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INADVERTENT DISHONESTY

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William M. Janssen*

From cave paintings to Aesop to Hans Christian Andersen, the enduring importance of storytelling is hard to deny. It is "a fundamental part of being human," writes life coach and author Christine Hennebury.[1] Stories help us "explain things to ourselves and to others" in a way that "makes the information memorable," allows us to understand the lived experiences of others, and positions us to then "take the lessons they have learned and apply [those] to our own [lives]."[2]

Hennebury relies on a well-spun illustration by a fellow storyteller to drive home the point—if your Grandfather spoke to you once about eating red berries, you may remember Grandpa and his red berries, but maybe not so much the lesson (were you supposed to *eat* the red berries, or *not* eat the red berries?).[3] But if Grandpa told you a graphic tale of the horrors that befell some little girl who ate red berries, you'll remember forever: steer clear of red berries.[4]

The namesake of this Issue of the *University of Pittsburgh Law Review* was a gifted raconteur. The Honorable Joseph F. Weis, Jr., could leave audiences

* Professor of Law, Charleston School of Law—Charleston, South Carolina. This Article is dedicated to the memory of the Honorable Joseph F. Weis, Jr. (1923–2014), and his incalculable contributions to the vitality and majesty of the law. I was privileged to have served the Judge from 1987 to 1989 as one of his law clerks during his lengthy tenure on the United States Court of Appeals for the Third Circuit. The bounty of lessons from those two remarkable years continue to guide my life each day. It is a debt I will never be able to repay. But in the cause of paying it forward, I thank both Julia K. Byerly Witt (Charleston Law Class of 2025) for her thoughtful research assistance with this Article and the *University of Pittsburgh Law Review* for hosting an extraordinary symposium feting the Judge on what would have been his 100th birthday.

[1] Christine Hennebury, Opinion, *Storytelling Is Not Just Entertainment. It's a Fundamental Part of Being Human*, CBC (Mar. 29, 2020, 4:30 AM), https://www.cbc.ca/news/canada/newfoundland-labrador/storytelling-is-human-1.5511027.

[2] *Id.*

[3] *Id.*

[4] *Id.*

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spellbound, be they seasoned lawyers or grade-schoolers. He had a marvelous storytelling manner—wide-eyed, raising eyebrow, and growing cadence—that drew you into his tale, captivated by the recounting. As I recall them now, most of Judge Weis's stories tended to end with his signature impish grin and a disarming "go-figure" shoulder shrug, as though leaving it to his listeners to work out the moral of the message. And there always was a moral to the message. It usually spoke to some aspect of character building. He was full of lessons.

Perhaps Judge Weis's talent at storytelling reflected his long and eventful life, filled with its own rich bounty of lesson-learnings. At age twenty-one, for example, he was a young officer who landed on Utah Beach in 1944 just a month after D-Day, assigned to an artillery battalion with General Patton's army as it pushed into France.[5] By late autumn, his unit had stalled near the town of Nancy, France, where German tanks had cut off the path ahead near a ridge.[6] The fighting was apocalyptic. Young officer Joe Weis witnessed the terror of war up close, but found his own humanity evolving in the process.[7] One day in mid-November, Officer Weis was calling in artillery strikes, roaming amidst his fellow soldiers with words of encouragement, when shrapnel from an exploding German shell tore through his lower body.[8] Lying on the battlefield in critical condition, he found he could not move to safety—but remained remarkably positive.[9] A fellow soldier (who became a life-long friend) rescued him, driving him by jeep through the barrage to an aid

[5] *See* William M. Janssen, *Hon. Joseph F. Weis, Jr. Senior Circuit Judge, U.S. Court of Appeals for the Third Circuit*, FED. LAW., Oct./Nov. 2012, at 23, 23; Torsten Ove, *French City Will Fete World War II Veteran: Senior Judge Was Wounded in 1944*, PITT. POST-GAZETTE (Aug. 15, 2004), 2004 WLNR 4849959.

[6] Janssen, *supra* note 5; Ove, *supra* note 5.

[7] *See* Ove, *supra* note 5 ("In August 1944, one of [Weis's] friends, David Moore, was cut in half by a German submachine gun. His comrades brought him back on a jeep, and he was later buried in Brittany. 'That's when I started to really hate the Germans,' Weis says. 'It was a white-hot hatred. I could say I was really scared of myself at that point.' But it didn't last. A few weeks later, he came across a dead German officer on the side of the road. Someone had gone through his pockets and found pictures of his wife and children. 'I thought, "He's just like us,"' Weis remembered. 'From then on, the hatred just went away.'").

[8] *Id.*

[9] *See id.* ("[W]hen he opened his shirt he saw his intestines. But even then, he wasn't too worried. He had read a *Reader's Digest* story about the advances made in treating stomach wounds since the last war, and he figured he had a good chance.").

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station where his four-year recuperation in and out of hospitals began.[10] After harrowing adventures like these, maybe all of life seems like a lesson.

Judge Weis lived a life of personal and professional integrity, until his passing in 2014.[11] In 1988, the *University of Pittsburgh Law Review* collected many tributes that laid testament to that fact, from the now-legendary characterization of how he won cases while a practicing lawyer (he "just out-niced" his adversaries),[12] to his magic as an administrator ("one who never let the solemnity expected of a judge obscure the twinkle in his eye"),[13] to the marvel of those who practiced before him as he sat as a judge ("How does one who constantly decides contentious litigation that lawyers and citizens cannot resolve themselves continuously receive admiring accolades?").[14] What was so curious about Judge Weis—and so worthy of study and emulation—is not that some felt admiring of him, but that everyone seemed to feel that way. Former Pitt Law Dean Mark Nordenberg captured the universality of the sentiment: "To merely report that Judge Weis is greatly admired is something of an understatement. He enjoys the highest professional respect and the deepest personal

[10] *Id.* For a more comprehensive sketch of Judge Weis's life and professional accomplishments, see Janssen, *supra* note 5.

[11] Matthew Santoni, *Fox Chapel Judge, Revered by Generations of His Peers, Dies at 91*, TRIBLIVE (Mar. 20, 2014, 12:01 AM), https://archive.triblive.com/news/obituaries/fox-chapel-judge-revered-by-generations-of-his-peers-dies-at-91/.

[12] Ruggero J. Aldisert, *A Tribute to Judge Weis*, 49 U. PITT. L. REV. 917, 917 (1988).

[13] William H. Rehnquist, *A Tribute to the Honorable Joseph F. Weis, Jr.*, 49 U. PITT. L. REV. 915, 915 (1988).

