of the others with her, her speech may constitute a sufficient overt act to convict her of conspiracy to violate the civil rights of another, conspiracy to commit murder, or conspiracy to

---


3. E.g., Weirum v. RKO General, Inc., 15 Cal. 3d 40, 539 P.2d 36, 42 (1975) ("The First Amendment does not sanction the [negligent] infliction of physical injury merely because achieved by word, rather than act.")


commit any number of other crimes or civil violations.6 Had this not been a largely unregulated public park, she might also have violated a host of permit laws as well as other laws regulating the time, place and manner of such expression.7

My goal is not to discuss whether these various claims would necessarily succeed but to awaken you to the many different ways a lawyer can recast, that is, describe, phenomena. Our language and our law are wonderfully rich for this purpose. As an aspiring lawyer, you want to cultivate your capacity to recast phenomena in as many different ways as possible. You cannot rely on your client for this. It is part of your job. The client may bring you the phenomena. The client may, in effect, show you the film excerpt we've just seen. But it is up to you, the lawyer, to conceive the different recastings, the different descriptions of phenomena, the different stories that can be told and to present the one most helpful for your client. It is to you as future storytellers, therefore, that this Essay is addressed.

Typically, a story of what occurred will not resolve the case immediately. Rather, it frames and identifies the central issues. Thus, the disorderly conduct story or the restraint of trade story identify the key issues to be whether the elements of those offenses exist, or more precisely, whether a sensible jury could find the elements of those offenses. Although these issues are left to be resolved, our description of what occurred may still largely predetermine, and manipulate, the outcome. Indeed by leaving the decisionmaker to resolve whether the elements exist (inquiries that, given a sound story, can only be resolved in our favor), our description may seduce the decisionmaker into overlooking the extent to which he is being manipulated.

For some of you, recasting behavior to suit your client’s purpose is second nature. You might think I am wasting paper to encourage you to do what comes so naturally. But occasionally a beginning law student gets “stuck” on one or two conceptualizations and blinds himself to the others. He slips into the false assumption that phenom-


ena are phenomena, facts are facts, and that they can be, or ought to be, described in just a couple ways. It is easy to get stuck. As a beginning student and a first amendment fan, I would have insisted that what we saw could only be described as speech that either was or was not constitutionally protected. That description was the ballgame. With that description the only issue left was whether the speaker's statements amounted to lawful or unlawful advocacy. Of course, law exists on that issue. I would have read the cases, judged correctly (let's assume) that under their standards this was clearly lawful advocacy, and thought I was done.

Such thinking is incompetent thinking. If anyone had been hurt by it, I would have been guilty of malpractice. For starters, I would have overlooked one of the oldest rhetorical moves, rhetorical tricks if you will, that each lawyer must include in his repertoire. When you cannot win under one description of events, change the description; tell another story. Because constitutionally protected speech cannot be the key element of a crime in itself, attack it indirectly; charge some other crime with different elements, and use the speech as evidence of those elements. After all, as long as the unpopular speech gets before the jury as evidence, it is likely to turn the jury against the speaker, thereby assisting you, the prosecutor, nearly as much as if the speech were criminal in itself.

This rhetorical move whereby conduct that cannot readily be attacked as unlawful in itself is used as evidence of some other crime or civil wrong that can be attacked appears throughout the law. Although this particular rhetorical move is just one of many made possible by recasting behavior, I wish to focus on it because too many students fail to stay alert to it.

I. AN EXAMPLE OF RECASTING BEHAVIOR: USING PROTECTED CONDUCT AS EVIDENCE OF UNLAWFUL CONDUCT

One use of this rhetorical move came in the famous labor case

---


9. Admittedly, I should not speak of defendant's "conduct in itself" as if to contrast it with any other description of defendant's conduct. The proper description of defendant's conduct is, of course, the key question. To say, for instance, that the speaker's conduct itself in our film excerpt is "speech" rather than "disorderly conduct" begs that question. Both descriptions of her conduct are equally valid. My only defense for using a question-begging concept like "the actor's conduct itself" is that I cannot find a better one to refer only to the actor's physical action, ignoring his intent and his action's consequences.
Giboney v. Empire Storage & Ice Co.\textsuperscript{10} In Giboney, a union seeking to organize peddlers set up a picket line around a dealer. The picketing was at all times peaceful and good-natured. The union members never obstructed customers or other individuals going through the picket lines. Nor did this dispute, or any related dispute, feature a background of prior violence. Moreover, the Supreme Court had recently recognized in Thornhill v. Alabama\textsuperscript{11} that peaceful picketing was constitutionally protected as free speech under the first amendment. The sweeping language of Thornhill suggested that picketing such as the union's deserved the fullest protection that the judiciary could provide.\textsuperscript{12}

Should the union attorney have felt secure? Absolutely not. The state recast the picketing as a "conspiracy in restraint of trade," a crime whose sole element is an agreement among the picketers to restrain trade. This element was satisfied by finding the obvious, namely, that the picketers agreed with each other to picket with the intent to induce the dealer to stop dealing with nonunion peddlers.

That recasting, that reconceptualization of the picketers' conduct, which all appellate courts accepted, sidestepped entirely the first amendment defense. Recasting extinguished any need for the Court

\begin{flushleft}
\textsuperscript{10} 336 U.S. 490 (1946). \textit{See} Welch v. APA, 1986-1 Trade Cas. (CCH) \textbar 67,037, at 62,373 (first amendment does not protect acts found to be illegal under the antitrust laws).
\textsuperscript{11} 310 U.S. 88 (1940).
\textsuperscript{12} The \textit{Thornhill} Court struck down an anti-picketing statute with the following words:

The range of activities proscribed by [the anti-picketing statute], whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute. The safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern. It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. . . .

. . . But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter.

\textit{Id.} at 104-05.
\end{flushleft}
to balance first amendment values against the values reflected in the restraint of trade law. Recasting even extinguished the need to acknowledge the first amendment values as a factor. The constitutional protection given the method by which the picketers committed the restraint of trade crime did not matter at all. Nor did it matter that the evidence from which the restraint of trade was inferred consisted of the same constitutionally protected picketing. Once the Court admitted picketing as evidence of this other crime, the picketers were doomed. In essence, the Court's syllogism amounted to the simple and disingenuous claim that it was not enjoining peaceful picketing, it was only enjoining an obvious conspiracy in restraint of trade. Even Justice Hugo Black, the Court's most uncompromising defender of the first amendment, approved of this rhetorical move. He later wrote, in citing Giboney with approval, "where speech is an integral part of unlawful conduct that is going on at the time, the speech can be used [in evidence] to illustrate, emphasize and establish the unlawful conduct." This concession should alarm those who think Justice Black's approach (or any definitional approach to the first amendment) will prove sturdy enough to withstand the political winds. As long as protected speech or conduct can be recast as evidence of some other illegal conduct, no expressor will be safe. And there is little, if any, practical difference between condemning speech or conduct outright, on the one hand, and granting it first amendment protection but then treating it as evidence establishing other illegal conduct, on the other hand.

Until the Supreme Court's recent decision in Hustler Magazine v. Falwell,\textsuperscript{14} the same rhetorical move was prevailing among the lower courts in an important branch of defamation law. In that case, Jerry Falwell sued Hustler magazine based on a parody it had published.


