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OF COURTROOMS & CLASSROOMS

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I. INTRODUCTION

Trial planning and preparation focus on the creation of a story the fact-finder can follow throughout the course of the trial.¹ Storytelling and narrative are essential to capturing the fact finders' attention and ultimately convincing them that one side should prevail over the other.² Trial presentation through storytelling is about persuasion—it is the essence of the trial process to persuade the fact-finder which party should win.³ Done well, the story an attorney tells over the course of the trial draws the juror

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¹ Stephanie Kane, *Narrative, the Essential Trial Strategy*, 34 LITIG. 52, 53 (2008).

² *Id.* See generally JULIE DIRKSEN, DESIGN FOR HOW PEOPLE LEARN 131–40 (2016) (describing how and why storytelling works as a teaching tool); JONATHAN GOTTSCHALL, THE STORYTELLING ANIMAL: HOW STORIES MAKE US HUMAN (2012); PHILLIP N. MEYER, STORYTELLING FOR LAWYERS (2014); Sara Gordon, *What Jurors Want to Know: Motivating Juror Cognition to Increase Legal Knowledge & Improve Decisionmaking*, 81 TENN. L. REV. 751 (2014).

³ Kane, *supra* note 1 at 53.

in, helps her to understand the client, and convinces her to decide in the client's favor.⁴ Yet, even with the benefit of compellingly told stories, a courtroom can be an inherently challenging environment for a jury—the days can be long and filled with unfamiliar concepts and emotionally draining details. In the face of such considerations, trial attorneys must find ways to influence how a juror hears and accepts the information presented over the course of a trial.

Throughout the 1950s and 1960s, comprehensive juror studies debunked the philosophical ideal that juries are unbiased, neutral decision-makers.⁵ Not surprisingly, the research demonstrated that jurors bear the same characteristics as the general population.⁶ Not only do jurors have the same capacity for listening and comprehending new information as their neighbors on the street, they also color their decision-making with their own experiences, beliefs, and biases.⁷

In the same way that jurors reflect the characteristics of the general population, they also bear striking similarities to learners in traditional lecture-based teaching environments. Broadly conceived, the juror experience looks very much like a classroom learning experience. Teachers, in the form of lawyers and judges, present carefully prepared information through witnesses and other evidence to influence perception, create empathy, and impact the eventual outcome of the jurors' understanding of the case. The courtroom experience is a mirror of a classroom community, where in the microcosm of a specific listening environment there are shared moments of learning filtered by individual beliefs, biases, and backgrounds.

This Paper argues that if trial practitioners view jurors from the perspective of adult learners, not simply passive listeners, attorneys may be able to increase the persuasive value of their message.⁸ Part I introduces

⁴ *Id.* at 52.

⁵ JOHN GUINTEHER, *THE JURY IN AMERICA* xiii (1988); HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 101–02 (1971). *See generally* ROGER G. BARKER, *HABITATS, ENVIRONMENTS, & HUMAN BEHAVIOR* (1978); URI BRONFENBRENNER, *THE ECOLOGY OF HUMAN DEVELOPMENT* (1979); RUDOLF H. MOOS, *THE HUMAN CONTEXT: ENVIRONMENTAL DETERMINANTS OF HUMAN BEHAVIOR* (1985).

⁶ GUINTEHER, *supra* note 5, at 230–31.

⁷ *Id.* *See also* HENRY A. GIROUX, *TEACHERS AS INTELLECTUALS: TOWARD A CRITICAL PEDAGOGY OF LEARNING* 26 (1988) (describing how current conceptions of education fail to address that often the manner in which a student perceives the world does not always reflect the actual structure and content of the world); Gordon, *supra* note 2, at 754; Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991); Paul T.P. Wong & Bernard Weiner, *When People Ask "Why" Questions and the Heuristics of Attributional Search*, 40 J. PERSONALITY & SOC. PSYCHOL. 650 (1981).

⁸ *See* Timothy Maher, *How Jurors Learn: Applying Learning Design to Trial Practice*,

the reader to andragogical theory as a teaching and learning theory. Part II draws the parallels between a courtroom during a jury trial and the more traditional lecture-based classroom. Part III provides a brief discussion of the similarities and differences between jurors and students in a classroom setting. This section illustrates the connection between the similar traits and similar responsibilities of students and jurors in their respective learning environments. Part IV does the same for the lawyer and the classroom teacher. Finally, Part V initiates the discussion of how persuasion in a trial-based setting can be served by approaching the courtroom like a classroom. This section introduces Jack Mezirow's theory of the disorienting moment and discusses how attorneys might use the disorienting moment to incorporate some andragogical principles into trial planning.

Throughout, this Paper offers a framework for systematically exploring how adult learning theory might influence trial practice. Attorneys who approach their trial preparation from an adult learning perspective may be able to create more desirable and understandable learning experiences that could affect how a jury decides a case.

II. INTRODUCTION TO ANDRAGOGICAL THEORY

A discussion of adult learning should necessarily begin with an exploration of what "learning" is comprised. From a physiological perspective, learning may be as easy to articulate as changes in how neural networks in the brain operate.⁹ Malcolm Knowles, credited with popularizing adult learning theory in the United States, uses a simpler definition, stating that learning "is the act or process by which behavioral change, knowledge, skills, and attitudes are acquired."¹⁰ Whichever conceptualization one prefers, it is generally accepted that learning is an ongoing experience that builds upon itself as a person ages and gains more experience.¹¹

Learning does not stop when a person formally exits the educational

WOLF TECH. SERV. INC. (Sept. 1, 2015), <http://www.wolftechnical.com/wp-content/uploads/2017/02/How-Jurors-Learn.pdf>.

⁹ See TERRY DOYLE, *HELPING STUDENTS LEARN IN A LEARNER-CENTERED ENVIRONMENT: A GUIDE TO FACILITATING LEARNING IN HIGHER EDUCATION* 5, 9–10 (2008) (citing J. RATEY, *A USER'S GUIDE TO THE BRAIN: PERCEPTION, ATTENTION, AND THE FOUR THEATERS OF THE BRAIN* (2002)).

¹⁰ MALCOLM S. KNOWLES, ELWOOD F. HOLTON III & RICHARD A. SWANSON, *THE ADULT LEARNER: A DEFINITIVE CLASSIC IN ADULT EDUCATION AND HUMAN RESOURCE DEVELOPMENT* 10 (5th ed., 1998) (citing ROBERT D. BOYD & JEROLD W. APPS, *REDEFINING THE DISCIPLINE OF ADULT EDUCATION* (1980)) [hereinafter KNOWLES, *THE ADULT LEARNER*].

¹¹ MALCOLM S. KNOWLES, *THE MODERN PRACTICE OF ADULT EDUCATION: FROM PEDAGOGY TO ANDRAGOGY* 44 (1980) [hereinafter KNOWLES, *THE MODERN PRACTICE*].

system. Some people seek new formal educational experiences while others continue to learn from their environments while simultaneously further developing their functional and theoretical knowledge.¹² Andragogy, or adult learning theory,¹³ is a theoretical basis for understanding how best to support adults¹⁴ as they continue to learn over the course of their lifetime.¹⁵ Critical to adult learning theory is the premise that the student is the center of the inquiry, not the subject matter being taught.¹⁶ Eduard Lindeman's ground-breaking work *The Meaning of Adult*

¹² *Id.* at 25 (explaining that adult education is hard to define because it has no set curriculum and often occurs in non-traditional spaces under non-traditional names like "staff development" or "in-service education"). Knowles is clear to identify that andragogy is neither separate from nor superior to pedagogy as a teaching and learning theory. Rather he argues that andragogy is a system of approaches to teaching different groups of people that may at times encompass and adopt pedagogical strategies. *Id.* at 59.

¹³ KNOWLES, *THE ADULT LEARNER*, *supra* note 10, at 59–60 (reviewing the history of use of the word "andragogy" as opposed to "pedagogy" to refer to adult learning); KNOWLES, *THE MODERN PRACTICE*, *supra* note 11, at 42.

¹⁴ Adult is defined differently across cultures and situations. Jack Mezirow defines "adult" as anyone old enough to be held responsible for her actions. Jack Mezirow, *Learning to Think Like an Adult: Core Concepts or Transformation Theory*, in *LEARNING AS TRANSFORMATION: CRITICAL PERSPECTIVES ON A THEORY IN PROGRESS* 24 (Mezirow, ed., 2000) [hereinafter Mezirow, *Learning to Think*]. For the purposes of this paper, I use the term to mean anyone old enough to be called for jury duty.

¹⁵ See K. PATRICIA CROSS, *ADULTS AS LEARNERS* 222–27 (1981); KNOWLES, *THE MODERN PRACTICE*, *supra* note 11, at 43.

¹⁶ Several writers have explored the value of, and tensions inherent within, using andragogical principles in conceiving and planning legal education. Because of this foundational discussion, legal educators can determine for themselves if the principles of adult learning theory would apply in their classrooms. At a minimum, using adult learning theory in the law school context creates space for legal educators to assess the relative maturity of their students, each individual student's capacity for learning, and what techniques might best serve the educator's goals when viewed through the lenses of maturity and capacity. In the clinical teaching context, adult learning theory offers educators a tool for inspiring students' understanding of the political and social contexts in which their clients live out their daily existences. Taken together, considering the application of adult learning theory to the legal classroom generally and the clinical classroom specifically opens the door to contemplating other places where legal processes and theories intersect with legal practice. See, e.g., Linda S. Anderson, *Incorporating Adult Learning Theory into Law School Classrooms: Small Steps Leading to Large Results*, 5 APPALACHIAN J.L. 127 (2006); Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321 (1992); Paul S. Ferber, *Adult Learning Theory and Simulations: Designing Simulations to Educate Lawyers*, 9 CLINICAL L. REV. 417 (2002); Linda Morton, Janet Weinstein & Mark Weinstein, *Not Quite Grown Up: The Difficulty of Applying an Adult Education Model to Legal Externs*, 5 CLINICAL L. REV. 469 (1999); Fran Quigley, *Seizing the Disorienting Moment: Adult Learning and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37 (1995).

Education,¹⁷ originally published in 1926, described five principles of adult experience that have formed the foundation for the bulk of adult learning theory today. Namely, Lindeman described that adults are motivated to learn when they have a need or experience that learning will satisfy.¹⁸ Lindeman explained that adults tend to orient their learning in very life-centered ways, that experience is the most fertile source of adult learning, and that adults want to be self-directed in their learning.¹⁹ Finally, Lindeman described that individual differences among people grow larger and more significant as people age such that optimal adult learning takes into account difference in style, time, pace, and place of learning.²⁰ Malcolm Knowles expanded on Lindeman's theory and described some other characteristics of andragogy that distinguish it from pedagogy, including the difference between young learners' dependence on educators for information and adult learners' movement from dependence to self-direction. Knowles also explored how varying levels of experience in the learner and the impact that experience has on motivation and readiness to learn, and the perception of learning as compulsory or voluntary.²¹

III. TRIAL AS CLASSROOM

Anthropologists view education as a way to train people how to think, feel, and act in a given cultural context.²² Learners are continually acquiring knowledge through the culture in which they grow.²³ Culture and knowledge acquisition exist in a dynamic relationship—the cultural influences students bring to the learning process affect what they gain from an educational experience.²⁴ Some of the most famous of the world's ancient educators—Confucius, Socrates, and Plato to name a few—

¹⁷ See generally EDUARD C. LINDEMAN, *THE MEANING OF ADULT EDUCATION* (2013).