[14] David B. Fawcett, *Judge Joe Weis—A Splendid Judge, a Good Guy*, 49 U. PITT. L. REV. 935, 935 (1988).

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affection."[15] Even after his passing, so revered was his legacy that the United States Congress renamed the Pittsburgh federal courthouse in his honor.[16]

Onto our story. What this Article will now recount is not a story I ever heard Judge Weis tell. He could have; I wouldn't swear away the possibility that he did, but I cannot claim to have witnessed it. This story is not about him or one of his friends or colleagues. But it's the sort of story he would make it a point to share with the young women and men who served as his law clerks. It's also now a quite dated story, tracing back to the late 1970s. But that has not deterred me. Like all good stories, whether found in a cave or penned by Aesop or Hans Christian Andersen, beginning with "once upon a time" only enriches the retelling. So, here it goes.

I. MAHLON'S STORY

Mahlon Fay Perkins Jr. died of heart failure in late March 2011.[17] He was 92.[18] He had lived in Greenwich, Connecticut, for more than half a century.[19] While there, he had served as president of the town's symphony, contributed as a board member on several of the town's civic organizations, co-founded a local forum on nuclear arms control, and worked as a volunteer attorney for more than a decade with the

[15] Mark A. Nordenberg, *Judge Joseph F. Weis, Jr.: A Humble Hero*, 49 U. PITT. L. REV. 931, 933 (1988). At the risk of overstaying the *Pitt Law Review*'s footnote tolerance levels, Dean Nordenberg's sentiments merit a bit more wholesome excerpting:

> To label Judge Weis a heroic figure might be an exaggeration, at least if that term is used in its traditional—and most narrow—sense. No one that I know has seen him slay a dragon, rescue a child, or hit five home runs in a single ball game. However, many of us have seen him wrestle with and conquer the most difficult of legal problems. We have watched him work with others in a way that has brought out the best in them and in him. We have been inspired by his dedication to the general good. We know that the system we cherish is far better for his contributions to it.

Id.

[16] *See* Act of May 29, 2015, Pub. L. No. 114-20, 129 Stat. 217 (designating the United States courthouse in Pittsburgh as the "Joseph F. Weis Jr. United States Courthouse").

[17] *See* Lisa Chamoff, *Mahlon Fay Perkins Jr., Devoted to Discourse, Civic Issues, Dies at 92*, STAMFORD ADVOC. (Apr. 8, 2011), https://www.stamfordadvocate.com/local/article/Mahlon-Fay-Perkins-Jr-devoted-to-discourse-1329669.php.

[18] *Id.*

[19] *See id.*

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Center for Constitutional Rights in New York City.[20] A town obituary remembered him as a "generous, warm-hearted and intelligent man" who was "really interesting to talk to," "loved ideas," and was the paradigm of "total commitment" to causes he cherished.[21] At the time of his death, he had been married to the same woman for sixty years; they were parents of three sons and had nine grandchildren.[22]

Mahlon was born in Shanghai in 1918 (his father was a diplomat) and lived in Beijing until, as a teenager, he left to attend school in Los Angeles and later enrolled in the prestigious Phillips Exeter Academy in New Hampshire and, thereafter, Harvard College.[23] In 1942, he enlisted in the U.S. Army, was promoted to captain, and earned both the U.S. Army Soldier's Medal for Valor and the Chinese Order of the Flying Cloud for parachuting into China to assist in the release of prisoners of war.[24] Once the fighting ended, Mahlon attended Harvard Law School,[25] where he served as a *Harvard Law Review* editor.[26] Upon graduating with his law degree in 1949,[27] he joined the prominent New York City law firm of Donovan, Leisure, Newton & Irvine where he worked for nearly thirty years, rising through the ranks to partnership.[28] While there, he was known as a "quiet, dignified, scholarly man,"[29] who became one of its "most revered" partners and widely considered its "best writer."[30] Long-serving federal judge Walter R. Mansfield, of the prestigious United

[20] *See id.*

[21] *Id.*

[22] *See id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] David Margolick, *The Long Road Back for a Disgraced Patrician*, N.Y. TIMES (Jan. 19, 1990), https://www.nytimes.com/1990/01/19/us/law-the-long-road-back-for-a-disgraced-patrician.html.

[27] Chamoff, *supra* note 17.

[28] Tom Goldstein, *Ex-Partner in a Major Law Firm is Spared Disbarment*, N.Y. TIMES, July 23, 1979, at B3.

[29] JAMES B. STEWART, THE PARTNERS: INSIDE AMERICA'S MOST POWERFUL LAW FIRMS 332 (1983).

[30] C. Evan Stewart, *The Associate's Dilemma: Joe Fortenberry, Mahlon Perkins, and the* Kodak *Antitrust Trial*, FED. BAR COUNCIL Q., June/July/Aug. 2021, at 26, 29.

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States Court of Appeals for the Second Circuit,[31] praised Mahlon as "the epitome, the acme, the paradigm of integrity."[32]

Now, all of that is just prologue. The crux of Mahlon's story is not how he came to his law firm, but how he left it.

Mahlon was suspended by his law partners in 1978; two months later, under a cloud of likely impending termination, he resigned.[33] He was criminally prosecuted, pleaded guilty to criminal contempt of court, and was sentenced to serve time in federal prison.[34] Once released from prison, he was no longer welcome to visit his former firm (or even to enter its reception area), and young firm attorneys, some whom he had hired into the firm, were counseled to "keep their distance" from him.[35] A five-judge panel of the New York Appellate Division deliberated whether to disbar him from the roll of licensed New York attorneys, but ultimately relented, opting instead for the imposition of a "severe censure," citing his term of imprisonment, now-tarnished reputation, and "consequent humiliation and disgrace" as mitigation.[36]

What Happened?

In 1978, Mahlon's law firm, Donovan Leisure, was representing a behemoth firm client, Eastman Kodak, in an antitrust lawsuit that had been filed years earlier by Berkey Photo, Inc.[37] Mahlon was part of that lawyering team.[38] Kodak had been an important client of the law firm for decades, and the Donovan Leisure lawyers were defending it against allegations that it had illegally monopolized camera and film markets.[39] The stakes were high. Berkey Photo sought many millions of dollars

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[31] Dennis Hevesi, *Walter R. Mansfield, Federal Judge, Is Dead at 75*, N.Y. TIMES (Jan. 8, 1987), https://www.nytimes.com/1987/01/08/obituaries/walter-r-mansfield-federal-judge-is-dead-at-75.html.

[32] Margolick, *supra* note 26.