Despite the tone of the text, I do not mean to criticize the tack taken in Giboney. There may be excellent reasons for condemning first amendment expression within the labor context. Justice Warren offered some in NLRB v. Gissel Packing Co., 395 U.S. 575, 617-18 (1969):

Any assessment of the precise scope of employer expression, of course, must be made in the context of the labor relations setting. . . . Stating these obvious principles is but another way of recognizing that what is basically at stake is the establishment of a non-permanent, limited relationship between the employer, his economically dependent employee and his union agent, not the election of legislators or the enactment of legislation . . . where the independent voter may be freer to listen more objectively and employers as a class freer to talk.

My point is only that conduct which seems invulnerable in light of some judicial decisions can be rendered vulnerable when recast as evidence of some other offense or civil wrong.

Hustler had clearly warned readers that the parody was fictitious and was not to be taken as suggesting any facts, including, of course, any facts that might defame Falwell. Apparently the jury took this warning as sincere, for they found that the parody could not be reasonably understood to state any facts. To a faithful reader of past Supreme Court opinions in similar disputes, this finding seemed fatal to Falwell. The Court had held repeatedly that there is no such thing as a false opinion and had seemed to require that the disparaging publication at least imply some false statement of fact before civil liability could be imposed.\(^{15}\) Even better for Hustler, the Court had required since \textit{New York Times v. Sullivan},\(^{16}\) in 1964, that a public figure like Falwell show not only that the statement of fact was false but also that it was published with knowledge of its falsity or in reckless disregard of its falsity.

How did Falwell's attorney successfully avoid this hostile law in the lower courts? He used our rhetorical move again—he told a different story. According to Falwell's attorney, those severe requirements, plainly fatal here, applied only to a suit for defamation. The attorney described the magazine's behavior not as defamation but as another tort, "intentional infliction of emotional distress."\(^{17}\) According to the Fourth Circuit Court of Appeals, the emotional distress action in \textit{Falwell} required an element not shared by the defamation tort, namely, that the parody be "intended to cause emotional distress."\(^{18}\) Because of this difference, the emotional distress tort was not subject to the constitutional requirements for defamation; that the ad was an opinion also became irrelevant. Once again the rhetorical move erased the first amendment concerns. The elements of the emotional distress tort, namely intent to cause emotional distress, outrageous conduct, and causing of severe emotional distress, could be proven by constitutionally protected expression that could not be attacked directly either through the criminal law or through the defamation torts. You might think this recasting attempt too transparent for a lower court to take seriously. You might think no adult, let alone a judge, could attach significance, or could expect others to at-

\(^{16}\) 376 U.S. 254 (1964).
\(^{18}\) \textit{Flynn}, 797 F.2d at 1274.
tach significance, to this simple change in description. You might think silly a legal regime that showers the world’s rewards upon those who recast behavior in this transparent way. You might find pathetic the image of a judge, oblivious to the thrust of *New York Times v. Sullivan*, gravely considering whether this parody satisfies each of the three elements of intentional infliction of emotional distress. Yet, until the Supreme Court decision, this rhetorical move had paid off handsomely in case after case. One commentator aptly summarized the attitude of the lower courts: “The incantation of the words ‘intentional infliction of severe emotional distress’ appears to blind both lawyers and judges to first amendment issues.”

This rhetorical move is not used merely to attack behavior that might otherwise seem to be constitutionally protected. It is used to attack various conduct that cannot be attacked when recast differently. A striking example appears in *Tuttle v. Buck.* In *Tuttle*, a banker in Howard Lake, a Minnesota village, set up a barber shop, hired the barbers, arranged with them to share the income from the shop, and tried to increase business through lower prices and advertisements. His success predictably reduced the income of the preexisting barber shop in town, an expected result whenever an entering business breaks up a local monopoly and brings to consumers the blessings of rivalry. Tuttle, the injured barber, sued.

How do you suppose Tuttle described the behavior of the banker? He could not successfully describe it as “setting up a barber shop” or “going into business” or any other obviously legitimate activity. He needed to find a description that would distract attention from the fact that the banker had merely engaged in rivalry, the quintessential conduct our free enterprise system encourages. The injured barber thus described the banker’s behavior as “maliciously endeavor[ing] to destroy plaintiff’s said business.” The injured barber relied on precedents which recognized as a tort “intentionally damaging another without just cause or excuse.” This tort shifts the burden of production onto the defendant to prove “just cause or excuse.” Thus, this description of the banker’s conduct enabled the plaintiff to overcome the banker’s demurrer, a major victory that enhanced the

---

RECASTING BEHAVIOR

settlement value of his suit. At trial, the injured barber could have introduced into evidence the uncontested facts about the banker’s conduct. That evidence may well have allowed the jury to infer that the banker, like any new entrant, knew his entry would hurt a preexisting rival and, therefore, by entering with this knowledge, the banker intended, perhaps maliciously, to hurt the rival. The absurdity of imposing liability on the banker for the entrepreneurial initiative our system cherishes only underscores the persuasive power of this recasting move.

If a state court today is too sophisticated to accept Tuttle’s rhetorical move, that court might yet allow Tuttle’s action if we change the facts to add another party who assisted the banker in his efforts. For then the banker’s actions become concerted, that is, conspiratorial, rather than purely unilateral. This allows Tuttle to tell the common law civil conspiracy story. Common law conspiracy requires only that the defendants conspire, that is agree between themselves, and that they conspire with an unlawful intent, such as the intent to injure another. The actions taken by the conspirators need not be unlawful independently. The action for civil conspiracy justifies itself on the rationale that there is always danger in numbers. Other business torts may likewise condemn conduct that everyone would deem lawful and socially useful when recast independently, that is, when viewed in itself, without reference to the actor’s intent to harm another or the fact that another was harmed. Intentional interference with another’s contract and intentional interference with another’s prospective business advantage, for example, have been interpreted in a fashion that renders unimportant the decisionmaker’s evaluation of the defendant’s conduct in itself.

In antitrust law, this rhetorical move of recasting legitimate conduct in order to turn it into sufficient evidence of unlawful conduct has paid dividends to plaintiffs’ attorneys for almost a century. For instance, the rhetorical move dominates the determination of whether


business conduct amounts to an attempt to monopolize in violation of section 2 of the Sherman Act.\(^{25}\) On the one hand, the courts repeatedly state that the Sherman Act does not penalize vigorous, aggressive rivalry. Instead, the Sherman Act is primarily directed against conduct like price-fixing which raises prices and reduces output by reducing rivalry. Mere vigorous rivalry, the courts insist, cannot amount to an attempt to monopolize.\(^{26}\) Plaintiff’s attorneys have circumvented this rule, however, by persuading courts to identify the key, and in some jurisdictions the sole,\(^ {27}\) element of attempt to monopolize as the specific intent to monopolize. All too often juries are allowed to infer this fatal specific intent from evidence of otherwise lawful, vigorous rivalry combined only with the wish to hurt rivals that is a commonplace aspect of a rival’s intent. The judicial opinions upholding these verdicts typically reiterate the rule that such rivalry does not violate the Sherman Act, but they then go on to say that the rule does not apply when the jury finds that the defendant had a specific intent to monopolize.\(^{28}\) Courts are unwilling to say that a defendant’s vigorous rivalry amounts to an attempt to monopolize. To say this would be an embarrassingly obvious contradiction of the court’s defense of such rivalry. But courts are willing to let juries infer specific intent to monopolize from rivalrous conduct that the courts are unwilling to condemn in itself. Again, the rhetorical move whereby plaintiff’s attorney says, in effect, “I am not attacking vigorous rivalry, I am attacking only those who specifically intend to monopolize” seems to

\(^{25}\) 26 Stat. 209 (1890), as amended, 15 U.S.C. § 2 (1982) (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize ... shall be deemed guilty of a felony . . . .”).