¹⁸ KNOWLES, *THE ADULT LEARNER*, *supra* note 10, at 40 (summarizing Lindeman's key assumptions about adult learners).

¹⁹ *Id.*

²⁰ *Id.*

²¹ KNOWLES, *THE MODERN PRACTICE*, *supra* note 11, at 43–44.

²² Bradford S. Woods & Peter Demerath, *A Cross-Domain Explanation of the Metaphor "Teaching as Persuasion,"* 40 *THEORY INTO PRAC.* 228, 230 (2001). See GIROUX, *supra* note 7, for an in-depth discussion of how education acts as an agent of socialization.

²³ Woods & Demerath, *supra* note 22, at 228.

²⁴ P. Karen Murphy, *Teaching as Persuasion: A New Metaphor for a New Decade*, 40 *THEORY INTO PRAC.* 224 (2001); Dennis M. McInerney, *The Motivational Roles of Cultural Differences & Cultural Identity in Self-Regulated Learning*, in *MOTIVATION AND SELF-REGULATED LEARNING: THEORY, RESEARCH, & APPLICATIONS* 370 (Schunk & Zimmerman, eds., 2008) ("Personal, social, and cultural histories shape student engagement. These histories include gender, class, race, religion, and family."). See also *id.* at 393 (describing specific cultural influences and their potential impact on learning)

approached teaching from the perspective that learning was an engaged activity of mental inquiry, not a submissive process wherein the learner absorbed information as an educator presented it.²⁵

A popular teaching and learning metaphor describes how educators support students in building the intellectual scaffolding necessary for continued learning over a lifetime.²⁶ As the name suggests, the metaphor presumes that educators are providing, and students are building upon, a solid foundation of knowledge and understanding that allows not only for immediate learning but also future growth.²⁷ Over time, the intricate network of knowledge acquisition and complex development of understanding provides a student with the capacity to transfer learning across disciplines and environments.²⁸ The metaphor takes as a given that people actively construct deeply personal meanings around the information with which they are presented.²⁹ It also presumes that information is not simply received by the mind of another in passive acts of absorption; rather, that there is an inherently engaged quality to knowledge acquisition and learning over the course of an educational experience.³⁰

The scaffolding metaphor is limited, however, and may not adequately consider students' pre-existing bases of knowledge and beliefs or the influence of that knowledge and belief on the topic at hand.³¹ Also, the metaphor takes for granted a certain teacher-student binary or hierarchy; one party is engaged almost exclusively in imparting information to another party who may either accept or reject it.³²

In response to the scaffolding metaphor, there has been some movement in the last decade to examine teaching through a different metaphoric lens, that of teaching as persuasion.³³ The metaphor begins from the premise that educating learners in a classroom is a fundamentally persuasive process.³⁴ That is, while educators may not be in the business of changing

²⁵ KNOWLES, *THE ADULT LEARNER*, *supra* note 10, at 35.

²⁶ "Learning" is an interesting concept as its definition encompasses several different ideas; it is simultaneously a product, process, and function. The aspect of the definition upon which any one educator focuses is a matter of interpretation and prioritization. KNOWLES, *THE ADULT LEARNER*, *supra* note 10, at 11.

²⁷ Patricia A. Alexander et al., *Teaching as Persuasion*, 18 *TEACHING & TCHR. EDUC.* 795, 797 (2002); DIRKSEN, *supra* note 2 at 42-43.

²⁸ Murphy, *supra* note 24, at 224.

²⁹ DIRKSEN, *supra* note 2, at 50.

³⁰ Alexander, *supra* note 27, at 797.

³¹ *Id.*

³² *Id.*

³³ See generally 40 *THEORY INTO PRAC.* 222, 222-86 (2001) (discussing these concepts generally throughout the entire volume).

³⁴ See generally *id.*

belief systems, they do need to persuade students that, on some level, there is value to the lessons students are learning.³⁵ Buy-in to the learning process allows a student to be successful in whatever way the educator defines.³⁶ Viewing persuasion as a teaching goal (and conversely, teaching as a tool of persuasion) allows an educator to reflect on how the learning environment necessarily creates space wherein differing values are placed on certain content, concepts, or arguments.³⁷ While learner buy-in remains an important component of the metaphor, the teaching as persuasion lens also allows for a critical examination of the socially-constructed values that are placed on what information is presented.³⁸

In addition, the teaching as persuasion parallel illuminates the different roles that teacher and student may play over the course of a learning experience. Persuasion is an invitation to join a position, to take on a perspective, even if only temporarily. It involves, to some extent, a greater interdependency between the educator and the learner and thus, some flexibility in approaching the educator-learner relationship.³⁹ Any learning that occurs is dependent on the knowledge, beliefs, and motivations the learner brings to any new environment,⁴⁰ all of which influence how and at what pace a student can receive information. Learning is primarily an act of will or acceptance; learning happens because a student allows it.⁴¹ Thus, the teacher must persuade the student, at a minimum, to listen and to decide whether buy-in will occur.

While it is generally accepted that persuasion can occur through a variety of methods,⁴² in order for persuasion to be effective the listener must be able to both internalize the message and process it carefully.⁴³ Lasting persuasion occurs when processing is “deliberative.” That is, the listener

³⁵ For an interesting exploration of the teaching as persuasion metaphor, including an examination of teaching and learning hierarchies, a discussion of the potential negative implications of viewing teachers as “persuaders,” and a review of the persuasion metaphor in science classrooms, see Woods & Demerath, *supra* note 22.

³⁶ See generally THEORY INTO PRAC., *supra* note 33.

³⁷ Alexander, *supra* note 27, at 796.

³⁸ *Id.*

³⁹ Donna Alvermann, *Teaching as Persuasion: The Worthiness of the Metaphor*, 40 THEORY INTO PRAC. 278, 278 (2001).

⁴⁰ Alexander, *supra* note 27, at 797.

⁴¹ *Id.*

⁴² See JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, & DECISION MAKING* 116 (2012).

⁴³ *Id.* at 116 (citing to RICHARD E. PETTY & JOHN CACIOPPO, *ATTITUDES AND PERSUASION: CLASSIC & CONTEMPORARY APPROACHES* (1996)); Shelly Chaiken, *Heuristic Versus Systematic Information Processing and the Use of Source Versus Message Cues in Persuasion*, 39 J. PERSONALITY & SOC. PSYCHOL. 752, 752–53 (1980).

systematically considers the message and its implications; the listener not only hears the message but understands why it is important.⁴⁴ Deliberative processing occurs when a listener weighs the pros and cons of the message or proposed decision to be made, when the listener gives ample attention to multiple perspectives, and when the listener carefully examines the evidence for the arguments offered.⁴⁵ When a listener is deliberative in his consideration of the message, the message is more likely to last and influence future decision-making.⁴⁶ In contrast, there is a more superficial path to persuasion that relies more on intuition.⁴⁷ The route tends to use heuristic cues to engage the listener more than the actual quality or substance of the message being delivered.⁴⁸ Superficial processing occurs when a person uses surface strategies or cues to make decisions about what to value or give weight to in a presentation or argument.⁴⁹ There is no corresponding weighing or deep understanding of the implications of a decision.

What is true for persuasive messaging is also true for teaching and learning. Learning occurs when a student can internalize the presented information, process that information, and apply it or transfer it to other contexts.⁵⁰ Effective persuasion and effective teaching, then, have the same end goal in mind—encourage the listener to engage deliberatively or deeply in taking in information and making decisions about what to do with it.

Trial work is located right in the center of the teaching-as-persuasion metaphor. Reflecting back on the anthropological perspective on education, trial attorneys' lawyering work is to influence how a juror thinks, feels, and votes.⁵¹ While there is some acceptance of teaching as a persuasive

⁴⁴ ROBBENNOLT & STERNLIGHT, *supra* note 42, at 116. See also Murphy, *supra* note 24, at 224–25 (describing how deep learning and transfer occur when students can elaborate on the presented information and connect that information to existing knowledge and/or recognize how to connect the information to other situations).

⁴⁵ ROBBENNOLT & STERNLIGHT, *supra* note 42, at 116 (“Persuasion is dependent on the content of the message, the decision maker is more likely to distinguish strong and weak arguments, and the strength of the arguments is likely to be influential.”)

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Murphy, *supra* note 24, at 225. Heuristics or schema cannot be ignored; they exist in both beneficial and detrimental contexts. At their core, however, they allow for people to process information quickly and efficiently to make sense of the world around them. For a detailed discussion of deliberative and superficial information processing, see ROBBENNOLT & STERNLIGHT, *supra* note 42, at 115–40.

⁵⁰ Kathleen Taylor, *Teaching with Developmental Intention*, in *LEARNING AS TRANSFORMATION: CRITICAL PERSPECTIVES ON A THEORY IN PROGRESS* 158 (Mezirow, ed., 2000) (discussing superficial information retention as opposed to deep inquiry).

⁵¹ See Woods & Demerath, *supra* note 22, at 230.

endeavor, there has not been a corresponding examination of the value of learning theory in approaching persuasive messaging for attorneys. An individual's ability to process a persuasive message affects the likelihood that the speaker's intended effect will result.⁵² A good trial attorney, through well-tested and long-proven trial advocacy methods, teaches a jury what is important about a case while simultaneously attempting to persuade the jury how to decide. Import and persuasion walk together through a trial from start to end.

The interdependency of the lawyer and juror in this context is abundantly clear. Persuasive trial technique requires juror buy-in in the same way that teaching requires student buy-in. Thus, the two ideas, persuasion in the courtroom and the metaphor of teaching as persuasion, are parallel concepts. Jury trials are, by their nature, a cooperative exercise. Attorneys plan and evaluate the way they present information and what pieces of physical and testimonial evidence they will emphasize. They must be able to craft a convincing story while simultaneously abstracting out the relevant law and facts.⁵³ Persuasive trial technique guides the juror toward an outcome, but ultimately, the effectiveness of any trial strategy is dependent on the jury accepting what the lawyer is presenting.

How much or how little a juror allows learning to happen is shaped, as mentioned above, by any number of characteristics including race, gender, political and religious orientation, class, and a myriad of other factors.⁵⁴ This is true throughout the trial; as critical as the story the lawyer tells through witnesses, evidence, and argument, the external and internal attributes of the individuals comprising the jury influence just as strongly how any individual juror may be inclined to vote. For instance, a well-developed trial strategy can serve a lawyer's knowledge goals—imparting information about the relevant law that impacts how a case should be decided—and critical thinking goals—helping jurors to consider the explanatory power of facts relative to the law as it is presented.⁵⁵ But, the

⁵² Murphy, *supra* note 24, at 225.

⁵³ KNOWLES, *THE ADULT LEARNER*, *supra* note 10, at 89 (describing some fundamentals of educational design).

⁵⁴ DOYLE, *supra* note 9, at 141. See also NANCY R. HOOYMAN & BETTY J. KRAMER, *LIVING THROUGH LOSS: INTERVENTIONS ACROSS THE LIFE SPAN* 78 (2006) (describing the concept of cultural nests and how any one individual is nested within several different frames of reference from family structure to religious affiliation); DEBORAH J. STIPEK, *MOTIVATION TO LEARN* 44 (1988) (describing how students learn from parents and other authority figures and institutions what to value and how to behave).

