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## The Perils of Courtroom Stories

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# THE PERILS OF COURTROOM STORIES

*Stephan Landsman\**

THE CRIME OF SHEILA MCGOUGH. By *Janet Malcolm*. New York: Alfred A. Knopf. 1999. Pp.161. \$22.

## I. ONCE UPON A TIME — THE ALLEGEDLY SAD TALE OF SHEILA MCGOUGH

As Janet Malcolm<sup>1</sup> tells it, Sheila McGough was a middle-aged single woman living at home with her parents and working as an editor and administrator in the publications department of the Carnegie Institute when she decided to switch careers and go to law school. She applied and was admitted to the then recently accredited law school at George Mason University. After graduation, she began a solo practice in northern Virginia that involved a significant amount of state-appointed criminal defense work.

In 1986, approximately four years after her graduation from law school, McGough received a call requesting assistance from an incarcerated arrestee named Bob Bailes. From the very start, McGough's assistance to Bailes was unorthodox. Immediately upon meeting him at the Fairfax County, Virginia, lockup, she decided that his apparent poor health warranted her taking the unusual step of personally signing as guarantor for his bail. McGough said of this decision:

What I did was something lawyers never, never do. I didn't go out of my way to tell anybody I had done that. It was just so unprofessional . . . I would not have committed crimes for my clients. But anything that was just risking my time and my money — if I had it — I would not hesitate to do. [p. 34]

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\* Robert A. Clifford Professor of Tort Law and Social Policy, DePaul University College of Law. B.A. 1969, Kenyon; J.D. 1972, Harvard. — Ed.

1. Janet Malcolm is a Czech-born American journalist whose parents fled their homeland when she was four, in 1939. She has, for many years, been one of the leading writers on the staff of *The New Yorker* magazine. A series of her articles have been turned into provocative and high-profile books. These have included her volume about Freudian psychiatry and the iconoclastic psychiatrist, Jeffrey Masson, entitled *IN THE FREUD ARCHIVES* (1984); her sharply critical assessment of the work of journalist Joe McGinniss regarding the case of convicted murderer, Jeffrey MacDonald, entitled *THE JOURNALIST AND THE MURDERER* (1990); and her biography of the marriage of Sylvia Plath and Ted Hughes, entitled *THE SILENT WOMAN* (1995).

McGough thereafter began preparing to represent Bailes at his upcoming federal court trial<sup>2</sup> on charges that he had provided false information to secure a bank loan and used a false social security number in that transaction.

While Bailes was awaiting trial, he conducted a number of business transactions out of McGough's office. These involved negotiations to sell certain allegedly still valid nineteenth-century insurance company charters that were claimed to excuse the holder from the constraints of state regulation or review.<sup>3</sup> On June 18, 1986, two men named Frank Manfredi and Francis Boccagna agreed, through their attorney, Alan Morris, to buy two of the charters for \$900,000 each with a down payment of \$75,000 for both. They were not really the principals in this deal but were "brokers"<sup>4</sup> for an investment banker named Kirkpatrick MacDonald. The down payment was wired into Sheila McGough's attorney trust account. McGough immediately drew the funds out of that account, transferring \$70,000 to Bailes and keeping \$5,000 for herself. Although Malcolm does not explore the matter in detail, other transactions involving the sale of charters also took place at around the same time.

In the late summer of 1986, Bailes, represented by McGough, went on trial in the bank fraud case. He was convicted and sentenced to five years in federal prison.<sup>5</sup> The story, however, was far from over. McGough redoubled her efforts on Bailes's behalf. She sought his release from prison by a variety of means. These included what one federal district judge found to be a frivolous attack on the sentence imposed upon Bailes<sup>6</sup> as well as the instigation of a bankruptcy proceeding. In the bankruptcy action, one set of corporations owned by Bailes sought bankruptcy protection while another set of his shell companies requested that the court release him from prison so he could facilitate the payment of their alleged claims. Although it would appear these claims were nothing but shams, McGough worked tirelessly to effectuate the scheme.

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2. The trial was to be held in the late summer of 1986.

3. A lawyer who represented McGough, later described these charters to Malcolm in the following terms: "These guys were buying insurance charters that gave them the right to sell insurance without reserves. That's like printing money. What are they talking about?" P. 72.

4. This is the term used by Judge Richard Posner to describe Manfredi and Boccagna in his review of Malcolm's book. See Richard Posner, *In the Fraud Archives*, THE NEW REPUBLIC, Apr. 19, 1999, at 29.

5. See *United States v. Bales*, 813 F.2d 1289 (4th Cir. 1987) (noting that the defendant used several aliases, including "Bob Bailes" — the name Malcolm uses throughout her book).

6. The federal judge who heard this challenge to the sentence, Judge James Turk, was so incensed by its frivolity that he threatened McGough with sanctions for pressing it. Pp. 29-33.

Bankruptcy Court Judge George Benson eventually consented to Bailes's release. This, however, could only be accomplished if a federal district court judge would agree to enter an order setting the defendant at liberty. The first judge McGough approached, Judge Charles Richey, agreed to the release on condition that the United States Attorney's office assent. The United States Attorney was then preparing a second, much more serious case against Bailes<sup>7</sup> and apparently would have opposed freeing the prisoner. Rather than accept this decision or enter negotiations with the United States Attorney's office, McGough approached a second federal district court judge, Stanley Harris, concerning the matter. McGough did not inform Judge Harris of Judge Richey's prior ruling, and Harris issued an order releasing Bailes into McGough's custody. Judge Harris rescinded this order as soon as he learned of the prior, undisclosed Richey ruling. Judge Harris was so disturbed by McGough's behavior that he sought to have her disciplined by the District of Columbia Bar for her conduct.

In 1988, Bailes was tried in a North Carolina federal court for his efforts to sell insurance company charters.<sup>8</sup> The government's case proved so strong and Bailes's defense so weak that in midstream he shifted to an insanity plea. That claim was rejected by the jury, and, upon conviction, Bailes was sentenced to twenty-five years in prison. In the meantime, a number of those either injured or affronted by McGough's behavior during her efforts on Bailes's behalf began civil proceedings against her. The first to proceed was the investment banker, MacDonald, who had lost \$75,000 in the escrow deposit incident in June 1986. He brought suit against McGough in 1987 to recover his lost funds. Included as a defendant in this action was the insurer that had provided McGough with Errors and Omissions insurance. Shortly before trial, in the fall of 1988, MacDonald settled with the insurance company, receiving \$75,000. One remarkable event in the civil action was the proffer of apparently forged documents by the defense immediately before the case was to go to trial. Who had forged the documents never became clear, but the most likely candidate was Bailes. Later disclosures, however, suggested that McGough may have been involved, at least insofar as seeking to get the forgeries notarized long after their alleged execution date.