\(^{27}\) See, e.g., Greyhound Computer Corp. v. International Business Machines Corp., 559 F.2d 488, 504 (9th Cir. 1977), cert. denied, 434 U.S. 1040 (1978); Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 933 (1964). But see Bushie v. Stenocord Corp., 460 F.2d 116, 119-20 (9th Cir. 1972) (retreating from Lessig by requiring at least “a substantial claim of restraint of trade”).

blind judges. By letting juries infer an unlawful attempt to monopo-

lize based on evidence of such rivalry (combined with that inevitable

intent to prevail over rivals), judges are, in effect, condemning the

rivalry itself.29

Courts occasionally reject this rhetorical move and insist that

conduct lawful in itself cannot be sufficient evidence for some other
cleverly recast crime or civil violation. Usually when courts do so,
however, they simply accept defendant's recasting, that is, defendant's
innocent description, conceptualization and story, without acknowl-
edging any alternative recasting. As a result, the opinion goes right
past the losing attorney's recasting, never engaging it or joining issue
with it. This is unfortunate because a recognition of both recastings
could clarify the policy concerns that lead the court to prefer one to
another. By ignoring the other recastings, the other descriptions, the
opinion makes the issues and the results sound too simple. Consider
the Supreme Court opinion in Gregory v. City of Chicago.30 That case
arose out of a school desegregation dispute in Chicago in the mid-
1960s. Supporters of desegregation including the comedian, Dick
Gregory, were marching on a residential street. A hostile crowd lined
the street. Some people in the crowd threatened the marchers. The
police stepped in, demanded that the marchers disperse upon pain of
arrest, and when this command was not obeyed, arrested the march-
ers for disorderly conduct. A jury convicted the marchers and their
appeal of that conviction reached the Supreme Court.

Past cases supported the prosecutor's "story" of disorderly con-
duct. One precedent, Feiner v. New York,31 involved a street corner
speech much like the woman's in our film excerpt. In Feiner, an ex-
cited crowd, including individuals hostile to the speaker, created (at
least in the policeman's mind), a danger of fighting and disorder. To
prevent the disorder the police arrested the speaker. Taking the "dis-

29. In general, the more vague the statutory prohibition, and the more the statute emphasizes
the result or end-state rather than the means or method to achieve that end-state, the easier it is to
use the statute for attacking behavior which cannot be attacked in itself. An act like the Sherman
Act is useful for this purpose because it emphasizes the end-state of "restraint of trade." One can
debate whether such acts as RICO and the mail fraud statute, which emphasize, respectively, a
pattern of racketeering activity and mail fraud, focus more on an end-state result or a method. But
thanks to their vagueness and sweep, those statutes can also be used to attack much conduct that has
not been attacked in itself by a more specific statute. See 15 U.S.C. § 1 (1982) (Sherman Antitrust
Act (RICO)); id. § 1341 (Mail Fraud).
orderly conduct" story as the relevant story, the Supreme Court opinion emphasized the danger of imminent disorder, that is, the effect of the speech, and did not focus on the speaker's speech and conduct. As a result the Court upheld Feiner's conviction for disorderly conduct, even though he had merely spoken and the only threat of violence came from the hostile crowd. Both Gregory and Feiner involved a danger of imminent disorder from those hostile to the defendant. In both, the police appealed in vain to the defendants to desist. If anything, the speaker in Feiner engaged in a purer form of speech than the marchers in Gregory, and thus was more entitled to the Court's protection.

The Court in Gregory simply embraced a different story. It did what I, as a beginning student, wanted a court to do. It asked itself only whether the marchers' conduct was within the sphere of conduct protected by the first amendment. That is, the Court embraced the "protected expression" story. Under this story all attention focused on the speaker and not on the consequences for public order. The Court's four paragraph per curiam opinion shows how simple a case becomes once a court embraces one story and ignores the others:

This is a simple case. Petitioners, accompanied by Chicago police and an assistant city attorney, marched in a peaceful and orderly procession from City Hall to the Mayor's residence to press their claims for desegregation of the public schools.

Petitioners' march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment. There is no evidence in this record that petitioners' conduct was disorderly. Therefore, under the principle first established in Thompson v. City of Louisville, convictions so totally devoid of evidentiary support violate due process.

The Court ignored Feiner and the other precedents that allowed protected speech to constitute some evidence of disorderly conduct that when combined with evidence of disorder (from whatever source) sufficed for a conviction. The Court rejected this "disorderly conduct" story without the least nod of acknowledgement.

A few splendid opinions that reject this rhetorical move confront the move expressly. Justice Black's opinion for the Court in Eastern Railroad Presidents Conference v. Noerr Motor Freight is one. In Noerr, a truck company sued a group of railroads for combining to-
gether to seek favorable legislation by lobbying the legislature and by pursuing a public relations campaign against the truckers which was aimed at the legislature.

Note the many recast stories that the railroads' action would allow. Sticking just to sections 135 and 236 of the Sherman Antitrust Act, the truckers told the stories "conspiracy to restrain trade" and "conspiracy to monopolize" the long distance freight business. Then, by emphasizing a more specific purpose of the railroads, the truckers told the story "conspiracy for the sole purpose of destroying the truckers as competitors for the long distance freight business." By emphasizing the railroads' methods, the truckers told the story "conspiracy for the deception of the public, manufacture of bogus sources of reference, and distortion of public sources of information."

An advantage of all these stories was that they could be accepted without denying an individual acting alone the right to express his opinion and to engage in lobbying activity without fear of antitrust exposure. The truckers could claim that a ruling in their favor would not infringe that right. After all, according to the truckers, the railroads here were doing much more. They were combining to restrain trade and to monopolize. Of course, these offenses would be inferred, would be proven as an evidentiary matter, largely through testimony and exhibits about how the railroad lobbyists expressed their opinion to a legislature. But as we have seen, using protected conduct as evidence of other unlawful conduct does not stop courts from insisting, with a straight face, that the conduct remains protected.

This time, however, Justice Black blocked the first rhetorical move forthrightly. He began innocently enough by repeating that mere attempts to influence the passage or enforcement of laws were lawful. But then he added that no violation of law could be "predicated upon" such attempts.37 The verb "predicated upon" is key here. Saying that an offense cannot be predicated upon certain conduct says much more than that the conduct is lawful. It says further that the conduct may not itself supply sufficient evidence of whatever recasted offense or tort is alleged. Moreover, it suggests that the conduct should not even be admitted in evidence to prove some other

37. Noerr, 365 U.S. at 135.
offense. In that event, opposing counsel could not refer to the conduct and argue that the conduct shows the unlawful intent, the unlawful result, or any other element of whatever recast crime or tort is alleged.