⁵⁵ There is room for further discussion of whether fostering critical thinking skills is a larger goal of trial strategy. On the one hand, it seems inherent to the trial process. As competing versions of a story are told, threaded together in contradictory versions, a lawyer may want the jurors to be able to consider the relative merits of the competing version of the story—to comprehend that the stories are being told based on the trial theory has gathered,

pre-existing characteristics of jurors, both uncontrollable and only superficially knowable, influence how a juror receives the information and the law presented at trial.⁵⁶ As a result, the attorney's ability to meet her knowledge and critical thinking goals are reliant on things the lawyer can control in only limited ways. Trial attorneys are often faced with situations where a fact-finder must have two different, potentially contradictory conceptions of the information an attorney presents at trial: one conception that comports with an understanding of the ideas presented and one that reflects their personal belief system or systems.⁵⁷

Persuasion plays a vital role in reconciling those conceptions because it is a rational process based on reasoned argumentation.⁵⁸ It involves convincing individuals to look differently or more deeply at a topic. In the courtroom, persuasive messaging is an attempt to influence the fact-finder's position on a topic. In theory, the trial process separates emotion from decision-making; trials attempt in some ways to separate performance from emotional expression and ask the juror to focus only on their most explicit purpose—deciding the outcome of the trial. Persuasion stems from the understanding the learner develops about the information presented and the two exist together in a dynamic relationship.⁵⁹ Persuasion, however, is

valued, and shared certain information relevant to one side—and discount them. However, the attorney is simultaneously attempting to tell her story in a way that discourages critical analysis or deconstruction; the attorney wants the jury to accept uncritically her version of the story while discounting the other side's version.

⁵⁶ The dynamic is further complicated by the reality that jury duty is compulsory, an obligation of responsible citizenship as defined by and ordered by the state. As learning is an act of acceptance, any willingness to accept what a lawyer must teach may be influenced by a juror's attitude about jury service. Brian H. Bornstein & Edie Greene, *Jury Decision Making: Implications For and From Psychology*, 20 CURRENT DIRECTIONS IN PSYCH. SCI. 63, 65 (2011).

⁵⁷ Clark A. Chin & Ala Samarapungavan, *Distinguishing Between Understanding & Belief*, 40 THEORY INTO PRAC. 237, 237 (2001).

⁵⁸ *Id.* at 239.

⁵⁹ See Patricia Cranton, *Individual Differences and Transformative Learning*, in LEARNING AS TRANSFORMATION: CRITICAL PERSPECTIVES ON A THEORY IN PROGRESS 182 (Mezirow, ed., 2000). Even as it is critical to persuasion, 'understanding' is an inherently nebulous concept. It is a word thrown around to describe something that is essentially indescribable, constantly changing, and somewhat evasive. 'Understanding' is more complicated than just comprehending facts and knowing how the controlling law interacts with those facts. In its noun form understanding reflects several different values: application of the law as well as empathy toward the client and reflection on the information presented. Given its flexible nature, how do trial attorneys create understanding on the part of the fact-finder in a meaningfully persuasive way? Because the fact-finder usually sits as a passive recipient of information the attorneys pick and choose to provide it, how do trial attorneys create an atmosphere where the fact-finder can begin to understand her client's case in a way that leads to the verdict or findings she seeks? See, e.g., MICHAEL HUNTER SCHWARTZ,

inherently an emotional process; even logic and reason are based on values which stem from a foundation of emotion.⁶⁰ Emotion and reason play a large role in the effectiveness of a persuasive message, which may thus influence understanding and judgments.⁶¹

IV. JURORS AS LEARNERS

All people move through the world taking in information, interpreting it, resolving ambiguities, and making choices about how to address whatever messages they receive over the course of a given experience.⁶² The nature of the human condition is such that the data a person is processing at any articulated point in time is filtered through a variety of lenses shaped by multiple factors including education, belief systems, and personal characteristics. Information processing is an inherently subjective process because perception and interpretation differ between individuals.⁶³

A traditional lecture-based classroom, whether it be elementary, high school, college, or graduate school, can be a diverse environment. Language, culture, race and ethnicity, and physical and learning ability all shape how students approach the work of learning. Students entering orthodox classrooms interpret the world around them and the merit of any educational setting through the lenses of their personal characteristics and history. A student listens to one teacher who has chosen what information to provide and what information to leave out. There is a measure of trust in the student-teacher dynamic in that the student is expected in various ways to repeat back to the teacher the perspective from which the educator has approached the topic. In addition, it is the job of the student to learn in whatever way the educator is asking. Successful performance of learning can be measured through testing or the use of other assessment tools. Throughout the experience, however, how much information students can

SOPHIE SPARROW & GERALD HESS, *TEACHING LAW BY DESIGN* 18 (2009); Jeffrey Berkowitz, *Breaking the Silence: Should Jurors be Allowed to Question Witnesses During Trial*, 44 VAND. L. REV. 117, 122 (1991); Burkhard Shafer & Olav K. Wiegand, *Incompetent, Prejudiced, & Lawless? A Gestalt-Psychological Perspective on Fact Finding in Law as Learning*, 3 L. PROBABILITY & RISK 93 (2004).

⁶⁰ See GIROUX, *supra* note 7, at 29 (discussing how traditionally conceived schooling demands the separation of emotion from performance, the performance being becoming a functioning member of adult society).

⁶¹ ROBBENNOLT & STERNLIGHT, *supra* note 42, at 46 ("But it would be virtually impossible to do away with the effects of emotion. Emotions inevitably influence how events are perceived and remembered. . .").

⁶² See generally KNOWLES, *THE ADULT LEARNER*, *supra* note 10, at 28 (discussing Carl Jung's conceptualization of human consciousness).

⁶³ Ayumi Yoshikawa, *Subjective Information Processing: Its Foundations and Applications*, 6 INT'L J. BIOMED. SOFT COMPUTING & HUM. SCI. 75, 76 (2000).

take in and when is influenced by the subtle and not-so-subtle impact of a lifetime of experiences.

Adult learners are also social and emotional beings who enter a learning environment with years of experience, pre-existing notions of how the world works and why it works that way, biases, and personal characteristics that may make it harder or easier for them to engage in an educational setting.⁶⁴ Adult learners may demand more independence in directing their learning, but they are still subject to a similar student-teacher dynamic as a younger student.

What is true for students and adult learners in a classroom listening to a teacher is true for jurors sitting in a courtroom observing lawyers presenting cases at trial.⁶⁵ Throughout the course of testimony, opening statements, and closing arguments, jurors construe meaning around the information and arguments presented by the lawyers.⁶⁶

There is a tremendous amount of responsibility placed on the fact-finder during trial.⁶⁷ The juror, with little or no experience in the law, is expected to absorb doctrine, theory, and multiple versions of case facts as presented by attorneys and witnesses.⁶⁸ The juror is immediately required to make weighty decisions about other people's lives by applying the relevant law accurately and fairly.⁶⁹ Yet trial lawyers do not always present their arguments in a manner that fosters or supports the juror's responsibility. Consequently, the juror can find herself faced with a disconnect between the sterile, sometimes convoluted expressions of law and the practical realities of human experience when those experiences must fit into legal boxes. That disconnect is a significant barrier to understanding and thus makes persuasion that much more difficult to achieve.

At trial, jurors face a challenging situation.⁷⁰ They are placed in an unfamiliar and possibly uncomfortable environment for long hours while simultaneously tasked to understand and critically evaluate testimony, contradictory arguments, physical evidence, and judicial rulings.⁷¹ Even in

⁶⁴ SUSAN A. AMBROSE, MICHAEL W. BRIDGES, MARSHA C. LOVETT, MICHELE DiPIETRO, & MARIE K. NORMAN, *HOW LEARNING WORKS: 7 RESEARCH-BASED PRINCIPLES FOR SMART TEACHING* 6 (2010) [hereinafter AMBROSE, *HOW LEARNING WORKS*].

⁶⁵ ROBBENOLT & STERNLIGHT, *supra* note 42, at 7.

⁶⁶ *See id.*

⁶⁷ *See* SCHWARTZ, *supra* note 59, at 21.

⁶⁸ *Id.* *See also* Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 197 (1990).

⁶⁹ Gordon, *supra* note 2, at 755; Joe S. Cecil, et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 729 (1991).

⁷⁰ *See* GUINThER, *supra* note 5, at 230–31.

⁷¹ *See id.* at xiii (“There is nothing quite like them in our society: A group of strangers brought together and required to sit in silence and listen to different versions of a story in

the best trial environment, it is impossible for a juror to comprehend the entirety of the information presented fully.⁷² What information that a juror absorbs in is almost universally influenced by the juror's pre-existing patterns of thought that, predictably, color interpretation.⁷³

Jurors fall, for the most part, in the category of "adult learner."⁷⁴ Like other adult learners, jurors walk into the courtroom with their own ideas, understandings, and misunderstandings of the law and the legal process.⁷⁵ As a result, jurors' preexisting ideas may cause them to misinterpret new information.⁷⁶ Jurors are also incredibly dependent learners who often have no experience in the given content area.⁷⁷ They may not necessarily understand how the content of the trial relates to their lives and as such, they may not feel any need to learn that content.⁷⁸ To be effective in persuading the juror of the superiority of a client's position, the attorney must be able to plan for how jurors' pre-existing ideas could be addressed at

which they have no personal interest, and who are then locked inside a room where they must stay while they try to sort out what they believe to be the truth from all they have heard.").

⁷² The best trial environment is often characterized by a good story, articulate witnesses, meaningful and understandable arguments. See generally CAROLYN GROSE & MARGARET E. JOHNSON, *LAWYERS, CLIENTS & NARRATIVE* xix–xx, 6–7 (2017) (discussing how a good narrative presented in a meaningful matter impacts trial).

⁷³ ROBBENOLT & STERNLIGHT, *supra* note 42, at 11.

⁷⁴ See discussion *supra* notes 64–66.

⁷⁵ See DIRKSEN, *supra* note 2, at 10. See also SCHWARTZ, *supra* note 59, at 23 (discussing how students come into the classroom with their own experiences, learning preferences, backgrounds, and preconceived notions). Jurisdictions define juror eligibility by age, often tying the legal voting age to the start of juror eligibility. See generally, *Juror Qualifications*, USCOURTS.GOV, <http://www.uscourts.gov/services-forms/jury-service/juror-qualifications> (last visited Mar. 8, 2018). For the purposes of this paper, I define adult in the same manner. However, in the context of fact-finding, the trial attorney might make some presumptions about what the ideal "adult learner" might be: someone with experience of the world and life, someone who can make her own judgments about the world around her, and, perhaps most significantly, that this is not her first experience in a learning environment. See NICHOLAS CORDER, *LEARNING TO TEACH ADULTS* 5 (2002). The truth is, however, that jurors come to the courtroom with a variety of life experiences, some more in-depth or broad than others, and varying levels of maturity.

⁷⁶ See DIRKSEN, *supra* note 2, at 68, 72 (discussing how race, gender, class, culture and ethnicity can impact how a listener receives, processes, and understands new information).

⁷⁷ Dependence is an important concept in learning as it reflects the degree of direction a learner needs. See KNOWLES, *THE ADULT LEARNER*, *supra* note 10, at 145. Specifically, dependence refers to how much assistance the learner needs from other people in the learning process. *Id.* It is directly related to how competent an adult is in the subject matter when they enter the learning environment. *Id.*

⁷⁸ See generally *id.* at 149.

trial.⁷⁹ It is also important that the trial attorney craft an environment within the courtroom that leaves the juror feeling respected and trusted.⁸⁰

As adults sitting in a courtroom, jurors may resist the learning that occurs over the course of the trial.⁸¹ Sitting in a particularly challenging trial environment may expose to a juror his or her self-perception and deeply-held belief systems.⁸² When a juror must face such deeply-held mental schema in a fundamental way, persuasion is made that much more difficult.⁸³ Theories of information processing suggest that learners are more likely to pay attention when the learning fits within the learners' prior experiences.⁸⁴ Conversely, learners will pay less attention when the requested learning does not fit with those prior experiences.⁸⁵

Jurors come into the courtroom with their own sets of knowledge, information, beliefs, and perspectives.⁸⁶ All these characteristics are developed over the course of a lifetime and they influence how a juror perceives and interprets information.⁸⁷ The innate influence of those lifetime experiences can both support and impede new learning.⁸⁸ This happens because those influences sometimes support a complete and appropriate understanding of the new information presented.⁸⁹ They also often reinforce inaccurate or inappropriate frameworks for considering new

⁷⁹ See generally *id.* at 147, 151–52.

