Legal Writing
The Journal of the
Legal Writing Institute

VOLUME 14 ..................................................... 2008

In Memoriam................................................................. viii

Introduction
An Introduction to Applied Storytelling
and to This Symposium.................................Ruth Anne Robbins 3

Articles
Applied Legal Storytelling, Politics, and
Factual Realism.......................................................Brian J. Foley 17

Storytelling, Narrative Rationality, and
Legal Persuasion ..............................................J. Christopher Rideout 53

Lawyer as Artist: Using Significant
Moments and Obtuse Objects to
Enhance Advocacy....................................James Parry Eyster 87

The Plot Thickens: The Appellate Brief
as Story ..............................................................Kenneth D. Chestek 127

The Case for “Thinking Like a Filmmaker”:
Using Lars von Trier’s Dogville as a Model
for Writing a Statement of Facts...............Elyse Pepper 171

Justice Formation from Generation to
Generation: Atticus Finch and
the Stories Lawyers Tell Their
Children ..........................................................Mary Ellen Maatman 207
Putting the “I” in Writing: Drafting an Effective Personal Statement to Tell a Winning Refuge Story

Stacy Caplow 249

Better Revision: Encouraging Student Writers to See through the Eyes of the Reader

Patricia Grande Montana 291
In Memoriam
Sincerest condolences are extended to the families and friends of colleagues who are no longer with us.

Donald J. Dunn
University of La Verne College of Law

Marion M. Hilligan
Thomas M. Cooley Law School

Roy M. Mersky
University of Texas School of Law
AN INTRODUCTION TO APPLIED STORYTELLING AND TO THIS SYMPOSIUM

Ruth Anne Robbins*

In July 2007 over eighty professors, judges, practitioners, and students gathered to listen to people talk about “Applied Legal Storytelling” at a conference entitled Once upon a Legal Time: Developing the Skills of Storytelling in Law.¹ This Volume of the Journal of the Legal Writing Institute includes articles from among the presentations, and marks a notable moment in the Journal’s history. Unlike previous volumes, this one is a topical symposium containing contributions by people who teach in a variety of legal education disciplines. The nature of Applied Legal Storytelling pulls from different aspects of legal education and practice. In this Volume, you will read articles written by people who teach legal writing but also by people who teach in clinics or in casebook courses. All are bound by the common thread that stories convey meaning in the day-to-day practice of law. As the Journal of Legal Writing editors openly acknowledged with their choice to invite all of the conference presenters to apply for publication, storytelling, for the purposes of these pages, is not merely a “legal writing skill.” Storytelling is the backbone of the all-important theory of the case, which is the essence of all client-centered lawyering.² In that way, we find common ground across

* © 2008, Ruth Anne Robbins. All rights reserved. Clinical Professor of Law, Rutgers School of Law-Camden. Thanks to the other law professors with whom I had the pleasure of imagining and organizing this conference: Robert McPeake, Steve Johansen, Erika Rackley, and Brian Foley. Thanks also to the City Law School-London administrative personnel who made the conference happen: Barbara Clarke, Alison Lee, Hafiza Patel, and Seth Stromboi.

¹ The conference was sponsored by City Law School/Gray’s Inn of Court and the Legal Writing Institute. Lewis & Clark Law School also provided assistance. The conference was held at the City Law School in London, United Kingdom, from July 18–20, 2007.

disciplines that have historically approached lawyering from different angles.\(^3\)

The articles in this Volume mirror the goals set by the conference organizers. We hoped to expand the dialogue of applied storytelling, to attract new and different voices to the conversation, and to create an ongoing and sustained dialogue merging narrative theory with legal skills.\(^4\) We have already begun plans for a second conference, scheduled to take place in Portland, Oregon in July of 2009.

I. THE STORY OF THE CONFERENCE

The 2007 conference began as a way for people to continue the dialogue that began at the 2005 Power of Stories conference, which was held at the University of Gloucester.\(^5\) During one of the panels, Barrister and Principal Lecturer Robert McPeake asked members of the audience to help him help his students better understand the nature and persuasiveness of narrative as a means to the practice of law.\(^6\) Robert teaches his law students skills courses. He believes that the European skills courses have not yet developed in terms of the theory or doctrine of lawyering. Specifically, he explained his interest was in teaching students the importance and communication of the client’s story.\(^7\)

---

\(^3\) For example, Sarah Schrup recently explored the real and the illusory dichotomies between the clinical and legal writing foci. See generally Sarah Schrup, *The Clinical Divide: Overcoming Barriers to Collaboration between Clinics and Legal Writing Programs*, 14 Clin. L. Rev. 301 (2007). Professor Schrup points out that clinical education has evolved on theories that focus on client-centered and client-empowering lawyering, whereas traditional legal writing programs have grown up on regnant models of lawyering, which stress the pedagogical notions of teaching stricter forms and structures to novices. *Id.* Legal writing courses at the first-year level also focus primarily on the relationship between the lawyer and audience (supervising attorneys and judges) rather than on the relationships between the lawyer and client. Even if there are such pedagogical dichotomies, I proffer that they are not absolute or universal. Much of legal writing is client-centered and some of clinic is regnant. The pedagogy of teaching students to tell a client’s story is one area in which both clinic and legal writing courses travel the same client-centered pathways.

\(^4\) The conference was successful enough to inspire a second symposium volume: 41 The Law Teacher: The International Journal of Legal Education 247–329 (2007). From the organizers’ standpoint, the conference represented a high point for both the Legal Writing Institute and the City Law School of London. We also found the presentations themselves as exhilarating as we had hoped.

\(^5\) The Gloucester Conference is an annual collaboration with Texas Wesleyan School of Law. Conference themes change each year. Volume 12 of the Texas Wesleyan Law Review contains articles from the 2005 Power of Stories conference.

\(^6\) We found out much later that his request for help with his skills pedagogy may have been merely rhetorical. In any event, he claims that he has learned what happens when someone asks for assistance and there is a legal writing professor in the audience.

\(^7\) Robert turned his musings into an article that belongs in the Applied Legal Storytelling bibliography. Robert McPeake, *Fitting Stories into Professional Legal Education—*
The 2005 Power of Stories conference was the first time in several years that there had been such an open call for conversation about story and narrative. As a result, several of the presentations were of a more traditional “Law and Literature” nature. But there were new voices in the mix as well. Several speakers addressed the topic in a lawyering context. Presentations included the use of metaphor as a way to better communicate the substance of the argument,\(^8\) the methodology of placing a client’s story within the context of heroic journeys and archetypes,\(^9\) and the ethical limitations of telling stories to our clients as a way to persuade them as we counsel them.\(^10\)

Each of the panels was something of a mixed bag, and that made the conference much more of a learning experience. The themes may have been vague, but really it was a smorgasbord of ideas. And, because we did not want to let go of the conversation that started in Gloucester, we decided to try a conference solely devoted to Applied Legal Storytelling.

This is not the first time that there has been a storytelling conference or symposium of some sort. There were at least two large conferences almost two decades ago, and of course, there was the Power of Stories conference in 2005.\(^11\) Each time, the partici-

---


\(^9\) Ruth Anne Robbins, Harry Potter, Ruby Slippers and Merlin: Telling the Client’s Story Using the Characters and Paradigm of the Archetypal Hero’s Journey, 29 Seattle U. L. Rev. 767 (2006) (beginning a discussion of how lawyers can strategize their clients’ legal dilemmas by identifying and placing them as part of a larger archetypal journey the client is undoubtedly on at that moment in his or her life).

\(^10\) Steven J. Johansen, This Is Not the Whole Truth: The Ethics of Telling Stories to Clients, 38 Ariz. St. L.J. 961 (2006). Professor Johansen suggests that when we, as lawyers, tell stories to our clients as part of counseling, clients are greatly influenced in their own decision-making process. For that reason, Professor Johansen cautions, we need to carefully reflect upon how and when we tell those stories to our clients.

\(^11\) For example, there was the watershed Legal Storytelling conference at University of Michigan in 1989 and there was a Pedagogy of Narrative symposium in 1990. See e.g. Paul J. Heald, A Guide to Law and Literature for Teachers, Students, and Researchers 48 (Carolina Academic Press 1998). There was also a symposium on the use of storytelling in the practice of law. See Philip N. Meyer, Will You Be Quiet, Please? Listening to the Call of
pants agreed that narrative is important because stories connect
law to the human experience. On a more practical level, stories
stimulate our brains in ways that the Socratic method of learning
cannot. And yet, for some reason, the dialogue about the teaching
and telling of stories has not been seen as sustained. We hope to
change that.

II. THE GOALS OF APPLIED LEGAL STORYTELLING

Stories are essential ingredients in human interaction. Accord-
ing Jerome Bruner, an educational psychologist and profes-
sor at NYU, stories are instinctual, and we understand, intuitive-
ly, how they work. Even though law is allegedly about something
other than stories, i.e. “logic” and “reasoning,” stories nevertheless
are there to guide the logic and reasoning. Ergo, it is misguided
for lawyers to be suspicious of stories as applied in law or to try
and mitigate their persuasive influence. Rather, stories or nar-
ratives (I will use the term interchangeably until the last para-
graphs of this Article) are cognitive instruments and also means of argu-
mentation in and of themselves. Lawyers need to realize the im-
portance of story towards accomplishing the goals of legal commu-
ication and legal persuasion.

We instinctually respond to stories in one of three ways:

(1) Response-shaping. Stories told for this purpose are de-
signed to create or shape new knowledge. The analogy is to
teaching a child how to behave in adult society or teaching
an adult how to react in a brand new culture or setting.

(2) Response-reinforcing. This is probably where most of the
stories we tell fit in. When we tell stories to reinforce re-
 sponses we are attempting to persuade our audience that
their existing knowledge is the correct knowledge. For ex-

---


12 Heald, supra n. 11, at 48. (citing Theresa Godwin Phelps from the 1990 Pedagogy of
Narrative symposium).

13 Id. (citing John Batt, Symposium on Pedagogy of Narrative, 40 J. Leg. Educ. 1
(1990)).

14 Jerome Bruner, Making Stories: Law, Literature, Life ch. 2 (Farrar, Strauss &
Giroux 2002). If you have problems finding the book itself know that it was reviewed by

15 Bruner, supra n. 14, at ch 2.

16 Peter Goodrich, Narrative as Argument, and David Herman, Narrative as Cognitive
Instrument, in Routledge Encyclopedia of Narrative Theory 348–350 (David Herman et al.
ample, religious stories are told to reinforce belief in that religious system. The most obvious example in legal settings is the use of precedent to persuade.

(3) Response-changing. This is what most people think of when they say “I am trying to persuade you,” though in reality this is the hardest response to achieve. Response-changing is what attorneys seek when they argue to change existing knowledge or beliefs.17

Stories help us create knowledge, reinforce knowledge, and change existing knowledge and beliefs. They are a primary form of human communication.18 The goal of applied legal storytelling is to help lawyers serve their clients through the use of story and to help professors create the foundation for future lawyers by using story as part of their pedagogy. The best that we can do for our lawyers (I am including judges and professors in that category) is to create a rich, and yet accessible, dialogue about how, why, and when legal stories can be used in our profession.

III. THE RELATIONSHIP OF APPLIED LEGAL STORYTELLING TO THE FIELD OF LAW AND LITERATURE

When I was told that I would be the organizer to deliver the conference opening address, I was also instructed to come up with a definition of Applied Legal Storytelling. “It is whatever we want it to be,” I assured the other conference organizers. Gentle with their admonishments, my colleagues reminded me that I needed cites for something so important. As a result, we spent a decent amount of time talking about where we fit in with what is already

---


18 I know that you expect a cite here. I could give you many—most people who write these articles do just that. But is another legal source really that authoritative? And have we not reached the point where we can just take judicial notice that stories are an important form of human communication? In fact, there is a whole field devoted to the topic of narrative cognition that recognizes the starting point that stories are a form of persuasive communication. Both a Medline and PubMed search nets hundreds of articles. For the common folk, we can find some of the work summarized at Narrative Theory and the Cognitive Sciences (David Herman ed., CSLI Publications 2003). There are also many entries, complete with cites, in Routledge Encyclopedia of Narrative Theory, supra n. 16. Please, let’s just take it as a given that stories are important and that stories persuade. See also Colin P.A. Jones, Unusual Citings: Some Thoughts on Legal Scholarship, 11 Leg. Writing 377 (2005) (a really fun article, worth assigning to students, about the dangers of going overboard with trying to find cites for law review articles).
The 2007 conference, *Once Upon a Legal Time: Developing the Skills of Storytelling in Law*, brought together lawyers, judges, students, and professors who spent three days conversing about the use of story in pedagogy and in practice. We asked participants to stay away from the traditional Law and Literature topics and instead to orient their thoughts towards improving the practice of law. The presentations by and large did just that. The topics ranged from the use of stories to teach Australian tax law or American banking law to the exposure of the use or misuse of biblical metaphors shaping custody decision-making trends in United States family courts. Other speakers took a pedagogical view of Applied Legal Storytelling, talking about ways to teach law students about their clients in the clinical context. One eye-opening panel discussion taught us about the use of stories, community judgments, and cross-cultural themes in the Australian aboriginal sentencing court system. What was particularly satisfying to the conference-goers and organizers was the tone of the conference. It was learned, certainly, but also grounded in practice-based realities.

Nevertheless, the hardest question to answer, as we selected talks from among the proposals, is how or even whether we fit in with the existing Law and Literature field. In order to think about this, I had to first go back and try to get a handle on what is surely one of the most slippery areas of legal scholarship.

### A. Taxonomy of Law and Literature

Law and Literature is a broad movement and is also relatively young in comparison to other areas of law. Most date it to about 1976, just after James Boyd White published *The Legal Imagination*.19 Thereafter, many people’s scholarship became classified as Law and Literature and the phrase has grown to encompass many different concepts and ideas. Thus the phrase is used for many different types of scholarship.

In 1998 Paul Heald provided some help for those of us trying to understand the taxonomy by describing categories. What follows, here, is my gross oversimplification of his easy-to-use book, *A Guide to Law and Literature for Teachers, Students, and Research-*

---

I am taking this in a different order than he presented it because it makes more sense as I try to tease out whether Applied Legal Storytelling fits into this scaffold.

1. Law and Literature as Ethical Discourse

The ethical discourse part of law and literature comprises, by far, the largest and probably also most recognizable branch. Much critical race theory and feminist legal theory and many articles by Professor Martha Nussbaum confront current legal issues in light of previous literary works. Applied Legal Storytelling has a place in this part of Law and Literature as one of the conference organizers, Dr. Erika Rackley, represents. She tells the stories of women judges in order to try to make changes in the system itself. Other presenters at the 2007 conference also used ethical discourse as a way to talk about how the story of a class of litigants could be better argued for a fairer application of legal standards. In this particular category, Applied Legal Storytelling probably runs in close parallel to Law and Literature.

---

20 Heald, supra n. 11. If Paul Heald is out there reading this introduction article, let me take the time here to thank him for writing that book. For an updated take, or, as the author calls it, a “limited reassessment,” see Wendy Nicole Duong, Law Is Law and Art Is Art and Shall the Two Ever Meet? Law and Literature: The Comparative Creative Processes, 15 S. Cal. Interdisc. L.J. 1 (2005).

21 Heald, supra n. 11, at 52–53 (citing many of Professor Nussbaum’s works in the appendices).

22 Erika Rackley, Judicial Diversity, the Woman Judge and Fairy Tale Endings, 27 Leg. Stud. 74 (2007). At the 2005 conference, Dr. Erika Rackley stole the show during her presentation about women judges and themes from The Happy Prince. When Hercules Met The Happy Prince: Re-imagining the Judge, 12 Tex. Wes. L. Rev. 213 (2005) (arguing that women judges do not have to fit into male judge norms in order to be effective and relaying stories of women judges who were, she believes, unfairly censured). The Legal Writing Institute members at that conference recognized a true teacher and kindred spirit and immediately adopted her as one of our own.

23 By way of one example, Professor Michèle Alexandre, Presentation, Girls Gone Wild and Rape Law: Insuring an Unbiased Appreciation of “Reasonable Doubt” When the Victim Is Non-Traditional (London, U.K., July 19, 2007) (copy of program available with Author). Professor Alexandre argued for a fairer application of the “reasonable doubt” standard in rape cases by analyzing the situations involving non-traditional victims. She defined non-traditional victims as “women who experience non-consensual sexual touching while participating in originally-consensual multi-partner sexual interactions.” Professor Alexandre’s examples led to a discussion of cases in which the jury’s perception of the victim’s character could lead to biased assessments about the circumstances surrounding the rape and ultimately focused on the inherent consent issues. See also Michèle Alexandre, Dance Halls, Masquerades, Body Protest and the Law: The Female Body as a Redemptive Tool against Trinidad’s Gender-Biased Laws, 13 Duke J. Gender L. & Policy 177 (2006). As another example, within this Volume, the ethics of storytelling are explored. Mary Ellen Mahtman, Justice Formation from Generation to Generation: Atticus Finch and the Stories Lawyers Tell Their Children, 14 Leg. Writing 207 (2008) (hypothesizing that stories help us form notions of justice and that there are dangers inherent therein); see also Johansen, supra n. 10.
2. **Law and Literature as Language**

This is another very large category that includes looking at law through the lens of rhetoric, narrative theories, semiotics, and aesthetics. For example, James Boyd White is traditionally seen as someone who looks at the rhetoric, metaphor, etc. of opinions. Legal aestheticians focus on how well an opinion was written.

Narrative theorists are exactly what the name implies. Professor Christopher Rideout looks at Applied Legal Storytelling via narrative theory. More recently, this sub-topic of Law and Literature has also included the debate about comparative practices between law and creative writing. Finally, this sub-topic includes semiotics: the signs and symbols of story and the way that we construct meaning. In some ways, Professor Eyster’s theories fall under semiotics, though his work goes far beyond that sort of niche.

3. **Law in Literature and Law as a Literary Movement**

In these two sub-topics, authors concentrate on the treatment of legal systems in literary works or on law as a humanity related

---

24 Heald, supra n. 11, at 9 (citing White, supra n. 19).
25 See e.g. Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 Yale J.L. & Humanities 201 (1990) (noting the parallelism between judicial opinion writing and narrative theory); Alyson Sprafkin, *Language Strategy and Scrutiny in the Judicial Opinion and the Poem*, 13 L. & Lit. 271 (2001) (arguing that judicial opinions and poems share some similarities in the way that they require dissection in order to gain knowledge and in the way that the reader must submit to the unique language patterns of each in order to understand them); see also Richard A. Posner, *Legal Writing Today*, 8 Scribes J. Leg. Writing 35 (2001–2002) (calling upon judges to regain a sense of distinction, rhetorical skill, and humanity in their judicial opinion writing).
26 J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 Leg. Writing 53 (2008). Professor Rideout focuses on credibility as an element of narrative persuasion but through the eyes of a skills professor. First, he discusses narrative coherence, which he further sub-categorizes into internal consistency and completeness. Second, he focuses on narrative correspondence—that is, the attorney placing the case story within the context of what the audience might find plausible based on their own experiences and their own (possibly outside of “rational” or “logical”) reactions.
27 Duong, supra n. 20 (arguing that although law and literary art share the domain of persuasive rhetoric, the two processes are otherwise very different in terms of creative process, causality, and product).
28 James Parry Eyster, *Lawyer as Artist: Using Significant Moments and Obstinate Objects to Enhance Advocacy*, 14 Leg. Writing 87 (2008) (teaching us that lawyers can strategize verbal and written decisions in order to conjure and convey powerful visual images, all of which create more memorable stories and which can enhance the credibility of the narrating witnesses). His presentation at the conference was invigorating, and I immediately incorporated some of his ideas into my upper-level writing courses. His were the first from this Volume to so be incorporated, but I fully expect that the others will be as well.
to literature. Anytime we analyze the Wizgamot or Gringotts we are talking about Law in Literature.  

B. Applications in Lawyering Are Not Part of the Law and Literature Taxonomy

Although Law and Literature technically includes a small subset regarding pedagogy, that debate has traditionally centered on the use of classics and narrative theory as part of a legal education. Most famous of those legal scholars, of course, are the Honorable Richard A. Posner, and the team of Anthony Amsterdam and Jerome Bruner. Until more recently, however, there were very few academic articles written about the use of storytelling in the nuts-and-bolts practice of law itself. The how-to articles had

---

29 Some of my favorite presentations at the conference were two from the Harry Potter panel during which I learned more about banking law and commercial paper than I ever knew or remembered. (My commercial law professor was a lovely individual and a fine educator, but I was a second semester 3L and headed for family law.) The two speakers on this topic addressed interesting questions: Is Gringotts a true bank with the ability to receive deposits and to make loans? Or is it merely a glorified security deposit box? There seems to be a definite financial class structure in the wizarding world. How do wizards earn money anyway? Heidi Mandanis Schooner, Presentation, The Fantasy of Money and Banking (London, U.K., July 19, 2007) (explaining how she uses Gringotts as a review session in her banking law class); Eric Gouvin, Presentation, Telling Business Stories (London, U.K., July 19, 2007) (materials on file with Author) (also discussing the use of the Harry Potter series in his business and banking law courses). Although the seventh Harry Potter book shed some light on the questions surrounding wizard economics and the banking system, the answers are still incomplete. The seventh book, by the way, was released the day the conference ended and therefore did not play a role in the presentation. J.K. Rowling, Harry Potter and the Deathly Hallows (Scholastic 2007). The conference-goers all trooped off after the closing banquet to queue up for the midnight release of the book. Between that and the setting of the closing banquet—held at Lincoln’s Inn in the room that was used as the climactic setting of Charles Dickens’ Bleak House—the whole night was quite an extraordinary experience.


31 Anthony G. Amsterdam & Jerome Bruner, Minding the Law (Harv. U. Press 2000) (looking at, among other issues, the United States Supreme Court’s use of storytelling as part of the decision-making process).

32 There are notable exceptions of course. First, Anthony G. Amsterdam published an often-cited article in the inaugural volume of the Clinical Law Review, Telling Stories and Stories about Them, 1 Clin. L. Rev. 9 (1994). In that article, Professor Amsterdam analyzed oral arguments made in front of the Supreme Court to support a position that legal arguments tell a story by using narrative techniques. That seminal article is in line with Ken Chestek’s hypothesis in his article contained in this Volume, namely that legal arguments are part of an overall narrative structure to brief writing. There are other important applied legal storytelling articles from earlier years discussing skills education or the practice of law itself. See e.g. Linda H. Edwards, The Convergence of Analogical and Dialectic Imaginations in Legal Discourse, 20 J. Leg. Stud. Forum 7 (1996) (including a subsection on pedagogies for teaching narrative skill to law students); Gerald P. Lopez, Lay Lawyering, 32 UCLA L. Rev. 1 (1984) (introducing us to the idea of “stock stories” as a way to persuade).
not yet been written. That is what we need more of. Scholarship that is relevant to the practice of law.

Also left incompletely explored during the first burst of the Law and Literature Movement has been the discussion about storytelling in skills pedagogy as a modeling technique for the storytelling that these future lawyers will be doing. Thankfully, this scholarship has been happening and is happening more and more. The criminal defense bar, for years, has been writing practitioner pieces about the nuts and bolts of storytelling techniques with juries. Law professors in the clinical and legal writing fields have also headed in that direction within the past ten years, starting with people like Binny Miller, continuing recently with others who organized or were part of the conference and this Journal volume, and even others who are part of Applied Legal Storytelling perhaps without even realizing it.

IV. SO THAT BRINGS US TO THE FUTURE OF APPLIED LEGAL STORYTELLING

I first started this section by contemplating whether Applied Legal Storytelling is a lawyering skills overlay on the whole Law and Literature discipline. In other words, is it the practical application of the domain knowledge of Law and Literature? Arguably, but I think that it goes beyond that. Ultimately, even with Paul

33 Brian J. Foley & Ruth Anne Robbins, Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections, 32 Rutgers L.J. 459 (Winter 2001). That article has been reprinted twice in other journals. Yes, I know that there is a certain crassness to citing oneself, but there is a reason why I am so interested in supporting the growth of applied legal storytelling scholarship.

34 Binny Miller, Telling Stories about Cases and Clients: The Ethics of Narrative, 14 Geo. J. Leg. Ethics 1 (2000) (discussing the roles that clients should play in the characterization of their stories told as part of legal scholarship).

35 Foley & Robbins, supra n. 33; Johansen, supra n. 10.

36 See e.g. Stacy Caplow, Putting the “I” In Writ*ng: Drafting an A/Effective Personal Statement to Tell a Winning Refugee Story, 14 Leg. Writing 249 (2008) (walking us through a model for teaching clinical students how to better get to the essence of the client’s story as the fact finders hope to read it); Kenneth D. Chestek, The Plot Thickens: The Appellate Brief As Story, 14 Leg. Writing 127 (2008) (considering a story arc model for brief writing); Eyster, supra n. 28 (providing some how-to advice on constructing a powerful visual take-home to the story); Elyse Pepper, The Case for “Thinking Like a Filmmaker”: Using Lars von Trier’s “Dogville” as a Model for Writing a Statement of Facts, 14 Leg. Writing 171 (2008) (suggesting that students can learn storytelling techniques from pop culture by recognizing that filmmakers are also advocates for outcomes based on narrative clues told throughout the movie).

37 See e.g. Carolyn Grose, A Persistent Critique: Constructing Clients’ Stories, 12 Clin. L. Rev. 329 (2006) (using a clinical classroom experience to explore how lawyers might reflect upon and address our own assumptions so that we can better hear our clients’ stories, particularly when those client stories are outside of our personal norms).
Heald’s handy book, Law and Literature’s domain knowledge is still hard to fully comprehend. Paul Heald himself acknowledges the difficulty in one of the footnotes in his “Law as a Literary Movement” section.\(^3\) In contrast, by its very name and approach, Applied Legal Storytelling is supposed to be concrete and knowable. So the application of a slippery domain base cannot be the whole answer to defining what the conference organizers and authors in this Journal seek to do.

Nor does it seem that Applied Legal Storytelling is fully described by simply calling it a sub-topic within Law and Literature. There are too many overlaps between the applied articles and the various other sub-topics of Law and Literature to allow Applied Legal Storytelling to be a pure subset. Finally, I simply do not have enough clout to proffer the radical idea that all of Law and Literature is a sub-discipline under Applied Legal Storytelling, so I won’t even go there.\(^3\) In the long run, it seems to me that the two might have sets of elements that are unrelated to each other.

There is also the nagging suspicion I have that trying to place Applied Legal Storytelling within the microcosm of a particular branch of legal scholarship might be a mental exercise that immediately takes me outside of what is “applied” about legal storytelling. That undermines the very purpose of the conference itself. So, I have decided to leave the exploration unfinished, making only a preliminary conclusion that the two forms of legal dialogue can exist in parallel or can exist in overlap and all that really matters is that the applied aspects of legal storytelling are used by lawyers and judges, taught to future lawyers, and discussed by people who care about everyday lawyering.\(^4\)

In the end, future conferences and scholarship will tell us how far into everyday lawyering and skills pedagogy we can take the scholarship of Applied Legal Storytelling. From my vantage point there is a wealth of articles that can be written about lawyering and story. In fact, what is also left open for future debate, perhaps, is whether the term “storytelling” is actually appropriate for the

---

\(^3\) Heald, supra n. 11, at 15 n. 61 (“Kids, don’t try this at home without a Ph.D.”).

\(^3\) Not that it would even make sense to try to go there.

\(^4\) I note that one of the articles in this Volume breaks down Applied Legal Storytelling into its own subcategories. Brian J. Foley, Applied Legal Storytelling, Politics and Factual Realism, 14 Leg. Writing 17 (2008) (considering things Applied Legal Storytelling if they discuss improving law, improving lawyering, improving teaching, or improving access to justice). I think that is pretty much what I said except that I was not rash enough to use subheadings to do it. Having co-taught, co-presented and co-published with Professor Foley, I just want to take this moment to say, “Brian, have you lost your mind? We can’t legitimately do a retrospective on this stuff until at least eighteen months after this Volume is published.”
material that can fall into the category. The tie that binds is really the ability to translate the material into real lawyering situations. The term “narrative” in modern discourse is a broader word that can encompass abstract entities such as the basis for analogizing factual scenarios in some forms of legal reasoning, whereas “stories” generally refer to specific people and events.\textsuperscript{41} Is storytelling, the more everyday concept, the better view to take because it is possibly more client-centered and concrete? Or is that too narrow a view for what it is we can do to help our students and practitioners?

I look forward to the next conference and next symposium issue of a law journal to help answer these questions.\textsuperscript{42} In the meantime, I hope that you find the articles in this symposium volume as worthwhile and illuminating as I have.

\textsuperscript{41} Narrative, supra n. 16, at 344–345.

\textsuperscript{42} Remember . . . July 2009 at Lewis & Clark Law School in Portland, Oregon.
APPLIED LEGAL STORYTELLING, POLITICS, AND FACTUAL REALISM

Brian J. Foley*

I. INTRODUCTION

The first Applied Legal Storytelling conference, *Once upon a Legal Time: Developing the Skills of Storytelling in Law*, was held in London on July 18–20, 2007. The almost ninety attendees hailed from eleven different countries. Our Programme asked “Why This Conference?” and answered,

The Applied Legal Storytelling conference was imagined and realized because the conference organizers wished to create a sustainable dialogue about the application of storytelling elements to the practice and pedagogy of law. This conference traces its roots directly from the 2005 *Power of Stories* conference sponsored by University of Gloucester and Texas Wesleyan School of Law. We are committed to spotlighting the concept of “story” in ways that will directly and tangibly benefit law students (i.e. “future lawyers”) and legal practitioners (i.e. “former law students”).

However, a person reading the Programme might have been struck, as was I, one of the organizers, that the conference and Applied Legal Storytelling (ALS) seemed political. Presentations addressed infanticide, women in polyamorous relationships, criminal defense strategies, immigration law, and American racial seg-

---

* © 2008, Brian J. Foley. All rights reserved. Visiting Associate Professor of Law, Drexel University Earl Mack School of Law (2007–2008); Associate Professor, Florida Coastal School of Law. This Article began as a late-added presentation at the *Once upon a Legal Time: Developing the Skills of Storytelling in Law* conference, City Law School, Gray’s Inn, London, United Kingdom, July 18–20, 2007. I was a co-organizer of the conference. I thank the other organizers. I thank all those who attended the talk, and my co-presenter, Melinda H. Butler, who helped spark the ideas in this Article. I thank M.G. Piety for reviewing a draft, and for all her support, Peter Egler, Faculty Services Librarian at Drexel Law, for great research help, Ruth Anne Robbins for her encouragement, and Steve Johansen for strengthening the piece through his editing. I thank Dean Peter Goplerud for the research grant that helped me write and Dean Roger Dennis for supporting my travel to London.

regationist lawyers. Inherent in other papers was a critique of United States and United Kingdom legal education, as a premise of the conference was that storytelling needs to be taught as a skill in law schools. Storytelling itself has been branded as left wing and “controversial”; storytelling has been the subject, and stories themselves have been the mode of discourse, in some scholarship, most notably in Critical Legal Studies and related left-wing movements. I want to say up front that I do not regard “political” as pejorative. Nor, for that matter, do I regard “storytelling” or “creative” as pejorative, although some jurists might. In fact, I have published on this topic myself.

My musing was also sparked by a conversation earlier in the summer with my research assistant, Melinda Butler, about whether storytelling in law is unnecessarily politicized. I was able to add a presentation to ask this question of politics and storytelling, on the final day in the final time slot, and Melinda agreed to co-present. It was entitled “What’s Going on Here? Is ALS Political?” and in a later version of the Programme was shortened simply to “Is Applied Legal Storytelling Political?” In preparation, I talked with many attendees, and most agreed that there is at least a prima facie case that ALS is inherently political. The presentation brought out similar views as well as competing views, including Melinda’s that ALS should not be political, or at least not merely political, because that could limit what she sees as a broader movement. I did not draw a conclusion during or immediately after the presentation about this question.

In this brief Article, I conclude that ALS is not political or politically motivated in the sense of being inherently Left or Right.  

2 Arthur Austin, Evaluating Storytelling as a Type of Nontraditional Scholarship, 74 Neb. L. Rev. 479, 481 (1995) (“Types of nontraditional composition [of scholarship] include doggerel, photography, ramblings on pop culture, haiku, Death-Row Articles and the most popular—and controversial—storytelling.” (Footnotes omitted)); Wendy Nicole Duong, Law Is Law and Art Is Art and Shall the Two Ever Meet? Law and Literature: The Comparative Creative Processes, 5 S. Cal. Interdisc. L.J. 1, 3 (2005) (“The art of storytelling—the cornerstone of fables, folklores, mythologies, and fiction—is making its way into the ‘narrative’ form of legal scholarships as this form emerges under great scrutiny, suspicion, and controversial debates.”).

3 Austin, supra n. 2, at 480–481, 482 (“Typically in narrative form, stories have become the fashion of feminists and minorities who use them to describe experiences of oppression.” (Footnote omitted)). Also, Critical Legal Studies itself has been the subject of academic and political controversy, creating “rifts” among faculties and among students at many law schools, most notably at Harvard in the 1980–1990s. See id. at 486 n. 46. For some of the Critical Legal Studies proponents’ justifications and battle cries, see David Fraser, If I Had a Rocket Launcher: Critical Legal Studies as Moral Terrorism, 41 Hastings L.J. 777, 804 (1980).

4 If any readers saw my presentation in London, they will recall that I said at the time that I was truly asking this question and had no answer. Trying to answer it has been part of the fun of writing this Article.
Instead, I think the question I had lopped off the title, “What’s Going On Here?” is the better question and leads to some fruitful answers about what we’re trying to accomplish with ALS. I suggest that, on the whole, ALS reflects a focus on fact and particularly on the indeterminacy of fact, as opposed to the indeterminacy of law that characterizes the focus of much traditional law teaching.\(^5\)

When I use “fact” in this Article, I mean not the facts themselves, but the facts in a lawsuit, in the sense of what we think happened. The facts themselves are determinate in an ontological sense, but the “facts” of a lawsuit as argued by lawyers and found by juries are indeterminate in an epistemological sense. To illustrate this contrast between legal indeterminacy and factual indeterminacy, I call this larger view of factual indeterminacy Factual Realism.

It has long been known that facts are slippery things, but Factual Realism has entered the law schools only recently, as a result of the widespread increase in teaching lawyering skills. In skills classes “the facts” are no longer simply an immutable part of an appellate opinion in a casebook, to be recited by a student and then essentially forgotten in the subsequent discussion of law, theory, and policy. Rather, in clinics and to some extent in legal methods courses, students face the challenge of ferreting out the facts themselves, taking this raw information and making sense of it for themselves and for the decision maker (real or hypothetical). Under the traditional law school model, students rarely needed to grapple with factual indeterminacy and would learn to do so only later, as apprentice attorneys, atomized in different practice settings, without the benefit of an overarching pedagogy. Storytelling is one way of addressing this indeterminacy.\(^6\)

The ALS view of storytelling leans toward “applied,” and therein lies the difference with much of what has gone before under the names “storytelling” and “narrative.” These previous efforts include such things as scholars’ criticizing legal doctrine,\(^7\) or

---


\(^6\) There are other ways, and some of them have been tried in the law school curriculum. In writing this Article, I “discovered” a small body of literature among Evidence scholars about teaching “Evidence, Proof, and Facts” (EPF). These scholars themselves acknowledge that their movement has not caught on. I will address EPF below. See infra sec. IV(A).

scholars’ digging up history to bring cases alive, and more mundanely, hypotheticals, and “war stories.” These uses of stories are within the scope of ALS, because ALS constantly seeks to improve understanding of this important tool. However, ALS goes beyond these efforts to explore how the skills of storytelling are incorporated into the practice of law.

I should add that I stumbled into ALS before we had ALS. After two years teaching legal writing, I was already tired of telling students to “tell a story” in their facts sections, but not really knowing what that meant. That’s when my shelf of books on How to Write the Great American Novel came in handy. The result was an article I co-wrote with Ruth Anne Robbins that explored what it meant to “tell a story” in a legal context, and how to teach students and lawyers to do so in legal briefs. Organizing the facts of a case as a story gives some control over factual indeterminacy. It makes for more effective lawyering. Legal storytelling can cut through doctrine that might at times seem to stray from issues of fairness and justice. Proponents of legal storytelling may find themselves in the position of criticizing traditional legal education as sometimes failing to get at the human element of the conflicts that become lawsuits. The experience of seeing that article used by professors and practitioners has informed my views that legal storytelling is a welcome development.

This Article proceeds as follows. Part II focuses on the conference presentations to show that ALS is not in the main politically motivated, though it does deal with political issues. Part III discusses how the interest in storytelling stems from a larger phenomenon, which is that skills teaching has taken law schools across the Great Fact-Law Divide. Factual Realism is now part of legal education. Part IV discusses implications of this evolution.

II. ALS IS MORE THAN POLITICS

Many of the conference presentations were political in their subject matter, but a closer examination of them, and of the people who made them, reveals that politics was not the main concern of the conference.

9 Austin, supra n. 2, at 488.
11 See id. at 469–471.
A. The Presentations

All of the organizers (Steve Johansen, Robert MacPeake, Ericka Rackley, Ruth Anne Robbins, and I) had a hand in choosing the presentations, and each of us read all of the abstracts and proposals. We did not deny any proposals categorically. We were open to most anything dealing with storytelling—and even papers that seemed to deal with it only tangentially. I have grouped the accepted proposals into the following four categories.

1. Improving Law

Generally, improving the law through storytelling often encompasses the idea of locating the stories of “outsiders,” people whose stories are otherwise not included in lawmaking and adjudication. I agree with the idea and have a work-in-progress that falls into this category.\(^\text{12}\) I specifically made this point about outsiders’ stories in October 2006, speaking inside a maximum-security prison to a roomful of men convicted of murder and sentenced to life-without-possibility-of-parole sentences as juveniles—they must get their stories of rehabilitation, of the unfairness, the waste, the excessiveness, the inaptness, of their sentences, out before a general public and legislators. Ultimately, when the public sees that the punishment does not fit the \textit{criminal}, it might move to change the punishment. So far, the public has seen only \textit{the crime}. It must meet the criminal. Stories can accomplish that.\(^\text{13}\)

The papers that I categorize as “improving the law” seem “political” in the sense that they discussed outsiders who are excluded because of a lack of political power, a term I use broadly. For example, by lack of political power, I mean people who are excluded or marginalized because they fall outside of the mainstream and could not hope to receive anything like considered understanding from many judges or juries—or the mainstream legal academy. Notable in this regard was a presentation that addressed rape victims who are involved in multi-partner sexual relationships.\(^\text{14}\) One

---

\(^\text{12}\) Indicted Men Tell No Tales: When Criminal Laws and Evidence Rules Don’t Let Defendants Tell Their Story (unpublished ms.) (on file with Author).


assumes that such victims run the risk of becoming victims, at least in less tolerant jurisdictions, of societal prejudices such as those modern rape shield laws work to eliminate by preventing criminal defense lawyers from inquiring into the victim’s sexual past.15 (Of course, canny lawyers do their best to work around these restrictions.) During the same session was a presentation concerning mothers who kill their own infant children that sought to understand, not merely condemn, these women.16 There were also presentations on women victims of sexual harassment,17 battered women’s syndrome,18 women involved in custody battles,19 and the forgotten history of three African-American women slaves who were forced into being subjects for experimental gynecology, a presentation that was self-described as applying a Critical Race Feminist perspective.20 There was a presentation on advocating for children using storytelling, specifically focusing on point of view and voice.21

Other presentations addressed: criminal defenses, and how in general the best defense is a good alternative narrative;22 storytelling in immigration cases;23 and a documentary-in-progress telling the story of the 9/11 Victims Compensation Fund (victims of a mass-casualty terrorist attack who are not being adequately compensated or compensated in a timely fashion by the government that had undertaken the duty to defend them from such vio-

15 See e.g. Fed. R. Evid. 412.
ing 249 (2008).
One panel included a presentation about the stories of segregationist lawyers, who were not, as commonly believed, merely “pushing back” against racial integration but whose actions were informed by white supremacist beliefs, and a presentation on a relatively recent desegregation case. There was a panel discussion from participants in Australian Aboriginal Sentencing Courts.

A detailed look at one presentation illustrates how ALS can change the law: Marianne Wesson’s paper on the famous 1892 United States Supreme Court case Mutual Life Insurance Co. of New York v. Hillmon. The dispute arose when life insurance companies refused to pay the proceeds of an insurance policy to Sallie Hillmon, the widow of John Hillmon, who had reportedly been killed when a gun discharged accidentally at Crooked Creek, Kansas, in 1879. The insurance company defendants argued that they were not liable on the policy, because they believed that Hillmon was not dead, and that he and others were attempting to defraud the insurers. The body they claimed was Hillmon’s was, according to the insurers, that of another man, Frederick Adolph Walters. To prove this, the companies offered into evidence a letter from Walters to his fiancée. In the letter, Walters said he had met a man named Hillmon and was going with him to work in starting a sheep ranch. Walters was never heard from again. The insurers also offered the testimony from Walters’s sister, who had received a similar letter but could not find it.

---

27 See Kate Auty et al., Presentation, Panel on Aboriginal Sentencing Courts from Australia (London, U.K., July 20, 2007). This presentation will be discussed further infra in section II(A)(4).
30 Id.
31 Id. at 287.
32 Id. at 288–289.
33 Id.
34 Id. at 287–288.
35 Id.
offered the letter and the testimony to prove that Walters had actually acted in accordance with his stated intention and had accompanied Hillmon. The inference was that Hillmon had killed Walters, and that it was actually Walters’s body in the grave. Hillmon at some point would swoop in and share in the proceeds from the life insurance policy with his wife.

The letter and the sister’s testimony, however, were pure hearsay. There was no exception that would allow them to be entered into evidence, and the trial court had excluded the letter and the sister’s testimony. However, the Supreme Court held that the letter was admissible. In doing so, the Court created a new exception to the hearsay rule for “future intentions” in admitting the letter and stated that it was up to the jury to decide whether the letter was credible. The Court must have believed that the case was one of insurance fraud to go to such lengths, according to Professor Wesson. The Court’s logic, as Wesson pointed out, was flawed: people’s expressions of intentions to do future actions are inherently unreliable, and hearsay exceptions are supposed to reflect inherent reliability. Consider New Year’s resolutions. Considerer promises such as “I’ll send you my draft tomorrow” (or indeed, anything anyone says they will do “tomorrow”).

If the Court had guessed that the body was indeed Walters’s, as Professor Wesson believes it did, then it was wrong. Professor Wesson’s presentation was about how she exhumed the remains from the grave. Unfortunately, the remains were insufficient for DNA testing. Professor Wesson had to rely on photographic analy-

---

36 Id. at 294–295.
37 Id. at 296–300.
38 Id. This rule is now formalized as part of Federal Rule of Evidence 803(3). Justice Cardozo stated that Hillmon “marks the high water line beyond which courts have been unwilling to go,” and that “[d]eclarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.” Shepard v. U.S., 290 U.S. 96, 105–106 (1933). Courts differ as to whether they distinguish between admitting statements of future intention as evidence that the declarant later acted in accord with that intent versus admitting them to prove that another person (non-declarant) acted in accord with the declarant’s stated intention. See Coy v. Renico, 414 F. Supp. 2d 744, 763–774 (E.D. Mich. 2006) (discussing Hillmon and collecting cases in holding on habeas review that murder victim’s statements of intention to meet with defendant at time of murder were properly admitted against defendant under Michigan Rule of Evidence 803(3)). Some courts will admit a statement of future intention against a non-declarant only with corroborating evidence. See e.g. U.S. v. Best, 219 F.3d 192 (2d Cir. 2000).
39 For Professor Wesson’s argument—and more on this fascinating story—see www.thehillmoncase.com. I believe I am indebted to Professor Wesson for the example of New Year’s resolutions.
sis instead, which she said showed to a reasonable certainty that the body in the grave was indeed that of John Hillmon.40

My sense is that although for 116 years this exception has stood, albeit based on shoddy reasoning, there is a chance it can be toppled decisively by Professor Wesson’s work. This will prove the persuasive power of storytelling: by showing that the high court got it wrong, and by showing it in such a dramatic way, the law might be changed, a law that has stood despite being so unsupported and unsupportable by logic or experience. At the end of the day, it doesn’t really matter whose body decomposed in the grave.41

Wesson’s thesis seems apolitical: the Supreme Court became sufficiently convinced of the possible story that Hillmon was perpetrating a fraud. Of course, a next step could make the thesis more political: the powerful insurance companies perpetuated the idea of widespread fraud, using their increased power to speak; the widow making the claim was treated dismissively by the Court; there were prejudices by established “East Coast” types against the sort of ruffian or outcast who would Go West to start a sheep farm. Wesson touched on this idea, but there was not time for it in the presentation.42

In any event, the political nature of most of the presentations I have described as “improving the law” is evident. Some reflect the Critical Legal Studies (CLS) tradition (many CLS scholars would, I am sure, chafe at my use of “tradition”),43 especially outsider jurisprudence (Critical Race Theory, Feminist Legal Theory).44 They show that lawmaking reflects dominant ideologies. As part of this, they argue that adjudication and legislation must not exclude those without power, and that the law must in many in-

40 Id.
41 For further discussion of Professor Wesson’s work, see Melinda H. Butler, The Hillmon Case: A Reply to Professor Wesson (unpublished ms.) (on file with Author).
42 The trial court expressed concern to the jury that it might be prejudiced in favor of Sallie Hillmon, a “poor woman . . . [versus] wealthy corporations” that were foreign whereas Sallie Hillmon was “a citizen of your own State.” George Fisher, Evidence 468 (Found. Press 2002) (quoting transcript quoted in John Henry Wigmore, The Principles of Judicial Proof 891 (Little, Brown & Co. 1913)). I am sure the “wealthy corporations” were pleased with the judge’s statement. Nevertheless, Hillmon won a third trial after two earlier trials ended with sharply divided juries; the first two juries saw Walters’s letters, but the third did not. Id. at 468–469.
stances be changed to reflect the wants, the needs, the existence of these less powerful groups and individuals. They are also political in the sense that they reveal that the legal academy has not yet found fit to include many of these stories in traditional law courses. But these presentations are also practical for anybody representing outsiders of any stripe: the presentations remind lawyers to search for the broader context of their client’s particular conflict.

2. Improving Lawyering

Another category that many presentations fell into is how to better persuade judges and juries by using storytelling. There were papers that explained how storytelling was located within legal reasoning and argumentation; how lawyers can improve their storytelling in cases; how to use storytelling in cross-examination, through reinterpreting a classic how-to legal text on cross-examination as conveying storytelling techniques; how storytelling carried from the facts section of briefs into the argument section; how to use parentheticals about cases to carry forth a narrative in an argument; and how to use storytelling in negotiations. There was some overlap between


the “outsider” papers discussed above and these, such as the presentations about children, criminal defendants and immigrants. These presentations, at least when considered in the category of “improving lawyering,” seem the least political in that they are about technique, which would be available to either side of a dispute on either end of the political spectrum.

3. Improving Legal Pedagogy

Another topic was improving legal education—by teaching students how to tell stories, and by using storytelling in teaching. In a way, all of the papers can be interpreted as making this claim in one way or another, explicitly or implicitly. But some stand out more than others in this sense. There were presentations on using storytelling in teaching casebook courses—including three on using *Harry Potter* in particular; using storytelling in teaching clinical courses; using storytelling to teach ethics; using judicial humor (and attempts at humor) in opinions to teach storytelling; and using storytelling to teach international students.

---

52 See Kelly, supra n. 21.

53 See Heller, Presentation, supra n. 22.

54 See Caplow, supra n. 23.

55 See Foley & Robbins, supra n. 10, at 473–475, 483 (providing examples of storytelling technique for corporate clients and criminal defendants); see also Anthony Kronman, Leontius’ Tale, in Law’s Stories: Narrative and Rhetoric in the Law 54, 54 (Peter Brooks & Paul Gewirtz eds., Yale U. Press 1996) (“Some stories have good effects and others bad ones. Some stories strengthen good practices and good institutions, and others do the opposite. Moreover, stories do not contain within themselves the criteria for distinguishing the good ones from the bad.”).


These presentations could be seen as saying to students and lawyers, “What you may have learned in your other classes is good, but here are a few more things you need to know.” That sort of statement can place us in the political position of critics, gadflies, reformers. What makes these papers political is not their content so much as their context: skills professors on the whole have less power within the legal academy than the casebook professors they criticize for using traditional teaching techniques. I will address this idea more fully in Part III, when I talk about the political struggles that result from Factual Realism’s entry into the legal academy.

4. Disparate Treatment: Australian Aboriginal Sentencing Courts

An intriguing presentation was given by the participants in an Australian sentencing court for Aboriginals. These courts are a recent phenomenon in Australia. They are designed to give Aboriginal defendants, tribal Elders, family members, police, victims, and other stakeholders a voice in the sentencing process. The defendant can tell his story. Elders can advise the Magistrate about cultural matters. Various options besides traditional punishment are explored. In short, the special sentencing court endeavors to tailor problem-solving punishments that take into account the perpetrator, victim, crime, and broader community interests. For example, if drugs were the root cause of the offense, drug treatment would be part of the sentence. If the offense reflected past transgressions or character traits of the offender that the court was not aware of but that Elders and family are, the court is able to take those into account in determining how to treat the offender. As the abstract of one presenter explained, “Historically defendant’s stories have been told through a combination of state prosecutors and legal counsel producing a tidy dialogue which is carefully scripted and recognisable to those insiders in control of the process. Such storytelling often serves to exclude the

62 See Kate Auty et al., supra n. 27.
63 Id.
64 Id.
defendant, his or her cultural norms and forms and it is san-
itiised.”

Such individual tailoring of sentences—and with an eye cast
directly upon all purposes of punishment except retribution—
seems promising as a means of crime control. The offender himself
is probably less likely to offend again. What is learned from him
can be brought back to the community and used to make changes
that could prevent future transgressions by similarly situated peo-
ple. Indeed, the number of Aboriginals sent to prison has declined
under the program. As for retribution, it may be that the victims
and the community coming to understand the reasons for the
crime—the unmet needs, unresolved anger, and shame from re-
pression, for example—temper the feelings for revenge that inform
the putative need for retribution. Such sentencing seems more ef-
fective than the mandatory minimum, three-strikes-and-you’re-out
sentencing that is emblematic of United States criminal punish-
ment. Much American sentencing is “story-less”: the offender’s sto-
ry will likely never be uttered in court, or will fall on deaf ears—he
did the crime, he will do the time, no matter what.

These Australian courts appear to reflect the resolution of a
political struggle. The stories of outsiders were heard.

B. Presenters and Participants: Point of View

We know from storytelling that character and point of view
matter and cannot be overlooked here. Participants at the confer-
ence shared several traits.

1. Skills Teachers

Many Conference participants were legal skills teachers (clini-
cal and legal methods). Skills teachers sometimes find themselves
at odds with “casebook” faculty. The gist of the critique from skill
professors is that casebook faculty need to do more skills training

66 Auty et al., supra n. 27 (specifically, the abstract for Sarah Gebert’s portion of the presentation).
67 Though retribution might be accomplished if the court, victim, police, prosecutor,
and others become convinced that the offender suffers from remorse or shame; this suffering
could be argued to be productive suffering; a corrective suffering that spurs the offender
onward toward a law-abiding, productive life.
68 Auty et al., supra n. 27 (specifically, the abstract for Daniel Briggs’s portion of the presentation).
69 See e.g. Ewing v. Cal., 583 U.S. 11 (2003) (upholding California’s three-strikes,
twenty-five-years-to-life imprisonment law for man with long criminal history who was
convicted of for stealing three golf clubs worth $399 each).
(including storytelling). There is good support for this critique in the famous 1992 MacCrate Report\(^70\) and, more recently, the Carnegie Foundation for the Advancement of Teaching’s report.\(^71\) This focus on skills versus doctrine, doing over knowing (I admit to oversimplification *arguendo*) can place skills professors in the role of outsiders—and critics—in the academy. That is a political position. At its extreme, this can be seen as a war over the hearts and minds of law students, waged between casebook and skills professors, though, happily, the Carnegie Report and probably most skill professors propose more of a mixture of traditional and newer pedagogies, not razing the Ivory Tower. Notably, this battle for balance between doctrine and skills is not new. According to the Carnegie Report, Judge Jerome Frank, a prominent legal realist, famously advocated a clinical “lawyer-school,” rather than a “law school” that would focus on preparation for practice as an alternative to the exclusive emphasis on the case method invented by [Christopher Columbus] Langdell. A variety of experiments with different models of such curricula—models involving clinical teaching and close student-faculty interaction—marked the interwar years in a number of leading law schools.\(^72\)

But for the most part, “legal education struggled to escape the ‘trade school’ stigma.”\(^73\)

In addition there is often the lower salary, less job security, and lower status that distinguish skills professors from casebook faculty.\(^74\) These distinctions can end up politicizing skills professors, with lasting effects. I attribute many of my political views to having spent six years in the “pink ghetto” of legal writing. Those years were enlightening to say the least; this was the first time I had been discriminated against, treated as a member of a subordinate class. A friend teaching legal writing as part of a prestigious law school’s program recently confided in me that as a result of his experiences, he now shares my political leanings.

There were several casebook professors at the conference, but it is fair to say that they were somewhat untraditional. Some, in-


\(^{72}\) Id. at 91 (citation omitted).

\(^{73}\) Id. at 93.

\(^{74}\) Status in the legal academy was recently addressed in a law review symposium. See Symposium: *Dismantling Hierarchies in Legal Education*, 73 UMKC L. Rev. 231 (2004).
cluding me, teach or have taught skills.\textsuperscript{75} Others have transcended traditional teaching and scholarship. For example, Garret Epps teaches a law school course in fiction writing. Marilyn Berger creates documentaries as scholarship and teaching tools. Mimi Wesson practices what could be called legal archeology. Epps and Wesson have published novels.

2. **Clinicians: Applied Outsider Jurisprudence?**

Many participants hailed from legal clinics, where much of law school skills training occurs (though only for a relatively small number of students). Almost by definition, clinics are political, inside and outside the academy. Clinics focus on skills, and they generally serve people who otherwise could not retain counsel to resolve their disputes: the poor and the marginalized. (Case in point: There are no clinics set up to help IBM or Pepsi or General Electric.) There are different types of clinical professors. Some see themselves primarily as teachers, with the client base of the clinic being of secondary importance, while others see themselves primarily as practitioners of the particular area of law, teaching students to practice in that area, and to further the policies and ideals of that area of law, with imparting general lawyering skills a matter of secondary importance. (The same of course can be said for casebook professors: for example, am I more interested in Criminal Law, Criminal Procedure, and Evidence, or in teaching law?) Either way, the clinician is to some extent an outsider in the academy and even in the larger lawyer population. Most lawyers do not serve such clients fulltime—even if the spirit is willing, the profits are too weak. It is also more likely that such outsiders will use stories as a way of teaching courts and colleagues about themselves.

There is of course a cart-horse question. Many law students take their particular initial career paths because of deeply held values, beliefs, and politics. Nevertheless, the fact is that skills in law schools are mostly taught through representing the poor and oppressed, supervised by people who often have lived lives committed to serving their particular clientele.\textsuperscript{76}

The inherent nature of clinics leads to cultural differences among clinicians and casebook faculty. Oversimplifying *arguendo*,
the lawyers opposing the clinician in the clinic’s cases are often lawyers for government or business—the powerful. Many casebook law professors are drawn from that milieu: the traditional law professor career path is top student from top law school; federal appellate clerkship; “high-powered” job such as a prestigious (albeit often lower level) federal government position or as an associate at a major corporate law firm.77 Clinical professors may come from such backgrounds and often do. But on the whole their career paths are broader, more varied.

Another difference is that clinical law professors generally have spent more time in actual practice than casebook professors, and clinicians still practice. They have fresh war stories, which help their teaching and also help them find meaning in what they do. Many casebook professors have not practiced in several years. Another difference is that clinical professors play supervisory roles where they strategize and make final decisions in real time and real life. Many if not most casebook professors practiced in subordinate positions where they did not make strategy decisions or interact with clients. Yet the message the academy sends is that what clinicians do is less important, or perhaps less pure.78 Clinicians are in the minority on faculties, and they are often marginalized, given less-private offices, limited or no voting rights, limited or no tenure. (They are often treated better than legal methods professors, however.)

3. Outsiders in General?

Last but not least, some participants are outsiders in general. Those of us who are may be attracted in whole or part to ALS for the aspects of it that are political, or as a tool of persuasion in political discourse. Some are political activists, if only part-time, and some of these and others write political commentary. At least one participant has run for Congress on a third-party ticket. Some people might be attracted to ALS simply because it is different and innovative.79

---

77 Sullivan et al., supra n. 71, at 89.
78 Less pure law. Below I discuss the fact-law distinction as a pecking order phenomenon.
79 Which can make one an academic outsider, perhaps. See Kathryn Abrams, Hearing the Call of Stories, 79 Cal. L. Rev. 971, 977 (1991) ("Not every law school numbers among its faculty either scholars who use or scholars who read narratives, so there may be no one present who can explain the objects or innovations of the form. Even those who can offer such explanations may find it difficult to do so ab initio, because of the time pressures and the contentiousness that often surface in this context. Here, as in other areas of academic life, the absence of full public discussion of innovation tends to favor those forms of scholar-
4. Conclusion: The Dangers of Politics

ALS could end up identified as a political movement, or at least aligned with left-wing politics, when it is not inherently political or left wing. That identity could limit its growth, which would limit law school pedagogy. But until skills are taught more widely in law schools, the ALS flag will be carried largely by skills professors, and some of the work in ALS will undoubtedly acquire a political character. It therefore will be important for those of us who believe in the value of teaching storytelling to law students, and using storytelling in our teaching, to articulate that storytelling is a tool that can be used by anybody.

The next Part examines how ALS may be explained not by political motivations but as a natural result of the recent increase in skills teaching in law schools, an advance that has taken the academy and the students across the Great Fact-Law Divide.

III. CROSSING THE GREAT FACT–LAW DIVIDE: FACTUAL REALISM

In this Part, I argue that ALS results not from the political leanings of many of its proponents, but from an increase in skills teaching in law schools. This focus takes professors out of the world of “pure” law, the appellate opinions that have long been the fare of casebook courses, and deep into the world of fact—investigation, negotiation, and trial. Traditionally, students did not cross the fact-law divide until after graduation. Skills professors, especially clinics, do not give students the facts of a case neatly packaged as “The Facts,” but must teach the students how to work with that are already established, with palpable consequences for the professional lives of innovators.