Alas, Justice Black did not go so far. To decide the case before him, he merely needed to say that the concerted lobbying and public relations efforts could not themselves supply sufficient evidence of an antitrust violation. He left unclear whether such efforts could provide some admissible evidence of a violation, which, when combined with other evidence, might allow a jury to find a section 2 violation.38

The experienced attorneys for the truckers in Noerr then turned to their second recasting of the railroads’ action, namely a conspiracy “to destroy the truckers as competitors for the long-distance freight business.”39 This recasting had carried the day for the truckers in the district court.40 But Justice Black met this move just as forthrightly. He ruled that the railroad’s efforts were protected even when undertaken solely for such anticompetitive purposes.41

The truckers then turned to their recasting of the railroads’ conduct as “deception of the public, manufacturer of bogus sources of reference, [and] distortion of public sources of information.”42 At first glance this move might seem to trap Justice Black. He would hardly want to write that such deception is protected.

Plaintiffs’ attorneys generally strive for a characterization of defendants’ conduct that is so undesirable that no court would possess the courage to deem it protected. Here the move succeeded to that extent; Justice Black would not say the deception was protected. Instead, he resorted to a narrow interpretation of the Sherman Act and its prohibition of actions in restraint of trade. Despite adverse precedents which he ignored,43 Justice Black interpreted the Act to regulate only actions of a business, and not a political, nature. Because he

38. Id. at 136.
39. Id. at 138. See also United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965).
41. Noerr, 365 U.S. at 139-40.
42. Id. at 140.
43. This interpretation ignored a host of cases in which the Sherman Act was used to regulate actions that many would call political and that plainly implicate first amendment values. See, e.g., Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949). Perhaps those prior uses of the Sherman Act can be reconciled with Noerr if we assume Justice Black meant “political actions” to refer only to actions taken to influence legislators directly. Admittedly, “political actions” would normally carry a much broader meaning.
characterized lobbying and public relation campaigns as actions of a political nature, he held that the Sherman Act did not regulate them.\textsuperscript{44}

The importance of Justice Black’s opinion lies in the extent to which he was willing to afford what I call “safe harbor” treatment to the conduct he wanted to protect. Safe harbor treatment means assuring that one who performs the harbored conduct will not increase his legal exposure directly or indirectly. That requires assuring, at a minimum, that the conduct can constitute neither an element of, nor sufficient evidence to prove an element of, some charge. Going further, safe harbor treatment should even preclude merely admitting the conduct into evidence in order to prove an element of some charge. At its most extreme, it might also preclude admitting the conduct in evidence either to rebut other evidence, such as to impeach the testimony of a witness, or to provide incidental background information.

There is a lesson for court-watchers here. How far along the journey toward safe harbor treatment a court goes depends on how much it supports the defendant’s lawful conduct. Conversely, we can measure the intensity of the court’s support by observing how far it goes. If a court holds certain conduct lawful but then allows the conduct to constitute the evidentiary predicate of some easily recast offense, we know the court’s support is unenthusiastic. Such a court is merely giving lip service to the notion that the conduct is protected. To return to the film excerpt, for instance, such a court might acknowledge that the woman’s speech was protected but then would allow that speech in combination with factors outside her control, like the disorder threatened by the crowd, to provide the evidentiary predicate for “disorderly conduct”. Indeed, that was the tack taken by the Court in \textit{Feiner v. New York}.\textsuperscript{45}

A court slightly more committed to first amendment values might at least insist that the other evidence constituting the disorderly conduct crime be within the actor’s control. In that event, a disorderly conduct charge for the conduct in our film excerpt would not get to the jury but a charge like “attempted breach of the peace” or “incitement to riot” might, for the elements of those latter charges might consist of her bad intent plus her speech, two matters within her control. A court still more committed to first amendment values might preclude these last two charges by ruling that a mere bad intent

\textsuperscript{44} Noerr, 365 U.S. at 142.

\textsuperscript{45} 340 U.S. 315 (1951).
does not make a lawful act unlawful. But this court might yet allow the conspiracy charges on the grounds that the required meeting of the minds for a common purpose adds a separate element that is sufficient. A court even more committed to first amendment values might preclude the conspiracy charge by holding that protected expression cannot constitute the overt act needed for the conspiracy charge or by holding that the concerted conduct must itself be unlawful.

Courts still more committed to first amendment values will go further and further toward the extreme position of complete safe harbor treatment. Be warned, however: a court will not state expressly where along the continuum toward safe harbor treatment it has decided to stop. A court may not even be conscious of the continuum. More likely, it will just adopt one story, say the "incitement to riot" story or the "protected expression" story, and ignore the others.

To summarize, the richer a culture's language, the more descriptions of behavior it allows. Typically, a ruling that certain behavior is lawful, or protected, applies to one or two but rarely to all the possible descriptions of that behavior. A determined court or legislature can still prohibit some descriptions of the behavior or, what amounts to the same thing, some description that is logically evidenced by the protected behavior. Whenever an opponent's behavior, protected or not, will likely turn the factfinder against him, a lawyer should advance a description of the offense that renders the opponent's behavior relevant evidence. If successful, he can claim to respect the policies and principles that call for protecting the behavior and, at the same time, he can exploit the behavior's prejudicial effect.

II. DEVELOPING THE ABILITY TO RECAST BEHAVIOR

If recasting behavior and other phenomena does not come naturally to you, how do you help yourself to see the other arguable descriptions? How do you develop your ability to move easily from one configuration of phenomena to another? A self-conscious awareness that you are striving for a different recasting is probably the first step. Then consider the following hints.

A. Emphasizing Different Aspects of Behavior

One way to begin is to remember the different aspects of any

46. A line of cases supporting this position is discussed in Ames, How Far an Act May be a Tort Because of the Wrongful Motive of the Actor, 18 HARV. L. REV. 411 (1905).
conduct that you can choose to emphasize. To oversimplify, you can emphasize the actor’s state of mind, the action’s method, the manner in which the method was carried out, the action’s physical description, the number of actors, or the result, either immediately or eventually.

Suppose you want to emphasize both the actor’s state of mind and the result, and you want to distract attention from either the specific method the defendant took or the physical description of the defendant’s action. Plaintiff’s attorney might want to do this whenever his client’s case is helped by defendant’s unkind state of mind and by the result of defendant’s conduct but not necessarily by defendant’s conduct itself. Perhaps plaintiff can begin the description of defendant’s conduct by focusing on that unkind state of mind and can complete the description of defendant’s conduct by focusing on the result.

This was just the tack taken in the Falwell case where Falwell’s attorney described Hustler’s behavior as intentional infliction of emotional distress. This tort, this description of behavior, nicely distracts attention from Hustler’s method. This was important to Falwell’s attorney because Hustler’s method was merely the publication of a nonobscene and, therefore, constitutionally protected, parody.

Note how well the “intentional infliction of emotional distress” description emphasizes the actor’s state of mind. More precisely, the description emphasizes his state of mind about his action’s effect on the plaintiff. The description does not focus attention on the defendant’s state of mind in regard to the public or in regard to other laws, other duties, or other ethical principles. In general, when a defendant either wanted to hurt the plaintiff or knew that his action would probably hurt the plaintiff and went ahead anyway, you, as plaintiff’s attorney, will want to conceive some description of defendant’s behavior that emphasizes this spite or, at least, this willingness to hurt. Similarly, the plaintiff’s attorney in Tuttle v. Buck used this tack in describing the banker’s act of setting up a rival barber shop as “maliciously endeavor[ing] to destroy [another’s] . . . business.” Rightly or wrongly, an attorney can still exploit our law’s commitment to the feudal notion that whoever intentionally hurts another should bear the burden of justifying his act or pay.