[33] *See id.*

[34] *See id.*

[35] *Id.*

[36] *In re* Perkins, 419 N.Y.S.2d 1, 1 (App. Div. 1979) (per curiam).

[37] *See* Goldstein, *supra* note 28.

[38] *See id.*

[39] *See* Robert E. Hinerfeld, *A Broader View of Discovery Ethics: The Societal Context*, 2002 PRO. LAW. (SYMP. ISSUE) 35, 41–43; *see also* JAMES B. STEWART, *supra* note 29, at 328 ("Donovan, Leisure had advised Kodak on antitrust matters ever since the Depression.").

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in damages that, when trebled as antitrust judgments are under federal law, threatened Kodak with staggering financial, reputational, and market share losses.[40]

Kodak's defense hinged, in part, on the opinions of an expert economist from Yale University.[41] The expert was intending to testify that Kodak's dominance in the camera and film markets was due not to illegal behavior, but rather to the superior quality of its products.[42] As the start of the trial neared, Berkey Photo's attorney scheduled the deposition of this Yale economist; Mahlon was tasked to defend it.[43] Before that deposition commenced, the Donovan Leisure firm had provided Berkey Photo's attorney with copies of the expert's interim reports, his appointment book and time sheets, and a summary of documents Kodak had provided to him and that he had reviewed in preparing his opinions.[44]

This documents issue is where the deposition questioning began.[45] The Yale expert was pressed on what documents he had and where they all were; he answered that, over the years since he had been hired to serve as Kodak's expert, he had been sending all of his documents—including his handwritten notes—along to the Donovan Leisure firm (because he believed they were encompassed within a confidentiality ruling earlier issued by the court and because his office at the university lacked the space to store them).[46]

This revelation created a stir. Berkey Photo's attorney had received no handwritten notes, prompting him to turn to Mahlon and demand these long-since-past-due documents in the law firm's possession.[47] Mahlon answered that he could not comply; all of the documents received from the expert had been destroyed.[48] The evidently incredulous Berkey Photo attorney pressed for details—what documents

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[40] JAMES B. STEWART, *supra* note 29, at 328 (stating that Berkey Photo claimed more than $300 million in damages that, if awarded, would then be trebled to nearly $1 billion).

[41] *Id.* at 339 ("It is hard to overestimate the importance of an economic expert witness in an antitrust case, especially one being tried before a jury.").

[42] *See* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 305–06 (2d Cir. 1979).

[43] *See* JAMES B. STEWART, *supra* note 29, at 339–40 (explaining that selecting and preparing all of Kodak's expert witnesses was Mahlon's assigned task in the case).

[44] *Berkey Photo, Inc.*, 603 F.2d at 305.

[45] JAMES B. STEWART, *supra* note 29, at 340–41.

[46] *Id.*; *see also Berkey Photo, Inc.*, 603 F.2d at 305.

[47] JAMES B. STEWART, *supra* note 29, at 341.

[48] *Id.*

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got destroyed, who destroyed them, and when?[49] Mahlon replied that all the destruction had occurred prior to any pending document production request from Berkey Photo and, although he had "no way of knowing" who actually participated in the destruction, Mahlon said: "I am the person responsible for destroying or seeing that they were destroyed."[50] The deposition continued. Later, the Yale expert testified that he knew the Donovan Leisure firm was destroying his documents after receiving them but continued to send his documents along to the firm anyway.[51]

While this heated exchange was occurring between Mahlon and the Berkey Photo lawyer, a young associate from the Donovan Leisure firm (Joe Fortenberry) was on hand for the purpose of assisting Mahlon with any tasks that might have come up during the deposition.[52] Evidently,[53] the young associate leaned over to Mahlon—during his jousting with Berkey Photo's counsel—and whispered to Mahlon that he seemed to be forgetting about the suitcase full of Yale expert documents that, at that moment, was stored in Mahlon's temporary law office in downtown Manhattan.[54] Mahlon apparently waved off his associate's reminder and maintained a strident position with Berkey Photo's attorney: there were no documents from the expert in the law firm's possession, nothing more could be produced to Berkey Photo, all had been destroyed, and he (Mahlon) had been the destroyer.[55]

But none of that was true. Mahlon hadn't destroyed the Yale expert's documents. Nor had he ordered others to destroy them. They were all still there. In a suitcase. In a closet. In Mahlon's office. And Mahlon knew it.[56]

About a month later, and just weeks before the *Berkey Photo v. Kodak* trial was due to commence, a pretrial hearing was held before the trial judge where the

[49] *See id.*

[50] *Id.*

[51] *Berkey Photo, Inc.*, 603 F.2d at 305.

[52] JAMES B. STEWART, *supra* note 29, at 339.

[53] As discussed below, whether this whispering occurred or not is disputed.

[54] JAMES B. STEWART, *supra* note 29, at 356; *see also* Walter Kiechel III, *The Strange Case of Kodak's Lawyers*, FORTUNE, May 8, 1978, at 188, 190 (clarifying that "the suitcase and the materials it contained were traveling back and forth between Perkins's Rockefeller Center office and his office downtown in the spaces Donovan Leisure had leased near the courthouse for purposes of the trial").

[55] JAMES B. STEWART, *supra* note 29, at 341; *see also* Steven Brill, *When a Lawyer Lies*, ESQUIRE, Dec. 19, 1978, at 23.

[56] Brill, *supra* note 55; JAMES B. STEWART, *supra* note 29.

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destruction of the Yale expert's documents was raised.[57] Mahlon assured the judge: the documents had been destroyed, but not to worry because "he had searched through the files and come up with duplicates, and those had been delivered to Berkey Photo's attorney.[58] Duplicates of handwritten notes? "Is that right, Mr. Perkins?," probed the judge.[59] Mahlon evaded the judge's question, prompting the judge to order that Mahlon submit an affidavit verifying his oral statements to the court.[60] Mahlon prepared, signed, and submitted his affidavit—thereby "doubl[ing] down on his misrepresentations."[61]

The *Berkey Photo v. Kodak* antitrust trial—before a jury, as Kodak had demanded—began in July 1977; it involved thousands of exhibits and lasted more than six months.[62] It became "one of the largest and most significant private antitrust suits in history."[63]

As the trial was drawing to its close in January 1978, the Yale expert economist was called as Kodak's final defense witness.[64] His testimony was hotly contested, including a spirited cross-examination that centered once again on his documents.[65] After court recessed for the day, the judge admonished the Donovan Leisure lawyers.[66] Mindful of the odd earlier revelation of the firm's destruction of the Yale expert's documents, the judge imposed a new obligation—that a further affidavit be submitted to explain "how and why" the Yale expert's documents had been sent to, and destroyed by, the Donovan Leisure firm.[67]

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[57] *See* JAMES B. STEWART, *supra* note 29, at 343.