---

80 Melinda Butler urged this in her portion of the presentation.

81 At least students who did not take clinical courses or work in law firms. As for legal methods courses, many students gave those short-shrift. For example, many legal methods programs were taught by adjuncts or third-year students and were ungraded. Students often lacked incentive to delve into them. As for working in law firms, students do not necessarily work with facts. I remember how as a summer associate I wrote legal memoranda about legal issues. A supervising partner would give me “the facts” for my short fact section. Indeed, more than one partner would not even give me the name of the client or other parties and witnesses. I remember writing a legal memo about a bankruptcy issue regarding “ABC” and “DEF” Corporations, and a termination of parental rights case where the names of the people involved were kept from me. I had a sense that I was not only not trusted with the facts, but that I was not trusted to work with the facts. See Foley & Robbins, supra n. 10, at 462 (discussing how law firm partners do not entrust to associates writing fact sections of appellate brief, citing and quoting Ruggero J. Aldisert, Winning on Appeal: Better Briefs and Oral Argument 156 (Rev. 1st ed., Natl. Inst. Tr. Advoc. 1996)).
to go out and get them. One way to understand, manage, and present facts is through storytelling.

A. Teaching Facts

One specific idea that many skills professors share is that students need to be taught that lawyering is often more about the facts than it is about the law. What I would call skills professors’ higher attention to the facts of cases makes them more sensitive to the need to focus on facts in the overall task of lawyering. A clinic, for example, has client intake, interviewing, and counseling. Throughout skills teaching persists an awareness that students need to be taught, that, as Richard Neumann points out, “[f]acts have subtleties that can entangle you if you are not careful. Beginners tend to have difficulties with four fact skills: (1) separating facts from other things; (2) separating determinative facts from other kinds of facts; (3) building inferences from facts; and (4) purging analysis of hidden and unsupported factual assumptions.”82 This focus on gathering facts for the judge or jury to accept, or not, for the legal reasoning that the court will later undertake focuses us necessarily on storytelling, which is a way of controlling and presenting the facts in a case. That is because in recent years there has been increasing support for the idea that jurors decide cases based on the “Story Model” as opposed to logical, probabilistic models of decision-making.83 According to Nancy Pennington and Reid Hastie, who have pioneered this work, jurors, when hearing the facts, are constructing a story from them, using the evidence and their own background knowledge; they ultimately must choose between competing stories and pick the one that makes most sense as representing what happened.84 So not only must skills professors be able to tell stories, but they must also be able to teach students and lawyers how to tell them, how to

---


recognize them, how to find within them the hidden assumptions, and how to identify those aspects that can be exploited by an advocate.

In legal methods classes and clinics, teaching students how to construct a legal argument in a particular situation necessarily includes more attention to the facts than is necessary in casebook classes, where the focus is on reading appellate opinions. In the appellate opinions students read for casebook classes, the facts are already provided, served up painlessly and authoritatively as having been “found” by the jury. Indeed, the facts sections of opinions in many casebooks are often horribly truncated or even outright eliminated. The material used by the fact-finder is not included. Students never see how the premises for this legal argument were actually created, that is, how the facts in the opinion were “found.” Students (and indeed their professors) reading the opinion never see directly the influences from advocates and parties, and the other, external influences of the sorts discussed above (politics, religion, social class, etc.). Indeed, this coloring may have influenced the jury or judge in ways these decision makers do not understand themselves. But casebook courses are silent as to these matters. As William Twining wrote, “rarely is fact finding as such directly studied in a systematic, comprehensive, and rigorous manner.” How juries actually find facts is not even taught in most Evidence courses; if students glimpse this process at all,

85 In law school I remember how revelatory it was in my first semester one day to go to the library and pull a case and read its facts—in one instance it made a case from our casebook that a professor had called “very complicated, very complex” seem fairly straightforward. The complication resulted from the fact that many facts were excised.


88 As Scott Howe wrote,

The typical evidence course teaches little about the overall process of fact-finding. Its narrow focus suggests that facts essentially leap from testimony and exhibits. The misleading message of the typical evidence class also frequently goes uncorrected by other courses. A few students may gain a sense of the complicated nature of fact finding through clinical or simulation classes.
they learn it in clinics. As a result of this failure of pedagogy, students are not able to gain what Walter Otto Weyrauch calls “fact consciousness.” The unrealistic view obtains that facts are set and immutable (as the judge cannot alter the findings on appeal). Although the indeterminacy of law is amply discussed, the indeterminacy of fact does not enter the classroom. A law student can easily end up believing that in most mundane cases, the law is indeterminate and the facts are not, when it is of course the other way around.

Of course in casebook classes, professors change the facts to create the hypotheticals that make up so much of traditional teaching. That reveals to students how different facts can change an outcome, which is probably not much of a revelation beyond the first semester of the first year. In any event, merely changing the facts does not capture the construction of the facts that the trial lawyer and jury participate in. There are, of course, approaches that are notable exceptions, such as casebooks that adopt a “case study method” as opposed to “case method,” which broadens the source material and requires some imaginative interpretation of fact by students, but these exceptions prove the rule.

However, these courses typically have small enrollments, and in any event, usually cannot focus heavily on the analytical and psychological dimensions of proof. Law schools have sometimes instituted classes focusing on the theoretical analysis of the proof process. The most notable, perhaps, was Wigmore’s course at Northwestern, which was based on his relatively unheralded book on judicial proof. These scattered attempts have not spread widely. The result is that law schools have largely avoided systematically engaging law students in rigorous analysis of the process of proof.

Scott W. Howe, UntanglingCompeting Conceptions of “Evidence”, 30 Loy. L.A. L. Rev. 1199, 1230–1231 (1997). There is a small movement among Evidence scholars, based on Wigmore’s “unheralded” book and course, known as EFP—Evidence, Facts, and Proof. Although I teach Evidence, I learned of EFP in the course of writing this Article. I will discuss it infra.

89 Walter Otto Weyrauch, Fact Consciousness, 46 J. Leg. Educ. 243 (1996) (arguing that as a result of this teaching, law students end up needing to be taught “Fact Consciousness,” a way of observing what is going on around them and, when practicing law, what is going on in their cases, in a manner similar to cultural anthropologists).

90 Aldisert, supra n. 86, at 54.

91 Regarding indeterminacy, see Brian Leiter, supra n. 5; Lawrence Solum, On the Indeterminacy Crisis: Critiquing Critical Dogma, 54 U. Chi. L. Rev. 462 (1987).

92 See e.g. Paul H. Robinson, Criminal Law: Case Studies & Controversies (West Group 2006).

93 I choose casebooks that give students a chance to work with facts. For example, in Criminal Law I use the Robinson book cited above; in Criminal Procedure I use Andrew E. Taslitz et al., Constitutional Criminal Procedure (3d ed., Found. Press 2007); in Evidence I use George Fisher, Evidence (Found. Press 2002). These books avoid the spectator sport approach found in most casebooks.
The fact-finder’s role is arguably the most important, albeit overlooked, event in many lawsuits that travel up to the appellate courts, given that the factual record the jury constructs with its findings and inferred findings has an enormous influence on the appellate judge in making law. The jury’s “finding” the facts is ultimately an effort to overcome indeterminacy. Finding facts means choosing among competing, opposite facts—and a multiplicity of competing inferences, some spoken, others not. Jurors must apply “common sense,” psychology, logic, their own experience, and they are instructed to try to block out biases and prejudices. The difficulty is accentuated in that there is no formalized, professional training in how to do it, in contrast to judge’s training for overcoming legal indeterminacy. It is also unclear whether the jury ever overcomes the factual indeterminacy; it may be that what comes out of the black box of the jury is as much, or more, opinion than fact. Anyway, how can that ever be tested, given that courts are allowed to make only extremely limited review of the jury’s factual determinations on reconsideration after trial or on appeal?

Juries may encounter indeterminacy even in a legally “clear” case, because the indeterminacy may come from the indeterminacy of facts or moral, ethical, religious, traditional, or political indeterminacy. An example of this would be a clear-cut case where the jury nevertheless refuses to apply the law, nullifying the case (“jury nullification”). Or a clear, unambiguous law concerning abortion rights. Jury members might bring as many external influences to bear on their decision as they would in participating in a dinner table discussion about the topic—influences such as biases based on gender, religion, class, or race that judges are on the whole loath to entertain consciously.

---

94 See e.g. N.Y. Mod. Civ. Jury Charge 1.12P (2007) (“No Prejudice, Passion, Bias or Sympathy”) (available at http://www.judiciary.state.nj.us/civil/civindx.htm); see also Fed. R. Evid. 403, advisory comm. nn. (rule designed to exclude evidence that would, inter alia, “induc[e] decision on a purely emotional basis”).

95 See supra n. 82 and accompanying text (Neumann discussing beginner’s problems).

96 See Croskery-Roberts & Tonner, supra n. 50.

C. Factual Realism

I suggest that recognizing the condition that judging and especially “jurying” are subject to the vagaries of fact, which includes intellectual and emotional responses to the facts as well as overall political leanings and ideologies, be called “Factual Realism.” Going further, indeterminacy of fact encompasses opinions as well—opinions about particular laws and law itself, testimony, documents, parties, witnesses, the judge, other jurors, etc. All of these opinions may arise from the law or facts themselves, or from other, external sources, such as moods, ideologies, religions, cultural influences, television, advertising, art, professional training, etc. These externalities, these inputs, are hard to control.

Instead of ignoring this indeterminacy, or railing against it as an unfortunate condition, we who are involved in ALS decide to train lawyers to address it. We reflect on how the decision makers came to the decisions we are now stuck with in cases we have argued, or helped argue, or studied, or trained and supervised students to argue. Or, more importantly, we must prospectively figure out the various ways in which the decision maker might decide, when given the case, and then try to influence the decision. In the world of ALS and of skills professors and most of the practicing bar, the jury is the star, the focal point, not the appellate judge. That’s because only a small percentage of all disputes ever reach appellate courts. Another related distinction is that ALS is about winning cases, whereas many of the ideas in the academy, including Legal Realism, focus on how law is made.

We also are not privy to the jury’s deliberations, in our cases or really in any others, so it is hard to assemble a working model of how juries actually go about deciding. Questionnaires given out to juries after trials that attempt to capture the decision-making process may suffer from post hoc rationalization as well as jurors’ own inability to understand and articulate how they arrived at, personally and as a group, what may in fact have been an emotional decision. Similarly, we are not necessarily privy to the appellate judge’s thinking. The opinion that the judge writes, if any,

---

98 See Nancy S. Marder, Juries, Justice & Multiculturalism, 75 S. Cal. L. Rev. 659 (2002).
99 For that matter, only a small percentage of cases ever reaches a jury, given that most are resolved through settlement or plea bargain. See infra sec. IV(B).
to justify her decision might in some cases be taken with a grain of salt as quite literally self-justifying and perhaps even self-serving or self-deluding—or even simply disingenuous. It characteristically does not describe the drama that might have taken place among the judges on the panel, or even among their squads of law clerks. Indeed many lawyers have probably experienced that sense in cases they have tried—especially in ones they have lost, which goes to show how, after a full airing of the facts and law, people may still disagree over them!

D. Factual Realism and Storytelling

Storytelling is a way of controlling, or at least taming, factual indeterminacy. The main focus in ALS is in helping shape the jury’s construction of “the facts” of the case, that is, how to convince the jury to see the facts in a particular way: our and our clients’ way, which often requires creating a story. ALS recognizes that the story is a powerful tool of persuasion, a powerful way to achieve control over and to present facts (and opinions and other external influences). Indeed, stories can take advantage of these externalities such as by invoking stock stories\(^\text{101}\) and tapping into myths\(^\text{102}\) and stereotypes.\(^\text{103}\) Storytelling can give a skilled advocate some control over the determination of facts and hence of the outcome of a case: If an advocate can organize a client’s facts into a compelling story, then she just might have a chance. The jury gains a cognitive frame for looking at the conflict before them.\(^\text{104}\)

This, of course, is nothing new. Legal storytelling (and law itself) fits well within the broader framework of persuasion and the study of rhetoric.\(^\text{105}\) Michael Smith reminds us that the ancient rhetoricians unpacked persuasion into the concepts of logos, pathos, and ethos.\(^\text{106}\) Logos “refers to the process of persuading through substance and logical argument,” including legal argu-

---

\(^{101}\) See Smith, supra n. 49.


\(^{103}\) Prosecutors often take advantage of stereotypes, especially given that it is difficult for criminal defendants to have good character evidence admitted. See Ross, supra n. 97, at 263–264. Of course, this is an example of the use of storytelling by the powerful.

\(^{104}\) See generally Pennington & Hastie, supra n. 84.

\(^{105}\) Duong, supra n. 2, at 2–3 (noting that these fields share in common the study of rhetoric).

ments based on precedent, statutes, and policy. Pathos “refers to persuasion through emotional argument, which classical rhetoricians recognize as being coequal with logical arguments using logos.” And “[e]thos . . . refers to establishing and maintaining credibility in the eyes of the audience,” by showing “intelligence, character, and good will.” Pathos and ethos can be achieved by storytelling; ethos, of course, may temper the appeal to pathos (and, again, the tension between logos, ethos, and pathos offers an avenue for teaching values). Roughly stated, casebook classes and appellate judges focus on logos, whereas clinics—and actual law practice—focus on all three aspects of persuasion. This is not to downplay the importance of teaching “legal logos”; after all, that is what sets legal argument apart from other forms of argument. The knowledge and training in legal logos is what makes law a distinct profession, what makes law school training unique, but law school has to be about more than logos—much to the chagrin of some casebook professors, perhaps—as long as lawyering is about persuasion, and, more to the point, as long as lawyering often concerns persuading jurors, who are usually not lawyers or otherwise legally trained.

E. Factual Realism, ALS, and Academic Politics: The Fact-Law Distinction

Factual Realism—though not identified as such until this Article—has entered the academy, and skills professors are leading the way in teaching students to address it. Expanding legal pedagogy in this way is long overdue, given that most law school graduates go on to become practicing lawyers at the trial level rather than at the appellate level, or in transactional work and counseling; few become law professors or judges. What skills professors do is more “relevant” to what lawyers do, and therefore teaching skills is something that law schools should do a lot more of.
This shift from the casebook method as the “signature pedagogy” in law school is not painless. Traditional legal education makes the casebook professor the brightest star in the law school firmament. The pain, and indeed the academic political struggles stemming from the rise in importance of skills professors, is rooted in a longstanding distinction that pervades law and legal culture more than we may have understood: the fact–law distinction. This distinction represents a pecking order with, of course, law on top. For example, judges deal with law, juries deal with fact. Appellate judges deal with law more purely than trial judges, who are involved in the jury’s fact-finding (such as by guiding it through evidentiary rulings). In the academy, casebook professors teach from appellate opinions, while skills professors teach students how to prepare for trial, conduct trials, and write legal briefs and memoranda. In academic hiring, an appellate clerkship is widely seen as more prestigious than a trial-level clerkship. And, of course, law professors outrank practitioners. (And given that law professors often critique judges’ work, many professors likely believe that in this pecking order they outrank judges.) The distinction is ultimately a distinction between elites and commoners. Law, i.e., abstract principles, is highbrow. Fact is concrete, lowbrow.

Skills professors bring into the hallowed halls of law schools the trial in all its mess and uncertainty, in all its impossibility of ever looking inside the black box of the jury—fact. Discussions in skills classrooms and clinics often revolve around methods and strategies for convincing juries, a convincing that often entails deeply studying the facts and investigating to get more facts; it also entails considering making appeals to jurors’ emotions rather than their intellects. Treating common people as decision makers.

---

115 Id. at 186.
116 For a report on some of these changes, see Jill Schachner Chanen, Re-engineering the J.D.: Schools across the Country Are Teaching Less about the Law and More about Lawyering, 93 ABA J. 42 (July 2007).
117 Some law professors even have noticeable disdain for practicing lawyers. Okamoto, supra n. 112, at 498 (noting “disdain” that many legal academics hold for practitioners and stating, “I suppose the obvious reason why law teachers generally care so little about private law practice is that most have had little exposure to it and the few who have tried it have rejected it as a career choice. But I want to ignore that sort of realist analysis and focus instead on the epistemological basis for the split. Law professors shun corporate practice because corporate practice is not a ‘serious subject.’”), Harry H. Wellington, Challenges to Legal Education: The “Two Cultures” Phenomenon, 37 J. Leg. Educ. 327, 329 (1987) (observing that many law professors “do not venture outside the ivy-covered walls [and] scorn the practicing lawyer and his work”); see also Harry T. Edwards, The Growing Disjunction between Legal Education and the Legal Profession, 91 Mich. L. Rev. 34, 36 (1992).
surely is not what elite law professors (or appellate lawyers and judges) relish. In their view—which is often correct—such people often simply cannot understand the complex legal issues involved in a case; far more preferable is it to argue to a similarly educated and trained judge.\textsuperscript{118} Consider how even many lawyers apparently try to keep educated people off their juries (and it is probably these same lawyers who call juries “stupid” when juries find against their clients!).

The focus of the skills and clinic teachers accurately captures what practicing law is all about. Skills teaching, including crafting a story from the client’s facts, also raises ethical issues in a lively and immediate way, which further increases its value.\textsuperscript{119} With increasing emphasis on teaching skills, the indeterminacy of facts now must be addressed by law students and their teachers during law school—it can no longer wait until the first jobs after graduation. The messiness and ugliness—witnesses who lie, corporations that conceal, people’s impaired memories, their hobbled senses of sight and sound, the rampant uncertainty that can topple a well-wrought syllogism—make the Ivory Tower look a bit less pure.

These things also make the academy, on a traditional view, impure in another sense: the increased focus on skills training is in response to student demand, the market. The majority of law students recognize that they will go on not to become judges, especially appellate judges, or appellate lawyers, or law professors, all of whom have the luxury to deal almost exclusively with issues of law, but practicing lawyers, trafficking in down and dirty fact. This recognition of (caving into?) student demand reveals the economic and marketing forces that act on law schools. The student demand is joined by and informed by demands by the practicing bar, which, because of clients’ cracking down on legal fees, no longer can afford to train beginning lawyers. At the salaries being paid new lawyers by top law firms, the firm cannot bill clients when the new associate merely observes a deposition or client intake interview. Nor can the law firm justify having the new associate handle these matters at the high hourly rate when the associate has never done these tasks before! The client would undoubtedly blanch at having a rookie handling its important matters.

Ultimately, however, law schools should be training law students to be lawyers. So the shift toward including more skills

\textsuperscript{118} See Joe S. Cecil et al., \textit{Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials}, 40 Am. U. L. Rev. 727, 733–734 (1991) (describing how judges and legal scholars have increasingly criticized the “ability of laypersons to serve as competent jurors”).

\textsuperscript{119} See Sullivan et al., \textit{supra} n. 71, at 136 (discussing calls for more professionalism and ethics teaching in law school).
training will be beneficial, and ultimately, students will be grateful. Discussing well known lawyer-author (legal storyteller?) Scott Turow’s reflections on the distinction between his Legal Methods course and casebook classes, the Carnegie Report states,

Yet the pedagogies of Legal Methods were largely divorced from the theoretical-analytical training in [Turow’s] doctrinal classes. Turow thought this reflected the valuing of certainty in legal education over the uncertainty and situational ambiguity of law revealed in the practice experience. Law school provided no formal place in which to come to grips with his momentous discovery that legal theory and the practice of law require very different habits of mind and modes of engagement.120

Factual realism and legal storytelling bridge the distinction that law schools have created between traditional teaching and skills teaching; they bring together these “very different habits of mind and modes of engagement.”121 As one law student told the Carnegie team, finding the “theory of the case” means “legalizing the [client’s] story,’ meaning by this that serving the client requires turning the client’s narrative of difficulty into a viable strategy for obtaining a legal remedy.”122 Such deep understanding from a law student seems promising.

Making such understanding the norm rather than the exception, however, will require fighting political battles. So far, the changes I have discussed have been incremental, slow. As the Carnegie Report states, “the strong position of academic law has made it difficult for the concerns of the practicing bar and the public to influence law school education, except around the edges.”123 Perhaps if casebook professors come to understand Factual Realism and ALS, and understand that the sorts of strategizing and crafting and legal storytelling that skills professor are training law students to do is not only realistic but decidedly not lowbrow (and, indeed, fun and rewarding), political opposition will dissolve. As William Twining has stressed, “fact investigation, fact management, and argumentation about disputed questions of fact in legal contexts (not just in court) are as worthy of attention and as intellectually demanding as issues of interpretation and reasoning about questions of law.”124

120 Id. at 107.
121 Id.
122 Id. at 122–123.
123 Id. at 90–91.
124 Twining, Seriously Again, supra n. 87, at 360.
Interesting times lie ahead. Whether this is a curse or a blessing remains to be seen.125

IV. IMPLICATIONS FOR FURTHER STUDY

I am sure I have merely scratched some complex surfaces in making my main point, which is that crossing the Great Fact-Law Divide, and Factual Realism, will further change legal education and law itself, and that ALS can be at the forefront of this (r)evolution. I offer the following suggestions and provocations, which I hope will spark further inquiry, discussion, and action.

A. Drawing from the EPF (Evidence, Proof, and Facts) Movement

Criticism of law schools for failing to teach students about facts has a distinguished pedigree, harking back to a course taught by Dean John Henry Wigmore at Northwestern.126 A “small” literature about his approach has developed and is known as EPF, “evidence, proof, and facts.”127 In EPF courses, students learn to ferret out facts, understand the inferences that can be drawn from them, and figure out the best way to present the case to the jury, including the use of stories.128 They learn to construct the arguments that will be presented to judge and jury.129 The movement, however, has not caught on widely—this according to one of its major proponents, William Twining.130 Jethro Lieberman (drawing on Twining) states that the failure can be attributed to objections inside the academy that “boil down to the claim that law schools have no time to teach ‘soft’ skills or notions rooted in common

127 Id.
128 See id. at 33–34.
130 Twining, Seriously Again, supra n. 87, at 360. Twining states that this failure caused him to repeat the argument he had made more than twenty years earlier in his 1980 Taking Facts Seriously paper and subsequent reprints. Id. (describing the response to Twining, Seriously, supra n. 87). Lieberman, writing in 1999, discusses the earlier article. See Lieberman, supra n. 126.
sense that have been learned elsewhere."\textsuperscript{131} Lieberman wrote that these objections are meritless:

They miss the distinction between a general skill and a particular practical requirement; they underestimate the difficulty inherent in the problem; they radically assume common sense for much that has not yet been investigated; and they assume without evidence that these things have been taught elsewhere. Moreover, the tables can be turned: After all, isn’t rule handling a matter, ultimately, of common sense? Yet we spend most of three years on rules handling, of detecting, understanding, distinguishing, and applying rules. Why should we do less about fact handling?\textsuperscript{132}

The criticisms of the law school curriculum made by EPF are dead-on. Even before discovering EPF while writing this Article,\textsuperscript{133} I found in my Evidence classes that students need extra instruction and practice in learning how to draw inferences from facts at the beginning of the semester. I have found throughout my teaching career spanning legal methods and casebook classes that students need help in critical reasoning and problem solving. And they need help in learning how to tell stories.\textsuperscript{134}

Engaging with EPF can help us see that, having crossed the Great Fact-Law Divide, we need to teach students other ways of reasoning besides storytelling, such as inference-building, psychology, rhetoric, informal logic, creative problem-solving,\textsuperscript{135} probabilistic reasoning, and statistics—in short, all the ways we think and argue about facts. EPF also addresses some of the challenges of storytelling. Anderson, Schum, and Twining call stories “necessary

\textsuperscript{131} Id. at 34.
\textsuperscript{132} Id. at 35.
\textsuperscript{133} My experience was similar to Lieberman’s, who wrote how he came to these conclusions on his own before.
\textsuperscript{134} Almost as an afterthought, I decided I should make a brief excursion to the library. I’m old enough now to know that most of what I think I have dreamed up has already been voiced by others. So I suppose I should not have been surprised to discover a literature, albeit a small one, about this very problem. It’s nearly a century old. It is even denominated by a set of initials, though I think these are perhaps only a few decades old: EPF, evidence, proof, and facts.
\textsuperscript{135} Id. at 26.
\textsuperscript{133} I have managed to tackle storytelling and inferences in my classes and scholarship. I’m still trying to teach critical reasoning and creative problem solving. My course proposals at two different schools have not survived the curriculum committees.
\textsuperscript{135} California Western School of Law has pioneered teaching Creative Problem Solving (CPS) to law students and even offers it as an area of concentration. Courses in the CPS program can be accessed at California Western School of Law, Center for Creative Problem Solving, Curriculum, http://www.cwsl.edu/main/default.asp?nav=creative_problem_solving.asp&body=creative_problem_solving/curriculum.asp.
but dangerous,” based on stories’ tendency to facilitate abuse by advocates because of stories’ possible appeal to emotion over intellect.\endnote{Anderson et al., supra n. 129, at 280–281, 285.} There is also the danger of what I will call “story indeterminacy,” the idea that the story might be misinterpreted.\endnote{Id. at 285.} Part of what makes a story such a powerful tool of persuasion is that it helps convey the experience to the audience through “narrative transportation”\endnote{Heller, Presentation, supra n. 22, at 287.} and lets the audience construct and experience the meaning of the story for itself. But to do so, the storyteller must give up some control over that meaning-making, lest the storyteller turn the story into a mere rhetorical argument. The distrust of stories that is part of EPF seems worth exploring further and can help us sharpen our own thinking.

Engaging with EPF politically could prove fruitful, too. My sense is that EPF has not gained traction because it is made up of a small subset of a subset of casebook professors (Evidence professors), and it did not address an immediate curricular need—few students were in clinics, and law firms obliged by teaching skills to graduates.\endnote{Twining suggests that his 1980 call for EPF failed to persuade, perhaps because it fell between audiences: Practitioners quite liked it, but it was about legal education; many academic lawyers perceived it as addressed to specialists in evidence and thus no concern of theirs; some evidence teachers perceived it as a radical and undiplomatic critique of traditional courses on the law of evidence; while others saw it as poor salesmanship for improbable Wigmore charts. Twining, Seriously Again, supra n. 87, at 360. Skills professors, whose numbers were few in the early 1980s, might be an excellent audience for EPF.} Now the landscape has changed. EPF might end up gaining more adherents, making it less of a small movement. And ALS can trumpet that it has Wigmore on its side.

\textbf{B. Thinking outside the Jury Box}

Although I have called the jury a focal point of ALS, I speak subject to correction—the breadth of topics presented in London gives me pause here. There should be further work taking into account the fact that something like 90\% of cases never go before juries. That means that in resolving disputes, no facts are ever found, at least not formally. How much agreement over them is there? How is agreement arrived at (or not)? Do advocates agree to disagree? Although it can be argued that the settlement discussions and plea bargain negotiations that resolve these disputes take place in the shadow of courts, which means that the parties
and their attorneys predict what a jury might conclude, at least one scholar has called this view of plea bargaining “far too simplistic.” Instead, these negotiations have a dynamic all their own, a system more akin to administrative law than to traditional law. That may make sense. If so, then how are facts used in these transactions? How are they valued? Is storytelling more or less important in these bargaining systems than at trial? What about facts and storytelling in alternative (to the jury trial) dispute resolution methods such as arbitration, mediation, and negotiations? Do these methods provide a better or worse vehicle for storytelling than jury trials? How do these methods compare to each other in this regard? How do these methods address factual disputes?

This is fertile ground for exploration, and the wide-ranging topics presented in London suggest that ALS is up to the task. Asking these questions and others could lead us to a more general theory of ALS, rather than our coming up with a theory first. Perhaps, as Ruth Anne Robbins warned me, it is too soon to define ALS! According to Twining,

The role of narrative in legal discourse and questions about the relations between narrative, reasoning, argumentation, and persuasion are distorted if narrative and stories are only considered in relation to disputed questions of fact in adjudication. Stories and story-telling are also important in investigation, mediation, negotiation, appellate advocacy, sentencing, and predictions of dangerousness, for example. A general theory of narrative in law and legal argumentation needs to encompass all such questions. Some of these topics have been canvassed rather eclectically under the heading of “law and literature,” but a comprehensive framework has yet to be developed within which all these lines of inquiry can be considered in relation to each other.

Is ALS this comprehensive framework? We might learn in trying to find out, and we might also find out more ways to apply storytelling and deal with factual indeterminacy.

---

140 See Stephanos Bibas, Plea Bargaining outside the Shadow of Trial, 117 Harv. L. Rev. 2464, 2464–2466 (2004) (noting that the “shadow-of trial model... dominates the literature on civil settlements” and “looms large in recent plea-bargaining literature” but is “far too simplistic”).

141 Id.

142 One conference presentation may have jumpstarted this effort. See Holbrook, supra n. 51.

143 Twining, Seriously Again, supra n. 87, at 362 (footnotes omitted) (emphasis added).
C. Where Are We Going: The End of Law?

The following is offered as provocation. If facts are indeterminate, or at least capable of different interpretations depending on point of view, character, language choice, and the like (all elements of storytelling), then might not law, which seeks to categorize, to treat like instances alike, and often to brazenly limit inquiry into the facts, at times present an obstacle to justice? Let me suggest that there is an argument that eliminating law as we know it could result from Applied Legal Storytelling. Let me suggest the possibility of a Problem-Solving/Storytelling Court.

Imagine, for example, a sentencing court like the Aboriginal Sentencing Court discussed above, but a court whose jurisdiction is not limited to a particular race. Or imagine, as we have in the United States, a “drug court.” Our problem-solving sentencing court would take into account an offender’s story, his unique situation that is created or at least informed by a confluence of individual characteristics, neurochemistry, culture, interpersonal relationships, family, history, abilities, goals, and obstacles. This court would regard criminal behavior not as the product of “evil” that needed to be punished (“justice”), but as a product of discernible causes that could be corrected for—in short, behaviors to be modified, problems to be solved. Such a concept would brush aside laws that require particular punishments as antiquated, regardless of whether those punishments are likely to “work,” as based on a world view that requires ideas of Good and Evil, a religious-based view that seems to be less and less relevant the more we learn about nature, neurology, psychology, the influence of culture, and the like. The court would be based on an understanding that an offender’s story should be paramount in how the law treats him. This view would replace quaint ideas of meting out justice and putting the devil back in his dungeon. Criminal law might no longer serve as a weapon in the fight between Good and Evil. Retribution could be replaced by understanding and restitution, from the offender and from the government itself. After all, the government should help those in need.

144 See supra sec. II(A)(4).
146 See generally James Gilligan, Preventing Violence (Thames & Hudson 2001) (advocating various measures that would treat violence as a public health problem, not as “evil”).
it unto itself to punish a private actor for harming another private actor, is it?

My tongue may be near my cheek, but the sweeping change I suggest might occur in at least a few courtrooms in the not-too-distant future. For example, the 2005 United States Supreme Court decision in *U.S. v. Booker*\(^{147}\) recently freed federal judges from the strictures of the Federal Sentencing Guidelines; the guidelines are no longer mandatory but are advisory, and sentences are reviewable for unreasonableness.\(^{148}\) What is to stop a judge from engaging in creative, reasonable sentencing practices? What is to stop a judge from taking a storytelling/problem-solving approach?

Could this approach go beyond criminal law? Imagine a problem-solving court with “Elders” (by this I mean wise people, regardless of age) who treat disputes as problems to be solved. Perhaps we would jettison the idea of equal justice, of precedent, of sedulously treating similar situations alike, and move toward an idea of treating individuals as individuals—based on their characters, their deeds, their “stories.” Would that not be a sort of true justice, even equal justice in terms of substance, if not in form? Taking into account “storytelling” and its focus on character and the goals and needs of the character could lead us to take such questions seriously, and lead us beyond our current conception of a legal system as well as to seriously ask questions such as “What is law?” “Do we need law?” and “Should we start all over?” For example, if law is simply a way to resolve disputes or solve problems or even achieve justice, if we can do these things more directly, more fundamentally, with a storytelling/problem-solving court, then we can at least sometimes disregard law in the traditional sense. After all, law was created to mediate between ideals of justice and actual disputes. To put it another way, if we can see more clearly without the glasses, then why wear them? To promote (or at least investigate) such ideas would certainly place us in a highly political position of reforming a legal system that is older than the London Inn of Court where we held our conference. But it’s a worthy project that could bear fruit. As Michael Dorf has written in discussing problem-solving courts: “Although the basic structures of American government are virtually unamendable, there remains considerable room for creative thinking about how law can serve the people.”\(^{149}\) Such thinking can come from ALS.


\(^{148}\) *Id.* at 245, 261.

\(^{149}\) See Dorf, supra n. 145, at 877 (footnote omitted).
D. Prospective Storytelling as Scholarship

The power of storytelling can be tapped as a *way of thinking* that is particularly suitable for critiquing proposed laws. When contemplating a proposed law (or even an existing one), why not write fictional stories of how people are likely to be affected? This might sound farfetched, but it can be less costly than waiting to see the damage that a policy might do if enacted. It also would engage the skills of lawyers who are interested in storytelling. This pursuit is usually seen as separate from legal scholarship. But the law could benefit from the full use of our imaginations that storytelling requires.

V. CONCLUSION

The increased focus on facts that ALS represents comes in large part from expanding law faculties to include skills professors, as well as providing them the resources (and in some cases, the requirement) to write about their interests, to reflect on the knotty questions of law and pedagogy that keep them up at night or wake them early in the morning. Storytelling has long been recognized as a powerful tool for exerting control over facts (real or fictional), or, more accurately, control over the *indeterminacy* of facts. Casebook professors have long had the comfort of canons of construction, rules about identifying and valuing precedent, legal theory, and the freedom to address policy concerns—and the freedom, in treating law as indeterminate, to *dazzle* with these tools. Perhaps storytelling serves this role for skills professors. Our challenge going forward is to continue to examine the uses and implications of storytelling in courts, in alternative dispute resolution, in negotiations and transactions, and in our classrooms.

Perhaps a greater challenge is for us to consider that storytelling may not be the last word or final answer to the questions raised by the broader challenge of factual indeterminacy. For that reason, I suggest that we see storytelling, and ALS, as a subset of a broader idea, Factual Realism. The time has come for the entire legal academy to address realistically the factual indeterminacy that has always been at the heart of law. Law teaching can no longer always be neat, clean, and fact-free. It must be messy, like law and life itself.

---

150 But see David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 Ind. L.J. 797 (1998) (criticizing the use of storytelling to support proposed legislation because narrative is essentially not testable in the way statistics and what I would call “harder” facts are).
STORYTELLING, NARRATIVE RATIONALITY, AND LEGAL PERSUASION

J. Christopher Rideout*

“Humans are essentially storytellers.”
—Walter Fisher¹

“[T]he law always begins in story: usually in the story the client tells, whether he or she comes in off the street for the first time or adds in a phone call another piece of information to a narrative with which the lawyer has been long, perhaps too long, familiar. It ends in story, too, with a decision by a court or jury, or an agreement between the parties, about what happened and what it means.”
—James Boyd White²

As James Boyd White pointed out over twenty years ago, storytelling lies at the heart of what lawyers do. Every legal case starts with a story—the client’s story—and it ends with a legal decision that, in effect, offers another version of that story, one cast into a legal framework. In between, in the middle, lies the story told at trial—or, rather, the stories told at trial, since most trials contain competing narratives.³ Much of the work on legal storytelling has concentrated on this middle—storytelling at the trial level. Storytelling there, everyone agrees, is persuasive. The question is, how?

For many, work on this question dates back to Lance Bennett and Martha Feldman’s 1981 treatise Reconstructing Reality in the

* © 2008, J. Christopher Rideout. All rights reserved. Associate Director of Legal Writing, Seattle University School of Law. The Author thanks Kenneth Chestek and Kirsten Davis for their comments on a draft of this Article, as well as Brooke Bowman for her editing assistance. He also thanks the organizers of the Applied Legal Storytelling Conference, held in London, United Kingdom, July 18–20, 2007: Brian Foley, Steve Johansen, Robert McPeake, Erika Rackley, and Ruth Anne Robbins.

³ Id. at 174; see also Robert Burns, A Theory of the Trial 164–166 (Princeton U. Press 1999).
Courtroom: Justice and Judgment in American Culture. Note the subtitle. As Bennett and Feldman explain, in looking for something broader in American criminal trials, “justice and judgment,” they reached “an interesting conclusion: the criminal trial is organized around storytelling.” Bennett and Feldman, both social science researchers, go on to explain how trial lawyers use storytelling strategies to construct their cases and, more importantly, how those story structures are not just descriptive but also analytic, forming an essential part of the basis for making judgments about the outcome of the trial and thus serving as an important part of the formal legal process.

Ten years later, Nancy Pennington and Reid Hastie looked more closely at the process of legal decision-making, primarily studying juries, and reached essentially the same conclusion: the “central cognitive process in juror decision-making is story construction.” Although in the legal academy Pennington and Hastie’s work shifted a large part of the discussion away from mathematical and probabilistic models of legal decision-making, their research offered support for what many trial lawyers had already long known—that lawyers persuade by telling stories. Since then, a long line of works has followed on the uses of storytelling for persuasion in law practice.

---

5 Id. at 3.
6 Id. at 18.
8 Id. at 519.
9 See e.g. Gerry Spence, Let Me Tell You a Story, 31 Tr. 72 (Feb. 1995).
I have long been interested in persuasion, and for many years I have included theories of persuasion in an advanced legal writing seminar that I teach. I always ask my students the same question—“what persuades in the law?”—and after looking at different theories of persuasion, they then develop their own theory of legal persuasion. When I first taught the course, I had in mind rhetorical models of persuasion, starting with Aristotle and Cicero and moving toward more contemporary rhetorical work.\textsuperscript{11} Very quickly, however, I had to add narrative models of persuasion, plus a second question—“what is it about narratives that makes them persuasive in the law?”

This second question has increasingly consumed the majority of our class time on theories of persuasion, reflecting the growing influence of theories of narrative on the ways that we think about legal persuasion. I would respond to my second question above as follows:\textsuperscript{12}

1. Narratives are “innate” ways of understanding and structuring human experience; this makes them inherently persuasive.

2. Narrative models go beyond models of persuasion based on formal or informal logic, to encompass “narrative rationality.”

3. Narratives embody several properties that are psychologically persuasive:
   a. Coherence (a formal property);
   b. Correspondence (a formal property);
   c. Fidelity (a substantive property).\textsuperscript{13}

In this Article, I intend to discuss briefly each of these persuasive features of narratives, but I am particularly interested in the psy-


\textsuperscript{12} In the seminar, I try to let the students pull these ideas out of the course readings, gently coaxing them toward these ideas.

\textsuperscript{13} I see these three concepts as the major sub-categories for the psychologically persuasive properties of narrative, and I discuss them—and their sources—in more detail later in the Article: coherence, \textit{infra} section I(C); correspondence, \textit{infra} section I(D); and fidelity, \textit{infra} section I(E).
chologically persuasive properties of narratives and their relationship to legal persuasion. Much has been written about the first two of those properties, coherence and correspondence—formal properties, as I would call them. But less has been written about the third, fidelity, which I would call a substantive property.

By “formal,” I mean the structural properties of narratives—the internal characteristics of the structure of a given narrative and the way in which those structural parts interact to tell a story persuasively. My use of the term echoes the initial work on narrative done in the early twentieth century by the group known as the Russian Formalists, who began to establish a formal (i.e., structural) vocabulary for talking about narratives. Much of the work on legal narratives, discussed below, focuses on the formal, or structural, features of those narratives. In contrast, narrative fidelity, the third psychological feature of narratives, is in my view best seen as a substantive feature of narratives. This property persuades, not as a matter of the structure of the narrative, but rather as a matter of its content and the particular substantive appeal that the content makes. This appeal, however, is not a simple matter of the narrative’s accuracy or realism, but rather is mediated through the judgment of the audience, as will be discussed below.

In making this distinction, between formal and substantive properties, I am taking a cue from the speech communication theorist Walter Fisher and his work on “narrative rationality.” Fisher writes that “[n]o matter how strictly a case is argued—scientifically, philosophically, or legally—it will always be a story, an interpretation of some aspect of the world that is historically and culturally grounded and shaped by human personality.” Drawing upon Kenneth Burke, Chaim Perelman, and Stephen Toulmin, Fisher then argues that any rhetorical model of persuasion, including legal persuasion, is incomplete without accounting for reason and argumentation as forms of symbolic action (as opposed to being only formal models for reasoning) and without accounting for the elements of argumentative discourse that lead to adherence on the part of the audience. That is, in Fisher’s view,

15 See generally Fisher, supra n. 1.
16 Id. at 49.
17 See supra n. 11.
any model of persuasion needs to account for the role of narratives.\textsuperscript{18} For Fisher, the idea of narrative rationality—and within it, the elements provided by storytelling—opens up argumentation and persuasion to this more complete view.\textsuperscript{19}

Fisher’s narrative model ends with fidelity and, in so doing, brings in the idea of the audience’s adherence.\textsuperscript{20} Fisher largely relies on Perelman for his discussion of adherence and uses Perelman to add this third, “substantive” property of narrative. I find this property compelling and somewhat overlooked, and so I intend to explore it more at the end of this Article, with some very brief application to a recent United States Supreme Court opinion.\textsuperscript{21} But first, an overview of the other features of narratives that, in my mind, can make them legally persuasive.

\section*{I. NARRATIVE FEATURES AND LEGAL PERSUASION}

\textit{A. Narratives Are “Innate” Ways of Understanding and Structuring Human Experience; This Makes Them Inherently Persuasive}

Legal trials involve the recounting of human events, which must be understood in a particular way before a judge or jury can arrive at a decision. One of the struggles of a trial lawyer is to provide a structure for that understanding that will lead to a favorable result. And narratives, as it turns out, offer a compelling structure, most probably because narratives are a natural mode for understanding human experience.\textsuperscript{22} The psychologist Jerome Bruner speaks of a human “predisposition to organize experience into a narrative form.”\textsuperscript{23} For Bruner, this predisposition toward narrative is linguistically or psychologically “innate,” as natural to human comprehension of the world as our visual rendering of what the eye sees into figure and ground.\textsuperscript{24} Robert Burns points to narrative features...
structure as “an innate schema for the organization and interpretation of experience.”

Little disagreement exists about the fact that narratives are fundamental to our understanding of human experience, but some questions exist about how (which is why I put “innate” in quotation marks). That is, are narrative structures a feature of language, or are they psychologically fundamental in some pre-linguistic way? And are narrative structures congruent with reality, or are they some type of Kantian category, a structure of the mind that pre-exists and shapes our understanding of experience? Several commentators have wrestled with these questions, digging deeper into why narratives are so fundamental.

Amsterdam and Bruner, for example, note that many theories treat narratives as being “endogenous”—that is, narrative structures are inherent either in the structure of the mind or in the structure of language. In contrast, they suggest that narrative structures might lie outside linguistic or psychological structures, as ways of sharing culturally-shared human experiences. If narrative structures are the latter, a type of social or cultural construction, they seem almost universal, perhaps as a consequence of the fact that humans experience social reality temporally or of the fact that the human life cycle itself contains the elements of a narrative structure—a beginning, middle, and end, to which we assign meaning.

Another theorist, Steven Winter, argues for an endogenous theory of narrative, favoring the view that narratives—or structures related to narratives—are fundamental mental models. Winter notes that these models have been described in various forms—as scripts, for example, or as stock stories—each form infused with social meaning. Borrowing from George Lakoff, Winter sees narratives as built on more fundamental mental models,

---

25 Burns, supra n. 3, at 159.
27 Id. at 117–118.
28 Although the precise nature of the temporality can differ; no matter—narrative structures, of various sorts, can be seen as the human effort to assign meaning to temporality.
31 More about stock stories later in this Article.
32 In much of his work, Lakoff explores human cognition, viewing it in terms of the mental structures that underlie what we call “rationality.” See George Lakoff, Women, Fire, and Dangerous Things: What Categories Reveal about the Mind (U. Chi. Press 1987).
ones that rely on category structures or “idealized cognitive models.” Whether their model could be called endogenous or exogenous, however, narrative theorists agree that narrative forms are not only immediately recognizable, but that they allow us to assign meaning to events through “pre-given understandings of common events and concepts, configured into the particular pattern of story-meaning.” Narratives strike us as natural ways of understanding experience.

Dodging the Kantian debate, Burns argues for a congruency between the structure of narrative and the structure of human experience.

Investigators in many fields... have concluded that narrative forms the deep structure of human action. In other words, the bedrock of human events is not a mere sequence upon which narrative is imposed but a configured sequence that has a narrative character all the way down. To act at all is to hold an immediate past in memory, to anticipate a goal, and to organize means to achieve that goal—allegorously, the “beginning, middle, and end” of a well-constructed story. Both action and storytelling are intrinsically chronological and logical.

If actions are understood chronologically, then they will also be understood logically, but “logical” in a way that lies deeper than ordinary understandings of that term. And any effort to understand human actions outside the structure of narratives will yield only “the disjointed parts of some possible narrative.”

B. Narrative Models Go Beyond Models of Persuasion

Based on Formal or Informal Logic to Encompass “Narrative Rationality”

Traditional models of legal adjudication, which are based solely on informal or formal models of logic, are increasingly seen as incomplete, or inadequate, for fully describing the persuasiveness of legal arguments. The “deeper” logic of narrative structures adds to more traditional models for legal argumentation. Burns,

---

33 Winter, supra n. 30, at 1629.
34 Id. at 1628–1629.
35 Burns, supra n. 3, at 222 (footnotes omitted); see also David Carr, Time, Narrative, and History 16–17 (Ind. U. Press 1986) (upon whom Burns relies).
37 See e.g. Bernard Jackson, Law, Fact and Narrative Coherence 37–60 (Deborah Charles Publ. 1988).
for example, sees narrative as co-equal with logic in the trial.\textsuperscript{38} For Burns, persuasion at the level of the trial relies on two strands—one strand of narrative and one of logical argument—related to each other like a twisting double helix that forms a lawyer’s theory of the case.\textsuperscript{39} “One strand is dominated by narrative and the other by informal logical inference or argument. Narrative is the story of events, actors, backgrounds, actions, and motives . . . . Argument is a logical pattern of propositions . . . that must be proven or disproved.”\textsuperscript{40} Narrative is thus central to the lawyer’s theory of the case—“a simple, plausible, coherent, legally sufficient narrative that can easily be integrated with a moral theme”\textsuperscript{41}—and provides the judge or jury with concrete reasons for deciding one way or another. The other embedded strand, the logical one, primarily serves the formal function of rendering the argument “legally reasonable,” but in Burns’s view does less to move the decision maker.\textsuperscript{42}

Walter Fisher goes further, offering what he calls “narrative rationality”\textsuperscript{43}—a broader view of rationality, one that encompasses all human actions symbolically expressed and that imposes sequence and meaning on those actions.\textsuperscript{44} In essence, he redefines rationality. Fisher sees narrative rationality as more comprehensive than traditional forms of rationality and as something that more fully enables us to interpret and understand human experience. He spends three chapters of his book outlining the differences between narrative rationality and what we ordinarily regard as “rationality.”

Fisher starts with Aristotle, an identifiable historical beginning point both for what we regard as formal structures of logic (“technical logic,” in Fisher’s term) and for rhetorical structures for argumentation (“rhetorical logic”).\textsuperscript{45} He then traces the historical development of each logical form, noting their separation into two forms of rationality even in Aristotle’s work. For Aristotle, both forms could be regarded as forms of argumentation, but in different ways. Technical logic, what we would commonly call formal or symbolic logic, found its full expression in the analytic syllogism and relies heavily on the form of the proof for the validity of its

\begin{footnotes}
\item[38] Burns, supra n. 3, at 36–38.
\item[39] Id.
\item[40] Id. at 36 (footnote omitted).
\item[41] Id. at 37.
\item[42] Id.
\item[43] Fisher, supra n. 1, at 20.
\item[44] Id. at 27–28, 47–49. Modern law, of course, relies upon both.
\item[45] See id. at 24–49.
\end{footnotes}
conclusions. In its emphasis on the validity of the logical form, coupled with the truthfulness of its premises, technical logic can lead to truth claims about the world. Rhetorical logic, on the other hand, although it also relies on set, formal structures for argument, leads to conclusions with a different status. Because rhetorical logic builds upon premises that are probable, as opposed to true, it leads to conclusions that are situational, contextual, and bound to the beliefs of the audience. The keys to rhetorical logic, then, are probability and audience. Despite this different status, however, Aristotle regarded rhetorical logic as an essential part of civic life and deemed it “practical wisdom.” Fisher traces these two traditions from Aristotle forward, noting the general privileging of technical logic over rhetorical logic and the transformation of technical logic into increasingly abstract forms following its shift toward the methods of empirical science. Technical logic ultimately finds its purest expression in mathematical and symbolic notation. Fisher’s point, however, is that the two logics, taken together, form what are commonly regarded as “rational” or “logical” ways of understanding the world, and all valid forms of argumentation and persuasion, including those in the law, derive from them. Fisher calls this the “rational-world paradigm.”

Fisher does not dismiss the rational-world paradigm, but views it as incomplete. To it, he would add narrative rationality. Narrative rationality, derived from the “narrative paradigm,” is broader and accounts more fully for human experience, and thus is an essential component of communication and persuasion.

The narrative paradigm challenges the notions that human communication . . . must be argumentative in form, that reason is to be attributed only to discourse marked by clearly identifi-

---

46 Id. at 28.
47 Id.
48 Rather than truth claims.
49 Id.
50 Id. at 30–36.
51 Id. at 31.
52 Id. at 44–47; see also Steven J. Burton, An Introduction to Law and Legal Reasoning (Aspen Publishers 2007).
53 Fisher, supra n. 1, at 47; see also Delia B. Conti, Student Author, Narrative Theory and the Law: A Rhetorician’s Invitation to the Legal Academy, 39 Duquesne L. Rev. 457, 469 (2001).
54 Richard K. Sherwin offers a similar challenge in law; see What We Talk about When We Talk about Law, 37 N.Y. L. Sch. L. Rev. 9, 13–16 (1992).
55 Fisher, supra n. 1, at 63. Jackson’s normative syllogism is central to what Fisher calls the “rational-world paradigm.”
ble modes of inference and implications, and that the norms for evaluation of rhetorical communication must be rational standards taken exclusively from informal or formal logic. The paradigm [Fisher] offer[s] does not disregard the roles of reason and rationality; it expands their meanings. . . .

To the traditional modes and norms for argumentation, then Fisher adds two more—narrative probability and narrative fidelity— to which this Article will return below.

Others have also challenged the completeness of traditional argumentative forms, seeing narrative forms as supplying a component that is missing from formal models of logic and less evident in rhetorical models of logic. Bennett and Feldman, for example, point out the “normative connections” that narrative structures provide: “Categorizations and logical chains of inference can be supported by, or even based upon, normative understandings about excusable and inexcusable behavior in certain circumstances.”

Bernard Jackson devotes an entire chapter of his treatise *Law, Fact and Narrative Coherence* to the question of what he calls the “normative syllogism,” in his view the prevailing model for legal adjudication. Jackson argues that this model, the traditional basis for the deductive view of the legal process and its application of law to fact, barely conceals the narratives upon which it is built. Jackson argues that the traditional major premise of the normative syllogism, the legal rule, is informed by underlying narrative models that typify human action, although expressed in the abstract terminology of the law. The minor premise, the evidence presented at trial, is built upon the story of the trial. The relationship between these premises, commonly understood as the application of law to fact, is guided by rules of construal that rely in turn upon a narrative basis for the underlying premises. In essence, Jackson rewrites the traditional model for legal adjudication—the application of law to fact—as a narrative model.

So if narratives are a primary form through which humans configure ideas and experience, an innate way of human understanding, then it follows that narratives can add something to the
more traditionally accepted ways of reasoning about the world, ways of reasoning through logical or rhetorical forms. The question becomes, then, what is it that narratives add? As mentioned above, Fisher responds with two specific principles—narrative probability and narrative fidelity: “These principles contrast with but do not contradict the traditional concepts or constituents of rationality. They are, in fact, subsumed within the narrative paradigm.”

These principles take us more specifically into the persuasiveness of narrative structures and thus inform the remaining three persuasive features of narratives, all of which I would call psychological.

C. Narratives Embody Several Properties That Are Psychologically Persuasive: Narrative Coherence (a Formal Property)

The first of Fisher’s two features of narrative rationality, narrative probability, embodies what I am calling the formal properties of narratives. In fact, almost all of the work on the persuasive properties of narratives has focused on their formal or structural features. From the beginning, Bennett and Feldman, for example, focused their work on the internal, structural relations within the stories told in the courtroom. These internal relations were the key to understanding the persuasiveness of a given story. The fact that these stories are also symbolic representations of reality makes their internal, structural relations all the more important.

[The way in which a story is told will have considerable bearing on its perceived credibility regardless of the actual truth status of the story. This means that the symbols chosen, the structural elements (scene, act, agent, agency, and purpose) that are defined and left undefined, and the amount of detail provided to facilitate connections between story symbols, will all have a significant bearing on audience judgments about stories.]

In looking at the way that a story is told, most researchers look primarily to the story’s coherence—how well its parts fit together. Fisher himself uses the term “coherence” almost as a synonym for

64 Fisher, supra n. 1, at 66.
65 Id. at 47.
66 Bennett & Feldman, supra n. 4.
67 Id. at 89.
“narrative probability” in talking about the features of narratives.68

Coherence is indeed an essential feature of a persuasive narrative.69 Faced with competing stories in a trial setting and the need to decide what “really happened,” jurors are influenced by the story that seems most probable, and the story that is presented most coherently will also be the story that seems most probable.70

In my view, narrative coherence can be best understood when it is further broken down into two parts: internal consistency, how well the parts of the story fit together, and completeness, how adequate the sum total of the parts of the story seems.

Internal consistency is important to legal storytelling because the full story, the “real” story, is seldom told at trial. Rather, judges and juries construct stories based on the evidence presented, the fragments of the potential story, perhaps attaching those fragments to a story framework suggested by a strong opening statement. The work of constructing the story, however, requires inferences, and adjudicators can only make those inferences in light of an underlying story structure that seems internally consistent.71 The inferences supply a connection between potentially-related parts of the story, but only if those parts seem related. If so, the story seems more likely to be true.72

Researchers like Jackson confine their discussion of internal consistency to the emerging story framework that underlies the arguments at trial. “Internal narrative coherence can be conceived primarily in quasi-logical terms. Are the various parts of the story consistent with one another, or do they manifest contradiction?”73

Pennington and Hastie extend the notion of internal consistency beyond the story framework itself; the framework must also be consistent with the credible evidence that is being presented and around which the juror is building the story.74 In any case, consistency—whether among the parts of the story, or between the story framework and the surrounding evidence—is vital. Legal stories that lack internal consistency will seem ambiguous—

---

68 Fisher, supra n. 1, at 47.
69 Pennington and Hastie tie the coherence of a story to its persuasiveness. Pennington & Hastie, supra n. 7, at 528.
70 See Burns, supra n. 3, at 167.
71 See Bennett & Feldman, supra n. 4, at 125–141.
72 Lubet, Persuasion at Trial, supra n. 10, at 346–347.
73 Jackson, supra n. 37, at 58.
74 Pennington & Hastie, supra n. 7, at 528.
unable to allow for relationships and connections between their parts—and worse, will be deemed implausible.\textsuperscript{75}

The other aspect of a story’s coherence is its completeness, the extent to which the structure of the story contains all of its expected parts.\textsuperscript{76} A story may be internally consistent and yet remain unconvincing if it is incomplete. According to Bennett and Feldman, this need for completeness extends to the inferences that a jury is willing to make.\textsuperscript{77} They note that a jury, in making inferential steps in the construction of a story, will refer to other cognitive models—narrative scripts—for guidance.\textsuperscript{78} If the story structure at hand is sufficiently incomplete, this process breaks down.\textsuperscript{79} Fisher, who calls this “material coherence,” makes a similar observation: “a story may be internally consistent, but important facts may be omitted, counterarguments ignored, and relevant issues overlooked.”\textsuperscript{80} The story must account for all of its parts, whether those parts are explicit or implicit.

The coherence of a legal story—its consistency and completeness—greatly influences its persuasiveness. Pennington and Hastie found that trial stories constructed with attention to features of coherence, for example completeness, resulted in more predictable judgments.\textsuperscript{81} Looking at the social science research of both Bennett and Feldman and of Pennington and Hastie, Richard Lempert was willing to generalize:

I think it is safe to say . . . that the more coherent the story a party presents at trial, the more likely it is that jurors will accept that party’s story independent of the informational content of the evidence. A trier presented with a jumble of facts is, in other words, less likely to find for the party presenting those facts than a trier who receives the same factual information presented not as a jumble but as a coherent story.\textsuperscript{82}

Lempert makes a very strong claim. The structure of the telling can prevail over the evidence in and of itself. But narrative coherence is only one of two formal or structural properties that render narratives persuasive, the second being narrative correspondence.

---
\textsuperscript{75} Burns, supra n. 3, at 168.
\textsuperscript{76} Pennington & Hastie, supra n. 7, at 528.
\textsuperscript{77} Bennett & Feldman, supra n. 4, at 44–45.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Fisher, supra n. 1, at 47.
\textsuperscript{81} See e.g. Pennington & Hastie, supra n. 7, at 546–549.
\textsuperscript{82} Lempert, supra n. 10, at 562.
Narrative correspondence is a matter of a story’s corresponding to what a judge or jury knows about what typically happens in the world and not contradicting that knowledge.\textsuperscript{83} This correspondence is an important part of the story’s plausibility and hence of its persuasiveness. Burns calls it “external factual plausibility,” a matter of the story’s satisfying the decision maker’s sense that it “could . . . have happened that way.”\textsuperscript{84} Bennett and Feldman add that the matching can be normative: the actions of a story model must correspond, not only to a sense of what happens in the world, but to socially normative versions of what happens in the world.\textsuperscript{85} Jackson agrees:

Each narrativised pattern of behavior is accompanied by some tacit social evaluation: that such behavior is good, bad, pleasing, unpleasing, etc. Social action is intelligible because we compare what we see with a stock of socially transmitted narrative models, each one of them accompanied by a particular social evaluation. The one which most resembles that which we observe renders our observation not only intelligible in a cognitive sense; it also provides an evaluation of it.\textsuperscript{86}

Although narrative correspondence may sound like a kind of reality check on the story being constructed at trial, and thus like a substantive property, it is still a formal feature of narratives. The correspondence is structural, not referential or “truth-based.” The story at trial must correspond to what “could” happen, or what “typically” happens, not to what actually happened. What “could” happen is determined, not by the decision makers’ undertaking an empirical assessment of actual events, but rather by their looking to a store of background knowledge about these kinds of narratives—to a set of stock stories.\textsuperscript{87} The narrative is plausible, and persuasive, to the extent that it bears a structural correspondence to one of these stock scripts or stories, not to the extent that it “really happened.”\textsuperscript{88}

\textsuperscript{83} Pennington & Hastie, \textit{supra} n. 7, at 528.
\textsuperscript{84} Burns, \textit{supra} n. 3, at 168. Pennington and Hastie also use the term “plausibility.” Pennington & Hastie, \textit{supra} n. 7, at 528.
\textsuperscript{85} Bennett & Feldman, \textit{supra} n. 4, at 57.
\textsuperscript{86} Jackson, \textit{supra} n. 37, at 99 (footnote omitted).
\textsuperscript{87} Bennett & Feldman, \textit{supra} n. 4, at 50.
\textsuperscript{88} Alper et al., \textit{supra} n. 10, at 2–3.
Nevertheless, correspondence relies on relationships with something outside the trial story itself, which leads Jackson to call it external narrative coherence.