47. See supra notes 14-19 and accompanying text.
49. Tuttle, 119 N.W. at 946.
Of course, the intentional infliction of emotional distress "description" also emphasizes the immediate result, emotional distress. Plaintiff presumably wants to emphasize this result because he can offer some evidence of such distress, as almost anyone can.

Notice the generality of the word infliction. The word "infliction" nicely suggests that the method of injury is unimportant. It invites the reader to skim over the method, to slip by the method with little concern and thus to include within the cause of action almost any method of causing emotional distress. The word distracts our attention (almost unconsciously) from whether the method was appropriate or inappropriate, normal or abnormal. One need not shoot the plaintiff's children to inflict emotional distress. One can inflict emotional distress by not hiring or not retaining the plaintiff as an employee, by telling the truth about the plaintiff, or by simply leaving the plaintiff alone. The word infliction fixes attention solely on whether the defendant intended to cause the plaintiff emotional distress and on the result, that is, whether such distress occurred. Among the actions mentioned, disorderly conduct, breach of the peace, intentional interference with another's contract, and intentional interference with another's prospective business advantage share a similar emphasis on the actor's state of mind and the result.

Having chosen to emphasize the state of mind and the result, you may yet face a choice about which state of mind and result to emphasize. You can emphasize the state of mind and result in the short-term or in a longer term. For instance, "conspiring to overthrow the government" focuses on a less immediate and a longer term purpose and result of a speech than does "breach of the peace" or "incitement to riot." "Attempting to monopolize" focuses on a less immediate and a longer term purpose and result of a certain business action than would "interfering with another's contract."\textsuperscript{50}

A few actions such as "restraining trade" come close to ignoring all aspects of defendant's behavior except for the result.\textsuperscript{51} These I call

\textsuperscript{50} To help give meaning to the admittedly vague notion of short-term versus long-term intent, consider the distinction philosophers draw between occurrent or aroused intent and standing or latent intent. An occurrent or aroused intent is an intent currently in the actor's mind at the instant being described. In contrast, a standing or latent intent is a disposition to have an occurrent intent to this effect. For instance, if John is now mowing the lawn, we might describe his occurrent intent by saying "John intends to finish mowing the lawn as quickly as possible." We might describe his simultaneous standing intent by saying "John intends to become president of the company." \textit{See A. Goldman, A THEORY OF HUMAN ACTION} (1970).

\textsuperscript{51} As the Chicago school uses the term, "restraining trade" does not mean interfering with the process of rivalry but instead means any action that yields a certain result, namely, a reduction in
end-state actions." I believe they will become more common as utilitarian approaches to law, such as the economic approach, move judges toward a greater emphasis on consequences.

In contrast such descriptions as unlawful advocacy, unlawful picketing, selling below cost, and assault focus more on the actor's specific method and the physical description of his conduct. These are two aspects of defendant's conduct that I call, for ease of reference, defendant's conduct itself.

Recasting behavior to emphasize results and to de-emphasize the conduct itself may represent an intellectual progression in a certain sense. As a person develops from a child to an adult, he may progress from viewing an act in terms of its concrete, physical aspects toward viewing it in terms of its goals and results; first, its immediate goals and results, and later, its more eventual ones. Consider these two examples of descriptions of the same act. The descriptions move progressively from an emphasis on the conduct itself to an emphasis on its results.

1. The actor raised his arm.
2. The actor flipped a switch.
3. The actor turned on the light.
4. The actor illuminated the room.
5. The actor alerted a prowler to the fact that the actor was home.

Also consider:
1. John moved his finger.
2. John pulled the trigger.
3. John fired the gun.
4. John killed Smith.

Notice the concrete verbs used in describing a physical action itself: raise, lower, move, push and pull. To describe conduct in terms of its results calls for a different set of verbs: illuminate, alert, or kill. Learning to "think like a lawyer" may consist in part of a growing ability to use a wide variety of verbs to emphasize less obvious, less immediate, and less concrete aspects of any phenomena.

Philosophers have listed some of the different aspects of conduct

economic efficiency, also known as consumer welfare. See R. Posner, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976). To be sure "restraining trade" requires a conspiracy, that most ephemeral of all phenomena. Thus, the action fixes attention on the number of actors as well as on the result.
that we can choose to emphasize. In effect, their efforts supply a lawyer with a checklist to guide his search for different descriptions of behavior. I have altered the list of Nicholas Rescher, Professor of Philosophy at the University of Pittsburgh, to adapt it for our purposes:

1. Agent (who did it?)
2. Act-type (what did he do?)
3. Modality of Action (how did he do it?)
   a. Modality of manner (in what manner did he do it?) e.g., firmly/weakly, rapidly/slowly, energetically/placidly, gently/roughly
   b. Modality of means (by what means did he do it?) e.g., did he open the curtain with the pull rope/with his hands/with a stick/with this pull rope/with these hands/with this stick
4. Setting of Action (in what context did he do it?)
   a. Temporal aspect (when did he do it?)
   b. Spatial aspect (where did he do it?)
   c. Circumstantial aspect (under what circumstances did he do it?)
5. Rationale of Action (why did he do it?)
   a. Causality (what caused him to do it?) e.g., out of rage/out of drunkenness/by an irrepressible urge/because of post-hypnotic suggestion
   b. Finality (with what aim did he do it?) e.g., out of ambition/out of concern for her feelings/out of a wish for gain or advancement
   c. Intentionality (in what state of mind did he do it?) e.g., voluntarily/involuntarily, deliberately/inadvertently, intentionally/unintentionally, consciously/out of habit, knowingly/unwittingly, willingly/unwillingly, gladly/reluctantly, confidentially/hesitantly
6. Evaluation
   a. Of the act itself, e.g., prudently/rashly, considerately/thoughtlessly, courteously/rudely, appropriately/inappropriately, recklessly/not recklessly, negligently/carefully
   b. Of the act in relation to other acts of the actor himself or of people in general, e.g., typically/atypically, normally/
abnormally, expectedly/unexpectedly, characteristically/unusually

7. Results
   a. For other parties
   b. For the actor himself
   c. For society

This outline suggests that one way to alter our descriptions of an action is to juggle a limited and manageable number of distinctive aspects of the action. But while the aspects are limited in number, our descriptions can change almost indefinitely.

B. Using Different Contexts

In describing conduct, a person is free not only to select which aspects of conduct to emphasize, but also how wide a context to use. Describing conduct within a wider context will often yield a richer, more complex account of the actor's purpose. Indeed, I suspect that a writer who is striving to indicate a more complex or more eventual purpose will invariably widen the context. Consider the following descriptions of the same act:

1. He raised and extended his left arm.
2. He extended his left arm out the car window.
3. He signaled for a turn.
4. He convinced his driver's education examiner that he was a competent driver.

Consider further:

1. He writes his name on a piece of paper.
2. He writes a check.
3. He pays off a gambling debt.

Granted, these descriptions resemble the ones discussed earlier in that they move from an emphasis on the act itself to an emphasis on the result. Yet the descriptions also move from a narrower to a wider context. We do the same thing when we describe the movements of chess pieces not as K→N1 and R→B1 but as "castling," for then we are describing an action in the context of the rules of the game. More incorporation of context will necessarily yield a different, and usually richer, description of action. As lawyers you will want to develop

the ability to widen the context in order to give however rich a description will best suit your client.