[58] *Id.*

[59] *Id.* at 344.

[60] *Id.*

[61] C. Evan Stewart, *supra* note 30, at 26.

[62] *See* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 268 (2d Cir. 1979).

[63] *Id.* at 267.

[64] *See* JAMES B. STEWART, *supra* note 29, at 345–48.

[65] *See id.* at 347–48.

[66] *Id.* at 348. In another bizarre twist to Mahlon's story, the reason prompting the preparation of this new affidavit was that "another Donovan Leisure partner was belatedly forced to disclose a letter from Kodak's expert stating the expert had initial qualms about the defense's theory—an entirely different 'smoking gun.'" Thomas C. Tew, *Electronic Discovery Misconduct in Litigation: Letting the Punishment Fit the Crime*, 61 U. MIAMI L. REV. 289, 299 n.52 (2007).

[67] JAMES B. STEWART, *supra* note 29, at 348.

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Over the course of the litigation, Mahlon's role in the *Kodak* trial defense had diminished almost entirely, but, for obvious reasons, Mahlon was asked to re-engage to collaborate on this new affidavit request.[68] Late on Sunday night, the day before trial was to resume, Mahlon visited with the partner leading the Donovan Leisure defense team.[69] "Looking tired, haggard, and with tears in his eyes, [Mahlon] finally confessed . . . . No documents had ever been destroyed. With his earlier affidavit, [Mahlon] had committed perjury. He couldn't do it again."[70]

Early the next morning, the firm notified both Berkey Photo's attorney and the judge of Mahlon's confession; then they notified the firm's client Kodak, the Yale expert, and, in the days that followed, the rest of the Donovan Leisure firm and many of its other longstanding clients.[71]

When the judge learned of this development, he unsurprisingly was deeply troubled.[72] He referred the matter to the local U.S. Attorney's Office for investigation.[73]

The trial resumed with a withering cross-examination of the Yale expert economist, positioning Berkey Photo's attorney for a devastating closing summation: he invited the jury to conclude that Kodak's Yale economist "had deliberately collaborated with [Mahlon] in an effort to destroy or conceal documents unfavorable to Kodak's cause."[74]

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[68] *See id.* at 345, 348.

[69] *See id.* at 348.

[70] *Id.*

[71] *See id.* at 349–53.

[72] *See* Jack Egan, *Perjury Probe Launched in* Kodak *Case*, WASH. POST (Apr. 11, 1978), https://www.washingtonpost.com/archive/business/1978/04/11/perjury-probe-launched-in-kodak-case/337cb7ca-1d53-4c49-8aae-e83bd2877ade/ ("Judge Frankel . . . referred to actions to 'conceal that perjury over many months while the court and opposing counsel were steadily and continuously misled and burdened by the resulting confusion and misapprehension of the affected circumstances.'") [hereinafter Egan, *Perjury Probe*].

[73] *Id.*

[74] Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 308 (2d Cir. 1979). Berkey Photo's attorney raged: "[Y]ou heard defendant's $70,000 Yale expert . . . . That sordid spectacle of dissembling, evasiveness, deception and concealment disgraces the dignity of this court, this proceeding, and you jurors." Jack Egan, *How Many Surprises Developed During the* Kodak *Case*, WASH. POST, Apr. 16, 1978 [hereinafter Egan, *How Many Surprises*]. It seems Kodak's lawyer conceded the impact:

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After thirteen days of deliberations (eight on liability and five on damages), and more than likely influenced by witnessing the sensational closing days of the trial, the jury returned a verdict against Kodak for nearly $40 million in damages.[75] The trial judge reduced the verdict to $27 million, but (as federal law requires) that amount was trebled and supplemented with attorney's fees and costs, for a total judgment of almost $90 million.[76] Victory in hand, Berkey Photo then demanded that the judge impose an equitable remedy as well, that Kodak be ordered "to divest itself of its photographic apparatus, film processing and film printing divisions except those which relate only to professional photography."[77] An appeal was certain.

But Mahlon would have no role in it. Federal prosecutors charged Mahlon with criminal contempt of court for making false statements to a federal judge and for later filing a false affidavit.[78] Mahlon pleaded guilty to criminal contempt; he was sentenced to one month in federal prison (later reduced to twenty-eight days for good behavior).[79] As noted earlier, his days as a Donovan Leisure partner were over, and he avoided disbarment by the wispiest of margins.[80]

Mahlon's story closes with several epilogues.

Few at the Donovan Leisure law firm could believe that Mahlon had lied at all, let alone so spectacularly. John Tobin, a member of the firm's executive committee at the time, "was astounded and confused—the facts were hard for him to grasp—he could not believe that 'Perk,' his friend, colleague and former classmate at Harvard

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> This court and the plaintiff were told by [the Yale expert] that certain documents that Kodak's lawyers had said had been destroyed had in fact not been destroyed. . . . I am certain that you never expected to hear anything so extraordinary. The fact is, the documents were not destroyed.

Id.

[75] *Berkey Photo, Inc.*, 603 F.2d at 268. The appeals panel acknowledged that the late-trial courtroom drama "led to the unfortunate consequence of casting Kodak's attorneys, and the defendant itself, in a highly unfavorable light." *Id.* at 308.

[76] *Id.* at 268.

[77] *See* Egan, *How Many Surprises*, *supra* note 74.

[78] *See* Hinerfeld, *supra* note 39, at 43.

[79] *See* Margolick, *supra* note 26.

[80] *See id.*

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Law School, was involved";[81] it was all, in his words, so "utterly uncharacteristic."[82] The associates with whom Mahlon worked praised him "in almost extravagant terms," as "one of the kindest, gentlest, most thoughtful men I've ever known," and as someone who simply "could not have done something like that."[83]

The "whispered" deposition comment to Mahlon became tangled in mystery. Mahlon himself was the source for this recollection, although he seemed originally to have suggested that he and his associate (Joe Fortenberry) had no discussions about the expert's documents.[84] For his part, Fortenberry consistently, categorically denied that any such whisper had ever occurred,[85] with commentators later debating the ethics of not reporting Mahlon's lie, had the whisper story been true.[86] One of Fortenberry's colleagues at the time offered a different recollection entirely, with an interesting perspective:

> What happened to Joe . . . was that he saw [Mahlon] lie and really couldn't believe it. And he just had no idea what to do. I mean, he knew [Mahlon] was lying, but he kept thinking that there must be a reason. Besides, what do you do? The guy was his boss and a great guy![87]

It seems that the judge presiding over the *Kodak* trial empathized on this point, commenting: "There isn't any way for an associate to handle that problem."[88] Fortenberry remained at the Donovan Leisure firm for the next year and a half, but

[81] JAMES B. STEWART, *supra* note 29, at 349.