In October of 1988, MacDonald took the next step in his campaign against McGough by seeking her disbarment in Virginia. Other bar-related complaints were then being processed, including that made by Judge Harris. The United States Attorney's office in Alexandria,

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7. This is the case that would be tried in a North Carolina federal court in 1988.

8. *See United States v. Bailes*, Nos. 88-5172, 88-5674, 1991 U.S. App. LEXIS 12199, at \*1-2 (4th Cir. June 14, 1991).

Virginia, responded to all this by initiating a grand jury inquiry into McGough's conduct. The grand jury proceedings resulted in McGough's being indicted on fifteen felony charges.

McGough's criminal trial took place in 1990, and addressed charges related to the withdrawal of funds from her escrow account, her behavior in the bankruptcy proceedings, and a number of other matters.<sup>9</sup> The federal prosecutor, Mark Hulkower, subpoenaed more than fifty witnesses for the case (although not all were called to testify). Among those who gave evidence against McGough were four judges, including federal district court judges Richey and Harris, who had been entangled in the bankruptcy scheme.

At the heart of the case against McGough was the withdrawal of the \$75,000 MacDonald deposit from her trust account. The "brokers" Manfredi and Boccagna, as well as their attorney, Morris, all testified that this withdrawal was in direct violation of their understanding with McGough that the funds would be held in escrow until the two \$900,000 deals were consummated. The credibility of these three witnesses was open to question since each was serving or had served time in prison, and two (Manfredi and Morris) were disbarred attorneys. Moreover, as Malcolm notes, but as McGough's defense counsel failed to observe, the key telephone conversation concerning the escrow arrangement lasted but one minute — a suspiciously short time to conduct all the business the government witnesses claimed was handled. MacDonald appeared for the government and reiterated many of his charges against McGough. These were amplified upon by Michael Wyatt, MacDonald's lawyer in the 1987 civil action involving McGough and her Errors and Omissions insurer. Wyatt described the events surrounding the proffer of the forged documents on the eve of the civil trial.

Prosecutor Hulkower's overarching theory was that Sheila McGough had joined Bailes in a series of illegal scams designed to benefit both the attorney and her erstwhile client. In the government's case, however, the motive for McGough's choosing to forsake the role of honest attorney and join forces with her con man client was never made entirely clear. There was some evidence (albeit thin) of a romantic attraction as well as the more prosaic suggestion that the motive might have been greed.

The defense strategy was to attack the credibility of the prosecution's key witnesses and to argue that McGough had done no more than act as a zealous lawyer on behalf of her client, Bailes. This may

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9. See *United States v. McGough*, No. 91-5511, 1991 U.S. App. LEXIS 28977, at \*2 (4th Cir. Dec. 12, 1991) (charges enumerated by the court of appeals included conspiracy to defraud, wire and mail fraud, receiving stolen monies and securities, obstruction of justice, witness intimidation, and perjury).

not have been a particularly effective defense, but counsel were impeded from any other choice by McGough's refusal to take the stand in her own defense or sanction any sustained attack on Bailes. Her justification for these choices was an assertion that she owed Bailes a continuing duty of loyalty and confidentiality.<sup>10</sup> The defense called a series of lawyers to testify in an effort to demonstrate that McGough had acted appropriately in her dealings with Bailes. Among those who testified was McGough's attorney in the 1987 civil proceedings, Kenneth Labowitz. He believed that his client had acted honestly. However, after McGough's criminal conviction, he emphatically asserted that McGough had shown extremely poor judgment in her relations with Bailes, a con man who Labowitz thought had taken advantage of her lack of legal experience, training, and supervision. Three lawyers who had dealings with Bailes also appeared but were not asked whether Bailes had ever tried to swindle them or use their offices and trust accounts for his schemes. (Several would later tell Malcolm that Bailes had done so.)

The jury did not buy the defense's arguments and on November 21, 1990, one day before Thanksgiving, convicted McGough on fourteen of the fifteen felony charges. Of the jury's deliberations Malcolm said: "[T]he jury, evidently needing the afternoon hours for shopping for cranberries and canned pumpkin, reached its verdict by lunchtime after six hours of deliberation" (p. 6). Malcolm says that she, after arduous investigation, came to share a number of McGough's views regarding her conviction. McGough set these out in a letter which stated:

I was a defense lawyer who irritated some federal judges and federal prosecutors in the course of defending a client. The federal prosecutors in my hometown [Alexandria, Virginia] investigated me for four years, and when they failed to turn up anything illegal in what I was doing, they made up some crimes for me and found people to support them with false testimony. . . . I didn't commit any of the 14 felonies I was convicted of. The U.S. Government office in Alexandria "framed" me. [p. 6]

Malcolm also has harsh words for McGough's defense counsel and the legal system:

Her lawyers had evidently not been up to the task. To win their case, they needed to tell a story at least as compelling as the prosecution's — the story, as Hulkower [the prosecutor] neatly summarized it in his opening statement, "of what happens when an attorney violates the first rule of criminal defense and crosses the line from representation of the criminal to participation in his crimes." But no powerful counterstory was ever told by Kohlman and Rochon [defense counsel]. With their

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10. Bailes died in 1995. This led McGough to decide, or at least so she told Malcolm, that she had been freed from the obligation of confidentiality.

hands tied by the double bonds of the rules of evidence and the stubborn silence of their client, they could do little more than rush around putting out little fires in wastebaskets as the entire building burned to the ground. [pp. 11-12]

In the end, Malcolm concluded that McGough was an “exquisite heroine” (p. 161), “a woman of almost preternatural honesty and decency” (p. 6), who through “the heedless selflessness that propelled her downfall has thrown into relief the radicalism of her vision of defense law as a calling for the incorrigibly loyal” (p. 161).