A related advantage of widening the context is to give yourself the option of describing either the intention to perform the precise act or the intention to perform some broader category of acts of which the precise act is only a specific example. To borrow an example given by Mark Kelman,54 suppose a person cashing a check made out to her tries to get more money from the bank by changing the numbers on the check. Her scheme fails because the letters on a check control when a dispute arises between the numbers and the words. How then do you describe her intent? If her intent is to perform the precise act, you say she “intended to alter the numbers on a check.” This description acquits her of attempted forgery because forgery requires a material alteration, and a mere alteration of the numbers is not material.55 If you opt to describe the intent to perform a broader category of acts, of which this precise act is only a specific example, you say she “intended to receive money from the bank by altering an instrument.”56 This second description of her intent helps the prosecutors immensely because it brings into play the well established principle that the crime of attempt is committed when a person intended to commit a crime and would have been guilty of the completed crime if the facts had been as the defendant believed them to be. With the latter description, the prosecutor can argue that the woman intended to commit forgery and would have been guilty of the completed crime if she had altered the instrument in a way that would have made the bank pay her more money.57

C. Using Different Time Frames

You can also vary the time frame of your description. That is, you can start the description either at the moment trouble breaks out between the parties or at a moment far back in time long before trouble breaks out, or at any point in between. For example, after a fight on a football field, the player who threw the first punch in that fight will justify his action by referring to the bad behavior of the

57. See W. LAFAVÉ & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 60, at 442-43 (1972) (discussing Wilson and Jaffe).
RECasting BEHAVIOR

victim earlier in the game or even in a previous game. Starting the story of the fight from the moment the player threw the first punch denies consideration to those earlier, provoking incidents. I would call that a narrow time frame. The recent aggressor wants to open up the time frame, that is, he wants a broader time frame that would start the story from the beginning of the game or from the time in the earlier game when the recent victim began his bad behavior. The resulting story would not favor the recent victim as much. The battered wife who shoots her husband when he comes home from work wants a time frame broad enough to include the beating her husband administered before he went to work. But those prosecuting the wife for murder want a narrow time frame that filters out of consideration everything that happened earlier than a few moments before the shooting.

Those like the battered wife who want to open up the time frame are not merely asking the court to observe the earlier incidents. They want more. They want the court to fuse earlier incidents, for example the beating, with the later incidents, for example the shooting, into a unified description of the wife's behavior, for example "self-defense against assault or against spouse abuse." This illustrates why the attorney's job is to describe behavior, not merely to accept the description implied by a narrow time frame, for example "shooting her husband", and to then ask that the earlier incident be noted in mitigation. In short, the defense attorney wants to describe the alleged criminal behavior in a manner that will broaden the time frame and fuse the earlier and later events while, ideally, emphasizing the earlier events. The prosecuting attorney, in contrast, seeks a description that narrows the time frame and that separates the earlier and later events thereby rendering the earlier events irrelevant.

A person describing behavior can choose not only how much time to include in his description but also the particular moment in time to emphasize. The descriptions of behavior, that is, the storytelling, that lawyers routinely present require a subtle shift in the moment emphasized. Consider a common nineteenth-century dispute in which a railroad train ran over a rancher's cow. A story that emphasizes the moment of contact, the moment of injury, is likely to show the railroad innocent of any negligence. There was probably nothing cost justified that the railroad could do at or immediately before that moment, especially if the engineer applied the brakes and blew the whistle.
The rancher's attorney must shift the moment of focus and look for negligence earlier. Perhaps he could pinpoint the railroad's negligence just a few moments earlier when the engineer failed to apply the brakes or failed to blow the whistle as soon as he should have. Failing that, he could pinpoint the negligence still farther back in time when the lookout man failed to see the cattle, provided the cattle would have been visible to one looking carefully. If the lookout man was asleep or otherwise distracted, and thus failed to maintain a lookout, the attorney can put the negligence at that moment when the lookout let himself fall asleep or allowed himself to be distracted.

If the railroad decided not to employ a lookout, the attorney could go further back in time and put the negligence at the moment when the railroad made that decision. If that story still will not carry the day, because maintaining a lookout would not be either financially justified or required by statute, then he can jump further back in time. He could point to the original decision to build the railroad with the knowledge that the railroad would inflict this dangerous risk on the rancher's cattle, a risk that is not eliminated by ordinary care. That decision to proceed and to inflict deliberately on the rancher this substantial risk, he can argue, ought to subject the railroad to strict liability when the risk materializes. According to this story, the organizers of the railroad should view its future compensation to the rancher as a cost factor to be incorporated into its decision to proceed with the construction of the railroad. In each of these examples the moment of focus changes, moving back in time from the moment of contact with the cattle to the moment when the original entrepreneurs contemplated the possible costs of their prospective venture.

One group of legal academics, the "Chicago" school, has achieved enormous influence by advocating a broad time frame in deciding what statement of facts to take as the relevant one. The Chicago school refuses to begin the relevant story at the moment trouble breaks out between the parties, for instance, at the moment the railroad strikes the rancher's cow. Nor is the Chicago school content to move back only to the moment the lookout fell asleep or the moment the railroad decided not to hire any lookout to begin with. Rather, following Roald Coase, they begin their story much earlier—when the prospective railroad and the prospective rancher might have first bargained about how to reconcile their potentially conflicting activities. The Chicago school then asks courts to calculate what result the

parties would have arrived at had they been able to bargain costlessly. Perhaps they would have bargained to the result that the railroad need not pay for the cow provided it hired a lookout, or instead, would have bargained to the result that the railroad would need to pay as long as the rancher maintained a fence around his property. Assuming that the cost of actually bargaining this way is high, the court should simply prescribe these results and apply them to the case before it. The result is to render irrelevant the circumstances surrounding the moment of collision.

The Chicago school’s insistence on viewing disputes *ex ante* rather than *ex post* also implies a broad time frame and an early moment of focus. Under an *ex ante* approach, a judge would not take the position of the parties at the time of trial as given and try to apportion gains and losses fairly. Rather, the judge would go back in time to search for the rules that would best encourage the parties to engage in efficient behavior, and therefore, to maximize society’s wealth. For instance, when the licensee or user of a patented device sues to restrict the patent holder’s ability to collect royalties, the *ex ante* approach does not consider the situation that exists and strive for a fair result. Rather, it goes back to the time before the patented invention existed and asks what rules will give the optimum incentives for people to invent, provided the cost of promulgating and enforcing those rules do not outweigh the benefits. Thus, the Chicago school tells the legal profession: “Don’t start your story when trouble breaks out between the parties. Open up your time frame and go back to that moment when the prospective parties with perfect foresight might have rationally bargained to, or when certain legal rules might best have encouraged, the efficient result.”

