

THE NARRATIVE CONSTRUCTION OF ANTITRUST

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ABSTRACT

In recent years, scholars have devoted increasing attention to the relationship between law and narrative. Drawing insights from a broad range of disciplines from literary theory to cognitive psychology, the resulting literature has deepened our understanding of the critical role of storytelling in the legal process and in certain legal texts. To date, however, students of narrative analysis have all but ignored business law cases. This study of the Microsoft litigation presents the first analysis of the role of narrative in a major business law dispute. The paper explores, inter alia, the use of character, narrative time, plot, genre, and schemas in the competing stories presented by the parties in the Microsoft case.

INTRODUCTION

Antitrust litigation is notoriously complex.¹ Cases often involve vast numbers of documents, extensive testimony, and difficult questions of fact.²

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¹ See generally *Fed. Trade Comm'n v. Dean Foods Co.*, 384 U.S. 597, 633 (1966) (“[T]here is no quick and easy, short and simple way to resolve the complexities of most antitrust litigation.”); *La Buy v. Homes Leather Co.*, 352 U.S. 249, 259 (1957) (“[M]ost litigation in the antitrust field is complex.”); Kimberly L. King, *An Antitrust Primer for Trade Association Counsel*, 75-MAY FLA. B.J. 26, 29 (2001) (“No litigation is more complex, drawn out, or expensive than antitrust litigation.”); Eric James Fuglsang, *Comment: The Arbitrability of Domestic Antitrust Disputes: Where Does the Law Stand?* 46 DEPAUL L. REV. 779, 795 (1997) (“Antitrust disputes usually involve exceedingly complex issues.”); Thomas A. Piraino, Jr., *Reconciling the Per Se Rule and the Rule of Reason Approaches to Antitrust Analysis*, 64 S. CAL. L. REV. 685, 700-01 (1991) (noting complexity, expense, and time-consuming nature of rule of reason cases); Edward D. Cavanagh, *Attorneys’ Fee Shifting in Antitrust Litigation: Making the System Fairer*, 57 FORDHAM L. REV. 51, 71-72 (1988) (noting that a trend away from *per se* rules and toward rule of reason analysis had made antitrust litigation more complex).

² See generally *Turner Broad. Sys., Inc. v. Fed. Communications Comm’n*, 520 U.S. 180, 223 (1997) (“[C]omplex antitrust litigation . . . involves extensive discovery”); *Capital Imaging Ass’n, P.C. v. Mohawk Valley Med. Ass’n*, 996 F.2d 537, 541 (2d Cir. 1993) (noting the “inherent factual complexity” of antitrust cases); Daniel E. Lazaroff, *Rule 11 and Federal Antitrust Litigation*, 67 TUL. L. REV. 1033, 1043 (1993) (noting “inherent legal and factual complexity of antitrust”); Donald I. Baker & Mark R. Stabile, *Arbitration of Antitrust Claims: Opportunities and Hazards for Corporate Counsel*, 48 BUS. LAW. 395, 396 (1993) (“Antitrust litigation is notoriously fact-intensive, time-consuming and expensive.”).

Moreover, the discourse of antitrust—that is, the language employed in the analysis of competition law issues—is technical and arcane.³ Despite this complexity and stylized argument, antitrust litigation is, like all litigation, an exercise in storytelling.⁴ The landmark case brought by the Justice Department against the Microsoft Corporation⁵ is no exception. Although the case has generated more public attention than any other antitrust matter in at least a generation,⁶ the academic commentary on *Microsoft* focuses almost exclusively on antitrust doctrine and the economic effects of the firm's business practices.⁷ Regarding what actually happened in the *Microsoft* litigation and why, the literature is virtually silent.⁸

³ See generally Spencer Weber Waller, *The Language of Law and the Language of Business*, 52 CASE W. RES. L. REV. 283, 283 (2001) (“Antitrust since its inception has relied heavily on economic discourse and price theory in particular in recent times.”); William E. Kovacic, *Evaluating Antitrust Experiments: Using Ex Post Assessments of Government Enforcement Decisions to Inform Competition Policy*, 9 GEO. MASON L. REV. 843, 850 (2001) (“To a degree unmatched in other fields of economic regulation, the elaboration of antitrust doctrine draws upon the contributions of economic theory.”).

⁴ See Robert A. Ferguson, *Untold Stories in the Law*, in LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 84–85 (Peter Brooks & Paul Gerwitz eds., 1996) (“Trials always function through a framework of storytelling.”); Philip N. Meyer, *Will You Please Be Quiet, Please? Lawyers Listening to the Call of Stories*, 18 VERMONT L. REV. 567, 567 (1994) (“It has long been recognized that storytelling is at the heart of the trial.”); Jerome Bruner, *A Psychologist and the Law*, 37 N.Y.L. SCH. L. REV. 173, 177 (1992) (“All adjudication is premised upon someone's presumed ability to decide which competing narrative version is truer, righter, or provides a better fit to some point of law.”). Indeed, it has been observed that narrative pervades the law. See, e.g., David Ray Papke, *Preface*, in NARRATIVE AND LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW I (David Ray Papke ed., 1991) (“When we reflect on the things and activities we consider ‘legal,’ we find narrative present at every turn.”).

⁵ *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000), *aff'd in part and rev'd in part*, 253 F.3d 34 (D.C. Cir. 2001).

⁶ See Jonathan Krim, *Scope of Antitrust Suit Goes Beyond Microsoft's Fate*, WASH. POST, Mar. 26, 2002, <http://www.washingtonpost.com/wp-dyn/articles/A16950-2002Mar25.html> (referring to *Microsoft* as “the most significant antitrust case in a generation”); Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 GEO. MASON L. REV. 617, 617 (1999) (“No antitrust matter in the past generation has attracted more attention than the *Microsoft* case.”); *Nationwide Poll Results*, FORTUNE, Feb. 2, 1998, <http://pathfinder.com/fortune/1998/980202/nationpoll.html> (reporting that 54% of those surveyed in nationwide poll had heard about the Justice Department's case against *Microsoft*).

⁷ See, e.g., RICHARD B. MCKENZIE, *TRUST ON TRIAL* (2000); STAN J. LIEBOWITZ & STEPHEN MARGOLIS, *WINNERS, LOSERS & MICROSOFT* (1999); Gregory J. Werden, *Network Effects and Conditions of Entry: Lessons from the Microsoft Case*, 69 ANTITRUST L. J. 87 (2001); Richard J. Gilbert & Michael L. Katz, *An Economist's Guide to U.S. v. Microsoft*, 15 J. ECON. PERSP. 25 (2001); Benjamin Klein, *The Microsoft Case: What Can a Dominant Firm Do to Defend Its Market Position?*, 15 J. ECON. PERSP. 45 (2001); Benjamin Klein, *Did Microsoft Engage in Anticompetitive Exclusionary Behavior?*, 46 ANTITRUST BULL. 71 (2001); J. Gregory Sidak, *An Antitrust Rule for Software Integration*, 18 YALE J. ON REG. 1 (2001); Carol B. Swanson, *Antitrust Excitement in the New Millennium: Microsoft, Mergers, and More*, 54 OKLA. L. REV. 285 (2001); Salop & Romaine, *supra* note 6; Michael P. Ackemann, *Microsoft's Licensing Agreements: Theory and Evidence on the Sale of MS-DOS and Windows*, 24 J. CORP. L. 553; John E. Lopatka & William H. Page, *Antitrust on Internet Time: Microsoft and the Law and Economics of Exclusion*, 7 SUP. CT. ECON. REV. 157 (1999); Thomas W. Hazlett, *Microsoft's Internet Exploration: Predatory or Competitive?*, 9 CORNELL J.L. & PUB. POL'Y 29 (1999); Ronald A. Cass & Keith N. Hylton, *Preserving Competition: Economic Analysis, Legal Standards and Microsoft*, 8 GEO. MASON L. REV. 1 (1999). But see Mark Cooper, *Antitrust as Consumer Protection in the New Economy: Lessons from the Microsoft Case*, 52 HASTINGS

An essential element of the *Microsoft* case was a contest over the narrative construction of reality.⁹ That is, the government and the company presented competing stories—“rhetorical narratives”¹⁰—upon which the court was urged to base its factual and legal determinations. The government presented a narrative of Microsoft’s transgressions,¹¹ while Microsoft offered in response an alternative account in which no violation of the law occurred.¹² This paper explores these competing narratives and their role in the *Microsoft* case.

The role of narrative in *Microsoft* merits our attention, in part, because it sheds light on the litigation process in a major legal dispute. Although we cannot quantify the impact of storytelling on the outcome of the *Microsoft* litigation, it is possible to deepen our understanding of how the competing narratives functioned in this case. Narrative analysis, moreover, sheds light on how we make antitrust law and policy. In the U.S. legal system, antitrust law is formulated largely through common law decision-making, rather than detailed legislation.¹³ Thus, it is principally left to the courts to adapt and develop antitrust doctrine.¹⁴ Because courts base their decisions in part on the arguments lawyers present, the narratives constructed by advocates in antitrust litigation contribute to the formulation and development of the law. An exploration of the rhetorical narratives in *Microsoft* may therefore advance our understanding of how such stories shape the law, while also informing our judgment regarding the role that storytelling *should* play in future cases.

This article is organized in five sections: Part I presents a brief history of the government’s antitrust case against Microsoft. Part II reviews the prosecution and defense narratives as they were presented in the closing arguments of the pivotal *Microsoft* antitrust trial of 1998–99 and isolates

L.J. 813, 816 (2001) (reviewing evidence and arguments presented at *Microsoft* trial and opining that Microsoft “lost because its acts were simply indefensible”).

⁸ Discussion of the litigation process has been largely confined to accounts of journalists. See, e.g., JOEL BRINKLEY & STEVE LOHR, *U.S. v. MICROSOFT* (2001); KEN AULETTA, *WORLD WAR 3.0: MICROSOFT AND ITS ENEMIES* (2001).

⁹ See generally Jerome Bruner, *The Narrative Construction of Reality*, 18 *CRITICAL INQUIRY* 1, 4–20 (1991) (noting that “we organize our experience and our memory of human happenings mainly in the form of narrative” and reviewing the principal characteristics of narrative constructions).

¹⁰ See generally ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 134 (2002).

¹¹ See *infra* Part III.A.1 and accompanying notes.

¹² Generally speaking, in litigation, defendants may challenge elements of the plaintiff’s story, reframe issues to suggest that there has been no violation of the law, present an alternative story, or employ some combination of these approaches. See W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM* 94–95 (1981). Microsoft used a combination of approaches.

¹³ See *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978) (explaining that the Sherman Act delegates to federal courts the authority to develop federal antitrust common law); Michael A. Carrier, *Unraveling the Patent-Antitrust Paradox*, 150 *U. PA. L. REV.* 761, 809 (2002) (noting that legislative history of the Sherman Act shows “Congress’s intention that the courts would play the primary role in the development of antitrust jurisprudence”).

¹⁴ See generally William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 *J. ECON. PERSP.* 43 (Winter 2000).

the principal themes pressed by the litigants. Part III analyzes the *Microsoft* closing arguments as narrative constructions, focusing on the elements of character, narrative time, structure, and schemas. Part IV offers a critique of the narrative that prevailed at trial, and Part V concludes. As this analysis will show, the government presented a compelling story at trial, while Microsoft never offered the court an effective counter-narrative in response. Tactically, the government's narrative construction of reality was a masterful achievement of legal advocacy. However, the government's approach came at a significant cost. By placing much of its narrative and rhetorical focus on Microsoft's character and motives, the prosecution substantially diminished the potential value of the *Microsoft* litigation as a rigorous and searching exploration of the most important antitrust policy issues presented in the case.

I. BACKGROUND

The current *Microsoft* case was initiated in May of 1998 by the Justice Department along with twenty states and the District of Columbia as co-plaintiffs.¹⁵ The government¹⁶ charged Microsoft with: (1) maintaining a monopoly in a relevant market for "Intel-compatible PC operating systems"

¹⁵ Complaint, *United States v. Microsoft Corp.*, No. 98-1232 (D.D.C. filed May 18, 1998). Although this article focuses on the conduct case brought by the Justice Department in 1998, Microsoft has been the subject of government antitrust scrutiny since 1990 when the Federal Trade Commission began investigating the company's licensing of the *MS-DOS* PC operating system. See generally *Tie Vote Blocks Move to Enjoin Microsoft Sales Practices; Administrative Charges Against DOS Advantages May Also Fail*, FTC: WATCH (Feb. 8, 1993). The FTC staff twice recommended antitrust enforcement actions against Microsoft, but was unable to persuade a majority of the Commissioners to vote out a complaint. See generally *FTC Closes Antitrust Probe of Microsoft; Antitrust Division Begins Its Own Probe*, 65 ANTITRUST & TRADE REG. REP. 288 (Aug. 26, 1993).

In 1993, the Justice Department's Antitrust Division opened an investigation of Microsoft's licensing practices that culminated in an agreement with the company in 1994 to settle the case. *Id.* However, the U.S. District Court for the District of Columbia refused to accept the settlement on the grounds that it was too narrow and too lenient. *United States v. Microsoft Corp.*, 159 F.R.D. 318 (D.D.C. 1995). See also *Court Rejects Proposed Consent Decree in Microsoft as Not in Public Interest*, 68 ANTITRUST & TRADE REG. REP. 194:1 (Feb. 16, 1995). The U.S. Court of Appeals for the District of Columbia Circuit reversed the District Court and removed Judge Stanley Sporkin from the case. *United States v. Microsoft Corp.*, 56 F. 3d 1448, 1449 (D.C. Cir. 1995). In the consent decree that was entered on remand in 1995, Microsoft agreed, among other things, to refrain from bundling its operating system software with other software products, subject to a proviso that nothing in the consent decree would bar the company from developing "integrated products." *United States v. Microsoft Corp.*, No. 94-1564, 1995-2 Trade Cases (CCH) (D.D.C. Aug. 21, 1995).

In 1997, the Justice Department sued Microsoft for violating the 1995 consent decree by licensing the *Windows 95* operating system and the *Internet Explorer (IE)* web browser as a single package to original equipment manufacturers ("OEMs") and other licensees. The government prevailed at trial, but the D.C. Circuit reversed, finding that the combination of *Windows 95* and the *IE* browser created an "integrated product" that did not violate the terms of the consent decree. *United States v. Microsoft Corp.*, 980 F. Supp. 537 (D.D.C. 1997), *rev'd*, *United States v. Microsoft Corp.*, 147 F. 3d 935 (D.C. Cir. 1998).