## II. SHOULD WE BELIEVE MALCOLM’S VERSION?

There are a number of reasons not to accept Janet Malcolm’s reconstruction and interpretation of Sheila McGough’s story. Some are contained within the story itself while others are highlighted in Judge Richard Posner’s assessment of Malcolm’s book in a review published in *The New Republic* in April of last year.<sup>11</sup> The most serious charge leveled by Malcolm is that the government “framed” Sheila McGough. It is not exactly clear what this means, but Malcolm herself appears to reject the charge by declaring:

Sheila has never been able to demonstrate to me that Hulkower and his boss, Henry Hudson, knew she was innocent and prosecuted her all the same. “I can’t prove it yet,” she wrote in 1996, and she hasn’t proved it two years later. While it seems clear to me that Morris and Manfredi and Boccagna testified falsely when they said that Sheila told them she would hold the money in escrow, it isn’t at all clear that Hulkower knew this and was cynically supporting a theory he didn’t believe in. I think he believed Sheila was Bailes’s gun moll and had lied and cheated on his behalf. He had never met Sheila — he didn’t know what I know about her character. He professed to find my defense of her pitiful. [p. 110]

With that charge out of the way, two assertions remain: first, that McGough was “almost preternaturally honest”; and second, that the explanation for her conduct was her selfless loyalty to her client.

As to the claim about McGough’s honesty, the record Malcolm sets out is not completely convincing. Although Malcolm is fully satisfied on the point, she does discuss at least one instance which draws McGough’s candor into question. That incident involved a man named Fred Quarles, who had made inquiries about purchasing one of Bailes’s infamous insurance company charters. Quarles had pursued the matter for some time and, as part of his inquiries, eventually asked McGough where Bailes was. The question came shortly after Bailes had been imprisoned pursuant to the 1986 Virginia bank fraud conviction. Apparently to protect the prospects of a deal and/or the reputa-

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11. See Posner, *supra* note 4.

tion of a client, McGough lied about Bailes's situation. As she put it when Malcolm confronted her about the matter:

"Quarles told the truth. I did mislead him," Sheila said.

"What did you say!"

"Yes, I told Quarles that nothing was final, that things were on appeal. That wasn't truthful. I did try to mislead him. All I can say in my defense is that I didn't want to give out damaging information about a client without his permission. A more experienced attorney would have found a better way of doing this. I didn't do it well. He took me by surprise, and instead of a generic, lawyerlike answer like, 'Oh, I don't ever give out information about a client,' I misled him. I wasn't under oath. It wasn't illegal. But I should have done it differently." [p. 129]

This anecdote suggests that truth was no real obstacle when Bailes's (and perhaps McGough's) interests were at stake. Despite this evidence, Malcolm chose to cling tenaciously to her belief that McGough was extraordinarily honest. Her spin on the Quarles matter is revealing, if unpersuasive. Malcolm says of the incident: "Her confession to me that she had misled Quarles was only further evidence of her honesty. She could have fudged or equivocated, but she had chosen to tell the shameful truth about herself" (p. 130). Confession may be good for the soul, but it is not proof of thoroughgoing honesty. This seems a weak defense and one that is strained beyond the breaking point when reconsidered in light of Judge Posner's disclosures, to be considered below.

What remains of Malcolm's claims is the assertion that McGough was guided in her actions by a selfless loyalty to her client, Bob Bailes. It is true that McGough seems, in Malcolm's telling of the story, extraordinarily, even self-sacrificingly, loyal. Yet much of what Malcolm describes as noble loyalty may equally well be described as muddle-headedness or downright stupidity. McGough took every opportunity to help her client sell his plainly suspect insurance charters, manipulate the system to escape confinement, and achieve a number of other self-serving ends. She let him pursue his dubious business out of her office and use her trust account without constraint or review. She told misleading stories on his behalf and did whatever seemed necessary to get the bankruptcy scheme to work. At a minimum, her conduct was careless and irresponsible. Even Malcolm is forced to concede: "It seems unbelievable that someone who had a law degree could be so credulous and so careless" (p. 25). Indeed, it does seem unbelievable.

None of the numerous attorneys Malcolm questioned thought McGough had acted sensibly. Labowitz, her civil counsel, said McGough's "judgment appeared to be flawed. It is inexplicable to me what she was hoping to accomplish when she took some of the actions she took on behalf of Mr. Bailes" (p. 73). He concluded that the escrow transaction, in particular, was handled in a thoroughly unprofes-

sional way. One of her criminal defense lawyers, Gary Kohlman, thought that McGough had performed services for her client “that started stretching the boundaries — or perhaps went beyond the boundaries” (p. 112). Her other criminal counsel, Mark Rochon, said: “What did she do? She simply followed the directions of that idiot [Bailes]. She lacked common sense. She was brand-new out of law school, with no supporting network of lawyers to temper her judgment” (p. 123). William Sheffield, an attorney whom Bailes had tried to manipulate in precisely the same way as he did McGough, barred Bailes from wiring funds into his trust account and confronted Bailes when he disregarded Sheffield’s instructions.

Sheila McGough’s failure to control Bailes and her advocacy on his behalf seem far more like gullible naïveté than noble self-sacrifice. It harmed not only McGough, but a number of others who had dealings with Bailes. The record Malcolm advances fairly shouts this conclusion. Moreover, when anyone other than McGough is single-mindedly or dogmatically devoted to an objective, Malcolm is immediately suspicious. This was certainly the case with respect to Malcolm’s assessment of the investment banker MacDonald. His long and unrelenting pursuit of McGough is presented as questionable, and he is, throughout Malcolm’s book cast in an unflattering light. His passion for revenge or justice (depending on how one looks at it) seems far less objectionable and dangerous than McGough’s zeal on Bailes’s behalf.

Malcolm, perhaps inadvertently, provides a number of alternatives rather than noble zeal, to explain McGough’s actions. One of the most intriguing is that McGough undertook her efforts on Bailes’s behalf out of a sense of guilt at having botched his defense in the Virginia bank fraud case. As McGough herself put it:

“Where I blundered was to take on legal matters I wasn’t prepared for,” she said. “I should have just said no. It was an error of pride. I was flattered by Bobby’s trust in me. But I didn’t have the proper experience, and I didn’t represent him adequately.” [p. 40]

Another possibility is that McGough, because of her naïveté and inexperience, was conned again and again by the artful Bailes. All of her counsel, both civil and criminal, appeared to subscribe to this notion, and it is amply supported by the reports of lawyers who, through bitter experience, were acquainted with Bob Bailes’s *modus operandi*. Alternatively, or in addition, McGough seemed to be experiencing severe mental distress during this period.<sup>12</sup> Her civil counsel, Kenneth Labowitz, said of his client during the run up to the 1987 civil trial: “She was coming apart at the time of the civil case. I mean, emotionally. It was unpleasant to watch” (p. 73). There is good reason to sus-

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12. I would like to thank my wife, Janice Toran, for bringing this point to my attention.

pect that her choices in relation to Bailes's affairs were the product of emotional pressures that deprived her of sound judgment.