[82] *Id.* at 353.

[83] *Id.*

[84] C. Evan Stewart, *supra* note 30, at 29.

[85] *See id.*; *see also* JAMES B. STEWART, *supra* note 29, at 363.

[86] *See, e.g.*, Brill, *supra* note 55, at 24; *see also* David J. Luban, *The Ethics of Wrongful Obedience*, *in* ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 94, 95 (Deborah L. Rhode ed., 2000); Douglas N. Frenkel, *Ethics: Beyond the Rules—Questions and Possible Responses*, 67 FORDHAM L. REV. 875, 885 (1998) (using the Fortenberry situation as a hypothetical problem for ethical study, focusing on "the pressures, incentives, and disincentives in large law firms . . . that tend to produce behavior exhibited by . . . Fortenberry").

[87] Brill, *supra* note 55, at 24.

[88] *Id.*

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walked around like "a beaten man with glazed eyes"; he left for a job at the Justice Department, but died of a heart attack not long after.[89]

The judgment against Kodak in the *Berkey Photo* case was partially vacated on appeal (handled by a different law firm; Kodak had fired Donovan Leisure) and, with a retrial looming, the parties agreed to settle for about $7 million, a modest sum compared to the jury's verdict.[90]

The Donovan Leisure law firm had lost not only the trial against Berkey Photo (and the work on the ensuing appeal), but also Kodak as a client—one that had accounted for about a quarter of the firm's total billings.[91] Kodak had obvious claims against the law firm arising from these events, which the law firm settled quietly by paying Kodak $675,000.[92] As devastating as all of this was, an even more haunting prospect confronted the firm's senior leadership—whether this crisis could bring down the entire firm itself.[93] The fate of its work for its other, globally prominent clients hung in the balance.[94] The firm survived until 1998, when it closed.[95] Once formidable with nearly two hundred lawyers in the early 1980s,[96] it had dwindled to about sixty lawyers in the late 1990s and could no longer effectively compete.[97]

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[89] C. Evan Stewart, *supra* note 30, at 29.

[90] *See* JAMES B. STEWART, *supra* note 29, at 364–65.

[91] *See* W. Bradley Wendel, *Morality, Motivation, and the Professionalism Movement*, 52 S.C. L. REV. 557, 607 (2001).

[92] *See* Brian Dumaine, *Kodak's Revenge on its Law Firm*, FORTUNE, May 30, 1983, at 80, 80.

[93] JAMES B. STEWART, *supra* note 29, at 328 ("[A]s the details of what was happening sank in, [the firm's leadership committee's] concern quickly expanded beyond worry about losing the *Kodak* case. They had to face the fact that the *Kodak* debacle now threatened the continued existence of Donovan, Leisure itself.").

[94] *See* Kiechel, *supra* note 54, at 194 ("One also wonders what effect this strange case will have on the good opinion of such longtime Donovan Leisure clients as American Cyanamid, Walt Disney Productions, and Mobil—not to mention the impact on potential new clients.").

[95] *See* Melody Petersen, *Donovan, Leisure, Old-Line Law Firm, to Shut Its Doors*, N.Y. TIMES (Apr. 20, 1998), https://www.nytimes.com/1998/04/20/business/donovan-leisure-old-line-law-firm-to-shut-its-doors.html.

[96] *See* Daniel F. Cuff & Tamar Lewin, *Litvack Plans to Resign From Donovan Leisure*, N.Y. TIMES (Nov. 5, 1986), https://www.nytimes.com/1986/11/05/business/business-people-litvack-plans-to-resign-from-donovan-leisure.html.

[97] Petersen, *supra* note 95.

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Mahlon had a difficult time finding legal work after his release from prison.[98] Ultimately, the Center for Constitutional Rights brought him on as a volunteer lawyer, where he provided yeoman's service for years.[99] By his new colleagues' account, Mahlon became "a treasured colleague," having earned—at the age of 71—"a reputation for productivity, effectiveness, dedication and modesty."[100] As he was being interviewed one day at the Center, a co-worker passing by piped in: "Mahlon, be sure to tell him how wonderful we all think you are."[101]

II. EXPLAINING MAHLON'S STORY

Many have endeavored to explain Mahlon's story over the years. Doing so, though, must always start with this nettlesome fact: none of the "destroyed" suitcase documents from the Yale expert economist were crucial to the litigation; in fact, "virtually all" of them proved to be copies of documents already produced to Berkey Photo's lawyers.[102] Thus, at least from the Kodak perspective, Mahlon's lie had served no strategic purpose whatsoever.[103]

So, why then?

Maybe it was due to the nearly unimaginable burden of litigating a case that posed existential threats to a legacy client of the Donovan Leisure law firm,[104] a case that promised to influence the law of federal antitrust in the United States for years

[98] *See* Margolick, *supra* note 26.

[99] *See id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*; *see also* C. Evan Stewart, *supra* note 30, at 28; JAMES B. STEWART, *supra* note 29, at 357.

[103] Jeffrey W. Stempel, *Asymmetry and Adequacy in Discovery Incentives: The Discouraging Implications of* Haeger v. Goodyear, 51 AKRON L. REV. 639, 676 (2017) ("The Perkins nondisclosure, although of course a serious violation (compounded by misrepresentations to the court), may have had less than zero effect on the outcome of the matter."); *see also* Kiechel, *supra* note 54, at 190 ("The bitter irony is that, as it later came out, the material contained nothing particularly damaging to Kodak. The contents of the suitcase became [the] 'smoking gun . . .' not because of anything revealed in the documents, but rather because their mere existence indicated that Perkins had lied under oath."); JAMES B. STEWART, *supra* note 29, at 357 ("The attempt to conceal [the Yale expert's suitcase of documents], in the end, did nothing to benefit Kodak.").

[104] *See* Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1140–41 (2013) ("Long hours, deadlines, and workplace politics can combine to take a toll on lawyers, as can lack of sleep, frequent interruptions, travel, difficult decisions, and the struggle to balance work and family life. . . . These sorts of job stresses impact ethical decision making.").