¹⁶ In this article, I will refer to the Justice Department and the state co-plaintiffs collectively as "the government" or "the prosecution."

in violation of § 2 of the Sherman Act; (2) attempting to monopolize a relevant market for “web browsers,” also in violation of § 2; (3) tying the *Windows* operating system with the *Internet Explorer* (“IE”) web browser in violation of § 1 of the Sherman Act; and (4) unlawfully restraining trade by means of licensing restraints that allegedly resulted in the foreclosure of certain channels of distribution for web browsing software, also in violation of § 1.¹⁷ The case was tried in the U.S. District Court for the District of Columbia before Judge Thomas Penfield Jackson in 1998 and 1999.¹⁸ In conclusions of law issued on April 3, 2000, the District Court held for the government on the claims of monopolization, attempted monopolization, and tying, and held for Microsoft on the Section 1 foreclosure claims.¹⁹ Several months later, the court ordered the break-up of Microsoft into two successor companies that were to be operated separately under substantial conduct restrictions.²⁰ On appeal, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the District Court’s ruling on the monopoly maintenance claim, reversed the trial court’s determinations of liability for attempted monopolization and tying, and vacated the divestiture remedy.²¹ The Court of Appeals also removed Judge Jackson from the case because of the appearance of bias against Microsoft.²²

In the wake of the Court of Appeals decision, Microsoft and the Justice Department reached a settlement in which the company agreed to substantial modifications of its software licensing practices.²³ On November 1, 2002, the consent decree was conditionally approved by the U.S. District Court for the District of Columbia as the final judgment in the case.²⁴

II. THE COMPETING NARRATIVES

This section reviews the competing narratives the government and Microsoft articulated in the closing arguments of the District Court trial that took place in 1998 and 1999.²⁵ Although the trial record runs

¹⁷ Complaint, *United States v. Microsoft Corp.*, (D.D.C. filed May 18, 1998) (No. 98-1232).

¹⁸ The trial began on October 19, 1998, and closing arguments were presented on September 21, 1999.

¹⁹ *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000).

²⁰ *United States v. Microsoft Corp.*, No. 90-345 (D.D.C. 2000) (final judgment). One of the successor companies was to continue Microsoft’s operating systems business. A separate successor company was to take over Microsoft’s application software business. *See also Judge Enters Final Decree Requiring Split of Microsoft*, 78 ANTITRUST & TRADE REG. REP. 565, 569 (June 9, 2000).

²¹ *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

²² *Id.* at 107–16.

²³ Proposed Final Judgment, *United States v. Microsoft Corp.*, (D.D.C. 2000) (No. 98-1232), available at <http://news.findlaw.com/cnn/docs/microsoft/msstipprpfnljd110201.pdf>; *Microsoft and DOJ Reach Settlement; States Need More Time to Review Case*, 81 ANTITRUST & TRADE REG. REP. 407, 413 (Nov. 9, 2001).

²⁴ *United States v. Microsoft*, 231 F. Supp. 2d 144, 202 (D.D.C. 2002).

²⁵ *See* Transcript of Trial, vol. 77, at 4–81 (Sept. 21, 1999, a.m. session), *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232). *See also* Transcript of Trial, vol. 77,

thousands of pages, it is in the closing arguments that the competing narratives were presented in sharpest relief. In these statements, the litigants had the widest latitude in which to tell their stories at length, without interruption, and without having to coax the elements of the narratives out of the mouths of witnesses;²⁶ to tell the court what all of the evidence meant and how the facts and the law compelled a certain result.²⁷

A. PLAINTIFFS' CLOSING ARGUMENT

The plaintiffs' closing argument was presented in three major parts: (1) a statement of the prosecution's case regarding monopoly power and harm to competition,²⁸ (2) an extended discussion of Microsoft's alleged anticompetitive conduct,²⁹ and (3) a rebuttal in which the prosecution essentially continued its anticompetitive conduct story and responded briefly to some of the points made in the defendant's closing argument.³⁰

The government began its closing statement by reviewing evidence of Microsoft's monopoly power and arguing that the company had harmed consumers by charging supracompetitive prices³¹ and suppressed innovation by impeding the development of new products and product

at 4-99 (Sept. 21, 1999, p.m. session), *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232).

²⁶ The latitude accorded to lawyers in closing arguments is reflected in the fact that post-trial motions and appeals seeking the reversal of a trial result based on statements made by the prevailing party in closing arguments are rarely successful, even when such statements approach or cross "the line of propriety." See *Baker v. Conn. Bank & Trust Co.*, 125 F.R.D. 25, 27 (D. Conn. 1988) (denying motion for new trial). See also *Baufield v. Safelite Glass Corp.*, 811 F. Supp. 713, 718 (D. Minn. 1993) (denying defendant's motion for new trial based on statements of plaintiff's counsel in closing argument characterizing defendant as "the Mafia" and a "corporate goon squad"); *Poe v. Nat'l R.R. Passenger Corp.*, 93 F.R.D. 573, 574-75 (E.D. Pa. 1982) (denying plaintiff's motion for new trial while acknowledging that statement of defense counsel referring to plaintiff in closing argument as a "con man" came "perilously close to being improper *per se*"). But see *Falkowski v. Johnson*, 148 F.R.D. 132, 137 (D. Del. 1993) (defendant's motion for new trial granted where plaintiff's counsel suggested that defendant's insurance carrier would cover any award of damages and engaged in a "generalized personal attack on defense counsel's integrity without reference to any specific facts").

²⁷ To be sure, both sides made many significant points at trial and in written submissions that were not reiterated into the closing arguments. But it was in the closing statements that the litigants had the opportunity to synthesize and highlight what they thought to be the most important arguments and evidence and leave a final impression in the mind of the court.

²⁸ Transcript of Proceedings at 4-28 (Sept. 21, 1999, a.m. session), *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232) [hereinafter Government Closing Argument I]. Steven Houck, representing the state co-plaintiffs, presented the first part of the government's argument. In addition to covering two important elements of the government's case, this part of the closing argument was very much the "opening act," setting the stage for the main event to follow.

²⁹ Transcript of Proceedings at 28-81 (Sept. 21, 1999, a.m. session), *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232) [hereinafter Government Closing Argument II]. David Boies for the Justice Department presented the second part of the government's closing argument.

³⁰ Mr. Boies also delivered the government's rebuttal after the defendant's closing argument was completed. Transcript of Proceedings at 79-99 (Sept. 21, 1999, p.m. session), *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232) [hereinafter Rebuttal].

³¹ Government Closing Argument I at 22-24.

features.³² In the second part of its closing argument and in its rebuttal, the prosecution set out its central factual contention that Microsoft “maintained its operating system monopoly by [engaging in] anticompetitive conduct” in response to the “middleware threat” posed by Netscape Communications’ *Navigator* web browser and Sun Microsystems’ *JAVA* programming language.³³ Microsoft responded to the “middleware threat,” according to the government, by bundling the *Internet Explorer* (“*IE*”) browser with the *Windows* operating system,³⁴ excluding Netscape’s *Navigator* browser from major distribution channels through licensing incentives and restrictions,³⁵ and drawing users toward Microsoft’s *Windows*-only version of *JAVA* and away from Sun’s cross-platform version.³⁶ As a result of Microsoft’s campaign against the “middleware threat,” it was argued, nascent platform competition from Netscape and Sun was crushed, innovation—particularly on the part of OEMs—was suppressed, and consumers endured both higher prices and inferior personal computer (“PC”) software and complementary products.³⁷

Microsoft, in the prosecution’s account, recognized the “middleware threat” some time in the first few months of 1995 and then embarked on a campaign of unlawful conduct in order to maintain its *Windows* operating system monopoly.³⁸ The government explained that “Microsoft’s conduct against *JAVA* and the browsers [was] part of a pattern.”³⁹ Beginning in 1995, “[w]henever a potential middleware [product], no matter how insignificant, has popped its head out, Microsoft has gone out to smash it down.”⁴⁰ The first pivotal event in this pattern of unlawful conduct was a meeting on June 21 of that year between Microsoft representatives and Netscape’s senior management, at which Microsoft, according to the government, presented Netscape with a choice.⁴¹ If Netscape would agree to cede the *Windows*-compatible consumer web browser market to Microsoft’s *Internet Explorer*, allowing *IE* to be the leading browser for use with the soon-to-be-released *Windows 95* operating system, and promise

³² *Id.* at 24–27. In accounting for Microsoft’s monopoly power, the government stressed the so-called “applications barrier.” According to the government, Microsoft’s dominant position as a software platform was essentially invulnerable to challenges from new entrants because so many more software applications had been written for *Windows* than for any other platform. *See id.* at 9–10.

³³ The “middleware threat” was the prospect that Netscape’s *Navigator* web browser and/or Sun Microsystems’ *JAVA* programming language would emerge as alternative platforms that would “facilitate the development of cross-platform [software] applications that could be used on multiple operating systems.” Such an alternative could displace Microsoft’s *Windows* as the dominant platform for PC software development. Government Closing Argument II at 30.

³⁴ *Id.* at 31–32.

³⁵ *Id.* at 32–34, 68–74.

³⁶ *Id.* at 36, 75–77.

³⁷ Rebuttal at 84–89.

³⁸ Government Closing Argument II at 36–37.

³⁹ *Id.*

⁴⁰ *Id.* at 37.

⁴¹ The government’s account of the meeting was principally based on notes taken by Mark Andreesen, Netscape’s vice-president at the time. *Id.* at 48.

not to compete “on the platform level,”⁴² Microsoft would provide financial and technical support for Netscape to develop other products and services.⁴³ If Netscape refused, Microsoft would punish the firm by delaying access to pre-release technical information that the company needed to assure that the *Navigator* browser would function optimally with *Windows 95*.⁴⁴ Emphasizing the significance of this event, the government told the court that the June 21 meeting “provides a context for everything that went ahead.”⁴⁵ This meeting, in the words of the Justice Department’s attorney, “provides an insight . . . into Microsoft’s soul as to what was really involved.”⁴⁶

After failing to persuade Netscape to accept its offer, Microsoft, according to the prosecution, used its control of the *Windows* operating system to crush Netscape as a potential platform competitor.⁴⁷ The defendant achieved its goal, in part by bundling the *IE* browser with *Windows 95*, and later integrating it into *Windows 98*, at no additional cost to the consumer,⁴⁸ thereby discouraging PC manufacturers (OEMs) and internet service providers (“ISPs”), among others, from offering Netscape *Navigator* to their customers.⁴⁹ Microsoft also allegedly used a combination of licensing restrictions and incentives to ensure that OEMs would configure the “first screens” of the PCs they manufactured in order

⁴² Government Closing Argument II at 50.

⁴³ *Id.* at 47–50.

⁴⁴ *Id.* Microsoft has vigorously disputed this version of what took place at the meeting, suggesting that Mr. Andreessen’s notes were tailored to be of use in the antitrust case, and noting that Netscape was lobbying the Justice Department to bring the case before and after the meeting. Rebuttal at 70, *Microsoft Corp.* (No. 98-1232). Although we will never know what actually transpired on June 21, 1995, Netscape’s lobbying campaign to persuade the Justice Department to sue Microsoft is a matter of public record. See JOHN HEILEMANN, PRIDE BEFORE THE FALL: THE TRIALS OF BILL GATES AND THE END OF MICROSOFT ERA 11–25 (2001) (describing efforts of Netscape’s lawyers to persuade the Justice Department to bring a case against Microsoft); MICHAEL LEWIS, THE NEW NEW THING 186–93 (1999) (reporting Netscape’s efforts to convince DOJ to bring a case against Microsoft, and Netscape’s involvement in the case that was brought); *Netscape Alerts Division to Charges of Anticompetitive Conduct by Microsoft*, 71 ANTITRUST & TRADE REG. REP. 171 (Aug. 22, 1996).

⁴⁵ Government Closing Argument II at 30 (emphasis added). See also *id.* at 40 (stating that the June 21 meeting “provides . . . important information and evidence to the court as to how the court should interpret other things MS has said and done”).

⁴⁶ *Id.* at 30 (emphasis added). See also *id.* at 40 (arguing that the June 21 meeting “provides . . . important information and evidence to the court as to how the court should interpret other things that Microsoft has said and done”); *id.* at 46 (claiming that the proposal Microsoft made at the June 21 meeting to secure Netscape’s agreement to move out of the consumer browser market exemplifies Microsoft’s “disregard for the antitrust laws and for the normal rules of competitive engagement that characterizes what Microsoft has done in its efforts to squelch any competitive threat that develops to its operating system monopoly”) (emphasis added); *id.* at 50–51 (claiming that the June 21 meeting “show[s] what Microsoft’s intent was, so that the court has a context for considering some of the other actions that they undertook”).

⁴⁷ See *id.* at 52–53.

⁴⁸ See *id.* at 30–32. The prosecution also argued that Microsoft “gave away” its web browser for the purpose of forcing Netscape to do the same, thereby denying Netscape a needed source of revenue. See *id.* at 34–35.

⁴⁹ See *id.* at 32–33.

to promote *IE* to the exclusion of *Navigator*.⁵⁰ According to the prosecution's version of events, as a result of the foreclosure to Netscape of the OEM and ISP distribution channels, Microsoft established *IE* as the leading web browser, marginalized Netscape's *Navigator* in the web browser market, and neutralized Netscape as a potential platform competitor.⁵¹

The prosecution argued further that while Microsoft was eliminating Netscape as a potential competitor, it was also employing unlawful exclusionary tactics against Sun Microsystems, whose *JAVA* programming language posed the other major middleware threat to *Windows*' dominance.⁵² According to the government, Microsoft's principal means of preventing *JAVA* from emerging as a successful platform competitor was the development of its own version of *JAVA*.⁵³ The Microsoft version ("MS *JAVA*"), unlike Sun's cross-platform *JAVA*, would run only on the *Windows* platform. Thus, it was argued that Microsoft "polluted" *JAVA* in order to draw customers to a platform-specific version that would hamper the further development of cross-platform *JAVA* and maintain the company's dominant position as the standard PC software platform.⁵⁴

Throughout its closing argument, the prosecution attacked the character and motives of Microsoft's managers and advocates. Microsoft was repeatedly characterized as dishonest,⁵⁵ bullying,⁵⁶ contemptuous of the

⁵⁰ See *id.* at 35, 68–74.

⁵¹ See Rebuttal at 93–95.

⁵² See Government Closing Argument II at 30–32, 36.

⁵³ See *id.* at 30–32, 36, 75–76.