External narrative coherence involves comparison of the content of the story told by the witness with other stories which form the stock of social knowledge of the jury. A story will appear plausible to the extent that it manifests similarity with some model of narrative which exists within the stock of social knowledge of the jury.89

Both Jackson and Bennett and Feldman raise the importance of stored social knowledge, or what this Article earlier referred to as “narrative scripts,” or what are sometimes referred to as “stock stories.”90

A story’s reference to stock stories bears on its persuasiveness. To the extent that a story is congruent with them, stock stories not only lend plausibility to that story, but also offer a frame of reference for the story’s significance. Stock stories not only contain standard models for human action91 but also allow generalizations about the meaning of those actions. In a sense, they are cultural archetypes, often driven by plot. For example, one stock story, common to Western culture, is the Conquering Hero-Turned-Tyrant story.92 A conqueror rescues the polis through valor and noble deeds and then assumes power. But the conqueror’s valor takes a reversal, through deception and mistaken judgment, or through corruption, or through character flaw, etc. Now the conquering hero becomes a tyrant. The plot can end tragically, with the destruction of the hero, or it can end redemptively, with self-realization on the part of the hero, or with the hero’s rescue by a defender, etc. This stock story, recognizable to all of us, can in turn be mapped onto other narratives, as Amsterdam and Bruner do with the Supreme Court opinion in Freeman v. Pitts.93 We can understand the Court’s judgment in this opinion, they argue, in terms of the stock story that lies behind it.

89 Jackson, supra n. 37, at 58–59.
91 See e.g. id. at 45–48, 121–122, 186–187; Foley & Robbins, supra n. 10, at 468–469; Gerald P. Lopez, Lay Lawyering, 32 UCLA L. Rev. 1, 5–16 (1984); Robbins, supra n. 10, at 773–738.
92 Amsterdam & Bruner, supra n. 26, at 143–164.
93 Amsterdam and Bruner view the Court’s opinions as versions of the stock story of catastrophe narrowly averted. In their retelling of Freeman v. Pitts, Justice Kennedy views the federal courts, formerly the hero in school desegregation efforts under Brown, as having turned into an overstepping tyrant that must be withdrawn from the process, which in turn should be handed back to local government. Id.
Because stock stories draw upon cultural archetypes, Amsterdam and Bruner lean toward an exogenous view of narratives—that the narrative forms we impose on events are culturally formed, in response to either the aspirations or the plights shared by human groups. Those narrative forms represent “both the culture’s ordinary legitimacies and possible threats to them.” And given that the idea of plight, or threat, or disruption seems common to stock stories, Amsterdam and Bruner find that they lend themselves especially well to legal narratives.

In litigation, the plaintiff's lawyer is required to tell a story in which there has been trouble in the world that has affected the plaintiff adversely and is attributable to the acts of the defendant. The defendant must counter with a story in which it is claimed that nothing wrong happened to the plaintiff (or that the plaintiff's conception of wrong does not fit the law's definition), or, if there has been a legally cognizable wrong, then it is not the defendant's fault. Those are the obligatory plots of the law's adversarial process.

This kind of disruption lends itself to any number of stock stories. The advocate's task is to successfully match the trial story to the appropriate stock story.

E. Narratives Embody Several Properties That Are Psychologically Persuasive: Narrative Fidelity (a Substantive Property)

So far, this Article has offered an overview of current thinking about legal narratives and what features of them lend persuasiveness to a legal argument. I have put the overview into a schema that makes sense to me, one that I offer to my students when we discuss narrative persuasion. In this next section, I want to go beyond that familiar schema, using Walter Fisher's concept of narrative rationality as a guide.

The schema so far has focused on formal, or structural, properties of narrative, as has much of the recent research on legal narratives and their persuasiveness. But do formal properties alone make a legal narrative sufficiently persuasive? That is, given that every trial contains competing narratives, what if those narratives were equally compelling formally—in terms of their internal consistency, completeness, and so on. Which, then, would offer

94 Id. at 117.
95 Id.
the better argument? At the level of the narrative alone (and setting aside other considerations—the underlying law, the “rhetorical” structure of the legal argument, the quality of the evidence, etc.), is there something else that a legal audience would find additionally compelling? Fisher’s model indicates that there is.

Alongside “narrative probability,” his term for the formal features of narratives, Fisher places the second property of “narrative fidelity.” As mentioned above, narrative probability has to do with whether an audience finds that a story is coherent. Fisher says that narrative fidelity, on the other hand, has to do with “whether or not the stories they experience ring true with the stories they know to be true in their lives.” In addition, Fisher contrasts narrative fidelity with the other properties of narrative by noting that it is a substantive property, not a formal one. This intrigues me and has induced me to explore further narrative fidelity.

At first, it may sound like Fisher is describing narrative fidelity in terms of stock stories—“the stories they know to be true in their lives”—but I think he is not. The effectiveness of stock stories, as explained above, is a matter of their formal correspondence with mental or socially transmitted models. Narrative fidelity is not a matter of formal correspondence. Rather, narrative fidelity reaches beyond what is only formal—to, in Fisher’s words, whether the components of a story “represent accurate assertions about social reality and thereby constitute good reasons for belief or action.” Narrative correspondence seems like a process of structural matching; narrative fidelity seems like a reaching for something substantive.

Here, Fisher seems to be responding to a question that initially haunted me: fidelity to what? His answer seems to be “social reality,” although that term may be slippery, and Fisher seems to know that. He wants to go beyond the formal properties of narratives, properties that make them persuasive, to something more essential, but he also knows that he must stay away from problematic concepts like “truth,” or even the simple one of “reality.” The term “social reality” will do for the moment, although he will tie it to the concept of audience later.

Fisher also seems deliberate in his choice of the word “good,” as in “good reasons for belief or action.” In addition to reaching out beyond the structural confines of narratives, he is also looking for

---

96 Fisher, supra n. 1, at 64.
97 Id. at 75–76.
98 Id. at 105.
99 Id. at 85–101.
a way to add an evaluative or normative component to them. Narratives can be persuasive because they touch something substantive as well. But having suggested that more traditional forms of argumentation are incomplete, he has to be careful not to use terms that would place narrative fidelity back within those traditions. So the reasons for belief or action cannot be simply “logical”—that would place narrative fidelity back in the realm of technical logic—and they cannot be only “probable”—that would place them in the realm of rhetorical logic. “Good” must suffice, and it adds the additional connotative sense of normativity, by connecting values to reason.100

Fisher, then, in describing narrative fidelity as a substantive property of narratives, must avoid the foundationalist trap of appealing to something like the truth, and he must elaborate on his use of an overly vague term like “good.” At the same time, he must try to avoid traditions that otherwise would offer a way of discussing these matters—for example, philosophy or logic—because he views those traditions as incomplete. He finds a resolution to all this in the new rhetoric of Chaim Perelman,101 in whose work Fisher sees a parallel to his own, and in particular in Perelman’s use of the concept of audience.102

Just as Fisher turned away from formal models for assessing reasoning, he notes, so did Perelman in developing his new model of persuasion.103 Perelman, who adopted a juridical model for argumentation, replaced truth with justice as the goal for argument.104 Perelman then made a second move, regarding the ways in which argument uses reason to move toward this goal of justice. Perelman rejected the efficacy of technical models for reasoning, what we would probably call formal logic, viewing their rules for validity as overly artificial.105

In his new rhetoric, Perelman modified these rules in a way that allowed for human judgment to enter: the validity of an argument would be determined, in part, by the judgment of the audience to whom the argument was addressed.106 With this move, Perelman moved argumentation from the realm of philosophy and logic back into the realm of rhetoric. Perelman immediately saw the objection—that this move could render argumentation overly

---

100 See Conti, supra n. 53, at 473–474.
101 See supra n. 11.
102 Fisher, supra n. 1, at 124–126.
103 Id. at 124.
104 See id. at 126–130.
105 Id. at 124.
106 Id. at 132.
relativistic or even fallible. He responded by postulating the idea of the universal audience—"the best body of critics you can imagine for your subject, given your situation."  

For Perelman, the worth of an argument could be tested by its ability to appeal to this construct of the universal audience. "An argument is as worthy as the audience that will adhere to it." Now argumentation, under Perelman's schema, has moved back into the realm of rhetoric, but also into a world not only of technical, logical reasoning, but of values.

Fisher examines Perelman's concept of the universal audience carefully and regards it as worth adopting for his own concept of narrative fidelity, with one interpretive modification. Fisher notes that the universal audience is implied by particular arguments and that those arguments can be evaluated in part on that basis. That is, although Perelman intends the universal audience to be an abstract concept, useful for testing the worth of an argument, Fisher believes that the concept can be grounded in specific situations for specific arguments, as a construct implied by any given text.

All of this is an elaboration on the idea of "good reasons," the driving force behind narrative fidelity. Narrative fidelity is a matter of assessing the substantive worth of a story, but not in terms of its appeal to abstract universals like the truth, and not in terms of its ability to translate into formal, logical propositions about social reality. Rather, whether a story constitutes good reasons for belief or action is a matter of how willing an audience is to adhere to the story. That audience is, in a sense, implied by the text of the story, but because the story itself is situated historically and socially, then in that respect the universal audience—universal in its willingness to appeal to the highest ideals for justice—is also an audience of the moment, also situated in an historical and social setting.

In assessing the concept of narrative fidelity, Fisher notes that he has introduced it as a way of going beyond logical ways of understanding argument to a normative understanding of argument. In his view, argument—"rhetorical communication"—is as laden with values as it is with reasons, and a fuller view of argument and persuasion must account for this. Looking more specifically

---

107 Id. (quoting Perelman).
108 Id. at 138.
109 Id. at 136.
110 Id. at 134–138 (footnote omitted).
111 Id. at 105.
at the law, Amsterdam and Bruner seem to agree. Law is inherently normative—it “prescribe[s] general rules about what is permissible and impermissible”—and narrative links this abstract normativity of the body of law to the circumstances of our individual lives.

[I]t is through narrative that we provide humanly, culturally comprehensible justifications for our principled decisions and opinions. It is through narrative, rather than through some impeccable, impersonal argument from first precepts, that we show how or why the plaintiff’s or the defendant’s case is to be judged as we judge it.

And Burns, as well, thinks that part of the value of narrative in the law is normative or evaluative and that narratives locate the more abstract normativity of legal rules within the particulars of individual cases and their settings. “The norms around which stories are told are not derived from an abstract morality of principle; they are those actually embedded in the forms of life of the community in which storyteller and listener find themselves.”

Burns notes that this morality inherent within narrative is intensified in trial contexts, because each of the competing stories is built around a “theme,” forcing the jury to make “comparative judgment[s] about the relative importance of the norms that the two positions represent.” And like Fisher, Burns sees legal narratives as having this evaluative, or moral, component because they are tied to action. But in an important step, Burns sees this connection between the morality of narratives and action as a link that makes any act of listening to and evaluating narratives an act of self-definition. “On the other hand, the trial is not simply a forum for judgments about the morality of individuals and actions. It is a public forum in which the jury engages in important public action. Such action reflects and redefines public identity . . .” In choosing between competing stories, we not only pass judgment on the competing narratives, but in that act, define ourselves. “Indeed, the coherence of the self is maintained by our being the storytellers of our own lives . . .” This act of self-definition locates

---

112 Amsterdam & Bruner, supra n. 26, at 140.
113 Id. at 141.
114 Id.
115 Burns, supra n. 3, at 171.
116 Id. at 172.
117 Id.
118 Id. at 173.
us in the public world and fosters the conversation that we call doing justice.\footnote{Id. at 162–166, 172–175. Burns sees this conversation as taking place within tensions created by competing narratives.}

I turn to Burns now because I believe that, in looking at this evaluative and self-defining function of narratives, he offers an elaboration on the role of audience in Fisher’s concept of narrative fidelity. For Burns, a trial jury makes its judgment about the competing narratives presented to it based on something more than an objective, empirical weighing of the presentation of events, or something that goes beyond the merely inferential:

The juror’s judgment is, finally, a practical judgment . . . . The jury grasps not the accurate objective characterization of a situation in theoretical terms but something far more difficult to describe. . . . What the juror grasps is a literally indescribable structure of norms, events, and possibilities for action.\footnote{Id. at 199.}

Burns later calls this practical judgment “nonformal intelligence,”\footnote{Id. at 209.} and he cites Justice Holmes in support of it: “[M]any honest and sensible judgments . . . express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions—impressions which may lie beneath consciousness without losing their worth.”\footnote{Id. at 209–210 (quoting Justice Holmes in Chicago, Burlington, & Quincy Railway v. Babcock, 204 U.S. 585, 598 (1907)).}

Burns finds cognates for this practical judgment, or “intuition of experience,” in philosophy, cognates that, in his view, fairly describe the judgments made regarding legal narratives in trials. In each of these cognates—from Kant, Aristotle, and Gadamer—Burns finds a philosophical account of a mode of human understanding that “is not reducible to formal inference.”\footnote{Id. at 211.} Rather, as in Fisher’s concept of narrative fidelity, these cognates go beyond formal models of understanding, rely upon a “communal validity,”\footnote{Id. at 217.} and in doing so rely upon shared norms of the community.\footnote{Id. at 218.}

In Kant, Burns finds the philosophical cognate of reflective judgment, a judgment that focuses on particulars rather than on making inferences from Platonic or abstract universals.\footnote{Id. at 212–213.} Burns views it as a commonsense kind of judgment that relies on public
perception of what kind of world the community desires. It resembles Fisher's model for a modified universal audience in that it is situated within particulars and relies on a “community of judgment,” rather than generalized, abstract categories of right and wrong.127

In Aristotle, Burns finds practical wisdom, *phronesis*, an ethical insight that is almost immediate, that works as a kind of ethical perception, and that relies on tacit knowledge.128 For Aristotle, this practical wisdom lies at the heart of moral judgment and responds to nuance and a sense of the concrete, outstripping abstract or general theories of what is right.129 In this way, practical wisdom relies on a kind of immediate insight, rather than more formal inferential processes.130

Finally, Burns finds a cognate for practical judgment in Gadamer’s notion of interpretive insight, an “interpretive understanding” in which the interpreter moves between hermeneutic circles—that is, moves between particular detail and more global structures for understanding, to a “mutual codetermination” between those particulars and universals that results in a considered judgment that is separate from technical, or formal, forms of decision-making.131 “Interpretive understanding is dependent on our prejudgments: the web of belief that constitutes our common sense and defines who we are.”132 As with Fisher’s universal audience, these prejudgments are normative and emerge from how we define ourselves.

So all three of these cognates for practical judgment rely upon “communal validity,” “a validity within the public horizon of the community with which the judging subject identifies.”133 That is, all three depend on shared norms, and in that dependence are rooted in the kind of ideals that characterize Fisher’s sense of the universal audience—ideals that are grounded in historical and social particulars, rather than in abstract universals. And thus the judgment available at trial relies upon “the perspectives, norms,


129 *Id.* at 213.

130 *Id.* at 214.

131 *Id.* at 215–216.

132 *Id.* at 216.

133 *Id.* at 217.
and practices of the community from which judge and jury are drawn”—but, for Burns, in the best way:

My contention is, of course, that the trial’s consciously structured hybrid of languages is designed precisely to actualize our reflective judgment, practical wisdom, and interpretive understanding in ways that can at least sometimes lift the common sense of a given community above the least common denominator of the institutions and practices of that community.\textsuperscript{134}

This statement helps to locate Fisher’s use of the universal audience within the setting of legal narratives. The language of the trial is interwoven with narrative structures, structures that, by their very nature, put the legal audience—at trial, the judge or jury—in a position of exercising practical judgment as well as technical, logical, inferential judgment. Furthermore, the very act of exercising that practical judgment is an act of self-definition, an act that can elevate that audience “above the least common denominator,” in the direction of Perelman’s best available audience—assuming that that audience will adhere to the narrative presented.

Admittedly, the dynamic of narrative fidelity is complicated and somewhat abstract. Its interest, for me, however, lies in the following:

- it is substantive;
- it offers a compelling account of how narrative persuasion can go beyond formal features alone;
- it reaches beyond “logical,” inferential models for argumentation—something that many of us intuit about narrative persuasion, but have difficulty accounting for;
- it helps to account for normativity in legal arguments and, in doing so, goes beyond logic alone, to values;\textsuperscript{135} and

\textsuperscript{134} Id. at 218.

\textsuperscript{135} Narrative fidelity may answer part of Richard Lempert’s concern, at the end of his article “Telling Tales in Court,” that lawyers may be more persuasive if they pay attention to how they construct stories, but that in focusing on the structural elements of story construction, they may not necessarily be promoting justice or the “right” result. See Lempert, \textit{supra} n. 10, at 573.
it involves an act of self-definition, not only by the immediate audience, but for the community within which that audience—and those narratives—are situated.

My remaining task would be, in the brief time left for this paper, to look at narrative fidelity within the context of a specific legal narrative. For that, I turn back to the beginning of this Article, and to James Boyd White’s comment that the law not only begins with a story but ends with a story, the decision of the judge or jury—itself a narrative. Quickly, then, I want to look at the ending story, in a Supreme Court decision.

For Supreme Court decisions, the narratives are stories not only about the case at hand, but also about who we are or wish to be as a community. In addition, Supreme Court decisions themselves offer arguments for their own validity—including an implicit argument based on the underlying narratives. That is, any Supreme Court decision serves not only as a legal prescription—the law of the land—but also as part of a larger story about who we are as a community and what kind of world we want to live in. It not only offers a legal argument to support its holding, but also locates that argument within an implicit narrative framework about what kind of people we are and what kind of world we might inhabit. That implicit narrative framework—about what kind of people we are—strikes me as a framework that conjures a version of Fisher’s modified universal audience. Whether we would embrace the world offered by that implicit narrative framework is a matter, in part, of its appeal to something like our practical wisdom about it, or our “intuition of experience”—that is, a matter of its narrative fidelity.

---

136 See White, supra n. 2.
137 See Robert Cover, Nomos and Narrative, 97 Harv. L. Rev. 4 (1983).
138 Cover states that “[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live. In this normative world, law and narrative are inseparably related.” Id. at 4–5.
139 Modified, that is, as Fisher indicates, by grounding that audience in specific situations for specific arguments. Fisher, supra n. 1, at 134–138.
II. JUDICIAL OPINIONS AND NARRATIVE FIDELITY: PARENTS INVOLVED IN COMMUNITY SCHOOLS v. SEATTLE SCHOOL DISTRICT NO. 1

On June 28, 2007, the U.S. Supreme Court issued its opinion in Parents Involved in Community Schools v. Seattle School District No. 1, a case regarding the racial composition of the student body in public schools. Parents v. Seattle School District is the latest in a series of cases to follow Brown v. Board of Education, the landmark case in which the Court ruled that a system of segregated schools could never offer equal educational opportunities and thus violated the Equal Protection Clause of the Fourteenth Amendment. The question following Brown was: what form could school desegregation take?—something that a long line of cases since Brown has addressed. In response to Brown and its successors, school districts across the country have implemented various desegregation or voluntary integration policies.

The plaintiffs in this most recent case, Parents v. Seattle School District, challenged the voluntary integration policies in two school districts, one in Seattle, Washington, and the other in Louisville, Kentucky. In Seattle, students could apply to attend any school in the district, but in deciding to which school the student was ultimately assigned, the school district used a system of tiebreakers that included race as a factor. In Louisville, the system was somewhat different: there, the school district assigned students to different schools depending upon the percentages of different races at any given school.

In its plurality opinion, authored by Chief Justice Roberts, the Court found both school plans unconstitutional. The Court ruled that the plans were not narrowly tailored and failed to meet the test of addressing a compelling state interest. The opinion of the Court was divided, however, with one notable concurrence (Justice Kennedy) that did not join fully with the reasoning of the plurality, and with two sharply-worded dissenting opinions (Justices Stevens and Breyer) that questioned whether the current opinion was

---

beginning to reverse the trend that the Court had begun with Brown.

The opinion in Parents v. Seattle School District promises to be the topic of a long, heated, and perhaps polarizing debate.144 How to assess it? In the commentaries to come, many approaches will no doubt emerge. I would like to look at the opinion from the perspective of two of its underlying narratives and briefly evaluate them in terms of their narrative fidelity. Do they offer assertions about social reality that comprise “good” reasons, or that appeal to our “intuition of experience”? What is the quality of the audience that would adhere to, or identify with,145 these narratives—or, put another way, would these narratives appeal to some version of a universal audience? And, to the extent that an audience would adhere to them, in what ways do they define us, as individuals and as a community?

The opinion is written in many parts. The plurality opinion is authored by Chief Justice Roberts, various parts of which are joined by Justices Scalia, Kennedy, Thomas, and Alito. Justice Thomas filed a concurring opinion, and Justice Kennedy filed an opinion concurring in part and concurring in the judgment. Justice Stevens filed a dissenting opinion. And Justice Breyer filed a dissenting opinion, in which he was joined by Justices Stevens, Souter, and Ginsburg. With so many opinions, there are bound to be a number of underlying narratives. Here, out of a very long written opinion, are two fragments.

First, from the plurality opinion, written by Chief Justice Roberts:

In Brown v. Board of Education, we held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority. It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954. (“The impact [of segregation] is greater when it has the sanction of the law”). The next Term, we accordingly stated that “full compliance” with Brown I required school districts “to achieve a system of determining admission to the public schools on a nonracial basis.”

---

144 See e.g. Linda Greenhouse, Justices, 6-4, Limit Use of Race for School Integration Plans: A Bitter Division, 156 N.Y. Times A1 (June 29, 2007) (specifically the headline). As of the initial presentation of this Article, the opinion was only a few weeks old.

145 On his use of Kenneth Burke’s concept of identification, see Fisher, supra n. 1, at 66; see also Conti, supra n. 53, at 469.
The parties and their *amici* debate which side is more faithful to the heritage of *Brown*, but the position of the plaintiffs in *Brown* was spelled out in their brief and could not have been clearer: “[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.” What do the racial classifications at issue here do, if not accord differential treatment on the basis of race?146

...  

Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way “to achieve a system of determining admission to the public schools on a nonracial basis” is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.147

And then an excerpt from the dissent written by Justice Breyer:

Finally, what of the hope and promise of *Brown*? For much of this Nation’s history, the races remained divided. It was not long ago that people of different races drank from separate fountains, rode on separate buses, and studied in separate schools. In this Court’s finest hour, *Brown v. Board of Education* challenged this history and helped to change it. For *Brown* held out a promise. It was a promise embodied in three Amendments designed to make citizens of slaves. It was the promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation’s cities and schools. It was about the nature of a democracy that must work for all Americans. It sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.

Not everyone welcomed this Court’s decision in *Brown*. Three years after that decision was handed down, the Governor of Arkansas ordered state militia to block the doors of a white schoolhouse so that black children could not enter. The President of the United States dispatched the 101st Airborne Divi-

146 *Parents*, 127 S. Ct. at 2767 (plurality) (brackets and emphasis in original; citations omitted).
147 *Id.* at 2768 (citations omitted).
sion to Little Rock, Arkansas, and federal troops were needed to enforce a desegregation decree. Today, almost 50 years later, attitudes toward race in this Nation have changed dramatically. Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it. The long history of their efforts reveals the complexities and difficulties they have faced. And in light of those challenges, they have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation, instruments that they believe are needed to overcome the problems of cities divided by race and poverty. The plurality would decline their modest request.

The plurality is wrong to do so. The last half-century has witnessed great strides toward racial equality, but we have not yet realized the promise of Brown. To invalidate the plans under review is to threaten the promise of Brown. The plurality’s position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret.\textsuperscript{148}

These are excerpts from two different opinions, offering two different stories about Brown and the events that have followed. I chose these excerpts because of their contrast with each other and the position in which that contrast puts the reader. It is difficult to read them without being moved toward a substantive position—they compel a reading that is, in part, a moral reading.\textsuperscript{149}

The opinion of Justice Roberts raises a question—what is the true legacy of Brown?—and then answers that same question by referring to the opinion of the plaintiffs themselves in that earlier case: states should not offer differential treatment to schoolchildren on the basis of their race. While affirming this earlier principle, the opinion then reverses the application of this principle in the present case: the school districts in both Seattle and Louisville, by enforcing voluntary integration policies, are now \textit{de facto} enforcing differential treatment on the basis of race. When viewed on purely logical grounds, the move seems reasonable.\textsuperscript{150} If the Court has earlier affirmed a policy of non-differential treatment on the basis of race, and if it wants to adhere to that policy, then it should strike the desegregation plans in both Seattle and Louisville because they, in turn, enforce differential treatment on the basis of

\begin{footnotes}
\item[148] Id. at 2836–2837 (Breyer, Stevens, Souter & Ginsburg, JJ., dissenting) (citations omitted).
\item[149] Burns, supra n. 3, at 170.
\item[150] Or a "cruel irony," as Justice Stevens notes. \textit{Parents}, 127 S. Ct. at 2797 (Stevens, J., dissenting).
\end{footnotes}
race. The plurality opinion appears to uphold a legal principle that was established in *Brown* and that is grounded in the Fourteenth Amendment. *Brown* and its legacy tell an important story, and this opinion attaches itself to that underlying story, as the latest chapter in its telling.

The underlying story, of course, is more complex. *Brown* struck down policies aimed at deliberately and systematically segregating schoolchildren on the basis of race. It was directed squarely at policies that discriminated against children of color and that afforded them inferior educational opportunities. The policies of the school districts in Seattle and Louisville, on the other hand, were not intended to discriminate, but rather to integrate—to achieve equal educational opportunities for all schoolchildren in their districts. Justice Breyer, in his dissent, tells a different version of the story.

Breyer notes both the history that lies behind *Brown* and the continuing need to enforce its promise. He cites the change in the attitudes toward race in the country, fifty years after *Brown*, and the role that *Brown* played in those changes. “Today, almost 50 years later, attitudes toward race in this Nation have changed dramatically. Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it.”

But, as he notes, the promise of *Brown* has not yet been fully realized.

In describing the promise of *Brown*, Justice Breyer notes the concreteness of that promise:

> It was the promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation’s cities and schools. It was about the nature of a democracy that must work for all Americans. It sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.

I am struck by how he frames this promise—“not as a matter of fine words on paper,” not as a “matter of legal principle,” but as a matter of “how we actually live.” In making this statement, he seems to be making a strong appeal in terms of an underlying story about American democracy—and its history, not only of embracing equality for its citizens, but also of correcting its own mistakes from the past. It is a story about the country—almost a statement

---

151 *Id.* at 2836–2837 (Breyer, Stevens, Souter & Ginsburg, JJ., dissenting).
152 *Id.* at 2836.
of mythos, really—laden with the values of fairness, promise, and hope. For those whose lives span all or a large portion of American history since Brown and who have seen the change, that story, for all of its struggles and its incompleteness, seems right; it appeals to our “intuition of experience” about that segment of American history and the effort to make its democratic promise as inclusive as possible. It also seems to be a story that has defined us, as a country, and that the vast majority of us are willing to embrace. We are willing to adhere to it and the values that underlie it.

The excerpt from Justice Roberts,153 viewed at this level of “narrative rationality,” strikes me as weaker. While it seems more logical, it does not tell the story with what strike me as “good reasons” or in a way that seems to best define who we are at this moment. It seems (to borrow Justice Breyer’s characterization) more like “words on paper,” or more a matter of abstract legal principle than of lived experience. It lacks some element that would make the story compelling. To me, the underlying story of Justice Roberts’s opinion is weak on narrative fidelity, weak on its appeal to my own “intuition of experience” and the way in which that appeal defines us as a community. I do not think this is where the legacy of Brown leads, in terms of its story and how that story fits in with the larger story of American democracy.

On the other hand, my view may not represent a majority view. It clearly does not represent the majority of the Court. And it may appeal to the “intuition of experience” held by others, if not to mine. I need to find a way to move away from personal preference at this point, because Fisher’s concept of narrative fidelity relies upon something larger—his modified sense of the universal audience. In that vein, it may be helpful to put the appeal (or lack of appeal) of the plurality opinion in Parents v. Seattle School District into a larger context. In a work that reexamines Brown and its legacy, Jack Balkin observes that the underlying principle of constitutional equality affirmed in Brown has subsequently been interpreted in one of two ways: as anticlassification or antisubordination.154

Anticlassification theorists argue that it is unconstitutional to classify citizens based on race. When the state does so, it “risks returning to the racial division of society that characterized Jim Crow.”155 Martin Luther King’s famous comment in his “I Have a

153Admittedly an excerpt, but one that purports to offer a story about Brown.
Dream” speech, that he dreamed of the day when his “four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character,” can be seen as an anticlassification stance. Contemporary anticlassification theorists argue that even when intended benignly, racial classifications can be harmful—either by promoting unfairness to other racial groups, or by stigmatizing the group that is classified.

Seen in this light, Roberts’s plurality opinion is more than merely a logical enunciation of “words on paper” when it indicates that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” It echoes the words of Justice Harlan, in his dissent in Plessy v. Ferguson, when he notes that the “Constitution is color-blind, and neither knows nor tolerates classes among citizens.” For Justice Roberts, and for a majority of the current Court, the legacy of Brown should be a legacy that extends the anticlassification principle first enunciated in the dissent in Plessy. And for them, anticlassification—to draw on the language of constitutional theory—relies upon some underlying narrative that carries with it a sense of “good reasons,” ones that are faithful to their own sense of the story to be told about American democracy.

Those who subscribe to the other theory, antisubordination, regard constitutional equality as a matter of whether the law is working to remedy subordination by race—regardless of the form that the law takes. In their view, the courts, in focusing on racial classifications alone, might divert attention away from forms of subordination that result from practices other than racial classification—or even subtly sanction them. In this theoretical debate, I am drawn to the antisubordination view, and that may help to explain my own preference for Breyer’s dissenting opinion in Parents v. Seattle Schools. It rests on an underlying narrative that seems more faithful to my own experience of who we are as a community.

Balkin places Brown into a grand national narrative that we tell about ourselves.

Brown Should Have Said, supra n. 154, at 12.

*156* Martin Luther King, Jr., I Have a Dream, in A Testament of Hope: The Essential Writings of Martin Luther King, Jr. 219 (James Melvin Washington ed., Harper & Row 1986). King, however, also made comments in the speech that could be seen as antisubordination comments, and he should not be seen as taking a position one way or the other in a theoretical debate that postdates him.

*157* Parents, 127 S. Ct. at 2768 (plurality).

*158* 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

Brown fits nicely into a widely held and often repeated story about America and its Constitution. This story has such deep resonance in American culture that we may justly regard it as the country’s national narrative. I call this story the Great Progressive Narrative. The Great Progressive Narrative sees America as continually striving for democratic ideals from its founding and eventually realizing democracy through its historical development. . . . The basic ideals of Americans and their Constitution are promises for the future, promises that the country eventually will live up to, and, in so doing, confirm the country’s deep commitments to liberty and equality.160

But we do not always adhere to the same narrative version of the particulars, to the same version of how we can best arrive at our ideals. Hence the sharp division in the opinions of the Court in Parents v. Seattle Schools, reflecting differences in how the story is best told.161 Those differences, under Fisher’s narrative paradigm, are differences in what best reflects our intuition of experience and in who we want to be as a people. They are differences about the story, felt at the deepest levels of what makes us human. We are still looking for the telling that seems like the right one.

III. CONCLUSION

On the one hand, narrative fidelity seems simple. Does a story, legal or otherwise, have a tug to it—does it appeal to our sense of lived experience, and the values that emerge from that experience? Is that part of what makes it persuasive? On the other hand, that appeal has to be more than personal preference, and it has to go beyond mere solipsism. Fisher carefully outlines a scheme for narrative rationality, as an extension of earlier philosophical and rhetorical traditions, and offers narrative fidelity as the most complex term of that narrative rationality, because of its appeal to something more substantive and because it incorporates values. This appeal intrigues me because versions of it, in one sense, have been around for a long time—in Aristotle’s practical wisdom, for example, or in Kant’s reflective judgment—and yet theories of argumentation have struggled to place it. Perelman, in Fisher’s view, incorporates it partly into his new rhetoric and the notion of the universal audience. Fisher places it in narratives.

I mentioned much earlier that one of the primary features of narratives, for me, is that they are inherently persuasive. The

---

160 Id. at 5.
question for those of us who teach narrative persuasion is, how? The answer, most commonly, lies in the formal features of narratives, which can be understood, taught, and used. Fisher insists that, as important as these formal features are, there is something else that reaches beyond the formal features of the story, and beyond simple plausibility, to the center of how we allow narratives to define who we are. I agree. To the extent that our students think a winning story is one that contains only well-constructed parts, I believe we should find a way to show them that persuasive stories should win hearts as well as minds. Narrative fidelity strikes me as a part of that way.

162 See e.g., the project that is partly described in Meyer, Vignettes, supra n. 10.
LAWYER AS ARTIST: USING SIGNIFICANT MOMENTS AND OB TUSE OBJECTS TO ENHANCE ADVOCACY

James Parry Eyster∗

Of course, the law is not the place for the artist or the poet.
—Oliver Wendell Holmes, Jr.1

Lawyers often act as storytellers, narrators of their clients’ tales of injustice and conflict. These stories tend to be action-based: “He did this, then that happened, then this occurred . . . .” These skeletal narratives may lack the necessary substance and depth to be convincing. Lawyers can attain greater clarity and power in their advocacy by taking on the artist’s mantel and becoming verbal painters of significant moments in their clients’ dramas, complete with the background and accessory objects that best display the righteousness of the client and the failings of the adversary.

I hope to share with you here the tools of selection and enhancement that visual artists use in telling stories. Traditionally confined to a moment in time, the visual artist faces the challenge of condensing a complex issue or rich life into a frozen glimpse of what was, what is, and what will be. This limitation, this creative straitjacket, has forced visual artists to carefully develop techniques to achieve meaningful results. Whether through insight or trial and error, artists2 have developed a number of tenets that have helped them to create powerful paintings, photos, and sculptures that reveal the souls and hearts of their subjects. What artists have learned through intuition, psycholinguists have confirmed through experimental research.

∗ © 2008, James Parry Eyster. All rights reserved. Director, Asylum and Immigrant Rights Clinic, Assistant Clinical Professor, Ave Maria School of Law. This Article grew out of presentations delivered at the 2007 Annual AALS Clinical Conference held in New Orleans and the Applied Storytelling Conference held in London, United Kingdom, July 18–20, 2007, and draws on my fascination of more than thirty years with the relationship between art and the law.

1 Oliver Wendell Holmes, Jr., Collected Legal Papers 29 (Harcourt Brace 1920).

2 By artists, I mean representational painters, sculptors, and photographers, from both the East and the West.
In this Article, I first describe and critique the two leading techniques for legal advocacy—legal analysis and applied narrative. I then argue for the special usefulness of verbal images in conveying a memorable depiction of particular events and for enhancing the credibility of witnesses. In the third section, I suggest ways of extracting these images from witnesses’ memories and fully developing these verbal pictures. Those in a hurry may choose to skip the first sections and plunge into the fourth section where I share two key techniques of the visual artist—“the obtuse object” and “the significant moment”—and show how to apply them to legal advocacy. I then explain why these techniques are effective, according to art history scholars, aestheticians, psychologists, and psycholinguists. I next discuss the significance of context in presenting images. In the final section, I warn of the dangers that lawyers face when they adapt artists’ techniques due to the seductive power of verbal images and the inaccuracy of human memory. And so, get out your paint brushes and your easel, put on your smock, and let’s learn how lawyers can become artists.

I. THE SHORTCOMINGS OF LEGAL ANALYSIS AND STORYTELLING

Legal advocacy is traditionally defined as argument seeking to convince a judge or jury that a certain rule, when applied to a proffered set of facts, supports the desire of the client. As such, law students and lawyers pore over published cases seeking another instance in which a judge in the same jurisdiction held in favor of someone else having a case that was “on all fours” with the present controversy. This dry matching game requires the sophisticated analytical abilities of both legal counsel and the finders of law and fact. Evidence may be presented in an artificial manner that is so isolated and filtered as to be uninteresting and impotent, with little regard for its meaning, but rather simply as a group of pegs whose shapes fit the peculiar holes demanded to satisfy each element of a certain legal rule.

While judges have obtained training in such analysis through their own law school experience, other fact finders and, in particular, juries, struggle to understand and retain evidence that is presented through traditional abstract analysis. Litigators and legal theoreticians have therefore come to realize the importance of storytelling in case advocacy as an alternative to abstract legal analysis and presentation. The story method relies on recounting action from a beginning to a conclusion based on evidence that is consistent with the story. Thus evidence is organized so that it makes logical sense based on the listener's experience with stories and expectations of how a story will develop and end.

6 “Notwithstanding the judge’s instructions and the manner of presenting evidence at trial (which conforms to the orthodox idea of legal truthfinding), jurors construct episodes based upon the factual evidence they hear and the judge’s instructions, and then search for goodness of fit between the possible episodes and the possible verdicts.” Jane E. Larson, “A Good Story” and “The Real Story”, 34 John Marshall L. Rev. 181, 184 (2000).

7 See W. Lance Bennett & Martha S. Feldman, Reconstructing Reality in the Courtroom 5 (Rutgers U. Press 1981). “Stories are everyday communication devices that create interpretive contexts for social action. In isolation from social context, behaviors or actions are ambiguous.” Id. at 7.

Legal writing expert Linda H. Edwards recognizes the power of facts, reciting the adage, “If you have to choose between the law and the facts, take the facts.” Edwards, supra, n. 4, at 323. As she explains, many lawyers have found that a judge or jury will work diligently to avoid the application of an unfavorable law if the facts have convinced them of the injustice this would cause. Id. Professor Edwards also recommends that attorneys include “significant background facts” and “emotionally significant facts” in a Statement of Facts. Id. at 329.


9 Bennett & Feldman, supra n. 7, at 8–10. The authors note, “The story is an everyday form of communication that enables a diverse cast of courtroom characters to follow the development of a case and reason about the issues in it. Despite the maze of legal jargon, lawyers’ mysterious tactics, and obscure court procedures, any criminal case can be reduced to the simple form of a story.” Id. at 4.

Vicarious participation in the constructed world of a narrative opens access to an emphatic understanding of narrative events, different in kind from the conceptual understanding gained through analysis. It is an experiential understanding acquired by “trying on” a story imaginatively and testing its “fit” and its “feel” from within, and depends more upon a gestalt appreciation of context and connotation.
While the story method creates a cohesive structure, it encourages a sparse and abstract presentation of action, as opposed to the development of memorable mental images. Indeed, the whole focus of a story is action. It is movement; it is someone doing something to someone else. It races on to a resolution. In doing so it often omits significant evidence that is not directly relevant to the action. In addition, the participants in the legal story can be reduced to superficial stereotypes whom the listener too easily dismisses as lacking sufficient richness to be memorable or credible. This is a grave mistake because such stories may fail to bring the key scenes to life for the fact finder. Such a method of fact presentation may also allow a listener to create mental constructs of the controversy that are far different from the actual circumstances.

II. THE ROLE OF VERBAL IMAGES

While skillful legal analysis and narrative are essential skills for advocacy, effective advocacy requires more than the ability to associate facts with legal elements and to recount appealing stories. Lawyers must also be able to pluck vivid images out of their witnesses’ minds and present them to the fact finder. The advocate may choose to present his or her case by describing in detail a particular object, scene, or key moment in the case. Such descriptions may produce a more emotional response in the listener than action words, riveting the listener’s attention in a way that legal than upon a literal-minded focus upon isolated details. Such an understanding, not simply of the meaning of a story’s details but of a “meaning beyond the details,” turns out to be largely beyond the grasp of the lawyer’s right hand, but within easy reach of the left.

Strong, supra n. 5, at 783–784.

10 Jerome Bruner, Making Stories 60–61 (Farrar, Straus & Giroux 2002). In this essay, noted narrative expert Jerome Bruner wrestles with the distinction between fictional and legal storytelling. To him, the major difference is literature’s attraction to the extraordinary with the law’s preference for the recognizable. “Literature, exploiting the semblance of reality, looks to the possible, the figurative. Law looks to the actual, the literal, the record of the past. Literature errs toward the fantastic, law toward the banality of the habitual.” Id. at 61. Bruner laments that this can limit the effectiveness and affect of legal narratives by making them trite and worn-out. Richly complex plaintiffs and defendants are reduced to superficial stock characters, such as the jealous lover and the lost child. Id. at 60. As a result, jurors rapidly lose interest in the story being told.

11 Fred Wilkins urges, “Jurors (like the rest of us human beings) tend to remember images far better than individual words. . . . We accordingly have to be wordsmiths who search for graphic and vivid words which create images readily recalled. Choose words which propagate pictures in the mind.” Fred Wilkins, Persuasive Jury Communication: Case Studies from Successful Trials 23 (Shepards/McGraw Hill, Inc. 1994) (emphasis in original).

12 Debate continues into the nature of mental images, since nearly all study must be based on subject self-reporting rather than on direct scientific observation. Nonetheless,
phrases and sterilized facts cannot. As discussed in detail below, psychologists Carl Jung and Joseph Campbell have identified elaborate universal structures of meaning that images possess: meanings that hold constant between cultures and throughout time periods.13

Where the decision maker is a juror, vivid images may have greater usefulness than they do for judges. While judges may be more skeptical of witness veracity and attempt to concern themselves predominantly with legal issues,14 jurors—who are regularly insulated from the legal controversies of a case—may be moved by their feelings toward the witness or party, based on the testimony they hear.15

Images are powerful. Sometimes they are considered too powerful.16 As such, they are not always welcome in the court. One author has suggested that the female embodiment of “Justice” found in law offices and courts is always blindfolded because we do not want justice to see anything.17 Nonetheless, images have an important, but often overlooked role to play in fact investigation and in advocacy.

Lawyers are not generally fond of images. Words are their trade. Attorneys’ antipathy toward visualization is confirmed in several psychological studies.18 I suggest, however, that visualiza-
tion skills are an integral part of legal advocacy and fit within the recommendations of the American Bar Association’s MacCrate Report, which analyzed law schools and their role in preparing students to enter the legal profession, as well as the more recent studies of Roy Stuckey and the Carnegie Foundation for the Advancement of Teaching.\(^\text{19}\)

In its designation of ten fundamental lawyering skills, the MacCrate Report states that graduating law students should be familiar with the skills and concepts involved in all aspects of factual investigation and presentation.\(^\text{20}\) This specifically includes the determination of need, the planning and implementation of an investigative strategy, evaluation, and the persuasive presentation of the information.\(^\text{21}\) Stuckey and the Carnegie Report expand on the MacCrate Report’s call for lawyering skills, promoting the teaching of narrative thinking and ends-means thinking—in contrast to analytical thinking.\(^\text{22}\)

In addition to word-based evidence, such as contracts and oral statements, non-verbal evidence can be of great significance. In many cases, the nature and even the existence of visual facts are in dispute.\(^\text{23}\) Identifying, analyzing, and transforming these pictu-


\(^{20}\) MacCrate Report, supra n. 19, at 142–207.

\(^{21}\) Id. at 163–172.

\(^{22}\) In the Carnegie Report, supra n. 19, at 78–79. Stuckey laments that law schools often fail to teach professional skills, including factual investigation, even though experienced lawyers and judges value such skills in beginning lawyers far above law-related reading, legal analysis, and reasoning skills. Stuckey et al., supra n. 19, at 96–97.

\(^{23}\) Visual facts include evidence that comes from a witness’s visual memory as well as non-verbal physical exhibits that are presented to the fact finder.
rial facts into words are skills that law students are not generally taught. This is unfortunate for two reasons. First, significant images may remain locked deep in the mind of a client or witness, absent an attorney’s careful encouragement. Second, if they lack the ability to translate visual images and their significance into words, attorneys cannot effectively use important persuasive evidence to their clients’ benefit. Simply put, facts matter. Attorneys must be able to find and skillfully organize and present all relevant facts, including visual facts, if they are to persuade fact finders of the justice of their case.  

Painters, photographers, and sculptors are often directly concerned with the identification and presentation of images, in a way that lawyers and storytellers may not be. Visual artists are restricted in their ability to tell stories since, generally, they must select a specific moment and a specific point of view. In addition, they must consciously decide what parts of a scene to include. These choices have led to a number of proven techniques that are transferable to legal advocacy and are, therefore, useful.

There are, in fact, a number of limitations to the utility of recalled images in legal proceedings. The psychological study of episodic memory has revealed several truths that contradict widely held views about the role of images and how and why we remember them. First, science has largely rejected the view that memories are like objects in the attic of a house, which one searches through to find the desired object. Images and sensory impres-

25 It can easily be argued that poets, especially those writing lyric poetry are equally concerned with images. Ezra Pound, for example, in The ABC of Reading (17th ed., New Directions Publg. Co. 1987), praised the ancient Greek rhetorical figure of speech phanopoeia, which he defined as, “You use a word to throw a visual image on to the reader’s imagination.” Id. at 37. Pound stressed the centrality of images in poetry and participated in the founding of the Imagiste school of poetry in 1920s Paris. The famous short poem, The Red Wheelbarrow by William Carlos Williams, another member of Imagiste group, dramatically illustrates the reverence of some poets for images and objects.

so much depends
upon
a red wheel
barrow
glazed with rain
water
beside the white
chickens.

William Carlos Williams, Spring and All 74 (Contact Publg. Co. 1923).
26 See William James, The Principles of Psychology, vol. 1, 654 (Harv. U. Press 1983). “In short, we may search in our memory for a forgotten idea, just as we rummage our house
vations (in contrast to words) are likely remembered as a series of spatial and visual impressions. This provides efficiency to mental processing. For example, a mouse is remembered for certain characteristics which can be changed independently in the brain. Because images are remembered in a relational manner, memories of them can be easily distorted: the image of a gun can be stored as larger or smaller than it actually was. Secondly, contrary to the intuitive convictions of most of us, memories of traumatic or unusual events are not captured with a special vividness or validity compared to memories of everyday occurrences. These make

for a lost object. In both cases we visit what seems to us the probable neighborhood of that which we miss. We turn over the things under which, or within which, or alongside of which, it may possibly be; and if it lies near them, it soon comes to view." Id. at 164.

Andrew Hollingworth, Scene and Position Specificity in Visual Memory for Objects, 32 J. Experimental Psychol.: Learning, Memory & Cognition 58, 58 (2006). Psychologist Hollingworth conducted numerous experiments on the way in which we receive information about an event. He found that in viewing a scene, attention is directed serially to different objects. "For example, while viewing an office scene a participant might direct attention and the eyes to a coffee cup, then to a pen, then to a notepad. In each case, focal attention supports the formation of a coherent perceptual object representation." Id.

Imagine a mouse on an elephant’s back. Now imagine a tiny elephant on a giant mouse’s back. Now think of a pink mouse. Our ability to manipulate such images indicates their dispersed existences in our brains. It also illustrates that supposedly “hard” facts will not be isolated by jurors into a particular pigeon-hole, but will be interpreted and identified with respect to their perceived qualities.

Steven L. Winter, A Clearing in the Forest 6 (U. Chi. Press 2001). As Winter demonstrates, in analyzing whether a criminal statute involving vehicles could be applied to airplanes, judges rely on radial categories when making law. Id. at 197–203. “A radial category consists of a central model or case with various extensions that, though related to the central case in some fashion, nevertheless cannot be generated by rule. Because they derive from the central case in different ways, the extensions may have little or nothing in common with each other beyond their shared connection to the central case.” Id. at 71.

These categories take the form of neural networks in our brain. When we see a dog, we may activate memories of our own dog, the name of our father’s dog that died long before we were born, the feeling of cold known to the protagonist in Jack London’s To Build a Fire, the smell of a wet dog, the recollection that our suit is at the cleaners because it was covered in dog hair, etc. Contemporary cognitive theory indicates that the same network of thoughts plays a role in legal decision-making. When considering a case of intentional infliction of emotional distress, a jurist may find that her mind reflects on memories of a tort law professor’s harsh questioning in front of her peers during the first year of law school, a Marx Brothers’ movie, and many other seemingly unrelated images and thoughts. And because of this network, one point of entry can lead us anywhere on the matrix. Thus, presenting an image of one thing makes it possible to reason about another image, by mapping “its inferential structure (with or without language) to the target domain.” Id. at 38.

Trial lawyers recognize this mapping concept. See e.g. Steven Lubet, Modern Trial Advocacy 32 (Natl. Inst. Tr. Advoc. 2004). In a leading law textbook, Lubet refers to it as “script theory.” “A ‘script’ is a person’s mental image or understanding of a certain context or set of events. Script theory posits that human beings do not evaluate facts in isolation, but tend to make sense of new information by fitting each new fact into a preexisting picture.” Id. at 32.

William F. Brower, The Theoretical and Empirical Status of the Flashbulb Memory Hypothesis, in Affect & Accuracy in Recall, in Studies of “Flashbulb” Memories 274–305 (Eugene Winograd & Ulric Neisser eds., Cambridge U. Press 1992). After reviewing ten years’ worth of analysis of this popular theory, Brewer concluded that there was no justifi-
truthful re-creation of a scene more difficult than might initially be expected. Nevertheless, images have a valid role in the law. They serve as potent hooks for the listeners’ ears, compelling attention in ways that abstract and general words cannot.31

III. EXPOSING AND DEVELOPING VERBAL IMAGES

Like an artist who sets an easel in a field, arranges fruit for a still life, or visits a homeowner whose portrait is to be painted, an attorney must conduct fact investigation to locate relevant images. These may be found at a crime scene or in a company’s warehouse. They may also reside in a witness’s mind, in which case the attorney must first retrieve the image. Next, the recollections must be translated into words. Finally, these words must be presented to a fact finder or judge in a way that correctly reconstitutes the memories in the receiver’s mind. This is a challenging assignment, yet it is one that can yield rich rewards by creating a palpable sense of an event. In the following paragraphs I will describe each of these steps.

A. Discovering Images

One of an attorney’s first jobs may be to extract relevant memories from a client or a witness. This may best be accomplished by a questioner who is both an investigator and an artist: the investigator to carefully review and clarify each of the statements made by the witness, and the artist to imagine the scene in his or her own mind, filling in the missing areas of the mental canvas with creative suggestions and then testing out these hypotheses on the witness.32 Encouraging the witness to use a pencil


32 Philosopher Lévi-Strauss characterized these two roles as those of an engineer and a “bricoleur.” Claude Lévi-Strauss, *The Savage Mind* 19 (U. Chi. Press 1962). He wrote, “[T]he engineer questions the universe, while the ‘bricoleur’ addresses himself to a collection of oddments left over from human endeavors, that is, only a sub-set of the culture. . . . [T]he engineer works by means of concepts and the ‘bricoleur’ by means of signs.” *Id.* at 19–20. For example, a client in our asylum clinic was describing a living room, and the assigned student intern imagined that there were framed photos on a bookcase. I asked the client about this, and she revealed that there was a photo of her father embracing the country’s president when they were both soldiers. Discussion about this image revealed rich detail and explained why she and her family were at special risk for persecution for their political
to sketch out each scene being discussed is also a valuable activity. Even if the people in the pictures are stick figures and none of the streets are straight, the process of transferring key images from the witness’s mind to the white empty surface will often uncover facts that otherwise lay dormant.

One cannot overstate the importance of taking the time for exhaustive interviewing of witnesses to access these images. As David Binder wrote in his seminal work on fact investigation, “[E]ffective fact investigation is the underpinning for most of the other major tasks litigators undertake.”33

B. Capturing Images

A listener who hears about an event uses previously obtained images to make sense of the words.34 Often meaning is culturally derived. For example, when a Pakistani tells of being beaten in a parking lot in Karachi, American listeners may imagine a parking lot based on an expansive American urban model, which is, in fact, very different from the dark, narrow, alley-like lot in which the action occurred. The fact finder thus will try to see the scene, but it will be constructed out of the building blocks that the person already has available in his memory, which may significantly vary from a witness’s internalized view of the scene.35 The same issues confront the viewer of an artwork: the cultural distance providing intellectual perspective, but at the loss of intuitive understanding.36

What makes one description effective, memorable, and living and another description stagnant? Certainly, it is the choice of words and clarity of portrayal. Nonetheless, it is also the unveiling of accessory objects that can give the scene a piquancy37 and authenticity that a presentation of the elemental objects alone cannot. For example, picture the following scene: A woman is being

---

34 Id. at 191.
35 Id. at 85–86.
36 Michael Baxandall, Patterns of Intention: On the Historical Explanation of Pictures 109 (Yale U. Press 1985). Art historian Baxandall writes, “The participant [in a foreign culture] understands and knows his culture with an immediacy and spontaneity the observer does not share. . . . On the other hand, what the observer may have is perspective—precisely that perspective being one of the things that bars him from the native’s internal stance.” Id.
37 Peter L. Murray, Basic Trial Advocacy 110, 111 (Little, Brown & Co. 1995). While even the simplest experience may contain millions of individual facts, it is the attorney’s responsibility to decide which facts are important and which are not.
held by her arms and roughly dragged out of her house into a police van. The police and the van are carefully described, as is the way in which she was held and pulled. All of these images support her claim that she was subject to government persecution. But what other accessory details can we discover from her? Imagine the scene for yourself. What do you see? Do you see her feet as she is dragged? What kind of shoes is she wearing? She revealed, when asked, that she had been wearing her bedroom slippers. Now do you see her slippered feet being dragged across the ground? Across gravel? Grass? Dirt? Again, in response to our query, she disclosed that the police dragged her through a bed of daisies that she had planted, trampling them and breaking their stems. Destruction of flowers is not grounds for asylum. It does, however, make the scene come to life.

The flowers are valuable as accessory details. They are also significant because they are objects with universally recognizable emotive qualities. Flowers are accessible to all of us regardless of class or background.38 Why do we feel so concerned with the ruined flowers? Because the woman’s concern reveals the sense of beauty that we share as human beings. In addition, the flowers serve as an ineffective talisman for protection.39 Surrounding her home with a lovely garden failed to restrain the empire of force from entering. Finally, we may doubt that an amateur flower gardener could be a real threat to a national government.

38 Philosopher Claude Lévi-Strauss distinguished between the ‘savage’ (wild, undomesticated) modes of thought that we all have in common and the civilized (tamed, domesticated) thought patterns of science and scholarship that are specific to each society. Claude Lévi-Strauss, The Cerebral Savage: The Structural Anthropology of Claude Lévi-Strauss, 28 Encounter 25, 25–32 (Apr. 1967).

Lévi-Strauss considered these civilized patterns (such as legal norms) to be useful, but inferior to the primary modes of thought, which are the foundations of human social life. Such modes are, he wrote, “undomesticated like the wild pansy.” See also Clifford Geertz, The Interpretation of Cultures: Selected Essays 345–359 (Basic Bks. 1973).

39 French artist Christine Arveil commented,
Each of us has a personal means to survive (I heard once a man saying that he resisted torture in Argentinean prisons by singing non-stop tangos to himself); yet these means, I gathered (this is my personal interpretation from a number of examples and personal experience) have one common factor: they focus the person on his/her personal sense of beauty. This, as you know, is extremely moving to narrate, as it describes something that belongs to the area of emotions in the person and is heard from the similar area in the audience: the area where art also takes place/happens.

Ltr. from Christine Arveil to Author (May 7, 2006) (copy on file with the Author).
C. Presenting Images

Having an interest in details does not mean that an attorney must preserve and present all the facts he or she discovers. Art historian Edmund Burke Feldman notes that an artist’s concern for accuracy does not demand that he or she paint in a photographically realistic way, including all details of substance, light, and color.\(^{40}\) He comments on the artist’s selective eye, “Often the illusion of reality is created by elimination of details which the eye might see.”\(^{41}\) How then does a lawyer select which details to reveal and which to omit?\(^{42}\) Feldman suggests that one cannot make this decision until one is thoroughly and deeply knowledgeable about the scene.\(^{43}\) Writing of the special importance of selected objects in a posed photograph, philosopher Roland Barthes stated:

> The interest lies in the fact that the objects are accepted inducers of associations of ideas (book-case = intellectual) or, in a more obscure way, are veritable symbols (the door of the gas-chamber for Chessman’s execution with its reference to the funeral gates of ancient mythologies). Such objects constitute excellent elements of signification: on the one hand they are discontinuous and complete in themselves, a physical qualification for a sign, while on the other they refer to clear, familiar signifieds. They are thus the elements of a veritable lexicon, stable to a degree which allows them to be readily constituted into syntax.\(^{44}\)

Barthes distinguishes three levels of meaning in a visual image: an informational level, a symbolic level, and an obtuse level.\(^{45}\) Each of these has utility for the advocate. The informational level is the obvious or plain meaning of an object.\(^{46}\) We are trained within our culture to ascribe an explicit meaning to images. Thus, we see a chair as a chair, and a rose is just a rose. We have also been taught to recognize a fat man in red clothes—seen during the Christmas season—as Santa Claus, although this might not be

---


\(^{41}\) Id.

\(^{42}\) Murray, *supra* n. 37, at 110–111.

\(^{43}\) See Feldman, *supra* n. 40, at 184. Feldman notes, “Every work of art within the style of objective accuracy represents the end result of a long process of observation and simplification.” Id. at 185.


\(^{45}\) Id. at 37.

\(^{46}\) Id.
When an asylum seeker described a lake in the middle of his home town, in which the government had drowned his brother, he had difficulty in conveying to the immigration judge his certitude that the government was responsible for his brother’s death. Finally he confided, after badgering by the government attorney, that all government opponents were drowned in this lake. Thus, for him, the image of his brother’s body floating in this lake explicitly meant that the government had killed his brother. While the meaning of this image was obvious to the asylum seeker, it required further explanation to convey that meaning to the judge.