Judge Richard Posner has written a lengthy review of *The Crime of Sheila McGough*.<sup>13</sup> As a part of his assessment of the book, he undertook an independent examination of the record in McGough's case. What he reports having found in that record raises additional questions about McGough's honesty and Janet Malcolm's interpretation of the case. Posner concludes that "the evidence taken as a whole leaves little doubt of McGough's guilt,"<sup>14</sup> and that Malcolm's description of it should, most fairly, be described as "fiction" rather than reportage.<sup>15</sup>

Posner notes a substantial number of instances of McGough's untruthfulness or fraud — instances not reported by Malcolm. Among these is the fact that MacDonald's lawyer in the original charter deal, a man named Blazzard, testified at McGough's trial that two weeks after the \$75,000 was wired into McGough's trust account, he spoke with her and she assured him that the money was still being held in escrow in the account.<sup>16</sup> Blazzard's testimony appears to provide independent evidence, by a credible source, of McGough's dishonesty regarding the escrow arrangement. Charges of dishonesty are reinforced, according to Posner, by McGough's denial during pretrial depositions in the MacDonald civil suit "that she had represented Bailes in connection with the sale of the insurance charters."<sup>17</sup> Posner also notes that MacDonald's \$75,000 was not the only deposit removed by McGough from her trust account and divvied up with Bailes during the course of the insurance charter scam. Two \$25,000 deposits, one paid by a man named Johnson, and the other by two investors named Irwin and Sali, were both removed from the account and shared out between McGough and Bailes. In both cases the depositors said they had been assured that the funds would be held in escrow until various charter deals were concluded. When Sali sought return of his deposit, "McGough threatened to sue him and to have him arrested."<sup>18</sup>

Posner also focuses on McGough's exceedingly troubling behavior during what he calls the "fantastic scheme"<sup>19</sup> to free Bailes by means of a bankruptcy proceeding. As he puts it: "McGough not only prepared numerous pleadings and motions in these fraudulent proceedings, but also procured and paid lawyers to represent the sham credi-

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13. See Posner, *supra* note 4.

14. *Id.* at 32.

15. *Id.* at 34.

16. See *id.* at 29-30.

17. *Id.* at 30.

18. *Id.*

19. *Id.*

tors.”<sup>20</sup> Judge Posner’s assessment of the record raises profound questions about whether we should accept Malcolm’s description of the matter. It seems far more likely than not that the prosecution and jury got the case right.

### III. THE MORAL ACCORDING TO MALCOLM

Malcolm sees *McGough*<sup>21</sup> as a paradigmatic case — one that can yield an enormous number of lessons. Malcolm’s central concern is with the impact of narrative on courtroom adjudication. What courts and juries do, according to Malcolm, is hear and weigh competing narratives. The most convincing story is the one that wins. Malcolm sees this as profoundly dangerous because the best narrative is not necessarily the truth. The problem starts with language itself, “which proscribes unregulated truth-telling and requires that our utterances tell coherent, and thus never merely true, stories” (p. 4). While in most situations “the line between narration and lying is a pretty clear one” (p. 4), that is not necessarily the case in trials. The rules of evidence and the manipulations of adversarial lawyers blur the factual outline, inhibit the flow of information, and leave the decisionmaker vulnerable to the lure of too neat a tale. These problems are exacerbated by the fact that virtually every witness suffers those small lapses of memory and takes those verbal shortcuts that will make him or her vulnerable to a lawyer’s cross-examination and accusations of untruthfulness.

The reconstruction that takes place in the courtroom is more “like ruins than proper buildings; there is never enough solid building material and always too much dust” (p. 19). Malcolm’s sense is that lawyers see truth as “a nuisance” (p. 26). This is particularly the case because “truth does not make a good story” (p. 26), and lawyers are constantly striving to fabricate the “good story,” one that will win the case. In the end, what helps is used and what is problematic is discarded. Out of this winnowing process, the lawyers shape and fashion their narratives: “Trials are won by attorneys whose stories fit, and lost by those whose stories are like the shapeless housecoat that truth, in her disdain of appearances, has chosen as her uniform” (p. 67). For Malcolm, *McGough*’s case is an archetypical example of all this — the prosecution’s story fit. The tale of a renegade lawyer who crossed the line was more attractive than the defense’s hobbled contentions about loyalty, although Malcolm was convinced that the latter was indeed true.

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20. *Id.*

21. See *United States v. McGough*, No. 91-5511, 1991 U.S. App. LEXIS 28977, at \*2 (4th Cir. Dec. 12, 1991).

The implications, according to Malcolm, are dire: “Law stories are empty stories. They take the reader to a world *entirely* constructed of tendentious argument, and *utterly devoid* of the truth of the real world, where things are allowed to fall as they may” (pp. 78-79; emphases added). In this view, biased argument rules over the facts. There is no chance for factually based assessment, and the lawyers’ reconstructions blot out the underlying reality. The jury is left guessing. One would think that these conclusions damn the system beyond any hope of redemption, yet Malcolm is, at least slightly, more circumspect:

The method of adversarial law is to pit two trained palterers against each other. The jury is asked to guess not which side is telling the truth — it knows that neither is — but which side is being untruthful in aid of the truth. No one has thought of a better system, but everyone who has participated in it — whether as defendant, defense lawyer, plaintiff, plaintiff’s lawyer, prosecutor, judge, or juror — has gained a sense of its cynicism and absurdism. [p. 79]

These are weighty charges. It is hard to know what to make of the caveat “no one has thought of a better system,” but implicit in Malcolm’s argument would seem to be the suggestion that any procedure which leaves participants with a sense that the process is a cynical hoax and essentially absurd cannot be one that is likely to endure.

Malcolm draws several further lessons from her examination of McGough’s case. She sees in McGough’s story a set of insights about lawyers. The key to legal success is the ability to tell a good story, and those who can best manipulate the evidence triumph. Such is the case with McGough’s prosecutor, Mark Hulkower. When faced with factual inconsistencies, he simply designed an effective cover story: “[I]n [his] capable hands . . . the narrative beautifully held. Hulkower simply wouldn’t allow the inconsistencies to impede the progress of his story” (p. 24). The silver-tongued advocate, something of a stock character, triumphs and dooms his less talented opponents to defeat. In this world, the merits are of little importance, and the lawyer’s cunning is all that really counts — a cynical insight, indeed!