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to come.[105] The eyes of the antitrust bar were watching, after all. Apropos that explanation, Professor Nancy Rapoport offers an apt observation regarding the *Kodak* trial specifically: "the pressure that the senior lawyers take to keep their clients, maintain their billings, and compete with other elite lawyers who are all too happy to steal clients away, is relentless pressure indeed."[106] Add in the often-repeated surmise that "[l]awyers tend to have certain personality characteristics that contribute to their need to 'win,'" and you have the makings of a volatile brew that could "explain how very well-intentioned lawyers can find themselves slipping into serious breaches of ethics."[107]

The spectating impressions of the judge presiding over the *Berkey Photo v. Kodak* trial seem to align with this surmise. In addressing the evolving circumstances, that judge indicted what he imagined to be a win-at-all-costs mentality with Kodak's defense generally, and Mahlon particularly: "a kind of single-minded interest in winning, winning, winning without the limited qualification of that attitude that the court, I think, is entitled to expect and which I feel must have infected [Mahlon] and has infected certain aspects of this case from time to time in ways I find upsetting."[108] But, no doubt, this was just a guess.

Another insight, suggesting a much different explanation, came from a lawyer who worked at Mahlon's law firm at the time and had first-hand knowledge of both the cast of characters and the unfolding events.[109] Mahlon was, this author writes, "the wrong man, for the wrong job, at the wrong time."[110] He was the firm's gifted brief-writer, not its courtroom brawler, and had been enlisted in the *Kodak* case only because the firm's other trial lawyers were being fully deployed to meet the heavy

[105] *See* C. Evan Stewart, *supra* note 30, at 26 (stating that *Berkey Photo v. Kodak* was "the most important antitrust trial of the 1970s").

[106] Nancy B. Rapoport, *Enron, Titanic, and The Perfect Storm*, 71 FORDHAM L. REV. 1373, 1390–91 (2003). *See generally* Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1390 (1997) ("Lawyers are likely to be more achievement-oriented, more aggressive, and more competitive than other professionals and people in general.").

[107] Rapoport, *supra* note 106, at 1387, 1389.

[108] *See* Egan, *How Many Surprises*, *supra* note 74.

[109] *See generally* C. Evan Stewart, *supra* note 30, at 27 (recounting the *Kodak* case's story by the author, a 1976 Donovan Leisure summer associate who began working there full-time in September 1977).

[110] *Id.* at 28.

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litigator staffing needs across the firm's various engagements.[111] "[B]eing a good team player," Mahlon was stepping up to help out but, in doing so, was "entering an arena which was not only a war zone, but also one with which he had no experience or aptitude."[112] In the heated deposition of Kodak's expert, the confrontation with Berkey Photo's attorney over the expert's documents exploded angrily and accusatorily.[113] As Berkey Photo's attorney was pummeling Mahlon to "immediately bend to his will," Mahlon "got his back up, snapped, and lost his way."[114] Having returned fire unadvisedly in the heat of the moment, Mahlon now "thought he was trapped."[115]

But then, why keep lying? Why lie to the judge's face? Why, even after time to reflect, draft a sworn affidavit "doubling-down" on the lie?

Here, the science of behavioral ethics may offer clues. This science hypothesizes that "people fool themselves. They do not wake up one morning and announce, 'Today is the day I start my life of crime.'"[116] Instead, the behavioral ethicist posits that personal circumstances can so compromise our decision-making facility that we "fail to observe an ethical issue sitting right in front of [us]."[117] When so compromised, our decision-making can become "non-deliberative," producing

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[111] *Id.* at 28–29.

[112] *Id.* at 29. In his riveting recounting of the *Kodak* case, author James Stewart offered a similar assessment:

> While it was a logical extension of his work in developing [the Yale expert's] testimony, Perkins was not looking forward to the deposition. As hard as he had tried, Perkins had never delighted in the kind of tough litigating tactics [that other lawyers employed] . . . and that might be called for in the deposition by the opponents' lead counsel of Kodak's single most important witness. But the need to prove himself was weighing heavily on Perkins . . . and he went into the deposition determined to take a hard line.

JAMES B. STEWART, *supra* note 29, at 340.

[113] *See* C. Evan Stewart, *supra* note 30, at 26.

[114] *Id.* at 29.

[115] *Id.*

[116] Robert A. Prentice, *Moral Equilibrium: Stock Brokers and the Limits of Disclosure*, 2011 WIS. L. REV. 1059, 1092.

[117] *Id.*

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behavior that is "not regulated with full consciousness."[118] In this light, the analysis of a lawyer's misbehavior more profitably focuses not on what rules of professional responsibility have been violated, but on "what situational and underlying psychological factors existed" to pave the way for that misbehavior.[119]

More specifically, the behavioral ethics theory of "cognitive dissonance" contends "that when our actions conflict with our self-concept, our beliefs and attitudes change until the conflict is removed."[120] In other words, cognitive dissonance instigates human beings to rationalize their own bad behavior: if, after all, we perceive ourselves to be good, moral actors, that premise may block an accurate, objective self-assessment of misdeeds.[121] "[Y]our brain may well get you to do things that will mortify you later, and admitting that you've done something wrong is hard when cognitive dissonance gets in the way," or, put another way, "not every bad act comes from a bad intent."[122]

Drawing on cognitive dissonance principles, Professor David Luban proffers a "corruption of judgment" lens through which to view Mahlon's actions.[123] This view starts with the "high-stakes discovery process" of civil litigation, where combatants search—ethically—for evasive but non-frivolous arguments to deny an opponent's access to information ("lawful adversarial deception"), a normalizing rationalization that is "the first step onto the slippery slope."[124] In this modeling: "[i]f legitimate advocacy marks the beginning of this particular slippery slope, Berkey-Kodak lies at its end," with "lies, perjury, and wrongful obedience."[125]

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[118] Yuval Feldman & Yotam Kaplan, *Big Data and Bounded Ethicality*, 29 CORNELL J.L. & PUB. POL'Y 39, 51 (2019) (describing a "dual-reasoning system" that differentiates "a controlled and deliberative process" in decision-making from one that is "automatic, intuitive, and mostly unconscious").

[119] Catherine Gage O'Grady, *Behavioral Legal Ethics, Decision Making, and the New Attorney's Unique Professional Perspective*, 15 NEV. L.J. 671, 678 (2015). While this scholar probes the forces at work in compromising the judgment of new attorneys, the observations offer credible insights for seasoned lawyers just as well.

[120] Luban, *supra* note 86, at 102.

[121] Robbennolt & Sternlight, *supra* note 104, at 1117.

[122] John G. Cameron, Jr. & Nancy B. Rapoport, *Ethics for Real Estate Lawyers Today*, PRAC. REAL EST. LAW., May 2023, at 30, 37.

[123] Lupin, *supra* note 86, at 106.