On the other hand, images can connote unanticipated meanings. That is, in one culture, objects can evoke meanings that are not directly related to their actual existence, and of which the ordinary observer may not even be aware. A painting of happy peasants in a field (figure 1, appendix A) served to reassure the wealthy landowning patrons that their own affluence was morally obtained. Although this affluence was based on the back-breaking labor of peasants, according to the painting the peasants were reverent and blessed. The image further connotes the role of artists in affirming and solidifying the values of capitalism over socialism. It is likely that few French viewers in the nineteenth century saw such meaning, or that they even could have had the ability to perceive of this meaning. Nonetheless, it is a valid and powerful signification of the painting.

Images and objects contained in a scene can also have a symbolic meaning that can evoke a theme or reinforce the equity of a client’s case. The growth of popularity of semiotics, the study of symbols, has led to acceptance of the stance that many, if not all, objects have symbolic meaning. However, an object can symbolize different concepts or have no meaning at all depending on the viewer. As art critic, Nelson Goodman, noted, “Almost anything


48 See e.g. Jean-Francois Millet, The Angelus (Musée d’Orsay, Paris 1859) (depicting a pair of praying farmers).

49 The symbolic meaning often reflects the cultural significance of an object. All objects that we make, use, or display express cultural values. Thus the type of chair, the height of the grass in a lawn, and the position of a desk in an office are signs.

50 A symbol “becomes meaningful and evokes human responses when, and only when, a perceiver of that symbol projects meaning into it and responds to it in terms of the meaning which he has learned as appropriate for that symbol.” Lawrence Frank, The World as a Communication Network, in Sign Image Symbol 8 (Gyorgy Kepes ed., George Braziller, Inc. 1966).
can stand for anything else.”51 It is therefore a challenge and a
gamble to describe an object and achieve the desired symbolic re-
sponse.52

The advocate’s test is to establish in the mind of the fact find-
er the particular symbolism that is beneficial to the theory of the
case, making the image a surrogate53 for the preferred symbol.
Creating this referential relationship requires focusing on certain
aspects of the scene and pointing out, or at least hinting at, relations-
ships with certain ideas.54

One of the difficulties in using images for their symbolic
meaning is that symbolism can be ambiguous and even yield con-
tradictory meanings. The artist, however, provides aesthetic value
to emphasize his intended meaning. Commenting on a frame from
Eisenstein’s classic film, Ivan the Terrible, Barthes writes, “Eise-
stein’s ‘art’ chooses the meaning, imposes, hammers it home. . . .
How? By the addition of an aesthetic value or emphasis. Eisen-
stein’s ‘decorativism’ has an economic function: it proffers the
truth.”55

D. Enhancing Images

How can the advocate add aesthetic value to his description of
an image? In addition to the careful use of language, one can select
the elements of a scene that enhance the theory of the case. How-
ever, this is not to say that the incidental object should acutely
symbolize an intended theme. The bloody shirt, the doll thrown
on the floor, and the children’s book with its pages ripped are too ob-
vious, too intense, too trite to affect seriously the fact finder’s
viewpoint. Such images prohibit our imaginations from exploring
more ambiguous connections and possibilities. We struggle to di-
vote additional significance. Barthes comments, “One could ima-
gine a kind of law: the more direct the trauma, the more difficult is

51 Nelson Goodman, Languages of Art: An Approach to the Theory of Symbols 8 (Bobbs-
Merrill Co., Inc. 1968).
52 The emotion that is excited in the listener will often differ from the emotion being
expressed. Id. at 47. A face showing agony, for example, may not produce pain in the view-
er, but pity. Id. A colorful painting does not make us feel colorful. Id. at 48.
53 A surrogate here is defined as a stimulus produced by another individual that is
relatively specific to some absent object, place, or event. James J. Gibson, A Theory of Picto-
rial Perception, in Sign Image Symbol, supra n. 50, at 93.
54 Goodman notes, “Pictures are no more immune than the rest of the world to the
formative force of language even though they themselves, as symbols, also exert such a force
upon the world, including language. Talking does not make the world or even pictures, but
talking and pictures participate in making each other and the world as we know them.”
Goodman, supra n. 51, at 88–89.
55 Barthes, supra n. 44, at 56.
connotation; or again, the ‘mythological’ effect of a photograph is inversely proportional to its traumatic effect.\(^{56}\)

Attorneys are wordsmiths and feel more comfortable with words than with images. However, in presenting images verbally, lawyers should resist the urge to talk too much about them. Rather, they will benefit most by describing the powerful moment or object and then refraining from explaining its significance, symbolism, or metaphor. Images serve as an alternative to legal analysis and do not benefit from extensive critical exposition.\(^{57}\)

How then does one call attention to an image? As in paintings, this can be done by placing it in a central or conspicuous place in a legal discussion, by having the client or another actor in the legal story interact with the image, or by placing the image in a context that makes it stand out.\(^{58}\)

**IV. THE OBTUSE OBJECT**

Art critics writing about successful still-life paintings and photos have identified a surprising aspect of art. Those pictures that provide prolonged aesthetic interest\(^{59}\) do so by including both recognizable patterns, but also some unexpected element that disturbs our expectations. J.N. Findlay terms this “poignancy,”\(^{60}\) while Barthes calls it the “gratuitous element.”\(^{61}\) The preeminent art theorist, E. H. Gombrich, went so far as to say the mental friction caused by the juxtaposition of the beautiful and the abhorrent is one of the chief tools of the artist: “(Art) relies for its effect on the complex interplay of attraction and repulsion, gratification and renunciation for the sake of ‘higher’ values.”\(^{62}\) Thus, a single missed stitch in a beautiful embroidery, Marilyn Monroe’s birth-

---

\(^{56}\) *Id.* at 31.

\(^{57}\) Cf. James Elkins, *What Do We Want Pictures to Be? Reply to Mieke Bal*, 22 *Critical Inquiry* 590 (Spring 1996). Art theorist Elkins urges that viewers should resist the urge to interpret images; “[t]he longer I can hold out against the impulse to find narrative meaning, the more aware I become of the picture itself and of the workings of the desire to find words.” *Id.* at 591.


\(^{59}\) This means that one is compelled to view the picture, read a poem, or listen to music for a longer time than is needed to merely identify its subject and contents. At its best the aesthetic object causes the viewer to forget his “self” in the act of contemplation. J. N. Findlay, *The Perspicuous and the Poignant: Two Aesthetic Fundamentals*, 7 *British J. Aesthetics* 89, 97, 102 (1972).

\(^{60}\) *Id.* at 101.

\(^{61}\) Barthes, *supra* n. 44, at 64.

mark, and one overcooked entree in the midst of a tasty feast all seem more perfect because of their flaws.

The element that is out of place surprises the viewer, ironically creating a feeling of reality, of credibility.\(^63\) This unexpected feature is especially powerful where its contrast with the rest of the scene highlights some antithetical quality that requires synthesis in the fact finder's own mind.\(^64\) In other words, the advocate should be receptive to visual details that seem out of place, even if they are immaterial to the cause of action. Students in Ave Maria Law School's Asylum and Immigrant Rights Clinic have identified such items as a necktie, an unfinished guest room, a coke bottle, and a pomegranate as obtuse objects that markedly strengthened their clients' cases. The more unanticipated the object, the more useful its addition to the description of the scene. “Unanticipated,” does not mean weird.\(^65\) The most successful “obtuse objects” are often the most common, the most intimate, as in a successful still life.\(^66\) The advocate should try to transmit to the fact finder the unsettling feelings that the presence of this object causes.\(^67\)

\(^{63}\) In an early case of mine concerning the validity of a marriage between an immigrant and a U.S. citizen, an immigration officer found that the parties were involved in a real marriage based on a description of the couple's home. The deciding evidence appears to have been the wife's description of the bathroom and her sudden anger over the husband's repeated failure to put down the toilet seat after use. This arresting vision of a yawning toilet convinced the officer as proof of cohabitation, where insurance, mortgage, and affidavits had not.

\(^{64}\) From the theater, another branch of the arts, comes an illuminating and reinforcing recollection of the remarkable acting director, Konstantin Stanislavski. In his memoir, he recalled advising a young actor portraying a hypochondriac, “[Y]ou are painting the picture in only one color, and black only becomes black when some white is introduced for the sake of contrast. So let in just a bit of white color as well as some other colors of the rainbow into your role. There will be contrast, variety, and truth . . . . When you play a good man look for places where he is evil, and in an evil man look for places where he is good.” Konstantin Stanislavski, My Life in Art 183 (J. J. Robbins trans., Routledge 1996).

Speaking also of colors, renowned trial lawyer Gerry Spence commented, “I learned that, like a painting, an argument could best be made with a variety of color. Yet it could not be a jumble of every color for sale at the artist’s supply store. Simple words were enough. Too many colors caused the painting to lose its power. As in language, the colors become muddy, the design blurred, the meaning lost.” Gerry Spence, How to Argue and Win Every Time: At Home, at Work, in Court, Everywhere, Everyday 169–170 (St. Martin's Press 1995).

\(^{65}\) Reference to even seemingly innocuous common objects can dramatically affect a person's decision-making process. Researchers placed a briefcase on a table near students who were taking a test to reveal their charitable traits. They displayed greater stinginess than other students sitting in a room in which a backpack, not a briefcase, sat on the table. The researchers theorized that the mere presence of the briefcase made the students think of business leading them to compete more aggressively. Aaron C. Kay et al., Material Priming: The Influence of Mundane Physical Objects on Situational Construal and Competitive Behavior Choice, 95 Org. Behavior & Human Decision Processes 83, 95 (Sept. 2004).

\(^{66}\) Writing of seventeenth century Dutch still life paintings, art historian John Rupert Martin notes that by concentrating attention on realistically painted tulips and lobsters, “(t)he beholder is enabled to pass from familiar, visible things to the contemplation of invis-
The juxtaposition of ordinary, but incongruous, objects was a commonly-used technique of artists in the sixteenth and seventeenth centuries in the design of devices and emblems. Art theorist, E.H. Gombrich, studied artists’ creation of enigmatic images, combining seemingly incompatible objects and words. One example he considered was the emblem depicting the sun hidden behind clouds coupled with the motto, hinc clarior, or “hence brighter.” Initially, the paradox appears illogical, while on reflection: “[I]t reveals its applicability over a wide area. The paradox becomes a sample of the ineffable mystery that is hidden behind the veil of appearances. . . . It is this effort to transcend the limitations of discursive speech which links the metaphor with the paradox and thus pave[s] the way for a mystical interpretation of the enigmatic image.”

Adam Smith, better known for his authorship of political polemics that galvanized American colonists to revolt, served earlier as a professor of logic. He urged students to include unexpected details when describing objects. Written while a professor of logic at the University of Glasgow, more than twenty-five years before his influential Wealth of Nations (1776), Lectures on Rhetoric nicely summarizes the value of selecting curious details:

A 3d Direction may be, that, We should not only make our circumstances all of a piece, but it is often proper to Choose out some nice [sic] and Curious ones. A Painter in Drawing a fruit makes the figure very striking if he not only gives it the form and Colour but also represents the fine down with which it is covered. The Dew on Flowers in the same manner gives the figure a striking resemblance. In the same manner in description we ought to choose out some minute circumstances which can

---

67 “Painters have long appreciated the power that still life paintings harness through the contrast of a captured moment of life, permanently unchanging, with the viewer’s recognition of the evanescence of flowers and food. While making a direct and visceral appeal to the viewer, the artist also invites him—paradoxically—to reflect on the brevity of man’s existence and the insubstantiality of all worldly things.” Id. at 134.

68 In the twentieth century, Andy Warhol revived the power of still life painting, with his celebrated Campbell’s Soup Cans and detergent boxes. In forcing viewers to contemplate everyday consumer products, Warhol “sought to set up a resonance between art and images, it having been his insight that our signs and images are our reality. We live in an atmosphere of images, and these define the reality of our existences.” Arthur C. Danto, Philosophizing Art: Selected Essays 81 (U. Cal. Press 1999).


70 For a detailed, but easily understood introduction to the life and writings of Adam Smith, see The Authentic Adam Smith: His Life and Ideas (W. W. Norton 2006).

concur in the general emotion we would excite and at the same time but little attended to. Such circumstances are always attended with a very considerable effect.\textsuperscript{72}

Best-selling horror author Stephen King may have intuitively followed this precept in describing his own near-fatal accident in which he was struck by a truck while strolling down a road near his house.\textsuperscript{73} He recalled the dust on the tail lights and the dirt on the truck’s windows, both evocative of the inattention of the driver to his vehicle. Such details will be retained by the listener, while others may be quickly forgotten.\textsuperscript{74}

\textit{A. Perceiving the Unexpected}

How can an advocate identify an obtuse object? Two methods seem to work. Both involve acceptance that such objects may be imbedded in a client’s story and a willingness to be vigilant in looking for them. In the first method, the advocate pays attention to every object that is mentioned, waiting for one that, like a loose tooth, makes him or her wince or feel uncomfortable. This attention should be directed to written testimony as well as to any photographs or physical evidence. In addition, in interviewing the client and witnesses, the advocate should seek out physical details—asking, for instance, about the contents of a desk or a purse. When an object is mentioned that seems out of place or surprising, the advocate should concentrate on determining why it was there.

The second method is more cerebral, starting with the theory of the case and applying it to the client’s story then searching for an object that thematically represents this theory. Of particular value in this approach is the intent to locate an ironic object, one that justifies an opposite conclusion to the theory of the case. For example, where one is arguing that the government is persecuting a client for her political opposition, a paperweight given to her father by the country’s president, with the etched remark “To my good friend and comrade,” seems ironic when compared to the government’s alleged persecution of the daughter. Upon closer reflection, however, it points out the dismay of the government at a re-

\begin{itemize}
\item \textsuperscript{72} \textit{Id.} at 72.
\item \textsuperscript{73} “This recollection is very clear and sharp, more like a snapshot than a memory. There is dust around the van’s tail-lights. The license plate and the back windows are dirty. I register these things with no thought that I have been in an accident, or of anything else. It’s a snapshot, that’s all. I’m not thinking; my head has been swopped clean.” Stephen King, \textit{On Writing: A Memoir of the Craft} 258–259 (pocket ed., Pocketbooks 2002).
\end{itemize}
bellious child of a close contact of the president. It also solidifies the claim that the government knows who she is and is more likely to persecute her in the future, should she return to that country.

Both methods for identifying obtuse objects demand an openness to their existence and a sensitivity to one’s feelings, as opposed to thoughts. Providing directions for identifying such objects has its limits. The object that gives one person an electrifying feeling may, of course, provide someone else with only a yawn or no reaction. An emotional response to the unexpected presence of an object in a legal story, even if ill-founded, can be the catalyst for further fact research and the basis for greater enthusiasm and passion for representing a client. Thus, the conscious and conscientious struggle to identify obtuse objects benefits clients and their advocates, even if others find the objects identified trivial or unconvincing.

Once identified, the visual image must be translated into words.\textsuperscript{75} It is the advocate’s job not to merely describe an image but to make the fact finder actually see it in his or her mind.\textsuperscript{76} This brings up the question of the attorney’s role in creating the presentation. Just as one of the goals of art is to infuse the subject matter of an artwork with feeling and meaning, the goal of an attorney is to make the judge see the meaning of the facts presented, not just the facts themselves. Thus, in describing a police station in which a refugee was beaten, one might elicit testimony that depicts the building as a structure of government power. In addition, a lawyer might ask the witness why a particular scene or motif created meaning for her.

\textbf{B. Giving Meaning to Obtuse Objects}

Who creates meaning in an image? Only the witness? Or do the attorney and even the fact finder also have an equal right to recreate the scene and give it meaning?\textsuperscript{77}

This dilemma highlights a danger in encouraging a fact finder to create meaning in images. As an art critic may deconstruct a scene by examining a work of art for “‘fissures’ and ‘slippages’ that

\textsuperscript{75} Novelist Joseph Conrad wrote that his aim as a writer was, “before all, to make you see” in Joseph Conrad, The Nigger of the Narcissus 14 (Doubleday & Co. 1959). This is a valid goal for an attorney as well.

\textsuperscript{76} “Art does not reproduce the visible; rather, it makes visible.” Paul Klee, The Inward Vision: Watercolors, Drawings, Writings 5 (2d ed., Henry. N. Abrams, Inc. 1958). When the advocate enables the fact finder to visualize an experience, he intensifies it.

give away—reveal, unmask—the underlying political and social realities that the artist sought to cover up with sensuous appeal,”78 so a judge may seek to find negative or harmful meanings in images. Meanings of images may not be as arbitrary as some assume. As discussed in the next section, Jungian psychoanalysis, cognitive linguistics, and classical rhetoric provide guidance on the likely interpretation and uses of images.

Swiss psychoanalyst Carl Jung and his disciple, Joseph Campbell, contended that certain images serve as universal symbols. Jung defined a “symbol” as “an expression of an intuitive idea that cannot yet be formulated in any other or better way.”79 And he stressed the significance in art and poetry of those images that have symbolic meaning outside the range of the creator’s and the viewer’s conscious understanding.80 Jung believed that these symbolic images gain their power from the sphere of unconscious mythology, which he referred to as “the collective unconscious.”81

Jung believed that the impulse for artistic expression often comes from an unconscious imperative that leads the creator to make compulsive artistic choices as dictated by his unconscious will.82 Such artworks exhibit an effect of the superpersonal that transcends our understanding to the same degree that the author’s consciousness was in abeyance during the process of creation. We would expect a strangeness of form and content, thoughts that can only be apprehended intuitively, a language pregnant with meanings, and images that are true symbols because they are the best possible expressions for something unknown—bridges thrown out towards an unseen shore.83

78 Id. at 85.
80 Jung, supra n. 79, at 319.
81 Jung wrote powerfully,
Whoever speaks in primordial images speaks with a thousand voices; he enthralls and overpowers, while at the same time he lifts the idea he is seeking to express out of the occasional and the transitory into the realm of the ever-enduring. He transmutes our personal destiny into the destiny of mankind, and evokes in us all those beneficent forces that ever and anon have enabled humanity to find a refuge from every peril and to outlive the longest night.
Id. at 321.
82 Id. at 313.
83 Id. at 313–314.
Nationally-renowned trial attorney Gerry Spence confided that a similar unconscious imperative guided some of his best advocacy. Commenting on a successful final argument that he delivered after dropping and disarranging his carefully drafted written notes, Gerry Spence discovered that “[s]ome mysterious force, some guiding, unconscious intelligence had taken over, picked the words, and formed the thought line.”\textsuperscript{84} Although these words that powerfully moved the jury were disjointed and syntactically illogical, “the jury heard with the ear of their hearts”\textsuperscript{85} and returned a verdict in favor of his client.

Continuing down the path blazed by Jung and Campbell, we may expect to find an object in the client’s story that serves as a talisman, a powerful gift that protects the client on his or her journey.\textsuperscript{86} In the archetypal story, this gift is not received until the hero has committed himself to the quest. For an asylum seeker, this talisman might be a forged passport and visa.

Perhaps these obtuse objects contain unconscious archetypes,\textsuperscript{87} and this is what causes them to possess the peculiar emotional intensity that keeps a person awake at night, trying unsuccessfully to resolve the meaning of the object and to attempt to discover why the object has such an overwhelming power.\textsuperscript{88} However, if Jung is correct, we will not be able to fully decode or explain the power of these images because their force is inaccessible to the conscious mind. The useful object transmutes the receiver’s individual concerns into the collective human comedy, making it

\textsuperscript{84} Spence, \textit{supra} n. 64, at 179.
\textsuperscript{85} Id. at 180.
\textsuperscript{86} See Campbell, \textit{supra} n. 79, at 69.
\textsuperscript{87} See Jung, \textit{supra} n. 79, at 321.
\textsuperscript{88} Psychologist Elizabeth Loftus wrote of the unbidden and abstruse visions that she retains from her role as an expert witness in numerous murder cases involving the potential misidentification of defendants as perpetrators. Having investigated the gruesome abduction and murder of a young boy, Dr. Loftus wrote,

> I remembered, too, the mother’s description of her lost boy. . . . [His shirttail was out; he wore a Polar Fleece jacket] “Oh, yes,” [his mother] said, “I almost forgot—his shoes were tied in double knots.”

> Those are the minor details, inconsequential to my work, that come back later to disturb my sleep. Those are the facts, typed on clean white paper, stapled into lengthy reports, placed in folders and shut up in files labeled “case pending,” that break the heart.


In debates over the meaning and value of art, adherents to the Phenomenological school viewed art as “valuable to the extent it is capable of stimulating and sustaining intense and prolonged aesthetic attention.” Harold Osborne, \textit{Introduction}, in \textit{Aesthetics} 15 (Harold Osborne ed., Oxford U. Press 1972). The boy’s shoelaces meet this test well. They also, tragically, represent a talisman that failed.
“possible for us to find our way back to the deepest springs of life.”

C. Learning from Rhetoric and Cognitive Science

Those readers who question the validity of Jungian theory may be convinced by similar, though non-metaphysical, theories of cognitive linguists. Some of these researchers have concluded that the objects can be used as metaphors that serve as “conduits for conceptualizing communication.” As explained by linguist Johan Vanparys, “ideas (or meanings) are objects and words (or other linguistic expressions) are containers; speakers put ideas into words and transfer through a kind of conduit to the hearer, who extracts the ideas from the words.” This contrivance is in part due to the challenges of communicating ideas because the speaker often has a more sophisticated understanding of an idea he or she is seeking to relate than does the listener and because “we tend to understand abstract phenomena in terms of more concrete things.” Thus, we use metaphors and metonyms as tools to transfer an idea to another person using objects that represent, but also characterize, those ideas.

For example, a putative murder victim’s profession may serve as a powerful metaphor for his itinerant lotharian tendencies. Law professor and novelist Marianne Wesson conducted meticulous research into the well-known Hillmon case, which served as the basis for the hearsay exception allowing the statement of the declarant’s then existing state of mind. In 1879, F.A. Walters was a traveling cigarmaker, whose alleged but unconfirmed murder was

89 Jung, supra n. 79, at 321.
93 Friedrich Nietzsche saw such figures of speech as primary devices for creating “truth” in a society. He wrote, “What is truth? a mobile army of metaphors, metonyms, anthropomorphisms, in short, a sum of human relations which were poetically and rhetorically heightened, transferred, and adorned, and after long use seem solid, canonical, and binding to a nation.” Friedrich Nietzsche, On Truth and Lying in an Extra-Moral Sense, in Friedrich Nietzsche on Rhetoric and Language 246, 250 (Sander L. Gilman et al. eds. & trans., Oxford U. Press 1989).
95 Fed. R. Evid. 803(3).
the centerpiece in the *Hillmon* case. Before his disappearance, Walters had informed his fiancée by letter that he would not return to her for a long time because he had been offered a position working on Hillmon’s ranch. This letter—the centerpiece of the defense’s position that Walters and not Hillmon had died—was likely a prevarication created to allow him to engage in romances transgressing his vows of betrothal as he wandered from town to town, plying his trade. I suggest that his profession stands metaphorically for his sexual promiscuity. The phallic significance is borne out by an account of him in the testimony of one of his employers: “[H]e was a young man who was all the time talking to the men about him and telling of his many travels. He had been in a large number of towns in different places and he also talked a great deal of his love scrapes and how he had gotten out of them.” Itinerant cigarmaking as a metaphor for licentiousness is valid here because it is probable that Walters was promiscuous and therefore had reason to lie to his betrothed. Walters’ reason to lie undermines the Supreme Court’s reliance on his letter’s stated intentions connected him to Hillmon and the letter’s admission under the existing state-of-mind exception to the hearsay rule. As

---

96 John Hillmon had taken out three sizeable life insurance policies before leaving his wife and going West to become a rancher. Soon after his departure, his partner reported that he had accidentally shot and killed Hillmon. Hillmon’s widow then demanded the proceeds of the insurance policies. The insurance companies hired investigators who suggested that the body presented by Hillmon’s partner was not Hillmon, but F.A. Walters, an unlucky victim of Hillmon’s scheme to defraud the insurance companies. *Mut. Life Ins. Co.*, 145 U.S. at 285–287. The insurance companies’ success at trial rested on the admission of a letter from Walters to his fiancée in which he stated his intention to go work on a ranch for a man named Hillmon. *Id.* at 287–288. This statement could have been used to establish a relationship between Hillmon and Walters if it did not fall under the evidentiary rule against the admission of hearsay. In allowing this letter into evidence, the U.S. Supreme Court fashioned a novel exception to the hearsay rule for statements of intention, which courts and the Model Rules of Evidence still cherish. Marianne Wesson, *The Hillmon Case, the Supreme Court, and the McGuffin*, in *Evidence Stories* 277, 277–278 (Richard Lempert ed., Found. Press 2006) [hereinafter *The Hillmon Case*]. Professor Wesson questioned the basis for this exception. Her digging into the facts was not limited to reading old court briefs and newspapers. *Id.* at 285–286. She also exhumed the body of the murder victim and discovered that he was very likely Hillmon, but definitely not F.A. Walters. Marianne Wesson, “Remarkable Stratagems and Conspiracies”: How Unscrupulous Lawyers and Credulous Judges Created an Exception to the Hearsay Rule, 76 Fordham L. Rev. 1675, 1697–1698 (2007). Thus, the facts—the “intention”—established by the exception to the hearsay rule were incorrect. Hillmon had indeed died as his partner stated. For further discussion of this case and Professor Wesson’s dogged pursuit of the truth, see Marianne Wesson, “Particular Intentions”: The *Hillmon Case* and the Supreme Court, 18 L. & Lit. 343 (2006) [hereinafter *Particular Intentions*].

97 145 U.S. at 288.

98 Recall as well Kipling’s adage, “A woman is only a woman, but a good Cigar is a Smoke.” Rudyard Kipling, *The Betrothed*, in *The Works of Rudyard Kipling* 47, 49 (Wordsworth Eds., Ltd. 1994).

interesting is the question of whether Walters’ profession unconsciously communicated the “idea” of his promiscuity to Professor Wesson, encouraging her to question his veracity in letters to his fiancée.100

According to psycholinguists, metonyms are equally as powerful as metaphors in communicating abstract ideas. While the metaphor reminds us of something else because of its similarity (a cloud is similar to a sheep), a metonym brings an association because it is part of something else (a pair of earrings reminds us of a particular woman). More than a poetic tool,101 a metonym is “recognized as a particular type of mental mapping” presented to call to mind “an entire person, object, or event.”102

The metonym is found in great works of art, such as Van Gogh’s painting, A Pair of Shoes (figure 2, appendix A).103 The debate over what person had worn those shoes set off a searing argument between philosopher Martin Heidegger and art historian Meyer Schapiro, cheerfully recounted by Jacques Derrida, who noted, “It’s certainly a question of feet and of many other things, always supposing that feet are something, and something identifiable with itself104 . . . . [W]hat a trip and what a story, for almost a century for these shoes of Van Gogh’s. They haven’t said anything, but how they’ve made people walk and talk!”105

Typically, a metonym allows the use of one idea as a vehicle to reach a “target” idea, but what if there are several targets to choose from? If one says, “Give me a hand,” the listener could

---

100 Wesson opines that Walters’s last letter to his fiancée was full of lies and that Walters had been persuaded by the insurance companies to manufacture this correspondence after the fact and in support of their defense to paying their policies’ proceeds to Hillmon’s widow. Wesson, The Hillmon Case, supra n. 96, at 299–304.
101 One should not discount metaphors and metonyms for their rhetorical power. Quintilian, a master of classical rhetoric, “looked upon the figures [of speech] as another means of lending “‘credibility to our arguments,’” of “‘exciting the emotions,’” and of winning “‘approval for our characters as pleaders.’” Edward Corbett, Classical Rhetoric for the Modern Student 424 (3d ed., Oxford U. Press 1990) (citation omitted) (quoting Marcus Fabius Quintilian, Institutio Oratoria of Quintilian vol. III, 359 (H.E Butler trans., Harv. U. Press 1920)). Figures of speech, such as metaphors, offer a vivid and concrete way to express our abstract thoughts, creating emotional responses in the listener. “[B]ecause they stir emotional responses, they can carry truth, in Wordsworth’s phrase, ‘alive into the heart by passion’; and because they elicit admiration for the eloquence of the speaker or writer, they can exert a powerful ethical appeal.” Id. at 459.
102 Raymond W. Gibbs, Jr., Speaking and Thinking with Metonymy, in Metonymy in Language and Thought 61, 66 (Klaus-Uwe Panther & Günter Radden eds., John Benjamins Publg. Co. 1999).
103 Vincent Van Gogh, A Pair of Shoes in Van Gogh Museum, Amsterdam (1886).
105 Id. at 272. Derrida deconstructed Heidegger’s and Schapiro’s arguments, showing how prejudices and unconscious suppositions caused both scholars to reach conclusions that, although strongly held, have little basis in the work of art itself.
choose either to applaud (hitting hands together) or to provide manual labor (using hands, arms, and body to assist in a task). Researchers have established that the listener will usually choose the clearest and the most relevant interpretation of a metonym.\textsuperscript{106}

Why then is a doll found lying in the rubble of a bombed home ineffective as an “obtuse object”? Why do we consider it to be trite and unmoving? Despite the usual function of metonyms in clarifying an idea by transmitting an object to the mind of the listener, they are most effective in describing an unsettling or taboo target by presenting a vehicle that mystifies or ostentatiously hides the target. If the vehicle transports the listener too easily to the taboo target, it will be rejected.\textsuperscript{107}

This obscuring of meaning makes metonyms especially useful as euphemisms when the target is socially unacceptable or disturbing,\textsuperscript{108} such as referring to a worker’s dismissal as “reduction in force.” While such reduction is a consequence of firing an employee, it does not directly describe the event of the dismissal. Another example of a euphemism is referring to someone’s death as “his time ran out.”

Consider a set of false teeth found on the living room floor of a victim’s apartment, the metonym used by a prosecutor in trying a grisly case of the rape and murder of an elderly woman.\textsuperscript{109} Rather than concentrate on the bloody carnage found in the bedroom, he focused the jury’s attention on the dentures that had been knocked out of the victim’s mouth by one of the assailant’s blows. The listener could choose several targets of this metonym:\textsuperscript{110}

\begin{enumerate}
  \item dentures as one of an elderly person’s possessions (PART FOR WHOLE);
  \item dentures as one of the objects found at the crime scene (PART FOR WHOLE);
  \item dentures on the floor as one of the results of being brutally punched in the face (EFFECT FOR CAUSE);
\end{enumerate}

\textsuperscript{106} Günter Radden \& Zoltán Kövecses, \textit{Towards a Theory of Metonymy}, in \textit{Metonymy in Language and Thought}, supra n. 102, at 17, 50–51.

\textsuperscript{107} Id. at 53.

\textsuperscript{108} Id.

\textsuperscript{109} From a transcript of an interview with Ann Arbor, Michigan defense attorney Michael Vincent, on March 23, 2006. (On file with the Author).

\textsuperscript{110} For a complete description of this categorization of metonyms based on the relationship of the metonym to its target meaning, identifying it as either part of a physical or a temporal whole, see Radden \& Kövecses supra n. 106, at 17–59.
dentures on the living room floor as the beginning of a horrific rampage (SUBEVENT FOR WHOLE EVENT)

While the listener might consider the third or fourth choices as the clearest and the most relevant targets of the metonym, he or she may be so repulsed by the attendant mental imagery that another target will be preferred. And yet, the mind vacillates between the brutal scene and other less disturbing targets. Like staring between the fingers that cover our eyes while watching a scary movie, we painfully delight in shifting between the shocking target of a metonymic vehicle and its less frightening alternative.

The safety of the mystifying, or obscuring, metonym is a characteristic that makes it useful in describing a disturbing target. This is at the core of the obtuse object’s power.

Another example of the effects of metonyms arose when two law students represented an asylum seeker who claimed political persecution. Both students expressed difficulty in relating to the client and her story. The client’s story was horrific and too intense for their imaginations and their hearts. She came from the capital city in a central African country and had experienced shocking violence, including the murder of her two brothers and her own beating and rape by soldiers, because of her brothers’ support for a pro-democracy political party. However, this story was simply too removed from the students’ own experience to be more than an abstraction. Consequently, the students were not fully engaged by the client’s story. Then in one of their interviews, when the students sought to create vivid depictions of the story using the techniques described in this Article, the client mentioned that her book bag was stolen when she was attacked. The students were surprised by the existence and the loss of this book bag. Being academically engaged themselves, the theft of the book bag suggested a loss of security far more accessible to the students, than the murders and the rape. It also classified the client as a student, someone like them. After that interview, the students changed gears in their representation, becoming zealous and dedicated.

The client subsequently related that, prior to her flight, she had been admitted to law school in her country. The stolen book bag was then seen by the students as part of the loss of the client’s education, of her career, and of her middle-class expectations. For the law students, the book bag was an obtuse object, having the metonymic target of the politically induced rape and murders as well as the process of academic attainment.
V. CONTEXTUALIZATION OF THE IMAGE

Just as a painting of a flower hanging on a museum wall is far removed from the flower growing in the field, the verbal image conveyed by a witness in a court room can suffer from lack of context because the fact finder is in a different location, and perhaps even a different country, from the described scene. This lack of context can be either helpful or damaging to an attorney, depending on whether this contextualization can be used to further the theory of the case. In any event, an advocate must be aware of the impact of decontextualization of images.111

The importance of image context is evident in one of the most significant Supreme Court cases of this decade, Bush v. Gore.112 In that case, the Court reviewed court transcripts to determine whether there was consistency in the various Florida counties in counting votes when a voter had failed to completely make a hole in the voting ballot. The language used in the discussion has a pithy, Anglo-Saxon bluntness, devoid of the multi-syllabic, Latin-based, legal jargon that one might expect in a significant legal decision. The Court wrote,

The law does not refrain from searching for the intent of the actor in a multitude of circumstances; and in some cases the general command to ascertain intent is not susceptible to much further refinement. In this instance, however, the question is not whether to believe a witness but how to interpret the marks or holes or scratches on an inanimate object, a piece of cardboard or paper which, it is said, might not have registered as a vote during the machine count. The factfinder confronts a thing, not a person. The search for intent can be confined by specific rules designed to ensure uniform treatment.

The want of those rules here has led to unequal evaluation of ballots in various respects. See [Gore v. Harris, 772 So. 2d 1243, 1267 (Fla. 2000)] (Wells, C.J., dissenting) (“Should a county canvassing board count or not count a ‘dimpled chad’ where the voter is able to successfully dislodge the chad in every other contest on that ballot? Here, the county canvassing boards disagree”). . . .

The record provides some examples. . . . Palm Beach County, for example, began the process with a 1990 guideline which

---

111 A similar decontextualization occurs when a crucifix is taken out of a church and placed on the white wall of a museum. This act changes the way it is perceived and thought about. “The frame is not neutral; rather it becomes part of what it frames.” David Carrier, Writing about Visual Art 22 (Allworth Press 2003).

precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a *per se* rule, only to have a court order that the county consider dimpled chads legal. This is not a process with sufficient guarantees of equal treatment.\(^\text{113}\)

The Court stated that it was confronted with “a thing.” Yet the image of the very human scene of a canvasser squinting as he lifts a ballot over his head to see if any rays of light shine through does make the controversy personal and, in a way, both humorous and pathetic. In this age of hyper-technological advances, the leader of the free world is chosen using such a primitive, vulnerable method.

This contrast perhaps resonates with our recollection of the events of September 11, 2001, when terrorists used simple box cutters to commandeer the planes for their destructive actions. But it also seems noble, symbolizing man’s quest to discern “the light.”\(^\text{114}\)

We may see this as echoing the plea in *The Star-Spangled Banner*, “O say can you see, by the dawn’s early light[?]”\(^\text{115}\) The dimpled chad may even remind us of the dimpled lad in Whittier’s poem;\(^\text{116}\) or the theme of any number of spiritual songs in which seeing the light is life’s most important goal and most valuable gift.\(^\text{117}\) Although these associations may seem unlikely as a group, highly individual metonymic and metaphorical relationships make such associations much more likely.

By describing the scene of a person attempting to see light through a dimpled chad, the Court has contextualized the chad. The case is no longer about a thing. It is personal. And it reveals the scene of a person in a rather undignified position. We may share in the embarrassment that would accompany being seen in this vulnerable and foolish stance. One may even feel a voyeuristic shame in witnessing this frailly human response to our human

\(^{113}\) *Id.* at 106–107.

\(^{114}\) Such related phrases as “a ray of light,” “the light at the end of the tunnel,” and “glimmer of hope” suggest themselves.


shortcomings. In any event, the test of searching for a ray of light through a dimpled chad to select a president is poetic,\textsuperscript{118} prophetic,\textsuperscript{119} and foolish—a powerfully metonymic activity.

\section*{VI. THE SIGNIFICANT MOMENT}

Art theory has a further role to play in informing us about effectively describing legally momentous activities. While filmmakers and novelists may present scenes, they usually emphasize action—a succession from one image to another. The painter, the sculptor, and the photographer, on the other hand, are limited to a single moment in a story.\textsuperscript{120} Thus they must carefully choose an instant that best presents the theme and the story. It is their task to choose which moment to memorialize. Different times have seen different solutions. For example, while Renaissance artists tended to depict the crucifixion of Christ during the crucifixion itself, with the raised cross bearing Jesus,\textsuperscript{121} Baroque artists preferred to depict either the raising of the cross or its lowering, with the dead, pale body of Jesus slumping in the disciples’ arms (figure 3, appendix A).\textsuperscript{122}

Eighteenth century French sculptor Jean-Antoine Houdon chose not a “moment of battle,” but an “anticipatory moment” for a life-size marble statue of French general Charles Bertin Gaston Chapuis de Tourville.\textsuperscript{123} In the selected scene, de Tourville is about

\begin{footnotesize}
\footnotesize{\textsuperscript{118} One is reminded of the most celebrated case of the previous decade, People v. Simpson, BA097211 (Cal. Super. Ct. L.A. Co. 1994), and the couplet, “If it doesn’t fit, you must acquit.” People v. Simpson, 1995 WL 697830 at *46 (Cal. Super. Ct. L.A. Co. Sept. 28, 1995) (closing argument). Attorney Johnny Cochrane’s use of a leather glove as a symbol is particularly obtuse, because most people thought of football star O.J. Simpson as someone who used his bare hands to carry a soiled piece of leather, not someone who donned leather gloves to avoid soiling his hands.

\textsuperscript{119} The appeal by Athens to the oracle at Delphi when attacked by Xerxes, see J. A. S. Evans, The Oracle of the Wooden Wall, 78 Classical J. 24, 24–29 (1982), and President Ronald Reagan’s reliance on astrology in responding to the Soviet Union, see Frances Fitz-Gerald, Way Out There in the Blue: Reagan, Star Wars and the End of the Cold War 370 (Simon & Schuster 2000), show the timeless plea to divination in resolving vital national issues.

\textsuperscript{120} An alternative used by some artists to depict a narrative in images is to present “two or more images of the same event” in a series of pictures. See Peter Burke, Eyewitnessing: The Uses of Images as Historical Evidence 151 (Cornell U. Press 2001). Burke references artists’ work that depicts both antithetical images, such as Hogarth’s contrasting pictures of “industrious and idle apprentices,” and scenes presenting before and after an event, id., such as A Rake’s Progress, a series of eight paintings. William Hogarth, A Rake’s Progress in Sir John Soane’s Museum, London (1732–1733).

\textsuperscript{121} See e.g. Matthias Grünewald, The Crucifixion, from the Isenheim Altarpiece, in Musée d’Unterlinden, Colmar (1512–1515).

\textsuperscript{122} See e.g. Peter Paul Rubens, The Descent from the Cross in Courtland Institute Galleries, London (c. 1611).

\textsuperscript{123} Jean-Antoine Houdon, Le Maréchal de Tourville in Sèvres, Musée National de Cé-}
to convey to his staff orders that he knows are wrong and the impact of which will be the destruction of his ships and his men.\textsuperscript{124} This moment displayed his remarkable loyalty and obedience to the ruler who had authored these flawed orders. According to art historian Francis Dowley, artists of the eighteenth century tended to select a scene from a story that favored “a moment which is not the climax or culmination of action or emotion, but a previous one which allows further play for the imagination. . . . [For] the moment of the highest emotional pitch, or we might say, the height of action, consumes the imagination, allowing it no further free range.”\textsuperscript{125}

Similarly, in painting \textit{The Raft of the ‘Medusa’} (figure 4, appendix A), French artist Théodore Géricault chose the moment just before the rescue of the shipwrecked survivors, conveying a heroic aspect to the men on the raft.\textsuperscript{126} Géricault painted a giant scene of the survivors who have just spotted a rescue ship. With this painting, Géricault brought attention to a national political scandal involving the wreck of a government ship and the failure to rescue most of the men on board. The artist chose not to paint the moment the ship foundered, nor the drownings and cannibalism that took place on the overburdened raft as the men awaited salvation.\textsuperscript{127} Any other moment would have revealed them as victims, not heroes on a quest.

Likewise, American painter Edward Hopper recognized that the most significant and revealing moments in life often occur while we are waiting. It is at these times that genuine internalized human dramas can be best observed and recorded.\textsuperscript{128} Hopper painted scenes of urban life, ignoring the hustle and bustle in favor of unguarded quiet moments, between lines of conversation and sips of coffee in a restaurant, before a movie let out.\textsuperscript{129} Lawyers used the same techniques in the trial of police officers accused of beating Rodney King. A videotape showing the callous and unprovoked bashing of the victim, King, by the defendant-policemen was repeatedly broadcast throughout the country.

\begin{footnotes}
\item \textsuperscript{124} Id.
\item \textsuperscript{126} Théodore Géricault, \textit{The Raft of the ‘Medusa’} in Musée du Louvre, Paris (1819).
\item \textsuperscript{127} Christine Riding, \textit{The Raft of the Medusa in Britain}, in \textit{Crossing the Channel: British and French Painting in the Age of Romanticism} (Patrick Noon & Stephen Bann eds., Tate 2003).
\item \textsuperscript{128} John Updike, \textit{Still Looking: Essays on American Art} 188 (Knopf 2005).
\item \textsuperscript{129} See e.g. Edward Hopper, \textit{Automat} in Des Moines Art Ctr., Des Moines (1927); \textit{New York Movie} in Museum of Modern Art, New York (1939).
\end{footnotes}
and seemed to confirm the culpability of the officers. “However, the defense team successfully reframed the issue by emphasizing over and over again—The issue in this case is not what is shown on the video tape; the issue is what happened before the camera began to run!” By carefully creating a picture in the jurors’ minds of the aggressive stance and acts of Rodney King prior to the beating, the attorneys won acquittal for their clients.

The successful “significant moment” is one that encourages the listener to confront deep questions of his own. Like Stendhal’s goal in writing, the advocate’s aim should be “to make each spectator question his own heart, articulate his own feelings, and thus form a personal judgment and a vision based on his own character, tastes, and predominant emotions.” To do so, the advocate must pay attention to the feelings that a moment in the client’s story arouses in his own heart. Lawyers may wish to write down their feelings or explain their interest in a particular moment or detail and then try to analyze why they are fixated on it and why others might as well. What does this moment tell the listener about the chain of events or the participants in the activity?

It is held by some aestheticians that emotional communication through the arts is usually not conceived as simply conveying factual information about the occurrence of real or imaginary emotional situations, in the manner in which a newspaper report gives information about events; artistic communication is thought of as inducing a special sort of sympathetic sharing of concrete affective situations, so that the observer not only receives information about situations of feeling already familiar to him but . . . achieves emotional experiences he has not known before and could not otherwise know.”

An example from one of my own cases comes to mind. I attended an immigration hearing to establish the bona fides of a marriage between a U.S. citizen and his wife, a slight Trinidad native with a melodic, syrupy voice. She was wearing an elegant black embroidered dress and crucifix earrings. On being asked how the couple had spent the previous Saturday evening, her husband revealed that he had spent the evening hiding in their bedroom, watching a show about fishing on a small television, while his wife

---

131 Id. at 234.
132 Carrier, *supra* n. 111, at 19 (quoting Stendhal (Marie-Henri Beyle), *Stendhal and the Art* 94 (David Wakefield ed., Phaidon Press Ltd. 1973)).
133 Osborne, *supra* n. 88, at 18.
watched “professional wrestling” in the living room on their wide-screen television. He said he was afraid to be in the same room with his wife when she watched wrestling. “She gets pretty emotional!” he opined. This odd special moment convinced the immigration officer that they were really living together as a married couple in a way that admissions about the color of the bedspread or the type of birth control used could not.

And finally, an example from one of our clinic’s cases combines both the significant moment and the obtuse object. Our client had been working in her country of birth in Africa as a live-in maid for an expatriate French army officer and his family. When the French air force destroyed all the African nation’s planes, the local government sent its soldiers to harass the French citizens living there. Our client was sitting at the kitchen table sharing a pomegranate with the French wife, when troops broke down the door, accused her of being a traitor and assaulted and beat her. In her application for asylum, considerable detail was provided about the kitchen, the kitchen table and chairs, and the sharing of the pomegranate. This moment was judged significant for several reasons. By sharing food with the French, our client had become their companion.134 Based on this one scene, the local government had imputed political opinion to her: they believed her to support the French position.

And the obtuse object? In an exercise involving this fact pattern that I gave at the 2007 National Clinical Conference in New Orleans and at the 2007 Midwest Clinic Conference in Des Moines, most of the attendees identified the pomegranate as an object that stood out. Some, with a knowledge of the classics (and one hopes that immigration judges recall their Bullfinch), recalled the tale of Persephone, Goddess of Spring, who was kidnapped by Hades and taken to the Underworld.135 Zeus demanded her release, but because Persephone had eaten a few pomegranate seeds down there, she had to remain underground for several months a year.136 Even without the classical association, the fruit that takes such great effort to eat, since the hard shell must be removed and each of the numerous seeds picked out one by one, might represent the great

---


135 Thomas Bullfinch, Bullfinch’s Mythology 52–57 (Avanel Bks. 1979). Like Persephone, our client was forced to leave the land of her birth because she had eaten a pomegranate. Could this association with a Greek goddess enter a judge’s thinking and elevate our client’s status? Such a view may be far-fetched. However, I cannot pass by the pomegranate display in a supermarket without recalling the client and the goddess.

136 Id. at xx.
efforts that our client had taken to flee, leaving her family and friends for a difficult future in the United States. If nothing else, the presence of a pomegranate, rather than an apple or an orange, catches the listener’s attention, bringing new focused attention to the story.

VII. A FEW WARNINGS AND CAUTIONARY STATEMENTS

The techniques discussed above can strengthen an advocate’s case, but are they ethical, and are the results true? Are the results admissible?

American law cherishes the principle that judges and juries can determine whether a witness is telling the truth.137 Recent studies have established, however, that we cannot correctly assess the truth or accuracy of testimony on the basis of a witness’s confidence or the vivid detail of his testimony.138

Despite popular belief, memory does not exist to assist us in recalling Babe Ruth’s batting average in 1923.139 We use memories, not to store up the truth about past experiences, but to help us steer a course toward the future. As a result, we are constantly rewriting our memories to make them conform to more recent incidents and discoveries.140 Thus a witness’s confidence in a memory provides little assurance that it is correct.141 Where a witness minutely describes a significant moment or an obtuse object, the fact finder is more likely to believe and to remember this testimony.142 This may create an unfair and unjust advantage for the client.143 The attorney’s obligation to promote only meritorious

137 Lubet, supra n. 29, at 42.
138 See Deborah Davis & William C. Follette, Foibles of Witness Memory for Traumatic/High Profile Events, 66 J. Air L. & Com. 1421, 1428 (2001) (“Notwithstanding the potential for error in memory, American courts rely extensively, and in some cases exclusively, on witnesses’ recollections to provide the ‘facts’ of the cases before them.”).
139 In case you have forgotten, it was “.393.” The Baseball Encyclopedia 323 (Macmillan 1984).
140 “A growing body of research shows that memory more closely resembles a synthesis of experiences than a replay of a videotape.” Elizabeth Loftus, Our Changeable Memories: Legal and Practical Implications, 4 Nat. Revs.: Neuroscience 231, 231 (2003); see also Frederick E. Chemay, Student Author, Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases, 45 La. L. Rev. 721, 724 (1985).
141 Loftus, supra n. 140, at 232.
142 Experimental studies and interviews have established that jurors place greater reliance on witnesses who provide much detail, even if the details are irrelevant to the subject of the testimony. Elizabeth F. Loftus & James M. Doyle, Eyewitness Testimony: Civil and Criminal 6–7 (2d ed., Michie Co. 1992); see also Richard C. Waites, Courtroom Psychology and Trial Advocacy 399, 400–401 (ALM Publ. 2003).
143 Larson, supra n. 6, at 181. “Stories are regarded as appealing to intuition and emotion, thus operating as a vehicle for ‘irrational means of persuasion.’ Although the dangers
causes, however, appears to permit that lawyers use rhetorical devices, such as those detailed in this Article, to present the strongest case for the client, subject, of course, to the lawyer’s reasonable belief that the witness’s statement of facts is true. In addition, resulting testimony may be challenged as inadmissible if it is irrelevant. As long as a description of a significant moment or a symbolic accessory makes the existence of a material fact more or less likely, a federal judge, following the Federal Rules of Evidence, should admit the testimony, provided that the testimony is not confusing, prejudicial, misleading, or dilatory. With that in mind, it should be noted that vivid visual imagery can interfere with analytic ability. An array of psychological tests have shown that visual imagery that is irrelevant to a logical inference may even impede reasoning and slow down comprehension.

144 See e.g. Model R. Prof. Conduct 3.1 (2004) (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. . . .”).

145 See Model R. Prof. Conduct 3.3 (Candor toward the Tribunal).

146 See e.g. Fed. R. Evid. 401 (Definition of “Relevant Evidence”: “Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

147 Fed. R. Evid. 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time) (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

Cases finding such prejudice tend to concern the admissibility of photos, rather than oral testimony. See e.g. LaRiccia 20 P.3d 342. In this case, the Utah Supreme Court refused to overturn a criminal conviction for murder, despite the screening to the jury of a videotape that showed the murdered victims, one an infant in a crib. The court held that the videotapes accurately presented facts, not “prejudicial conjectures designed to inflame a jury.” Id. at 369. In practice, courts generally allow admission of evidence unless it is “unduly” prejudicial. For an exhaustive listing and analysis of cases involving the exclusion of photos, see 29A Am. Jur. 2d Evidence §§ 961, 963 (2007). One poignant example of this is the Minnesota Supreme Court’s decision to permit the admission of a toy car (allegedly belonging to a murdered child), found in the defendant’s own car. See State v. Ture 632 N.W.2d 621, 630–631 (Minn. 2001). The defendant claimed that the prejudicial effect of admitting the toy car substantially outweighed its probative value. Id.

He argues that the toy must have had “a powerful effect on the jury” because “the incredibly sad events that befell William Huling” must have made them want to believe that it was William’s. This argument lacks merit. While it suggests that William Huling’s experience had a prejudicial effect on the jury, it says little if anything about the toy car’s prejudicial effect. Ture has offered no other basis on which we can conclude that the prejudicial effect of admitting evidence related to the toy car substantially outweighed its probative value. We therefore conclude that the district court did not abuse its discretion when it admitted evidence related to the toy car at trial. Id. at 631 (emphasis in original).


149 Id.
searchers have even concluded that presenting vivid details may impair a fact finder’s ability to think clearly and judge wisely. In addition, those qualities in a person that promote accurate memory may increase false memories for analogous events.\textsuperscript{150} Thus, the witness who tends to be the most accurate about an actual event is also the most likely to manufacture false memories of similar events.

The identification and presentation of vivid scenes and details can heighten the credibility of a client and the theory of the case. Given their power, they, like the hero’s talisman, should be used wisely and ethically.

**VIII. CONCLUSIONS**

The success of advocacy is based on the ability to convince a judge, jury, or other decision maker that our view of the facts, of the story, and of the law is the most probable. To do so, we must create an argument that resonates with the listener, that fits with his or her own world view. As J.B. White, the father of the Law and Literature movement, intones:

\textquote{Language has its roots not in ideas, but in social relations; and its deepest motives and meaning are social still. . . . To put it differently, our language is at the deepest level, the expression of a set of motives and gestures we share with all mammals; its radical meaning is social and relational. Who are we to each other? What place is there for me in your universe, or for you in mine?}\textsuperscript{151}

Showing the listener significant moments and obtuse objects that represent the heart of your position can convince them of the validity of your argument in ways that legal analysis and action-based narrative may not, reaching their hearts as well as their minds with an intuitive certainty of the truth. It is perhaps emblematic of the common law’s respect for equitable principles that metonymic devices, such as the significant moment and the obtuse object are respected.

Justice Holmes, quoted at the beginning of this Article, expressed an aversion for artists in the law. And yet, he admitted in one of his Supreme Court decisions, “many honest and sensible judgments . . . express an intuition experience which outruns

\textsuperscript{150} Harvey H.C. Marmurek & Melinda E. Hamilton, *Imagery Effects in False Recall and False Recognition*, J. Mental Imagery 83, 94 (Spring 2000).

analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth.\footnote{152}

Like perfume, the obtuse object, the significant moment, and other artistic devices should not drench the legal audience. They should be discreetly and innocently introduced into the legal narrative in the appropriate places. While it is hard to overlook attorney Johnny Cochran’s success with the jury in making an extra-large brown glove the centerpiece of the O.J. Simpson murder trial, lawyers are not granted “artistic license” to disregard the truth and paint pictures that lie. Ethics, professional responsibility, and morality demand more.

These codes cannot, however, deny advocates the use of significant moments or obtuse objects to generate conclusions that “out-run analysis.” Learning of a significant moment or an obtuse object produces a vicarious participation in the audience and opens access to empathetic understanding of the legal narrative.

Why do artists concentrate on capturing certain moments and particular details? Why should lawyers imitate artists? Beyond achieving greater effectiveness as advocates, the attorney gets the chance to share in and transmit flashes of consciousness as clients “self-remember”\footnote{153} the sights and sounds of a moment in the past. By absorbing that moment into one’s own consciousness, the indescribable wonder of life is revealed. Just as we tend to see more intensely our surroundings after a visit to an art exhibition, we can gain insights in seeing the world as it truly is by approaching clients’ stories as a painter would. “What exactly did you hear? What did you see?” Through these techniques, we perceive, not only the tiniest details of an isolated incident, but also the grandest designs of the universe.\footnote{154} The lawyer as artist may then “see

\footnote{152} Chi., Burlington & Quincy Ry. Co. v. Babcock, 204 U.S. 585, 598 (1907); see also Robert P. Burns, Notes on the Future of Evidence Law, 74 Temp. L. Rev. 69, 73 (2001); Larson, supra n. 6, at 184 (discussing the perceived dangers and benefits of intuitively persuasive legal stories).

\footnote{153} Russian mystic P.D. Ouspensky lamented that much of the time we go through life in wakeful sleep, our imaginative thoughts about the future, recollections about the past, and analytical self-talk rendering us oblivious to what is actually happening. Conscience: The Search for Truth 17–26 (Penguin 1988).

\footnote{154} Master jeweler and artist Robert Eberdorf sees attention to visual details and to the moment as a remedy for stress and depression. “As we get older our world gets bigger and the challenges get bigger. We are always worried about what we did wrong yesterday or thinking about what we have to do a week from now. But the gift of the day, the beauty of the day and the challenge of the day lies in the moment.” Nancy McGillicuddy, Artistic Gem, ECU E. J. 37 (Fall 2003).
the world as it really is—without values, judgments, or preconditions,\textsuperscript{155} while at the same time paradoxically seeing

\begin{quote}
\textit{a World in a Grain of Sand,}
\textit{And a Heaven in a Wild Flower,}
\textit{Hold[ing] Infinity in the palm of your hand,}
\textit{and Eternity in an hour.}\textsuperscript{156}
\end{quote}

\textsuperscript{155} Tom Brown, Jr., \textit{Tom Brown's Field Guide to Nature Observation and Tracking} 46 (Berkley Bks. 1983).

\textsuperscript{156} William Blake, \textit{Auguries of Innocence}, in \textit{The Portable Blake} 150 (Viking Press 1968).
APPENDIX A
ILLUSTRATIONS

Figure 1: Jean-Francois Millet, *The Angelus*, 1859, Musee d’Orsay, Paris

Figure 2: Van Gogh, *Old Shoes with Laces*, 1885, Van Gogh Museum, Amsterdam
Figure 3: Peter Paul Rubens, *The Descent from the Cross*, circa 1611, Courtland Institute Galleries, London.

I. INTRODUCTION

Ellen sat at her desk for a long time after the client left. The client’s case troubled Ellen deeply. She and her son needed legal help, immediately, and it had to be decisive. Margaret Rubin, her new client, had just been devastated by the loss of her life partner, and now the legal system was attempting to take her son away from her too.

Margaret and her partner, Francie Kohler, had been a committed couple for nearly ten years. Their relationship had been sanctified by an Episcopal priest. In October 2000, they entered a civil union in Vermont after that state adopted legislation permitting the union of gay and lesbian couples.

Margaret and Francie were devoted to each other and wanted what many married couples wanted: to nurture and raise a child. But the Legislature of Old York, the state where they lived, had adopted a statute twenty years ago prohibiting homosexuals from adopting children. They therefore decided to have a child through in vitro fertilization. When Francie gave birth to their son Johnnie in 2003, Margaret moved from a full-time position to a part-time position so she could stay home and raise Johnnie.
Now Francie was gone—killed in a car-pedestrian accident while she was on her lunch break in downtown Old York. And now Francie’s mother, who never approved of Francie’s relationship with Margaret, was asking the state to declare Johnnie a dependant child and place him in a foster home, arguing Margaret had no legal claim to guardianship and Old York Law did not permit Margaret to adopt Johnnie. Moreover, the Old York Supreme Court had, just last year, refused to recognize the validity of civil unions entered into in Vermont.

Margaret wanted to adopt Johnnie and continue raising him. To do so in Old York, Ellen needed to overturn the Old York adoption statute, which she knew would be difficult. After all, under standard equal protection analysis, the state would only need to prove the statute was rationally related to a legitimate state interest, and she knew that most statutes survived such scrutiny.

* * *

Ellen’s task in this fictional account is daunting. Courts tend to tread lightly when reviewing the constitutionality of legislation. Nevertheless, the mechanical application of Old York’s statutory law threatened to separate a mother from her child. How can Ellen make the human drama of her case overcome the formidable legal barriers that the legal doctrine had created?