⁵⁴ *Id.* at 30–32, 36.

⁵⁵ The government accused Microsoft of lying to the court through testimony that was inconsistent with documents from its files. See, e.g., *id.* at 40–42 (juxtaposing Microsoft's then-chairman Bill Gates' deposition testimony that he did not fear Netscape as a potential competitor as of May and June of 1995 against contemporaneous documentary evidence tending to show that he did); Rebuttal at 97 (accusing Microsoft of saying at trial "[I]et's pretend our documents don't exist"). See also *id.* at 18 (claiming that "Microsoft knows it's a monopoly," but denies it in court); Government Closing Argument II at 47 (accusing Microsoft's lawyers of lying when they said that the company did not think, as of 1995, that Netscape would realize significant earnings from browser sales); *id.* at 60 (accusing Microsoft lawyers of lying when they said that the company bundled *IE* with *Windows* in order to increase demand for *Windows*); *id.* at 70–71 (accusing Microsoft managers and lawyers of lying about the reasons for the first-screen restrictions the company imposed on OEM licensees of *Windows*). The government also accused Microsoft of raising "creative" legal and economic theories that bore no relation to the "real world." See, e.g., *id.* at 32–33 (arguing that the case was not about "creative legal arguments" or "creative economic arguments," but about "common sense") (emphasis added); Rebuttal at 99 (government counsel saying "I urge the court to look at the contemporaneous documents, look at what people said before their lawyers got to them, and before the economists began to spin their creative theories") (emphasis added). With regard to Microsoft's economic expert, Dean Richard Schmalensee of the Massachusetts Institute of Technology's Sloan School of Business, the government told the court that he was not to be believed:

Before moving on, I'd like to pause here and say a few words about witness credibility. Your Honor has . . . ample basis to make findings as to [witness] . . . credibility where appropriate. I think such findings are appropriate with regard to Dean Schmalensee's testimony, much of which is inconsistent with his prior statements under oath and his academic writings, is based on data that was faulty or manipulated, is internally inconsistent and/or is simply incredible.

law,⁵⁷ and motivated exclusively by the desire to crush legitimate competition in order to protect and extend its monopoly.⁵⁸ Regarding the totality of Microsoft's conduct in response to the middleware threat from Netscape and Sun, the prosecution maintained: "This was not about efficiency. This was not about better products. This was not about lower prices. This was not about serving consumers. This was about stopping competition."⁵⁹

Microsoft, if left unchecked, would continue to charge supracompetitive prices, deprive consumers of choice, and inhibit innovation.⁶⁰ The company had to be prevented from using its power in the market for operating systems to maintain its monopoly and extend its dominance into other markets.⁶¹

B. THE DEFENDANT'S CLOSING ARGUMENT

Microsoft's closing argument⁶² was comprised principally of a brief preamble, followed by responses to the government's major claims regarding tying,⁶³ monopoly power,⁶⁴ attempted monopolization⁶⁵ and

Government Closing Argument I at 15.

⁵⁶ See, e.g., Government Closing Argument I at 26 (as a result of Microsoft's suppressing innovation, "consumers are victimized") (emphasis added); *id.* (claiming that companies will not invest in products that might threaten Microsoft because they are "intimidated" by Microsoft); Government Closing Argument II at 36 (Microsoft characterized as telling other firms: "[e]ither you limit your competition . . . or we will deprive you of the things you need to survive"); *id.* (arguing that Microsoft has "coerced, induced, solicited, and forced many people in this industry to do its will").

⁵⁷ See, e.g., Government Closing Argument II at 37 (describing Microsoft as "a monopoly that has shown *it has no limits* to what it will do to prevent emerging competition") (emphasis added); *id.* at 46 (referring to Microsoft's "disregard for the antitrust laws and for the normal rules of competitive engagement that characterizes what Microsoft has done in its efforts to squelch any competitive threat that develops to its operating system monopoly") (emphasis added); Government Closing Argument I at 21 (claiming that Microsoft "robs consumers of choice") (emphasis added); *id.* at 24 (asserting that Microsoft is "robbing consumers of choice and dollars") (emphasis added).

⁵⁸ See, e.g., Government Closing Argument I at 21 (claiming that the "central objective" of "Microsoft's predatory campaign against Netscape . . . was to impede consumer choice by making *Navigator* difficult or impossible to obtain"); *id.* at 23 (arguing that Microsoft's "overriding motive for virtually all of [its] anticompetitive conduct" was to "prevent the commoditization of *Windows*"); Government Closing Argument II at 31–32 (arguing that Microsoft "decided to tie . . . [*Windows* and *IE*] for the simple reason that that was the way of increasing their dominance of the browser market and eliminating the threat that a cross-platform browser and JAVA could eventually erode the application software barrier to entry").

⁵⁹ Rebuttal at 99.

⁶⁰ Government Closing Argument I at 27; Rebuttal at 84–87. See also Government Closing Argument I at 20 (arguing that Microsoft has hurt consumers "by restricting their choices, by denying them the benefits of price competition, and by impeding the development of new products").

⁶¹ See, e.g., Rebuttal at 83.

⁶² Transcript of Proceedings at 4–79 (Sept. 21, 1999, p.m. session), *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232) [hereinafter MS Closing Argument].

⁶³ See *infra* notes 74–76 and accompanying text.

⁶⁴ In response to the government's claim that the company possessed monopoly power in a relevant market consisting solely of "Intel-compatible P.C. operating systems," Microsoft identified a logical inconsistency in the prosecution's case: While asserting that Microsoft engaged in extensive

foreclosure of browser distribution channels.⁶⁶ The defense also disputed the government's argument that Microsoft had prevented Sun from developing and promoting *JAVA* as an alternative platform to *Windows* in order to preserve the dominant position of the *Windows* operating system.⁶⁷

In its preamble, Microsoft articulated some of the principal defense themes. For one thing, the government had failed to prove its pleaded claims.⁶⁸ The prosecution's case was good theater,⁶⁹ but comported with neither the law, nor the facts.⁷⁰ Netscape, far from being marginalized, continued to function as a competitor, and its capacity to challenge Microsoft had been vastly enhanced since it had been acquired by America Online ("AOL").⁷¹ Microsoft also faced formidable competition from powerful firms such as Sun, IBM, AOL, and Oracle, individually and in combination.⁷² Moreover, the government was applying a double standard under which conduct that would be viewed as procompetitive when engaged in by Microsoft's powerful competitors "becomes wrongful and anticompetitive when engaged in by Microsoft."⁷³

unlawful conduct in order to crush the "middleware threat" to the dominance of the *Windows* platform, the government excluded alternative platforms such as *Navigator* and *JAVA* from the relevant market in which Microsoft was said to compete. *Id.* at 34. If *Navigator* and *JAVA* were technologies that could supplant *Windows*, Microsoft faced significant platform competition and could not be a monopolist. *Id.* at 34–36. Microsoft also noted that the market for computer operating systems "has none of the traditional hallmarks of monopoly." *Id.* at 36. There is no scarcity of inputs for developing operating systems, no constraints on output, and "no applications barrier to entry," given the thousands of developers of software for *JAVA* and other alternative platforms. *Id.* at 36–38.

⁶⁵ With regard to the attempted monopolization claim, Microsoft argued that there was no market for "web browsers." Web browsing functionality, according to the defense, was a standard *feature* in all of the major operating systems on the market, and that no firm made money from the direct sale of stand-alone web browser programs. *Id.* at 42–43. Microsoft noted further that the company lacked the specific intent to monopolize the web browser market because the goal that every firm has to become the market leader cannot be equated with intent to monopolize, and if there ever was a dangerous probability that Microsoft would succeed in monopolizing the web browser market, that probability had been eliminated by AOL's acquisition of Netscape. *See id.* at 44–47.

⁶⁶ *Id.* at 48–56.

⁶⁷ *Id.* at 67. Microsoft argued that it had consistently supported *JAVA*, distributed millions of *JAVA* virtual machines, and developed a "blazing fast" *JAVA* implementation—*MS JAVA*—optimized for the *Windows* environment. *Id.* at 67–68.

⁶⁸ Specifically, Microsoft argued that the government had failed to prove that: (1) *Windows 98* was not an integrated product, (2) Microsoft prevented Netscape from distributing its browser, (3) Microsoft has the power to exclude competitors, and (4) the company attempted to monopolize the web browser market. MS Closing Argument at 6.

⁶⁹ The characterization of the government's case as theater, illusion, and trickery recurs throughout the defense argument. *See infra* Part III.D.

⁷⁰ MS Closing Argument at 5–6.

⁷¹ *Id.* at 7–9. AOL entered into an agreement to acquire Netscape during the *Microsoft* trial. Steve Lohr & John Markoff, *Deal is Concluded on Netscape Sale to America Online*, N.Y. TIMES, Nov. 25, 1998 at A1. The acquisition price for Netscape at the time the purchase was completed in March of 1999 was \$9.6 billion. Shannon Henry, *AOL-Netscape Merger Official*, WASH. POST, Mar. 18, 1999 at E3.

⁷² MS Closing Argument at 8–12.

⁷³ *Id.* at 9.

After completing the preamble, defense counsel answered the prosecution's claim that Microsoft's bundling of *Windows* and *IE* was anticompetitive and unlawful.⁷⁴ The defense explained that the evolution of Microsoft's operating system had been punctuated since the first years of the company's existence by the periodic integration of previously separate features into the operating system without separate, additional charges to licensees.⁷⁵ The integration of *IE* web browser codes into the operating system was just another example of Microsoft's ongoing effort to improve *Windows* by adding functionality for the purpose of "making personal computers more powerful and easier to use."⁷⁶

Toward the end of its closing statement, the defense pressed the argument that the government's case was based on groundless competitor complaints that did not justify judicial interference with the market. "Large companies often take tough stances with one another in business negotiations," explained Microsoft, and the government should not act as a "hall monitor . . . under the guise of antitrust enforcement."⁷⁷ This was a case "in which disgruntled Microsoft competitors were invited to come in and air their grievances, real and imagined," a case that "was brought to shield huge companies like AOL, Netscape, IBM, and Sun from the rigors of competition."⁷⁸ Moreover, according to Microsoft, the government was seeking an "extraordinary intervention in the marketplace in the form of an order regulating product design."⁷⁹

As a final point, the defense recalled Microsoft's historical achievement of transforming the PC industry by establishing a standard platform that could be used with multiple brands of computer hardware and

⁷⁴ Microsoft identified the "integration" of *Windows* and *IE* as the most important issue in the case. *Id.* at 13 (noting that the tying claim was "central to the government's case under both Section 1 and Section 2"). Based on the 1998 D.C. Circuit opinion in which the court had found that the bundling of *Windows* and *IE* created an integrated product that did not violate the 1995 consent decree, *United States v. Microsoft Corp.*, 147 F. 3d 935 (D.C. Cir. 1998), the defense argued that, in order to establish that the bundling of *IE* and *Windows* was unlawful, the government had to show "the absence of any plausible claim that the integration of *IE* into *Windows* brings some advantage." MS Closing Argument at 14. In support of its position that the government had failed to meet its burden of proof, Microsoft cited three benefits of integrating *IE* into *Windows* 98: (a) seamless access to information from the internet through the browsing window, (b) continuous updates of the *Windows* operating system from the web, and (c) an HTML *Windows* user help system based in *IE*. The defense also referred to a longer list of benefits in the company's written testimony. *Id.*

⁷⁵ MS Closing Argument at 15–16 (noting that "some of those features duplicated functionality that had been offered in separate products").

⁷⁶ *Id.* at 17. Microsoft also made the point that the company's subjective intent in bundling *Windows* and *IE*—which was to respond to the emergence of the Internet and to "win"—was both proper and legally irrelevant because product integration is judged under antitrust law according to its effects, and the economic effects of combining *Windows* and *IE* were objectively procompetitive. *Id.* at 18–19. The defense further noted that the decision to ship *Windows 95* with *IE* substantially predated the June 21, 1995 meeting that figures so prominently in the prosecution's argument. *Id.* at 21–24.

⁷⁷ *Id.* at 75.

⁷⁸ *Id.* at 76.

⁷⁹ *Id.* at 77.

for which thousands of software applications could be developed.⁸⁰ “Rather than being pilloried,” defense counsel concluded, “Microsoft should be lauded for . . . its striking success which has brought the benefits of competition, the very fruits of competition—improved products, lower prices, and greater output—to consumers around the world.”⁸¹

III. THE ARGUMENTS AS NARRATIVE CONSTRUCTIONS

This section examines the closing arguments in the *Microsoft* case as narrative constructions. The analysis focuses on the principal elements of narrative—characters, time, story structure, and schemas—as they were employed by the litigants.

A. CHARACTERS

All narratives feature characters⁸² whose actions, thoughts, and experiences drive the story and communicate meaning.⁸³ Thus, the “casting” of the narrative, i.e., the choice of characters and the roles assigned to them, is a significant element of the storyteller’s art.⁸⁴ It is not surprising then, that although the plaintiff and the defendant drew upon the same record in constructing their closing arguments in the *Microsoft* case, there were significant differences in their casting decisions.

1. *Government*

In the government’s rhetorical narrative, there is a single villain and many victims. The leading roles are played by Microsoft and Netscape.⁸⁵ Microsoft—which is sometimes referred to as an entity, and sometimes personified by specific figures in the company’s management structure⁸⁶—is the villain of the piece, while Netscape serves as Microsoft’s principal victim.⁸⁷ Sun Microsystems also plays a prominent role as a victim of Microsoft’s bad acts,⁸⁸ as do OEMs (sometimes referred to collectively and

⁸⁰ See *id.* at 78. “Before Microsoft began developing and marketing operating systems, the world was populated by vertically integrated companies like IBM and Sun—and Apple, for that matter—that sought to lock consumers into their proprietary and high-priced hardware and software.” *Id.* “[T]he broad availability of *Windows* as a development platform for ISV’s has resulted undoubtedly in large numbers of attractively priced *Windows* applications from which there is huge consumer choice.” *Id.*

⁸¹ *Id.* at 79.

⁸² See AMSTERDAM & BRUNER, *supra* note 10, at 113 (narrative “needs a cast of human-like characters, beings capable of *willing their own actions, forming intentions, holding beliefs, having feelings*”).

⁸³ *Id.* at 131 (“Narrative deals out fate to protagonists”).

⁸⁴ See *id.* at 150.

⁸⁵ As indicated in Figure 1 below, the government mentions Microsoft 301 times and Netscape 93 times.