⁸⁰ See generally *id.* at 150.

⁸¹ See generally *id.* at 151.

⁸² See *id.* at 140–41.

⁸³ See generally ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* 57 (rev. ed. 2007) (describing a phenomenon in racetrack betting whereby, once an individual places a bet on a horse, that individual will be much more steadfast and confident in their decision than they were before placing the bet).

⁸⁴ See *id.* (describing that, as a whole, humans like to be consistent within their decision-making frameworks).

⁸⁵ KNOWLES, *THE ADULT LEARNER*, *supra* note 10, at 141. Confirmation bias is the tendency of people to see what they want to see in a given situation or interaction. ROBBENNOLT & STERNLIGHT, *supra* note 42, at 15. If people will pay more attention to information that reflects stereotypes they already hold, and less attention to information that is contrary to stereotypes they hold, what techniques gleaned from adult learning theory are available to trial attorneys to minimize reliance on preconceived notions? See *id.* (discussing confirmation bias and some of the problems attendant thereto).

⁸⁶ Victor Gold, *Psychology Manipulation in the Courtroom*, 66 NEB. L. REV. 562, 567 (1987).

⁸⁷ See AMBROSE, *HOW LEARNING WORKS*, *supra* note 64, at 4.

⁸⁸ See *id.* See also KNOWLES, *THE ADULT LEARNER*, *supra* note 10, at 139 (describing that as learners age, their learning experiences are shaped by the wider range of individual differences they reflect and that biases and differences can inhibit and shape new learning).

⁸⁹ *Id.*

information.⁹⁰ For teachers and trial attorneys alike, creating situations in which learners and listeners can draw on relevant prior knowledge is critical to the learning process;⁹¹ students must be able to connect their previous knowledge to new knowledge.⁹²

Aside from the weighty responsibilities the legal system places on jurors, the jury may feel uneasy about the triangular informational experience that occurs with the trial. Jurors are expected to evaluate the content of not just one person's presentation but two. The information is simultaneously contradictory and complimentary.⁹³ At the same time, the two contradictory yet similar stories are not told in a linear fashion but rather threaded together in competing versions. Finally, aside from the contentious informational triangle, sits a judge whose rulings are not explained and whose ultimate position on the matter before her should be less than obvious. This judge influences everything that occurs in the learning environment. The trial court environment does not necessarily build a foundation for creating or supporting the jury's trust in the trial attorneys.

Juror motivation,⁹⁴ when compared to that of students in a traditional educational environment, presents an interesting inquiry. As a general principle, motivation theory suggests that there are several influences on what "makes" a student want to learn: a desire to develop competencies, curiosity, autonomy, socialization, and anticipation of rewards or punishment.⁹⁵ Highly motivated learners tend to pay better attention both to their own experiences and to the situations around them.⁹⁶ It would be challenging for an attorney preparing for trial to determine which, if any, of

⁹⁰ See AMBROSE, *HOW LEARNING WORKS*, *supra* note 64, at 13; GIROUX, *supra* note 7, at 26.

⁹¹ See AMBROSE, *HOW LEARNING WORKS*, *supra* note 64, at 13.

⁹² See *id.* at 15.

⁹³ Some educational theorists would describe this process as a "two-sided refutational" presentation. See Cyndie Hynd, *Persuasion and Its Role in Meeting Educational Goals*, 40 *THEORY INTO PRACTICE* 270, 271–72 (2001).

⁹⁴ Theories of learning and motivation are necessarily shaped by the cultural institutions and values that support the research thereon. See, e.g., Michael A. Peters, *The Shapes of Theory in Education*, 46 *EDUC. PHIL. & THEORY* 1315, 1315–16 (2014) (describing what he terms as "waves" in educational theory development and the influences thereon). While these theories may be useful in considering some of the relationships between jurors and attorneys or students and teachers, they must also be examined in light of the institutional constructs which have allowed for their creation and study. McInerney, *supra* note 24, at 369.

⁹⁵ STIPEK, *supra* note 54, at 39.

⁹⁶ Barry J. Zimmerman & Dale H. Schunk, *Motivation: An Essential Dimension of Self-Regulated Learning*, in *MOTIVATION AND SELF-REGULATED LEARNING: THEORY, RESEARCH, AND APPLICATIONS* 2–3 (Schunk & Zimmerman, eds., 2008).

these motivations any one juror called to service and engaging in civic duty might possess. It is also impossible to determine the goals jurors may have. An attorney cannot presume every juror on a panel wants to master an understanding and application of the law. How then, are jurors motivated to learn? Some studies suggest that jurors wish to understand what is happening around them and then make the “correct” decision.⁹⁷ Such findings suggest that jurors will be motivated to listen and retain as much information as they can to make the “correct” decision.⁹⁸ It is also generally accepted that no matter what characteristics a student or juror brings into a learning environment, there is some innate motivation to engage.⁹⁹ And yet, given the difficult nature of sitting through trial as an observer, many jurors will not attentively engage, either because they do not want to or because they are not able to.¹⁰⁰

In practice, while the fact-finder sitting in a courtroom may be comparable to a student in a classroom, the model of the adversarial trial system creates significant distinctions between the two environments. First, jurors are not agents of their own learning, rather they absorb information that is entirely externally presented.¹⁰¹ There is little to no opportunity (depending on the jurisdiction) for the juror to do her own research,¹⁰² ask her own questions,¹⁰³ or explore what interests her about the evidence,

⁹⁷ Gordon, *supra* note 2, at 770 (citing Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 481 (1990)). See also Zimmerman & Schunk, *supra* note 96, at 10 (describing that it is necessary to understand how a student feels about her own capacity to learn).

⁹⁸ STIPEK, *supra* note 54, at 14.

⁹⁹ See Johnmarshall Reeve et al., *Understanding and Promoting Self-Autonomous Self-Regulation: A Self-Determination Theory Perspective*, in MOTIVATION AND SELF-REGULATED LEARNING: THEORY, RESEARCH, AND APPLICATIONS 228 (Schunk & Zimmerman, eds., 2008).

¹⁰⁰ See James G. Apple, *Is the Jury Listening?*, 13 AM. J. TRIAL ADVOC. 851, 855–56 (1989).

¹⁰¹ See Mezirow, *Learning to Think*, *supra* note 14, at 31 (discussing the importance of adult learners deciding what they want to know and not absorbing what others want them to know).

¹⁰² Outside research during trial creates its own potential for controversy because the concept goes outside the basic principle that a trial decision should be made based on only the materials presented at trial. Robbie Manhas, *Responding to Independent Juror Research in the Internet Age: Positive Rules, Negative Rules, and Outside Mechanisms*, 112 MICH. L. REV. 809, 812 (2014). Outside research, however, could encompass simply providing jurors, in addition to any jury instructions required, with treatises or texts that help to explain substantive law or procedural rules.

¹⁰³ For a comprehensive review and critique of the Arizona Jury Reform Project, see B. Michael Dann & George Logan, III, *Jury Reform: The Arizona Experience* 79 JUDICATURE 280 (1996). The committee charged with reforming Arizona’s jury system included in its recommendations that jurors be allowed to ask their own questions of witnesses and/or

arguments, or facts.¹⁰⁴ Second, a juror does not necessarily have to know anything,¹⁰⁵ he is simply required to render a decision in the case. A juror decision implies, in some respects, that the juror believes what he has been told, or at least that he believes one side more than the other. A student, on the other hand, must be able to recall and apply what the teacher wants her to know to pass the course.¹⁰⁶ This is true even if the student does not believe the validity of the information she is presented.¹⁰⁷ Also, while some students may be expected to retain what they have learned for application outside the classroom, there is no such expectation of the juror. Once the jury renders its decision, its job is complete. Students are expected to develop intellectual habits to improve both their effectiveness as learners and their performance inside and outside a classroom.¹⁰⁸ The transfer of learning from one specific topic in one classroom to other contexts is the ultimate measure of success for the student¹⁰⁹; the same expectation does not apply to the juror. Finally, an interesting conflict arises in understanding and applying learning motivational learning theory to the juror context. Namely, adult learning research indicates adult learners are most strongly motivated when they choose their own learning activities.¹¹⁰ Jurors, on the other hand, are compelled to appear, listen, and

judges in written format during trial. The fundamental theoretical perspective on this recommended change is that "active learners make better learners." *Id.* at 281. *See also* J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L. J. 1433, 1509–17 (1996); Marietta S. Robinson, *Should Jurors be Allowed to Ask Questions of Witnesses?* 45 FED. LAW. 48, 48–50 (1998).

¹⁰⁴ Pre-deliberation discussions of evidence are a controversial potential juror reform. *See* Dann & Logan, *supra* note 103, at 281; David A. Anderson, *Let Jurors Talk: Authorizing Pre-Deliberation Discussion of the Evidence at Trial*, 174 MIL. L. REV. 92, 93–94, 96–97, 104–13, 121 (2002).

¹⁰⁵ 'Knowing' is a difficult and flexible concept to define. It may be recall of information or something more depending on the context in which the word is used. *See* DOYLE, *supra* note 9, at 10 (quoting Nobel laureate Herbert Simon); GRANT WIGGINS & JAY MCTIGHE, *UNDERSTANDING BY DESIGN* 229 (2nd ed. 2005).

¹⁰⁶ *See generally* Helenrose Fives & Patricia A. Alexander, *Persuasion as a Metaphor for Teaching: A Case in Point*, 40 THEORY INTO PRACT. 242, 247 (2001).

¹⁰⁷ *See generally id.*

¹⁰⁸ *See* AMBROSE, *HOW LEARNING WORKS*, *supra* note 64, at 7.

¹⁰⁹ WIGGINS & MCTIGHE, *supra* note 105; John D. Bransford & Daniel L. Schwartz, *Rethinking Transfer: A Simple Proposal with Multiple Implications*, 24 REV. RES. EDUC. 61, 61, 63 (1999); Sandra Ratcliff Daffron & Mary Wehby North, *Learning Transfer: Enhancing Retention and usage of New Knowledge, Skills, and Abilities Acquired in Training and Learning Programs to Leverage and Promote Lifelong Learning* (July 2009) (unpublished article), <http://www.leeds.ac.uk/educol/documents/181972.pdf>.