Let’s be honest here. Many legal briefs, even those considered well written and logically presented, are dry. (Some might even say “boring.”) One possible reason for this is that most legal writ-

---

1 The story of Margaret Rubin and Johnnie Kohler is slightly modified from a moot court problem used by Indiana University—Indianapolis School of Law in its intramural moot court competition in the fall of 2004. The “record” of that case (as modified to suit my needs for this Article), containing various fictional depositions as well as the lower court’s opinion, can be found at Record of Proceedings, Rubin v. Old York County, Department of Social Services, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=998322. The complete appellate brief that I wrote based upon that record can be found at Brief of Petitioner, Rubin v. Old York County, Department of Social Services, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=998325. Excerpts from that brief are reproduced in this Article.

2 One appellate judge has characterized “[l]on, [b]oring [b]riefs” as one of the “seven sins” of appellate brief writing.” Harry Pregerson, The Seven Sins of Appellate Brief Writing and Other Transgressions, 34 UCLA L. Rev. 431, 431–433 (1986); see also Philip Kissam, Law School Examinations, 42 Vand. L. Rev. 433, 477–478 (1989) (arguing the boring, “heav-
ers learn to write using the IRAC\(^3\) paradigm (or one of its related brethren, such as CRAC,\(^4\) CRuPAC,\(^5\) TREAT,\(^6\) CREXAC,\(^7\) and similar formulations).\(^8\) The paradigm is, of course, a very useful tool for constructing a legal proof, and it is welcome relief for struggling first-year students because it feels like an “answer” in a year of study that is otherwise nothing but questions.

The problem with IRAC, however, is that it doesn’t have much room for people.

Think about this. “I” refers to the legal issue under consideration. No people in there.\(^9\) The same goes for “R,” the rule, which refers to the legal concepts and theories that will guide the court in reaching a decision. “A” has a bit of promise, if you take “A” to mean application, but even then, people are just objects upon which the rule operates. And if you take “A” to mean analysis, that is just more processing of the legal rule. The “C,” or conclusion, is then just the legal conclusion that flows logically from the previous pieces.\(^10\)


\(^{5}\) Neumann, *supra* n. 4, at 101.


\(^{8}\) See Brian Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 Rutgers L.J. 459, 462–463 (2001) (“Facts sections are not taught with the rigorous attention used in teaching argument sections. Most likely, this is because law schools are structured around teaching legal analysis, teaching students to look at cases, facts, and arguments coldly. Legal writing courses have followed suit.”); see also Philip N. Meyer, *Vignettes from a Narrative Primer*, 12 Leg. Writing 229, 229 (2006) (“It may appear initially that paradigmatic forms of legal reasoning ‘tame’ narrative and bring narrative impulses under control, translating and reshaping the story for purposes of argumentation.” (Footnote omitted)).

\(^{9}\) It is, of course, possible to construct an issue statement based upon the factual dispute before the court; that would include the people invested in the dispute. But many appellate brief writers believe the appellate court is only interested in the law, so they only state the legal issue without setting it in the relevant factual context.

\(^{10}\) Or, as Judge Kozinski colorfully put it: “There is a quaint notion out there that facts don’t matter on appeal—that’s where you argue about the law; facts are for sissies and trial courts. The truth is much different. The law doesn’t matter a bit, except as it applies to a particular set of facts.” Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. Rev. 325, 330 (empha-
Law, law, law. Where did all the people go in this process? Law, and the legal system, should be about people. It decides disputes between people and provides people with neutral rules for conduct in civilized society. It is a tool to enrich and order peoples’ lives. So why do legal briefs focus so much on the abstract law and overlook the people?\textsuperscript{11}

The premise for this Article is that legal writing need not be—nay, \textit{should} not be—boring. When we write legal briefs to a court, we are trying to resolve some human conflict. That’s inherently interesting stuff. People like to hear about what other people are doing, or what has happened to them. If something bad has happened, many people want to help out in some way. It is human nature to feel empathy for somebody caught up in a conflict, and to want the conflict to be resolved.

Yet slavish adherence to the IRAC paradigm can suck the life right out of these conflicts.\textsuperscript{12} Lawyers learn in the first year of law school to break the problem into abstract little pieces, apply a set of legal principles to them, and reason out the answer in a logical way. And IRAC, being almost all about the law, is a great tool for doing just that.

I contend that a persuasive appellate brief should bring people—the client (whether human or institutional)—more conspicuously into the picture. I am not suggesting that brief writers can, or should, disregard the law or abandon the logic of their case in favor of making a purely emotional appeal. But I am suggesting that when we write about our clients’ conflicts, in an effort to resolve them, we need to keep the clients in the story. We can do this by weaving a thread of narrative reasoning into the logical, or legal, argument.


\textsuperscript{12} Another way of saying this is that over-reliance on \textit{rule-based reasoning}, and neglecting other forms of reasoning, creates a risk that the human aspects of the case will be overlooked. Professor Edwards has described what she calls different “strands” of legal reasoning, including rule-based reasoning, analogical reasoning, policy-based reasoning, consensual normative reasoning, and narrative reasoning. Linda Holdeman Edwards, \textit{The Convergence of Analogical and Dialectic Imaginations in Legal Discourse}, 20 Leg. Studies Forum 1, 9–10 (1996); \textit{see also infra} sec. III(A) (specifically the discussion on pages 138–139).
Trial lawyers have known this for a long time. To succeed before a jury, a trial lawyer usually needs to get the jury to empathize with their client’s perspectives. Having favorable law helps, but having favorable facts is always a better bet. Trial lawyers know that they have to tell their client’s story to the jury, and the story has to resonate with the jury.

Shouldn’t appellate lawyers do the same thing? If we think of appellate briefs as stories instead of pieces of technical writing, would they be more interesting and therefore more persuasive? A good novel, or a good movie, can inspire the audience. Even well-written non-fiction can do the same. If we study how these writers inspire us, perhaps we can transfer those techniques to our own writing.

Fortunately, literary scholars have studied these techniques and have developed a vocabulary for describing ones used by fiction writers to move and to inspire their readers. Legal writers can usefully employ these concepts to move and inspire their own readers: the judges and courts that must act upon the written words and render just decisions.

Many legal writers are already doing this, perhaps unconsciously and without identifying it as “storytelling.” I submit that paying closer attention to the elements of narrative can help an appellate brief writer produce a far more compelling, and thus persuasive, work. But note that “storytelling” is not limited to writing a compelling fact section of the brief. Rather, an essential element of a compelling story is a strong plot line in which conflict is revealed, the protagonist struggles to

---


14 See e.g. Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 Clin. L. Rev. 1, 4–9 (2005) (providing a number of reasons narrative technique is important in litigation and stating that juries are particularly persuaded by the technique).


16 See Meyer, *supra* n. 8, at 231 ("[N]arrative persuasion in advocacy is not limited to the Statement of the Case. Narratives often shape the choice of issues and the internal organizational structure of effective arguments.").
resolve the conflict, and the protagonist ultimately succeeds. Thus, the plot line is necessarily contained within the argument section because it is only there the conflict can reach resolution (an essential element of a satisfying story).17

I do not contend that IRAC and its brethren are inherently bad. IRAC clearly has a place in legal writing; it is a very useful tool for explaining and examining logical pieces of the legal puzzle that every case presents. But its utility is limited to small-scale organization and legal reasoning; when used to create the superstructure of a brief, it can lead to formulaic writing devoid of the personal stories that form the conflict being presented to the court. In short, IRAC is a building block—merely one type of material that a writer can use to construct a solid brief. My premise here is that what the writer builds with those blocks, the client’s story, should be organized as a narrative.

II. WHAT DO APPELLATE JUDGES SAY THEY WANT?

The first step in crafting a persuasive argument is to analyze and understand the audience. In the case of an appellate brief writer, this task is daunting, especially when writing a brief for an intermediate appellate court that sits in randomly assigned panels. At the time she writes her brief, a lawyer almost never knows which judges will be on the panel; often she will not know the panel until shortly before, or even the day of, oral argument.

Since a lawyer usually cannot know the specific judges who will be reading her brief, she can only rely on what characteristics appellate judges commonly say they would like to see. But what do appellate judges say they want in a brief? Is narrative a good vehicle for delivering that information? After considering these questions, we will return to Ellen’s story and see how she puzzles this out.

Judge Ruggero J. Aldisert, a senior judge of the United States Court of Appeals for the Third Circuit, has written extensively on judicial opinion writing as well as appellate brief writing. He has spoken with many of his colleagues on the federal and state appellate benches and has asked them what mistakes they see most often in appellate briefs. While he does not provide statistics as to which problems are perceived most often, he has listed the follow-

---

17 Foley & Robbins, supra n. 8, at 478 (recognizing an effectively written fact section may end with the protagonist in peril, awaiting the judge’s intervention to produce a satisfying conclusion); Philip N. Meyer, Retelling the Darkest Story: Mystery, Suspense, and Detectives in a Brief Written on Behalf of a Condemned Inmate, 58 Mercer L. Rev. 665, 707–709 (2007).
ing items that judges generally perceive as problems: substantive errors (including things like misrepresented facts and case holdings and citing cases that have been overruled); errors in persuasion (including too many issues or points); and writing mechanics (including verbosity, lack of organization, excessive citations, typographical errors, and grammatical mistakes).\(^\text{18}\)

Finally, Judge Aldisert also reports that he, and many of his colleagues, commonly observe what I would describe as a failure to tell a good story. Judge Aldisert’s list includes things like: “rudderless; no central theme(s)”; “failure to disclose the equitable heart of the appeal and the legal problem involved”; “lack of focus”; and “uninteresting and irrelevant fact statements.”\(^\text{19}\) Each of these problems could be corrected if the brief writer fully identifies, and enunciates, the narrative at the heart of each case.

Recently, Brian Garner surveyed more than 100 state and federal judges.\(^\text{20}\) He asked them whether they preferred a brief written as “an essay with a clear train of thought” or a brief written as “a repository of all the information that a curious judge might want to know about.”\(^\text{21}\) Of the 57 responses, he reports that 49 judges (86%) preferred the first formulation, none preferred the second, while 8 (14%) said neither model was quite right.\(^\text{22}\) If one thinks of the “clear train of thought” as the “plot line,” the narrative form of brief writing might be what the judges in Garner’s survey are looking for.\(^\text{23}\)

* * *

Ellen knew Old York was a fairly conservative state. Worse still, in the last twenty-five years, it had become a “battleground”

---

\(^{18}\) This list is condensed from a longer list of common errors found in Aldisert, supra n. 10, at 25–27.

\(^{19}\) Id.


\(^{21}\) Id. at 2.

\(^{22}\) Id. at 3.

\(^{23}\) Professor Kristen Robbins has surveyed more than 350 federal judges for their opinion of the overall quality of the legal briefs submitted to them by practicing lawyers. The survey asked judges to rate the quality of legal writing in the areas of “analysis, organization, tone, style, and mechanics.” Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think about the Way Lawyers Write*, 8 Leg. Writing 257, 260 (2002). She found that federal judges (both trial and appellate) believe that many lawyers generally are good at correctly identifying the legal issues, but they often fail to make the best arguments in support of their clients’ positions; they also often fail to adequately refute opposing arguments. Id. at 267. Professor Robbins’s survey focused almost exclusively on the logical strand of legal arguments; thus, it provides little guidance as to the persuasive power of storytelling in legal argumentation.
in the culture wars. In recent elections, the Old York Chamber of Commerce had allied itself with conservative religious groups and secured the election of three conservative justices to the Old York Supreme Court, each of whom campaigned on a “family values” platform. That court now had a marked rightward tilt. Although the court had not considered any major gay rights cases in the past ten years, Ellen feared that Margaret’s case could trigger an anti-gay backlash, not only with the public but also among the members of the court.

She needed to find a way to turn the case into something other than a gay rights case.

III. THE TOOLS OF THE TRADE

Fiction writing is not so different from brief writing. An author of a fictional work certainly has more freedom because she can create facts and scenarios to suit her narrative objectives. But good fiction and good appellate briefs share several traits:

- Both are plausible.
- Both are readable.
- Most importantly, both evoke an emotional response from the reader.\(^\text{24}\)

The latter point may seem controversial at first. Appellate judges pride themselves on deciding cases on the basis of neutral principles, dispassionately understood and evenly (and logically) applied.\(^\text{25}\) We certainly do not want judges deciding cases based on emotion . . . do we?\(^\text{26}\)

---

\(^{24}\)Any similarity of these three concepts to Aristotle’s classic three types of persuasive appeals (logos, ethos, and pathos) is strictly intentional.


\(^{26}\)Professor Johansen has suggested that, in fact, we might. While most lawyers understand that emotions can strongly influence judges and juries, many also view analytical reasoning as a more legitimate approach to legal problem solving. Because stories tend to emphasize emotions over analytical reasoning, some scholars question the appropriateness of storytelling in some legal contexts. However, when used properly, stories can enhance, rather than conflict with, analytical reasoning and are appropriate decisionmaking tools.

Steven J. Johansen, This Is Not the Whole Truth: The Ethics of Telling Stories to Clients, 38 Ariz. St. L.J. 961, 962 (2006) (footnotes omitted). Other scholars concur. Professor Hender-
I suggest that an appellate brief writer who overlooks the emotional appeal of her case does so at her client’s great peril.27 Certainly a purely emotional appeal is insufficient if it is not also grounded in the law and in logic.28 No matter how much a judge might sympathize with an injured plaintiff, if the law does not support recovery, recovery must be denied. But judges are people too, and a good story can have an impact on the court, especially if the rule of law (or its application) is ambiguous or unclear.29 As Linda Edwards has noted, “[l]egal reasoning is incomplete without the soil of narrative from which the reasoning grows and to which

son has noted that

a judge may react to the pain and anguish caused actual human beings by a given law or doctrine, but she will seldom point to the painful or existential consequences of that law as reason to change it. This is because the ideological structures of legal discourse and cognition blocks affective and phenomenological argument: The “normal” discourse of law disallows the language of emotion and experience. The avoidance of emotion, affect, and experiential understanding reflects an impoverished view of reason and understanding—one that focuses on cognition in its most reductionist sense. This impoverished view stems from a belief that reason and emotion are separate, that reason can and must restrain emotion, that law-as-reason can and must order, rationalize, and control.

Henderson, supra 11, at 1575–1576 (footnotes omitted; emphasis in original). Professor Neumann writes,

[a] persuasive theory is a view of the facts and the law “intertwined together” that justifies a decision in the client’s favor and motivates a court to make that decision. A persuasive theory “explains not only what happened but also why” through a compelling story that “has both rational and psychological appeal” and this is “persuasive both to the mind and to the heart.”

Neumann, supra n. 4, at 305 (quoting David Binder & Paul Bergman, Fact Investigation: From Hypothesis to Proof 140, 184 (West 1984)); see also Fontham et al., supra n. 4, at 27 (“The brief should capture the human side of the case, describe the actors, and evoke sympathy for their concerns. . . . Properly presented, a mixture of the human element and legal theory is intriguing.”).

27 “Although lawyers are trained to value logos over pathos, juries and clients are not. Thus, a litigator who relies solely on analytical reasoning may fail to persuade non-lawyers as effectively as one who incorporates pathos into her strategies.” Johansen, supra n. 26, at 980. One could argue that appellate judges, who are lawyers trained to value logos over pathos, may be more receptive to logos-based appeals than most juries and clients. However, I am not suggesting in this Article that lawyers abandon the appeal to logos; rather, I suggest that lawyers leaven the necessary logical appeal with a healthy and well-presented dose of pathos.

28 Meyer, supra n. 8, at 230 (“Narrative persuasion in the law is obviously not unbounded storytelling; narratives are constrained by and shaped to fit legal rules, legal cultural assumptions, and the conventions of legal writing practice.”); see also Smith, supra n. 25. Professor Smith recognizes, however, the power of a good narrative as a way to reinforce the rule-based argument: “When a legal writer must communicate rule-based analysis, the writer, knowing the cognitive limitations of the human mind, should consider supplementing a statement of the general rule with a narrative that illustrates how the rule operated in a precedent case.” Smith, supra n. 25, at 261.

29 Professor Smith surveyed cognitive science literature and concluded that “humans understand concepts expressed in the form of ‘stories’ or ‘narratives’ better than they understand concepts explained as abstract principles.” Id. at 259. This is because “human beings learn by interacting with and experiencing the world around them. . . . A person is basically the protagonist in the story that is his or her own life.” Id. at 260.
it will return.\footnote{Edwards, supra n. 12, at 50. Professor Edwards also makes the point that “[r]ules are not narratives, but they are in significant part codified explications of the points of narratives, some of which are explicit and some of which form a silent sub-text of legal doctrine.” \textit{Id.} at 22. She concludes that “narrative reasoning and other forms of legal reasoning must function together, complementing and constraining each other . . . . The process of jurisgenesis arises from both dialectic and analogical processes in order that law may play its role in human living, which is likewise both dialectic and analogical.” \textit{Id.} at 28. Or, putting it more simply, “[r]ules restrain narratives; narratives restrain rules. Each needs the insight of the other.” \textit{Id.} at 9.} She suggests that when deciding cases courts do engage in “narrative reasoning” (reasoning that “evaluates a litigant’s story against cultural narratives and the moral values and themes these narratives encode”).\footnote{\textit{Id.} at 13–17. She gives the example of the case \textit{Marsh v. Chambers}, 463 U.S. 783 (1983), in which the United States Supreme Court upheld the practice of the Nebraska legislature in opening its sessions with a non-denominational prayer offered by a state-paid chaplain. She shows how the Court “reasoned directly from the facts of the narrative in precisely the way one would expect it to reason from a rule.” \textit{Id.} at 18–19.} Many times, judges supplement rule-based or analogical reasoning with narrative reasoning, but sometimes the only type of analysis a judge provides is the narrative reasoning.\footnote{Robert P. Burns, \textit{Studying Evidence Law in the Context of Trial Practices}, 50 St. Louis U. L.J. 1155, 1171 (2006); see also J. Christopher Rideout, \textit{Storytelling, Narrative Rationality, and Legal Persuasion}, 14 Leg. Writing 53 (2008). Professor Neumann, in his excellent legal writing text, alludes to this concept in different terminology. He argues that a well-written brief should include both motivating arguments (i.e., arguments that make a judge want to rule a certain way) and justifying arguments (i.e., the legal rules that permit the judge to rule in that way). Neumann, \textit{ supra} n. 4, at 319–323.}

Robert Burns has also observed that, in a different persuasive context (the trial), lawyers can construct their case from a double helix of norms. One of those strands is constituted by the law of rules. The other strand is constituted by the norms that find their natural home within the life-world of the judge and jury. These common sense norms are embedded primarily in the different sorts of narratives that the trial lawyer may employ at trial, from the fully characterized storytelling of the opening statement to the more Spartan narratives of direct examination.\footnote{See generally Michael R. Smith, \textit{Rhetoric Theory and Legal Writing: An Annotated Bibliography}, 3 J. ALWD 129 (2006).}

In this sense, the dual strands of rule-based reasoning and narrative-based reasoning form the DNA of persuasion.

Scholars have examined the topic of narrative in the law, especially in legal writing, from a variety of different perspectives. Some scholars have analyzed court decisions and applied the tools of the literary critic to consider the stories that lie at the heart of
those decisions. Others have observed the ways in which voices on the margins of the law or the legal system have used narrative techniques to change the story and effect reform. I will not re-plow this already fertile field. However, I will explain how brief writers can put these concepts into action.

Fiction writers use a literary tool kit to construct stories that are plausible, readable, and emotionally satisfying. The kit contains at least the following elements: setting, conflict, character, point of view, theme, and plot.

Appellate brief writers, like Ellen, can use these tools too.

* * *

As Ellen expected, the trial court ruled against Margaret. Before the hearing, Margaret applied to adopt Johnnie, but the county office of children and youth denied the petition because of the state law barring gays and lesbians from adopting children. The judge who heard Margaret’s appeal of the county’s decision was well known to the local bar as a very conservative judge. He frequently opined that the courts’ role was limited and that judges should apply the law, not make law.

Ellen had tried three different arguments: a claim that the statute was unconstitutional under the substantive component of the Due Process Clause; a claim that the statute was unconstitutional under the Equal Protection Clause; and a claim that the court should recognize Margaret’s and Francie’s civil union in Vermont under the Full Faith and Credit Clause, thus rendering Johnnie legally her child. The court rejected them all. The court summarily dismissed the Full Faith and Credit Clause argument, citing a decision last year by the Old York Supreme Court that rejected the same argument in a case involving the attempted dissolution of a Vermont civil union by a couple now residing in Old York. The court rejected the substantive due process claim because the court was “not prepared to declare the existence of new rights not found in the express language of the Constitution.” Ellen also ran into the same brick wall with her Equal Protection argument; the court curtly wrote that it would “not find a new suspect or qua-

---


37 See Robbins, supra n. 13, at 772 (“Within the legal framework, a story has a few key elements: character, point of view, conflict, resolution, organization, and description.”).
si-suspect classification where the United States Supreme Court had not.”

Most depressingly, the court hardly mentioned Johnnie or Margaret, except in the Order granting the state’s motion and directing the county’s child welfare office to place Johnnie in foster care pending his adoption by a heterosexual couple or individual. Fortunately, the judge stayed the effect of his opinion until Ellen could file an appeal with the Old York Court of Appeals.

Ellen knew she had to present an appealing story to the Court of Appeals.

* * *

Let’s examine each of the narrative tools that Ellen can use to construct her brief.\(^{38}\)

**A. Setting**

In fiction writing, “setting” refers to the characteristics of the time and place in which the story takes place. The author can “set” the story in a different time (the “historical” or “social” setting) or a different locale (the “physical” setting). The writer must explain both types of settings to the reader in sufficient detail so the reader can visualize the action, and understand what happens, in the correct context. The fiction writer will describe all the features of both the social and physical settings that are important to the plot, or which help the reader understand what is going on. But the writer must not include too many irrelevant details, for fear of losing the reader’s attention.

In persuasive legal writing, there are also at least two different types of “settings” that the reader needs to understand: the “factual” setting and the “legal” setting. The “factual” setting is the background information about the factual dispute between the parties. We can refer to these as the “legally relevant facts” and the “helpful background detail” that aids the reader’s understanding of why and how the dispute occurred. Readers want writers to exclude “distracting detail” just as much as the fiction writer wants to avoid too much distracting detail. The factual setting compares to the “physical” setting of a work of fiction.

\(^{38}\)Note that some of the elements overlap; for example, the elements of “character” and “point of view” are closely related. For the sake of clarity, however, we will examine each separately.
The “legal” setting is equally important: what is the governing law that will resolve the legal issue? What is the relevant rule of law? What are the helpful “background” rules? Sometimes these rules are familiar and easily understood, and therefore do not require a great deal of explanation (the standard of review, for example); other times the rules are so murky that the writer must describe and explain those rules in detail. The legal setting is comparable to the historical or social setting in fiction.

In fiction, as in legal writing, the setting is immutable. It consists of hard, external facts that the writer cannot change. Of course, to a greater or lesser extent (depending upon the genre) the fiction writer can make up the setting, but once the author sets the story in a major metropolitan area, for example, the story is limited by the constraints of having large buildings, traffic, large crowds of people, and other attributes found in that setting. In appellate briefs, the proven facts (the record) limit the author’s description of the factual setting, while the author’s description of the legal setting is bound by the case law, statutes, regulations, legal doctrines, and other aspects of “the law.”

The lawyer’s craft, just like the fiction writer’s, lies in how the lawyer describes the setting. The setting binds the authors of both the appellant’s and the appellee’s briefs, yet both authors are attempting to tell stories that are fundamentally opposed to each other. As a result, each author must carefully select which details to call to the reader’s attention and arrange them to evoke the response that the author wants. For example, in a novel, a vacant building might be portrayed as a safe haven, a place for the protagonist to escape from pursuers. The same building could be portrayed as a fire hazard, or a refuge for the antagonists; a place the protagonist should avoid.

Because the setting is immutable, the writer cannot ignore aspects that impede the protagonist’s journey. In fiction, for example, if the author describes a river and the protagonist needs to cross the river, the author must provide a boat, a bridge, or some other means to enable the protagonist to overcome that barrier. Likewise in legal writing, a lawyer cannot ignore adverse authority; the lawyer must distinguish it, argue that it is not controlling, or provide another legal theory that supersedes the adverse authority.

*   *   *

The factual setting in Ellen’s case was easy. Margaret’s relationship with and commitment to Francie Kohler was undisputed and well-documented in the record. Likewise, her love for her son
was undeniable; even the caseworker who performed the home study admitted that Johnnie was in a safe and loving environment and appeared to be quite attached to Margaret.

The legal setting, however, was more problematic. Margaret clearly had legal barriers standing in her way, chief among them the Old York adoption law. The likelihood that the court would analyze the law using a rational basis analysis was a significant legal barrier that Margaret would have to address. Ellen could encourage the court to scrutinize the statute strictly, but her chances of success with that argument were not good. She would also need to argue that the prohibition failed even lesser scrutiny.

B. Conflict

In literature, the “conflict” is the fuel that drives the story. Conflict creates interest. In literature, writers often describe conflicts using broad categories, such as “person vs. person,” “person vs. nature,” “person vs. society,” and so forth. Conflicts are interesting; the reader wants to understand why the conflict exists and how it can be resolved so the reader can return to a satisfying state of tranquility by the end of the story. If there are multiple conflicts, the reader wants them all resolved.

The presence of conflict in persuasive writing is, of course, obvious. There are usually two distinct types of conflicts: the factual conflict (the dispute that caused the parties to bring the case to the attention of the court), and the legal conflict (i.e., the legal issue). In persuasive writing, as in literature, conflict drives the writing. The reader wants to know how the conflict arose and how it can be, or should be, resolved.

Lawyers, like fiction writers, also describe conflicts using broad categories. The substantive law provides the lawyer with tools for converting factual conflicts into legal issues. For example, in an automobile accident, the factual conflict requires a description of the circumstances that caused the two vehicles to collide. The lawyer then labels the legal conflict as a “negligence” case and, through legal research, determines how the courts resolved similar negligence cases. In literary parlance, “negligence” would be a form of a “person vs. person” conflict. Other common person vs. person conflicts might be called “defamation,” “breach of con-

39 Foley and Robbins describe the “famous list” of possible conflicts as including “man against man,” “man against self,” “man against nature,” “man against society,” “man against machine,” “man against God,” and “God against everybody.” Foley & Robbins, supra n. 8, at 469; see also Janet Burroway & Elizabeth Stuckey-French, Writing Fiction: A Guide to Narrative Craft 263 (7th ed., Pearson Longman 2007).
tract,” etc. A genre of “person vs. society” conflict would, in legal terminology, be called “crime.”

In an appellate brief the court is bound to the facts found by the trial court, and the court very rarely decides matters related to the factual conflict; instead, the appellate court resolves the legal conflict. However, the factual conflict remains relevant. Indeed, if the appellate court senses that the lower court resolved the factual conflict incorrectly, then one would expect the chances of success on appeal to be measurably greater.\footnote{See discussion, supra n. 13.}

* * *

Ellen had several options for framing the conflict in her case. One possibility was “person vs. person” since this dispute had arisen when Stella Kohler, Francie’s mother, asked the county’s children’s service agency to declare Johnnie a dependent child. But that conflict seemed too personal and fact-bound to attract the attention of the appellate court; framing the issue as Margaret vs. Stella seemed like Margaret was asking the court to settle a private family dispute. Ellen decided that “person v. society” would be a more compelling legal conflict. Society, through the legislature, had declared that homosexuals had fewer rights than heterosexuals. Ellen thought that she might prevail if she conveyed the personal disaster that the legislature’s unilateral and sweeping choice would cause in the lives of Margaret and Johnnie.

C. Character

In most forms of narrative literature, character development is central to the story. Readers quickly spot the protagonists: people or institutions that the writer wants the reader to care about, to root for. Antagonists are also easy to spot. By portraying characters positively or negatively, the author creates sympathies for protagonists and against antagonists. A skillful fiction writer, of course, is not heavy-handed with character development. If the writer is too obvious, the reader will see what the writer is doing and feel manipulated; or the reader will simply not believe what she is reading because the story is too simplistic or unrealistic. Rather, the skillful writer will provide proof of each character's true nature by piling detail upon objective detail, arranged carefully to evoke the emotional response in the reader that the writer
wants to create.\footnote{See e.g. Burroway & French, supra n. 39, at ch. 2; Orson Scott Card, Elements of Fiction Writing: Character & Viewpoint (Writer’s Dig. Bks. 1988).} Moreover, a well-developed character in a work of fiction is one that a reader can believe in: neither purely good nor purely evil, but essentially human.

Legal writers are starting to recognize the power of character development in representing clients. Ruth Anne Robbins suggests that lawyers should portray their clients in archetypal hero roles.\footnote{Robbins, supra n. 13, at 775–782.} She argues that “casting” a client as a hero can help the lawyer portray the client as a real and complete person; a person who needs the court’s assistance. All heroes have a “quest” as well as a “fear,” and they must overcome obstacles in pursuit of the quest. By assigning the client the role of “hero,” the lawyer (the “narrator”) can assign the court the role of “mentor,” which she describes as “a former hero who now serves as the sage advice-giver to the next hero.”\footnote{Id. at 782.}

If, as I suggested at the outset, many brief writers overlook the emotional content of the case in favor of more rational, legalistic argumentation, that is probably true because the brief writer failed to fully understand, and convey to the reader, the client’s character. There may be several reasons why a brief writer might fail to fully develop the characters who inhabit the controversy. For example, in many jurisdictions, the appellate court rules that require the statement of the case to be presented in a balanced fashion, or without argument, or some other formulation of that concept.\footnote{For example, the Pennsylvania Rules of Appellate Procedure provide, “The statement of the case shall not contain any argument. It is the responsibility of appellant to present in the statement of the case a balanced presentation of the history of the proceedings and the respective contentions of the parties.” Pa. R. App. P. 2117(b). Oregon requires “[a] concise summary, without argument, of all the facts of the case material to determination of the appeal.” Or. R. App. P. 5.40(8).}

Failure to fully develop the characters in the brief might also be a result of inattention. We preach brevity in writing, and spend so much time on teaching legal analysis that we lose sight of the bigger picture: why did the parties act as they did? What was their motivation? Does that motivation make sense at a human, emotional level? Are their motivations emotionally appealing? Should the litigants be allowed to behave in such manners? Do they deserve punishment for their actions? Should the court want to assist one or more of the characters because what happened to them is unfair?
Finally, inattention to the element of character may be the result of the IRAC paradigm and the tendency of brief writers to focus primarily on rule-based reasoning to the exclusion of other forms of reasoning. As Steve Johansen has noted, “[m]ost lawyers are trained to persuade by logos.”\textsuperscript{45} Indeed, most legal writing texts deal explicitly with rule-based reasoning and spend a great deal of time in explaining the IRAC paradigm and its brethren.\textsuperscript{46} All of these paradigms include an R for “Rule,” and thus (if adhered to uncritically) they seem to preclude other forms of reasoning, including the pathos-based form of narrative reasoning.

But “character” is inherently a pathos-based concept. The brief writer wants the court to identify her client as the protagonist of the story. That is to say, the writer wants the court to sympathize with her client so that the court is more likely to rule in the client’s favor. Thus, if the brief writer can successfully, but subtly, identify her client as the protagonist, and the opposing party or parties as antagonists, she will have created a reason for the court to want to rule in her client’s favor. This is a major step toward persuading the court to actually rule in her client’s favor.

* * *

Ellen had several choices to make here. The easier choice was to choose a protagonist. She quickly decided her protagonist was the family unit comprised of Margaret and Johnnie. She chose to do this instead of portraying Margaret and Johnnie as separate, co-protagonists in an effort to avoid a possible counter-story that the state might offer: that one protagonist (Margaret) might be manipulating or exploiting the other co-protagonist (Johnnie) for selfish or immoral purposes. Emphasizing the family unit, however, held out the prospect of defusing the moral objections that the state might raise. The social conservatives who lobbied for, and won the adoption of, the anti-gay adoption measure liked to trumpet themselves as “family values” activists. How could they justify tearing apart a family in the name of preserving “family values?”

The second choice was more difficult: whom should she portray as the principal antagonist? She had several options here. She could portray the state, or the legislature that enacted the statute, as the antagonist. Or she could lower her sights and portray the local county office of children’s services as the villain. She could also portray Francie’s mother, Stella Kohler, as the antagonist;
after all, Stella’s antipathy toward Margaret had prompted Stella to seek a declaration that Johnnie was a dependent child.

Ellen decided to focus her attention on the county children’s services agency. The state was too large a target, and Ellen did not like the image of the David vs. Goliath conflict that emerged. As romantically appealing as that kind of struggle might be in fiction, in the real world David lost most of the time. Likewise, making this a personal battle between Margaret and Stella made the debate sound too much like a battle of spite between two people who intensely disliked each other, neither of whom had Johnnie’s interests truly at heart. But the county agency was supposed to protect children. Ellen concluded that the path to success lay in showing how the county agency’s action would actually disrupt a healthy and loving family, contrary to its stated mission.

D. Point of View/Voice

The fiction writer has a choice of voices and points of view. She may write in the first person or the third; she may choose to be an omniscient narrator who knows all and sees all, or she may choose a more limited narrator who only sees things from the protagonist’s point of view.

The brief writer, however, must write in the third person; the story is about the client and the client alone. Any attempt to use the first person will inject the lawyer into the controversy in a personal way and cause a loss of credibility. And the limited perspective of telling the story from the client’s point of view is essential. A legal writer who attempts to tell the opponent’s story would lack credibility; how would the writer know how the opposing party perceives things? What does she really know about what made the other party act as he, or it, did? An attempt to tell the story from the opposing side’s point of view would look contrived and, therefore lack persuasive punch.

But it is still important for the legal writer to think carefully about point of view. Every contested matter contains several possible stories. Opposing counsel will certainly attempt to get the court to see the case from their client’s point of view. If the lawyer can paint a much more credible and sympathetic picture for the court, then she will have the upper hand in persuading the court.

* * *

47 See Edwards, supra n. 12, at 29–31; see generally Johansen, supra n. 26.
Ellen saw that selecting the family unit as the protagonist of her story presented some challenges. There were two members of that family unit, but one of them was legally incompetent to express himself. Still, Johnnie’s point of view was perhaps the most compelling, and most persuasive, of all. He was probably unaware of the legal controversy that was brewing around him and that threatened to remove him from Margaret, the mother who had raised him from birth. He was already traumatized by the loss of his other mother, Francie. If Ellen could get the court to imagine what it might be like for Johnnie to be removed from the home where he was comfortable and loved and well cared for, and to be placed in a temporary foster home with strangers, Ellen knew that she would have a powerful story to tell.

E. Theme

Theme is another element that most brief writers consciously think about. In literature, we might ask what is the “moral of the story?” What lesson(s) do you want the reader to learn from your writing? At a most basic level, what is the story “about?”

An appellate brief writer will ask what “bottom line” point she is trying to prove? Why is her client’s cause just, or why is the other side’s cause unjust? Most texts on persuasive writing spend a great deal of time discussing how to develop a theme, or theory, of the brief. Judge Aldisert’s text makes this point by going to the experts: skilled appellate practitioners and appellate court judges. He quotes Patricia M. Wald, Chief Judge Emeritus of the United States Court of Appeals for the District of Columbia Circuit:

Visualize the whole before you begin. What overriding message is the document going to convey? What facts are essential to the argument? How does the argument take off from the facts? How do different arguments blend together? Better still, if it’s a brief, visualize the way the judge’s opinion should read if it goes your way. (Too many briefs read as if the paralegal summed up

48 Or at least they should think about it. One recent survey of legal writing professors, judges, and practitioners found that “lack of focus” and “failure to develop overall theme or theory of case” were the two most common errors found in legal memo writing. Susan Kosse & David ButleRitchie, How Judges, Practitioners and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study, 53 J. Leg. Educ. 80, 85 (2003).
49 See e.g. Beazley, supra n. 7, at 37–38; Calleros, supra n. 3, at 326–327; Fontham et al., supra n. 4, at 4–9; Neumann, supra n. 4, at 305–310.
all conceivably relevant facts, and then the lawyer took over with the legal arguments, and never the twain doth meet.)

* * *

Ellen knew she had to choose her theme carefully. If she chose too broad a theme, she risked alienating the more conservative judges who might come to hear her case. Thus, a “gay rights” theme could polarize the judges, especially on the ever-more-conservative Old York Supreme Court; it also left Johnnie’s rights out of the picture. She therefore chose as her theme the concept that over-generalizations can create terrible injustice in specific cases. In particular, in this case the over-generalization that gays and lesbians are unfit parents posed a huge risk to the emotional well-being of a vulnerable three-year-old child.

F. Plot

The brief writer can use all of the preceding elements to give the reader (the court) the reasons to favor her client. But that is not the entire process of persuasion. In addition to giving the court a reason to want to rule in favor of the brief writer’s client, the author also must show the court how it is legally permissible to do so. This is where the element of plot fits nicely.

The plot line is the glue that holds all of the elements together. To mix metaphors, it is the superstructure of the building: the foundation, posts, girders, and beams that carry the weight and give the building shape. If you want to build a solid, persuasive brief, you need to craft a strong plot line, sufficient to carry the elements of character, conflict, and theme.

Literary critics have studied plots for years. These principles also work well by analogy in persuasive legal writing. The five stages of plot development are generally described as introduction/exposition, complicating incident/rising action, climax, resolution/falling action, and denouement. This trajectory also describes a well-organized legal brief.

---

50 Aldisert, supra n. 10, at 197.
51 Jill Ramsfield has written a wonderful text on helping attorneys visualize their legal writings as works of architecture. Jill J. Ramsfield, The Law as Architecture: Building Legal Documents (West 2000).
52 Burroway & Stuckey-French, supra n. 39, at 269. Anthony Amsterdam and Jerome Bruner describe the trajectory of a plot in different language, but covering the same basic arc:
1. **Introduction/Exposition**

In literature, this is called “setting the stage.” The setting is established: time and place are described, and relevant background details are revealed. Characters are introduced. Usually the story begins with everything in stasis; calm prevails, things are at an even keel.\(^5^3\)

The fact section of a brief should also begin with an introduction, in which the factual setting is revealed. Helpful background details that explain the protagonist’s character can be included here as well.

2. **Complicating Incident/Rising Action**

Once the stage is properly set, the action begins. Something happens. A conflict arises. The status quo is upset; something is no longer right.

Of course, the conflict drives the story and grabs the reader’s attention, and the author reveals the conflict through the complicating incident in any story. The incident may be a series of incidents, one building upon another (rising action).

This is all the stuff of a compelling fact section. A good fact section (statement of the case) will reveal not only the character of both the protagonist and the antagonist, but will also define the factual conflict that brings the parties to the court, seeking redress.

But this is as far as the fact section can take you. The plot is far from fully developed yet. The reader is not ready for the climax; you cannot resolve any conflicts in the fact section. You need more.

---

\(^1\) an initial steady state grounded in the legitimate ordinariness of things

\(^2\) that gets disrupted by a Trouble consisting of circumstances attributable to human agency or susceptible to change by human intervention,

\(^3\) in turn evoking efforts at redress or transformation, which succeed or fail,

\(^4\) so that the old steady state is restored or a new (transformed) steady state is created,

\(^5\) and the story concludes by drawing the then-and-there of the tale that has been told into the here-and-now of the telling through some coda—say, for example, Aesop’s characteristic moral of the story.

Amsterdam & Bruner, supra n. 35, at 113–114 (emphasis in original).

\(^5^3\) Sometimes in works of fiction the “tranquility” or “stasis” condition (what Amsterdam and Bruner call the “steady state,” supra n. 52) is implicit rather than express. One frequently used literary device is for the reader to be taken immediately, on the first page of the story, to the conflict, or “complicating incident” that drives the story. The reader is left to wonder what condition of stasis existed immediately before the complicating incident occurred, which can be entertaining for the reader. It does not, however, lessen the reader’s desire to return to that condition of stasis by the end of the story.
In truth, both the “introduction” and the “rising action” must be continued in the argument section. The fact section only describes the factual setting and identifies the factual conflict. The legal setting (the fixed legal rules that must be applied by the court) must be described in the argument section, and the legal conflict must be explained there as well. Thus, at the beginning of the argument section, the writer needs to complete the introduction and the “rising action” by adequately describing the legal principles that are needed to resolve the conflict. And, if there is a dispute as to what those rules are, or should be, the legal conflict needs to be developed and explained sufficiently.

3. Climax

In literature, the climax occurs when the protagonist is at the height of peril. Things are out of kilter, making the reader uncomfortable and aching for things to get better, to return to a condition of stasis. The reader’s attention is at its peak. “How will the conflict be resolved? How does the story come out?”

In a legal brief, this moment occurs at the point in time when the reader (1) knows the characters; (2) understands the factual dispute (what happened to drive the parties to the court for assistance); and (3) understands the legal dispute (the legal principles needed to resolve the dispute). The reader wonders: “How are these issues going to be resolved? How is this going to turn out?” And in an appellate brief, the reader’s interest is even more piqued because the reader is the person who ultimately gets to decide (or at least vote on) how the story “turns out.”

Note that the climax must occur within the argument section of the brief because only then is the legal setting and the “rising action” of the legal issue fully developed, arriving at the climax of the story.

4. Resolution/Falling Action

In fiction, the climax often happens very near the end of the story because it is more entertaining that way. Once the climax is reached, the reader is usually brought back to stasis very quickly, as if riding a roller coaster. Things fall into place rapidly, and the story reaches a satisfactory conclusion, either restorative or transformative.

In legal writing, this will only happen in limited situations. If the legal rule is hard to decipher or is a question of first impression, the writer may need to spend a great deal of time with the
“rising action” to arrive at a sufficient description of the legal issue, explained clearly enough that the court can then take appropriate action. In such situations, once the difficult rule is synthesized, the application of that rule to the facts may be fairly straightforward, resulting in a very short section of falling action/resolution.

The more common situation, however, will be the opposite: the rules are fairly straightforward, but the way in which they should be applied to the peculiar facts of the case at hand may be more difficult. In that situation, the falling action/resolution part of the plot is likely to be much more complex and lengthy.

5. Denouement

And then there is the conclusion. Readers of fiction generally like happy endings. All of the conflicts are resolved in a plausible way and the characters return to a state of peace and calm. The resolution can be a return to the prior condition of stasis (a restorative resolution), or to a new, yet tranquil and satisfying, condition (a transformative resolution).54

Likewise, the legal brief must come to a plausible conclusion. The writer returns to the theme that has been developed throughout the plot and makes it explicit. All of the conflicts are resolved, and the court is led to a calm, rational, and just conclusion: your client wins, either by being restored to status quo ante or by being placed in a new, satisfying condition, consistent with the theme of the narrative.

So now it is time for Ellen to start writing her brief.

IV. APPELLANT’S BRIEF IN THE CASE OF RUBIN v. OLD YORK COUNTY DEPARTMENT OF SOCIAL SERVICES

A. The Fact Section

Ellen knew that the appellate court was likely to be even less sympathetic to Margaret’s and Johnnie’s plight than was the trial judge. The appellate court, after all, would not have to look into Margaret’s or Johnnie’s eyes and explain to them why the mother and child bond they had formed over the past three years would have to be broken to satisfy the preferences of a legislative body from twenty years ago that knew, and cared, nothing about them.

54 Amsterdam & Bruner, supra n. 35, at 114.
To succeed, Ellen knew she would have to make Margaret and Johnnie real to the appellate court. At the same time, she understood that she had to avoid manipulation. The story had to ring true—to make sense to the appellate judges at a gut level. The emotions she wanted to evoke from the judges had to come from within them, so the emotions would be real.

She wrote the fact section:

Margaret Rubin and Francie Kohler only wanted a child.

Having committed themselves to each other emotionally and legally, they decided, as do many committed couples, that they wanted to raise a family. But the state of Old York told them that they were unfit parents, simply because they loved each other. Without knowing anything about the depth and sincerity of Margaret’s and Francie’s commitment to each other, and without any individualized investigation into their fitness as parents, the state categorically declared that they, along with all other gay and lesbian citizens, were unfit to adopt and raise children.

Margaret and Francie were devoted to their dream, however. They had overcome obstacles before. In 1995, when Old York would not recognize their relationship, Margaret and Francie went to Father Roger Smith, an Episcopal priest, who sanctified their marriage. In 2000, soon after the Vermont legislature approved a measure allowing gays and lesbians to enter into civil unions, Margaret and Francie went to Vermont and entered such a union.

In 2002, Margaret and Francie went to several adoption agencies, seeking to be approved as adoptive parents. No agency would accept their application, however, since an Old York statute approved in 1986 provided that homosexuals could not adopt children. Undaunted, the couple then sought the services of the Old York Fertility Clinic. Through a process of in vitro fertilization, Francie became pregnant, and in August of 2003, Francie gave birth to a son, John Rubin Kohler.

Since Francie’s job as vice president of Beautimous Cosmetics was both time-consuming and financially lucrative, the couple decided that Francie would return to work, while Margaret would stay home to raise Johnnie. The arrangement worked well, and the couple could not have been happier.

On September 9, 2006, Francie left her office in downtown Old York to get some lunch. A cab driver ran a red light at a high rate of speed and struck Francie, killing her instantly.

Francie left no will. Since Old York does not recognize the Vermont civil union, Francie’s mother Stella Kohler sought and was awarded letters of administration for Francie’s estate. Stella, who never approved of Margaret’s relationship with Francie,
also petitioned the Old York County Office of Children and Youth (OCY) to have Johnnie declared a dependent child, despite the fact that Johnnie had resided with Margaret since birth and calls Margaret “Mommy.” Because Stella is in ill health and unable to care for a young child, she asked OCY to place Johnnie in a foster home and ultimately for adoption.

Margaret immediately filed a petition to adopt Johnnie, notwithstanding the Old York statute prohibiting homosexuals from adopting. OCY assigned one of its caseworkers, Delia Clarke, to do a home study. Ms. Clarke testified at her deposition that she found Margaret to be “a devoted mother” who was “very attentive” to Johnnie, “treating him in an age appropriate manner.” She said that Johnnie “seemed to be quite happy” and that he was “quite attached to his mother.” She also concluded that the home was clean and safe, but despite these findings, Ms. Clarke recommended that the adoption petition be denied, solely because Margaret admitted that she was a lesbian.

On March 3, 2007, the Superior Court of Old York County approved Ms. Clarke’s recommendation, and denied Margaret’s petition for adoption. It also ordered Johnnie to be taken from Margaret by OCY and placed with a foster family, pending adoption proceedings “by a heterosexual couple or individual.” The court did, however, stay enforcement of its order pending this appeal.

[Citations to record omitted.]

* * *

Ellen’s fact section begins with some character development. Margaret and Francie are introduced as loving people with natural human instincts: they want a family. The factual setting of the case is then developed. The couple faces an initial hurdle: the state, portrayed as antagonist, prohibits them from adopting because it disapproves of their relationship. But they persevere, and the protagonists win the initial battle: the state cannot prevent either of them from conceiving a child through medical technology. The introduction is now complete. Thus, the story begins from a condition of stasis: a loving family with a healthy child.

Then the complicating incident arrives, beginning the “rising action” of the plot line: Francie is killed in an automobile accident. The heroine’s tragic flaw is revealed: she and Francie had neglected to anticipate and plan for this possibility. Francie left no will, and therefore Margaret cannot be appointed the legal guardian for her young son. A new antagonist appears on the scene: Francie’s mother, who disapproved of Margaret’s relationship with her deceased daughter and now wants to prevent Margaret from raising her grandchild. She joins forces with the original antagonist, the
state, and moves swiftly to try to take Johnnie away from Margaret. A third antagonist, the Old York Office of Children and Youth, also appears. In the event of a victory by the state in this case, that agency would have to carry out the dirty deed of entering Margaret’s home and physically removing Johnnie to a foster home. OCY is set up to become the principal antagonist. OCY is portrayed as uncaring. Despite the fact that its agent, Delia Clarke, finds the home safe and Johnnie well cared-for, the agency denies the petition for adoption. Ellen’s theme (that overgeneralizations can do great violence to individuals in specific cases) begins to emerge.

The fact section thus describes the characters who inhabit the story, and introduces the factual conflict. The factual setting is thus complete. The final paragraph (describing the procedural history of the case, a section almost universally required by appellate court rules) also serves as a transition to the argument section, where the rising action will continue with a discussion of the legal setting (the rules of law that will govern the resolution of the conflict).

B. The Argument Section

The facts, Ellen knew, were her best asset in this case. But Ellen knew that strong facts clearly were not enough, especially on appeal where the rule of law and logic predominated. Ellen needed to create a plausible, if not compelling, legal rationale to allow the court to do what she felt the facts of the case required: preserve the family that Margaret and Johnnie had formed.

Ellen knew that the case law was problematic. Sexual orientation had never been defined as a “suspect classification” for Equal Protection analysis. While the Lawrence v. Texas case had been helpful, it still had stopped short of declaring private sexual intimacy a “fundamental right” under the Due Process Clause.55 Moreover, while the Supreme Court had given lip service to the concept that “family integrity” was a fundamental right, no majority opinion had ever applied that principle in a case where there was no blood relationship between the members of the putative family. Thus, it appeared likely that the Old York Court of Appeals would likely apply a rational basis test to Ellen’s constitutional challenge, and that was an uphill battle. Ellen saw little hope that the Old York appellate courts would reverse direction on the Full

Faith and Credit Clause issue so soon after resolving the question against her client’s position.

Ellen elected to forego the Full Faith and Credit Clause argument in favor of what she considered her stronger arguments based on the Fourteenth Amendment. Ellen decided that, while she needed to raise the issue of the appropriate level of scrutiny (in order to preserve that issue for subsequent appeals, if necessary), at the intermediate appellate level her client’s best hope for success lay in showing the irrationality of disrupting a stable and loving home and placing Johnnie in limbo, with strangers, in the foster care system.

Ellen began:

Margaret Rubin is challenging the constitutionality of the provision in the Old York adoption law that denies gay and lesbian adults the right to adopt children. The trial court denied her appeal as a matter of law. This Court reviews such decisions de novo. Jones v. Exposition Services, Inc., 835 O.Y.2d 425 (2000).

The Old York adoption statute provides:

§ 19-67-2 Persons eligible to adopt

(A) The following persons are eligible to adopt:

(1) A husband and wife together; or

(2) An adult who is not married.

(B) Homosexuals are not eligible to adopt under this statute.


The Prohibition violates the Fourteenth Amendment to the United States Constitution in two ways. First, the Prohibition deprives Rubin of her fundamental right to privacy, and it deprives Rubin and her son Johnnie of their right to family integrity, both in violation of the substantive component of the Due Process Clause. U.S. Const., Amend. XIV, cl. 3. Second, the Prohibition discriminates against gay and lesbian individuals, a classification that this Court should find to be a suspect or a quasi-suspect classification, in violation of the Equal Protection Clause. U.S. Const., Amend. XIV, cl. 4. Accordingly, this Court should strictly scrutinize the Prohibition and declare it uncon-
stitutional because it is not narrowly tailored to serve a compelling state interest.

Even if the Court declines to apply strict scrutiny, the Prohibition fails because it is not rationally related to any legitimate state interest. The Prohibition was enacted in reaction to a single incident involving a gay parent; it was therefore enacted out of animus toward homosexuals in general. Such animus can never be a legitimate state interest. Moreover, the Prohibition results in an irrational destruction of a healthy family unit in this case. The evidence establishes that Rubin has provided a safe and loving environment for her son and that Johnnie is happy and emotionally attached to his mother. Destruction of this family unit because of an irrational reaction by the legislature more than twenty years ago can only wreak unknowable emotional damage on Johnnie and potentially expose him to years of instability and uncertainty in the foster care system. No legitimate state interest would be served by such a result.

* * *

The plot thickens. Having revealed the factual setting and the factual conflict in the statement of the facts, Ellen now proceeds to establish the legal setting (the foundational law necessary to resolve the dispute) and the legal conflict (the issue presented to the court for decision). This is still the introduction/exposition portion of the plot, although this passage ends with the hint of conflict. The first few paragraphs establish the legal landscape: the standard of review and the statute adopted by the Old York legislature. Some background information as to why the statute was adopted is provided; these details will later help support a claim of “animus” in the adoption of the statute, serving to de-legitimize the state interest served by the statute.

The “road map” paragraphs at the end of this passage conclude the exposition. They describe where the legal issues will be encountered in the remainder of the brief. They serve both as “foreshadowing” of the conflicts to arise in the coming pages and as a neat transition to the “rising action” portion of the plot.

* * *

Ellen continued.

A. THE COURT SHOULD STRICTLY SCRUTINIZE THE PROHIBITION.

Because the Prohibition impinges on fundamental rights of both Rubin and Johnnie, and because it discriminates against
Rubin on the basis of her sexual orientation, this Court should strictly scrutinize it.

1. **Margaret Rubin Has a Fundamental Right under the Due Process Clause.**


   The Court looks to history to determine whether an asserted right is a “fundamental right” protected by the substantive component of the Due Process Clause. The Court asks whether the asserted right is “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if [it was] sacrificed.” *Id.* at 720–721. If the answer to this question is “yes,” then the asserted right is a fundamental right entitled to heightened protection under the Due Process Clause.


   * * *

   The “rising action” has begun. The brief now begins to explore, and develop, the legal conflicts identified in the final paragraphs of the exposition. Several sub-plots are identified: the potential con-
flict between the adoption statute and the Due Process Clause, as well as its potential conflict with the Equal Protection Clause. More legal setting is revealed in the form of additional case law that may help, or harm, the protagonists in their quest.

In the interest of brevity, the entirety of Ellen’s brief will not be set out herein. Her point headings, however, describe how she manages the rising action portion of the argument:

* * *

A. The Court Should Strictly Scrutinize the Prohibition.

1. Margaret Rubin Has a Fundamental Right under the Due Process Clause.
   a. Margaret Rubin has a fundamental right to privacy.
   b. Margaret Rubin and Johnnie Kohler have a fundamental right to family integrity.

2. Sexual Orientation Should Be Recognized as a Suspect Classification.
   * * *

Under each of these point headings, Ellen expanded upon the concepts introduced in the exposition. She engaged in a thorough explanation of why the Supreme Court had chosen to apply strict scrutiny in the contexts of both “fundamental rights” analysis under the Due Process Clause and for discrimination claims under the Equal Protection Clause. Ellen concluded each section with an argument that the court should apply strict scrutiny to the statute, but she stopped short of showing how the statute would measure up under such scrutiny. Instead, each sub-section ended with a reminder that enforcement of the statute would destroy the family unit. For example, she concluded section A(1)(b) with these paragraphs:

   In the case at bar, Rubin and Johnnie have developed an extremely close “custodial, personal [and] financial relationship.” Rubin has raised Johnnie as her son since birth, and with the sudden traumatic death of Francine Kohler, Rubin is the only remaining source of stability in Johnnie’s life. And unlike the situation presented in Smith, there is no competing claim in this case from a blood relative; Francine’s mother, Stella Kohler, has told OCY that she is unwilling to serve as Johnnie’s
The Plot Thickens: The Appellate Brief as Story

2008]

custodian. The choices for Johnnie are to stay with the loving mother he’s known his whole life or to be put in the foster care system.

Nothing could be more fundamental than a bond formed between a mother and the three-year-old child whom she has raised since birth. Strict scrutiny of the Prohibition is, therefore, required to prevent the OCY from tearing this family apart.

[Citations to record omitted.]

* * *

By the end of Ellen’s second sub-point heading (dealing with the Equal Protection argument for strict scrutiny), the rising action of the plot was complete. Margaret’s and Johnnie’s peril was fully exposed: the OCY was poised to snatch Johnnie out of Margaret’s arms, on the authority of a twenty-year-old statute adopted in the heat of a long-forgotten passion. Several avenues of escape from this peril had been identified: perhaps the statute violated the Due Process Clause, or the Equal Protection Clause, of the United States Constitution. Will the protagonists be able to successfully escape to safety through either of those avenues? The reader, who wants resolution now, is interested to see how this story turns out.

We have reached the climax of the story. Now it is time to start resolving the conflicts.

* * *

Ellen devoted her second major point heading to showing how, under either strict or intermediate scrutiny or under rational basis analysis, the court should strike down the adoption statute. She structured this portion of her brief like this:


1. The Prohibition Fails under Strict and Intermediate Scrutiny.

   a. The Prohibition does not serve any compelling or important state interest.

   b. The Prohibition is not narrowly tailored.

2. The Prohibition Fails under Rational Basis Analysis.
a. The Prohibition was enacted out of animus toward gay and lesbians, which is not a legitimate state interest.

b. The Prohibition is irrational.

This organizational structure reveals one of the important distinctions between fiction writing and brief writing. Unlike the readers of fiction, readers of legal briefs do not read for entertainment. They read for information. Thus, entertaining devices, like “suspense,” don’t usually work.

In a novel, the hero might try the safest route of escape from his peril first; if that route is blocked, or his escape is unsuccessful, he might try a riskier route. It is more entertaining to the reader if the riskier route is hidden from the reader’s view until the last moment. A judge reading a brief, however, wants information—not entertainment. Thus, Ellen chose to reveal both possible escape routes: the “safe” (from her client’s point of view) route of strict or intermediate scrutiny and the riskier path of rational basis analysis.

Ellen’s brief then plays out each of these possible escape routes. She argues that there is no compelling, or even legitimate, state interest in denying gays and lesbians the right to raise children; thus, under either strict or intermediate scrutiny, the statute fails. She concludes, as she must, with her “fail-safe” argument: that even under rational basis analysis, the statute fails because (a) the statute was apparently adopted out of animus toward homosexuals, which can never be a “legitimate state interest,” and (b) the statute is not rationally related to any legitimate interest because it does not take into account the familiar, and well-settled, “best interest of the child” standard.

Ellen had learned in law school that she should “lead with her strongest argument.”56 She thought her strongest argument was

---

56 This “conventional wisdom” has been validated empirically. In a recent survey of 355 federal court judges (both trial and appellate courts), 74% of the respondents said it was "essential or very important for advocates to put their strongest arguments first." Robbins, supra n. 23, at 273. However, this general rule of thumb can always yield to other organizing principles, such as the logical structure of the argument based upon the legal issues. Here, it seems that Ellen’s choice to put her rational basis argument last is the logical way to organize the legal analysis.
that the Old York statute had no mechanism for taking into account its impact on the children. In making custody decisions, the courts routinely recited the “best interest of the child” standard; yet the statute gave no weight at all to that bedrock principle. However, when she put that argument up front, the brief did not seem to flow well. She decided to save that argument for last and end her brief with a bang:

Even if, like the trial court, this Court frames the issue here as an effort to “encourage a stable and nurturing environment for the education and socialization of its adopted children,” *Lofton*, 358 F.3d at 819, the Prohibition is not rationally related to that end. There is no evidence in this record, or in the social science literature, that suggests that gays and lesbians are categorically incapable of providing a stable and nurturing environment in which to raise children. Yet this enactment of the Old York legislature prohibits all gay and lesbian individuals from adopting children without even a minimal inquiry into the circumstances of the proposed adoption. No consideration is given to the best interest of the child, which has been described by Old York Supreme Court as “the touchstone consideration in every child custody case,” including adoption cases. *In re Adoption of O.*, 719 O.Y.2d 873 (1997).