⁸⁶ These include James Allchin, Bill Gates, Joachim Kempin, Paul Maritz, and Daniel Rosen.

⁸⁷ See Figure 1.

⁸⁸ In descriptions of Sun’s interaction with Microsoft, “*JAVA*” is often used as a kind of metonym for Sun.

sometimes identified individually),⁸⁹ and consumers of PCs.⁹⁰ All of these victims—among them, some of the largest and most prominent companies in the United States, such as IBM and Intel—are portrayed as essentially powerless in their dealings with Microsoft.⁹¹

FIGURE 1

REFERENCES TO CHARACTERS IN THE GOVERNMENT'S CLOSING ARGUMENTS

Microsoft	301
Netscape	93
Customers/Consumers	73
OEMs	68
Java	41
Intel	25
ISVs	15
The Government	14
ISPs	13
Apple	12
MS rivals in combination	8
IBM	7
OS/2	7
AOL	6
Sun	5

2. Microsoft

The leading characters in the defendant's story are not Microsoft and Netscape, but Microsoft and *the government*.⁹² Netscape, Sun, and AOL also appear frequently throughout the defendant's story,⁹³ as do consumers,⁹⁴ and Microsoft's actual and potential competitors collectively in a number of different combinations.⁹⁵

⁸⁹ See Figure 1.

⁹⁰ *Id.* See also Government Closing Argument I at 19 ("Microsoft's illegal conduct has been bad—very bad for consumers").

⁹¹ See, e.g., Government Closing Argument I at 10–11 (attributing the failure of IBM's competing operating system—OS/2—despite the investment of hundreds of millions of dollars by one of the largest and best-known companies in the world, not to any business or technological missteps of IBM, but to Microsoft's unassailable power and invulnerability).

⁹² See Figure 2.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Sometimes the firms comprising the group are referred to individually by name. See, e.g., MS Closing Argument at 11 (referring to business alliance among Sun, IBM, Oracle, and Netscape to use

FIGURE 2

REFERENCES TO CHARACTERS IN THE DEFENDANT'S CLOSING ARGUMENTS

Microsoft	168
The Government	136
Netscape	88
AOL	59
Customers/Consumers	47
Sun	38
MS rivals in combination	32
Java	30
IBM	18
OEMs	18
ISVs	17
Apple	17
Intel	12
ISPs	8
OS/2	4

While Microsoft casts most of the same characters that appear in the government's narrative, the company assigns the characters strikingly different roles. In the defendant's narrative, Microsoft is both the hero (innovating, serving consumers, and succeeding in the marketplace) and the victim (falsely accused and attacked by competitors who have enlisted the government as their champion). Whereas the government portrays Microsoft as rapacious and criminal, the defense draws the company as a somewhat idealized "good corporate citizen" managed by customer-driven problem-solvers.⁹⁶ While the government's Microsoft character acts only for the purpose of stifling competition,⁹⁷ the Microsoft of the defense narrative exists to satisfy customer needs and, in so doing, to win fairly in the marketplace.⁹⁸

JAVA to "promote *JAVA* as a competitor to *Windows*"). At other times, they are referred to collectively. See *id.* at 9 (collective reference to "Microsoft's competitors").

⁹⁶ This character is somewhat reminiscent of the noble images presented in the television commercials large companies run on Sunday morning news shows. In such advertisements, Archer-Daniels-Midland, for example, is the "supermarket to the world" and General Electric "bring[s] good things to life."

⁹⁷ See *supra* Part III.A.

⁹⁸ See, e.g., MS Closing Argument at 17 (saying that integrating browser functionality into the *Windows* operating system is part of a twenty-year history of "making personal computers more powerful and easier to use").

The government is Microsoft's main antagonist,⁹⁹ but it acts as the instrument of Microsoft's competitors, on whose behalf the case has been brought.¹⁰⁰ The "victims" of the government's narrative, e.g., Netscape, Sun, and IBM, appear in the defendant's narrative either as competitors that have been fairly beaten by Microsoft in the market¹⁰¹ or as business partners (principally licensees who sell products that complement Microsoft's software) with whom Microsoft maintains normal and lawful business relationships.¹⁰² Consumers, in contrast with the passive victims in the government's story, are both active (their demands drive Microsoft's innovations)¹⁰³ and very satisfied with Microsoft's products.¹⁰⁴ The "customers [,]" in Microsoft's story, "want *Windows*."¹⁰⁵

B. TIME

Narratives unfold in narrative time.¹⁰⁶ Indeed, narrative is defined, in part, by the sequentiality of the events recounted.¹⁰⁷ In the *Microsoft* closing statements, the time frames selected by the litigants are important elements of the stories they tell.¹⁰⁸

1. *Plaintiffs*

In the government's narrative, time begins in 1995 when Netscape's *Navigator* emerged as the dominant web browser and Microsoft was waking up to the challenge of the "middleware threat."¹⁰⁹ Although the prosecution's story is unfinished at the time of the trial, the narrative essentially stops progressing by 1998 when *Windows 98* is released and *IE* has overtaken *Navigator* as the leading web browser. This retrospective vantage point frames the conduct described by the government as completed bad acts that are ripe for punishment at the time of the trial.

⁹⁹ See *infra* Part III.C.2.

¹⁰⁰ *Id.*

¹⁰¹ See, e.g., MS Closing Argument at 59 (arguing that "there was . . . a head-to-head competition for the AOL business [to become AOL's default browser], and Netscape lost it" because *IE* was better suited to AOL's needs than *Navigator*).

¹⁰² See, e.g., *id.* at 41-42 (OEMs license *Windows* not because of a lack of alternatives, but "because their customers want *Windows* and because they can get *Windows* at an attractive price").

¹⁰³ See, e.g., *id.* at 66 ("consumers pick winners and losers in our system").

¹⁰⁴ *Id.* at 78 (by establishing a standard PC software platform, Microsoft had facilitated "huge consumer choice").

¹⁰⁵ *Id.* at 41-42.

¹⁰⁶ See AMSTERDAM & BRUNER, *supra* note 10, 124-27 (discussing narrative time); Paul Ricoeur, *Narrative Time*, in ON NARRATIVE 165-87 (W.J.T. Mitchell ed., 1981) (same).

¹⁰⁷ See JEROME BRUNER, ACTS OF MEANING 43 (1990) ("Perhaps [the] . . . principal property [of narrative] is its inherent sequentiality: a narrative is composed of a unique sequence of events, mental states, happenings involving human beings as characters or actors").

¹⁰⁸ See generally Kim Lane Scheppelle, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2094 (1989) ("[I]n legal stories, 'where one begins' has a substantial effect because it influences just how the story pulls in the direction of a legal outcome.").

¹⁰⁹ See *supra* Part III.A.

Consistent with this approach, the prosecution resists Microsoft's efforts to focus the court's attention on the present and the future.¹¹⁰

2. *Defendant*

The sense of narrative time is less clear and less consistent in Microsoft's closing statement. To be sure, compared with the government, the defense locates more of its narrative in the present¹¹¹ and the future,¹¹² highlighting, for example, AOL's acquisition of Netscape, which occurred while the trial was in progress.¹¹³ In so doing, the defense advances its argument that Microsoft is not harming the competitive process today and faces substantial competition in the future, so it would be inappropriate for the court to intervene against the company now. However, the bulk of Microsoft's narrative takes place between 1995 and 1998 because it largely consists of responses to the government's claims regarding the events of that period.¹¹⁴ To a substantial extent, then, Microsoft effectively ceded the definition of the relevant time frame to the government.

Twice in its closing argument, Microsoft very briefly shifted the narrative focus to the years before 1995. The first of these instances was the defendant's recounting of the development of its operating system through the integration of previously-separate features.¹¹⁵ The second was the reference to the company's early history when Microsoft transformed the PC industry by establishing a single operating system platform that became the industry standard.¹¹⁶ These brief excursions into Microsoft's past suggest a line of argument that the defense never developed in any detail, though it is notable that the company presented a brief review of its historical achievement as the capstone of its closing statement. The implicit argument is that Microsoft should be judged by its entire record, rather than just the record from 1995 to 1998, and that when the entire record is taken into account, the procompetitive benefits of the company's conduct substantially outweigh its anticompetitive effects.

¹¹⁰ Government Closing Argument I at 13 (rejecting Microsoft's arguments regarding the competitive effects of emerging technologies that threaten to displace *Windows*); Rebuttal at 83 (rejecting Microsoft's arguments as well).

¹¹¹ See, e.g., MS Closing Argument at 31 (responding to government cross-examination regarding integration of *IE* into *Windows 95* with points regarding the integration of *IE* into *Windows 98*); *id.* at 34–35 (maintaining that *JAVA* and *Navigator* are serious platform competitors in the present that threaten to displace *Windows*).

¹¹² *Id.* at 35 (discussing AOL's plans to challenge the *Windows* platform by becoming "the de facto user environment"); *id.* at 77 (noting four current indicators of dynamic present and future competition: (a) the AOL/Sun/Netscape alliance, (b) emergence of web-based application software, (c) increasing popularity of *Linux*, and (d) increasing numbers of non-PC computing devices).

¹¹³ See, e.g., *id.* at 47–48, 51–52.

¹¹⁴ See *supra* Part III.B.

¹¹⁵ *Id.*

¹¹⁶ See *supra* note 80 and accompanying text. Microsoft was founded in 1979.

C. NARRATIVE STRUCTURE / PLOT

The events in narratives are generally recounted in broadly recognizable forms.¹¹⁷ At the most basic structural level, narratives typically begin with an initial steady state of ordinary life.¹¹⁸ This steady state is disrupted by some sort of trouble or challenge,¹¹⁹ the trouble is then resolved by characters in the story, and “the old steady state is *restored* or a new *transformed* steady state is created.”¹²⁰ Overlaid upon this generic architecture is plot—the author’s selection and ordering of events in the story.¹²¹

1. *Government*

In the *Microsoft* case, the government’s narrative took the form of an unfinished history.¹²² In this tale, the world was in a steady state until early 1995, when the trouble began: A rapacious villain recognized threats to its dominance and proceeded to victimize a long list of firms. “Microsoft,” according to the government, “used its monopoly power not merely to exclude—but to *extirpate*—competition,” conducting “a campaign of predation against Netscape, Sun and others.”¹²³ No match for Microsoft’s power and ruthlessness, these companies either capitulated to Microsoft’s demands or faced grievous consequences. The government put the matter in striking terms:

¹¹⁷ This is not to say that most storytellers (trial lawyers included) generally choose narrative forms with self-conscious deliberation. Some certainly do. However, narrative forms are probably most often employed without much thought as to labels or categories, but based, instead, on a sense of what feels “right.”

¹¹⁸ See AMSTERDAM & BRUNER, *supra* note 10, at 113.

¹¹⁹ See *id.* at 114. See also Bruner, *supra* note 9, at 11–12.

¹²⁰ See AMSTERDAM & BRUNER, *supra* note 10, at 114 (emphasis in the original).

¹²¹ Familiar plots include the ascent from “rags to riches” (as in Horatio Alger stories), the spiritual awakening, death and resurrection, star-crossed love, the hero’s journey, and pride goeth before a fall stories. It is interesting to note that the story of Bill Gates and Microsoft is sometimes told in popular accounts as a “pride goeth before a fall” story, see, e.g., HEILEMANN, *supra* note 44, while in other accounts, the story of Microsoft and its managers is told in something like the form of the “hero’s journey.” See, e.g., CHERYL TSANG, MICROSOFT FIRST GENERATION: THE SUCCESS SECRETS OF THE VISIONARIES WHO LAUNCHED A TECHNOLOGY EMPIRE (1999); MICHAEL A. CUSUMANO & RICHARD W. SELBY, MICROSOFT SECRETS: HOW THE WORLD’S MOST POWERFUL SOFTWARE COMPANY CREATES TECHNOLOGY, SHAPES MARKETS AND MANAGES PEOPLE (1998).

¹²² The history can be an enormously effective tool in the hands of a skilled advocate because of its power to endow a reconstruction of events with the ring of objective truth. See generally Hayden White, *The Value of Narrativity in the Representation of Reality*, in ON NARRATIVE 19 (W.J.T. Mitchell ed., 1981) (arguing that “[t]he authority of the historical narrative is the authority of reality itself”). Nevertheless, it is important to bear in mind that all histories are “constructed” narratives, if only by virtue of the author’s selection of content. See generally NORTHROP FRYE, MYTH AND METAPHOR 3–4 (1990); Louis O. Mink, *Narrative Form as a Cognitive Instrument*, in THE WRITING OF HISTORY 145 (Robert H. Canary & Henry Kozicki eds., 1978) (“narrative form in history, as in fiction, is an artifice, the product of individual imagination”).

¹²³ Government Closing Argument I at 19 (emphasis added).

[Microsoft] coerced, induced, solicited and forced many people in this industry to do its will: OEM's, Intel, Apple. And the evidence in this record is replete with examples of where Microsoft has come to people and said 'either you do our bidding—either you limit your competition, or either you limit your support of competitive products or we will deprive you of the things that you need to survive.'¹²⁴

As a result of this campaign to “extirpate” competition, consumers were robbed daily through monopoly prices for the *Windows* operating system, while Microsoft's wise-like control over innovation in the computer industry deprived them of the benefits of technological progress.¹²⁵ The narrative was unfinished when the trial began because the defendant's anticompetitive conduct continued unabated and no single firm, nor any combination of firms and/or consumers, could possibly subdue the Colossus of Redmond.¹²⁶ Thus, the story could be brought to a satisfactory resolution only through the court's heroic intervention to bring Microsoft down.¹²⁷

The government's narrative was a great story: dramatic, emotional, character-driven, internally coherent, accessible, and vividly told in striking rhetoric.¹²⁸ The story actively enlisted the judge's emotional and moral

¹²⁴ Government Closing Argument II at 36.

¹²⁵ See, e.g., Government Closing Argument I at 20 (arguing that Microsoft harms consumers by: (a) “restricting their choices;” (b) “denying them the benefits of price competition;” and (c) “impeding the development of new products”); Rebuttal at 84–86 (claiming that Microsoft harmed consumers by raising OEM and ISV costs and impeding innovation).

¹²⁶ See, e.g., Government Closing Argument I at 10–11 (asserting that the commercial failure of IBM's *OS/2* operating system proved that Microsoft's dominance was invulnerable to challenge, even by firms with enormous resources); Rebuttal at 81 (“in the real world . . . neither Sun nor Netscape nor anyone else effectively competes with Microsoft in the operating system market”); *id.* at 82 (“there is no evidence that any prospect exists in the immediate future for such competition”).