Lawyers are not only amoral mouthpieces, they are self-serving as well. Lawyers “will do almost anything to stay in [judges’] favor” (p. 112). One sees this most clearly, according to Malcolm, at side-bar conferences. In remarks apparently adapted from her own brief essay in a book based on a Yale Law School symposium,<sup>22</sup> Malcolm says that at sidebars “lawyers drop their masks of antagonism and behave like schoolboys in front of the teacher, vying . . . to impress her” (p. 113). This sycophancy signals a deep disloyalty to or, as Malcolm puts it,

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22. See Janet Malcolm, *The Side-Bar Conference*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 106 (Peter Brooks & Paul Gewirtz eds., 1996) [hereinafter *LAW’S STORIES*].

betrayal of the client. For most lawyers, unlike McGough, self-preservation and advancement are placed far ahead of loyalty to or zeal on behalf of a client. All of McGough's lawyers are accused of betrayal. Labowitz, her civil lawyer, takes Malcolm "aback by the coldness" of his remarks about his client (p. 72). Malcolm says: "I had expected the posture of loyalty to hold a bit better than this" (p. 72). Kohlman and Rochon, McGough's criminal defense counsel, fare no better. Kohlman suggests to Malcolm that McGough may have transgressed the boundary of propriety in her efforts on Bailes's behalf. In this suggestion, Malcolm sees Kohlman straying "across the line, separating loyalty tempered by honesty from careless betrayal" (p. 112). Rochon, too, "subtly undermined Sheila" in his remarks to Malcolm and, hence, joined Kohlman in the ranks of betrayers. As Malcolm sees it, in a system dedicated to dissembling narratives, it is not surprising to find lawyers who pay no more than lip service to their clients.

Malcolm's third major target is the jury. McGough's jury is depicted as shamefully uninterested in getting at the truth in the case before them. After six hours of deliberations, at least part of which were held on the day before Thanksgiving, they decided to convict on fourteen of the fifteen charges. Malcolm suggests (without any cited evidence) that their motivation for deciding was a desire to get on with holiday grocery shopping. She later suggests that the same jurors (again without any articulated proof) disregarded the testimony of a particular black defense witness because they were an "all-white Alexandria [Virginia] jury" and that similar "testimony might have impressed a New York jury" (p. 36). All of this is consistent with Malcolm's vision of the jury system in general. Late in her book, she writes:

The jury system is posited on the idea that people are capable of suspending their normal state of having a fixed opinion about everything and allowing new ideas to penetrate the defenses of their old ones. But this is like believing people capable of suspending the peristaltic motion of their stomachs. It is like imagining a ballpark filled with placidly neutral spectators. Every juror listens to the testimony through the filter of his preconceptions and as a (conscious or unconscious) rooter for one side or the other. The recognition of this actuality is what gives jury selection its tense atmosphere and has, in our culture of store-bought horse sense, created an industry of experts on jury selection, to whom each side now runs for help whenever it can afford to do so. [p. 131]

In the end, Malcolm constructs, out of her reading of McGough's case, a devastating portrait of the justice system: beguiled by stories, misled by lawyers, and in the hands of dogmatically closed-minded jurors.

## IV. DOES MALCOLM GET IT RIGHT?

Malcolm's work does touch a nerve. Ours is a time seemingly preoccupied with the idea of narrative. The importance of stories to cases has even been remarked on by the United States Supreme Court. In the 1997 decision, *Old Chief v. United States*,<sup>23</sup> Justice Souter, writing for a closely divided court, emphasized the importance of judicial recognition "of the offering party's need for evidentiary richness and narrative integrity in presenting a case."<sup>24</sup> The lawyers on each side of a criminal case are, according to the Court, entitled to tell their stories, more or less, in their own way. Their evidentiary offerings are to be treated as having a "force beyond any linear scheme of reasoning."<sup>25</sup> The natural and appropriate result of each lawyer's storytelling is that "as its pieces come together, a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences . . . necessary to reach an honest verdict."<sup>26</sup> The prosecution's obligation in criminal cases transcends a syllogistic presentation to encompass the telling of "a story of guiltiness."<sup>27</sup>

All of this seems to verify Malcolm's charge that the law cares more for stories than for truth. Yet, *Old Chief* is *not* a case empowering lawyers as storytellers, but one *imposing limits* on the scope of storytelling. The Court bars the prosecution's introduction of a somewhat detailed description of the defendant's prior conviction and insists on the use of a defense-proffered stipulation in its place.<sup>28</sup> This was done to avoid prejudice and discourage jurors from formulating too potent a story regarding the defendant's past.

Malcolm uses the story of Sheila McGough to indict storytelling in the courtroom. In the burgeoning literature on storytelling, there has been a robust debate about the merits of attacking the legal system by means of stories.<sup>29</sup> One needs to search no further than the dispute about the story of Stella Liebeck's injury after dousing herself with an extremely hot cup of coffee purchased at McDonald's,<sup>30</sup> to glimpse the

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23. 519 U.S. 172 (1997).

24. *Old Chief*, 519 U.S. at 183.

25. *Id.* at 187.

26. *Id.*

27. *Id.* at 188.

28. *See id.* at 190-92.

29. For discussion of the dangers of this sort of storytelling, see, for example, STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* 37-46 (1995), and Daniel A. Farber & Suzanna Sherry, *Telling Stories out of School: An Essay on Legal Narratives*, 45 *STAN. L. REV.* 807 (1993).

30. *See* Andrea Gerlin, *How a Jury Decided that a Coffee Spill Is Worth \$2.9 Million*, *WALL ST. J.*, Sept. 1, 1994, at A1.

nature of the problem. The story of Liebeck's suit and the jury's award of \$2.9 million has been used as "exhibit A" by tort reformers seeking to revamp personal injury law.<sup>31</sup> Careful examination of the case, however, suggests that the matter is far from simple. It would appear that McDonald's may have handled the problem of coffee burns in a high-handed manner, disregarded a substantial risk to its customers, and been particularly unpleasant in its dealings with the 81-year-old, badly burned Liebeck.<sup>32</sup> In the end, the Liebeck story does not shed an enormous amount of light on the question of tort reform although it generated a considerable amount of heat.