Nor would removing Johnnie from Rubin’s home rationally serve the state’s claimed interest in stable homes for adopted children. In fact, as Delia Clarke found, Johnnie is already in a stable and nurturing environment in Rubin’s home. Removing him from the mother he has known and loved from birth, and who has been found through the home study process to be a loving and nurturing mother, to be placed in foster care awaiting adoption at some unknown future time by strangers, can only serve to traumatize this young boy.

The emotional damage such an outcome would produce is impossible to predict, but is certain to be significant. Old York County’s own statistics show that the median time a child older than a toddler spends in the foster care system is four years. Thus, if Johnnie turns out to be the average case, he would be seven years old before he were placed in another stable, long-term home—one again with people he did not know. What purpose is served by this, when he is already in a stable, loving, and nurturing home?

For all of these reasons, the Prohibition, amended into the Old York adoption statute in 1986, is not rationally related to any legitimate state interest. It must therefore be declared unconstitutional.

[Citations to record omitted.]

*  *  *
The resolution/falling action portion of the plot is now complete. The peril of the protagonists, made explicit at the moment of climax, can be resolved. A transformed “steady state” (the removal of the legislative impediment to the continuation of this family) is not only possible, but is emotionally satisfying because it preserves Johnnie’s normal and healthy relationship with his mother. All that remains is the denouement.

Ellen wrote the conclusion:

The 1986 amendment to the Old York adoption law violates the privacy of every prospective adoptive parent by requiring them to answer intensely personal questions regarding their sexual orientation. It violates the fundamental right to family integrity by forcefully separating a mother from the child she has raised from birth, for no reason other than animus expressed by the legislature against homosexuality. The best interest of the child, which should be the primary consideration, is not taken into consideration at all.

Whether strict or intermediate scrutiny or rational basis analysis is applied, the Prohibition violates the Fourteenth Amendment to the United States Constitution. This Court should declare the 1986 amendment unconstitutional, and remand this case with instructions to the lower court to approve the adoption of Johnnie Kohler by Margaret Rubin.

V. NARRATIVE THEORY IN APPELLATE BRIEFS

How does conceiving of an appellate brief as a story change the brief?

I submit there are at least two salutary effects of consciously thinking of the brief as a narrative. First, narrative theory provides the writer with a useful large-scale organizational schema. Second, narrative forces the writer to focus on the human elements of the controversy, and thus serves as a reminder to include a strong narrative strand of argumentation.

A. Narrative as a Tool for Large-Scale Organization

Philip Meyer has suggested that excessive reliance on structural paradigms (all of which are rule-based) may have a tendency
to “tame narrative.” This is true if the author attempts to use IRAC as a large-scale organization device. But IRAC really does not work well for such purposes. While it is a useful device for structuring parts of a legal proof, its utility is limited to the logical strand of the argument. This is because IRAC is a specialized form of a syllogism, the principal mode of logical reasoning. Given that most cases involve multiple issues and sub-issues, a legal brief requires multiple syllogisms (IRAC structures). The author is left to her own intuition as to how to organize these logical pieces into a coherent whole. Much of the scholarship and commentary on large-scale organization focuses on the legal, rather than the narrative, strand of the argument, compounding the tendency of appellate brief writers to focus on the logos at the expense of the pathos.

Narrative, however, is organized through the plot line: stasis, rising action, climax, falling action, and denouement. Its very purpose is to provide large-scale organization. I suggest the story line is a good way to think about the large-scale organization of a brief.

Consider the brief that Ellen might have written if she tried to use pure logic as the large-scale organization scheme. It might have looked something like this:

ARGUMENT

INTRODUCTION (foundational law regarding standard of review, roadmap)

A. Substantive Due Process Claim
   1. Issue: level of scrutiny
   2. Rule
      a. Strict scrutiny if fundamental right

57 Meyer, supra n. 8.
58 “The syllogism is the vessel which contains IRAC, not the other way around.” James Boland, Legal Writing Programs and Professionalism: Legal Writing Professors Can Join the Academic Club, 18 St. Thomas L. Rev. 711, 721–722 (2006).
59 See e.g. Beazley, supra n. 7, at 49–58 (describing how to use the logical structure of the statutory or case law to outline the discussion section of an appellate brief); Calleros, supra n. 3, at 330 (suggesting that an advocate should consider departing “from a purely logical ordering of the arguments” to present one’s strongest argument first); Fontham et al., supra n. 4, at 13–15 (suggesting that advocates lead with their best argument unless the requirements of the law dictate another structure); but see Linda Edwards, Legal Writing: Process, Analysis and Organization 307–309 (4th ed., Aspen Publishers 2006) (describing four “common choices” for large-scale organization of a brief: organizing by strength of law, organizing by strength of equities, ordering by the reader’s priorities, and ordering by familiarity. Of those four options, the second describes an organization scheme based upon the emotional appeal of the arguments, while the others describe logos-based considerations).
i. Right to privacy, or  
ii. Family integrity  
b. If neither, rational basis  

3. Application  
a. Strict scrutiny  
b. Rational basis  

4. Conclusion: Rubin wins  

B. Equal Protection Claim  

1. Issue: level of scrutiny  

2. Rule  
a. Strict scrutiny if suspect classification  
i. Sexual orientation has not yet been identified as suspect classification  
ii. But it should be  
b. Intermediate scrutiny if quasi-suspect classification  
i. This is similar to gender discrimination  
ii. The court should recognize a new category of intermediate scrutiny  
c. If neither of the above, rational basis test  

3. Application  
a. Strict scrutiny  
b. Intermediate scrutiny  
c. Rational basis analysis  

CONCLUSION: Rubin wins  

A brief structured in this manner might be pleasing to some readers; certainly a competent brief could flow from this structure or some variant of it. But does it flow as well as the “narrative

---

60 A more sophisticated brief following the IRAC paradigm, for example, might have broken down each of the two main issues (due process and equal protection) into two sub-issues: strict scrutiny and rational basis review. Each sub-issue would then get its own
that Ellen wrote? For one thing, the structure feels very rigid and mechanical; all logos and no pathos. For another thing, this brief will likely be longer, because the application of the rational basis test is the same under either the Due Process or Equal Protection questions, requiring some duplication of analysis. It might also be disjointed because, to save words, the author might cross-reference the rational basis application from one issue to the other. Either solution would be unsettling to the reader.

Now consider the structure of the brief that Ellen actually wrote, using the storyline as her organizational principle:

ARGUMENT

EXPOSITION (foundational law regarding standard of review, road map; legal conflict revealed)

A. Rising action
   1. First sub-plot (Due Process claim)—legal setting explained
      a. Right to privacy
      b. Family integrity
   2. Second sub-plot (Equal Protection claim)—legal setting explained
      a. Suspect classification
      b. Quasi-suspect classification

{CLIMAX (the factual and legal settings are complete, the conflict is apparent, the protagonists are at maximum peril)}

B. Falling action
   1. “Safe” escape from peril tested (strict/intermediate scrutiny)
   2. “Risky” escape from peril tested (rational basis review)

CONCLUSION (Denouement)

One might argue that Ellen’s “narrative brief” is not all that different from the logic-oriented brief (let’s call it the “IRAC brief”)

IRAC sequence. Such a structure would still be unsettling to some readers, because it requires the reader to endure four separate analyses. Moreover, since some of the analyses are closely related to each other (the rational basis analysis, for example, is virtually identical in both the due process and the equal protection arguments), the reader might get impatient because it feels like the author is repeating herself.
described above. Or, stated another way, could reliance on IRAC as a large-scale organization structure lead one to write the narrative brief? Isn’t it just a question of how one defines the “issues?” Specifically, one might argue that while the IRAC brief defines the two main issues as Due Process analysis and Equal Protection, the narrative brief just defines two different issues: “(1) What is the appropriate standard of review?” and “(2) Does the Old York statute serve appropriate state interests?”

Upon close examination, however, the narrative brief is actually different in kind rather than just different in form. The IRAC brief is structured entirely on the “rule-based” strand of the legal analysis. It defines two rule-based issues (based upon two separate clauses of the Fourteenth Amendment), breaks those rules down into their logical sub-parts (i.e., what is the appropriate level of scrutiny under each rule, based on prior case law), and ultimately applies the formulaic rules resulting from the possible outcomes of the scrutiny inquiry: does the statute serve a “compelling state interest” (as defined by case law)? Is it rationally related to a “legitimate state interest” (again as defined by case law)? The focus of this analysis is heavily dependent upon rules, and very little attention would likely be paid to the narrative “strand” of the analysis.

Most importantly, nothing about the logical structure of the IRAC brief seems to require the writer to bring in the narrative strand. The question of determining the proper level of scrutiny (the “R” portion of the IRAC brief) is a pure question of law, dependent upon case precedent and standard rule-based analysis. Once that question is resolved, the application of the appropriate level of scrutiny is also rule-based. The challenged legislation is measured against whatever level of scrutiny the author needs to analyze; the rules relevant to how one performs the measurement are set forth in precedent cases and applied mechanically.

Certainly, a clever advocate could, and should, find a way to personalize the application of the law to the Old York statute and to raise the reader’s sights above the pure legal question involved. But the point is that doing so requires bending or breaking entirely out of the IRAC paradigm. This suggests that the utility of the IRAC paradigm is limited, which in turn leads to my second point.

**B. Narrative as “Reality Check”**

On the other hand, organizing a brief using the narrative paradigm provides the tools for the author to bring in the human aspects of the controversy. By recognizing that rule-based reasoning
and narrative-based reasoning are two distinct strands, wound together in the double helix that Burns describes, the author of the brief is constantly reminded of the client’s story and the need to tie it into the legal analysis at appropriate places. The legal rules are not ignored in the narrative brief; indeed they are one of the essential strands. The client’s story is the other essential strand.

I am not claiming that a narrative structure is inherently better than the IRAC paradigm for large-scale organization. Indeed, there may be cases in which a more formal, legalistic structure is better, or even necessary. For example, criminal defense lawyers, who frequently have unappealing clients, often choose to present technical legal defenses based upon procedural rules. Indeed, in any case where the facts strongly favor one side, the opposing side may be best advised to redirect the court’s attention to the legal rules. That could be the only option if the opposing side cannot come up with a compelling counter-story of its own.

I am claiming, however, that an appellate brief writer ought to at least consider the narrative elements of every case, before writing a single word. Consciously thinking about the elements of character, conflict, theme, and point of view can lead the writer to make well-informed strategic choices about how to persuade the reader. And thinking about the plot and its natural trajectory can, in some (perhaps many) cases, lead to a coherent and highly readable brief.

---

61 Burns, supra n. 33, at 1171.
62 But see Foley & Robbins, supra n. 8, at 473. Foley and Robbins describe criminal defense cases as a “special case” because the writer often has an “unsavory” client; however, they point out that the author can often find a persuasive story to tell by making the client “a proxy for an ‘ideal,’ such as the Fourth or Fifth Amendment: a holding against the client is a holding against the Fourth Amendment.” Id.
63 For example, the Old York County Department of Social Services may have a tough time writing its brief in a narrative form in this mock case. Advocates for the county would need to tread very lightly; their best strategy would likely be to attempt to distract the court’s attention from the harsh image of the social worker arriving at Rubin’s home to snatch a crying child from his mother’s arms. It might be an interesting exercise for an advanced appellate advocacy class to write Old York County’s brief in this case.
64 Obviously, the mock case described in this Article was “loaded” so that the facts were heavily on one side. We did this in our moot court problem to create a sort of balance between the two sides. We also wanted to create as “pure” a legal question as possible for the competition, so we needed to exclude possible factual disputes that could have arisen had Margaret Rubin not been a good mother. The extreme facts of this case also made it a good vehicle for this Article, since the strength of the narrative makes it easy to observe and analyze. My point here is that, even in cases where the facts are not as compelling, understanding the narrative can help the writer produce a more persuasive brief.
VI. CONCLUSION

As Ellen expected, OYDSS’s brief was very technical and legalistic. It argued for rational basis review, based predominantly on a lack of United States Supreme Court precedent requiring heightened scrutiny in cases such as this. It contained few references to Margaret and Johnnie, and none to the foster care system that would await Johnnie should the court rule in favor of OYDSS.

Ellen invited Margaret to attend the oral argument. She had briefly considered asking Margaret to bring Johnnie to the argument, so the judges could see the two of them together, but she quickly rejected that idea. Not only did it seem too manipulative, there was a risk of causing some emotional trauma to Johnnie. Ellen was not sure how much of the argument Johnnie would be able to follow, but if she succeeded in making Johnnie’s plight real to the court, Johnnie would probably have understood enough of it to become alarmed. But at least Ellen wanted the court to see Margaret as a real person and not just some abstract appellant in a paper dispute.

Ellen thought the oral argument went well. Because she had structured her brief as a narrative, when the court questioned her she was always able to bring Margaret and Johnnie into her answer. After all, she was asking the court to write the conclusion to the story; the judges needed to fully understand the story up to this point in order to write a satisfying conclusion. She felt the judges were engaged with the case and troubled by its implications.

The attorney for OYDSS stuck primarily to the law and, for the most part, was rewarded with technical questions regarding the appropriate level of scrutiny. But the court had been clearly troubled by the harsh result that OYDSS seemed to be asking for. Several judges asked questions about the foster care system and the possible impact of the statutory prohibition on Johnnie. Each time, his response returned to his own theme: that the legislative process reflected the will of the people and needed to be respected. It was not the place of the court to substitute its judgment for that of the democratically-elected legislators, he argued.

Ellen’s rebuttal was short and to the point:

Counsel for the Department has just suggested that the democratic process is more important than the family bonds that Johnnie and Margaret Rubin have built. But any suggestion that legislators get to vote on whether Margaret Rubin is a good and loving mother stands centuries of child custody law on its
head. That is irrational. This court must declare the Old York adoption statute unconstitutional.

As the judges filed out of the courtroom at the conclusion of the argument, Ellen sank down in her chair. Had she done enough?

Margaret Rubin was quickly beside her. She took Ellen’s hands in her own, and, in a tremulous voice, she said simply, “Thank you. For everything.”
THE CASE FOR “THINKING LIKE A FILMMAKER”: USING LÅRS VON TRIER’S
DOGVILLE AS A MODEL FOR WRITING A
STATEMENT OF FACTS

Elyse Pepper

INTRODUCTION

There’s just something about a movie. The anticipation that takes hold when the lights dim, the crowd hushes, and the credits roll. We know a story is coming. A “story”—“what happened” to these people, in this place, at this time. It’s an outstretched hand, a gift from the filmmaker to us, the audience.

Although legal writers likewise convey what happened to particular people, in a particular place, at a particular time, few lawyers, and fewer law students, view the “stories” they tell from a filmmaker’s perspective. The “what happened,” as told through a brief’s “statement of facts,” is to be gotten over with, related as rapidly and innocuously as possible. The statement of facts is rarely conceived by the writer or received by the reader as a “gift.”

But it should be. Legal writing educators and members of the bench and bar highlight the importance of the client’s “story.” That cases are won on facts not law is an adage handed down from generation to generation.¹ Why, then, the dearth of formal instruction on how to tell the court “what happened”? The deficiency in the law school curriculum is indisputable. A review of well-known legal writing texts reveals only limited treatment of fact-writing.²

¹ Robert H. Jackson, Advocacy before the Supreme Court: Suggestions for Effective Case Presentations, 37 A.B.A. J. 801, 803 (1951) (“[M]ost contentions of law are won or lost on the facts.”); Alex Kozinski, The Wrong Stuff, 1992 B.Y.U. L. Rev. 325, 330 (“There is a quaint notion out there that the facts don’t matter on appeal—that’s where you argue about the law; facts are for sissies and trial courts. The truth is much different. The law doesn’t matter a bit, except as it applies to a particular set of facts.”).

² Even some of the most respected first-year texts by the most renowned authors devote only a handful of pages to fact-writing, whether for predictive or persuasive purposes. See e.g. Gertrude Block, Effective Legal Writing for Lawyers and Law Students (5th ed.,
And the lack of mastery at the law school level has lasting implications. So many seasoned litigators who can effortlessly reconcile contradictory precedents, find support for arcane legal propositions, and recite chapter and verse from the *Bluebook*, struggle mightily when faced with the prospect of drafting the fact section. The results are predictable: briefs with lackluster fact presentations.

In all fairness, the study of law is appreciably different from the study of character, plot, and pacing. Most students who choose law school from among the graduate educational options do not inherently view themselves as creative types. Law school does not aim to produce screenwriters and filmmakers. But it should produce legal writers who can convey their clients’ stories in a compelling and sympathetic way. Incorporating movies as teaching tools within the Legal Writing curriculum may be a way out of the dilemma.

Movies can help law students make the connection between storytelling and legal outcomes. Indeed, the films that captivate us as an audience tell the very stories we must communicate as advocates. The narrative, structure, and style of a film can serve as a model for conveying a story in a legal context. Using Lars von Trier’s 2003 film, *Dogville*, this Article explores the philosophy and process of crafting a series of events into a persuasive statement of facts. Examining the film’s storytelling techniques and borrowing many of them allows the advocate to build a convincing narrative that will further the logical reasoning advanced in the brief’s argument section.

*Dogville* is an ideal vehicle for discussing Applied Legal Storytelling. The film recounts the tale of the relationship between the

---

3 On the other hand, Garret Epps, the Orlando John and Marian H. Hollis Professor at the University of Oregon School of Law, made a convincing case for teaching creative writing as a way to improve legal writing skills. See Garret Epps, Presentation, *Why Am I in Here While You’re Out There?* Teaching Creative Writing to Law Students (London, U.K., July 19, 2007).

4 “Applied Legal Storytelling” refers to ways in which “everyday lawyers can utilize elements of mythology as a persuasive technique in stories told directly to judges—either via bench trials or via legal writing documents such as briefs—on behalf of an individual client in everyday litigation.” Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client’s Story Using the Characters and Paradigm of the Archetypal Hero’s Journey*, 29 Seattle U. L. Rev. 767, 771 (2006).
inhabitants of a Depression-era Colorado town and a young woman, whose flight from neighboring gangsters forces her to seek asylum within its borders. The power clash between the townsfolk and the refugee, the transformation of plain, but decent, people to ruthless exploiters of the unfortunate, and the excessive reprisal of the victim, expose the cruelty of human nature.⁵

Poignant as the narrative of Dogville is, it is the film’s restraint that serves as a critical example to the legal writer. Its cinematic style highlights the rawness of the story. It is narrated, much like a fable, and shot on a “black-box set” (a virtually bare stage with few props). The juxtaposition of the film’s inflammatory substance with its minimalist form makes the audience experience the incident—participate, rather than observe—in much the way legal writers should inspire their readers.

Moreover, Dogville is an especially useful model from which to create a cinematically-inspired statement of facts because there are, as in any legal dispute, two plausible sides to the story. Thus, recasting the film in the context of a case, and applying its narrative and cinematic techniques, produces two distinct stories: one on behalf of the young woman, and the other on behalf of the townsfolk. Both stories draw in the reader so that he or she experiences the circumstances from the advocate’s perspective, and ultimately goes into the argument prepared to agree with the advocate’s analysis.

Part I of this Article introduces movies as a persuasive medium. Part II examines the value of movies as teaching tools in the law school context. Part III breaks down Dogville and demonstrates how it might be used to create two Statements of Facts in a fictionalized criminal case. Part IV recaps the lessons learned from using a film as a model for fact writing.

⁵ Dogville supports a number of interpretations, including, among others, a biblical perspective recounting the battle between the Old Testament morality of retribution and the New Testament morality of forgiveness, a political view criticizing American attitudes toward immigration practices and slavery, and a psychological reading centering on perversion and voyeurism. See Andrea Brighenti, Dogville, or, the Dirty Birth of Law, 87 Thesis Eleven 96, 97, 103 (Sage Publications 2006).
I. MOVIES EMBODY THE ART OF PERSUASION

A. Telling the Court “What Happened” in a Legal Dispute Is Critical to Success

If effective advocacy consists of telling the court not only how your client can win, but why your client should win, the story the legal writer presents to the court is paramount.

Understanding what happened, why it happened, and how it happened motivates the court to rule in favor of one side over the other. Indeed, “it may be impossible for humans to understand a human’s behavior except as part of a story.” Particularly in our common law system, lawyers and judges rarely discuss a legal issue “without connecting it to some story, real or hypothetical.”

Developing the story for the court is so important because, as Prof. Llewellyn explains, “rules alone, mere forms of words, are worthless.” Rather, “the concrete instance, the heaping up of concrete instances, the present, vital memory of a multitude of concrete instances, is necessary in order to make any general proposition, be it rule of law or any other, mean anything at all.” Accordingly, even when there is a “statistical correlation between what the evidence describes and the defendant’s characteristics,” with-

---


7 “The job of the advocate is to take the raw data of the client’s story and reformulate it to conform to [an ‘Idéalized Cognitive Model’] and, therefore, to structure for the legal decisionmaker a sense of the situation that suggests only one specific outcome.” See Steven L. Winter, The Cognitive Dimension of the Agon between Legal Power and Narrative Meaning, 87 Mich. L. Rev. 2225, 2272 (1989).

8 Although the world of law still “does not overtly recognize ‘narrative’ as a category in the process of legal adjudication,” legal scholars are beginning to realize that “both the questions and the answers in . . . matters of ‘fact’ depend largely on one’s choice (considered or unconsidered) of some overall narrative as best describing what happened or how the world works.” Peter Brooks, Narrativity of the Law, 14 L. & Literature 1, 1 (2002) (quoting Anthony G. Amstermd & Jerome Bruner, Minding the Law 111 (Harv. U. Press 2000)).


10 Id. at 456. It bears emphasizing that the legal writer must focus on “the role of both tellers and listeners in determining how a story goes together, and what it means, and how stories become effective in their listener’s reaction to them, and participation in them.” Brooks, supra n. 8, at 3.


13 Lubesdorph, supra n. 9, at 455.
out “a story,” lawyers and judges resist imposing liability.\textsuperscript{14} Rather, it is the “design, intention, and meaning” of a narrative that permits a court to side with the plaintiff or the defendant.\textsuperscript{15} Thus, although it may be true that “[a] judge decides for ten reasons/nine of which nobody knows,”\textsuperscript{16} the advocate can be certain that the persuasiveness of the story played no small part in the decision.

\textbf{B. Films Do an Excellent Job of Telling “Legal” Stories}

Without doubt, films “satisfy our need for a compelling story.”\textsuperscript{17} But films with legal and jurisprudential issues as their subject matter are particularly resonant narratives because they involve stories about “what precipitates trouble and . . . what redresses trouble.”\textsuperscript{18} It is through the stories these movies tell that we come to see individuals as “heroes, villains, tricksters, stooges . . . and that we come to see situations as victories, humiliations, career opportunities, tests of character, menaces to dignity (and so forth).”\textsuperscript{19} Films that examine the way law works in society “provide a unique mechanism for structured critical reflection on the dynamics of legal cultural storytelling.”\textsuperscript{20} They illustrate that audiences think “imagistically and visually.”\textsuperscript{21} And largely because “imagistic storytelling appeals to emotions and instinctual responses that are the primary targets of rhetorical persuasion,”\textsuperscript{22} law movies endure. Not only do they inspire successive generations of filmmakers, but they linger in the minds of those who have seen them.\textsuperscript{23}

Movie-goers and lawyers alike think of Spencer Tracy and Dick York in \textit{Inherit the Wind}\textsuperscript{24} when the phrase the “Scopes Monkey Trial” is uttered. We see Spencer Tracy and Maximilian Schell

\begin{itemize}
  \item \textsuperscript{14} Id.
  \item \textsuperscript{15} Brooks, supra n. 8, at 4.
  \item \textsuperscript{16} Steven L. Winter, supra n. 7, at 2225 (citing W.S. Merwin, \textit{Asian Figures} 65 (Athenaeum 1973) (Chinese proverb)).
  \item \textsuperscript{18} Id. (quoting Amsterdam & Bruner, supra n. 8, at 45).
  \item \textsuperscript{19} Id.
  \item \textsuperscript{21} Philip N. Meyer, \textit{Law Students Go to the Movies}, 24 Conn. L. Rev. 893, 904 (1992).
  \item \textsuperscript{22} Id.
  \item \textsuperscript{23} Between 1933 and 2005, no fewer than 240 movies in which a lawyer or the legal process was integral to the plot were released in the United States. See Wendy R. Leibowitz, \textit{Lawyers in the Movies}, http://www.wendytech.com/index.htm (accessed Feb. 22, 2008).
  \item \textsuperscript{24} \textit{Inherit the Wind} (United Artists 1960).
\end{itemize}
in *Judgment at Nuremberg* when we think of the famous World War II tribunal. The image of Ron Silver and Jeremy Irons in *Reversal of Fortune* springs to mind when we hear the names “Alan Dershowitz and Claus von Bulow.” And most of us picture John Travolta as Jan Schlichtmann in *A Civil Action* when we remember the high profile cases against W.R. Grace and Beatrice Foods. Hollywood’s leading lights, from Katherine Hepburn to Al Pacino, have brought and continue to bring fictional lawyers to life year after year. The storytelling capabilities of these films along with their “popular images of lawyers, criminals, and the legal system help people to understand, or think they understand, the reality these images depict.”

---

28 Hepburn played Amanda Bonner in *Adam’s Rib* (MGM 1949).
29 Pacino has played lawyers on three occasions: Arthur Kirkland in *And Justice for All* (Columbia Pictures 1979), John Milton in *The Devil’s Advocate* (Warner Bros. 1997), and Roy Cohn in *Angels in America* (HBO 2003).


Ironically, stories told for entertainment purposes in movies are frequently more convincing than stories told for much higher stakes. Although it is true that many films based on actual events contain fictionalized scenes that intensify the drama, and the advocate cannot similarly augment the record, it is not necessarily the added material that enhances persuasiveness. Rather, it is the specificity of the situations in movies and the details the filmmaker cultivates that drive home the reality of the circumstances. That level of detail and specificity is often lacking in the legal versions of events.

Two recent films, *North Country* and *Monster*, are illustrative. *North Country* is based on the first class-action sexual harassment lawsuit, *Jenson v. Eveleth Taconite Co.* It tells the story of a young mother who applies for and gets one of the first iron-mining jobs available to women in Minnesota. She and her fellow female miners are threatened, insulted, belittled, ogled, fondled, and physically attacked by their male co-workers and supervisors. The film depicts how the women are treated, on the one hand, as sexual objects and, on the other, as interlopers who are entitled to no civility, much less respect. Through dialogue, shot selection, lighting, music, and pacing, the film makes palpable the anguish of a mother who desperately wants to support her children, and is willing to fight hatred, violence, and humiliation to do it.

For example, from her first moment on the job, when her new supervisor christens her “his bitch,” to the day she quits after that same supervisor forces her down on a mountain of taconite, his hands around her neck, his pelvis melded to hers, the slurs—“Rats,” “Cunts,” and “Blowjobs”—follow Josey Aimes (the fictional Lois Jenson) wherever she goes. Sometimes they are whispered as she passes by the rows of lunch tables filled with male miners in the break room. Sometimes they are scribbled in colored chalk on the dank walls of the mine’s passageways. Ultimately they are

---

32 See Mary Ellen Gage, *The Impossible Takes a Little Longer*, 44 Albany L. Rev. 298, 308 (1980) (laying bare the challenge of reconciling professional ethics with the demands of a client. “The law may be stretched, but how far? The facts may be dressed up, but how much?”).


34 *Monster* (Newmarket Films 2003).

scrawled in excrement, four feet high, on every visible surface in the women’s locker room.

The threats against the women escalate in a scene in which, after months of pleas from women miners who suffer perpetual bladder infections from the inability to relieve themselves when out of locker-room range, management finally provides a portable toilet. Josey’s co-worker Sherrie steps inside to use it, but before she can get out of her work jumpsuit, several male co-workers start to rock the structure back and forth. Although it is arguable that it all begins as fun, the men continue to rock more and more violently, and Sherrie starts to panic when she cannot keep her balance as the structure tips over onto its side. A stream of waste and chemicals from the toilet empty out on to her, and the men exult in their victory. It is more than a symbolic gesture of their feelings for all the women at the mine.

The story the district court tells when certifying the class, however, is clinical—devoid of the circumstances’ sensibilities:

Sexually explicit graffiti and posters were found on the walls and in lunchroom areas, tool rooms, lockers, desks, and offices. Such material was found in women’s vehicles, on elevators, in women’s restrooms, in inter-office mail, and in locked company bulletin boards. Women reported incidents of unwelcome touching, including kissing, pinching, and grabbing. Women reported offensive language directed at individuals as well as frequent “generic” comments that women did not belong in the mines, kept jobs from men, and belonged home with their children.36

Nor does the appellate court’s opinion, affirming the mine’s liability for sexual discrimination and sexual harassment, do more than allude to what the plaintiffs endured:

[M]ale-focused references to sex and to women as sexual objects created a sexualized work place. Id. These references included graffiti, photos, and cartoons that male employees, including bargaining unit and salaried employees such as foremen, displayed throughout Eveleth Mines. Id. at 879–880. Other references included “verbal statements and language reflecting a sexualized, male-oriented, and anti-female atmosphere.” Id. at 880. . . . In one incident, a male employee pretended to perform oral sex on a sleeping female co-worker. Id. at 880. Other incidents involved men touching women in an objectionable manner. Id. Some women were presented with various sexual mate-

36 139 F.R.D. at 663. Even assuming that the North Country scenes described above were fictionalized to some extent, the court’s act of omitting the explicit words and events contained in the record—sanitizing the opinion—strips it of any force.
rials. Id. Judge Kyle concluded “the presence of sexual graffiti, photos, language and conduct . . . told women that the sex stereotypes reflected in and reinforced by such behavior were part and parcel of the working environment at Eveleth Mines.” Id. at 884.37

In stark contrast to the diffident portrayal by the court, the film conveys in a single scene the “sexualized, male-oriented, and anti-female atmosphere” that was “part and parcel of the working environment at Eveleth Mines.”38 In that scene, at a meeting of the mine’s union brotherhood, Josey stands to address the membership about the working conditions she and her female co-workers face. The camera follows her—one lone woman—as she tentatively walks to the front of the room, which is packed to overflowing with male miners. With their eyes boring into her, their mouths set in anger, their arms folded in intractability, an underlying hum of hostility gives voice to the obstacle these women faced.

The film Monster presents an even greater divergence between the story told by the filmmaker and the story told by the legal writer. The film recounts the story of serial killer Aileen Wuornos, a highway prostitute who murdered seven clients, and who was sentenced to capital punishment in Florida. Although the film takes a moderately sympathetic view of Wuornos’s childhood, during which she was sexually abused and forced into prostitution to survive, it nevertheless holds her accountable for her actions. She is portrayed as a vengeful murderer; she is not justified in taking the lives of the men who preyed on her. Through close-ups of Wuornos’s facial expressions, shots of her posturing with her weapon, and the monotone of her narration, the audience experiences the character’s chilling ruthlessness as she executes one victim after another.

For example, Wuornos brings a customer who has given her a ride in exchange for sex out to a clearing in the woods. She spreads a tattered army blanket on the ground, and he starts to undress. She, on the other hand, watches him while smoking a cigarette, flicking her lighter with nervous energy. She tells him how a family friend raped her when she was a child. Her customer sits on the

37 Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1292 (8th Cir. 1997) (emphasis added). Admittedly, the appellants gave the Eighth Circuit very little to work with. In the fifty-three-page brief on appeal, there were but two single references to specific offensive acts. See Jenson v. Eveleth Mines, No. 97-1147 (8th Cir. Mar. 8, 1997) (on file with Author). Appellants described how one female miner was given a dildo named “Big Red,” id. at 3, and how a foreman approached another female miner, who was sitting in a truck with a male co-worker, and asked her if they had been “fucking.” Id. at 44 n. 43.

38 Id.
blanket, his trousers off, and looks at her. When she sees his face turned toward her in confusion, she tells him that she’s not a “hooker.” He gets up, gets dressed, and tells her that he’s still willing to give her a ride. His confusion grows as she tells him that she doesn’t need a ride because she’s going to take his car. She laughs and pulls out a heavy silver pistol. They both look at the gun. He takes two steps back and puts his hand in his pocket. This is the situation in which Wuornos revels. She is in control and she relishes her victim’s unease. He pulls his car keys out of his pocket, but, before he can give them to her, she aims the gun and shoots him in the stomach. He falls backward onto the ground, pleading for her to stop. Wuornos fires five more times in rapid succession, while he looks up at her. Then she strides away, full of fury despite the pleasure she took in the killing.

In contrast, the State’s appellate brief in Wuornos v. Florida, reads exactly like the police report from which it was taken. “The Statement of the Case and Facts” begins with the description of the death of a victim:

**THE DEATH OF CHARLES HUMPHREYS**

The southwest section of Marion County where the body of Charles Humphreys was found is on Highway 484, just west of 1-75 (R 528). It was at the end of a cul-de-sac (R 530). Humphreys was 6’ ½” tall and weighed 200 pounds (R 595). He worked as an investigator for H.R.S., in child protective investigations (R 531). He did not carry a weapon in his job. No weapon was found at the scene (R 535). The day before his body was discovered he was in Wildwood, in Sumter County, conducting an investigation. His family reported him missing (R 532). His supervisor at H.R.S. identified his body (R 531). His body was fully clothed when found (R 535). His pants were zipped and his belt was buckled (R 544). No evidence was found at the scene to indicate he had engaged in sexual activity (R 535). An I.D. case, with the badge missing, was found off Highway 27 (R 536). Police association cards, credit cards and papers concerning Humphreys’s Oldsmobile Firenza were also found (R 537). A spent .22 caliber casing was found, as well (R 538). Bullets were removed from Humphreys’s body during autopsy and examined (R 541). A cartridge case found with Humphreys’s personal property had been fired in Wuornos’s 9 shot .22 (R 634). Humphreys’s briefcase was reported missing (R 543). It was recovered in a storage facility rented by Aileen Wuornos (R 541). It was opened using Humphreys’s social security number (R 542). There was one wound to the upper part of the right arm (R 587).

---

39 644 So. 2d 1012 (Fla. 1994).
The other wound was to the right wrist (R 588). There was a donut abrasion on the right side of the abdomen consistent with a gun barrel being shoved into the body.  

Certainly, the drama inherent in the story, so effectively transmitted in the film, could be similarly “dramatized” on paper. There is no conceivable reason for the government to begin its story with a geographical description of Highway 484. Similarly, the height and weight of the victim, even if not extraneous information, is insufficiently important to appear so prominently in the presentation. The government does not even mention the wounds on the body until the very last part of the statement. There is nothing in the description of Charles Humphreys’s death that even alludes to the heinousness of the killing and the monstrousness of the killer. Indeed, the list of “facts” provided to the Florida Supreme Court in this recitation is merely a series of unconnected events; it tells no story at all.

II. MOVIES MAKE EXCELLENT TEACHING TOOLS

A. Films Have a Place in the Law School Curriculum

We live in an age of “pervasive visual communication.” Although there is limited empirical research documenting the precise visual learning abilities of law students, legal educators agree

---

41 The Statement of the Case and Facts then chronicles the deaths of two other men, Troy Burress and David Spears. Those discussions are similarly bland. The apathy with which the prosecution presents this part of the story is all the more anomalous, because the latter part of the Statement of the Case includes Wuornos’s confession, including the details of the circumstances surrounding each of the murders. See id. at 3–19.
42 There is no consensus on this point. Although at least twenty-five law schools, including my own, have upper-class electives in which films constitute the narrative of the course, many faculties do not see the value of using film in the law school classroom.
44 Professor Robin Boyle has conducted learning styles studies with first-year law students at St. John’s University School of Law since 1998. See e.g. Robin A. Boyle & Rita Dunn, Teaching Law Students through Individual Learning Styles, 62 Albany L. Rev. 213 (1999); Robin A. Boyle, Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student, 81 U. Detroit Mercy L. Rev. 1, 20 (2003). Those studies found that anywhere from 8% to 22% of the St. John’s students tested were
that law students come to the academy well equipped to absorb knowledge through visual storytelling.\textsuperscript{45} And film, more than virtually any other visual medium, can engage law students’ visual, interactive learning styles.\textsuperscript{46} Films resonate with their audiences so profoundly for three basic reasons. First, they invite the viewer on a journey.\textsuperscript{47} Second, they provoke a particular response from the viewer.\textsuperscript{48} Third, they convince the viewer of a truth.\textsuperscript{49} In other words, by virtue of the filmmaker’s intention, a movie draws the viewer off the sidelines and into the story. Thus, using movies as teaching tools would make the study of law far more accessible to students.

Consider first-year law students’ experience with authority. When students begin their studies, many of them misunderstand the casebooks used in Torts, Contracts, Property, and Civil Procedure. They believe that the material printed in them was written to teach them the substantive law.\textsuperscript{50} They forget that casebooks

\textsuperscript{45} Galves, supra n. 43, at 202 (noting that modern law students are raised within an age of “pervasive visual communication,” absorbing much of their information through visual imagery); Philip N. Meyer & Steven L. Cusick, Using Non-Fiction Films as Visual Texts in the First-Year Criminal Law Course, 28 Vt. L. Rev. 895, 897 (2004) (noting that, through the proliferation of visual narratives in television and movies, law students are “bathed and swaddled in endless popular stories”); Steven I. Friedland, How We Teach: A Survey of Teaching Techniques in American Law Schools, 20 Seattle U. L. Rev. 1, 35 n. 91 (1996) (“Visual learning techniques provide a pertinent illustration of techniques that . . . may augment and reinforce the learning of many students weaned on television and movies.”). Thus, although books are certainly still relevant in the law school classroom, “[v]isual learning begins very early [and frequently] continues into . . . higher education.” Galves, supra n. 43, at 202 n. 22. Law students are receiving more information visually than ever before. Id.

\textsuperscript{46} Edward Rubin et al., A Conversation among Deans from “Results: Legal Education, Institutional Change, and a Decade of Gender Studies” Harvard Journal of Law & Gender Conference, March 2006, 29 Harv. J. L. & Gender 465, 482 (2006). Katherine Bartlett, Dean of Duke Law School, recognized the phenomenon after the law school invested heavily in video technology to augment classroom instruction. Twenty-five years ago, Dr. Howard Gardner, Hobbs Professor of Cognition and Education at Harvard University Graduate School of Education, identified spatial visual intelligence as one of eight “intelligences” in his groundbreaking work, Frames of Mind: The Theory of Multiple Intelligences (Basic Bks. 1983).


\textsuperscript{48} See Walkyria Monte Mór, Reading Dogville in Brazil: Image, Language and Critical Literacy, 6 Language & Intercultural Commun. 124, 126–127 (2006) (noting that this process parallels “literacy,” defined as a socially constructed critical practice of reading, as the interpretative ability of the viewer is constantly stimulated to respond, resulting in enhanced critical abilities”).

\textsuperscript{49} Robert McKee, one of the foremost authorities on screenplay writing, explains that storytelling in film is “the creative demonstration of truth.” Robert McKee, Story: Substance, Structure, Style, and the Foundations of Screenwriting 113 (HarperCollins Publishers 1997).

\textsuperscript{50} R. Lawrence Dessem, Pretrial Litigation Law, Policy & Practice 12 (4th ed., Thomson/West 2007).
contain excerpts from real opinions that decided real disputes between real people. In essence, from the beginning of their law school career, students divorce legal disputes, and in particular, the people who experience them, from legal doctrine.

Yet when the real life events that give rise to legal disputes are presented independent of the casebook, students empathize with the parties, spot the legal issues, and apply substantive law in response. This is especially true when situations implicating legal issues are presented in movies.

That phenomenon should not be surprising. As Professor Sherwin has noted, “[l]aw is more than a system of rules and the fear of predictable consequences. It is a world made up of meanings that are drawn from shared texts and practices. It is a normative world, which means that embodied within it is a moral point of view, a normative vision.” The powerful synergy between legal stories and film stems from their common ground. Both law and cinema are “theaters of conflict, spectacles through which we understand essential aspects of our humanity and society.”

As one scholar has remarked on the strength of film to unearth legal issues:

At its best, a movie can take the shadow of justice and injustice and, with its enlarged images flickering across the screen, remind us that law in the final analysis is a human enterprise, that there is a human cost behind both our failures and our successes. Films can return us to occasions which have tested the law—and tested it in the most human of terms. . . . Film not only tells us what kind of community we have become but is also capable of helping us understand what kind of community we ought to become . . . .

---

51 Id. (discussing the disconnect students experience between the actual disputes underlying the cases of Erie Railroad v. Tompkins, 304 U.S. 64 (1938), and Hansberry v. Lee, 311 U.S. 32 (1940), and the legal doctrines those cases teach).

52 Dean Katherine Bartlett observed that law students better understand the motivation and perspective of individuals involved in leading U.S. Supreme Court cases after watching video documentaries about them. In fact, according to preliminary testing done at Duke, students who viewed the videos “gain[ed] a deeper understanding of both the factual and analytical aspects of the cases.” Rubin et al., supra n. 46, at 482.

53 According to Steven Lipkin, movies, and, in particular, docudramas, “convince us that it is both logical and emotionally valid to associate cinematic proximity with moral truth.” Steven N. Lipkin, Real Emotional Logic: Persuasive Strategies in Docudrama, 38 Cinema J. 68, 82 (1999).

54 Sherwin, supra n. 31, at 1526.

55 Shale, supra n. 47, at 991.

Of course, not all movies are suitable vehicles for studying law.\textsuperscript{57} But many films accessible to students raise universal themes inherent in the analysis of law and society.\textsuperscript{58} Moreover, many movies address the issues that underlie lawsuits in every court in the country. Films that tell stories about, among other things, human rights,\textsuperscript{59} civil rights,\textsuperscript{60} racial discrimination,\textsuperscript{61} sexual harassment,\textsuperscript{62} divorce,\textsuperscript{63} murder,\textsuperscript{64} capital punishment,\textsuperscript{65} insider trading,\textsuperscript{66} corporate misfeasance,\textsuperscript{67} products liability,\textsuperscript{68} sexual harassment,\textsuperscript{69} divorce,\textsuperscript{70} murder,\textsuperscript{71} capital punishment,\textsuperscript{72} and fraud,\textsuperscript{73} help students connect law to life.

\textbf{B. Films Have a Particular Significance in the Legal Writing Classroom}

It has been well documented that the first-year legal writing course focuses on legal analysis, to the exclusion of almost everything else.\textsuperscript{72} The conventional IRAC approach, used to some degree in virtually every first-year writing program, doesn’t even consider components other than the legal issue, the rule of law, the application of the rule of law to the factual scenario presented, and the legal conclusion.\textsuperscript{73} Thus, when first-year legal writing students are
asked to discuss what happened in a precedent case or to explain why a particular result should occur under a new set of circumstances, they list a series of unconnected events—some relevant, some irrelevant. Students have great difficulty seeing that convincing a reader is dependent in large part on telling a story, shaping those events so they have a particular meaning.\(^{74}\) Instead, students recite the “facts.”

I drive home the absurdity of the disconnect between “facts” and “story” in my legal writing classes with the following hypothetical:

Your study group is meeting in the Cafeteria at noon, but by 12:15 one member, Pricilla, is still missing. Ten minutes later, Pricilla stumbles into the Cafeteria. Her clothes are torn, she has a cut on her forehead, and she’s dragging her backpack. Do you cry, “quick—what are the facts?” Of course not. You cry, “Pricilla—what happened?”

Bringing movies into the classroom can heal the rift.\(^{75}\) Not only are films “part of the universe of meaning-making in which we all live,” but they “suppl[y] at least some of the narratives and the storytelling styles that situate our being in a normative world.”\(^{76}\) Thus, movies can serve as a bridge to understanding the purpose and process of a story.

\(^{74}\) Brooks, supra n. 8, at 4 (explaining that narratives do not “simply recount happenings; they give them shape, give them a point, argue their import, proclaim their results”).

\(^{75}\) Quite a bit has been written about the use of literary narrative technique in the context of teaching legal advocacy. See e.g. AALS Sec. Leg. Writing, Reasoning & Research, Annual Meeting Program, Developing the 5th McCrate Skill—The Art of Storytelling, 26 Pace L. Rev. 501 (2006); Linda H. Edwards, The Convergence of Analogical and Dialectical Imaginations in Legal Discourse, 20 Leg. Stud. Forum 7 (1996); Brian J. Foley & Ruth Anne Robbins, Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections, 32 Rutgers L.J. 459 (2001); Philip N. Meyer, Vignettes from a Narrative Primer, 12 Leg. Writing 229 (2006) [hereinafter Vignettes]; Philip N. Meyer, Retelling the Darkest Story: Mystery, Suspense, and Detectives in a Brief Written on Behalf of a Condemned Inmate, 58 Mercer L. Rev. 665 (2007) [hereinafter Darkest Story]. Cinematic storytelling style, however, is different from, and in many respects, more effective than literary technique when telling a court the story. See Philip N. Meyer, Why a Jury Trial Is More Like a Movie Than a Novel, 28 J.L. & Socy. 133, 134 (2001) [hereinafter Jury Trial] (arguing that trial advocates are influenced most often by the oral and visual storytelling styles of Hollywood filmmakers, rather than the literary styles of novelists). Not only are we entrenched in a “post-literate storytelling culture” dominated by popular cinema, id., but films create a complete universe for the viewer in ways that novels cannot. The audience enters a shared reality when watching a film; readers, on the other hand, construct their own independent vision of the novelist’s description. Unlike film, literature leaves much to the individual imagination. A successful brief, however, draws a court into a specific universe; it welcomes the court to a shared reality—the one that favors the advocate’s client.

\(^{76}\) Sherwin, supra n. 31, at 1526.
Moreover, film narrative follows accepted conventions, and, as a persuasive presentation, a film shares characteristics with a legal argument. A finished film reflects the conscious choice of a storyteller who takes a point of view and supports it. As Professor Philip Meyer explains, like filmmakers, “[l]awyers tell imagistic narratives constructed upon aesthetic principles . . . that control the formulation of plot-structure in commercial cinema. . . . We speak and think filmically. We have much to learn from visual storytellers working the same popular cultural turf.”

C. Legal Writers Should Adopt the Cinematic Storytelling Techniques of Filmmakers

Appreciating the storytelling value of films is not enough. Before legal writers can effectively use movies as a model for fact writing, they must first understand the particular narrative structure and cinematic methodology filmmakers employ. Filmmakers rely on three elements to achieve synergy between the audience and themselves: the dramatic structure of the story, the characters who live the story, and the cinematic language used to tell it.

1. The Dramatic Structure

From a narrative perspective, films embrace the principle of causality—in other words, every story event happens for a reason, and the reason is evident from the events depicted on screen. Employing causality ensures that the filmmaker tells the story in an intentional, rather than random, way. The filmmaker con-

---

77 Lipkin, supra n. 53, at 68–69 (Docudrama “functions as a moral truth in its representation of the actual people, places, event, and actions at its source but also proffers an argument highly appealing to its audience . . . ”).
78 See Mór, supra n. 48, at 126 (noting that filmmakers adopt methods intended to “elicit a particular reaction from the viewer”).
80 Shale, supra n. 47, at 1005 (explaining how E.M. Forster illustrated the difference “between flat narration and meaningful story as the difference between recounting ‘the king died, and then the queen died’ and ‘the king died, and then the queen died of grief’”).
81 See David Bordwell, The Way Hollywood Tells It: Story and Style in Modern Movies 15 (U. Cal. Press 2006) (explaining our innate ability to comprehend movie narratives because they are a “heightening and focusing of skills we bring to understanding everyday social life—connecting means to ends, ascribing intentions and emotions to others, seeing the presents as stemming from the past”).
82 Shale, supra n. 47, at 998.
nects one event to another, building to a conclusion that cannot be denied.\footnote{I compare the process of building a story to cooking. Certain dishes can be assembled randomly, in any order, without connection to the other ingredients. For instance, boiled potatoes, cream, and butter add up to mashed potatoes whether the cook adds the butter to the potatoes first and the cream second, or vice versa. On the other hand, as Prof. Sheila Simon explains, a lasagna must be assembled in a particular order. See Sheila Simon, Brutal Choices in Curricular Design: Top 10 Ways to Use Humor in Teaching Legal Writing, 11 Persps. 125, 125 (Spring 2003). If, instead of building alternate layers of noodles, sauce, and cheese, the cook piles all the noodles in the bottom of the pan, then pours on all the sauce, and tops the sauce with all the ricotta, the result will be, at least, disappointing. What emerges from the oven will not be a “lasagna.” See id. (discussing how she illustrates the layering analogy with photographs of her husband serving lasagna in regular, disorganized and blender formats”). Facts must be handled like lasagna, not mashed potatoes.}

Further, film narratives draw from the very experiences and values of their audiences,\footnote{Meyer, Jury Trial, supra n. 75, at 138 (discussing how Hollywood storytelling convention “enforces rather than defies the conventional shared understandings and the morality of the audience”).} which allows viewers to not only recognize and identify with the characters and circumstances in the film, but also to collaborate with the filmmaker in interpreting the story.\footnote{See Mór, supra n. 48, at 125–126 (discussing how the viewer moves from an observer to a co-producer of an image).} Thus a film is a joint enterprise by the filmmaker and the viewer, which results in a shared understanding of “what happened.”

Commercial films, moreover, adhere to a conventional formula.\footnote{Bordwell, supra n. 81, at 28.} Renowned screenwriter William Goldman instructs novice writers that “[s]creenplays are three things: ‘structure, structure, structure!’”\footnote{Mickael Rozwarski, Life or Movie: Which Comes First? 17 (Universal Publishers 2002).} Indeed, although “[w]hat makes a story interesting is creativity, what makes it believable is form.”\footnote{Id. (quoting Carlos De Abreu & Howard Smith, Opening the Doors to Hollywood, How to Sell Your Idea, Story, Book, Screenplay, Manuscript 170 (Crown Publishers, Inc. 1995)).} Robert McKee takes a similar position: “A story’s event structure is the means by which you first express, then prove your idea . . . without explanation.”\footnote{McKee, supra n. 49, at 113.} Story structure is critical, in large part, because it creates “an environment that is favorable for the mind to rely on . . . .”\footnote{Rozwarski, supra n. 87, at 22.} Such an environment, Jerome Bruner explains, contains “rules not only about the propositional content of an utterance but about required contextual preconditions, about sincerity in the transaction,
and about essential conditions defining the nature of the speech act . . .”

The well-established paradigm is that of the “hard” Three-Act narrative structure. Act I is the “set up” or the “hook,” in which the characters and their goals are introduced. An “inciting incident,” something that drastically changes the protagonist’s life, triggers the dramatic action of Act I. Act II is the “complication” or “confrontation,” in which the protagonist confronts a “catalyst,” and struggles with “the forces of antagonism.” A “climax” occurs in the middle of Act II, just as the protagonist is on the verge of taking control for the first time. Act III is the “resolution,” when the protagonist either achieves or falls short of the goal, and the conflict is settled.

The Three Act Structure engages the viewer in a “carefully articulated mental and emotional experience.” A “set up” provides the background needed to understand the story that follows and to develop an attachment to the characters. A “complication” deepens the viewer’s interest by “changing the terms” of the set up, thus raising the emotional stakes. A “resolution” settles the questions raised in the First and Second Acts, ultimately inviting the viewer to “recall the path the protagonists have taken and measure their success or failure.” The Three Act structure ensures that storytelling will be “the creative demonstration of truth.”

---

91 Id. at 22–23 (quoting Jerome Bruner, Acts of Meaning 63 (Harv. U. Press 1990)).
92 Bordwell, supra n. 81, at 28; Meyer, Jury Trial, supra n. 75, at 141; see Syd Field, Screenplay: The Foundation of Screenwriting 16 (MJF Bks. 1994).
93 Shale, supra n. 47, at 998.
94 Rozwarski, supra n. 87, at 24.
95 Id. at 22.
96 Id. at 24.
97 Shale, supra n. 47, at 998 n. 23.
98 Rozwarski, supra n. 87, at 24. Some screenplay gurus instruct that Act II should culminate in “what has come to be called the ‘dark moment’ or ‘darkest moment.’” Bordwell, supra n. 81, at 29.
99 Rozwarski, supra n 87, at 24.
100 Shale, supra n. 47, at 1015.
101 Bordwell, supra n. 81, at 42 (attributing the comment to Kenneth Burke in The Psychology of Form, Counter-Statement 31 (U. Chi. Press 1957)).
102 Id. at 41 (discussing Kristen Thompson’s analysis of plot structure).
103 Id.
104 Id. at 41–42. Thompson refers to the viewer’s assessment of the protagonist’s achievement as the “epilogue.”
105 McKee, supra n. 49, at 113.
2. The Characters Who Live the Story

Commercial filmmakers realize that the audience must recognize and identify with the characters who tell the story. Absent that connection, there can be no collaboration between the viewer and the storyteller. At a minimum, the protagonist must be someone with whom the audience can sympathize. The audience must be able to identify with the characters’ goals. “Hollywood stories are ones in which the leading characters are propelled into some personal odyssey, in pursuit of something they desire. By the journey’s end, their experiences will have changed them in a significant way.”

As David Bordwell explains, the characters who populate Hollywood films “struggle to solve a clear-cut problem or to attain specific goals.” These characters are “discriminated individual[s] endowed with a consistent batch of evident traits, qualities, and behaviors.” Thus, films that resonate best are about recognizable characters resolving the “human conflicts” that their “incompatible goals and incommensurate values” create. They are the films that force the protagonist to make the kinds of “hard choices and difficult decisions” we would rather not have to make.

3. The Cinematic Storytelling Language

Because film so closely approximates reality, “it can communicate a precise knowledge that written or spoken language seldom can.” Filmmakers take advantage of the medium’s unique connotative abilities by making deliberate cinematic choices about casting, shot composition (including distance, focus, angle, etc.).
movement, lighting, and point of view), film texture and color,\textsuperscript{116} sound,\textsuperscript{117} and montage.\textsuperscript{118} These cinematic “codes”\textsuperscript{119} are integral to the viewer’s perception of the story.

III. USING \textit{DOGVILLE} AS A MODEL FOR FACT-WRITING

What follows is a multi-step method for bringing the story of \textit{Dogville} to life in a fictional murder case, \textit{State of Colorado v. Grace Margaret Mulligan}. After viewing the film, discussing it, identifying the underlying themes and competing viewpoints, the class will be ready to draft two “Statements of Facts”: one for the prosecution, and the other for the defense.

\textbf{A. Step 1: View the Movie as a Group and Assign a \textit{“Statement of Facts”}}

Although it might seem counterproductive, it is worth watching \textit{Dogville} as a class.\textsuperscript{120} The film’s unflinching examination of human nature evokes an intense response from the audience, and often viewers will visibly react and interact non-verbally during the movie.\textsuperscript{121} Moreover, despite the movie’s traditional linear Three Act structure, which is underscored by chapter titles segueing between sequences, \textit{Dogville} is atypical in its look and sound. That, too, elicits special attention. Thus, a communal viewing experience is a more complete viewing experience.

The film tells the story of a young woman, Grace Margaret Mulligan, who comes to a small town seeking a safe haven from gangsters. Although they are disinclined to accept her at first, the

\textsuperscript{116} For example, a “grainy” image is associated with a “truthful” one. \textit{Id.} at 194.

\textsuperscript{117} \textit{Id.} at 212.

\textsuperscript{118} The way the shots of a film are put together to tell the story is also called “editing” or “cutting,” the most familiar examples of which are the jump-cut, the fade, and the dissolve. \textit{Id.} at 216, 225.

\textsuperscript{119} \textit{Id.} at 175. “Codes are critical constructions—systems of logical relationship—derived after the fact of film.” \textit{Id.} The combination of cinematic codes, culturally derived codes, and codes shared with other arts “make up the syntax of film.” \textit{Id.} at 179.

\textsuperscript{120} Group viewing also ensures that everyone sees the entire film, under the same circumstances, without any disruptions. However, because the film is long—almost three hours—it might be necessary to schedule a special screening time.

\textsuperscript{121} The film was excoriated by more than a few critics who perceived it as an attack on America for, among other things, its presence in Iraq. See Bo Fibiger, \textit{A Dog Not Yet Buried: Or Dogville as a Political Manifesto}, 16 P.O.V.: Danish J. Film Stud. (U. Aarhus) 56 (2003). “Through his contrived tale of one mistreated woman, who is devious herself, von Trier indicts as being unfit to inhabit the earth a country that has surely attracted, and given opportunity to, more people onto its shores than any other in the history of the world. Go figure.” \textit{Id.} (quoting Todd McCarthy’s review in \textit{Variety}).
townspeople grudgingly agree to give her shelter in exchange for work. But as the stakes get higher and it becomes riskier for the townspeople to hide her, they exploit, and, ultimately, enslave her. She takes her revenge at the end of the film, by killing everyone in the town and burning it to the ground.

The staging of the film is one of its most arresting aspects. The entire film takes place on an open black stage, with white chalk lines and labels marking out the town’s various buildings, roads, and points of interest, much like a blueprint. There are no walls or ceilings—the audience sees everything that happens at any given time, unless the camera deliberately focuses the viewer’s attention on a specific action.

Striking, too, is the film’s use of a narrator who alternates between an on-and-off-screen presence. He provides a running commentary throughout the film—an inside track designed to let the audience believe it is getting the whole story. Yet through the ironic tone and text of the narration, the filmmaker evaluates every action that occurs and puts it in its proper context.

Because so many components are at play in Dogville, it is helpful to have students concentrate their attention on one of the three Acts. They should take notes during the film about what they see on screen (shot composition, shot sequencing, staging, and special effects), what they hear (dialogue, narration, sound effects, and music), and what they feel while watching that particular Act. Instruct them to list the characters with whom they sympathize and why, and ask them to note the legal themes, crimes, and defenses they notice. Before the following class, have each student write a “typical” “Statement of Facts.”