The time frame of the Chicago school echoes a time frame employed generally by neoclassical economists in that centuries-old dispute about the source of wealth. To argue that the source of wealth lies in the willingness of private entrepreneurs to invest, neoclassical economists like those in the Chicago school typically start their story at the moment the entrepreneur confronts a primitive state of nature, an empty prairie or an empty lot. With a view toward making a profit by anticipating and meeting consumer demand, the entrepreneur gambles his capital and starts construction of a factory and the other steps in the production process. Society’s increased consumption of

---

goods and services—its increased wealth—then seems obviously to spring from that investment.\textsuperscript{60}

In arguing that the source of wealth lay in the surplus value of the worker’s labor expropriated by the entrepreneur, Karl Marx used a different time frame.\textsuperscript{61} He started his story not at the moment the entrepreneurs confronted the state of nature but at the moment the finished factory with its assembly line waits only for the workers to tend it. Starting at that moment, Marx filters out everything that happened before. Thus, he begins his lengthy story with the wealth that existed before the worker added his labor and ends his story with the increased wealth that exists afterwards. From the total increase in wealth, the reader is invited to subtract the wages of the worker and to see the difference between the increased wealth and the wages as the surplus value of the worker’s labor which the entrepreneur has extracted and now retains. With such a starting point, that surplus value appears to be the key source of wealth.\textsuperscript{62}

\textsuperscript{60} See, e.g., id. at 27-29.

\textsuperscript{61} Karl Marx attributed the capital required to get the factory ready for the worker solely to past labor and not even in part to the efforts or initiative of the entrepreneur. According to Marx, there is “not one single atom of its value that does not owe its existence to unpaid labor”. 1 K. Marx, Capital 637 (1919). See also T. Sowell, Marxism: Philosophy and Economics 190-95 (1985).

\textsuperscript{62} By adopting a different time frame, you can contrive alternative stories to the neoclassical and Marxist stories about the source of wealth. See T. Kuhn, The Structure of Scientific Revolutions (1970). For instance, a model based on an even broader time frame than that used by the neoclassical model might start the relevant story not when the entrepreneur gambles the capital he has raised, but instead when the community or kinship group first opted for increasing efficiency through specialization of labor, despite the hierarchies, unequal distribution of wealth and power, and the other disadvantages that such specialization of labor would entail. This model would implicitly view the hierarchies and the unequal divisions of wealth and power that result from society’s drive for efficient production as necessary evils. Thus, the model suggests that managers and supervisors, those put in charge by society’s need for efficiency, owe certain obligations—beyond the market wage—to those “specializing” in subservient roles. Accordingly, the claims of those who succeed in the market to the unequal share of wealth and power that accompany their success need not be seen as untouchable.

Thus, the model would call for some government interference with marketplace outcomes in order to assure a more egalitarian distribution of wealth and power and in order to eliminate any privileges not necessary for efficiency. Just as the neoclassical model emphasizes the need for optimum incentives for entrepreneurs and investors, this model would emphasize the need to keep those in subservient roles cooperative and free from resentment. On the other hand, unlike Marx’s model, this model might accept, in the name of increased efficiency, the authority of entrepreneurs and managers to decide what is produced and how. The model would invite us to see society as an organism consisting of interdependent parts, each of which is essential to the organism’s success. Admittedly, this model echoes the corporate view of society long associated with feudalism and Catholicism. The model would not highlight exclusively the marginal effect of government actions on the incentives of an entrepreneur, but would also direct attention to the marginal effect of government actions on the willingness of others to assist, tolerate, and cooperate with the entrepreneur.
This example suggests that recasting behavior does not merely allow you to argue clusters of facts into or out of various tort, criminal, and other legal categories. It allows you to inculcate others with your interpretation of experience generally. In telling your stories, therefore, consider the different time frames you can choose. Pick your starting and ending points purposely and judiciously.\(^6^3\)

\subsection*{D. Expanding and Collapsing Behavior}

Closely related to our choice of a starting and ending point and to our choice of how much context to provide is our choice of whether to expand or collapse behavior. We collapse behavior by lumping together the various different steps in the behavior. We expand behavior by emphasizing each of those steps. The torts scholar Clarence Morris illustrates this rhetorical move\(^6^4\) in his description of Hines v. Morrow.\(^6^5\) In Hines, the defendant negligently left a mudhole in a highway. A third party's car drove into it and got stuck. The plaintiff, a man with a wooden leg, came along, and after some discussion, attempted to pull the third party's car out of the mud with a tow rope. The plaintiff's wooden leg got stuck in the mud. The plaintiff took hold of the tailgate of the tow truck in order to extricate himself. As the tow truck moved, a loop in the tow rope lassoed his good leg and broke it.

The issue was whether the defendant's negligence in leaving the mudhole in the highway should be held to be the proximate cause of the plaintiff's broken leg. The proximate cause issue would normally turn, in part, on the extent to which defendant should have foreseen that his conduct created an unreasonable risk of what occurred. Professor Morris attributed the decision for plaintiff to this summary of the facts in plaintiff's brief: "The case stated in briefest form is simply this: Appellee was on the highway, using it in a lawful manner, and slipped into this hole, created by appellant's negligence, and was in--

\[^6^3\] The philosopher Stanley Fish believes people can never consciously choose to use a broad or narrow time frame in describing phenomena. He believes the time frame, like the other interpretative constructs, are "a condition of consciousness" that is "already-in-place" for every lawyer who confronts a particular phenomena. He believes we can never distance ourselves from the unconscious choices that particular time frame represents. We can never choose an alternate time frame. In short, Fish claims you can never make the choices that I believe every self-conscious lawyer seeking to persuade a decisionmaker makes routinely. Fish, Dennis Martinez and the Uses of Theory, 96 YALE L.J. 1773 (1987).

\[^6^4\] Morris, Proximate Cause in Minnesota, 34 MINN. L. REV. 185 (1950).

jured in attempting to extricate himself." This statement of facts nicely collapsed several distinct events, thereby making plaintiff's injury seem a natural and foreseeable consequence of defendant's action in failing to fix the mudhole. By collapsing the event, plaintiff's attorney took advantage of the favorable feature that the injury came about while his client was trying to extricate himself and emphasized that feature alone while ignoring such unforeseeable (and thus unfavorable) circumstances as his wooden leg, the presence of the tow truck, the use of the tow rope, his grabbing hold of the tailgate of the tow truck and the tow rope lassoing his healthy leg.

In contrast, defendant's attorney in trying to expand the event would have told a much longer story. That story would have emphasized each distinct event and would have emphasized the improbability of each unlikely event following the previous improbable events. Thus, defendant's story would implicitly invite the reader to multiply together the small chance of each event occurring and to conclude that the chance of all these events occurring one after another is remote indeed.

Sometimes a plaintiff wishing to show proximate cause will expand the number of facts. Professor William Prosser provides the example of the decedent who scratched his finger on a chipped milk bottle that the defendant had left on his doorstep. A collapsed story might say that "the defendant left a glass milk bottle with a slight chip near the top on the plaintiff's doorstep and the decedent perished as a result." Since the death of the customer seems so unforeseeable a result of defendant's negligence in using an imperfect milk bottle, this collapsed story favors the defendant. Therefore, plaintiff's attorney wants to describe how naturally each of the distinct events leading to his client's death followed from the one before it. When each event in the sequence of events appears foreseeable, the ultimate result will seem more foreseeable. Thus plaintiff's attorney might expand the story as follows: "The decedent picked up a defective milk bottle that defendant negligently left on his doorstep. In the lifting process, plaintiff scratched a finger. The scratch became infected and the infection led to blood poisoning (before penicillin). This resulted in the decedent's death." This description takes advantage of the fact that

67. W. PROSSER, supra note 22, at 375 (6th ed. 1976) (discussing Koehler v. Waukesha Milk Co., 190 Wis. 52, 208 N.W. 901 (1926)).
the manner by which defendant's negligence led to his client's injury was foreseeable even though the resulting death was not.