¹²⁷ There is an intriguing echo here of a biblical narrative—the Exodus story from the Old Testament. The Exodus story is a narrative of national liberation in which the Hebrews are rescued from the oppression of a powerful tyrant through the intercession of a national hero—Moses, acting as Yahweh's instrument. In the government's unfinished story, Microsoft's licensees and competitors are not entirely unlike a powerless people oppressed by a tyrannical Pharaoh, and the judge is offered the role of the heroic liberator.

¹²⁸ The prosecution's story is also “cinematic.” Once the government's story of anticompetitive conduct began in earnest in the second part of the prosecution's closing argument presented by David Boies, its structure was consistent with the basic “Hollywood formula for screenwriting success.” See generally Philip N. Meyer, “*Desperate for Love*”: *Cinematic Influences upon a Defendant's Closing Argument to a Jury*, 18 VERMONT L. REV. 721, 728–40 (1994). Mr. Boies almost immediately “hooks” the audience by focusing the court's attention on the dramatic June 21, 1995, meeting with Netscape's managers. And within the first ten pages of the anticompetitive conduct narrative, the audience learns “who the main character is, what the premise of the story is and what the situation is.” See *id.* at 728 (quoting SYD FIELD, *SCREENPLAY: THE FOUNDATIONS OF SCREENWRITING* (1984)). The government also quickly establishes the dramatic situation and the dramatic conflict between Microsoft and its victims, with Netscape singled out as the “victim-in-chief,” and then later (in the “third act,” so to speak) sets up the resolution of the story by implicitly inviting the court to intervene heroically against Microsoft on behalf of the victims.

Microsoft's conduct, as presented in the government's narrative, also recalls some archetypal patterns of “villain” conduct from folktales. See generally VLADIMIR PROPP, *MORPHOLOGY OF THE FOLKTALE* (1968). Thus, for example, Microsoft's conduct vis-à-vis Netscape is portrayed as

engagement by presenting a stark, “black and white,” tale of a powerful villain hurting blameless, vulnerable victims. And in so doing, the narrative may also have helped the government overcome some of the key problems with its case. Armed with a compelling story in which Microsoft is vividly drawn as *both* invincible *and* consumed by the fear of losing its dominant position, the government elided the problem of simultaneously maintaining, on the one hand, that Microsoft faced mortal threats from Netscape and Sun middleware, and, on the other hand, that Microsoft’s *Windows* platform faced no competition.¹²⁹ The narrative also simplified the case in ways that appear to have mitigated some of the problems of establishing causation and anticompetitive effects. Consider, for example, the question whether *Internet Explorer* may have displaced *Navigator* as the leading web browser, at least in part, because some customers came to view *IE* as the superior product.¹³⁰ In the narrative universe created by the prosecution, a superior Microsoft browser was impossible because: (a) rapacious monopolists do not prevail by making superior products and competing on the merits¹³¹ and (b) Microsoft developed *IE* not to improve *Windows*’ functionality in response to customer needs, but for the sole purpose of destroying Netscape as a potential competitor.¹³²

progressing from reconnaissance (studying and realizing the middleware threat from Netscape), to the use of trickery and persuasion (attempting to convince Netscape to capitulate at the June 21, 1995 meeting), to causing actual harm to the victim (crushing *Navigator* by bundling *IE* with *Windows*). *Id.* at 26–32.

¹²⁹ In a remarkable tactical victory for the government, the proposition that firms developing middleware platforms constituted a profound competitive “threat,” but did not “compete” with Microsoft for purposes of market definition and the assessment of monopoly power, was accepted by both the District Court at trial and the D.C. Circuit on appeal. *See* *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 17–19, 28–33 (D.D.C. 1999); *United States v. Microsoft Corp.*, 253 F. 3d 34, 52–54 (D.C. Cir. 2001).

¹³⁰ *See, e.g.*, MS Closing Argument at 59 (arguing that “there was . . . a head-to-head competition for the AOL business [to become AOL’s default browser], and Netscape lost it” because *IE* was better suited to AOL’s needs than *Navigator*).

¹³¹ *See generally* Government Closing Argument I at 25 (quoting Judge Wyzanski’s assertion in the *United Shoe* decision that “creativity in business, as in other areas, is best nourished by multiple centers of activity,” *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953)).

¹³² *See, e.g.*, Government Closing Argument I at 21 (stating that Microsoft’s “central objective,” in its conduct vis-à-vis Netscape, “was to impede consumer choice by making *Navigator* difficult or impossible to obtain”); *id.* at 23 (arguing that that Microsoft’s “overriding motive for virtually all of [its] anticompetitive conduct” was to “prevent the commoditization of *Windows*”). *See also* Government Closing Argument II at 59 (“Here you have a company that is so intent on using its monopoly power over *Windows* to tie the browser . . . to force people to take it, that they are prepared to hold back on other technological advances . . . even though their customers will suffer.”). The government makes similar arguments regarding Microsoft’s development of *MS JAVA*. Although *MS JAVA* ran *JAVA* implementations customized for the *Windows* environment faster than Sun’s cross-platform *JAVA*, according to the prosecution, the advantages of the Microsoft product were to be discounted because Microsoft had only developed it for the purpose of thwarting platform competition from Sun. *See generally id.* at 75–77.

2. Microsoft

In contrast to the government's approach, the Microsoft closing argument lacked a single, unifying narrative structure.¹³³ As noted earlier, for most of its closing argument, the defense responded methodically to the government's principal claims, identifying weaknesses in the case and offering exculpatory responses, issue by issue.¹³⁴ Although this type of narrative that can be very effective in many cases, it relies upon a dry recitation of facts and debating points, rather than a vivid, character-driven "story."

Substantially obscured in this thicket of debating points was another defense narrative, articulated in fragments and communicated as much by implication as by express statement. This second narrative combined elements of an unfinished history and a present courtroom drama in which a worthy, free market winner struggles against bitter, defeated competitors championed by the government. In this story, Microsoft competed aggressively, but fairly, during the period at issue in the case.¹³⁵ It won more battles than others because it did a better job of responding to the needs of consumers. However, in this narrative, Microsoft's actual and potential competitors—Sun, IBM, Oracle, AOL, and Netscape—having been defeated in honest market competition, refused to accept the judgment of consumers. Instead of focusing their energies on working harder and winning on the merits, they enlisted the power of the State to obtain what they had been unable to secure through competition in the marketplace.¹³⁶ The defeated, but powerful, firms persuaded the Justice Department to be their champion and to bring a meritless antitrust case on their behalf.¹³⁷ Microsoft, for all of its resources, was cast in the role of David forced to

¹³³ Of course, the government had the burden of proof. So Microsoft was under no obligation to present a story of its own.

¹³⁴ See *supra* Part III.B. As noted earlier, defendants may challenge elements of the plaintiff's story, reframe issues to suggest that there has been no violation of the law, present an alternative story, or employ some combination of these approaches. See BENNETT & FELDMAN, *supra* note 12, at 94–95. Most of Microsoft's closing argument consisted of challenging the prosecution's story, while seeking to reframe some issues, such as the nature of monopoly power.

¹³⁵ See MS Closing Argument at 41–42 (OEMs ship PCs loaded with *Windows* because customers want it and it is attractively priced). Regarding the propriety of Microsoft continuing to compete aggressively after it achieved a leading position in the industry, the defendant argued:

Your honor, the Sherman Act is not a TV game show, where once you win a prize you have to give up your seat to another contestant. In our free enterprise system, even if you win the first game, you keep on playing in the second and the third. And you not only keep on playing, you get to keep on winning until somebody better or smarter beats you. It is not the office of government to decide who is better or smarter. That is done by consumers.

Id. at 33.

¹³⁶ See, e.g., MS Closing Argument at 4 (noting that several of the firms on the government's witness list "were Microsoft's competitors, several of whom actively lobbied the Justice Department to bring this case"); *id.* at 70 (referring Netscape's efforts devoted to "ginning up" a case against Microsoft).

¹³⁷ See, e.g., MS Closing Argument at 76 (arguing that the case "was brought to shield huge companies like AOL, Netscape, IBM and Sun, from the rigors of competition").

defend itself against the government Goliath. Moreover, since its case on behalf of capitalism's "also-rans" was fundamentally baseless, the prosecution was resorting to trickery, illusion, and deception in its effort to prevail at trial.¹³⁸ The question presented by this narrative, as of the close of the trial, was this: Would the court be able to see through the prosecution's desperate trickery and rule in favor of Microsoft?

This second narrative casts Microsoft in the sympathetic roles of underdog and victim. It also invests the company with the cachet of the free market victor. The story, moreover, characterizes the present courtroom drama as a miscarriage of justice in-the-making that can be averted only if the court rules in favor of Microsoft. But although this narrative is not without appeal, it is highly problematic in several important respects. First, it asks the court to view Microsoft—at various times the most valuable company in history¹³⁹—as a persecuted victim. Second, it suggests that the government's position in the case is not just wrong, but fundamentally corrupt.¹⁴⁰ Third, it casts the judge in a very unflattering role. According to Microsoft, the government has inundated the court with specious arguments, trickery, and deceptions. Instead of casting the judge as the hero whose courage and wisdom will lead him to the correct result, Microsoft lectures the court on all of the antics of the prosecution, as if to say: "We shouldn't even be here acting out this travesty. If you're not careful, Judge, these guys are going to bamboozle you into the colossal mistake of holding for the government."

D. SCHEMAS

All narratives, from the anecdotes told over the backyard fence to the rhetorical narratives presented in litigation, are composed in substantial part of references that elicit understandings and associations based on the audience's pre-existing knowledge structures or "schemas."¹⁴¹ Broadly

¹³⁸ See, e.g., *id.* at 76 ("[W]hen it became clear that the initial allegations were legally unsound and factually baseless, the government changed course in a classic bait-and-switch maneuver. This began the litany of allegations of pushing people around, wrongful conduct . . .").

¹³⁹ In September of 1998, shortly before the start of the trial, Microsoft's market capitalization passed General Electric's to become the highest of any publicly traded U.S. firm. See Rob Landley, *Microsoft and Its Competition*, THE MOTLEY FOOL (Sept. 21, 1998), at <http://www.fool.com/server/foolprint.asp?+/cashking/1998/cashkingport980921.htm>.

¹⁴⁰ Microsoft's "government" character acts not in the public interest as is its solemn duty, but on behalf of the private interests of Microsoft's competitors.

¹⁴¹ As explained by one commentator:

[Schemas or scripts] are the mental blueprints that we carry around in our head for quick assessments of what we may or should be seeing or feeling in a given situation. Such blueprints are simplified models of experiences we have had before. They represent a kind of short hand that transcribes our stored knowledge of the world, describing kinds of situations, problems, and personalities. These models allow us to economize on mental energy: we need not interpret things afresh when there are preexisting categories that cover the experience or condition in question.

Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VERMONT L. REV. 681, 700 (1994) (citations omitted). See also RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES

defined, “a schema is a category in the mind which contains information about a particular subject.”¹⁴² Thus the term encompasses a vast array of understandings and expectations of what things are and how the world works. “Genres,”¹⁴³ “stock stories,”¹⁴⁴ “scripts,”¹⁴⁵ and “stock characters”¹⁴⁶ are among the types of schemas that are often employed in the construction of narratives. Schemas function as efficient short cuts for conveying information without going into detail.¹⁴⁷ But they also suggest conclusions and trigger judgments¹⁴⁸ that can be particularly useful in the

AND SHORTCOMINGS OF SOCIAL JUDGMENT 28–41 (1980); Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2230–35 (1989).

¹⁴² Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273, 279 (1989). See also ROGER C. SCHANK & ROBERT P. ABELSON, *SCRIPTS, PLANS, GOALS AND UNDERSTANDING: AN INQUIRY INTO HUMAN KNOWLEDGE STRUCTURES* (1977). If, for example, one says “I went to the dry cleaner yesterday,” it brings to the listener’s mind a set of understandings about what happens when one goes to the dry cleaner. Because of the knowledge structures the listener brings to the conversation, it is unnecessary to explain the concept of “going to a place,” to define “yesterday,” or to explain that a “dry cleaner” is a commercial establishment at which clothes are cleaned by means of a chemical treatment in exchange for money. Multiple schemas are also employed in statements such as: “I will mow my lawn tomorrow,” “she has a cold,” or “they like to go bowling.” The important point is that we organize much of our knowledge in the form of shared understandings about the way things normally work that can be accessed through the use of cues to the listener.

¹⁴³ See generally THE CONCISE OXFORD DICTIONARY OF LITERARY TERMS 104–05 (Chris Baldick ed., 2001) (defining a “literary genre” as “a recognizable and established category of written work employing such common conventions as will prevent readers or audiences from mistaking it for another kind”); THE CASSELL DICTIONARY OF LITERARY AND LANGUAGE TERMS 129 (Christina Ruse & Marilyn Hopton eds., 1992) (defining “genre” as “a category into which a literary work can be put according to type and purpose, and also to whether the work conforms to a particular set of techniques. Comedy, tragedy, tragic-comedy, ballad, epic, one-act play, documentary drama, short story and novel are all genres”). Regarding film genre, see generally Rick Altman, *A Semantic/Syntactic Approach to Film Genre*, in FILM GENRE READER 29 (Barry Keith Grant ed., 1986) (“genres are simply the generalized, identifiable structures through which Hollywood’s rhetoric flows”). See also Bruner, *supra* note 4, at 180 (1992) (noting choice of genre in the construction of judicial opinions).

¹⁴⁴ “Stock stories”—also sometimes referred to as “stock scripts,” or “frames”—are familiar story structures that are widely recognized and “embody our deepest human, social, and political values.” See Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 3 (1984).

¹⁴⁵ “Scripts” or “event schemas” are widely shared understandings of the ways in which events in life normally unfold. See Moore, *supra* note 142, at 281. Although “script,” “stock script,” and “stock story” are loose terms that may be used interchangeably, it may be useful to think of “scripts” as the broadest category of internalized stories about the way events take place. See generally SCHANK & ABELSON, *supra* note 142, at 36–68. Thus we have scripts for virtually all activities and events from crossing the street to setting the alarm clock. “Stock scripts” or “stock stories”—categories that can overlap with genre—might be understood as a subset of somewhat more complex and value-laden scripts, such as the fish out of water, the abuse of power, or the realization that comes too late.

¹⁴⁶ “Stock characters” or “person schemas” are widely recognized personality types, such as the life of the party, the family man, or the know-it-all. See generally Moore, *supra* note 142, at 281; NISBETT & ROSS, *supra* note 141, at 35.