[124] *Id.*

[125] *Id.*

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Once Mahlon started down that slippery slope, the natural human tendency to avoid unpleasantness might have led, in turn, to willful ignorance during his ensuing behavior, something one scholar labeled "avoiding the dread": the "awful," "traumatic," "deflating," or "embarrassing" feeling that follows "*the realization* that we were wrong—that we have made a mistake. At a most basic level, our unconscious avoidance of mistake realization reflects our unwillingness to confront the 'sense of dread on realizing that one has made an error.'"[126] Consider Stanley Milgram's famous simulated electrical-shock experiments from 1961: "Cognitive dissonance theory suggests that when I have given . . . a series of electrical shocks, I simply won't view giving the next shock as a wrongful act, because I won't admit to myself that the previous shocks were wrong."[127] Worse yet, realizing that his blunder was permanent (given the definitive, dismissive, absolutist nature of his representation to the Berkey Photo attorney) increased the tendency that Mahlon's mind would begin a process of "unconscious rationalization" that would excuse or justify the behavior, thus preventing "full realization and acceptance of the mistake."[128] From there, the die was likely cast—to Mahlon, whether consciously or not, there probably seemed no way to walk back his representation.[129] Thus, the doubling-down.

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[126] Catherine Gage O'Grady, *A Behavioral Approach to Lawyer Mistake and Apology*, 51 NEW ENG. L. REV. 7, 15–16 (2017) (quoting Jennifer K. Robbennolt, *Apologies and Medical Error*, 467 CLINICAL ORTHOPAEDICS & RELATED RSCH. 376, 378 (2009)).

[127] Luban, *supra* note 86, at 102. Our own lived experiences readily validate the proposition that framing has at least a subliminal impact on human decision making. *See, e.g.*, Robert A. Prentice, *Behavioral Ethics: Can It Help Lawyers (and Others) Be Their Best Selves?*, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 35, 49 (2015) ("People would rather purchase potato chips labeled 90% fat free than potato chips labeled 10% fat, even though they are the exact same potato chips.").

[128] O'Grady, *supra* note 126, at 22. To illustrate the point, O'Grady uses the example of a lost appeal due to a missed deadline:

> Once an attorney learns about the missed deadline, she may begin rationalizing that her client probably would have lost the appeal anyway and she probably saved her client thousands of dollars in appellate legal fees that would have been incurred with no good result. Before too long, the magic works—the attorney did not make a mistake.

Id. at 22–23.

[129] Which, interestingly, Mahlon's recollections seem to corroborate. The Yale expert's documents remained in a locked closet in Mahlon's office. He never looked at them, until the night he confessed to his partner, the lead counsel for Kodak. Afterwards, he remarked:

> I know this is difficult to explain . . . but I simply treated those documents as if they had in fact been destroyed. . . . This whole thing had become something

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All of this is conjecture, of course.

The most important source for understanding Mahlon's motivations is Mahlon himself. At the time of his late-night confession to the firm's lead counsel for Kodak, Mahlon offered very little by way of explanation to his flabbergasted colleague: he "couldn't give a very good account of his conduct, other than to say that once he had lied, he couldn't undo it."[130]

Later, after the jury retired to begin their deliberations in *Berkey Photo v. Kodak*, the trial judge held a special afternoon hearing in his chambers.[131] Present, in addition to the judge, were Mahlon, Mahlon's private attorney (urged upon him by the Donovan Leisure firm, which sensed an impending conflict of interest), Berkey Photo's attorney, and the Donovan Leisure attorney serving as Kodak's lead trial counsel.[132] There, Mahlon offered this explanation to the court:

> [Berkey Photo's attorney] asked me where the documents were and I said they had been discarded. He asked me who destroyed them, and I said, "I did." That was not the truth, Your Honor. As I recall it now, that answer came into my head for some reason at the deposition. I had not planned to make that answer. I don't believe that I had really considered it. . . . [After being told to prepare a new affidavit on the document destruction,] it began to grow on me that I shouldn't be handing in any more affidavits to Your Honor. . . . I am not going to go into my feelings on the subject of the documents which were not destroyed in the suitcase and my affidavit to you, but I understand absolutely that what I did was wrong . . . . I injured many people as a consequence.[133]

This was not to be Mahlon's last word on the matter. In the months and years that followed the colossal fallout from his conduct, Mahlon was often pressed on the

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> that I kind of wanted to forget about, and hoped it would go away, and put out of my life.

JAMES B. STEWART, *supra* note 29, at 356.

[130] Kiechel, *supra* note 54, at 194.

[131] *See* JAMES B. STEWART, *supra* note 29, at 355.

[132] *See id.*

[133] *Id.* at 355–57.

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"why" question. At first, he avoided public explanations.[134] But later, on reflection, he offered an assessment that is little short of breathtaking. Mahlon said: "It was sort of an impromptu kind of thing and then I sort of got stuck with it."[135] What happened, he added, was done "really unwittingly."[136]

III. THE LESSON FROM MAHLON'S STORY

You already know it.

If it is true that humankind learns best from storytelling, then the value of storytelling comes from the listening and from the retelling itself. It is a mindfulness of sorts—the locking in of a memory so vivid, so inescapable that it triggers timely recall of the "moral of the message." Storytelling might well install a reflexive cognitive process, where our conscious and subconscious conspire to guide future behavior.[137] The subtle, underlying mission of storytelling, then, is to impart an instinctive appreciation for a certain danger, coupled with a new, subliminal empowerment to avoid it.[138]

An abiding lesson of Mahlon's story is that no matter how spotlessly we aspire to live our personal and professional lives, we remain vulnerable to terrible error in the moment.[139] This type of error can be ruinous, even though, in every way, it is diametrically contrary to how we have lived, now live, and will live our lives. Such errors can happen in an instant, in an unplanned, unwitting way. It is not the dishonesty of the contriver, the dark-soul conjurer of misdirection calculated to thieve or destroy. Rather, it is dishonesty of an almost involuntary, inadvertent type, one that leaves the actor incredulous at what she or he just did. And we must face the

[134] *See* Tew, *supra* note 66, at 299 n.52 ("He has never publicly explained his mysterious lapse, except to tell the trial judge, 'I understand absolutely what I did was wrong. I injured many people as a consequence.'").

[135] Margolick, *supra* note 26.

[136] *Id.*

[137] *See* Hennebury, *supra* note 1.

[138] *See id.* If the behavioral ethicists are right, the challenge then becomes how "to induce awareness in *real time*," to "implant the law into people's consciousness." Feldman & Kaplan, *supra* note 118, at 67–68.