Daniel Farber and Suzanna Sherry have been particularly trenchant in their criticism of the use of narratives as a method of attacking the flaws in the legal system.<sup>33</sup> They have concluded "that stories can distort legal debate, particularly if those stories are atypical, inaccurate, or incomplete."<sup>34</sup> Malcolm's chosen story seems to pose all these problems. As Judge Posner has pointed out, there are substantial questions about the accuracy and completeness of Malcolm's description. These are critically important in determining whether *McGough* has anything at all to teach us. Assuming that Malcolm's tale may be relied upon, it remains to be seen whether it is at all typical or representative. If it is a one-of-a-kind phenomenon, it has very little didactic value. A single idiosyncratic anecdote is not proof of anything. Unfortunately, Malcolm makes no effort to place *McGough* in any sort of context or demonstrate its general applicability. It seems as if she is asking readers to condemn the entire justice system on the strength of a single court proceeding that has (if we accept Malcolm's analysis) gone awry. Malcolm provides no proof that *McGough* is typical of anything.

Argument by anecdote poses other risks as well. Anecdotes do not provide a sound basis for understanding: "[S]uch evidence permits only the loosest and weakest of inferences about matters a field is trying to understand. Anecdotes do not permit one to determine either the frequency of occurrence of something or its causes and effects."<sup>35</sup> Stories concerning legal misadventure, without more, do not tell us anything about *why* things happened the way they did. To as-

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31. See, for example, the remarks of Representative Ron Packer in support of proposed tort reform legislation, in CONG. REC. E548 (Mar. 8, 1995).

32. See Gerlin, *supra* note 30.

33. See Farber & Sherry, *supra* note 29; Daniel Farber & Suzanna Sherry, *Legal Storytelling and Constitutional Law: The Medium and the Message*, in LAW'S STORIES, *supra* note 22, at 37 [hereinafter Farber & Sherry, *Legal Storytelling*].

34. Farber & Sherry, *Legal Storytelling*, *supra* note 33, at 38.

35. Michael Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System — And Why Not?*, 140 U. PA. L. REV. 1147, 1159 (1992).

sume that the system is at fault — or, in the *McGough* case, to conclude that narrativity and evidence rules did an “exquisite heroine” in — is not justified. Moreover, anecdotes like *McGough* tend to cut off discourse. They do not develop rational or detailed proof but a pre-packaged story. Such stories are hard to challenge, especially because of their sympathetic nature and emotional appeal. Affecting stories tend to hide the complexity of events and clothe important questions in distracting emotional garb.<sup>36</sup> The lamentable image of McGough languishing in prison tends to obscure the harder questions raised by Malcolm’s book.

These criticisms of Malcolm’s anecdotalization of the *McGough* trial might be read to suggest that when the legal system itself places reliance on stories, narratives, or anecdotes at trial, it courts disaster. The answer to this argument requires an assessment of precisely how adjudicators use narratives and how narratives interact with the underlying facts of a case. Nancy Pennington and Reid Hastie argue that jurors decide the complex questions posed in lawsuits by fashioning narratives.<sup>37</sup> According to this theory, jurors construct a “causal model,” or narrative, to explain the available proof. This model is then matched with the decision options made available through legal instructions. The best match forms the basis for decision. It is important to note, however, that the causal model, or narrative, is not fabricated independently of the proof but, rather, premised upon it. The process of narrative formulation is not the product of the lawyers’ efforts but a construction undertaken by each juror. The construction is a syncretical process that has regard for the evidence and legal rules as well as for prior juror experience. Once each juror has fashioned a narrative, he or she is required to harmonize it with the similar efforts of all the other jurors. No individual’s story dictates the outcome.

The question remains whether jurors pay adequate attention to the facts presented to them. While there is no surefire way to answer this question, Harry Kalven and Hans Zeisel, in their seminal work *The American Jury*, concluded that “the jury by and large does understand the case and get it straight, and . . . the evidence itself is a major determinant of the decision.”<sup>38</sup> Moreover, in almost four cases out of every five studied, judge and jury independently came to the same verdict — a rate of agreement superior to that of professionals facing a

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36. For an analysis of the same problem in a slightly different setting, see Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229 (1995).

37. The remainder of this paragraph is based upon Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991).

38. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 162 (1966).

range of other decisional tasks.<sup>39</sup> Based on these findings, as well as on subsequent research, a number of prominent social scientists have concluded that the weight and directionality of evidence are the preponderant determinants of jury verdicts. As Richard Lempert puts it: "A considerable body of research indicates that even when aspects of a case might appeal to the prejudices of jurors, unless the case is otherwise close on the facts, the evidence dominates."<sup>40</sup> Lempert cites a study by Christie Visser supporting this proposition.<sup>41</sup> Visser, in turn, cites several more to the same effect.<sup>42</sup> These conclusions are reiterated by Michael Saks who states: "Studies that have pitted trial evidence and arguments against what jurors bring with them to court usually find that the trial information carries far more weight."<sup>43</sup> Similarly, Shari Diamond concludes: "In studies that have measured the contributions of juror characteristics and trial testimony to jury verdicts, the trial testimony dominates."<sup>44</sup> In the end, the empirical research suggests that evidence is key and that narrative construction is driven by it. While it is a leap from these observations to concluding that jurors find the truth, we have solid evidence for joining with Aristotle in arguing: "things that are true and things that are just have a natural tendency to prevail over their opposites."<sup>45</sup>

Several of Malcolm's charges remain to be considered, including two against lawyers: first, that they are silver-tongued tricksters who, by twisting the evidence get their way; and second, that they generally betray their clients. As to the first, the above-cited social science materials indicate very serious limits on the power of lawyers to affect outcomes. This question was one that Kalven and Zeisel attempted to assess. Their key findings are that counsel have only an extremely modest impact on decisions and that lawyers are evenly matched more than three-quarters of the time.<sup>46</sup> In light of these findings, Malcolm's

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39. See Shari S. Diamond, *Order in the Court: Consistency in Criminal-Court Decisions*, in THE MASTER LECTURE SERIES, VOLUME II: PSYCHOLOGY AND THE LAW 123, 125 tbl.1 (C.T. Scheiner & B.L. Hammonds, eds. 1983).

40. Richard Lempert, *Civil Juries and Complex Cases: Taking Stock after Twelve Years*, in VERDICT 181, 218 (Robert E. Litan ed., 1993).