¹⁴⁷ See SCHANK & ABELSON, *supra* note 142, at 38; NISBETT & ROSS, *supra* note 141, at 34–35 (scripts make “events [or secondhand accounts of events] readily comprehensible”).

¹⁴⁸ See generally Bernard S. Jackson, *Narrative Models in Legal Proof*, in NARRATIVE AND LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW 128, 168 (David Ray Papke ed., 1991) (noting that narrative always contains social judgment); BRUNER, *supra* note 107, at 51 (1990) (“To tell a story is inescapably to take a moral stance.”). Thus, if a lawyer says “my client, a devoted family man, had just returned from helping his elderly neighbor bring in her groceries,” it calls forth one set of

construction of persuasive rhetorical narratives.¹⁴⁹ By evoking a stock story or a well-known genre,¹⁵⁰ for example, the storyteller can summon in the mind of the listener a resonant set of understandings, feelings, and judgments and associate them with his own narrative.¹⁵¹

1. *Plaintiffs*

The most striking use of schemas in either of the *Microsoft* closing arguments is the government's evocation of a staple of popular culture—the gangster film.¹⁵² The June 21, 1995, meeting between Microsoft's representatives and Netscape's senior management¹⁵³ is presented by the prosecution in the form of a classic gangster “shakedown” scene—a stock story that is instantly recognizable from countless film and television portrayals.¹⁵⁴ In the government's version of the event, the Microsoft

understandings and associations. If, by contrast, a lawyer says “the defendant, a drifter, had just returned from the racetrack,” it calls forth an equally vivid, but rather different, set of understandings and associations.

¹⁴⁹ See Paul Gerwitz, *Narrative and Rhetoric in the Law*, in *LAW'S STORIES*, *supra* note 4, at 2, 8 (noting that “lawyers will have an easier time persuading a jury that their side's story is true if they can shape it to fit some favorable stock story”).

¹⁵⁰ The list of archetypal genres includes tragedy, comedy, romance, and satire. JOHN G. CAWELTI, *ADVENTURE, MYSTERY AND ROMANCE* 6 (1976). Contemporary genres (which may also draw upon elements of archetypal forms) include the Western and the Detective Story. *Id.* at 139–161, 192–259.

¹⁵¹ See Sherwin, *supra* note 141, at 709. A storyteller might say, for example: “When they met in that conference room last August, they were like two gunslingers just itching for a fight.” For most listeners, the simile would likely bring the Western genre to mind. For discussion of the association between factual narratives and stock stories in the context of historical writing, see Hayden White, *The Historical Text as Literary Artifact*, in *THE WRITING OF HISTORY* 52 (Robert H. Canary & Henry Kozicki eds., 1978) (“The historical narrative . . . mediates between the events reported in it and the generic plot-structures conventionally used in our culture to endow unfamiliar events and situations with meanings.”).

¹⁵² Because of their near universality, forms and images from films and other popular media can be especially useful tools in the construction of persuasive rhetorical narratives. See Sherwin, *supra* note 141, at 692 (“[I]n order to perform effectively, many lawyers, particularly litigators, may be obliged to keep abreast of [in order to tap into] the popular storytelling forms and images that people commonly carry around in their heads. Today the main source of these forms and images is the electronic mass media.”) (citations omitted); Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55, 105–06 (1992) (“Motion pictures and other sources of popular culture (television, best-selling novels, and so forth) offer a window into the stock scripts that are familiar to our culture. By taking these stock scripts into account, an advocate can prompt his or her audience to supply the ‘right’ answers to the syllogisms that s/he sets up.”) (citations omitted). On the gangster film genre, see generally NICOLE RAFTER, *SHOTS IN THE MIRROR* (2000); JONATHAN MUNBY, *PUBLIC ENEMIES, PUBLIC HEROES* (1999); MARILYN YAQUINTO, *PUMP ‘EM FULL OF LEAD: A LOOK AT GANGSTERS ON FILM* (1998); CARLOS CLARENS, *CRIME MOVIES* (1997); DAVID E. RUTH, *INVENTING THE PUBLIC ENEMY* (1996); EUGENE ROSOW, *BORN TO LOSE* (1978); CARLOS CLARENS, *CRIME MOVIES* (1980); JACK SHADOIAN, *DREAMS AND DEAD ENDS* (1977). See also David Remnick, *Is This the End of Rico?* *THE NEW YORKER*, Apr. 2, 2001, at 38 (cultural analysis of popular Home Box Office television series—“The Sopranos”—based on the conventions of the gangster film); Manohla Dargis, *Dark Side of the Dream*, 8 *SIGHT & SOUND* 16 (1996) (discussing widespread and enduring resonance of the gangster film genre).

¹⁵³ See *supra* Part III.A.

¹⁵⁴ A “shakedown” is a form of extortion. Typically, one person or group of persons threatens another person with violence or some other type of grievous loss that will befall the threatened person if

representatives speak as if they were drawn straight from central casting when they make their proposal to Netscape's management:

Look, you need these API's.¹⁵⁵ We know you need these API's. If we had a special relationship, you wouldn't have a problem getting them from us. And if we walk out of the room today with an agreement, we have a solution for your API problem, or else maybe in three months you will see them.¹⁵⁶

This use of the stock script of the shakedown scene from the gangster film genre was not simply a flourish or an aside. It was the dramatic keystone of the government's narrative.¹⁵⁷ It will be recalled that the prosecution told the court that this 1995 meeting "*provides a context for everything that went ahead*" and "*an insight . . . into Microsoft's soul.*"¹⁵⁸ The government's heavy emphasis on this shakedown scene, in combination with descriptive rhetoric throughout the argument,¹⁵⁹ powerfully associated Microsoft's management with lawlessness and criminality.¹⁶⁰

The government also used selected case references to associate Microsoft's conduct with other damaging schemas. For example, the prosecution responded to Microsoft's argument that products threatening to displace the *Windows* operating system should be understood as competing with *Windows*, by referring to the ninety-year-old monopolization case against John D. Rockefeller's Standard Oil of New Jersey¹⁶¹ as follows:

I mean, Standard Oil, from the old Standard Oil case, made a point of trying to restrict the availability of railroad service to its competitors in competing with Standard Oil. That was a wonderful device. It didn't

he fails to give something of value to the person or persons making the threat. A classic example of a gangster film shakedown scene can be found in *THE PUBLIC ENEMY* (Warner Brothers 1931), in which Tom Powers (played by James Cagney) threatens the owner of a speakeasy with violence and destruction if the owner refuses to sell beer supplied by Powers' gang. An inventive variation on the classic shakedown script appears in *THE GODFATHER* (Paramount Pictures 1972) when Vito Corleone's lawyer and adopted son, Tom Hagen, is dispatched to Hollywood with instructions to meet with a film producer and "make him an offer he can't refuse."

¹⁵⁵ "API's," Application Programming Interfaces, are technical specifications made available to application software developers—such as Netscape—in advance of the release of a new version of *Windows*. Application software developers need access to API's in order to design their software to run optimally with *Windows*.

¹⁵⁶ Government Closing Argument II at 24.

¹⁵⁷ Indeed, the government discusses the meeting on one out of every ten pages of its closing argument. *See id.* at 30–31, 37, 39–40, 47–51.

¹⁵⁸ Government Closing Argument II at 30 (emphasis added).

¹⁵⁹ *See supra* notes 57, 59.

¹⁶⁰ Judge Jackson made several statements in press interviews comparing Microsoft managers to criminals. *See* *United States v. Microsoft*, 253 F.3d 34, 109–10 (D.C. Cir. 2001) (noting that the judge compared Microsoft to drug dealers, street gang members who had been convicted of murder, and Napoleon Bonaparte because he believed that Gates' and Microsoft's "crime" of "hubris" derived from Napoleonic "arrogance" and "unalloyed success"). These statements and others helped to convince the D.C. Circuit to remove Judge Jackson from the case because of the appearance of bias. *See also* KEN AULETTA, *WORLD WAR 3.0: MICROSOFT AND ITS ENEMIES* 369–70 (2001).

¹⁶¹ *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

make railroads in the same market as oil, but it was a facilitating device.¹⁶²

As a syllogistic response to Microsoft's argument about monopoly power and market definition, the government's legal reasoning is less than entirely persuasive.¹⁶³ However, the tactical value of the reference lies not in the strength of the legal analogy, but in the schemas it calls to mind. By linking Microsoft's conduct to the *Standard Oil* case, the prosecution associated the "New Economy" defendant with the stock story of the traditional—indeed, the quintessential—"Old Economy" industrial monopoly.¹⁶⁴ The government's brief discussion of *Standard Oil* also implicitly drew an analogy between Bill Gates (Microsoft's then-C.E.O. and the richest man in the world) and the stock character of the infamous, rapacious "robber-baron" of the late 19th and early 20th centuries, exemplified by John D. Rockefeller.¹⁶⁵

In addition to its use of genre, stock scripts, and stock characters, the government also used highly evocative words throughout its closing

¹⁶² Rebuttal at 89.

¹⁶³ In the *Standard Oil* case, *supra* note 161, neither the government, nor the defendant maintained that Standard Oil engaged in anticompetitive conduct in response to a perceived competitive threat from railroads. However, in the *Microsoft* case, the government's argument depended on the notion that *Navigator* and/or *JAVA* constituted alternative platforms that could substitute for *Windows* and thereby displace it as the dominant platform. Thus, the prosecution appears to have raised an input foreclosure point from *Standard Oil* in response to an argument regarding monopoly power and relevant market.

¹⁶⁴ *Standard Oil* was the only case mentioned by David Boies (the Justice Department's attorney) in the eighty pages of closing arguments he presented on behalf of the government. Mr. Houck also identified Microsoft with a traditional industrial monopoly in the first part of the government's closing argument by quoting Judge Wyzanski's observation in the *United Shoe* decision "that monopoly is bad even though a monopolist doesn't opt for the quiet life because, as he put it, 'creativity in business, as in other areas, is best nourished by multiple centers of activity.'" Government Closing Argument I at 25 (quoting *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 347 (D. Mass. 1953)).

¹⁶⁵ In its (implicit) association of Gates with Rockefeller, the government was echoing an analogy that has often been drawn in the press coverage of Microsoft. See, e.g., Gary Chapman, *Digital Nation: "New Economy" Fears Familiar to Authors of Century-Old Law*, L.A. TIMES, June 19, 2000 (noting that the *Standard Oil* and *Microsoft* cases both arose in times of profound economic transformation); Max Frankel, *How To Bust His Trust*, N.Y. TIMES, Dec. 12, 1999 (stating that "[t]he parallels [between Gates and Rockefeller] are uncanny"); K.K. Campbell, *Gates a Modern Day Rockefeller?*, TORONTO STAR, Nov. 12, 1998; Linton Weeks, *Money Magnates; At Opposite Ends of a Century, John D. Rockefeller and Bill Gates Converge*; WASH. POST, June 18, 1998; Allen R. Myerson, *Rating the Bigshots: Gates v. Rockefeller*, N.Y. TIMES, May 24, 1998; Holman W. Jenkins Jr., *Business World on Microsoft, Standard Oil and Trustbusters*, WALL ST. J., May 20, 1998 (crediting Gates with introducing efficiencies that transformed the PC industry in much the same way Rockefeller transformed the petroleum industry); David Frum, *Bill Gates—A Rockefeller for the '90s*, FIN. POST DAILY, May 19, 1998 (observing that "[t]he parallels between the careers of Rockefeller and Gates are striking"); Richard Kain, *Microsoft '97 is Just Another Standard Oil '07*, L.A. TIMES, Aug. 8, 1997; Darrell M. West, *Microsoft Doesn't Play D.C. Ball*, NEWSDAY, Oct. 23, 1997, at A47 (arguing that Microsoft, like Standard Oil, failed to pay sufficient attention to cultivating public support and support among federal officials); Ted C. Fishman, *Microsoft Rules Cyberhighway*, USA TODAY, Dec. 11, 1997 (observing that "[o]ne near analogue [to Microsoft] is John D. Rockefeller's Standard Oil Trust Before its 1911 breakup"); Robert Marquand, *U.S. Antitrust Chief Battles Crosscurrents*, CHRISTIAN SCI. MONITOR, Feb. 16, 1995 (reporting that competitors maintained that Microsoft was "poised . . . to become the Standard Oil of the Computer World").

argument to bring to mind schemas that reinforced its story. Thus, for example, the government repeatedly described Microsoft's power and conduct in language that conjured images of constriction, coercion, obstruction, and destruction. The defendant was said to have a "stranglehold" on the market.¹⁶⁶ The verbs "stifle" or "stifling" were used five times.¹⁶⁷ The word "squelch," three times.¹⁶⁸ And the words "extirpate,"¹⁶⁹ "suppress,"¹⁷⁰ "impose,"¹⁷¹ "force,"¹⁷² "coerce,"¹⁷³ "crush,"¹⁷⁴ "stymie,"¹⁷⁵ "restrict,"¹⁷⁶ "foreclose,"¹⁷⁷ "smash,"¹⁷⁸ "eliminate,"¹⁷⁹ "control,"¹⁸⁰ "inhibit,"¹⁸¹ "preclude,"¹⁸² "harm,"¹⁸³ and "attack"¹⁸⁴ were also liberally employed in the characterization of Microsoft's motives and acts. These words bring to mind schemas that propel plot development and reinforce the government's central claim that Microsoft was managed by bad people who did bad things.

2. Defendant

The defense also used various types of schemas in constructing its rhetorical narrative, though not as effectively as the prosecution. There are suggestions of stock stories and stock characters in the defense narrative, for example. But none of the schemas evoked in Microsoft's closing argument had the resonance of the gangster film genre¹⁸⁵ or the venerable *Standard Oil* case.

¹⁶⁶ Government Closing Argument I at 5, 13.

¹⁶⁷ *Id.* at 21, 25, 27; Government Closing Argument II at 76; Rebuttal at 99.

¹⁶⁸ Government Closing Argument II at 29, 46, 81.

¹⁶⁹ Government Closing Argument I at 19.

¹⁷⁰ *Id.* at 24.

¹⁷¹ *Id.* at 21.

¹⁷² *Id.* at 25; Government Closing Argument II at 53, 56, 63, 72; Rebuttal at 95.

¹⁷³ Government Closing Argument II at 36, 71, 74; Rebuttal at 85.

¹⁷⁴ Government Closing Argument II at 31, 51.