¹¹⁰ KNOWLES, *THE ADULT LEARNER*, *supra* note 10, at 47–48. On a subjective level, adult learning motivation may be divided into 3 categories: goal-oriented learning (use learning to meet a specific goal), activity-oriented learning (participate primarily because it

perform. For adult learners in particular, motivation to learn may stem from the belief that the learning exercise will relate in some way to how they can, will, or should solve problems in their own lives.¹¹¹ As a result, learning motivation may play less of a role in defining a juror's experience in the courtroom than it would in other learning environments.¹¹²

V. LAWYERS AS TEACHERS

Classroom learning has many purposes depending on its specific environment¹¹³ including developing knowledge, refining beliefs, and perhaps helping students to personally identify with some of the information presented.¹¹⁴ Teachers provide one source of credible knowledge in an expansive wellspring of information.¹¹⁵ Some educators may not perceive their role as trying to convince students of any one understanding but rather may view their job as creating opportunities for students to construct their own meanings informed by personal value systems.¹¹⁶ Teachers may also want their students to engage in a sophisticated analysis of arguments.¹¹⁷ Helping students to find ways to support their views and develop and communicate effective counterpositions is one goal subsumed into the broader aim of transfer of learning outside the classroom.¹¹⁸

Litigators are adult educators, albeit in a courtroom environment and not a traditional classroom.¹¹⁹ With some limitations, educators in classroom

is something to be involved in), and learning oriented learning (learning for its own sake). CROSS, *supra* note 15, at 82–84 (“Adult learners are most frequently motivated by the pragmatic desire to *use* or apply the knowledge or skill. Most often, they hope to take action – do something, produce something, or decide something.”). See also Gordon, *supra* note 2, at 751.

¹¹¹ KNOWLES, THE ADULT LEARNER, *supra* note 10, at 149.

¹¹² Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 374–75 (2001).

¹¹³ Classroom learning environments can take many shapes from traditionally conceived schooling settings to religious education shaped and informed by specific belief systems. Thus, specific educators' goals in each individual's milieu necessarily vary.

¹¹⁴ Alexander, *supra* note 27, at 797.

¹¹⁵ ROBERT L. FRIED, THE PASSIONATE LEARNER: HOW TEACHERS & PARENTS CAN HELP CHILDREN RECLAIM THE JOY OF LEARNING 126 (2001).

¹¹⁶ *Id.* at 810.

¹¹⁷ COMMON CORE STATE STANDARDS, ENGLISH LANGUAGE ARTS & LITERACY IN HISTORY/SOCIAL STUDIES, SCIENCE, AND TECHNICAL SUBJECTS 24–25 (2010).

¹¹⁸ WIGGINS & MCTIGHE, *supra* note 105, at 40–41. See also Doug Fisher & Nancy Frey, *Show & Tell: A Video Column/Transfer Goals for Deeper Learning*, 73 LEARNING FOR LIFE 80 (2016).

¹¹⁹ See, e.g., KNOWLES, THE MODERN PRACTICE, *supra* note 11, at 26 (explaining how a

settings pick and choose the information they wish to present.¹²⁰ While a curriculum may be directed by state educational standards or teaching theory and style, the educator sets his own goals, determines the educational pace, continually assesses student learning, and generally controls the learning atmosphere with little to no intervention from outside sources.¹²¹ Courtroom lawyers work from trial theory, similar to the way teachers build their lessons to achieve student engagement in the lesson and application of the lesson learned to life outside the classroom. Case or trial theory acts much like an educational unit by creating a framework within which the advocate can tell a relatable, understandable story that makes sense and that, subsequently, can be argued in deliberation. To be persuasive, the lawyer must be able to facilitate the juror in “making meaning” of the story the attorney is telling. Meaning-making is critical to learning.¹²² When a student can make meaning from information as it is presented to him, he can find ways to assimilate that information into his pre-existing frameworks for understanding the world.¹²³ Meaning-making and learning exist in a dynamic relationship.¹²⁴ Without the coherent theory and story acting as a foundation for the trial, a lawyer cannot persuade the jury to render a favorable decision.¹²⁵

At the same time, trial goals are different from teaching goals in fundamental ways. As a primary matter, teachers may approach the classroom with the goal of achieving deep and lasting understanding and

growing number of professionals are acting in the capacity of adult educators, even if they are not aware they are doing it).

¹²⁰ Aleidine Moeller, *Optimizing Student Success: Focused Curriculum, Meaningful Assessment, and Effective Instruction*, in THE YEAR OF LANGUAGES: CHALLENGES, CHANGES, AND CHOICES: SELECTED PAPERS FROM THE 2005 CENTRAL STATES CONFERENCE 77, 77 (Boyles & Sandrock eds., 2005) (“Individual state standards delineate performance outcomes, what students should be able to do (e.g. write a personal communication such as, a note, letter, or invitation) at various levels of language learning. These standards guide our choices of what to teach, but the curriculum must still be adapted to meet the age, needs, and interests of the students in our classrooms.”).

¹²¹ See *id.* at 77–80.

¹²² Michael Ignelzi, *Meaning-Making in the Learning and Teaching Process*, 82 NEW DIRECTIONS FOR TEACHING & LEARNING 5, 6–7 (June 2000).

¹²³ *Id.*

¹²⁴ Mezirow, *Learning to Think*, *supra* note 14, at 24. See also Peter McLaren, *Foreword: Critical Theory and the Meaning of Hope* to HENRY A. GIROUX, *TEACHERS AS INTELLECTUALS: TOWARD A CRITICAL PEDAGOGY OF LEARNING* xix (Freire ed., 1988) (“He recognizes that pedagogy . . . does not restrict itself to classrooms; that it is involved wherever there exist deliberative attempts to influence the production and construction of meaning or how and what knowledge and social identities are produced within and among particular sets of social relations.”).

¹²⁵ THOMAS A MAUET, *TRIAL TECHNIQUES & TRIALS* 25 (9th ed. 2013).

transfer between learning environments for their students.¹²⁶ In addition, while teachers may not necessarily focus on whether their students believe what they are being taught,¹²⁷ lawyers do have a particular investment in creating an environment where the juror prefers one side of a story the other. Lawyers also have the ethical responsibility to attempt to convince their listeners of the relative truth of a specific position or perspective on the law.¹²⁸ It is the trial lawyer's purpose to mold unshaped testimony and free-floating evidence into meaningful, relatable stories that a juror can accept.¹²⁹ The lawyer's job is not necessarily to open the door to a philosophical weighing of or discussion about varying meanings or interpretations of evidence but to convey a meaning, a story that supports the position of her client.¹³⁰ As a result, trial lawyers find themselves promoting their own credibility while simultaneously discouraging the weighing of alternative positions or viewpoints, perhaps by questioning the credibility of their opponents.¹³¹

Ideally, on the day of trial jurors can absorb all the information with which attorneys present them, fully comprehend it, and evaluate it from a neutral perspective. The limitations and barriers to this ideal situation are many. Most jurors have not been in a trial environment before and have not been asked to process information in the way that trial anticipates (i.e., quickly and completely in an environment that presumes comprehension and that does not allow for reflection other than at specific breaks during the day or at the end of a full day of testimony).¹³² From the jurors perspective, perhaps particularly for the inexperienced juror, there may be an expectation that there will be some clarity in the legal process, easy answers or application of the law to the facts they anticipate hearing.¹³³ It

¹²⁶ Alexander, *supra* note 27, at 796.

¹²⁷ See generally, Chin & Samarapungavan, *supra* note 57, at 235, 236 (providing as an example that a student who believes in creationism need not necessarily believe in evolutionary theory to perform well on substantive assessments in a biology class).

¹²⁸ See MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1. (AM BAR ASS'N 1983).

¹²⁹ MAUET, *supra* note 125, at 25.

¹³⁰ If, however, a trial attorney finds himself representing the less-culturally accepted or validated perspective on a case, or if the attorney is trying to introduce a new narrative or stock story into the consciousness of the fact-finder, that lawyer may want deeper learning to occur. Effective persuasion in these conditions may be brought on by challenging understandings and forcing reflection on the part of the fact-finder. See generally KNOWLES, THE ADULT LEARNER, *supra* note 10, at 15 (summarizing an element of humanistic psychology, evaluation by learner, as the recognition by the learner that the learning may expose areas of ignorance or lack of experience).

¹³¹ See Wayne Morse, *Courtroom Ethos: How to Win Over a Jury with Credibility and Respect*, 2015 A.B.A. Sec. of Litig. & Trial Prac.

¹³² GUINThER, *supra* note 5, at xiv.

¹³³ There may be a larger, culturally-based perspective at play, as well. As a broad

can be a disconcerting reality for that juror to learn how elusive clarity in the law can be.

Trial lawyers face several challenges in approaching jurors as adult learners. For instance, a student-centered approach to teaching may assume that students learn new information most effectively when they can relate new concepts to their own constructions of self.¹³⁴ This approach further assumes that any learning that requires a student to change or question their comprehension of self, is likely to face resistance.¹³⁵ Therefore, the most effective learning environments are those that reduce, as much as possible, any threat to the student's perception of self.¹³⁶ However, some trial attorneys may find that in order to prevail, they must make arguments and present evidence that inherently challenges not only the jurors' self-perceptions but also jurors' perceptions of society, culture, and institutions.¹³⁷ Using challenges to self-perception as an effective trial strategy is discussed in more detail below.

VI. ANDRAGOGY'S IMPACT ON TRIAL PREPARATION

Trial advocacy theory already takes some aspects of adult learning theory into account.¹³⁸ Effective trial advocacy includes an element of setting the mood of the trial from the moment opening statements begin.¹³⁹ Persuasive messaging begins when the attorney conveys to the jury in both subtle and direct ways that the jurors can understand what is about to occur in the courtroom and that they are trusted to make good decisions.¹⁴⁰ Good trial

generalization, people may conceive the law as rational, neutral, abstract, and reason-based. If faced with a competing idea of the legal process, that law is profoundly shaped by context, power, and other constructed meaning systems, a juror who had not previously considered that context may feel defeated or powerless to influence outcomes. *See generally* Douglas O. Linder, *Juror Empathy & Race*, 63 TENN. L. REV. 887, 896–900 (1996) (discussing the impact of juror empathy on the courtroom and trial outcomes).

¹³⁴ MALCOLM KNOWLES, *THE ADULT LEARNER: A NEGLECTED SPECIES* 32–34 (1973) (summarizing the work of Carl R. Rogers, a clinical psychologist who hypothesized that learning can be very threatening to adult learners thus it would behoove adult educators to reduce those threats as much as possible).

¹³⁵ KNOWLES, *THE ADULT LEARNER*, *supra* note 10, at 48–50 (describing the work of Carl R. Rogers, a clinical psychologist who likened student-oriented teaching to therapy).

¹³⁶ *Id.* at 49.

¹³⁷ *See e.g.*, Arthur H. Patterson & Nancy L. Neuffer, *Removing Juror Bias by Applying Psychology to Challenges for Cause*, 7 CORNELL J.L. & PUB. POL'Y 97, 98 (1997).

¹³⁸ DENT GITCHEL & MOLLY TOWNES O'BRIEN, *TRIAL ADVOCACY BASICS* 78 (2006).

¹³⁹ KNOWLES, *THE ADULT LEARNER*, *supra* note 10, at 48. (explaining that for adult learners, actually being self-directed is not necessarily as important as having the self-concept that others respect that they are capable of self-direction).

¹⁴⁰ The process of setting expectations and developing a trusting relationship in the courtroom reflects the aspects of Knowles' theory that encourage adult educators to

attorneys spend a significant amount of their limited time before the jury repeating and reinforcing the concepts that they have prioritized.¹⁴¹ Trial attorneys are, in effect, attempting to help jurors develop competencies in the areas of law the case addresses.

Knowing that tried and true trial advocacy techniques work and understanding *why* they work are two different things. Knowing the 'why' can help a trial attorney be more informed and intentional about what techniques to use and when to implement them in trial preparation and execution. Lawyers find their preparation is influenced not only by client goals but also by anticipation of opposing arguments, rulings from the bench on evidentiary questions, and the relevant rules of evidence, procedure, and ethics, among other things. These considerations necessarily shape what information is presented and its ultimate influence on the decision-making process.¹⁴² The lawyer's 'lessons' are also shaped by the woven nature of the trial process: one opening statement then another, a witness's direct-examination followed by cross-examination followed by a new witness telling a new story in a careful manner and so on, and finally one closing argument and then another.