E. Using Different Perspectives

You might consider how you can change a description of events by changing the perspective slightly. Consider the following possible descriptions of the same simultaneous act of moving a piece in a chess game from one square to another:

1. The actor chases away a fly.
2. The actor checkmates his opponent.
3. The actor gives his opponent a heart attack.
4. The actor proves to himself that he can learn chess successfully.

All four descriptions focus on the result of an act. Nevertheless, they vary based on which result you wish to emphasize. Different possible results are seen by moving the perspective from one person or event to another. You can describe the result for the fly, for the game itself, for the health of the actor's opponent, or for the actor himself. Some results may seem incidental, like the chasing away of the fly, because we just don't care about the perspective of, or result for, the fly. In our film excerpt, we might help ourselves see the other possible descriptions by taking the perspective of the various people affected. From the policeman's perspective, the important result was the possible disorder or riot. To the passerby, it was the blocking of the path. To the park's maintenance crew, it was littering.

F. Using Different Degrees of Specificity

You can also expand or collapse your description by changing the degree of specificity with which you describe behavior. Thus, the same act can be described as follows:

a) sawing wood;

b) sawing a wood plank;

c) sawing an oak plank; or

d) sawing one of Smith's oak planks.

You can augment the description of an act by indicating how the act is performed: slowly, quickly, or loudly. In describing how the act is performed, you can vary the degree of specificity as well: loudly versus a squeaking noise; quickly versus three thrusts per second. Such descriptions can merge well into the evaluation of the conduct that
you want the decisionmaker to accept. To take an extreme example, the attorney for someone injured by defendant’s sawing can add the word “carelessly” to his description of how the defendant sawed the wood. This is a heavy-handed example because the attorney is obviously sneaking an evaluation into what purports to be merely a factual description of the conduct. The adverb “carelessly” is so similar to the legal conclusion “negligently” that the attorney betrays his rhetorical maneuvering.

In sum, when you view conduct, ask yourself which aspects of it you wish to emphasize. Do you wish to emphasize the state of mind of the actor? Do you wish to emphasize that the action was deliberate or accidental? Do you want to emphasize that the motive was intent to harm another, thereby suggesting spite? Or is the motive one that is approved, as in self-defense? Or perhaps you wish to emphasize how the action was performed, that is negligently or recklessly? Was the action done alone? If not, you can emphasize the plurality of actors by alleging conspiracy. Were others approached by the actor? If so, you can emphasize this aspect by using the “soliciting,” “incitement,” and “inducement” actions.

Do you want to emphasize what the action amounts to physically, an aspect emphasized by such descriptions as “exceeding the speed limit,” or “failing to buckle a seat belt?” Or do you want to emphasize the result, the tack taken by such claims as infliction of emotional distress. If you don’t wish to emphasize the immediate purpose or result, consider emphasizing the purpose or result that occurs over a longer time period. When do you want the story to start? When do you want it to end? In how wide a context do you want to set the behavior? How complex a purpose or result should you describe? Through whose eyes should the result be described? In describing the conduct, what level of specificity, that is, how much detail, should you use? Do you want your description to expand or collapse the conduct?

The insight that phenomena can be described, can be shaped, so many different ways is liberating. It gives you power by giving you options. It also foists upon you the responsibility of selecting among those options shrewdly and carefully.

Our judgment about which description to use will naturally depend on whatever we want the decisionmaker to think is important about the conduct. In general, our choice of descriptions represents a choice about what is important. When judges describe conduct by its
results, as in the crime of price-fixing, the judges are really saying that
that result dwarfs in importance the particular method used, which
here may be purely speech, for example, one executive saying to an-
other on the telephone, "let's raise prices two dollars on Monday,"
and the other replying, "okay." Recasting to distract attention from
certain aspects of behavior is just a shorthand way of saying that
those aspects are not important.

If you are revolted, as I am, by a recasting of what our speaker in
the film excerpt did as "disorderly conduct" with the result that the
audience's hostility justifies throwing her in jail, that is only because
we feel such a recasting insufficiently values her freedom of speech
and improperly shifts onto her the responsibility for the actions of the
hostile members of the crowd. We are not able to claim seriously that
this recasting is inaccurate or wrong in any absolute or objective
sense.

By seeing the different ways conduct can be described, we save
ourselves from asking "which story is true?" or "which description is
correct?" Those are questions for children. As long as our descrip-
tion does not, for instance, emphasize an aspect of the phenomena
that the phenomena simply does not display (the redness of the sun
when the sun was invisible, or the wish to hurt the plaintiff when
there was no wish), our description is neither right nor wrong, but
only more or less persuasive to the decisionmaker. After all, each
description can only give a partial picture, a highly selective picture.

CONCLUSION

Seeing the different ways conduct can be described suggests sev-
eral conclusions about the law itself. The legal realists would say it
suggests the indeterminacy of the law. At least it undermines our
confidence in the ability of legal doctrine to withstand the political
winds. It warns us against assuming that legal doctrine will ever pro-
vide secure protection. By showing that legal doctrine rarely deter-
mines results, the legal realists also press us to replace doctrine as the
determining factor with the policy arguments of which the realists are
so fond.

In theory, past cases can limit the ways stories can be told. They
may, for instance, indicate the time frame to be used in describing
certain behavior. If the Supreme Court should adopt a definitional
rather than a balancing approach to an issue, that decision may limit
the time frame and the amount of context one can use. For instance if
the Court rules that one who shows a movie can't be jailed based on the content of the movie unless the movie itself is "obscene" and further rules that only four factors can be considered in determining whether the film is "obscene," that decision will limit the prosecutor's choices about which time frame and how wide a context to use in describing what the movie exhibitor did. Few cases enforce such limits, however. Because judges are so often content merely to decide the dispute before them and explain that decision cogently, their rules typically give the clever recaster more room to maneuver.

The conclusion I suggest concerns the status of our legal discourse. Despite a good deal of populist grumbling, we still give our legal discourse an exalted status. Some of us even speak of legal science. We pride ourselves on our close analytical analysis that rejects generalizations or approximations. We think our legal discourse, and that of other developed nations of the West, marks our cultures as civilized. For many, that pride in our legal discourse amounts to more breath into that ever-expanding balloon of Western pomposity and smugness. To see legal reasoning and argument as mastery over a handful of rhetorical moves punctures that balloon. It deflates our legal discourse back to the level of ordinary political and literary discourse—in short, back to the level of the rest of the world. Why then our law schools? How then justify our status and our fees? On what then does our system's prominence rest?


69. Granted, there is more to legal argument than telling the most persuasive story. Usually the lawyer will still need to sell his story. A host of sources may supply helpful arguments for this purpose, although policy arguments seem most in fashion. As others have asserted, these policy arguments are "little more than slogans or formulas currently acceptable in legal discourse." Macauley, Law Schools and the World Outside Their Doors II: Some Notes on Two Recent Studies of the Chicago Bar, 32 J. LEGAL EDUC. 506, 517 (1982). In choosing which policy arguments to rely upon, just as in choosing which story to tell, your political instincts may guide you better than will anything you learn in law school.