¹⁷⁵ *Id.*

¹⁷⁶ Government Closing Argument I at 27; Government Closing Argument II at 32, 36, 53, 80.

¹⁷⁷ Government Closing Argument II at 32, 34; Rebuttal at 93.

¹⁷⁸ Government Closing Argument II at 37.

¹⁷⁹ *Id.* at 52, 53.

¹⁸⁰ Government Closing Argument I at 24; Government Closing Argument II at 42, 59.

¹⁸¹ Rebuttal at 85, 86, 93.

¹⁸² *Id.* at 95.

¹⁸³ Government Closing Argument II at 71; Rebuttal at 83, 84.

¹⁸⁴ Government Closing Argument II at 36.

¹⁸⁵ The Hollywood motion picture that perhaps most closely parallels the defendant's "Microsoft-as-victim" narrative is Francis Ford Coppola's *TUCKER*, (Paramount Pictures 1988). In that film, the eponymous inventor/entrepreneur/visionary designs a technologically advanced, highly innovative, and exceptionally safe automobile immediately following World War II. But his efforts to manufacture and market the product are aggressively and successfully resisted by the established "Big Three" automakers and their influential allies in the federal government. At the behest of powerful members of Congress, the Securities and Exchange Commission prosecutes Tucker for securities fraud. A jury acquits him, but he and his company are ruined by the ordeal.

Although *TUCKER* is a compelling story, it was not a very successful film. In theatrical release, the film grossed a modest \$19.7 million in domestic ticket sales, making it the 105th most popular

Perhaps the most interesting use of schemas in Microsoft's closing statement is the evocation of the stock character of the oppressive government agency and the stock story of government out of control.¹⁸⁶ It will be recalled that the principal antagonist in the defense narrative is the Justice Department acting on behalf of Microsoft's competitors.¹⁸⁷ Entrusted with the power to enforce the antitrust laws impartially and in the public interest, the agency portrayed by Microsoft instead devotes the full weight of the federal government to the task of overturning the judgment of the market and bringing a successful company to its knees.¹⁸⁸

The lawless and out-of-control government is a recognizable set piece of U.S. political culture.¹⁸⁹ Thus, it is not uncommon for the rhetoric of some politicians and commentators to feature government agencies, such as the Internal Revenue Service or OSHA, hurting, and in some cases, destroying, productive, law-abiding citizens and businesses through oppressive regulatory measures and law enforcement activities.¹⁹⁰ However, the stock story of government out of control lacks the near-universality of the gangster film shakedown scene. Moreover, the most sympathetic victims in stories of oppressive government agencies tend to

picture of 1988. See generally Chuck Kahn, *WorldwideBoxOffice*, at <http://www.worldwideboxoffice.com> (last visited May 10, 2003). By comparison, the most popular movie of that year—RAIN MAN (United Artists 1988)—earned \$172.8 million in the U.S., and THE GODFATHER (Paramount 1972) grossed \$134.8 million upon its release in 1972, at a time when ticket prices were lower than in 1988. *Id.* TUCKER, moreover, spawned no sequels or parodies and there is no popular genre of similar films. Therefore, telling a "Tucker"-like story lacks the impact of evoking the almost universal gangster film genre.

¹⁸⁶ See *supra* Part III.C.2.

¹⁸⁷ See *id.*

¹⁸⁸ See *id.*

¹⁸⁹ See, e.g., Jim Abrams, *Armed Promises IRS Overhaul Bill This Year*, WASH. POST, Sept. 30, 1997 (reporting statement by Sen. Orrin Hatch that the IRS is "out of control"); John E. Yang, *Revenue Day and Rhetoric*, WASH. POST, Apr. 16, 1997, at A10 (reporting then-House Speaker Newt Gingrich's statement that "April 15, is the appropriate day to emphasize the IRS is too big, too complicated, out of control"). See also PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1994) (detailing examples of unfair, inappropriate, and economically damaging policies of regulatory agencies).

¹⁹⁰ Regarding the Internal Revenue Service as an oppressive, out-of-control government agency, see, e.g., Jonathan Weisman, *Congress and Country Fired up After Hearings on IRS Abuses*, CONG. Q., Oct. 4, 1997 at 2379 (reporting that Senate hearings on IRS abuses had sparked a "firestorm of protest" against the agency); Albert B. Crenshaw, *IRS Issues Mid-Level Suspensions; Actions in Response to Internal Probe, Senate Panel Warnings*, WASH. POST, Sept. 29, 1997, at A1 (reporting on the fallout after "three days of explosive [Senate] hearings . . . in which several taxpayers detailed how they were pursued by the agency for taxes they did not owe or had paid or tried to pay"). Regarding OSHA, see, e.g., U.S. Senate Committee on Small Business, *Bond Urges Senate to Strike Clinton Ergo Rule; Protect Small Firms from Regulatory Menace*, (Mar. 6, 2001) at <http://sbc.senate.gov/republican/107press/mar0601.html>, (announcing that Sen. Christopher Bond characterized an OSHA ergonomics regulation "the most menacing adversary facing small business"); Office of Sen. Rick Santorum, *Santorum Asks OSHA to Retract Advisory That Threatens Future of Telecommuting*, (Jan. 5, 2000) at <http://santorum.senate.gov/press/000105.html> (announcing letter from Sen. Santorum to OSHA expressing "outrage" regarding an OSHA advisory opinion on telecommuting and stating that the advisory opinion "grossly extends the reach of the federal government into the homes of millions of telecommuters and teleworkers").

be “little guys;” i.e., individuals or smaller businesses that are hopelessly over-matched in any conflict with the state.¹⁹¹ With its high profile and vast resources, Microsoft is at a considerable disadvantage in attempting to portray itself as a besieged victim of government run amok.¹⁹²

Like the government, Microsoft also used evocative words throughout its closing argument to summon up schemas that reinforced its story. This is particularly evident in the language employed to characterize the government’s case as fundamentally baseless and to accuse the prosecution of resorting to trickery, illusion, and deception in its crusade against the defendant. Microsoft advanced this story line by, for example, characterizing various aspects of the government’s case as “courtroom melodrama,”¹⁹³ “spin doctoring,”¹⁹⁴ “red herrings,”¹⁹⁵ “misstatements,”¹⁹⁶ “the game of let’s pretend,”¹⁹⁷ “sleight of hand,”¹⁹⁸ a “shell game,”¹⁹⁹ “gerrymandering,”²⁰⁰ “beguiling,”²⁰¹ “shibboleths,”²⁰² “atmospherics,”²⁰³ “myths,”²⁰⁴ “fiction,”²⁰⁵ “classic bait-and-switch,”²⁰⁶ “false,”²⁰⁷ “grossly exaggerated,”²⁰⁸ and “pure baloney.”²⁰⁹

IV. THE PREVAILING NARRATIVE AND THE SEARCH FOR TRUTH

As outlined above, the government presented a more coherent and compelling narrative than did the defense in the *Microsoft* case. The prosecution’s arguments coalesced in a single, dramatic story line—brimming with bad acts, guilty minds, and sympathetic victims²¹⁰—that

¹⁹¹ See generally *IRS Treatment of Employees and Taxpayers: Hearings Before the Senate Finance Committee*, 106th CONG. (1997) (hearing testimony of IRS abuses of ordinary citizens); *IRS Abuses*, CONG. Q., *supra* note 190, at 2379 (reporting, for example, Senate testimony of a retired priest recounting IRS abuses against him); *Hearing on Exploring the Development of Taxpayer Bill of Rights II Legislation Before the Subcommittee on Oversight of the House Committee on Ways and Means*, 104th CONG. 3 (1995) (“When the average taxpayer goes up against the IRS, it’s like a contest between David and Goliath.”).

¹⁹² See *supra* Part III.C.2.

¹⁹³ MS Closing Argument at 5.

¹⁹⁴ *Id.* at 9.

¹⁹⁵ *United States v. Microsoft Corp.*, No. 90-345 (D.D.C. 2000); *United States v. Microsoft Corp.*, 253 F3d X 34 (2001).

¹⁹⁶ MS Closing Argument at 6.

¹⁹⁷ *Id.* at 25.

¹⁹⁸ *Id.* at 26.

¹⁹⁹ *Id.* at 32.

²⁰⁰ *Id.* at 36.

²⁰¹ *Id.* at 37.

²⁰² *Id.* at 41.

²⁰³ *Id.* at 69.

²⁰⁴ *Id.* at 60.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 76.

²⁰⁷ *Id.* at 61.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 51.

²¹⁰ See *supra* Part III.C.1.

helped the government win a stunning victory at trial. But more is at stake in litigation than who wins and who loses. Trials are also searches for truth, occasions to do justice, and exercises in making public policy.²¹¹ Antitrust law in the United States, it will be recalled, is substantially formulated through the decisions of the federal courts.²¹² Thus, it is principally left to the courts to adapt and develop antitrust doctrine in response to changing economic conditions and advances in the understanding and analysis of economic competition.²¹³ As the first major antitrust prosecution litigated against a leading “New Economy” firm, the *Microsoft* case raised significant competition policy questions and offered an extraordinary opportunity for a rigorous examination of the application of established antitrust doctrine to business practices in a dynamic, high technology industry.²¹⁴

²¹¹ See generally Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 749–54 (1998) (arguing that truth seeking is the principal goal of trials); David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 2-3 (1986-87) (arguing that rational truth seeking is the “dominant paradigm” underlying the modern trial); William Twining, *Evidence and Legal Theory*, 47 MOD. L. REV. 261, 272 (1984) (“There is undoubtedly a dominant underlying theory of evidence in adjudication, in which the central notions are truth, reason, and justice under the law.”).

²¹² See *supra* note 13 and accompanying text.

²¹³ See *supra* note 14 and accompanying text.

²¹⁴ See Michael A. Carrier, *Unraveling the Patent-Antitrust Paradox*, 150 U. PA. L. REV. 761, 784 (2001) (“The *Microsoft* case has garnered widespread attention as a paradigmatic case of the application of antitrust to the ‘new economy.’”). For discussion of the characteristics of dynamic competition in high technology industries, see generally Jerry Ellig & Daniel Lin, *A Taxonomy of Dynamic Competition Theories*, in DYNAMIC COMPETITION AND PUBLIC POLICY 16 (Jerry Ellig ed., 2001); Joshua A. Newberg, *Antitrust for the Economy of Ideas: The Logic of Technology Markets*, 14 HARV. J.L. & TECH. 83, 131–134 (2000); David J. Teece & Mary Coleman, *The Meaning of Monopoly: Antitrust Analysis in High-Technology Industries*, 43 ANTITRUST BULL. 801 (1998); FEDERAL TRADE COMMISSION STAFF, ANTICIPATING THE 21ST CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE (1996); Raymond Hartman, David Teece, Will Mitchell, & Thomas Jorde, *Assessing Market Power in Regimes of Rapid Technological Change*, 2 INDUS. & CORP. CHANGE 317 (1993); Andrew C. Hruska, *A Broad Market Approach to Antitrust Product Market Definition in Innovative Industries*, 102 YALE L.J. 305 (1992). See also Thomas M. Jorde & David J. Teece, *Introduction*, in ANTITRUST, INNOVATION, AND COMPETITIVENESS 3, 7 (Thomas M. Jorde & David J. Teece eds., 1992) (positing that “dynamic, not static, competition is what the antitrust laws should promote to advance the goal of enhancing economic welfare”); JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, DEMOCRACY (1950); Richard R. Nelson & Sidney G. Winter, *The Schumpeterian Tradeoff Revisited*, 72 AM. ECON. REV. 114 (1982).

At the core of the *Microsoft* case is a debate over the application of traditional antitrust analysis to high-technology markets in which firms achieve a dominant position by virtue of establishing a technological standard with substantial network effects. See generally DAVID S. EVANS, FRANKLIN M. FISHER, DANIEL L. RUBINFELD, & RICHARD L. SCHMALENSEE, DID MICROSOFT HARM CONSUMERS? (2000) (debating the economic issues in the *Microsoft* case); Richard Schmalensee, *Antitrust Issues in Schumpeterian Industries*, 90 AM. ECON. ASS’N PAPERS & PROCEEDINGS 193 (2000) (articulating the theoretical basis for Microsoft’s defense). Among the most important questions before the court were the following: (1) Did Microsoft have monopoly power in the context of its specific competitive environment, i.e., a dynamic, high-technology market? (2) If Microsoft faced relatively little static competition within the PC operating system market from substitutable products, how should antitrust law weigh the evidence that the firm faced intense platform competition for the market to become the next leading PC platform? (3) If the firm had something like monopoly power by virtue of its position

Ideally, in an adversarial adjudication process, something approximating truth emerges from the consideration of the litigants' competing versions of reality, and that truth forms the basis for a just and prudent result.²¹⁵ There can be little doubt, however, that some courtroom narratives serve the process better than others.²¹⁶ It is worth asking, then, whether the prosecution's tactically successful story advanced or hindered the cause of thoughtful and reasoned inquiry in this important case.²¹⁷ Although there was nothing legally improper about the government's narrative construction of reality, on balance, the record suggests that it diminished the trial as an exercise in thoughtful and reasoned inquiry by encouraging the court to analyze the case in reductive terms.

A. CULTIVATING COGNITIVE ERROR

"Narrative is," as one commentator has observed, "a primary cognitive instrument."²¹⁸ Thus, the discipline of psychology offers insights into some of the basic problems with the government's approach.

Research in cognitive psychology has established that when faced with a complex decision, people often use intuitive strategies or "heuristics" to understand the problem and reach a conclusion.²¹⁹ Although heuristics are,

controlling access to the *Windows* platform, should Microsoft be barred absolutely from entering other markets, or from implementing technological innovations that might have the effect of disadvantaging or excluding actual or potential competitors? (4) If not, what types of conduct—for example, exclusive licensing or other potentially exclusionary contractual restrictions on the conduct of licensees, or technological "tying"—should be proscribed for such a firm? and (5) How should the court weigh exclusionary effects of Microsoft's conduct on competitors against procompetitive benefits of such conduct for consumers?

²¹⁵ This is not to say that this describes what actually happens in most litigation. But ideals are worthy of consideration and, in some cases, aspiration, even if institutions often fail to live up to them.