Lawyers preparing for trial may tend to overestimate the juror's capacity to take in the information presented and process it effectively.¹⁴³ Attorneys cannot control the characteristics that define each individual juror; however, those defining characteristics are an important aspect of the courtroom as learning environment model. Every attribute that a juror brings into the courtroom is as integral to trial success as the attorney's expertise because those very characteristics shape perception, retention, and application of

demonstrate respect for and trust in their students' individual capacities to learn. *Id.*

¹⁴¹ *Id.* at 74–75 (summarizing nineteen unifying principles of adult learning theory).

¹⁴² In any real-world environment, decision-making is shaped not only by the information presented (and the values and priorities of the person presenting it) but also by time constraints, cost considerations, etc.) See generally ROBBENOLT & STERNLIGHT, *supra* note 42, at 86–113 (discussing psychological influences on the decision-making process). See also STIPEK, *supra* note 54, at 55 (discussing how the institutional constraints of learning environments can influence how learning can occur); Keith Broyles, Note, *Taking the Courtroom into the Classroom: A Proposal for Educating the Law Juror in Complex Litigation Cases*, 64 GEO. WASH. L. REV. 714, 714–15 (1996).

¹⁴³ AMBROSE, HOW LEARNING WORKS, *supra* note 64, at 13. See also KNOWLES, THE ADULT LEARNER, *supra* note 10, at 143 (hypothesizing that while adult educators tend to recognize how they can use past experiences as a resource for learning, they are less likely to recognize how past experiences are a gatekeeper for learning); MEL SILBERMAN, ACTIVE LEARNING: 101 STRATEGIES TO TEACH ANY SUBJECT 3 (1996) (describing how in an average classroom, students are listening to speakers who average 100–200 words per minute and that in a lecture-based classroom students pay attention only about 40% of the time and arguing that the speed of everyday speech and the lecture format make it difficult to concentrate, thereby leading students' minds to wander).

law and facts as well as participation in the deliberation process.¹⁴⁴ Effective persuasion is dependent on framing the trial theory in a way that both considers and accepts the differing experiences and personal values among the jurors.¹⁴⁵ In fashioning a trial strategy, a trial attorney can use the principles of adult learning theory to influence the outcome of the trial itself by improving the juror's grasp of the content of the trial.¹⁴⁶ By understanding the factors that influence how a juror receives information, trial attorneys can adapt their trial strategies to suit the variety of jurors and the factual case scenarios they will encounter. Enhanced comprehension of the learning process can also help a trial attorney reflect on what makes any given strategy more or less persuasive in a courtroom.

As discussed in Section I, andragogy is based on several assumptions that distinguish it from pedagogy.¹⁴⁷ First, adults need to know *why* they should learn something before they will commit to learning it.¹⁴⁸ Second, adults like to believe that they are responsible for their own decisions.¹⁴⁹ Third, adults come to any learning experience with a greater volume and different quality of experiences than younger people.¹⁵⁰ Fourth, adults are most willing to learn those things they feel they need to address real-life situations.¹⁵¹ Fifth, adults tend to be task-centered in their orientation to learning; that is, adults are most willing or motivated to learn those things that will help them in their day-to-day living.¹⁵² Sixth and finally, intrinsic motivators such as self-esteem and quality of life are the most effective motivators to learn.¹⁵³

One of the biggest challenges to using adult learning theory in the trial planning process is the lack of ability to engage jurors throughout the planning and execution of the case, a challenge that includes not being able to determine juror motivation or goals.¹⁵⁴ Trial is not an inherently learner-

¹⁴⁴ Erin York & Benjamin Cornwell, *Status on Trial: Social Characteristics and Influence in the Jury Room*, 85 SOC. FORCES 455, 463-64 (2006).

¹⁴⁵ Sara Gordon sums up this concept exceptionally well when she states, "What we can attempt to influence, however, is how carefully jurors think about and understand the law they are expected to apply to the facts in a trial." See Gordon, *supra* note 2, at 774.

¹⁴⁶ See Alexander, *supra* note 27, at 795.

¹⁴⁷ See *infra* Section I.

¹⁴⁸ KNOWLES, THE ADULT LEARNER, *supra* note 10, at 64-68.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ See *id.* at 133 (explaining that to be most effective, adult education programs must engage the adult learner in a collaborative planning process). Not being able to determine motivations, as mentioned above, is particularly challenging because if the primary

centered environment, it is, in fact, the opposite of learner-centered. The focus is on the client's goals and the authoritative nature of the evidence presentation process.¹⁵⁵ Learning goals, if a trial attorney labels them as such, are almost entirely framed in terms of what needs to happen so the client prevails.¹⁵⁶ Even Malcolm Knowles in his seminal work on adult education theory acknowledges the inherent conflict between the ideal of adults taking control of their learning and the reality of the limitations adults face in being truly self-directed.¹⁵⁷

The differences or challenges are, however, most salient if the attorney is unable to incorporate juror judgments into her trial planning.¹⁵⁸ In the same manner that a litigator may wish a juror to adopt a client's perspective in deciding the outcome of a case, an attorney can intentionally use the adult learning model to develop case strategy and direction. Rather than viewing trial planning as externally controlled and directed entirely by the institutional framework of trial practice, an attorney can sit as the juror would, asking the fundamental questions of, "What do I need to know to decide for this client?" and, "What is the best way to create an environment where I can learn what I need to know?"¹⁵⁹ Stepping into the shoes of potential jurors is not an easy task; demographics, geography, and a myriad of other factors influence the frame of mind from which a juror approaches jury duty.¹⁶⁰

There are attorneys and law firms, however, that have the resources to conduct focus group research presentations as they prepare for trial.¹⁶¹ After the presentations, participants answer questions about what they would have liked to have seen or heard about the case. Attorneys conducting this form of research move back and forth between case analysis

motivation is to get the case over with and go home, how does an attorney shift juror perspective to something more salient to the trial? See STIPEK, *supra* note 54, at 49.

¹⁵⁵ Paul M. Lisnek, *Trial Counsel's Goal: Create New Reality for Jury*, 67 WIS. LAWYER 29, 30-31 (describing the need for both the plaintiff and the defendant to control the presentation of the trial "story").

¹⁵⁶ *Id.*

¹⁵⁷ See KNOWLES, THE ADULT LEARNER, *supra* note 10, at 124.

¹⁵⁸ See KNOWLES, THE MODERN PRACTICE, *supra* note 11, at 57 (suggesting that learner goals may be substantively different than the learning goals of the educator).

¹⁵⁹ See KNOWLES, THE ADULT LEARNER, *supra* note 10, at 127.

¹⁶⁰ GUINTEK, *supra* note 5, at 58.

¹⁶¹ See generally Douglas Keene, *The "Why" and "How" of Focus Group Research*, JURYSOLUTIONS.COM (March 8, 2018), <http://www.thejuryexpert.com/2013/08/the-why-and-how-of-focus-group-research/>; Douglas Keene, *Jury Solutions, Focus Groups*, JURYSOLUTIONS.COM (March 8, 2018), <http://www.jurysolutions.com/DrawOnePage.aspx?PageID=3>. Not every law practice has the resources to conduct this kind of juror research. It is compelling to consider what it means to research juries when you are staring down the barrel of need without capacity.

and juror response, asking themselves, "How do we learn what a juror needs to achieve our client's goals?"¹⁶² Focus group research of this kind is one step toward implementing the identification of needs centered in the framework of the potential juror pool.¹⁶³ It also has some significant drawbacks, primarily that participants do not always know how to analyze their information requirements meaningfully.¹⁶⁴ At best, the participants may struggle to distinguish what kinds of things they need to hear as opposed to what they want to hear.¹⁶⁵ Juror votes are based on a myriad of factors, however, so this concern may be irrelevant.¹⁶⁶

The question is, of course, if one accepts that it is beneficial to incorporate adult learning theory more intentionally into trial practice, how might it impact trial preparation other than as described above? How might an attorney keep her attention focused on the jury's experience at trial in a deliberate, intentional way? While there are several possible answers to this question, this paper focuses on one: exploring the value of the disorienting moment that is likely to occur at trial for some jurors.¹⁶⁷

A. *Using Adult Learning Theory to Persuade in the Disorienting Moment*

A disorienting moment happens when an educator creates a challenge to an individual's schema.¹⁶⁸ Schema are individual knowledge structures that have been shaped by past experiences and that define how a person expects the world to operate.¹⁶⁹ It is an event that problematizes a person's way of perceiving the world. As described by Fran Quigley, the

¹⁶² Keene, *The "Why" and "How" of Focus Group Research*, *supra* note 161.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See KNOWLES, *THE ADULT LEARNER*, *supra* note 10, at 115–32 (describing a human resources process wherein the HR manager asks employees what kinds of professional development they would like to see. While the process allows for employee participation, it may not actually identify educational 'needs' as much as it identifies educational 'wants.').

¹⁶⁶ Melissa A. Pigott & Lina A. Foley, *Social Influence in Jury Decision-Making*, 18 TRIAL DIPLOMACY J. 101, 101 (1995).

¹⁶⁷ There is significant scholarly and anecdotal attention paid to methods trial attorneys might use to influence and improve jury decision making. See generally Gordon, *supra* note 2; Leon D. Lazer, *Is Plain English the Answer to the Needs of Jurors?*, 73 N.Y. ST. B.J. 37 (2001) (discussing juror comprehension problems in pattern jury instructions); John P. Wesley, *Jury Trial Innovations: Daring to Improve What We are Sworn to Revere*, 30 VT. B.J. & L. DIG. 17 (2004).

¹⁶⁸ See Taylor, *supra* note 50, at 155.

¹⁶⁹ See Jack Mezirow, *How Critical Reflection Triggers Learning*, in FOSTERING CRITICAL REFLECTION IN ADULTHOOD 1, 2 (1990) (differentiating between meaning schemes and meaning perspectives or schemata that frame how new information is assimilated into one's understanding of the world) [hereinafter Mezirow, *Critical Reflection*]. See also ROBBENOLT & STERNLIGHT, *supra* note 42, at 12.

disorienting moment is that moment when a student faces a challenge that, because of its very nature, he or she cannot reconcile with previous experiences or current understandings of how the world or lawyering work.¹⁷⁰ In Quigley's opinion, the disorienting moment is critical to clinical legal education because it creates a path by which a clinical professor can facilitate a nuanced understanding of social justice principles and the relationship between social contexts and the work of lawyers.¹⁷¹ The same is true for the trial attorney. Schemas provide people with frameworks within which they can make meaning of the environment; challenges to schemas create space for changing how an individual might process information and may provide the impetus for re-examining previously held beliefs.¹⁷² A trial attorney can use the concept of the disorienting moment to facilitate persuasion at trial. Adult learning theory suggests that the better an attorney is at planning her case around a disorienting moment, the more effective the attorney may be at achieving persuasive goals.¹⁷³

Disorienting moments, persuasion, and meaning-making are closely linked in a dynamic relationship. The trial attorney can use persuasive tools to help influence a juror's interpretive schema while simultaneously guiding the juror through the disorienting moment and back again.¹⁷⁴ The lawyer has an opportunity to persuade the reluctant juror through this guided challenge to previous ways of making meaning. This concept also ties well into Jack Mezirow's learning as transformation theory more generally—a learning student is one who becomes aware of how judgments and assumptions influence how she makes meaning of the world around her and how they influence her perception.¹⁷⁵ At the same time, however, courts are inherently conservative institutions, crafted and run in a manner that supports and reflects dominant value systems.¹⁷⁶ They are, by their nature,

¹⁷⁰ Quigley, *supra* note 16, at 37, 52.