**B. Step 2: Explore What Really Happened in Dogville**

Before discussing the events that transpired in each Act of the film, share some of the fact statements drafted by the students. A student might produce an accurate, but shapeless, factual presentation like this:

**STATEMENT OF FACTS**

Grace Margaret Mulligan, the daughter of a gangster from Georgetown, arrived in the Rocky Mountain town of Dogville on March 12, 1932. She was on the run from a notorious band of gangsters. Tom Edison, Jr. offered her shelter in the town, and she accepted. She provided services to the townspeople of Dogville in return for their protection. Over time, however, when police officers repeatedly came to Dogville to arrest her, the townspeople forced Grace to increase her working hours and
submit to sexual assaults. She attempted to escape from Dogville by paying the local truck driver to smuggle her out of town in the back of his pickup. But she was discovered and apprehended, and subsequently chained to a fly wheel, which she had to pull behind her as she fulfilled her obligations to the townspeople. When the citizens of Dogville no longer knew what to do with her, Tom called her father who, along with his subordinates, came to bring her back to Georgetown. After speaking with her father, Grace reconsidered her treatment by the people of Dogville. She concluded that they had acted reprehensibly, and without any excuse. When given the opportunity, she shot Tom and allowed her father’s men to destroy the town.

Discuss the following points about the factual recitation with the class:

- Whether the Statement reflects either Grace’s or the State’s perspective.
- Whether the Statement raises any justification for what happened to Grace or the townspeople.
- Whether the Statement conveys any of the emotion they felt while watching the film.

To emphasize the distinction between what they saw and what they wrote, have the students explain what happened in the film, Act by Act. Focus their discussion on the dramatic structure of the film, the legal themes underlying the story, the characters’ different points of view, and the visual and aural effects that caught their attention.

1. **My Students’ Reaction to Act I: The Hook**

The students first commented that the inhabitants of Dogville were a ragtag collection of characters. Although a retired medical doctor lived in the middle of town, most of the residents appeared to be poor and uneducated. Moreover, it was immediately apparent to the students that Dogville was a lonely place, isolated at the edge of an impassable mountain. Life was hard and unsentimental in Dogville. There was little generosity, curiosity, or social grace among the townsfolk. The people of Dogville didn’t “take nothin’ from nobody,” and aimed to keep it that way.

They all recognized that the inciting incident occurred when Tom Edison, Jr., the son of the retired physician, heard gunshots from the neighboring village of Georgetown. He discovered Grace, a distraught but elegant young beauty, on the run from gangsters.
Tom brought Grace back to his home to see if he could help her. From their whispered conversation, which the students pointed out emphasized the air of secrecy surrounding the meeting, Tom learned that Grace feared the gangsters would kill her if she returned to Georgetown. Tom suggested the people of Dogville would hide her, but Grace was skeptical that they would compromise their own safety for her. “They are good people,” Tom responded, and he assured her that she “ha[d] a lot to offer Dogville.”

The students easily identified Grace as a fish out of water. She is sensitive, where Dogvillians are cold. She comes from a privileged background, where Dogvillians barely scrape by. She openly admits her vulnerability, where Dogvillians take pride in their self-sufficiency. Yet, the students also saw the possibility of an alliance between Grace and the townspeople. Despite their differences, Grace and the people of Dogville shared a basic humanity, which bonded them together. By the end of Act I, the students sympathized with Grace who epitomized “good” as opposed to the “evil” gangsters. They admired the heroic Tom who had become her redeemer. Finally, the students expressed cautious optimism that the community would keep Grace’s presence in Dogville a secret.

2. My Students’ Reaction to Act II: The Complication

At Tom’s urging, the townspeople gave Grace sanctuary for a trial period, during which she proved her worth to them as a babysitter, tutor, apple picker, cleaner, gardener, and home health aide. After the probationary phase ended, the community members voted to allow Grace to stay. Thus, by the Fourth of July, an unusual equilibrium settled over Dogville. As the townspeople gathered together for the annual picnic, it was evident that these were the very best days in Dogville.

The students became anxious when police officers intruded on the celebration, looking for Grace. The officers claimed that Grace was a fugitive from justice: subject to arrest for bank robbery. All the picnickers’ eyes followed the officers as they nailed a “WANTED” poster with Grace’s likeness to a tree. The students said that they empathized with the townspeople when the police warned them that anyone found harboring Grace would be subject to severe penalties.

Few, if any, of the townspeople believed that Grace was a bank robber. Indeed, they pointed out, Grace was with them in Dogville at the time the robberies were staged. Nevertheless, the students recognized the catalyst, which would upset the delicate
balance Grace and the townspeople had established. The students were alert to the new power shift, when the community questioned whether Grace should be allowed to stay.

The students were taken aback by Tom’s suggestion that the town exploit Grace’s precarious position. He told Grace that rather than visit each home or place of business once a day, she would now have to make two visits and do twice as many chores, for half the wages she received before. Further, her chores would no longer be limited to superficial tasks—she would now be expected to uproot trees in the apple orchard, change an invalid’s urine-soaked bedding, and scrub garage floors on her hands and knees. Nevertheless, Tom reasoned, this arrangement was in her best interest, since it had become much riskier for the town to hide her and she had more of an incentive to want to remain hidden. Grace agreed to the new terms.

The students were dismayed to see Grace at the mercy of everyone in Dogville. Her vulnerability brought out the worst in the townspeople, as they threatened her, both explicitly and implicitly, with exposure. The students lost all sympathy for the townspeople when they berated her for any small mistake, for taking a shortcut through the gooseberry bushes, for arriving a minute or two after the church bell had rung. They interpreted Grace’s upright posture and resolute facial expressions as stoicism. They commented on the cinematic effects that the filmmaker used to convey the absurdity of the circumstances: an accelerated film speed to show Grace mindlessly racing from one job to another, the superimposition of the Roman numerals and pendulum of a grandfather clock over the sequence to illustrate time flying by, and the ringing of the church bell every ten seconds to punctuate Grace’s transition from one task to another.

But nothing up until that point distressed the students as much as the sight of the men of Dogville forcing themselves on Grace, as a condition of their silence, with their children in the very next room, and their wives within hearing distance. That was, for the students, the point at which Grace ceased to be a member of the community and became a piece of property.

Even when Grace decided that enough was enough, and borrowed $10.00 from Tom to pay the truck driver, Ben, to smuggle her out of Dogville in the flatbed of his truck, the students were not reassured. After the truck rumbled along for a short while, it stopped and Ben lifted up the tarp covering her. The students braced themselves when Ben climbed into the back, rolled on top of Grace and, despite her protests, exacted “extra payment” in the form of sexual intercourse. Yet, as the truck pulled back onto the road, and Grace was lulled to sleep, the students relaxed a little
bit. When Grace woke as the truck stopped, and the students thought that the long ride was over, they got another surprise. A dog barking; it was the watchdog, Moses—and we all understood that she was back in Dogville.

The students recalled that their hearts sank at the climax, when the tarp covering the flatbed was flung back and Grace was exposed. The townspeople surrounded the truck, like hunters encircling their prey. The filmmaker had effectively raised his viewers’ hopes and crushed them, right along with Grace’s.

The students reported feeling numb when they saw the townspeople make Grace their prisoner. Using an old flywheel, the bell from the door of the general store, the chains that guarded the gooseberry bushes, and Moses’s iron collar, the townspeople fashioned what they call an “escape protection mechanism.” The students mentioned that the hollow sound of the hammer hitting iron drove home the horror of the townspeople’s act, as the collar was fastened around Grace’s neck and she was shackled to the flywheel, which she dragged behind her as she labored for the inhabitants of Dogville. But by the end of Act II, every student was outraged; every student wanted justice for Grace.

3. **My Students’ Reaction to Act III: The Resolution**

The students expressed how frustrated they were by the time the Third Act opened; they wanted to take matters into their own hands. Winter had come again. Grace had more-or-less resigned herself to a life of servitude, yet her presence still discomfited the townspeople. Tom, in particular, had trouble facing her, since his accusation that she took the $10.00 missing from his father’s medicine cabinet to facilitate her escape precipitated her imprisonment. He resolved that the town had to dispose of Grace, and persuaded the community to turn her over to the gangsters for a reward.

The students truly had no idea what to expect when the gangsters’ shiny black cars rolled into Dogville. They were disgusted by Tom’s obsequiousness toward the men in sleek black suits and fedoras, and uncomfortable with how keyed up the townsfolk, who anticipated an execution, were. The students were as surprised as the townspeople to learn that Grace’s father was the leader of the gangsters, and he was incensed to find her shackled. She was immediately freed and ushered into the back of her father’s limousine.

Although Grace tried to excuse the townspeople who had wrongly imprisoned and enslaved her, neither her father nor the
students were moved. Her father pointed out that she accepted behavior from the citizens of Dogville that she would never accept from herself, because she was arrogant and considered herself superior to them. She had to choose whether to remain in Dogville or to leave with him and run his organization.

The students said they were fascinated when Grace left the car to consider her options. As she looked at the townspeople, who hovered anxiously in the background, the full moon, hanging very low in the sky, emerged from behind a cloud and illuminated the town. That shift in light allowed her to finally see Dogville for what it was: a miserable place, filled with miserable people, no better than those she had known at home. She realized that their conduct toward her was reprehensible and committed without any conceivable excuse. It dawned on her that she had a duty to “put [the town to rights] . . . for the sake of humanity, itself.” Through the narration of Grace’s thought process, the students were able to reason along with her. They agreed that Grace’s odyssey was complete; she had been transformed by her experience.122

But Grace’s next action stunned all the students. She authorized the gangsters to destroy Dogville, and they methodically gunned down the citizens. Grace executed Tom with a shot to the back of his head. Dogville went up in flames; Moses, alone, survived.

When considering whether Grace was guilty of murder, the students debated if she was justified or if she should be excused. They could not agree about whether she had consented to her conditions in Dogville. What they did agree on was that Grace made the kind of “hard choices and difficult decisions” we would rather not have to make.123 Even those who thought she made the wrong choice could understand why she felt she had to make it.

C. Step 3: Shape the Statement of Facts in State of Colorado v. Grace Margaret Mulligan into a Compelling Story

The key to transitioning from the kind of factual recitation that the students wrote before the class analyzed the story told by the filmmaker and the kind that best serves the argument is focusing on the two distinct points of view—Grace’s and the State’s—in a homicide prosecution.124 Assign half the class to prosecute Grace

---

122 See Shale, supra n. 47, at 997.
123 Id. at 1001.
124 One commentator has noted that “[i]n every murder case, . . . there are only two issues: Did the deceased deserve to die and, if so, was the defendant the person to do it?”
and the other half to defend her. Remind the students that, although both fact presentations arise from the same events, those incidents and events must be made to “combine in a meaningful way,” which leads to opposite outcomes.125

Raise the legal points of view each side must convey. For example, Grace’s story must express that although the homicides may not have been justified, the brutality Grace endured excuses some of her culpability. In contrast, the State must convince the reader that even under the most extreme conditions, revenge is not acceptable in our legal culture. Emphasize the underlying themes each side must communicate: Grace must impress upon the reader the fundamental right to bodily integrity, and the consequences of perpetuating a society unaccountable for its actions, while the State must stress the devastating effects that flow from embracing foreign cultures, and the risks associated with undertaking to rescue those in need.126

Both sides should use the Three Act narrative structure in creating the story. Ensure that the students set up the Statement of Facts with a “hook,” a “complication,” and a “resolution.” Have them double check for an “inciting incident,” a “climax,” and the protagonist’s “transformation.” Stimulate the students’ memories of the cinematic effects that helped them to interpret the story—particularly those that prompted them to shift their sympathies. Ask them to recall what about the tone of the narration, the camera work, the sound effects, and the editing moved them in one direction or the other.

Finally, encourage each side to turn its “bad facts” to its advantage. In other words, the advocates for both the State and Grace must accept that neither the townspeople nor Grace behaved like model human beings. All the characters in the film are flawed.127 But that is what makes what happened in Dogville so realistic—and so suitable for telling a legal story.128 Below are two

---

Winter, supra n. 7, at 2272 n. 163 (attributing the quote to Professor Herbert Wechsler, made in the course of the author’s first year class in criminal law).

125 Brooks, supra n. 8, at 3 (discussing how the “narrative glue” used in two stories based on the same “facts” can either send a man to prison for rape or release him because the sex was consensual).

126 McKee refers to the theme as “the Controlling Idea.” McKee, supra n. 49, at 115. The Controlling Idea “shapes the writer’s strategic choices . . . it must be expressible in a single sentence.” Id.

127 As one commentator has observed, “the town of Dogville has two faces, which reveal themselves alternatively through ‘tiny changes of light.’” Brighenti, supra n. 5, at 99. They hint at “fundamental moral ambivalence: on the one hand, the town is a poor but dignified rural community . . . on the other hand it is a ragged place, full of vices, ignorance, bestial appetites and gross behaviours.” Id.

128 The goal here is to have the legal reader “live[']’ the story-experience, [so to] engage
annotated model Statements of Facts, the first on behalf of Grace, and the second on behalf of the State. The annotations on the right side of each table highlight the advocate’s intentions in telling the story. They make explicit the narrative, thematic, and cinematic techniques adapted from the film. In other words, the annotations explain the choices an advocate might make in telling each version of the story to the court.

**ANNOTATED MODEL #1 (GRACE’S BEHALF)**

<table>
<thead>
<tr>
<th><strong>STATEMENT OF FACTS</strong></th>
<th><strong>PROLOGUE</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><em>or What Happened to Grace in the Township of Dogville</em></td>
<td><strong>Overview</strong>: Grace Margaret Mulligan fled to the Rocky Mountain town of Dogville from nearby Georgetown, just moments before a mob of gangsters roared up Canyon Road in hot pursuit. She arrived breathless and terrified, looking for sanctuary. But after a year in the town, during which she had been raped repeatedly by most of the townsmen, imprisoned by an iron collar attached to a 50 pound fly wheel, and forced to perform hard labor, she had to accept that Dogville was far from a safe haven.</td>
</tr>
</tbody>
</table>

**ACT I: THE HOOK**

**Grace Arrives in Dogville**: Grace’s only family was her father—a notorious gangster. But she had rejected her father’s ways in favor of an honest life, which had put her in jeopardy. That is why Grace was grateful to come upon Tom Edison, Jr., the local philosopher of Dogville, who promised to protect her from the violent men who were on her trail. True to his word, he convinced his community to give Grace a chance to prove herself worthy of residing in Dogville, through hard work and good fellowship. After two weeks of providing services to nearly every Dogvillian, they voted unanimously to let her stay.

in the process of constructing meaning out of another’s experience. Through this process, the audience can achieve a measure of understanding and empathy.” Winter, *supra* n. 7, at 2277.


Words like “bargain” and “unilateral” remind the reader of Grace’s lack of negotiating position. This has become a contract of adhesion.
ACT II: THE COMPLICATION
Grace Is Exploited and Enslaved: Shortly thereafter, the tide began to turn. At the Independence Day celebration, a police officer reported that Grace was wanted by the FBI for bank robbery. Although the crimes had occurred when Grace had been working with, and for the families of Dogville, members of the community began to reconsider their bargain with Grace. Recognizing her vulnerability and, indeed, her dependence upon them, the townspeople unilaterally changed the arrangement. Encouraged by Tom, they demanded that Grace work twice as many hours for half her pay. In return, they would keep her presence in Dogville a secret from police and others who might come looking for her. With no meaningful choice, Grace complied.

She rose before dawn:
- From 7:00 to 8:00, she read to Jack.
- From 8:00 to 9:00, she cleaned Ben’s garage.
- From 9:00 to 10:00, she bathed and fed June.
- From 10:00 to 11:00, she babysat for Chuck and Vera.
- From 11:00 to 12:00, she tended to Dr. Edison’s health.
- From 12:00 to 1:00, she picked apples in Chuck’s orchard.
- From 1:00 to 2:00, she weeded the gooseberry bushes.
- From 2:00 to 3:00, she packed eye glasses in the factory.
- At 3:00, she began her rounds all over again.

When she shuffled home each night, she still had obligations to fulfill, for virtually every one of her male employers now demanded that she satisfy his sexual needs. First, Chuck forced himself on her in exchange for keeping her hidden from the police. Second, Ben, the truck driver, whom Grace had paid to drive her out of Dogville, insisted on additional payment in the form of sexual intercourse, because Grace was a “dangerous load.” Within weeks, almost all the men in Dogville could be found each night lined up at Grace’s door waiting for their turn on top of her.

The quality of Grace’s life deteriorated even further after she tried to escape from Dogville. Although Ben took money and sexual favors from Grace, he breached his promise to drive her away from Dogville, delivering her instead...
to the very townspeople she tried to escape. The community officially made her their prisoner, locking an iron collar around her neck and shackling her to a 50 pound fly wheel, which Grace was forced to drag behind her while she toiled for the citizens of Dogville. Coerced into physical labor, sexual labor, and with no end in sight, Grace understood that she could expect no kindness from anyone in Dogville. She would have fared no worse with the gangsters who had wanted to kill her.

ACT III: THE RESOLUTION

Grace Is Handled Over for Execution: And sending Grace to her death was exactly what the townsfolk of Dogville had in mind. Having no more use for her, Tom contacted the men who had once offered him a considerable reward for Grace, and informed them that she was their captive in Dogville. However, when the gangsters, headed by Grace’s own father, arrived to collect her, they were angered to find her shackled to the iron wheel. Stunned by this reaction, the Dogvillians had no choice but to release her. As she came face-to-face with her father, Grace realized that she had been deluding herself about the “good people” of Dogville. She saw them for who they were—people bereft of moral character; people who were a danger to other innocent souls who might happen upon them. Thus, she ended the life of the man who had betrayed his promise of protection, and allowed her father’s men to destroy the town.

ANOTATED MODEL #2 (STATE)

STATEMENT OF FACTS
(or What Happened to the Township of Dogville)

PROLOGUE

Overview: In the winter of 1933, Grace Margaret Mulligan wiped out the township of Dogville. First, she gave the order for an army of thugs to open fire on every child and all but one adult in Dogville. Second, she gave the order to burn down the dilapidated buildings and personal property left behind. Third, she picked up a revolver, and, with a single shot to the back of the head, murdered the only remaining citizen of Dogville—Tom Edison, Jr.—
the young man who had given her sanctuary when she first arrived from Georgetown, lost, starving, and in a state of panic. After the smoke had cleared, only Moses, the watchdog, had survived Grace Mulligan.

**ACT I: THE HOOK**

The Community Rescues Grace: Grace had been received into the small, tight-knit community a year earlier. Accepting her story that she was on the run from mobsters, the people of Dogville hid her, gave her work, and risked their own safety by lying to the police when officers came looking for her. Even when the police informed the community that Grace was wanted by the FBI for a spate of recent bank robberies, the town protected her. In return, Grace babysat for Chuck and Vera’s children, read to Jack who had lost his sight, nursed Tom Edison, Sr., the debilitated town doctor, cleaned truck driver Ben’s garage, tended to Olivia’s invalid daughter, June, and weeded Ma Ginger’s gooseberry bushes.

Of course, life was far from idyllic in the Rocky Mountain town—it was, after all, the time of the Great Depression. Grace had to work hard to earn her place in the community. Coming from a privileged background, it was no doubt stressful for Grace to get used to physical labor and humiliating to undertake chores that she considered beneath her. She was unused to the boorish behavior of the men of Dogville, who tried to grop her on occasion. Yet, when Chuck initiated a sexual encounter, Grace didn’t fight him off. Rather, she acquiesced to sex with him and most of the other women’s husbands on a regular basis.

**ACT II: THE COMPLICATION**

The Community Discovers a Theft: It was only after Grace absconded with Dr. Edison’s $10.00, that the community realized its predicament. Instead of protecting Grace from danger, it should have been protecting itself from Grace. Upon discovering that she had tried to smuggle herself out of town by hiding in the bed of Ben’s truck, the townspeople put her under lock and key until they could decide how best to deal with her.

**ACT III: THE RESOLUTION**

The Community Returns Grace to her Family: After a town meeting, the community

Likewise, the hardscrabble nature of the Depression conveys their inescapable cycle of poverty, and reflects the scenic minimalism. Grace’s highfalutin ways are to blame for her inability to conform to the town’s old-fashioned standards.

The prosecution turns the sexual encounters to its advantage: Grace was not exploited; she is a “loose woman” who benefited from her liaisons.

The prosecution’s story is how Grace betrayed Dogville’s trust. They fell prey to an opportunist who exploited them. Ten dollars may be a trifling amount to a spoiled, rich girl, but it is a sizeable sum to poor working folk.

The phrase “lock and key” reflects the townspeople’s view that they are the wronged parties here.

The prosecution establishes causality also. It is Grace’s inability to conform to the code of her adopted community that forces the community to eject her. Grace, not the community, is responsible for her demise.

The townspeople are rightfully indignant, which is evident in the film’s narration and acting.
agreed that Grace should return to Georgetown. Tom contacted Grace’s father who arrived with his subordinates to collect her. Although there was some tension as the parade of limousines rolled up Canyon Road onto Elm Street, for the townspeople really did not know what was in store for Grace, they felt somewhat relieved to have come up with a solution that benefited everyone concerned. After Grace came face-to-face with her father, however, it was clear that the community would receive no thanks for its effort. Indeed, Grace proclaimed that “if there were one place this world would be better off without,” it was Dogville. Without further ado, she obliterated the town.

CONCLUSION

There is little dispute that advocates rely on narrative to persuade. Steven Winter emphasizes that “narrative corresponds more closely to the manner in which the human mind makes sense of experience than does the conventional, abstracted rhetoric of law.”\(^{129}\) The persuasive power of storytelling is in its ability to take experience and “configure it in a conventional and comprehensive form.”\(^{130}\)

Yet, it is the screenwriting master, Robert McKee, who most effectively articulates the advocate’s mission when he explains:

An artist must have not only ideas to express, but ideas to prove. Expressing an idea, in the sense of exposing it, is never enough. The audience must not just understand; it must believe. You want the world to leave your story convinced that yours is a truthful metaphor for life. And the means by which you bring the audience to your point of view resides in the very design you give your telling. As you create your story, you create your proof; idea and structure intertwine in a rhetorical relationship.\(^{131}\)

McKee pinpoints the critical goal shared by those writing for a movie audience and those writing for a legal audience, but also clarifies that the “design [of the] telling” is the means by which to convince every audience.

\(^{129}\) Id. at 2228.

\(^{130}\) Id.

\(^{131}\) McKee, supra n. 49, at 113.
Movies are indeed fast becoming our common language, and we instinctively “think in pictures.”\textsuperscript{132} Thus, legal writers would do well to develop cinematic storytelling skills. But doing so in a vacuum is a daunting exercise. Basing a statement of facts on a film by, first, adopting the Three Act Structure that advances the themes expressed in the narrative, second, creating recognizable characters with whom an audience can identify, and, third, applying a modified cinematic language, permits a legal writer to understand both the philosophy and the process of telling a story cinematically.

Movies like \textit{Dogville}, which address changing relationships, power shifts, and the consequences that accompany those shifts, contain core legal themes intimately familiar to advocates. Deconstructing the way in which filmmakers tell these stories, allows us to reflect on effective methods of persuading an audience. Examining how filmmakers present meaningful, thematic narratives, rather than disjointed recitations of events, provides new insight into a more successful collaboration with the legal reader. The power of cinematic storytelling is undeniable. Legal writers ignore that power at their clients’ peril.\textsuperscript{133}

\textsuperscript{132} Meyer, \textit{supra} n. 79, at 91.
\textsuperscript{133} Shale, \textit{supra} n. 47, at 994.
I begin with a story.

Two years ago, I was working on an article about lawyers who believed in, and litigated for the preservation of, white supremacy in the American Deep South. One night, I was reading The Story of Ruby Bridges to my eight-year-old son. I bought the book to explain what I was doing at work when I was not teaching or otherwise working with students. As I read about how six-year-old Ruby Bridges faced vicious white mobs that opposed the desegregation of William Franz Elementary School in New Orleans, I became teary-eyed and a bit overwhelmed. As my son nervously watched me, I explained why I had become emotional: “This is what my article is about; it’s about lawyers who tried to stop Ruby Bridges and other children like her from going to school with the white kids. It’s about people who used their skills to do the wrong thing.” My son nodded in understanding. I regained my self-possession, we read and talked about the book, and I kissed my son goodnight. As I finished my article, I kept thinking about that night, and I resolved to continue to tell my children stories about the ways lawyers have promoted injustice as well as justice.

The article I was working on began with an intent to write an essay about a story: To Kill a Mockingbird. This Pulitzer-Prize-winning novel recounts several years in the lives of Scout and Jem Finch, children of a widowed lawyer in Depression-era Alabama. The story is told from the perspective of a reminiscing Jean Louise

* This Article elaborates on a presentation made on July 20, 2007, at the Once upon a Legal Time Storytelling in Law Conference held at City University, London, United Kingdom.

** © 2008, Mary Ellen Maatman. All rights reserved. Associate Professor of Law and Director of Legal Methods Program, Widener University School of Law. For Steven and Rose.

2 Robert Coles, The Story of Ruby Bridges (Scholastic 2004).
“Scout” Finch. Scout recounts the events of three years, during which her lawyer-father, Atticus Finch, represented a black man named Tom Robinson, who had been accused of raping a white woman named Mayella Ewell. In the first part of the novel, Scout remembers how she, her brother, and their friend, Dill Harris, became morbidly fascinated with a reclusive neighbor named Boo Radley. The novel’s second part focuses on her father’s representation of Tom Robinson, and the repercussions of that representation upon the entire family and town. Throughout the novel, it is clear that Scout’s father—Atticus Finch—regards this case as “the one . . . in his lifetime that affects him personally.” It is also clear that the small town in which the Finch family resides largely subscribes to the racial codes and stereotypes of the day, thereby complicating the representation and subjecting the family to opprobrium.

To Kill a Mockingbird has been widely read. Many people first encounter the novel in school, and a 1990 survey of English teachers indicated it is among the most frequently required books in high schools. Among lawyers, To Kill a Mockingbird has a special influence, and Atticus Finch is “arguably the most praised lawyer, real or fictional, in American legal lore.” Lawyers see Atticus as a hero to be emulated; some even say the book or movie inspired them to become lawyers, or inspires their practice of law. They say that “Atticus Finch knew” what it means “to be a lawyer,” “people like Atticus Finch made me want to be a lawyer,” and “I had hoped I might become a lawyer very much like Atticus.”

---

4 Id. at 86.
6 Id. at 14.
8 See e.g. Johnson, supra n. 5, at 17–20 (discussing how lawyers have written about the inspiration they find in Atticus Finch); Richard Pena, What Would Atticus Do? 62 Tex. B.J. 14 (Jan. 1999) (reporting that in remarks at new lawyer induction ceremony, state bar president suggested that lawyers measure their conduct by reference to Atticus Finch).
9 See e.g. Morris Dees, Foreword, in Mike Papantonio, In Search of Atticus Finch: A Motivational Book for Lawyers 7 (Seville Publg. 1995) (Atticus Finch and Clarence Darrow inspired Dees to become a lawyer); Gene Schabath, Lawyer Gives His All for Clients, Det. News 5C (July 9, 2000) (chronicling influence of Atticus Finch on prominent Detroit-area attorney in his decision to enter legal profession).
10 Carla T. Main, What Does It Mean to Be a Lawyer? Atticus Finch Knew, N.Y. L.J. 9 (June 5, 2000).
12 Papantonio, supra n. 9, at 23.
To start an essay on the novel, I perused back issues of the *Alabama Lawyer* to get a feel for the profession in the place and nearly the time of Atticus Finch. What I found was a succession of supremacist articles—spanning decades—in the state’s bar journal. That discovery set me off on a journey to learn what lawyers across the Deep South said, wrote, and did to promote white supremacy in twentieth-century America. When I finished that journey, I had a full-blown article with only a passing reference to Atticus Finch.

This Article comes full circle by entwining the story of *To Kill a Mockingbird* with the supremacist stories I uncovered as I researched and wrote my essay-turned-article. Juxtaposing these stories reveals how race narratives have been deliberately used to “affect [the] hearts and minds” of children “in a way unlikely ever to be undone.”\(^1\) The shaping of a generation’s hearts and minds, through stories told to socialize and educate its children, produces in those children a vision of what a racially just world looks like. Or, in other words, the stories form children's notions of justice based on the tales they learn. I call this process “justice formation.” When a generation reaches adulthood, the stories its parents tell their children replicates the vision anew. This process of intergenerational justice formation through storytelling affects the justice system itself, because each generation’s lawyers and judges have the power to inscribe their vision of justice into the law. Thus, storytelling’s power over justice formation poses dangers to justice: if the dominant story is one that promotes a vision of justice that is in fact unjust, the law will fall prey to that vision. In that situation, creating a truly just system depends upon the telling of counterstories—tales that challenge the existing justice system and its formative stories—to promote renewed justice formation.

To explore this thesis, I will begin by addressing the power of stories. I will discuss their powerful influence upon children, their possible role in justice formation, and the ways lawyers and the legal system have used stories to perpetuate white supremacy and promote it as just and fair. Such stories fueled lawyers’ involvement in massive resistance to *Brown v. Board of Education* and opposition to the civil rights movement. Juxtaposing these stories against *To Kill a Mockingbird*, Part II will argue that Harper Lee wrote her novel in response to massive resistance turmoil, creating a counterstory to supremacist rhetoric. Specifically, Atticus Finch tells stories to his community and his children in the hopes that

his listeners will form new conceptions of justice and render true
his assertion that “in our courts all men are created equal.”
Part III will conclude by reflecting upon the value and necessity of
telling counterstories about the legal profession that reveal lawyers’
opposition to, as well as promotion of, the progress of civil rights in
America.

I. STORIES AND JUSTICE FORMATION

Education scholar Frank Smith has said that “[t]hought flows
in terms of stories—stories about events, stories about people, and
stories about intentions and achievements. The best teachers are
the best storytellers. We learn in the form of stories. We construct
stories to make sense of events.” Because stories are so powerful,
they shape our world view. As this section will explore, stories
have an especially powerful influence on how children come to see
the world. I further suggest that stories may well shape our tem-
plate for what a “just” world looks like, a process I refer to as “ju-
stice formation.” Finally, this section explores the role that stories
have played in justice formation on race questions in the American
Deep South, and how lawyers absorbed and re-told those stories
over many generations.

A. Stories and Visions of Justice

Stories have an especially powerful impact upon children.
Darlene Witte-Townsend and Emily DiGiulio, writing about the
moral and spiritual impact reading can have on children, propose
that stories can mark out pathways for children. Specifically, they
suggest that children can sharpen their awareness of and empathy
with others through reading. To Kill A Mockingbird itself em-
phasizes the significance of empathy in moral development. Atti-
cus repeatedly emphasizes the importance of empathy for oth-
ers.” Atticus even urges empathy for Bob Ewell, the vicious fa-
th of the woman who falsely accused his client of rape. To Kill

---

14 Lee, supra n. 3, at 234.
15 Frank Smith, To Think 62 (Teachers College Press 1990).
16 As Smith puts it, “Our stories are the vantage points from which we perceive the
world and the people in it.” Id. at 64.
18 See Lee, supra n. 3, at 33 (Atticus advising Scout on the importance of empathy).
19 Id. at 250.
A Mockingbird closes with Atticus reading to a drowsy Scout, who tells her father that the story is about “Stoner's Boy,” who was thought to be a villain, but, “when they finally saw him, why he hadn’t done any of those things . . . Atticus, he was real nice . . .”

As engines for moral development, stories can influence how children learn and act upon the social construct of race. The story of race has intergenerational power; it replicates not only itself, but also social and legal systems based upon it. This power can work for both good and evil.

Because we produce and communicate stories within a social context, the stories we tell reflect and reproduce existing social relations. While stories about race and racism may derive from individual experiences, they also communicate cultural assumptions and habits of thinking that transcend the individual and are idiosyncratic. As such, stories are a bridge between individual experience and systemic social patterns.

In the Deep South, stories about race not only transmitted Jim Crow, but also intensified it as successive generations grew up with Jim Crow as a social norm. Thus, white Georgia native Rollin Chambliss wrote in 1933: “At the age of ten I understood full well that the Negro had to be kept in his place, and I was resigned to my part in that general responsibility.” For their part, African-American parents schooled their children in caution. Ralph Abernathy’s father taught him that the safest course in dealings with whites was to pretend to be mute. If whites insulted their parents, black children dared not react.

---

20 Id. at 323.
21 There is a massive volume of literature on how and why race is a social construct, but it suffices here to concur with historian Jennifer Ritterhouse that “race is a man-made distinction meant to secure and explain material and social inequalities . . . .” Jennifer Ritterhouse, Growing up Jim Crow 9 (U.N.C. Press 2006); see also Grace Elizabeth Hale, Making Whiteness 3–7 (Vintage Bks. 1999).
23 See Ritterhouse, supra n. 21, at 16. “Jim Crow” is the term that refers to the all-encompassing web of laws and customs mandating separation of the races throughout the American South. See generally David R. Goldfield, Black, White, and Southern 2, 11 (L.S.U. Press 1990) (describing the broad reach and message of segregation laws and custom). The term’s origins trace back to a nineteenth-century minstrel act, and came to refer to “the legal, quasi-legal, or customary practice of disfranchising, physically segregating, barring, and discriminating against black Americans.” See Jerrold M. Packard, American Nightmare: The History of Jim Crow 14–15 (St. Martin’s Griffin 2002).
24 Ritterhouse, supra n. 21, at 167 (quoting Chambliss’s master’s thesis, entitled What Negro Newspapers of Georgia Say about Some Social Problems (1933)).
25 See Goldfield, supra n. 23, at 6–8.
26 Id. at 10.
27 See id. at 6 (quoting novelist Ernest Gaines, who said “we had all seen our brother, sister, mama, daddy insulted once and didn’t do a thing about it”).
Can stories influence how we think about justice? Not just in the abstract, but, to paraphrase Bell, can they be a bridge between individual experience and how the justice system is constructed and operates? At first blush, the answer to this question seems simple: “why not?” Yet law is complex and abstract. Perhaps our operational concepts of justice, the ones we use as lawyers, are not formed until we get to law school. The problem with that theory is that law schools generally do not teach courses in “justice.” There is scant “big picture,” abstract talk about justice in law school. As Benjamin Sells says in his book *The Soul of the Law*: “Early on a distinction is drawn between justice as an altruistic goal and the law’s work-a-day procedures and practices.”

A wonderful anecdote about Justice Holmes underscores this distinction: Learned Hand recalled driving Holmes to work at the Court one day, and seeing him off with the words “[D]o justice,” to which Holmes retorted that applying the rules of law, not doing justice, was his job.

Abstract statements about justice seem resounding, yet vague. For example, the Bible discusses justice. Deuteronomy counsels: “Justice, and only justice, you shall pursue . . . .” The prophet Amos exhorted: “[L]et justice roll down like waters, and righteousness like an ever-flowing stream.” Philosophers and statesmen have spoken of justice. Francis Bacon declared: “The place of justice is a hallowed place.” Benjamin Disraeli described justice as “truth in action.” An inscription above a Department of Justice building entrance in Washington proclaims that “justice in the life and conduct of the State is possible only as first it resides in the hearts and souls of the citizens.”

These are all memorable statements, but they are, at best, vaguely descriptive. They tell us to pursue justice, and they stress its importance, but they do not pro-

---

28 I do not wish to engage in deeply complex arguments about the validity or nature of a law/justice distinction. My claim is simply that lawyers, judges, laypeople, and even children, form some sort of sense of whether matters are “just” or not, and use that sense to decide whether particular laws or social arrangements are fair and ought to be maintained, or are unfair and ought to be abolished.


31 Deuteronomy 16:20 (New Oxford Ann.).

32 Amos 5:24 (New Oxford Ann.).


vide a blueprint for visualizing or producing it, let alone a world view for determining whether a particular practice is just.36

One could conclude that lawyers do not form or draw upon a sense of justice at all; perhaps we merely operate in the Holmesian manner and ignore notions of pursuing “justice.”37 Moreover, it may be unrealistic or unwise to operate in any other way. In Holmes’s dissent in Abrams v. U.S., he stated, “[e]very year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge,”38 suggesting that he feared pinning his jurisprudence upon flawed conceptions of justice. Indeed, he explicitly warned of “evil effects of the confusion between legal and moral ideas.”39

Nonetheless, even Justice Holmes operated (at least sometimes) from an innate sense of justice rooted in stories. For example, his Abrams dissent rests upon the story of our Constitution’s creation, which he referred to as “an experiment, as all life is an experiment.” Moreover, he rejected “the argument of the Government that the First Amendment left the common law as to seditious libel in force” because “[h]istory seem[ed] to [him] against the notion.”40

Holmes’s own harrowing Civil War experience41 left him telling tales of “the snowy heights of honor . . . for us to bear the report to those who come after us,”42 and certain at least of what he called “the soldier’s faith” of “obedience to a blindly accepted duty.”43 This theme surfaces in Holmes’s judicial rhetoric. In Schenck v. U.S., he admitted: “When a nation is at war many things that might be said in time of peace are such a hindrance to its effort

36 Benjamin Sells persuasively explains this problem. He says, “The Law simply doesn’t know what to do with Big Ideas that escape analytic definition.” Sells says this is true of all fields—“[a]ll founding and generative ideas are ambiguous—that is why they are founding and generative.” See Sells, supra n. 29, at 37.

37 Justice Holmes reportedly said, “I hate justice.” Mendelson, supra n. 30, at 329. His famous dissent in Lochner v. New York can be read as an elaboration on this statement. See 198 U.S. 45, 75–76 (1905). Holmes’s statement that “[g]eneral propositions do not decide concrete cases” seems particularly pointed. Id. at 76; see also Noble St. Bank v. Haskell, 219 U.S. 104 (1911). Such statements make Holmes a figurehead for proponents of the “Separation Thesis,” which distinguishes the law from any value system, like justice or morality. See Herz, supra n. 30, at 113.


39 Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 458 (1897).

40 Abrams, 250 U.S. at 630 (Holmes, J., dissenting).

41 See David W. Blight, Race and Reunion 96 (Belknap Press 2001) (Holmes was “[w]ounded at Antietam, horrified by what he called ‘an infamous butchery’ at the battle of Fredericksburg in 1862, and worried for his own sanity during his experiences of the Wilderness campaign in 1864 . . . .”).

42 Id.

43 Id. at 208–210.
that their utterance will not be endured so long as men fight and . . . no Court could regard them as protected by any constitutional right.” In Buck v. Bell, Holmes called on Civil War memory to uphold Virginia’s forced sterilization law in terms reminiscent of “the soldier’s faith.” He wrote:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for the entire world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough.

As Holmes’s writing inadvertently reveals, stories strongly influence justice formation. Unfortunately, Buck v. Bell demonstrates that justice formation stories can “be as authoritarian, reactionary, closed-minded, and self-satisfied as any other form of discourse.” Justice Holmes’s “soldier’s faith” story led him to deny Carrie Buck’s humanity. Other stories—some told from the same well of Civil War experience—led lawyers of the twentieth-century Deep South to deny the humanity of African Americans in ways that shaped the region’s justice system.

**B. Justice Formation and the Dominant Story of Race**

The stories we tell about history and race play a role in the social construction of race and the legal system’s operation upon it. The power of stories is particularly apparent in how lawyers and others used them to justify white supremacy in the post-Civil War American Deep South. These stories conflated racial constructs with justice formation to produce a dominant story that said segregation and inequality were desirable and just. By “dominant story,” I mean one that “shapes the ‘mindset’ from which we observe

---

and interpret the world, excluding other possible interpretations and making current social arrangements seem natural and fair."

The Deep South’s dominant story of race and justice generally encompassed four key points:

(1) Portrayal of the antebellum South as a genteel paradise in which white slaveholders were refined, their wives cultured, and slaves content with their lot;

(2) Portrayal of Reconstruction as disastrous proof that African Americans should not exercise any political or economic power;

(3) Insistence that both races preferred segregation, or “our way of life,” and that nobody wanted “mixing” except troublemaking “mixers,” who desired “amalgamation,” which was also called “mongrelization”; and

(4) The belief that political and legal equality for African Americans would inevitably lead to amalgamation and thereby halt American progress and soil American purity.

After the war, whites were determined to preserve as much of the old social hierarchy as possible. Once Reconstruction ended, white political and economic hegemony returned, in a consciously supremacist form. Several cultural strands fed and reinforced the dominant story of race that produced and justified White Supremacy.

One strand was eugenics. Eugenics is “the science of improving stock . . . especially in the case of man.” The field arose in the late nineteenth century, and its adherents included northern academics and foundations. The field’s persistence is reflected in Buck v. Bell’s affirmation of a eugenics-based sterilization law. In the race context, eugenicists deemed segregation and miscegenation laws necessary to forestall race degeneration.

---

48 Bell, supra n. 22, at 5. “Dominant story” is Ms. Bell’s phrase. Id.

49 Professor Leon Litwack has documented this effort in great detail. See generally Leon F. Litwack, Trouble in Mind (Knopf 1998).


51 See id. at 18–21, 30.

52 274 U.S. 200 (1927) (upholding statute that “recite[d] that the health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives . . .”). The lower court referred to the statute as the “Virginia sterilization act,” citing 1924 Virginia Acts, chapter 394. See Buck v. Bell, 130 S.E. 516 (Va. 1925), aff’d, 274 U.S. 200 (1927).

The popular "plantation novel" genre reinforced both the historiographical and eugenist strands of supremacist thought. Although plot particulars varied, such novels typically depicted ante-bellum plantations as places of genteel grace, peopled with noble proprietors and happy slaves. Not only were slaves portrayed as happy, their characters were drawn in terms that emphasized black inferiority and white supremacy; for example, a white woman’s memoirs of plantation life described her “dear black Mammy” as a woman whose “skin was black, but... heart was white.”

Grace Elizabeth Hale aptly describes the picture such novels painted as a “plantation pastorale.” To complete the romanticized picture, “the faithful slave, and his or her older cousin, the unfortunate freedman, were the star characters of sentimental plantation fiction.” Similarly, in Thomas Nelson Page’s novels depicting post-bellum life, ex-slaves spoke warmly of “good ole times.”

Professor Leon Litwack reveals the effect and purposes of such depictions:

As filtered through Page’s translation and predilections, the reader had no way of knowing the circumstances under which [the ex-slave] memorialized slavery or the extent of his duplicity, the degree to which he might be masking his genuine feelings. What Page wanted to remember and celebrate in his... stories was that “relation of warm friendship and tender sympathy” between the races. And he wanted to memorialize that relationship in the early twentieth century because it was being undermined by “Afro-Americans” with their “veneer of a so-called education.”

Although the genre’s popularity waned in the new century, Thomas Dixon’s blatantly supremacist novel The Clansman channeled its supremacist impulses into a more brutal form. The

---

54 Blight, supra n. 41, at 216 (Turn-of-the-century American culture was “awash in sentimental reconciliationist literature . . .”)

55 See Litwack, supra n. 49, at 186. Professor Litwack’s elaborations on the genre and the impulses behind it suggest that plantation nostalgia reflected antipathy to a new generation of African Americans who had not known slavery. Id. at 184–189.

56 See Hale, supra n. 21, at 52–53.

57 Blight, supra n. 41, at 220.

58 Id. at 222.


61 Brown, supra n. 59, at 35 (quoting Dixon’s book). Dixon believed “God . . . anointed the white men of the south . . . to demonstrate to the world that the white man must and
Clansman celebrated and romanticized the establishment of the Ku Klux Klan to “save” civilization from “barbarism.”\[^{62}\] One of the novel’s protagonists puts it this way: “for a thick-lipped, flat-nosed, spindle-shanked negro, exuding his nauseating animal odour, to shout in derision over the hearts and homes of white men and women is an atrocity too monstrous for belief. Our people are yet dazed by its horror.”\[^{63}\] Such passages prompted one reviewer to praise the book as “the best apology for lynching.”\[^{64}\] In 1915, D.W. Griffith’s film The Birth of a Nation adapted (and slightly softened)\[^{65}\] Dixon’s novel to the silent screen and was widely seen.\[^{66}\] The film celebrated “a white manly nation”;\[^{67}\] its “black villain, Silas Lynch, . . . summed up the Black Peril in his impudence, venality, and lust for white women.”\[^{68}\]

Literature more critical of the pre- and post-war South arose throughout the remaining twentieth century,\[^{69}\] but the plantation pastorale endured. In 1929, best-selling Pennsylvania author Joseph Hergesheimer penned Swords and Roses.\[^{70}\] A passage in the book declared:

Women were pale, delicate, in delicate pale muslins. They knew they were superior to others less lovely. Certainly beautiful women are more momentous than women who are plain. That is where democracy, the theory that all men and women are equal, is absurd. The old South knew better. There are more plain women than beautiful, more undistinguished than distinguished men, and their vast multiplication over-threw a state which, naturally, they envied and condemned.\[^{71}\]

\[^{62}\] Merritt, supra n. 60, at 35–36.
\[^{63}\] See id. at 35 (quoting Thomas Dixon, The Clansmen 290–292 (Doubleday, Page & Co. 1905)).
\[^{64}\] See Hale, supra n. 21, at 78–79.
\[^{65}\] See Merritt, supra n. 60, at 37–39.
\[^{66}\] See id. at 27, 27 n. 2 (estimates of total attendance range from 200–300 million).
\[^{67}\] See Hale, supra n. 21, at 267.
\[^{68}\] Litwack, supra n. 49, at 443.
\[^{69}\] See id. at 43.
\[^{70}\] See Percy Hutchinson, The South That Was Romance, N.Y. Times BR1 (Apr. 7, 1929) (reviewing Hergesheimer’s book and welcoming it as a sign and agent of sectional unity); see also Grand Manner, Time (Apr. 29, 1929) (available at www.time.com/time/magazine/article/0,9171,769206,00.html).
The same year Hergesheimer published his novel, Claude Bowers published *The Tragic Era*, which popularized “the dark and bloody ground of reconstruction historiography” with “zestful . . . imagination.” Bowers’s book was a widely read Literary Guild selection. If readers rejected it as too coarse for serious consideration, there was much of the same—albeit in more muted tones—in scholarly works. In the twentieth century’s first half, historians depicted Reconstruction as a mistake that proved White Supremacy’s necessity. For example, Professor E. Merton Coulter of the University of Georgia described Reconstruction “as a ‘diabolical’ time ‘to be remembered, shuddered at, and execrated.’” Both North and South accepted this story for the purposes of smoothing over sectional reunion. As Gunnar Myrdal put it in his groundbreaking 1944 study of race in America: there was a “popular demand of the American whites for rationalization and national comfort” in how they remembered the Civil War and Reconstruction; in particular, southerners “need to believe that when the negro voted, life was unbearable.” Myrdal concluded: “[T]he myth of the horrors of Reconstruction [was a] false [belief] with a purpose.”

One group that purposively told Reconstruction and “plantation pastorale” stories was the United Daughters of the Confeder-

---

74 Id.
75 Bowers was a journalist, not a professional historian. See Brown, *supra* n. 71, at 135.
77 See Blight, *supra* n. 41, at 358–361.
79 See Hale, *supra* n. 21, at 80–81 (discussing Reconstruction scholarship from the turn of the century through the 1940s).
80 See generally Blight, *supra* n. 41.
cy ("UDC"). Founded in the 1890s,\textsuperscript{82} this influential group was determined to "instruct and instill into the descendants of the people of the South a respect for the Confederate past and its principles."\textsuperscript{83} Most of the UDC’s work occurred between 1900 and 1920. UDC members installed Confederate monuments across the South, made speeches honoring Confederate soldiers, and produced and circulated essays that touted Southern culture and idealized slavery as a benevolent system.\textsuperscript{84}

The UDC focused particularly on shaping children’s views of southern history. UDC leaders thought of their work as a project to influence the mindset of young southerners, reminding themselves that "[t]hought is power."\textsuperscript{85} They worked "to control America’s memory of slavery, the Civil War, and Reconstruction . . . laying down for decades (within families and schools) a conception of a victimized South, fighting nobly for high Constitutional principles, and defending a civilization of benevolent white masters and contented African slaves."\textsuperscript{86} Children were always prominently included in monument unveiling ceremonies, and monuments were placed where children would see them.\textsuperscript{87} UDC chapters placed Confederate flags and portraits of Confederate heroes in southern classrooms, visited classrooms, and ran children’s chapters.\textsuperscript{88} At children’s chapter meetings, young members recited a "catechism" that characterized slaveholding as a right and asserted that slaves were treated "[w]ith great kindness and care in nearly all cases, a cruel master being rare."\textsuperscript{89} These assertions elided the stark, dehumanizing reality of chattel slavery. The 1838

\textsuperscript{82} See Karen L. Cox, Dixie’s Daughters 15–16 (U. Press Fla. 2003).
\textsuperscript{83} See id. at 95.
\textsuperscript{84} See id. at 20, 41–43, 63, 104–105.
\textsuperscript{85} See Blight, supra n. 41, at 277.
\textsuperscript{86} Id. at 278.
\textsuperscript{87} See id. at 63–65, 68.
\textsuperscript{88} See id. at 121, 127–134, 138–139.
\textsuperscript{89} Cox, supra n. 82, at 138–139 (quoting Cornelia Branch Stone, U.D.C. Catechism for Children 11 (Veuve Jefferson Davis Ch. UDC 1904)). Professor Leon Litwack’s discussion of lynching and its origins sheds some helpful light on the realit\textsuperscript{ies. He explains, “During slavery, blacks had been exposed to violence on the plantations and farms where they worked and from the patrollers if they ventured off those plantations. The financial investment each slave represented had operated to some degree as a protective shield for blacks accused of crimes, but in the event of an insurrection—real or imagined—whites had used murder, decapitation, burning, and lynching to punish suspected rebels and impress on all blacks the dangers of resistance. Litwack, supra n. 49, at 285. Such reprisals for resistance were legally permissible. See Davis v. State, 22 Ala. 33, 33 (1853) ("[T]he master is entitled to the absolute dominion and control over the slave. The slave owes absolute and unconditional submission to the master.").
Louisiana Code puts things more clearly, stating: “A slave is one who is in the power of a master to whom he belongs. The master may sell him, dispose of his person, his industry and his labor: he can do nothing, possess nothing, nor acquire any thing but what must belong to his master.”

The UDC’s curricular influence was not limited to classroom decorations and schoolhouse visits. Pro-Confederate UDC materials were sent to schools for instructional use, and the UDC was heavily involved in textbook selection for southern schools. “[O]n the matter of textbook control, . . . [UDC] women . . . engaged in all manner of indoctrination of youth in the service of forging a white supremacist society.” Even a UDC book glorifying the Klan was adopted in 1913 as a supplemental text in Mississippi.

The UDC’s curricular efforts were part of a larger movement before and at the turn of the century to indoctrinate youth and schoolchildren in the dominant story. Through censorship, pressure tactics, and production of pro-South histories, the movement worked to ensure that children and young people would be instructed with “blatant apologies praising antebellum southern culture, justifying the Confederate cause, and perpetuating the aristocratic ethos into the twentieth century.” This movement successfully ensured that school textbooks portrayed elite southern whites as “brave and true men and pure and noble women.” Slavery was “boldly proclaimed . . . a virtuous institution.” One text told children that “while an occasional ‘master was cruel to his

---

90 James B. White, The Legal Imagination 434–435 (Little, Brown & Co. 1973) (quoting Louisiana Natural and Juridical Persons Code Ann. Art. 35 (1838) (superseded 1870)). The Code states, “[T]he slave is entirely subject to the will of his master, who may correct and chastise him, though not with unusual rigor, nor so as to maim or mutilate him, or to expose him to the danger of loss of life, or to cause his death.” Id. at 435 (quoting Louisiana Master and Servant Code Ann. Art. 173 (repealed 1990)). A recurring problem for antebellum courts was the degree of latitude permitted owners who physically mistreated their slaves. See e.g. State v. Jones, 1 Miss. 83, 84–85 (1820) (masters can be subjected to indictment for murdering their slaves); State v. Hoover, 20 N.C. 365, 369 (1839) (masters can punish, but not murder, slaves); State v. Mann, 13 N.C. 263, 267 (1828) (reversing a battery conviction against a defendant who shot and wounded a slave and ruling “[w]e cannot allow the right of the master to be brought into discussion in the courts of justice”); Dave, 22 Ala. at 34 (a slave “simply in a state of disobedience” can be punished, but “without endangering life or limb”).

91 Cox, supra n. 82, at 123–127.


93 Cox, supra n. 82, at 109–110.


95 Id. at 512.

96 See id. at 520.

97 Id. at 521.
darkies; . . . for the most part, he was kind and lenient to them. They in turn loved their master.”98 In contrast, textbooks portrayed African Americans as inferior beings content with slavery who later turned from docility to savagery under Reconstruction and carpetbagger influence.99

Such themes echoed in memoirs written for young people, which told of ex-slaves longing for the pre-war past.100 Ironically, the memoirs’ purpose often was to provide “a warning to future generations against the dangers of forgetting or misremembering the past.”101 As one memoirist wrote to her granddaughter, “Those memories are a legacy to the new generation from the old, and it behooves the old to hand them down to the new.”102 Plantation genre writer Thomas Nelson Page distilled the legacy in these terms: “The Old South was a civilization of ‘the purest, sweetest life ever lived. . . . [I]t has left its benignant influence behind it to sweeten and sustain its children.”103

C. The Law’s Retelling of the Dominant Story

At the turn of the century, Deep South states successively adopted constitutions designed to keep the vote solely in white hands.104 For example, the 1901 Alabama Constitutional Convention was convened for the precise purpose of disfranchising African-American voters with minimum impact on white voters. As the Convention’s president stated: “What is it that we want to do? Why it is within the limits imposed by the Federal Constitution to establish white supremacy in this State.”105

This aim was rooted in the dominant story, well-known to all of the Alabama convention-goers. Thus, one delegate, a former slaveholder, urged that the new constitution should “go to the utmost limit allowed us [under the Federal Constitution]” because enfranchised African Americans were “a menace to our civiliza-

---

98 Id. (quoting a 1915 Alabama state history textbook).
99 See id. at 525–527.
101 Id. at 118.
102 Id. (quoting Nancy Bostick De Saussure, *Old Plantation Days: Being Recollections of Southern Life before the Civil War* 9–10 (Duffield & Co. 1909)).
103 Id. at 126 (quoting Thomas Nelson Page, *The Old South* 184–185 (Chautauqua Press 1919)).
104 Mastman, supra n. 1, at 7–13.
tion, our happiness and prosperity.”

He disclaimed prejudice as the reason for his thinking; instead, he justified disfranchisement with a telling of the dominant story on the convention floor. Nearly uninterrupted, he spoke at length of his plantation and his loyal, trusted slaves who assisted him in wartime. The story turned from “the history of the negro, as a slave,” to Reconstruction, when “[t]he race which had been quiet so long converted this whole country into pandemonium. . . . Here was a peaceable race of people, obedient in law, and here was pandemonium raised when they were no longer retrained [sic] by law, and were inflamed and led.”

He recounted lurid tales of violence and misrule. Then he concluded,

See what condition we were in when the negro predominated in this State, and made our laws for us, and enforced them, and see our condition when it passed from them back into the hands of the white men. Can anybody look upon those two pictures and come to any conclusion other than that the negro, as a race, is incapable of self-government? and has no appreciation of the duties and obligations of a citizen of a Republican form of government or that the white man, by reason of belonging to the white race, or his education, or some other characteristic, is competent to rule and can be trusted with the State’s government with perfect safety.

The transcript of the proceedings reveals that no one spoke a word of disagreement.

Within legal circles, such sentiments were repeated as truths by generations to come. In 1929, a speaker at a Birmingham Bar Association event rendered post-Reconstruction history a tale of white triumph:

Defeated, exhausted, impoverished, the South found in its own unyielding soul the resources for its preservation . . . instead of thirteen Haiti’s or San Domingo’s, backward, barbaric, mongrelized, . . . impeding the progress of civilization and corrupting the national life, there are thirteen splendid Anglo-Saxon commonwealths, whose citizenship is worthy of the proud traditions

---


107 Id. at 2711.

108 Id. at 2711─2712.

109 Id. at 2713.

110 Id. at 2711─2720.
it inherits. They . . . carry forward in the van of progress the Anglo-Saxon civilization which our fathers gave us.\textsuperscript{111}

Another speaker at the same event, Mississippian D.W. Houston, invoked Claude Bowers’s \textit{The Tragic Era} and his pride that his ancestors “bravely battled on, for years with a determination as strong as the strength of the hills, that white supremacy should be re-established, that racial integrity should be maintained, and that the Anglo-Saxon race should reign and rule in Mississippi again.”\textsuperscript{112} The event in question was a dinner honoring a Birmingham lawyer who had been named President of the ABA.\textsuperscript{113}

Thirty-one years later, at a 1960 bar event, a Georgia lawyer named Charles J. Bloch said: “[T]he States of the South emerged from the ravages of War[.] . . . [S]tep by step they and the magnificent men and women who formed them laboriously climbed the steps from the abyss into which war and its might, reconstruction and the illegality which created it, had plunged them . . .”\textsuperscript{114}

Charles Bloch was an elite lawyer. He was prominent in the Georgia Bar Association, was a leader in bench and bar relations, and served on the University of Georgia Board of Regents. He was considered one of the region’s finest lawyers and had a sophisticated practice.\textsuperscript{115} He also—as one adversary put it—could “spin legally respectable arguments upholding segregation as easily as a carnival vendor spun cotton candy.”\textsuperscript{116}

Starting in the mid-1940s, Mr. Bloch embarked on a two-decades-long body of legal work defending laws that kept the vote from African-American hands and segregated African Americans in all spheres of life. In the course of his efforts, he—like many other skilled, well-educated lawyers of the Deep South—told and used the dominant story to courts, lawyers, and society at large. Importantly, the latter audience included children, to whom Bloch and his compatriots directed materials specifically designed to in-


\textsuperscript{112} D.W. Houston, \textit{Address, Address of Honorable D.W. Houston of Mississippi} (Birmingham, Ala.), in 5 Ala. L.J. (Tuscaloosa) 151, 154 (1929–1930).

\textsuperscript{113} The lawyer’s name was Henry Upson Sims. Educated at Harvard Law School, Sims had lectured at the University of Alabama Law School, held numerous state bar positions including the state bar presidency, was a member of the American Law Institute, authored numerous legal treatises and articles, and was elected ABA president in 1929. \textit{See Our New President: Henry Upson Sims}, 15 ABA J. 744, 744 (Dec. 1929).

\textsuperscript{114} Charles J. Bloch, \textit{One Hundred Years Ago}, 21 Ala. Law. 318, 323 (1960).

\textsuperscript{115} See Maatman, \textit{supra} n. 1, at 34–35.

fluence justice formation in the next generation of white southerners and prospective lawyers.

Doubtless Bloch—born in 1893—and his compatriots had themselves learned the dominant story from books and speeches touting eugenics, glorifying the Lost Cause, and vilifying Reconstruction. Bloch and other lawyers used this story in attempts to keep the south’s “way of life”—which depended on its legal systems—free from interference. Just as *stare decisis* and appeals to precedent can produce recursive, self-reinforcing strands of law, Deep South lawyers used the dominant story to produce a recursive, self-reinforcing defense of White Supremacy.