²¹⁶ See generally William Twining, *Narrative and Generalizations in Argumentation About Questions of Fact*, 40 S. TEX. L. REV. 351, 359 (1999) (observing that "[s]tory telling can also be shown to be dangerous in legal contexts in that it can be, and is often, used to violate or evade conventional legal norms about relevance, reliability, completeness, prejudicial effect, etc"). Indeed, it has been observed that some types of narratives should be excluded from certain legal proceedings. See, e.g., Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 365 (1996) ("[V]ictim impact statements are narratives that should be suppressed because they evoke emotions inappropriate in the context of criminal sentencing."); Elaine Scarry, *Speech Acts in Criminal Cases*, in *LAW'S STORIES*, supra note 4, 165, 171 ("the victim impact statement in death penalty cases [and probably in all cases] ought to be eliminated altogether").

²¹⁷ This discussion focuses on the government's narrative because it was the prosecution's story that prevailed in court. This is not to suggest that the defense narrative was any better or worse than the government's narrative in this regard.

²¹⁸ Louis O. Mink, *Narrative Form as a Cognitive Instrument*, in *THE WRITING OF HISTORY* 131 (Robert H. Canary & Henry Kozicki eds., 1978). See also BRUNER, supra note 107 (1990) (arguing that "narrative is . . . an instrument for making meaning"); Donald C. Langevoort, *Taking Myths Seriously: An Essay for Lawyers*, 74 CHI-KENT. L. REV. 1569 (2000).

²¹⁹ See generally Moore, supra note 142, at 276 n.4 ("Heuristics are intuitive strategies or theories that people employ in complex decision-making tasks."); JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic, & Amos Tversky eds., 1999) [hereinafter JUDGMENT UNDER UNCERTAINTY]; NISBETT & ROSS, supra note 141. Recognized heuristics include: (1) the "availability heuristic" (judging "the relative frequency of particular objects or the likelihood of

for the most part, efficient and effective analytical short cuts, psychologists have identified several recurrent cognitive errors to which we are prone when applying them.²²⁰ In its closing argument, the government's rhetorical narrative implicitly encouraged the court to make two such recognized types of cognitive error—"fundamental attribution error" and "misguided parsimony"—in its analysis of the issues presented in the *Microsoft* case.

Fundamental attribution error is "the tendency to attribute behavior to the actor's dispositions and to ignore powerful situational determinants of the behavior."²²¹ The government's narrative cultivated fundamental attribution error by telling a story that: (a) attacked the defendant's character and subjective motives²²² and (b) urged the court to view Microsoft's conduct as the product of the firm's bad character and bad motives.²²³ In this story, the actions Microsoft took to promote its *Internet Explorer* browser over Netscape's *Navigator*, for example, were not legitimate competitive responses to a major situational determinant arising in the firm's business environment, i.e., the emergence of the Internet as a significant factor in personal computing.²²⁴ Instead, the prosecution fostered the impression that Microsoft's conduct to promote *Explorer* was driven by the firm's characterological *dispositions* to "crush" competitors, "rob" consumers, and "disregard" the law.²²⁵

In the government's defense, it could be argued that the prosecution was actually attributing Microsoft's conduct to the situational determinant of the "middleware threat."²²⁶ This argument is not without merit because situational determinants certainly play a significant role in the

particular events" based on "the relative *availability* of the objects or events, that is, their accessibility in the processes of perception, memory or construction from imagination"), *id.* at 18–19; and (2) the "representativeness heuristic" (making assessments regarding the extent to which something is representative of a given category), *id.* at 24.

²²⁰ See generally Elizabeth R. Loftus & Lee Roy Beach, *Human Inference and Judgment: Is the Glass Half Empty or Half Full?*, 34 STAN L. REV. 939 (1982) (book review); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974) ("In general . . . heuristics are quite useful, but sometimes they lead to severe and systematic errors."); Chris W. Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1242–46 (surveying literature on cognitive error in jury decision-making).

²²¹ See NISBETT & ROSS, *supra* note 141, at 31. See also *id.* at 120–27 (reviewing empirical research); JUDGMENT UNDER UNCERTAINTY, *supra* note 219, 135 ("[F]undamental attribution error is the tendency for attributers to underestimate the impact of situational factors and to overestimate the role of dispositional factors in controlling behavior.").

²²² See *supra* Part III.A. See also CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 340–41 (1st ed. 1954) (defining "character" as "a generalized description of one's disposition, or of one's disposition in respect to a general trait such as honesty, temperance, or peacefulness").

²²³ See *supra* Part III.A.

²²⁴ See MS Closing Argument at 17–19.

²²⁵ The government also claimed, among other things, that Microsoft substantially standardized the look and feel of the first screens of PCs shipped with *Windows*, and developed a version of *JAVA* optimized for the *Windows* platform, for the sole purpose of stopping competition.

²²⁶ *Id.*

government's case. But such an interpretation does not account for the government's characterizations of Microsoft as, among other things, dishonest and criminal in temperament.²²⁷ Similarly, if the winning narrative were not substantially based on attributing Microsoft's conduct to the firm's character, it is not clear why the government would urge the court to focus on "insight into Microsoft's *soul*" and to apply this "insight" in order to understand "what was really involved" in the case.²²⁸ In its narrative, the government made the nature of Microsoft's soul a central issue and presented it as a matter for the court to judge.

The second cognitive error that was encouraged by the government's narrative—"misguided parsimony"—is closely related to fundamental attribution error. Misguided parsimony is the tendency to attribute events and actions to unitary, as opposed to multiple, causes.²²⁹ This notion of a unitary cause for all of Microsoft's bad acts played a significant role in the prosecution's story. Indeed, it was part of what made the story so compelling and accessible. As noted earlier, the government characterized Microsoft's conduct vis-à-vis Netscape and Sun in one-dimensional terms:

This was not about efficiency. This was not about better products. This was not about lower prices. This was not about serving consumers. This was about stopping competition.²³⁰

Thus, the cultivation of fundamental attribution error and misguided parsimony complemented each other. The former encouraged the court to understand Microsoft's conduct as a result of its character, while the latter encouraged the court to discount the importance of other factors.

B. WHY IT MATTERS

Of course, there is nothing new or exceptional about trial attorneys attacking the character of a defendant and intimating, in one way or another, that the defendant's bad acts principally emanate from his malevolent soul. So even if the government's narrative invited fundamental attribution error and misguided parsimony in the *Microsoft* case, it might reasonably be asked why we should care. We should care, first, because it raises the risk of an unjust result. Bad character is not a violation of the antitrust laws. But fundamental attribution error and

²²⁷ *Id.*

²²⁸ Government Closing Argument II at 30 (emphasis added).

²²⁹ NISBETT & ROSS, *supra* note 141, at 127–28. This type of cognitive error often arises, for example, in judgments regarding the causes of political events. *Id.* at 130. For example, some may assert that "Bush lost the '92 election because he raised taxes" or "Clinton was impeached for having an affair with an intern," even though a careful consideration of the evidence would reveal multiple causes for each event.

²³⁰ Rebuttal at 99. Throughout its closing argument, the government urges the court to view Microsoft's conduct in dichotomous terms: Either Microsoft was engaging in "normal competitive" conduct, or acting solely to thwart competition. *See, e.g.*, Government Closing Argument II at 31, 60.

misguided parsimony increase the likelihood that a court will judge the *actor*, rather than judging his *acts*.²³¹

A second concern is that fundamental attribution error and misguided parsimony, especially in the context of evaluating corporate policies, are highly reductive and simplistic. In the government's narrative, Microsoft's senior managers are driven only by the disposition to thwart competition and innovation. Concerns such as efficiency, quality, reputation/good will, technological potentialities or constraints, internal research and development trajectories, ease of use, or other customer preferences *never* enter into their decision-making process.²³² Moreover, even if one accepts the government's portrait of the inner life of the firm's leaders, it would be of no more than passing relevance. *All* firms may be presumed to want to win in the marketplace.²³³ Hence the primary focus in monopolization cases is appropriately placed not on subjective motives, but on the conduct by which monopoly is preserved and its competitive effects.²³⁴ The

²³¹ See WILLIAM TWINING, *RETHINKING EVIDENCE* 231, 243–45, 259 (1994) (discussing the precept that courts are called upon to “judge the act not the actor”); Paul Gerwitz, *Victims and Voyeurs: Two Narrative Problems at the Criminal Trial*, in *LAW'S STORIES*, *supra* note 4, at 144 (“a central part of the prevailing ideology of law is that it is a realm of reason, not emotion”). Although there is no way to determine how much of it was inspired by the government's trial advocacy, statements indicating Judge Jackson's poor opinion of Microsoft's character helped to convince the D.C. Circuit to remove him from the case because of the appearance of bias. See *United States v. Microsoft*, 253 F.3d 34, 109 (D.C. Cir. 2001) (“Reports of . . . interviews [Judge Jackson gave while the trial and remedy phases were in progress] have the District Court Judge describing Microsoft's conduct, with particular emphasis on what he regarded as the company's prevarication, hubris and impenitence.”); *id.* at 110 (“The Judge told a college audience [a few months after the final judgment] that ‘Bill Gates is an ingenious engineer, but I don't think he is that adept at business ethics.’”). In the utterances that were cited by the Circuit Court, it is difficult to avoid the impression that the judge found fault with the character of Bill Gates and his Microsoft colleagues.

²³² Significantly, the government rejected the possibility that Microsoft, like many other firms, might have developed innovations (such as integrating *IE* into *Windows*) for the purpose of gaining advantage over competitors, but in so doing, improved its products and benefited consumers. Thus the prosecution argued, for example, that *all* of the claimed benefits of integrating *IE* with *Windows* could be realized without any technological integration of the two programs. Compare Government Closing Argument II at 61–63, with *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998) (finding that there was a plausible efficiency in Microsoft's bundling of *IE* with *Windows*).

²³³ See *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989) (“Firms ‘intend’ to do all the business they can, to crush their rivals if they can If courts use the vigorous, nasty pursuit of sales as evidence of forbidden ‘intent,’ they run the risk of penalizing the motive forces of competition.”); Herbert Hovenkamp, *The Monopolization Offense*, 61 OHIO ST. L.J. 1035, 1039 (2000) (“any competitively energetic firm ‘intends’ to prevail over its actual or potential rivals. . . . [I]n most circumstances involving monopoly, the ‘intent’ to create a monopoly anticompetitively cannot be distinguished from the intent to do so competitively.”).

²³⁴ See generally *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983) (Breyer, J., holding that subjective intent is irrelevant); Hovenkamp, *supra* note 233, at 1039 (“[T]he critical point is that [in the antitrust analysis of conduct] the nature and consequences of a particular practice are the vital consideration, not the purpose or intent. Qualifying anticompetitive conduct must always be established first by objective facts about the relevant market and the defendant, quite apart from any manifestation of subjective intent.”). Before becoming an expert witness for the government in the *Microsoft* case, Professor Franklin Fisher also argued that intent should not play a role in monopolization cases. See FRANKLIN M. FISHER, JOHN J. MCGOWAN & JOAN E. GREENWOOD, *FOLDED, SPINDLED, AND MUTILATED: ECONOMIC ANALYSIS AND U.S. v. IBM* 272 (1983). *But see also*

government's approach urged the court to discount evidence of multiple causes and varied competitive effects, and thus to assume away the situational complexities that may have informed Microsoft's conduct. To a significant extent, that appears to be what the court did. Judge Jackson's voluminous findings of fact include a series of statements in which he: (1) discounts or ignores evidence of alternative explanations for, or consumer benefits from, Microsoft's conduct; (2) purports to have discerned Microsoft's "true motive" for the conduct; and (3) finds the true motive to be anticompetitive.²³⁵

As noted above, the government's attempts to focus the court's attention on judging the defendant's character (its "dispositions") was neither exceptional, nor legally improper. But to the extent that it directed the court's limited time and attention away from a more searching consideration of market dynamics, conditions of competition, relevant economic theory, and empirical evidence, the goals of reasoned inquiry and understanding the momentous issues before the court were not well served. This is not to say that a deeper consideration of market conditions necessarily would, or should, have changed the result in the *Microsoft* case. But it might have improved the trial and the resulting opinion of the court as guides for understanding the issues arising in future antitrust actions against high technology firms in industries characterized by dynamic competition.

Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S. CAL. L. REV. 657, 659 (2001) (rejecting subjective intent inquiry, but arguing that requiring a showing of specific intent, inferred from conduct, "minimizes the costs of error in applying section 2").

²³⁵ See, e.g., *United States v. Microsoft*, 84 F. Supp. 2d 9, 44 (D.D.C. 1999) (asserting that "while Microsoft might have bundled Internet Explorer with Windows at no additional charge even absent its determination to preserve the applications barrier to entry, that determination was *the main force driving its decision* to price the product at zero") (emphasis added); *id.* at 46 (discounting the notion that Microsoft gave away and promoted *IE* in hopes of generating future revenue, the court states that "*the purpose of the effort* had little to do with attracting ancillary revenues and everything to do with protecting the applications barrier from the threat posed by [*Navigator* and *JAVA*]" (emphasis added); *id.* at 65 (noting that Microsoft eased certain restrictions on OEM modifications of the boot sequence and first screens in 1998, the court declared: "Either Microsoft stopped caring about the consistency of the Windows experience in 1998, when it tempered its restrictions on modifications to the boot sequence, or preserving consistency was never Microsoft's *true motivation* for imposing for imposing those restrictions in the first place.") (emphasis added); *id.* at 74 ("The *real motivation* behind the exclusionary terms in the Referral Server agreements was *Microsoft's conviction* that even if IAPs ["Internet Access Providers"] were compelled to promote and distribute Internet Explorer, the majority of their subscribers would nevertheless elect to use Navigator if the IAPs made it readily available to them.") (emphasis added); *id.* at 106 (regarding Microsoft's development of "its own Java development tools and its own Windows-compatible Java runtime environment" [that allowed Java applications to run faster than with Sun's Java], the court asserts: "[F]ar from being the unintended consequence of an attempt to help Java developers more easily develop high-performance applications, *incompatibility* was the *intended result of Microsoft's efforts*." (emphasis added).

V. CONCLUSION

Even the most technical and complex antitrust litigation is fundamentally an exercise in storytelling. It follows, then, that if we want to understand what happens in such litigation, we need to understand the narratives that compete for the court's heart and mind. Although its impact can never be quantified, an examination of the *Microsoft* case tends to support the notion that narrative can be of substantial tactical significance. But the stories lawyers tell in court can also affect the rigor and value of common-law antitrust decision-making, and hence, the doctrinal development of antitrust law. Although it is fitting to recognize and admire the tactical brilliance the government demonstrated in the *Microsoft* case, it is difficult to escape the conclusion that the cause of rigorous, impartial and reasoned inquiry suffered in the telling of the prosecution's excellent story.