[139] The stories of accomplished lawyers engaged in unconjurable misconduct seem to be legion. *See, e.g.*, Att'y Grievance Comm'n of Md. v. Bonner, 271 A.3d 249 (Md. Ct. App. 2022) (ordering disbarment of former "Lawyer of the Year" for misappropriation of funds from the law firm he co-founded in angry, frustrated response to compensation decisions).

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fact that we are, each of us, capable of it.[140] Knowing that truth—genuinely knowing and appreciating this built-in human vulnerability—is central to sidestepping it when that terrible risk presents itself,[141] as it most certainly will.[142] For this all to work, our reactions must become instinctual: the yield from an enduringly memorable story.

Mahlon F. Perkins, Jr. is worth remembering not because he was a bad person. He is worth remembering for precisely the opposite reason—because, by all accounts, he was otherwise a very, very good person.[143] He lived an exemplary life. He gifted his time and talents generously and in what appears to have been some of the kindest, most other-centered of ways. He was loyal, courageous, endearing, hardworking, gentle, conscientious, intellectually distinguished, and gifted as a wordsmith and strategist.[144] Mahlon is worth remembering because if this paradigm of integrity was susceptible to a terrible, awful, publicly horrifying, life-altering ethical lapse, then so are we all.[145]

There was a happily-ever-after of sorts toward the close of Mahlon's life. His time after 1978 is part redemption, to be sure. But it seems far more a resumption, a return to a life of consistent, nearly uninterrupted honor and correct living. Mahlon

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[140] *See* Robbennolt & Sternlight, *supra* note 104, at 1156 ("[W]hile some ethical failures are the result of deliberate moral reasoning and cost-benefit analysis that lead to an unethical decision and some ethical failures are due to a lack of knowledge of the relevant rules, a range of evidence suggests that many ethical failures occur unconsciously and unintentionally, even where the attorney has basic knowledge of the relevant ethical rules.").

[141] *See, e.g.*, Prentice, *supra* note 127, at 52 ("Moral awareness is a precondition to moral action.").

[142] Professor Stempel argues that, in the annals of discovery malfeasance, "Mr. Perkins looks like an amateur abuser" when measured against some of his comparators. Stempel, *supra* note 103, at 676. Professor Stempel recounts what seems to be far more egregious, premeditated, and methodical discovery abuse occurring in more recent years—and which was punished much less severely. *Id.* at 675–76 (stating that "there are signs that the system may be more tolerant of discovery abuse now"). Mahlon withheld expert preparation materials. Yet, as Professor Stempel notes: "[U]nless one's adversary is slow of wit, he or she will have a pretty good idea of how an expert will be deployed, what sorts of communications were made, and so on." *Id.*

[143] *See* Luban, *supra* note 86, at 95 ("[R]esign[ing] from his firm, and serv[ing] a month in prison. . . . sounds like an instance of chickens coming home to roost for a Rambo litigator. But by all accounts, Perkins was an upright and courtly man, the diametrical opposite of a Rambo litigator.").

[144] *See* Margolick, *supra* note 26; C. Evan Stewart, *supra* note 30, at 29.

[145] Before the judge in Mahlon's criminal prosecution passed sentence, Mahlon's lawyer entreated the court with this very argument: "Those in our profession who know about this, if they are honest about it, would admit that there, possibly but for the grace of God, go I, because of the pressures which come upon men and women who practice law in big cases." Goldstein, *supra* note 28.

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took one ethical detour, which led to another, then another. But it all started with one. Just one. Committed unthinkingly.

What a story.

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In fairness, it would have been better if Judge Weis could be telling you this story himself and in person. That would add such gravity to the tale. There is an old storytelling proverb attributed to Scottish travelers that goes: "A story should be told eye to eye, mind to mind, and heart to heart."[146] Maybe that's a final lesson from Mahlon's story. All of us bear a shared responsibility for imparting this lesson. Professor Luban wisely notes: "The point is that to understand all is *not* to forgive all. But . . . to understand all may well put us on guard against doing the unforgivable."[147] Attorney, author, and educator C. Evan Stewart shares a personal practice with excellent advice: since the time he began teaching law school ethics, "I have devoted one class session to reviewing this tragic episode."[148]

We should all be doing the same. In law school classrooms, new associate training sessions, and at onboarding for new prosecutors, public defenders, and in-house counsel, and then later at lawyering retreats and continuing education classes, Mahlon's story should be told and retold and retold again.[149] For in that retelling, the

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[146] Review—*Take the kids to . . . Scottish Storytelling Centre, Edinburgh*, THE GUARDIAN, Aug. 20, 2019, https://www.theguardian.com/travel/2019/aug/20/scottish-storytelling-centre-edinburgh-review-spoken-word (with thanks to Christine Hennebury who flagged the proverb, see Hennebury, *supra* note 1.

[147] Luban, *supra* note 86, at 116.

[148] C. Evan Stewart, *supra* note 30, at 27.

[149] *See* Prentice, *supra* note 127, at 53 ("[P]eople can help keep ethics in their frame of reference by reminding themselves every morning in the shower that they wish to be good people and that to meet that goal, they must constantly strive to act ethically . . . .").

This is not to suggest that introducing a regularized reminder to the phenomenon of "inadvertent dishonesty" will operate as some magical panacea to cure the profession of that risk. Indeed, one study of the impact of legal education on the ethical behavior of attorneys-in-training concluded that "the strongest influences on ethical identity are external to or only peripherally related to legal education," while noting—more than a little alarmingly—that between one-fifth and one-fourth of the study cohort "were prepared to admit hypothetically that they were willing to falsify time records for personal (and business) gain." Richard Moorhead, Catrina Denvir, Rachel Cahill-O'Callaghan, Maryam Kouchaki & Stephen Galoob, *The Ethical Identity of Law Students*, 23 INT'L J. LEGAL PRO. 235, 257–58 (2016).

There will always be dishonorable lawyers. Retelling Mahlon's story might not convert bad actors to good ones, but it might rescue good actors from unintended calamitous choices.

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"moral of the message" is made plain and, hopefully, galvanized.[150] Then, perhaps, fewer lawyers may find themselves eating the red berries.

[150] *See* Robbennolt & Sternlight, *supra* note 104, at 1157 (explaining that although many phenomena of ethical failings "operate outside of conscious awareness, recognizing their existence makes it possible to take steps to address them"); *see also* Hinerfeld, *supra* note 39, at 43 ("The published history of what happened to this senior partner . . . is fascinating and instructive reading for lawyers of any generation who are, or should be, concerned about the future of their profession.").

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