41. See Christie A. Visser, *Juror Decision Making: The Importance of Evidence*, 11 LAW & HUM. BEHAV. 1 (1987).

42. See *id.* at 5-6.

43. Michael Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 18 (1997).

44. Shari S. Diamond, *Scientific Jury Selection: What Social Scientists Know and Do Not Know*, 73 JUDICATURE 178, 182 (1990).

45. ARISTOTLE, RHETORIC I.1.1355a22-35, in THE COMPLETE WORKS OF ARISTOTLE (rev. Oxford trans. Jonathan Barnes ed., 1984), quoted in Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141, 146 (1997).

46. See KALVEN & ZEISEL, *supra* note 38, at 354-55.

attribution of particular persuasive power to the prosecutor with a brilliant narrative approach must be treated with a good deal of skepticism, at least as an indictment of the entire justice system.

The accusation regarding betrayal is far harder to deal with as it is intimately bound up with our reactions to Sheila McGough's story. If McGough is a shining paragon of loyalty, then her story stands as a serious accusation against a legal profession that cannot recognize nobility or abide devotion. If, on the other hand, McGough is little more than an emotionally troubled and inexperienced lawyer who made grievous mistakes in attempting to help a conniving client, then there is little need to defend McGough's lawyers or the system of which they are a part. The betrayal/loyalty question, however, has a larger dimension.

Modern criminal defense lawyers confront the dilemma of loyalty on a regular basis. Defense counsel are expected to act with warm zeal on behalf of their clients,<sup>47</sup> to render them loyal service,<sup>48</sup> and to guard client confidences.<sup>49</sup> Yet, the criminal law regarding accessories "forbids a lawyer from intentionally assisting a client in committing a crime."<sup>50</sup> What this restriction means is a hotly disputed question. Some take it to mean that criminal liability can be triggered if a lawyer ignores her suspicions or consciously seeks to avoid the truth about a client.<sup>51</sup> Others challenge this view as too restrictive.<sup>52</sup> Even if one embraces a less restrictive interpretation of the law on accessories, the lawyer's representation, counseling, and drafting can all result in criminal charges if undertaken with the goal of advancing a criminal objective. Charges of this nature have been made by the government in a series of high profile cases including those of several Miami lawyers defending members of the Cali drug cartel<sup>53</sup> and of a New York lawyer working on behalf of a prominent member of the Gambino

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47. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980) ("[A] lawyer should represent a client zealously within the bounds of the law."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983) ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

48. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. 1 (1983) ("Loyalty is an essential element in the lawyer's relationship to a client.").

49. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1983) ("A lawyer shall not reveal information relating to the representation of a client . . .").

50. Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 *FORDHAM L. REV.* 327, 355 (1998). The argument in the remainder of this paragraph is based primarily on Green's persuasive analysis.

51. See, e.g., *United States v. Wilson*, 134 F.3d 855, 868 (7th Cir. 1998).

52. See generally Green, *supra* note 50.

53. See Mireya Navarro, *Lawyers Weigh Effect of Conviction of Missing Colleague*, N.Y. *TIMES*, Aug. 9, 1998, § 1, at 24, cited in Green, *supra* note 50.

crime family.<sup>54</sup> There are no easy answers in this area. Wisdom counsels restraint before the criminal law is used to discipline lawyers for what they perceive as zealous representation, but lawyers are not free to ride roughshod. There are limits beyond which loyalty may not be pressed. Respect for those limits is not a matter of betrayal but of necessity in any system premised upon the rule of law rather than individual whim.

## V. WHY MIGHT MALCOLM HAVE SEEN IT AS SHE DID?

It is not easy to determine why Malcolm interpreted McGough's case as she did. One might begin by noting that McGough, like Malcolm, was a middle-aged woman struggling to make her way in a sometimes hostile profession. This similarity of situation was likely to have generated some sympathy on Malcolm's part for her subject. Of potentially greater importance are two significant events in Malcolm's life that may have colored her reaction to McGough's story when she became aware of it in the winter of 1996. The first of these was the resolution in that year, after more than a decade of litigation, of a libel suit filed by psychoanalyst Jeffrey Masson against Malcolm and her employer, *The New Yorker* magazine. The other was Malcolm's participation in February 1995 in a Yale Law School symposium entitled "Narrative and Rhetoric in the Law."<sup>55</sup>

The Masson lawsuit was a bitter and protracted affair that arose out of *The New Yorker's* publication in December 1983 of a two-part article entitled "In the Freud Archives."<sup>56</sup> This piece presented a scathing portrait of Jeffrey Masson, a man who had meteorically risen to the prominent position of Projects Director of the Freud Archives only to be ousted when he advanced the claim that Freud's work was fatally flawed because of the master's cowardly abandonment of the "seduction theory," which hypothesized that many psychiatric patients were the victims of childhood sexual abuse.<sup>57</sup> Masson had been extensively interviewed by Malcolm in preparation for the writing of the article. These interviews had generated more than 1,000 pages of transcript and notes.<sup>58</sup> Masson sued after the publication of the piece, claiming that it "falsely portrayed him as egotistical, vain, and lacking

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54. See *United States v. Locascio*, 6 F.3d 924, 932-33 (2d Cir. 1993) (charge that lawyer was criminal co-conspirator used to disqualify him as counsel).

55. See *LAW'S STORIES*, *supra* note 22, at vii.

56. The basic facts of the commencement and early stages of the lawsuit are recited in *Masson v. New Yorker Magazine, Inc.*, 686 F. Supp. 1396, 1397 (N.D. Cal. 1987).

57. For discussion of the seduction theory issue, see *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1536 (9th Cir. 1989).

58. See *Masson*, 686 F. Supp. at 1397.

in personal honesty and moral integrity.”<sup>59</sup> After a good deal of preliminary legal skirmishing, Judge Lynch of the federal district court for the Northern District of California granted Malcolm’s motion for summary judgment in August of 1987.<sup>60</sup> The judge did so despite finding that Malcolm had been involved in the “fictionalization or dramatization of conversations”<sup>61</sup> presented as direct quotations in *The New Yorker* article.