¹⁷¹ *Id.*

¹⁷² See ROBBENNOLT & STERNLIGHT, *supra* note 42, at 12 (“... schemas ... can influence how we perceive and interpret information and ... those interpretations, in turn, affect a range of understandings and behaviors. Specifically, preconceptions and expectations can influence how information is labeled and understood, how ambiguous information is interpreted, and the degree to which information is scrutinized.”).

¹⁷³ Quigley, *supra* note 16.

¹⁷⁴ See GIROUX, *supra* note 7, at 31 (describing how it is critical in an effective learning environment to challenge both the perception that information is static as opposed to variable and that “knowledge” is inherently valuable without understanding the contexts in which it arises).

¹⁷⁵ See Mezirow, *Learning to Think*, *supra* note 14, at 4.

¹⁷⁶ See generally Tara Smith, *Neutrality Isn't Neutral: On the Value-Neutrality of the Rule of Law*, 4 WASH U. JUR. REV. 49 (2011); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 INDIANA L.J. 301 (1989); Robin West, *Jurisprudence*

socializing agents that teach citizens how they should function within the broader societal structure.¹⁷⁷ This presents a challenge to the trial advocate because there may not be room for a trial attorney to develop a trial framework around a disorienting moment. It is also difficult to prepare jurors to reflect critically (on themselves or the case) with an eye toward social change.¹⁷⁸

The steps in the process to both focusing on a disorienting moment in trial preparation and using adult learning theory to maximize its impact are somewhat intuitive: assess if the facts warrant exploration of a disorienting idea or theme;¹⁷⁹ decide when and where to use it during the trial presentation; determine how to use it and for what purpose; and finally, use the basic principles of adult learning theory to increase persuasive value and to keep the presentation of information juror-centered.¹⁸⁰ It is integral to the planning process to keep in mind some of the basic tenets of adult learning principles. The jurors must feel like, in some capacity, they have control over their engagement in the trial process.¹⁸¹ They also want to feel competent in their choice making and respected in the environment as competent.¹⁸²

At its heart, persuasive messaging at trial is about convincing the fact-finder to adopt the perspective your client has on a case. 'Perspective' is the ability to consider the viewpoints of other people and to acknowledge and reflect on the ways in which those viewpoints will influence how a person perceives an experience.¹⁸³ The myriad of characteristics that jurors

and Gender, 55 U. CHI. L. REV. 1 (1988).

¹⁷⁷ Edgar Bodenheimer, *The Inherent Conservatism of the Legal Profession*, 23 IND. L. J. 221 (1948) (discussing the role of the judiciary and the bar in social progress and wide-sweeping societal change).

¹⁷⁸ However, as described by Giroux, school knowledge is organized in terms of accepted conventions, knowledge is presented as part of generally accepted community norms and reflects exactly what members of the society need to be successful. On its own, "knowledge" is not necessarily compelling enough to interest learners in engaging with the material; "knowledge" has little connection to the everyday experiences of the students themselves. GIROUX, *supra* note 7, at 90 (citing P. Cusick, *THE EGALITARIAN IDEAL & THE AMERICAN SCHOOL* 25, 71 (1983)).

¹⁷⁹ In the civil context, this might look like challenging whether victims of domestic violence are actually victims if they fight back or whether sexual assault victims are worthy of protection if they have an orgasm during a rape. See *infra* note 185 and accompanying text for more references regarding challenging stock narratives.

¹⁸⁰ See *infra* note 185 and accompanying text for more references regarding challenging stock narratives.

¹⁸¹ See STIPEK, *supra* note 54, at 39–40, 44; Reeve, *supra* note 99, at 230 (defining autonomy as "the sense that one's actions emanate from oneself and are one's own.").

¹⁸² See STIPEK, *supra* note 54, at 39–40.

¹⁸³ See ROBBENOLT & STERNLIGHT, *supra* note 42, at 25, 143 (describing how difficult

bring to the courtroom—experiences, belief systems, political and cultural identities—create and support how they make meaning from the information with which they are presented.¹⁸⁴

However, as discussed above, sitting through a trial can be confusing and challenging for a juror. Being exposed to new information, the adversarial structure of a trial, unfamiliar legal concepts, and client stories that may directly conflict with a juror's belief system and approach to the world creates a situation ripe for a misapplication of the law and an inclination to resort to internalized schema for making decisions. The trial attorney representing an unpopular position or challenging a stock narrative¹⁸⁵ has a responsibility to try to controvert a juror's inclination to fall back on easy, familiar ways of problem-solving. The better the trial attorney is at both teaching the juror and persuading the juror to reconsider previously held opinions, the better that trial attorney will be at persuading the juror to the client's side.¹⁸⁶

it is to stand in another's shoes, particularly when the experience of considering differing perspectives is influenced by communication skills and how capable one is of seeing the gaps between what one knows and what someone else knows). See also JACK MEZIROW, *FOSTERING CRITICAL REFLECTION IN ADULTHOOD: A GUIDE TO TRANSFORMATIVE & EMANCIPATORY LEARNING* xiv (1991) ("These perspectives, which define how we construe meaning, are factors often neglected in attempts to understand and facilitate adult learning."); WIGGINS & MCTIGHE, *supra* note 105, at 95–96 (describing how creating the opportunity for students to analyze material with perspective helps to support knowledge acquisition and transfer and defining perspectives as developing critical and insightful points of view that question judgments and assumptions).

¹⁸⁴ See Mary Field Belenky & Ann V. Stanton, *Inequality, Development, & Connected Knowing*, in *LEARNING AS TRANSFORMATION: CRITICAL PERSPECTIVES ON A THEORY IN PROGRESS* 72 (2000).

¹⁸⁵ There is a rich collection of scholarship on the "stock narrative" concept. See, e.g., Leigh Goodmark, *Clinical Cognitive Dissonance, the Values and Goals of Domestic Violence Clinic, the Legal System, and the Students Caught in the Middle*, 20 J.L. & POL'Y 301, 316 (2012); Leigh Goodmark, *When is a Battered Woman not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 82 (2008); Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 3 (1984); James A. Sonne, *Religious Liberty, Clinical Education, and the Art of Building Bridges*, 22 CLINICAL L. REV. 251, 285 (2015); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 959 (1996).

¹⁸⁶ See Sharan B. Merriam, *Learning and Life Experience: The Connection in Adulthood*, in JAN D. SINOTT, *INTERDISCIPLINARY HANDBOOK OF ADULT LIFESPAN LEARNING* 86 (Jan D. Sinnott, ed., 1994) ("Psychologists and educators thus have some understanding about how adults learn from life experience. If an experience is unsettling or puzzling or somewhat incongruous with our present meaning structure, it captures our attention. If the gap is too great between how we understand the world and ourselves in it and the experience, we may choose to ignore or reject it. If, however, we choose to grapple with it, learning results. Some of this learning affects us more than others. Powerful learning experiences may even transform how we think and act."). See also Mezirow, *Learning to*

Purely content-based approaches to trial development may negatively impact persuasive messaging.¹⁸⁷ Content-based trial strategies, even when presented in story form, influence a listener's capacity to interact on a human level with the case by divorcing the facts of a case from the human context that helped create the situation that subsequently led to trial. Trial attorneys who separate their trial strategy from the human experience limit the ability of the jurors to evaluate the information with which they are presented.¹⁸⁸ If a juror fails to perceive trial as anything other than the sum of its parts, for example, if it has no purpose beyond its limited, client-focused outcomes,¹⁸⁹ the advocate may have lost the opportunity to help the juror make meaning that will support a decision for the advocate's client.¹⁹⁰

On the other hand, finding ways to plan for and use disorienting moments during trial can counter-act the effects of a more content-only focus. This is because of the emotional impact of the disorienting moment—people take their current emotional state into their decision-making and meaning-making processes, but they also take anticipated emotions, what they think they or others around them will feel, into account.¹⁹¹ Managing the disorienting moment therefore includes considering what emotions might arise because of the challenge to preexisting schema and how to best use those emotions to support persuasion.

B. *Losing (And Regaining) Control After the Disorienting Moment*

Trial lawyering is, in many ways, about control and management: litigators must control the information presented and manage, as well as possible, the fact-finders' interpretations of that information. Persuasion, and persuasive messaging, are about managing interpretation.¹⁹²

Think, supra note 14, at 5 (describing how, once a learner accepts a new or broader perspective on an issue, that learner may be able to make choices or act based on that new perspective).

¹⁸⁷ Taylor, *supra* note 50, at 158 ("Those learners who perceive that knowledge is primarily bits of information, and that their task is to get, store, and retrieve this knowledge, are identified with a surface approach to learning. They can often summarize a text reasonably well and can answer factual questions about what they have read, but they tend to focus on the details of the content and may not distinguish effectively between important and unimportant details.").

¹⁸⁸ *Id.*

¹⁸⁹ See GIROUX, *supra* note 7, at 22 (discussing educational models of curriculum theory that fail to acknowledge the broader impacts of educational programming as agents of socialization).

¹⁹⁰ See *id.*, at 22 (discussing educational models of curriculum theory that fail to acknowledge the broader impacts of educational programming as agents of socialization).

¹⁹¹ ROBBENOLT & STERNLIGHT, *supra* note 42, at 46.

¹⁹² GIROUX, *supra* note 7, at 90 (describing one view of pedagogy that sees knowledge

The difficulty, of course, is that the trial attorney loses control of the learning environment once the jury retires to deliberate. However, this is the place that a fundamental tenet of andragogical theory can manifest: specifically, once a jury enters deliberation, individual learners can influence each other through discussion and reflection.¹⁹³ There is a deeply emotional component to deliberation—decision-making is influenced not only by meaning-making schema but also by the answers to the questions, “How will this decision impact me and how are the people around me thinking about the impact on them?” Jury deliberation is, by its very nature a group decision-making environment that must be cooperative;¹⁹⁴ the group dynamic influences the decision-making process.¹⁹⁵

Cooperative learning, the learning that occurs when peers have the opportunity to share with each other, is a deeply effective learning strategy.¹⁹⁶ Pooling individual experiences in the jury room is common in the deliberation experience.¹⁹⁷ Cooperative learning environments allow for many things, not the least of which is the opportunity for learners who have heard similar information and who have experienced the learning environment together to challenge each other’s interpretations of the presented information and the choice each would make in determining the outcome of the trial.¹⁹⁸ Ultimately, a trial attorney needs at least one juror on a panel to process the information presented in a way that sways that juror to her side. When the juror then takes that opinion into deliberation, he or she can have the fight that the attorney cannot: convincing the other jurors to see the case and the outcome as she does. The learning principle of ‘transfer’ occurs when the juror can make the connection between the

as beyond the reach of critical interrogation except at the level of immediate application). Giroux’s work was informed, in large part, by the work of Paolo Freire. See PAOLO FREIRE, *EDUCATION FOR CRITICAL CONSCIOUSNESS* 13 (1982).

¹⁹³ See Quigley, *supra* note 16, at 57.

¹⁹⁴ STIPEK, *supra* note 54, at 68 (describing how, if the group dynamic is working effectively, productivity and discussion occur at high levels).

¹⁹⁵ See ROBBENNOLT & STERNLIGHT, *supra* note 42, at 110. See also WIGGINS, *supra* note 105, at 97 (arguing that educational instruction should allow for students to confront and discuss diverse points of view).

¹⁹⁶ Quigley describes this environment as the “Student-to-Student Discussion.” Quigley, *supra* note 16, at 57. See also Lyle Yorks & Victoria J. Marsick, *Organizational Learning & Transformation*, in *LEARNING AS TRANSFORMATION: CRITICAL PERSPECTIVES ON A THEORY IN PROGRESS* 253 (Jack Mezirow & Assoc., eds., 2000).

¹⁹⁷ ROBBENNOLT & STERNLIGHT, *supra* note 42, at 109.

¹⁹⁸ This aspect of the adult learning environment is critical to Jack Mezirow’s theory of adult learning as transformational. Mezirow argues that for adults to experience shifts in their understandings of the world, they must engage in conversations that challenge their assumptions and engage them in considering different perspectives. Mezirow, *Learning to Think*, *supra* note 14, at 5. See also WIGGINS MCTIGHE, *supra* note 105, at 35.

trial attorney's case to her own belief system and then tell the story to the other jurors through the lens of that belief system. The vulnerability inherent in such storytelling is what, hopefully, brings the other jurors to the same conclusion in the case. In persuasively teaching a juror, the trial attorney is building the foundation for a cooperative learning environment in the deliberation room—the one special caveat being that the trial attorney has an advocate on the inside, someone who can reteach the lessons the trial attorney was teaching during the trial.¹⁹⁹

Closing argument may be one of the most effective places for trial attorneys to ensure they are serving whatever goals they have regarding their disorienting moments and persuasive messaging. By encouraging critical reflection in closing—an exploration of experience that hopefully leads to new or expanded understandings—the attorney can not only connect the pieces of the case for the juror but also lay the foundation for how deliberative conversations will develop.²⁰⁰ Closing argument becomes, then, not just the story of the case, but a story with intention and purpose.²⁰¹

First, using a cognitive bias tool called focalism, the advocate can front-load the impact and staying-power of the disorienting moment. Focalism describes the tendency to rely heavily in decision-making on the first pieces of information someone hears.²⁰² As a psychological experience, future decision-making is grounded in the focalized, or anchored, information, that is, the decision-maker will use the focalized information as a reference point not only in making future decisions but also in interpreting the value of any additional information offered. A trial attorney can attempt to anchor the perception of the case in the desired results of the disorienting moment, then when the friendly juror goes into deliberation, he or she has a conceptual framework for extending the lawyer's arguments into the new setting.

Once the attorney has anchored the disorienting moment she can move on to suggest critical reflection around that moment. Disorienting moments, as described as above, present fundamental challenges to individual ways of being; disorienting moments can be profoundly

¹⁹⁹ See Quigley, *supra* note 16, at 53 (describing how peer influence has a documented effect on the formation of political and moral beliefs and attitudes).

²⁰⁰ Mezirow, *Critical Reflection*, *supra* note 169, at 5.

²⁰¹ The intention and purpose are to wrap up the lessons of the trial in the way that will most effectively influence deliberation.

²⁰² ROBBENOLT & STERNLIGHT, *supra* note 42, at 72; Fritz Strack & Thomas Mussweiler, *Explaining the Enigmatic Anchoring Effect: Mechanisms of Selective Accessibility*, 73 J. PERSONALITY & SOC. PSYCHOL. 437 (1997); Timothy D. Wilson et al., *A New Look at Anchoring Effects: Basic Anchoring and Its Antecedents*, 125 J. EXPERIMENTAL PSYCHOL.: GEN. 387 (1996).

emotional experiences because they require critical self-examination and redefinition of self through increased self-awareness.²⁰³ For the disorienting moment to have an impact on a juror, it should make the juror want to reflect not only on what her previous assumptions were but also on why she held them. It is a tall order for both the attorney and the juror.

One way around the potential negative impact of the disorienting moment is to credit the value of whatever current perspectives might exist while offering a pathway to see expanded context or larger frameworks for making meaning.²⁰⁴ In weaving the story of the case through the disorienting moment in closing argument, the attorney can start with her understanding of the existing schematic frameworks and guide the jury through a broadening of context, giving value along the way to the starting position.²⁰⁵ By both using the disorienting moment and crediting existing understandings, the trial attorney can lead the juror in a potentially less emotionally challenging way.²⁰⁶

If an attorney attempts to use the disorienting moment to win over jurors to her side and maintain some control over deliberation, it is important that jurors already inclined to decide one way are aware of other jurors' reluctance to that position. Those favorable jurors also must be able to use the disorienting moment as a transformative tool during group discussions. However, it is an interesting question whether the juror already inclined to a position even experienced the moment as disorienting—if he was already sitting on the side of the client, the juror may not even be aware that something deeply challenging had occurred.

The discussion of using the disorienting moment in closing argument begs another question: whether it is the job of the attorney to encourage discussion of differing viewpoints, to ask the jurors to make room for dissent and listen in deliberation for common ground.²⁰⁷ Is it contrary to

²⁰³ Mezirow, *Learning to Think*, *supra* note 14, at 6, 18 ("Our values and our sense of self are anchored in our frames of reference. They provide us with a sense of stability, coherence, community, and identity. Consequently, they are often emotionally charged and strongly defended.").

²⁰⁴ Taylor, *supra* note 50, at 156.

²⁰⁵ *Id.* at 166.

²⁰⁶ The project of crediting and expanding existing contexts relates back to the interconnected nature of learning and perception of self. See STIPEK, *supra* note 54, at 43 (describing research that finds that learning satisfaction and movement arise when stimuli and self-perception are only moderately discrepant, that is, the greatest learning occurs when someone is challenged just enough to rethink the world around them).

²⁰⁷ Mezirow, *Learning to Think*, *supra* note 14, at 15 ("To assess and fully understand the way others interpret experience requires discourse, and to understand and assess the reasons for their beliefs and understandings requires the ability to become critically reflective of their assumptions and our own."). Mary Field Belenky and Ann V. Stanton offer a strong critique of this aspect of Mezirow's theory. Specifically, they suggest that

ethical trial practice for an attorney, in closing argument, to suggest to the jury that they discuss their differing opinions if they have them? As a general principle, allowing groups to discuss divergent views increases access to information that can beneficially inform the decision-making process. As suggested earlier, however, a practical reality is that trial attorneys may not necessarily want discussion or critical reflection to occur. Perhaps it is less of an ethical conundrum to suggest that jurors reflect on why they hold certain positions while pointing out the disorienting moment; the attorney can suggest that jurors discuss the source, nature, and consequences of the assumptions that underlie a reluctance to adopt the client's point of view.²⁰⁸

As mentioned above, time-proven trial planning methods already reflect or adopt strategies like the adult learning self-directed model. It seems intuitive that being intentional in trial planning is the most effective way for a litigator to ensure she is as prepared as possible. When being purposeful and intentional in trial planning, the trial attorney can assume the perspective of the juror using adult learning theory to frame trial preparation. Adult educators describe a circular model when describing how adults take control over their learning in ideal environments. The model includes the following phases centered around the adult learning that occurs: need identification (what learning is needed to achieve my goals?); creation of a learning plan (what strategy should I use to achieve my goals and what resources do I have available?); implementation of a learning plan (attempt the learning strategy and use the available resources); and evaluation of the learning plan (how well did this strategy work to meet my identified learning needs?).²⁰⁹

most adults (let alone adult learners) have not developed the kind of reflective skills or capacity to engage in a meaningful way with challenges to their schematic frameworks. Belenky & Stanton, *supra* note 184, at 72.

²⁰⁸ Mezirow, *Learning to Think*, *supra* note 14, at 28–29 (discussing creating autonomous thinkers and defining their characteristics). See also Cranton, *supra* note 59, at 182.

²⁰⁹ KNOWLES, THE ADULT LEARNER, *supra* note 10, at 125. Knowles' infographic uses a circle rather than a flow chart or rectangular frame. The circle imagery supports the recognition that adult learning is an iterative process where the learner is moving between phases in a non-linear fashion, allowing learning needs and creation and implementation of strategies to remain flexible. At all times, however, the learning occurs in the center of the model and adult learning theory surrounds the phases. Knowles indicates that while there has been a significant amount of research completed on the idea of self-assessing learning needs, little to no substantive work has been done on the creation and implementation phases. *Id.* at 128

VII. CONCLUSION

As trial practitioners, it is important, although complicated, to approach the courtroom as a learning environment. Jurors do not and cannot enter the courtroom as blank slates. Like a new student in a classroom, a juror is often unfamiliar with the trial experience, other than what they may have observed on television or film or through the anecdotes of family, friends, or colleagues. Just as with students sitting through a lecture, information processing (and therefore the persuasive value of an attorney's message) is dependent upon the juror's ability to pay attention to the presentation of the case. Individual capacity to pay attention is likely to be different across jury members but shaped by the degree to which the juror is activated by the topic or motivated to be engaged with the topic.²¹⁰ In addition, some jurors may not have had positive experiences with the legal system specifically, and many may not have had positive, engaged past learning experiences generally. Being aware of and intentionally adding adult teaching and learning principles into trial preparation can help a trial attorney account for those individual experiences. Such awareness can also direct some aspects of trial preparation and planning.

The ideas discussed in this paper should not be construed to challenge the value of traditional trial preparation techniques or strategies. Accepted conventions of trial persuasion remain valuable even as trial attorneys reframe their perspective about jurors. Specifically, credible lawyers with strong, balanced arguments and an easily relatable, understandable, and emotionally compelling story will be more effective persuaders than those that approach trial less systematically. However, as trial attorneys face the ever-shrinking numbers of cases that go to jury trial because of mediation, jurisdiction-required facilitation, and bench trials, it is critical that attorneys actively reconsider the most effective ways to approach jury comprehension.

The trial attorney wants and needs to create an environment wherein the jury decides favorably for that attorney's client. To serve that end, the attorney can use adult learning theory as she provides reasons to decide in favor of her client. This goes beyond connecting the dots between law and facts in closing argument and stretches into subtle challenges to jurors about why they might be inclined to decide a certain way. By creating an opportunity for the jury, in even a nominal fashion, to take control of the decision, the trial lawyer may not only be increasing jury comprehension but may also be reinforcing the foundation of constitutional trial practice by increasing juror competency in the law and application of the law to facts.

²¹⁰ MARILLA D. SVINICKI & WILBERT J. McKEACHIE, *McKEACHIE'S TEACHING TIPS: STRATEGIES, RESEARCH, & THEORY FOR COLLEGE & UNIVERSITY TEACHERS* 66 (2nd ed., 2014).

This paper raises many questions that remain as yet unanswered. If applying andragogical theory is an effective method for improving comprehension and retention in the courtroom, and subsequently persuasion, how might a jurisdiction incorporate the missing pieces of the theory into a trial presentation? Because some of adult learning's primary tools—discussion, assessment, and engaging in multiple sources of learning²¹¹—are not necessarily available to trial attorneys, how does an attorney assess juror understanding throughout the course of the trial? Should jurors be allowed, as a universal principle, to question attorneys or witnesses themselves? Should jurors be allowed periodic breaks for group discussions about what they have heard and seen? What kind and how much outside research might a juror be allowed to do to flesh out for himself pieces of the puzzle he does not understand? How does an attorney develop learning objectives within trial strategy that accounts for juror needs and interests while simultaneously serving the client's stated trial objectives? How can jury researchers measure how strongly a juror feels she influences the outcome of a case, or even the presentation of the case information? Answering these questions requires additional research and analysis.

²¹¹ Anderson, *supra* note 104, at 127.