Masson appealed this ruling to the Ninth Circuit which, in 1989, affirmed the district court’s summary judgment by a two-to-one vote.<sup>62</sup> The majority noted that quotes had been fabricated or altered but concluded that “[a]n author may . . . under certain circumstances, fictionalize quotations ‘to some extent.’”<sup>63</sup> In a sharply worded and lengthy dissent, Circuit Judge Kozinski challenged the assertion that material presented in quotation marks can be freely fabricated. “As I see it,” opined Kozinski, “when a writer uses quotation marks in reporting what someone else has said, she is representing that those are the speaker’s own words or something very close to them.”<sup>64</sup> According to Judge Kozinski, quotations are not fair game for fictionalization or alteration. Such manipulation breaches oft-repeated journalistic principles. In support of his argument, Kozinski referred to a 1984 scandal in which a writer for *The New Yorker*, Alistair Reed, had admitted that he “regularly used composite characters, nonexistent settings, and invented dialogue in what were purported to be nonfiction articles.”<sup>65</sup> This admission set off a firestorm of criticism from some of journalism’s leading practitioners, including *The New York Times*, the *Atlantic* magazine, *Time* magazine, the *Los Angeles Times*, and a host of others.<sup>66</sup> The outcry eventually led the long-time editor of *The New Yorker*, William Shawn, to backtrack from his support for Reed and declare:

We do not permit composites.

We do not rearrange events.

*We do not create conversations.*<sup>67</sup>

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59. *Id.*

60. *See generally Masson*, 686 F. Supp. 1396 (N.D. Cal. 1987).

61. *Id.* at 1398.

62. *See Masson*, 895 F.2d 1535 (9th Cir. 1989).

63. *Id.* at 1539 (citations omitted).

64. *Id.* at 1548 (Kozinski, J., dissenting).

65. *Id.* at 1560 (Kozinski, J., dissenting).

66. *See id.*

67. *Id.* at 1561 (Kozinski, J., dissenting, emphasis in original).

By tying Malcolm to this embarrassing episode and to another involving a reporter named Janet Cooke, whose fabrications led her to have to surrender a Pulitzer Prize,<sup>68</sup> Kozinski had delivered several stinging blows. He underscored them by observing, “[t]he circumstantial evidence that defendant Janet Malcolm acted with malice, deliberately or recklessly altering Masson’s statements, is very strong indeed.”<sup>69</sup>

The United States Supreme Court granted certiorari and, in June 1991, reversed the decision of the two lower courts.<sup>70</sup> Justice Kennedy, writing for a seven-member majority,<sup>71</sup> embraced Judge Kozinski’s analysis. The Court held that quotation marks are not to be trifled with, and that evidence presented by Masson regarding a half dozen article passages suggested the possibility that Malcolm had libelously falsified the plaintiff’s words. This ruling made front page headlines and exposed both Malcolm and *The New Yorker* to further humiliating public criticism. The case was returned to the district court where, in May 1993, a jury found that Malcolm had libeled Masson but could not agree on an appropriate damage award.<sup>72</sup> Judge Lynch granted Malcolm’s motion for a new trial, which was held in October of 1994. At the second trial a new jury exonerated Malcolm. The second jury verdict was appealed to the Ninth Circuit which affirmed the jury’s decision in June 1996, thus ending the case.<sup>73</sup>

This prolonged legal battle must have been both embarrassing and wearing for Malcolm. The only real hero, from Malcolm’s point of view, would have been the stalwart district court judge who, through more than a decade, steered the case to the result he had early on concluded was warranted on the merits. Both appellate judges and juries must have appeared fickle from Malcolm’s perspective. In light of this grueling and all-too-public experience, it would not be surprising if Malcolm were attracted to a version of McGough’s story that emphasized jury incompetence, lawyer perfidy, legal ineptitude, and the cynical conclusion that the litigation process is absurd. The only “hero” in Malcolm’s case was Judge Lynch, and it is remarkable how gently Malcolm treats virtually every trial judge connected to the McGough story, even those who testified against her at her criminal

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68. *See id.* at 1561 n.15 (Kozinski, J., dissenting).

69. *Id.* at 1566 (Kozinski, J., dissenting).

70. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991).

71. Justices White and Scalia concurred in part and dissented in part, calling for an even stricter standard with respect to the use of quotations. *See Masson*, 501 U.S. at 525-28.

72. The history of the case subsequent to the Supreme Court’s ruling is set forth in *Masson v. New Yorker Magazine, Inc.*, 85 F.3d 1394 (9th Cir. 1996).

73. *See id.*

trial. Malcolm's experience may help explain why she saw the *McGough* case the way she did.

The one remaining piece of Malcolm's work that seems to call for explanation is its particular emphasis on the baleful effect of narrative. At least some of this may be traced to Malcolm's participation in the 1995 Yale conference. The papers presented at that meeting were edited into a book entitled *Law's Stories*,<sup>74</sup> which was published by the Yale University Press in 1996. Of that book, the seemingly ubiquitous Judge Posner has written:

Remarkably, considering that the book is intended to showcase this new movement that I am calling legal narratology, the overall tone of *Law's Stories* is skeptical and critical, even defensive. Criticisms and expressions of doubt outweigh praise and claims of insight, and the criticisms are more convincing than the praise.<sup>75</sup>

It should come as no surprise that out of this critical assessment of narrative, Malcolm might have formulated a rather jaundiced view of courtroom storytelling. When the *McGough* case came along, it may have seemed custom-made to challenge legal narrative because of the prosecution's smooth presentation and the defendant's refusal to allow a neat story to be told on her behalf.

In a brief essay in *Law's Stories*, Malcolm set out to analyze sidebar conferences. As in her book on *McGough*, she notes a feeling of "betrayal" as each lawyer's "mask suddenly dropped"<sup>76</sup> during the side-bar. Curiously, however, her overarching view of the system appears more benign in the Yale piece. She praises the side-bar declaring:

But in relegating to a private place the trial antagonists' negotiations over the limits of storytelling — over the containment of hating and blaming within crisp rules of procedure (the rules of fair play) — the law restores something of what it has taken. By so clearly denoting what is backstage and what is onstage, by keeping the illusion-destroying activities of backstage firmly hidden, the law, with a kind of moving clumsiness, signals its acknowledgment of a possibly higher power than its own: the power of the imagination.<sup>77</sup>

By the time Malcolm reached the end of her work on Sheila McGough's case, she appears to have lost her respect for trials, narratives, and "the power of imagination." Her disillusionment is to be regretted. Its basis is somewhat mysterious. Its consequence, however, is the prejudicing of a canny observer who has, in the past, helped us

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74. See Malcolm, *supra* note 22.

75. Richard Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737, 742 (1997).

76. See Malcolm, *supra* note 22, at 108.

77. *Id.* at 109.

scrutinize with the greatest care the way we have told stories about poets, murderers, journalists, and psychoanalysts.