1. Justice Formation According to the Dominant Story

When D.W. Houston praised the battle for White Supremacy at the 1929 Birmingham dinner, he also sounded more familiar bar-dinner themes. Specifically, he exhorted lawyers to “lead, and help to hand along the avenues of time the lamp of liberty and the torch of truth,—hold aloft the banner of justice and right, and keep the fires of freedom burning.” He probably saw no conflict between his praise of White Supremacy and his exhortations, for the Deep South’s legal order and sense of justice were built upon the dominant story.

As E.B. Reuter once put it, “The law articulates and the institutional structures embody the formal racial dogmas.” These structures included segregation, which was an unremitting means of “performing” the tenets of White Supremacy. The ways in which physical spaces were divided and maintained told a story: “For whites . . . African Americans were . . . most publicly inferior because they sat in inferior waiting rooms, used inferior restrooms, sat in inferior cars or seats, or just stood.”

From the onset of Jim Crow into the modern civil rights era, courtrooms were no different. There were separate Bibles for black and white witnesses to swear their oaths. Attorneys ad-

---

117 See Maatman, supra n. 1, at 34.
118 Houston, supra n. 112, at 157.
120 Hale, supra n. 21, at 284.
121 Id.
122 My inspiration for recognizing the symbolic power of this point is Judge Leon Higginbotham’s powerful and extensive analysis of it. See A. Leon Higginbotham, Jr., *Shades of Freedom* 131–151 (Oxford U. Press 1996).
dressed white witnesses with titles, but an African-American witness who in the 1960s asked a lawyer to address her as “Miss Hamilton” instead of “Mary” earned a contempt citation. The appellate court affirmed the citation, holding: “The record conclusively shows that petitioner’s name is Mary Hamilton, not Miss Mary Hamilton.”

Courtroom segregation was the norm and was considered unremarkable. Thus, considering the 1948 appeal of an African-American defendant convicted of murder in a segregated Mississippi courtroom, the Mississippi Supreme Court remarked that the arrangements were “pursuant to a custom whose immemorial usage and sanction has made routine . . . .” As late as 1963, the Louisiana Supreme Court rejected an argument that courtroom segregation rendered a civil rights demonstrator’s trial unfair. It reasoned that “[i]t has not been made to appear that the segregation resulted in a miscarriage of justice to this defendant. . . . If it were otherwise, it would result that every Negro convicted in that court in the past would be entitled to have his conviction set aside.”

After the Supreme Court prohibited courtroom segregation in 1963, remnants of the practice remained. In 1964, a Louisiana courtroom door still bore the words “witnesses” and “colored”; as the room was used to store air conditioning equipment, the Louisiana Supreme Court regarded the signage as “a meaningless relic of former years.” As for the rest of the facility, “segregation in the House of Detention and the Parish Prison and rest room facilities” admittedly continued. In Mississippi, the federal courthouse likewise bore reminders of White Supremacy, for a Works Progress Administration artist had painted on one of its courtroom walls a large mural depicting a plantation scene complete with master, lady, and slaves.

---

125 Murray v. State, 33 So. 2d 291, 292 (Miss. 1948).
129 Id.
130 Higginbotham, supra n. 122, at 132 (quoting Jack Bass, Unlikely Heroes 13 (Simon & Schuster 1981)); When Fifth Circuit Chief Judge Elbert Tuttle expressed his dislike of the mural, it was covered, Bass, supra n. 130, at 167, but the question of covering it or leaving it visible continued to be debated. See id. at 329 (noting at least one African American thought it should be visible as a reminder of Mississippi’s fraught history).
In what amounted to storytelling through use of space, courtroom segregation proclaimed a supremacist vision of justice. Perhaps the clearest expression of this attitude came during the 1961 trial of the *New York Times v. Sullivan* case, over which Alabama Circuit Court Judge Walter Burgwyn Jones presided. Judge Jones, an ardent segregationist,\(^{131}\) asserted his “right and power . . . to direct [and segregate] the seating of spectators in the courtroom.” Thus, Jones announced, “[T]he XIV Amendment has no standing whatever in this Court, it is a pariah and an outcast, if it be construed to hold and direct the Presiding Judge of this Court as to the manner in which proceedings in the Court, . . . shall be conducted.”\(^{132}\) In contrast, Jones praised Alabama’s laws as the “‘full flower[ing]’ of ‘the [w]hite man’s justice . . . brought over to this country by the Anglo-Saxon Race.’”\(^{133}\)

The notion that “the white man’s justice” actually imparted justice was a fiction. The fiction on which this victory was built ran so deep that it seemed real to the mainstream white imagination. When nine African-American young men, ranging in age from thirteen to nineteen—“the Scottsboro boys”—were arrested in 1931 for the alleged rape of two white women, the *Scottsboro Progressive Age* predicted: “The general temper of the public seems to be that the negroes will be given a fair and lawful trial in the courts and that the ends of justice can be met best in this manner . . . .”\(^{134}\) Instead of a “fair and lawful trial,” defendants were tried without real counsel, for no one was willing to represent them.\(^{135}\) In four days, all nine defendants were convicted, and all but one sentenced to death. As for the defendant not sentenced to death, thirteen-year-old Roy Wright, some jurors wanted the death penalty though the prosecution sought only life imprisonment.\(^{136}\) The mainstream press generally thought justice had been fairly done; as the *Huntsville Times* headline put it: “DEATH PENALTY PROPERLY DEMANDED IN FIENDISH CRIME OF NINE BURLY NEGROES.”\(^{137}\) Yet when the Supreme Court ruled on appeal that defendants in capital cases must be provided counsel, it had little trouble seeing the injustice of the trials, which “from beginning to

\(^{131}\) See Maatman, supra n. 1, at 30.

\(^{132}\) Id.

\(^{133}\) Id.


\(^{135}\) *Powell v. Ala.*, 287 U.S. 45, 57–58 (1932).


\(^{137}\) See id. at 18.
end, took place in an atmosphere of tense, hostile and excited public sentiment.”

In short, most Deep South whites looked at the legal system they had created, and even when they saw its realities, they did not see those realities as injustices. Even blatant disregard for basic rights could seem unexceptional. An example is Brown v. Mississippi, a mid-1930s murder case in which three African Americans were convicted for the murder of a white man. The African American defendants’ confessions comprised the only evidence supporting a conviction. Yet the confessions followed severe whippings, and even, for one defendant, a mock hanging. The majority of the Mississippi Supreme Court rejected their appeals, simultaneously proclaiming that “[a]ll litigants, of every race or color, are equal at the bar of this court . . . .” As the dissenters pointed out, the reality of the case rendered that assertion a lie. The Mississippi Supreme Court had repeatedly ruled that coerced confessions were inadmissible, and the trial court judge knew the confessions were coerced yet still admitted them into evidence. The deputy even admitted on the stand to whipping the defendants but testified “in response to the inquiry as to how severely [the defendant] was whipped . . . ‘Not too much for a negro; not as much as I would have done if it were left to me.’”

Dissenting Justices Griffith and Anderson recognized the fiction of calling such proceedings just. They admonished:

[N]o court shall by adoption give legitimacy to any of the works of the mob, nor cover by the frills and furbelows of a pretended legal trial the body of that which in fact is the product of the mob, and then, by closing the eyes to actualities, complacently adjudicate that the law of the land has been observed and preserved.

This case was no anomaly. Nine years earlier, the Mississippi Supreme Court had considered a case in which a defendant’s confession was coerced through “the water cure, a species of torture well known to the bench and bar of the country.” This “cure” consisted of pouring water into the nose of a suspect while he lay

---

138 Powell, 287 U.S. at 51.
140 Brown, 297 U.S. at 279.
142 Id. at 471 (Griffith, J., dissenting).
143 Id. at 472.
144 Fisher v. State, 110 So. 361, 362 (Miss. 1926).
prostrate and restrained on the floor.\textsuperscript{145} True, the court overturned the conviction, but its recitation of three prior Mississippi cases overturning convictions based on confessions obtained by torture—including one in which a young African-American male was whipped into confessing the theft of a diamond pin—suggests that such rulings mouthed fictions honored more in the breach than the observance.\textsuperscript{146}

Even setting aside fictions surrounding the use of coercion, “the full flowering of the white man’s justice” produced a system in which a Mississippi district attorney argued, in 1906, that “mulatto” such as the defendant

were negroes, and that as long as one drop of the accused blood was in their veins they have to bear it; that these negroes . . . thought they were better than other negroes, but in fact they were worse than negroes; that they were . . . a race hated by the white race and despised by the negroes, accursed by every white man who loves his race, and despised by every negro who respects his race.\textsuperscript{147}

The Mississippi Supreme Court overturned the conviction, stating that “[m]ulattoes, negroes, Malays, whites, millionaires, paupers, princes, and kings, in the courts of Mississippi, are on precisely the same exactly equal footing.”\textsuperscript{148}

The next sixty-odd years of Mississippi and Deep South legal history belied that assertion. Although some white lawyers and judges challenged it from time to time—including the lawyers who challenged the 1935 coerced confessions in \textit{Brown v. Mississippi} at great personal costs\textsuperscript{149}—the fiction endured. It was spread by lawyers and judges who “had been reared entirely in a legally man-

\begin{footnotes}
\item[145] See id. at 363. This practice appears quite similar to water boarding. See \textit{White v. State}, 91 So. 903, 904 (Miss. 1922) (stating the water cure was intended to “strangle . . . causing pain and horror, for the purpose of forcing a confession”).
\item[146] \textit{Fisher}, 110 So. at 363–364.
\item[147] \textit{Hampton v. State}, 40 So. 545, 546 (Miss. 1906).
\item[148] \textit{Id.}
\item[149] One of the attorneys, John Clark, “suffered a physical and mental collapse” from the strain of attempting to appeal the case; in addition, his political career was ruined. He never recovered his health and retired from his law practice in 1938. Cortner, \textit{supra} n. 139, at 155–156. After Mr. Clark left the case, his wife approached her friend, ex-Governor Earl Leroy Brewer, to take the case. She warned him not to expect a fee because the defendants were impoverished sharecroppers whose families “could not raise five dollars if all their lives depended upon their so doing.” \textit{Id.} at 64–65. Brewer took up the appeal and personally underwrote many of the considerable expenses involved with an appeal to the United States Supreme Court. He was partially reimbursed through fundraising efforts by the NAACP, the Committee for Interracial Cooperation, the Association of Southern Women for the Prevention of Lynching, and individual contributors moved by reading about the case in \textit{The Nation}. \textit{Id.} at 89–105.
\end{footnotes}
dated, almost wholly segregated society. They generally knew little else but a white supremacist social order, and few had been given reason to question its existence.”\textsuperscript{150} They proclaimed the law to be just but defined justice in strictly supremacist terms. As civil rights historian David J. Garrow explains, the southern judiciary was “determined to have its way and willing to dissemble in doing so.”\textsuperscript{151}

2. Lawyers and Massive Resistance to Justice Reformation

After the United States Supreme Court held in 1954 that segregated schools violated the Constitution’s Equal Protection Clause,\textsuperscript{152} lawyers were active in the organization of so-called “Massive Resistance” to desegregation. They helped found the Citizens’ Council movement and contributed to the production of its rhetoric. Perhaps most significantly, they helped to give the movement an aura of legitimacy by cloaking race hatred in legal arguments. Some did so in their roles as state government officials and judges.

An important founder of the council movement was Judge Tom P. Brady of the Mississippi Circuit Court and later the Mississippi Supreme Court. Shortly after the Supreme Court decided \textit{Brown v. Board of Education} in 1954, Judge Brady turned a speech into a ninety-two page paperback entitled \textit{Black Monday}. The book shrilly recited the dominant story in terms reminiscent of Dixon’s \textit{The Clansman}, complete with a passage declaiming “[t]he loveliest and the purest of God’s creatures, the nearest thing to an angelic being that treads this terrestrial ball is a well-bred, cultured Southern white woman or her blue-eyed, golden-haired little girl.”\textsuperscript{153} Another passage warned: “Whenever and wherever the white man has drunk the cup of black hemlock, whenever and wherever his blood has been infused with the blood of the Negro,

\textsuperscript{150} Robert J. Norrell, \textit{Law in a White Man’s Democracy: A History of the Alabama State Judiciary}, 32 Cumb. L. Rev. 135, 154 (2001–2002). As late as 1956, a candidate for the Alabama Supreme Court declared he was “the grandson of a Confederate cavalryman” and that he was “for segregation of the races, always have been and will continue to be, as have members of my family down through the years.” \textit{Id.} at 155 (quoting Mayhall Opens Court Campaign, Birmingham News A-14 (Apr. 8, 1956)).


the white man, his intellect and his culture have died.” The council movement treated Brady’s book as a generative document, and it sold well. Brady repeated his ideas in hundreds of speeches at Citizens’ Council organizational meetings.

Local councils formed in towns and cities across the Deep South, with the avowed purpose of blocking desegregation. As a council pamphlet entitled “Why Does Your Community Need a Citizens’ Council?” explained: “The citizens’ council is the South’s answer to the mongrelizers.” Council tactics included intimidation and “mak[ing] it . . . impossible . . . for any Negro who advocates desegregation to find and hold a job, get credit or renew a mortgage.”

The council movement attracted many lawyers. They fit easily with a group whose speakers addressed “small town and county seat service clubs,” and whose membership drew from “the ranks of the Lions and Kiwanis, Exchange and Rotary clubs.” For example, the leadership of Alabama’s first council organization included prominent businessmen, state legislators, and several lawyers. The council “line” appeared often in The Alabama Lawyer, a bar journal automatically mailed to all Alabama attorneys. Articles such as “I Speak for the White Race,” “All Men Are Not Equal,” and “Origin of the Races and Their Development for Peace (Separate but Equal)” all appeared in the journal.

Council members, following the example of their United Daughters of the Confederacy and other “Lost Cause” forbearers, repeated and used the dominant story. As contemporaneous observer Dan Wakefield put it, council “leaders and orators never fail to mouth a firm dedication to law and order at every public gathering, [but] they also . . . deliver soul-searing declamations on the

---

154 Id. at 7.
156 See Cook, supra n. 155, at 16.
160 See id. at 87–88.
162 R. Carter Pittman, All Men Are Not Equal, 17 Ala. Law. 252 (1956).
sacred cause of white supremacy.”¹⁶⁴ Indeed, the council members and like-minded segregationists embellished on the story with a new twist: they argued that the civil rights movement was the product of a communist plot to weaken the United States by diluting the “purity” of the white race.¹⁶⁵

The council movement focused particularly on telling the dominant story to children. The communications wing of the movement’s national umbrella entity serially produced materials for elementary school students entitled A Manual for Southerners. Statements in these materials—sent to schools with the suggestion that they be used in the classroom—included these passages:¹⁶⁶

“God put the white people off by themselves. He put the yellow, red, and black people by themselves. God wanted the white people to live alone. And He wanted the colored people to live alone. That is why He put them off by themselves.”

• • •

“We do not live side by side. The Negro has his own part of town to live in. This is the Southern Way of Life. This is the way Negroes and whites can live in the same land. We do not live together. . . . [D]id you know our country will grow weak if we mix our races? It will.”

• • •

“You understand now why the races should not mix and why we Southerners want to keep our own Way of Life. And you must learn your lessons well so that you can help keep your race and nation pure. . . . We do not want the Race-Mixers and Communists to take our country from us.”

Materials suggested for Mississippi fifth and sixth graders stated,

God made different races and put them in different lands. He was satisfied with pure races so man should keep the races pure and be satisfied. BIRDS DO NOT MIX. CHICKENS DO NOT MIX. A friend had 100 white chickens and 100 reds. All the white chickens got to one side of the house, and all the red chickens got on the other side of the house. You probably feel

¹⁶⁴ Dan Wakefield, Revolt in the South 23 (Grove Press 1960).
¹⁶⁵ See Bartley, supra n. 159, at 185.
¹⁶⁶ All of the quoted passages (and more) are provided in Muse, supra n. 155, at 173–175.
the same way these chickens did whenever you are with people of a different race. God meant it to be that way.\textsuperscript{167}

Councils and segregationists also pressed the dominant story upon older students. In the late 1950s, Citizens’ Council speakers toured high schools to give speeches and distribute selected textbooks. Some schools sponsored essay contests on the topic of “racial integrity,” requiring students to read one of three segregationist texts.\textsuperscript{168} The Mississippi Citizens’ Council sponsored an essay contest in which over eight thousand high school students submitted essays on topics such as “Why I Believe in Social Separation of the Races of Mankind.”\textsuperscript{169} In 1961, a law-trained airline executive named Carleton Putnam published \textit{Race and Reason: A Yankee View}.\textsuperscript{170} Putnam’s book was an unabashed recitation of the Deep South’s dominant story, dressed up in pseudo-scientific clothes. Louisiana’s legislature mandated it for high school reading, and Virginia’s legislature debated doing so.\textsuperscript{171}

Counterstories were excluded. School libraries were “purged,” and teachers were discouraged from advocating integration.\textsuperscript{172} In Mississippi, an Anti-Defamation League film was removed from curricula under pressure from Council and Sovereignty Commission members who felt it “was unfit for showing to Mississippi school children. . . .”\textsuperscript{173} Pro-segregation activist Florence Sillers Ogden suggested resisting desegregation by “adopting such textbooks in Mississippi schools as we see fit.”\textsuperscript{174} The Mississippi DAR took up her strategy. The textbooks deemed inappropriate “g[ave] evidence that Negro people have done much to develop themselves,” or suggested that “our world is really one great community.”\textsuperscript{175} When Governor Ross Barnett took office in 1960, this campaign tangibly affected textbook selection for Mississippi schools.\textsuperscript{176} In Alabama, the Montgomery Citizens’ Council criticized a children’s book entitled \textit{The Rabbits’ Wedding}, which had drawings depicting the marriage of a black rabbit to a white one,

\begin{thebibliography}{174}
\bibitem{Roberts} See Gene Roberts & Hank Klibanoff, \textit{The Race Beat} 201 (Knopf 2006).
\bibitem{Maatman} See Maatman, \textit{supra} n. 1, at 36.
\bibitem{Muse} See Muse, \textit{supra} n. 155, at 170–171 (saying some state laws even required dismissal of teachers advocating integration).
\bibitem{Silver} Silver, \textit{supra} n. 167, at 12.
\bibitem{McRae2} See McRae, \textit{supra} n. 169, at 189.
\bibitem{Id} \textit{Id.} at 189.
\bibitem{id} \textit{See id.} at 190.
\end{thebibliography}
on the grounds that it promoted integration. The book was withdrawn from the open shelves of the agency serving Alabama’s public libraries. For one Alabama state senator, that was not enough; he wanted the book burned.\textsuperscript{177}

\section*{II. UNDERSTANDING \textit{TO KILL A MOCKINGBIRD} AS A COUNTERSTORY}

Counterstories are what Lee Anne Bell calls “back talk” that “challenge the mainstream story or master narrative that constitutes the public script.”\textsuperscript{178} While the dominant story closes off alternatives, counterstories resurrect them. The dominant story in the Deep South pared alternatives to race relations down to “our way of life.”\textsuperscript{179} The fact that the law worked hand-in-hand with the dominant story made other possibilities all the more remote,\textsuperscript{180} and the absence of felt alternatives replicated the system from generation to generation.\textsuperscript{181} In contrast, a teller of counterstories “bear[s] witness to social relations that the dominant culture tends to deny or minimize.”\textsuperscript{182} Specifically, a counterstory—whatever its content or mode of operation—reveals, by one means or another, the lies and uncomfortable truths of the dominant story.\textsuperscript{183} Thus, for example, Gunnar Myrdal believed in 1941 that the best hope for change in southern race relations would be to eradicate white ignorance of the realities of African-American life by “force-feeding


\textsuperscript{179} See Ritterhouse, supra n. 21, at 150.


\textsuperscript{181} See id. at 45; see also Ritterhouse, supra n. 21, at 161.

\textsuperscript{182} Bell, supra n. 22, at 8.

\textsuperscript{183} There is no reason to assume counterstories take a single form or mode of making their point. For instance, Mark Twain’s \textit{Huck Finn} is likely to have been meant as a counterstory about race even though its protagonist outwardly ascribes to the racial mores of his day. \textit{See} Toni Morrison, \textit{Playing in the Dark} 54–57 (Vintage Bks. 1992) (analyzing how Twain’s novel critiques and explores white racism). Langston Hughes used poetry about Scottsboro to provide a counterstory to the south’s dominant story about “white man’s justice,” writing, “The Law’s a Klansman with an evil will.” \textit{See} Langston Hughes, \textit{Ballad of Ozie Powell}, in \textit{The Collected Poems of Langston Hughes} 188–189 (Arnold Rampersad ed., Vintage Classics 1994). Even a performative act can serve as a counterstory, such as the decision of a black mother to have an open casket display the body of her son who had been kidnapped and murdered for whistling at a white woman. \textit{See} Roberts & Klibanoff, supra n. 168, at 86–89 (discussing the Emmett Till case).
the rest of the nation a diet so loaded with stories about the cruelty of racism that it would have to rise up in protest.”\footnote{See id. at 5–6 (stating that use of the northern press and the national press would be the best means to disseminate the realities of racism and bringing awareness to the rest of the nation).} Whatever a counterstory’s form, this revelatory function is the key to its nature.

*To Kill a Mockingbird* is a counterstory, within which a lawyer tells counterstories to his family and community. Harper Lee wrote *To Kill a Mockingbird* while the southern legislatures and judiciary were still defying the Supreme Court by engaging in “massive resistance” to the realization of true justice and civil rights for African Americans.\footnote{See generally Bartley, supra n. 159.} She set her story in 1930s Alabama, a world in which practices such as the water cure defined the white man’s justice. The novel shies from such hard realities and focuses more on the era’s prejudices than its practices. In the story, Atticus Finch “talks back” to that world in a way that reached into the future and spoke to the era in which she wrote.

This section identifies the massive resistance era stories that Harper Lee countered. It then examines the Finch family’s race relations, and the counterstories Atticus told on that subject, before Tom Robinson’s trial. It concludes with Tom Robinson’s trial, at which Atticus tells his most important counterstory of all.

### A. The Stories Harper Lee Countered

Harper Lee set *To Kill a Mockingbird* in 1935 Alabama, but it is most likely a reaction to the events of the 1950s in her native Alabama and neighboring Mississippi. The most significant of these events—all of which made nationwide news—were the murder of fourteen-year-old Emmett Till for whistling at a white Mississippi woman; white rioting at the prospect of desegregating the University of Alabama; and vicious, white demonstrations and the presence of the National Guard to desegregate Central High School in Little Rock, Arkansas. The backdrop for all of these events was the rhetoric generated by the White Citizens’ Councils as they told the dominant story that had shaped and sustained the region’s legal system. The events themselves can be regarded as performative counterstories that acted out the rhetoric of the dominant story.

Fourteen-year-old Emmett Till was murdered in 1955, as revenge for reportedly flirting with, and whistling at, a white woman...
named Carolyn Bryant. Carolyn’s husband, Roy Bryant, and his half-brother, J.W. Milam, kidnapped, beat, and killed Emmett, then dumped his body in the Tallahatchie River by fastening a large metal cotton gin fan to him with barbed wire. After Till’s brutalized body was found, local papers called for justice, and Bryant and Milam were arrested.\textsuperscript{186}

In between their arrests and the trial, however, white public opinion turned in favor of the accused after the NAACP and the African-American Chicago community characterized Till’s case as a manifestation of systemic ills in Mississippi and the Deep South. Ironically, an important white reaction to these characterizations was the conclusion that “this was not a simple murder, but Mississippi and ‘our way of life’ against the outside agitators.”\textsuperscript{187}

The power of the dominant story hung over the trial. Although prosecutors vigorously argued for conviction, one let slip that Emmett might have “needed a whipping” if he had done wrong.\textsuperscript{188} A defense lawyer argued that “every last Anglo-Saxon one of you has the courage to free these men . . . [and that the jurors’] forefathers would turn over in their graves” if these boys were convicted on such evidence as this. An all-white jury found Bryant and Milam not guilty after deliberating a little over an hour.\textsuperscript{189} Months later, \textit{Look} magazine published an article in which J.W. Milam fully described how he and Roy Bryant killed Emmett Till.\textsuperscript{190}

In 1956, mobs rioted at the University of Alabama on the eve of Autherine Lucy’s attempt to desegregate it. Rioters pelted her with eggs, charged her car, fired guns, and yelled, “[l]et’s kill her, let’s kill her!”\textsuperscript{191} This was not an isolated incident. In February 1956, Montgomery, Alabama saw a rally of 15,000 persons who opposed Ms. Lucy’s admission to the University.\textsuperscript{192} All of these events were widely reported.\textsuperscript{193}

The next year saw the Little Rock crisis. In 1957, a federal court ordered the desegregation of Central High in Little Rock,

\textsuperscript{187} \textit{Id.} at 197–199 (quoting an interview with J.J. Breland, Dean of Defense Attorneys, Sumner, Miss. (Aug. 15, 1962)).
\textsuperscript{189} \textit{Id.; see also} Whitaker, supra n. 186, at 210–11.
\textsuperscript{191} See McWhorter, supra n. 123, at 98.
\textsuperscript{192} See McMillen, supra n. 158, at 44.
\textsuperscript{193} See Roberts & Klibanoff, supra n. 168, at 130–132.
Arkansas. After a standoff with Arkansas’s Governor Faubus, who left the African-American students exposed to jeering mobs, President Eisenhower sent federal troops to Little Rock. They escorted the students to school for the rest of the year. The papers reported every step of the weeks-long crisis.\footnote{194 See Muse, supra n. 155, at 122–145.} In the meantime, Birth of a Nation played in Little Rock theaters.\footnote{195 See id. at 41.}

\subsection*{B. The Finch Family’s Race Relations before the Trial of Tom Robinson}

With the backdrop of her own time in mind, Ms. Lee gave Atticus Finch a biography typical of a small-town Alabama lawyer in the mid-1930s. Atticus was Alabama born, raised, and educated.\footnote{196 See id. at 3–5.} He is a solo practitioner in a small town, like most of his fellow Alabama lawyers.\footnote{197 See Tony A. Freyer & Paul M. Pruitt, Jr., Reaction and Reform: Transforming the Judiciary under Alabama’s Constitution, 1901–1975, 53 Ala. L. Rev. 77, 83–84 (2001) (“Most Alabama firms had only two or three partners and were geared towards handling the problems of farmers, storekeepers, and small-scale industrialists.”).} He is a generalist,\footnote{198 Scout’s references to her father’s legal practice reveal that he worked on a variety of small matters, including criminal cases, property problems, and will preparations. See Lee, supra n. 3, at 5, 22, 127.} handling a variety of small matters in local courts, again like the majority of Alabama’s lawyers of his time.\footnote{199 Freyer & Pruitt, supra n. 197, at 87 (most attorneys were content to practice in state courts despite burgeoning claims in federal courts).} His family had once been prosperous and owned a small number of slaves.\footnote{200 See Lee, supra n. 3, at 4.} As a child born in the 1880s, he would have known former slaves; in adulthood, a black woman, Calpurnia, worked for him in domestic service. Calpurnia, who likely was descended from his family’s slaves,\footnote{201 Calpurnia, the black housekeeper who managed the Finch household and largely raised Scout and Jem, grew up near the Finch family property, and had always worked for the white families who lived nearby. See id. at 142. She left her childhood home to continue working for Atticus. Id. She was older than Atticus, id. at 141, so it is undoubted that her parents were former slaves. Given her childhood home’s proximity to that of Atticus, it is likely that either the Finches or their neighbors, the Bufords, owned her parents.} keeps house and helps the widowed Mr. Finch raise Scout and Jem.

Although Atticus refers to Calpurnia as a member of the family and instructs his children to obey her, they well know she is a servant even as they follow her strict rules. When Jem turns twelve, Calpurnia (who was older than Atticus)\footnote{202 See id. at 141.} begins to call
him “Mister Jem.” In contrast, the children refer to the woman who raises them only as “Calpurnia,” or “Cal,” reserving the appellations “Miss” or “Mister” for white adults. This habit comported with the customs of white supremacy; as Willie Morris has put it, “you would never call a Negro woman a ‘lady’ or address her as ‘ma’am,’ or say ‘sir’ to a Negro man.” Indeed, this was one of the most pervasive lessons taught children in the Deep South; one young woman interviewed in 1944 recalled her mother saying “call them colored women. There are no colored ladies.”

The Finch children are well-versed in the behavioral expectations for Calpurnia’s race. Jem and Scout accept servile gestures of respect from black adults as an unquestioned norm; like Willie Morris, they took it “for granted . . . that Negro adults . . . would treat [them] with generosity and affection.” This assumption, which arose from strict limitations on how African Americans could interact with whites of any age, was a common reinforcement in the lessons of white supremacy; “[a] child who is constantly treated with deference by members of a group visibly distinguishable from himself on physical grounds can hardly escape the conclusion that he is superior to members of that group.” They know that blacks were not supposed to enter a white family’s house through the front door; indeed, Scout sees consistency with this custom as a point of pride and cultivation for blacks. Thus, she says of Tom Robinson that “[h]e seemed to be a respectable Negro, and a respectable Negro would never go up into somebody’s yard of his own volition.”

Atticus attempts to tell counterstories to his children and community that will promote justice formation and undercut the dominant story. For example, his sister Alexandra, like tellers of the dominant story, constantly stressed the Finch family’s background and “breeding” to the children. Atticus found himself unable to follow this “party line,” and told the children to forget about how Finches were supposed to behave. When his sister told him

---

203 See id. at 131.
205 See Quinn, supra n. 180, at 42.
206 See e.g. Lee, supra n. 3, at 135–136 (adult members of Calpurnia’s church accorded the children “gestures of respectful attention” and minister led them to front seats); id. at 187 (adult blacks yielded front row seats in their section of the courtroom to Scout and Jem).
207 Morris, supra n. 204, at 33.
208 Quinn, supra n. 180, at 45.
209 Lee, supra n. 3, at 220.
210 See id. at 151–153.
to fire Calpurnia because she could bring up the children, he refused to do so and told her Calpurnia was a member of the family.\textsuperscript{211} Alexandra objected to conversing about race matters in front of Calpurnia; Atticus remonstrated that “[a]nything fit to say at the table’s fit to say in front of Calpurnia.”\textsuperscript{212} When business leaders of his community question his decision to represent Tom, he flatly rejects community attitudes, saying his client “might go to the chair, but he’s not going till the truth is told. . . . And you know what the truth is.”\textsuperscript{213}

Atticus’s most famous lesson for his children is “[y]ou never really understand a person until you consider things from his point of view . . . until you climb into his skin and walk around in it.”\textsuperscript{214} They did not readily absorb his meaning. They knew little of the practical consequences of Jim Crow; thus, they were startled to learn that Calpurnia and her son were two of the only four members of Maycomb’s African-American community who knew how to read, even though there had been no school for them in Maycomb.\textsuperscript{215} It never occurred to the children that the social customs and laws of Jim Crown were meant and felt as humiliations. Far from Scout’s assumption that “respectable” blacks preferred to follow Jim Crow customs,

“[n]othing is quite as humiliating, so murderously angering, as to know that because you are black you may have to walk a half mile further than whites just to urinate; that because you are black you have to receive your food through a window in the back of a restaurant or sit in a garbage-littered yard to eat.”\textsuperscript{216}

In their ignorance, the children did not fully understand the implications of their father’s representation of Tom Robinson. They knew their father was unpopular for representing a black man accused of rape, yet they were not sophisticated enough to fully understand the sources and scope of the town’s hostility.\textsuperscript{217} Scout’s initial reaction to her father’s representation of Tom Robinson was negative; she was all too willing to accept local opinion that such work was a “disgrace.”\textsuperscript{218} Even as Atticus counseled her

\textsuperscript{211} See id. at 156–157.
\textsuperscript{212} Id. at 179.
\textsuperscript{213} See id. at 167.
\textsuperscript{214} Id. at 33.
\textsuperscript{215} See id. at 141–142.
\textsuperscript{216} Goldfield, supra n. 23, at 11–12 (quoting John Williams).
\textsuperscript{217} See Lee supra n. 3, at 186–187 (Scout puzzling over the town’s attitude).
\textsuperscript{218} Id. at 87.
to “keep your head high and . . . fists down.”\textsuperscript{219} she had difficulty accepting his role as Tom’s lawyer and got into fights with children who criticized Atticus for representing Tom.\textsuperscript{220} As for Jem, he naively thought that Atticus could win the case.\textsuperscript{221}

\begin{center}
C. The Trial as Turning Point: The Most Important Counterstory
\end{center}

The trial of Tom Robinson was an important turning point for the children and their father. Atticus dreaded the trial because he knew the outcome of a rape case, in which the accuser was white and the defendant black, was a foregone conclusion.\textsuperscript{222} He wanted to get the children through the trial “without bitterness, and most of all, without catching Maycomb’s usual disease” of racism.\textsuperscript{223} As for his representation of Tom, he fully expected to lose the case, but “intend[ed] to jar the jury a bit” and have a “reasonable chance on appeal.”\textsuperscript{224}

Atticus put his greatest effort into “jarring” the jury with his closing argument at Tom Robinson’s trial. In it, he argued: “in this country our courts are the great levelers, and in our courts all men are created equal.”\textsuperscript{225} Should we conclude he means it in the way the Mississippi Supreme Court meant it when it said much the same thing in 1906? Can we read \textit{To Kill A Mockingbird} and believe Atticus Finch sincerely means this? After all, he speaks those words in a segregated courtroom, his physical surroundings rendering his words obviously false. Perhaps his character is too simply drawn,\textsuperscript{226} but he is surely not so stupid that he cannot see the contradiction between his words and his physical surroundings.

I think Atticus is telling the most important of his counterstories. From the standpoint of justice formation, in his closing Atticus “talks back” to the “white man’s justice” by reminding the jury and all the listeners in the packed courtroom of the alternative of treating all parties as equals before the law. Scout, Jem, and their friend Dill are among the listeners. The children were forbidden

\textsuperscript{219} See id. at 86.
\textsuperscript{220} See id. at 94–96 (fight with a cousin who said Atticus was ruining the family), 279–280 (dealing with classmates after the trial), 283–284 (trying to understand her teacher’s racism).
\textsuperscript{221} Id. at 237 (Jem assumes the jury will acquit Tom Robinson.).
\textsuperscript{222} See id. at 100.
\textsuperscript{223} Id.
\textsuperscript{224} Id.
\textsuperscript{225} Id. at 234.
\textsuperscript{226} See generally Thomas Mallon, \textit{Big Bird}, New Yorker 79 (May 29, 2006) (reviewing biography of Harper Lee and commenting critically on \textit{To Kill a Mockingbird}).
from attending the trial, but Atticus has every reason to suspect they are among his listeners. Not only does he know they are keenly interested in the trial, but Atticus has a way of knowing when they disobey him, overhear him speak with adults, or turn up where they are not supposed to be.

The closing was as much a counterstory for the future as it was for his client. When Atticus was finishing his closing argument and came to his counterstory, he paused to unbutton his vest and collar, and took off his coat. Scout tells us that “this was the equivalent of him standing before us stark naked.” If such nakedness can be compared to an absence of pretense and truth-covering, then perhaps his removal of his watch may also be compared to stepping out of time to tell his counterstory to the future. The future he speaks to is the world in which his children will be adults, and one of them—Jem—will be a lawyer.

Before hearing his father’s closing, future lawyer Jem Finch is untroubled by the prosecutor’s unsanctioned references to Tom Robinson as a “big buck” and “boy,” whose testimony is “impudent.” Whether or not he recognizes the racism in such talk, Jem believes Tom will be acquitted. After hearing the closing and believing his father’s counterstory of equality before the law, the unanimous guilty verdict stuns Jem like a stab in the back. Walking home from the courthouse with his father, Jem says, “[i]t ain’t right, Atticus,” His father replies, “[n]o son, it’s not right.” Jem has learned what Atticus knew all along: the system is not fair.

Days later, Atticus confirms this lesson. He tells Jem, “[i]n our courts, when it’s a white man’s word against a black man’s, the white man always wins.” Agreeing that Tom’s conviction was unfair, he says that “[t]he one place where a man ought to get a

\footnotesize{227 See Lee supra n. 3, at 180 (Atticus telling the children he doesn’t want them in town that day).}

\footnotesize{228 As the trial approaches, the children discuss the case or some aspect of its impact on the family in nearly every chapter of the novel.}

\footnotesize{229 See e.g. id. at 45, 54–55 (Atticus knows they play games acting out Boo Radley’s rumored life even though he has told them not to), 100–101 (Atticus knows Scout is eavesdropping), 173 (the children show up as Atticus confronts a mob outside the jail where Tom Robinson is held).}

\footnotesize{230 Id. at 231.}

\footnotesize{231 Id.}

\footnotesize{232 See id. at 225–229 (Jem sends Scout and Dill out of the courtroom because Dill is so upset by the prosecutor’s treatment of Tom Robinson.).}

\footnotesize{233 Id. at 230.}

\footnotesize{234 Id. at 241.}

\footnotesize{235 Id. at 243–244, 252.}

\footnotesize{236 Id. at 252.}
square deal is in a courtroom.”237 Atticus predicts that Jem will “see white men cheat black men every day of your life, but... whenever a white man does that to a black man, ... that white man is trash.”238 In effect, he is telling Jem—and an eavesdropping Scout—that the supremacist legal system is “trash.”

Why does Atticus tell such a startling counterstory to his children? Before the trial, he counseled acceptance even while he told counterstories.239 His bluntness about the legal system’s flaws is a marked turn for him; I think he takes this turn because he is a father, and because he is a lawyer aware of the imperatives of time and history.

As a father, Atticus realizes that his children must learn to cope with the Deep South’s dominant story. Before the trial, his worry regarding how his children would cope with the display of racism it would prompt, and his hope “that Jem and Scout come to [him] for their answers instead of listening to the town,”240 reflected his anxiety over the possibility that they would heed the dominant story of race and justice. After the trial, when Atticus’s sister Alexandra tells him it was unwise to let the children see the trial and verdict, Atticus responds: “[t]his is their home, sister... [w]e’ve made it this way for them, they might as well learn to cope with it.”241

As a lawyer who knows his son wishes to study law, Atticus has another reason to tell his counterstories. Lawyers of Atticus’s generation grew up with the invention of Jim Crow. As youths, they lived in a world in which lynchings could generate a “carnival” atmosphere,242 and children played “lynching” by reenacting with dolls what they had seen done to humans.243 These lawyers oversaw the “elaboration and... expansion” of Jim Crow laws throughout the 1920s and 1930s,244 Jem’s generation would take up the law after the mid-1940s. Atticus, therefore, needs to “speak now against the day” when Southern people must decide whether to resist or “accept... with dignity and goodwill” the end of “the Southern way of life.”245 He says as much by telling his children

---

237 Id. at 253.
238 See id.
239 See e.g. id. at 128 (Atticus refers to a blatantly racist old woman as a “great lady,” while acknowledging her views differ from his).
240 Id. at 101.
241 Id. at 243.
242 Hale, supra n. 21, at 203.
243 See Litwack, supra n. 49, at 288.
245 I am paraphrasing William Faulkner’s speech to the Southern Historical Society’s
that “‘it’s all adding up and one of these days we’re going to pay the bill for it.’”

In particular, Atticus speaks to the day when an attorney named Jem Finch must decide whether the justice system he saw as a child is one that should be defended or challenged. Some attorneys, such as Charles Bloch, decided to defend it. Others—fewer—were agents for change. For some of these, counterstories dislodged old conceptions of justice. For instance, Judge J. Skelly Wright of the Louisiana District Court—the very Judge who ordered desegregation of Ruby Bridges’s school—was deeply affected by watching sighted people segregate blind arrivals at the New Orleans Light House for the Blind. For him, this became a kind of living story that “‘[a]te at [him]. And . . . [i]t began to make me think more of the injustice of it, of the whole system that I had taken for granted.’” The views of Judge Richard Rives of the Fifth Circuit Court of Appeals evolved under the influence of his beloved son, who studied law at the University of Michigan and discussed his progressive racial views with his father. Under the influence of his son’s counterstories, Judge Rives became an important jurist who rendered many decisions favorable to civil rights because he “‘wanted to live the new South his son talked about.’”

What would Jem Finch have chosen if he had practiced law in the era of massive resistance? Would he have joined a Citizens’ Council chapter and championed segregation? Or, would the memory of Tom Robinson’s trial and conviction, and all the counterstories his father told before and after that trial, have prompted him to join the slender ranks of progressive white attorneys who fought for civil rights against the tides of massive resistance? In 1950s Alabama, the most prominent local civil rights lawyers—


246 Lee, supra n. 3, at 253. Atticus goes on to say, “I hope it’s not in your children’s time”; however, I interpret that to mean that he hopes resistance to change and accompanying strife will not occur in his children’s times. Given the evolving attitudes of Harper Lee’s father during the 1950s, when he came to believe justice required change, it is unlikely that a character modeled after him would hope for continuation of Jim Crow law in his children’s adult lifetimes. See Charles J. Shields, Mockingbird 125–126 (Henry Holt 2006) (biography of Harper Lee).

247 See Bass, supra n. 130, at 112–113.

248 See id. at 69–70.

249 See id. at 16–17 (describing Rives as having a passion for reacting to injustice and commitment to “racial justice and equality under law”). Rives’s son died in a car accident; pro-segregationists trashed and defaced his grave to protest a decision Judge Rives had authored. Id. at 79.

250 Id. at 74 (quoting an interview with Douglass Cater (Sept. 18, 1979)).
Arthur Shores and Fred Gray—were black. Clifford Durr, a New Deal lawyer of Atticus’s generation, was the rare, white Alabama lawyer who assisted movement lawyers, but even he did so behind the scenes, advising Fred Gray and Rosa Parks during the Montgomery bus boycott.

In the 1960s, when Jem Finch would have been a seasoned lawyer, the Commonwealth of Virginia prosecuted Richard and Mildred Loving for marrying and then living in Virginia in violation of Virginia’s miscegenation laws prohibiting interracial marriage. They ultimately pled guilty. Judge Leon Bazile gave them the lightest sentence possible—one year in jail—and suspended the sentence, with the caveat that neither could return to Virginia for twenty-five years; even then, they could never simultaneously be in the Commonwealth. In a subsequent opinion declining to set aside the sentence, Bazile repeated the dominant story, writing: “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix.”

On appeal to the United States Supreme Court, Virginia’s lawyers had Charles Bloch’s assistance when they wrote their brief. In it, they argued in part,

[I]t is the exclusive province of the legislature of each State to make the determination for its citizens as to the desirability, character and scope of a policy of permitting or preventing such alliances . . . . The Virginia statutes here under attack reflect[ ] a policy which has obtained in this Commonwealth for over two centuries . . . .

Richard Loving sent his lawyers to oral argument before the Court with his own counterstory: “[t]ell the Court I love my wife, and it is just unfair that I can’t live with her in Virginia.” His lawyer did just that, and the Court agreed.

251 See McWhorter, supra n. 123, at 64, 175.
253 Richard was white, and Mildred was African American. See Loving v. Va., 388 U.S. 1, 2 (1967).
255 See Maatman, supra n. 1, at 87.
257 See Wallenstein, supra n. 254, at 428.
258 Id.
In this counterstory—at last turned a dominant one in the law—I hear an echo of Jem Finch telling his father that Tom’s conviction was unfair. Jem reaches that conclusion because he believes the counterstory of justice his father recounted in his closing argument at Tom’s trial: all persons are equal before the courts.

III. CONCLUDING REFLECTIONS

Just as we throw ourselves into the future with our children, we throw our children into the future with our stories. Charles Bloch knew the power of stories told to the next generation. In 1963, he told an audience: “We are supposed to read, to learn, and then to teach . . . . We lawyers of the South—of all America—have a great heritage—a great privilege—to . . . save our families, our neighbors, our children, our children’s children, ourselves.”259 If we do not talk back to stories like those Charles Bloch and his compatriots tried to embed in American law and culture, we risk “bolster[ing] the status quo by minimizing racism, avowing White goodness and innocence, and focusing on an exaggerated sense of forward progress.”260

Ironically, for lawyers this means that we must tell our children that Atticus Finch is not real. We must explain this is not merely because To Kill A Mockingbird is a novel; instead, we must tell them of Robert Coles’s recollection that his friends doing civil rights work in the South expressed “incredulity” over the character of Atticus Finch as “they’d yet to meet this kind of lawyer.”261

Pride in the legal profession is a part of our self-regard. It is easy and inspirational to say that “Atticus Finch knew” what it means “to be a lawyer,”262 “people like Atticus Finch made me want to be a lawyer,”263 and “I had hoped I might become a lawyer very much like Atticus.”264 As Professor Steven Lubet has said,

Atticus Finch saves us by providing a moral archetype, by reflecting nobility upon us, and by having the courage to meet the standards that we set for ourselves but can seldom attain. And even though he is fictional, perhaps because he is fictional, Atticus serves as the ultimate lawyer. His potential justifies all of

260 Bell, supra n. 22, at 14.
262 Main, supra n. 10, at S9.
263 Duncan, supra n. 11, at 3 (quoting news reporter and lawyer Joel Daley).
264 Papantonio, supra n. 9, at 23.
our failings and imperfections. Be not too hard on lawyers, for when we are at our best we can give you an Atticus Finch.\footnote{Steven Lubet, Classics Revisited: Reconstructing Atticus Finch, 97 Mich. L. Rev. 1339, 1340 (1999) (citations omitted). As Nancy B. Rapoport has stated, “To Kill a Mockingbird . . . is trotted out every time we need an example of a good lawyer.” Nancy B. Rapoport, Dressed for Excess: How Hollywood Affects the Professional Behavior of Lawyers, 14 Notre Dame J.L., Ethics & Pub. Policy 49, 64 (2000).}

In fact, if we focus long enough on Atticus Finch we can forget altogether that most lawyers in the Deep South came very late to the civil rights cause, if they came at all. Indeed, we largely have forgotten that fact.\footnote{See Maatman, supra n. 1, at 3–4.}

Southern states,” but specifies only newspaper editorialists as proponents for resistance.\textsuperscript{273} Illinois materials detailing “myths and truths” about \textit{Brown} do not mention the role played by segregationist lawyers in making \textit{Brown} necessary, and in resisting its mandate.\textsuperscript{274}

Telling counterstories about our profession can be difficult; nonetheless, it is necessary. Dan Bar-On is an Israeli Behavioral Scientist who interviewed German adults whose parents had participated in ways large and small in facilitating the Holocaust. When his stepson asked Bar-On why this difficult work was so important to him, Bar-On said that “the quest for hope has to do with confronting the truth.”\textsuperscript{275} Bar-On saw his “quest for hope” as “a ‘working through’ process that involves a gradual movement away from the euphemisms and distortions of the parents, which project a false reality, and toward an acknowledgement of what happened and what meaning those events have.”\textsuperscript{276}

The legal profession must engage in such a process to begin to renew justice formation in our children, our students, and new lawyers. The story of Atticus Finch has influenced millions of readers over two generations; a 1991 survey “found that among the books mentioned by its 5,000 respondents, Harper Lee’s TKM [\textit{To Kill A Mockingbird}] was second only to the Bible in being ‘most often cited as making a difference’ in people’s lives.”\textsuperscript{277} In general, the book’s influence is a positive force; however, it is a double-edged sword for the legal profession. The image of Atticus Finch seeking justice for Tom Robinson inspires many people to become lawyers, and can even inspire their practice. Yet this image allows us to use a fictional character to avoid confronting our profession’s uses of the dominant racial narrative to produce, perpetuate, and defend white supremacy and segregation. Exploring how the dominant story influenced, and was perpetuated by, the profession is vital to understanding how justice formation in lawyers can perpetuate injustice. Only if we teach our children to question dominant stories, and heed the call of counterstories, will we realize the opportunity for justice formation reflected in this ancient Jewish saying: “with each child, the world begins anew.”\textsuperscript{278}

\textsuperscript{273} ABA, \textit{Dialogue on Brown}, supra n. 269, at 4.
\textsuperscript{276} Id. at 331.
\textsuperscript{277} Johnson, supra n. 5, at 14.
\textsuperscript{278} Lisa Katz & Robin Elise Weiss, \textit{Naming Your Jewish Baby}, http://judaism.about
2008] Justice Formation from Generation to Generation 247

PUTTING THE “I” IN WR*t*NG: DRAFTING AN A/EFFECTIVE PERSONAL STATEMENT TO TELL A WINNING REFUGEE STORY

Stacy Caplow*

I. INTRODUCTION

For lawyers representing asylum seekers, a narrative told in the first person is the central evidence in the case. The story eventually will be related in oral testimony before either an asylum officer or an immigration judge, or both, but a written personal statement in affidavit format drafted by a legal representative will be the first exposure the fact finder has to the heart of the claim.¹ That affidavit, like an opening statement, creates a lasting first impression that previews the facts, establishes the case theory, introduces the client, and sets the stage for all subsequent proceedings.

The first person singular rarely has a place in legal writing during law school; indeed, it seems to be bred out of first-year students as they are introduced to this craft. So, when students in the asylum law clinic I teach are confronted by the task of drafting an affidavit, they are almost always unprepared to write in their client’s voice. Law students are exposed to a wide range of legal documents—from client letters, to contracts, to appellate briefs—but the affidavit receives virtually no attention.

¹ An affidavit is a “voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths, such as a notary public.” Black’s Law Dictionary 62 (8th ed., Thomson/West 2004). Often a declaration is submitted instead of an affidavit since it can be completed without notarization. In asylum practice, many statements are submitted without notarization pursuant to 28 U.S.C. § 1746, especially when the declarant is outside of the United States.
There are, of course, different kinds of affidavits that call for different approaches in their composition. Some are written by a person with an interest or stake in the matter; others are written by non-party witnesses or experts. The goal or point of the affidavit likely will dictate its tone, degree of formality and objectivity, and level of detail. In litigation, affidavits usually are submitted in support of motions, such as summary judgment, or as part of discovery. In other forms of practice, affidavits might be submitted in connection with fairly routine matters such as a will for probate or an application for a search warrant. As one author concedes,

Most lawyers will need to prepare an affidavit at some time; many will write dozens, if not hundreds. For most lawyers, writing an affidavit is strictly routine: drag out an old form, duplicate it, and change the details.\(^2\)

Despite the crucial, recurrent, if unheralded, role of the affidavit in legal practice, it receives little or no attention in legal writing texts. If it is discussed at all, the focus tends to be on form and organization rather than content.\(^3\) As a result of this second-


\(^3\) My search of legal writing texts turned up three chapters or sections of chapters addressing affidavit drafting. Each of these chapters offers some useful practical advice on how to write and organize an affidavit with tips about using boldface and headings, and avoiding legal jargon. They caution the writer to understand the goals of the affidavit and the procedural and evidentiary rules that apply. Elizabeth Fajans et al., *Writing for Law Practice* 108, 113–116 (Found. Press 2004); *The Redbook: A Manual on Legal Style* 375–381 (Bryan A. Garner ed., West Group 2002) [hereinafter *The Redbook*]; Schiess, supra n. 2, at 92–100. Another offers a skeletal example. Carol Ann Wilson, *Plain Language Pleadings* 88–89 (Prentice Hall 1996).

class status, when advice is offered about affidavit-drafting, it tends to be perfunctory, and lacks the theoretical underpinnings developed to teach effective legal writing in other formats. At most, the guidance is to be clear about the purpose of the affidavit, use straightforward language, explain the basis for the affiant’s knowledge, and make the document readable. The dearth of written materials authored by legal writing experts available to assign students to teach them the skill and the rhetoric of affidavit-drafting is especially frustrating in a clinic where this document plays such a leading role in the advocacy.

Materials written by asylum law advocates and immigration lawyers are slightly more helpful, largely because they understand and address the specific needs of these cases. All recognize the critical importance of the asylum applicant’s affidavit, as well as the contribution made by expert affidavits on such issues as physical and mental health, social and political conditions, or cultural practices. However, few offer much guidance about how to draft an affidavit beyond the superficial. The usual fallback is to provide an example.

This essay attempts to fill the void in legal writing texts and other materials and to amplify the usually wise, but often too general, advice of asylum advocates. After introducing briefly the asylum process and the role of the affidavit in it, I offer a model for teaching affidavit drafting in this admittedly rarified and even idiosyncratic practice area. While I cannot guarantee that lawyers, law teachers, or law students will be comfortable transferring this theory to other areas of practice, perhaps some helpful and adaptable common threads will emerge.

4 Practitioners give affidavit drafting short shrift, too. A quick on-line search uncovered only a few practitioner-oriented “how-to” articles devoting some discussion to affidavit drafting; See e.g. David L. Lee, Legal Writing: Summary Judgment: The Intersection of Legal Writing & Trial Practice, 12 Chi. B. Assn. Rec. 16, 22 (Apr. 1998); Scott Moise, The Scrivener: Affidavits, 16 S.C. Law. 47 (2005); Jason Vail, Legal Practice Tips: Attention to Detail: How to Draft Testimony, 60 Or. St. B. Bull. 31 (1999). The advice offered by these articles was strategic (Lee: “Draft your affidavits and choose your affiants like you were preparing for trial.”); stylistic (Vail: “Write like an ordinary person.”); technical (Vail: “Get the jurat right.” or Moise: “Affirmatively state in the affidavit that it is being made upon personal knowledge or, . . . upon information and belief.”); or ethical (Moise: “Be ethical . . . Lawyers may not . . . elicit improper and untrue testimony.”). In Canada, lay persons are given the advice to follow the “S.O.S. Principle” (simple, organized, short). David Mossop, Q.C., Drafting Affidavits: A Lay Person’s Guide, http://www2.povnet.org/uploads/images/172/Drafting.Affidavits.GUIDE.4thEd.Edition.pdf (June 10, 2004).

5 See The Redbook, supra n. 3; Schies, supra n. 2.


II. ASYLUM LAW AND THE APPLICANT'S AFFIDAVIT

Asylum cases depend heavily on facts, both to meet the legal standard for eligibility and to establish credibility. The facts need to be detailed, plausible, and consistent, and the applicant must relate them convincingly in writing and orally. This is standard advice, unquestionably true, but so vague that it offers no usable guidance about how to translate facts into a story that compels the desired result.

An application for asylum has only one prerequisite: a timely-filed Department of Homeland Security form known as an I-589. This form requires the asylum seeker to answer specific questions that, to the informed eye, mirror the essential elements of the statutory definition of “refugee,” which have to be satisfied to be eligible for relief. A refugee is

[...]

An asylee is a refugee who is physically present in the United States at the time of the application.

On the form, the asylum seeker simply checks a box to answer: “I am seeking asylum or withholding of removal based on... race,... religion,... nationality,... political opinion,... membership in a particular social group,... Torture Convention.” Another question asks, “Have you, your family, or close friends or colleagues ever experienced harm or mistreatment or threats in the past by anyone?” Another question asks, “Do you fear harm or mistreatment if you return to your home country?” Other questions address possible bars or exceptions. For many questions, there is space provided to explain “in detail” any answer requiring elaboration.

Asylum can be granted solely on the basis of facts set forth in this application after an interview with an Asylum Officer or a

---


10 I.N.A. § 208.

11 Asylum Officers receive special training in international relations and law and also non-confrontational interviewing techniques. 8 C.F.R. § 208.1 Asylum offices nationwide are
hearing in Immigration Court. The asylum seeker bears the burden of proving a "reasonable possibility" that she or he will be persecuted on account of at least one of the protected grounds if forced to return to a particular country. Like most administrative law adjudications, both the interview and the hearing are less formal than regular court proceedings. Evidentiary rules such as hearsay are not in effect. This allows the applicant to testify about threats or other statements made by a persecutor or other non-available witnesses, to offer conclusions and speculation about the intent and motive of the persecutor, and to submit affidavits that can be received into evidence despite the lack of opportunity to cross-examine the declarant. Notwithstanding this more lenient environment, usually considerable supporting evidence has to be submitted to meet even this fairly low burden of proof.

Many applicants are unrealistic about their chances of success and fail to appreciate the nuances of the law, the potential for misunderstandings about language and culture, and the role of credibility assessments. As the caption of one famous cartoon so aptly illustrates, however, success is elusive: The applicant appearing before an asylum officer asks, "What kind of evidence would be enough?" The asylum officer responds, "A note from your dictator."

Undue optimism leads many applicants to try to navigate the process on their own, a choice that rarely pays off. It is well documented that an applicant has a significantly greater chance of

under the jurisdiction of the Department of Homeland Security. By regulation, the interview process is non-adversarial and confidential. 8 C.F.R. § 208.9.


14 8 C.F.R. § 208.9(b) (interviews); 8 C.F.R. § 1240.7(a) (hearings); U.S. Dept. of Just., Immig. & Naturalization Serv., Basic Law Manual (1994); see also Matter of Wahud, 19 I & N Dec. 182, 188 (BIA 1984).

15 The Federal Rules of Evidence do not apply to administrative proceedings. Villegas-Valenzuela v. I.N.S., 103 F.3d 805, 812 (9th Cir. 1996). Immigration proceedings adopt the more generous approach of the Administrative Procedures Act. 5 U.S.C. § 556(d) (excluding only "irrelevant, immaterial, or unduly repetitious material"). An Immigration Judge, therefore, "may receive any oral or written statement that is material and relevant to any issue in the case," 8 C.F.R § 1240.7(a).


17 An asylum applicant can be interviewed without any representative present although non-lawyers are permitted to appear on behalf of non-citizens in the asylum office and in immigration court if they are properly certified. 8 C.F.R. § 1292.1(a).
success if she or he has counsel or other qualified representation.\(^{18}\)

Unrepresented applicants usually rely only on their applications or may submit some additional materials that they hope will substantiate the claim such as identity documents, medical records, news articles, other official records of arrests, court proceedings, or organization membership cards if they are available. In many instances, the fact finder is dubious about the authenticity of these submissions particularly from countries where fraudulent documents are easy to obtain. Without the assistance of counsel, these documents are not woven into a coherent story, so the fact finder may not give much weight to their contents. Often the applicants have nothing to proffer other than their sworn testimony because they fled without time to gather documents or to compile their records. Indeed, the overall grant rate for asylum applications at the asylum office level is around 32 percent\(^{19}\) and in immigration court around 24.5 percent.\(^{20}\)

With the passage of the REAL ID Act of 2005,\(^{21}\) the requirements for proof have become more stringent. Although it is still possible to grant asylum solely on the testimony of the applicant,\(^{22}\) when it is reasonable to expect corroborating evidence, the applicant must produce it or provide a convincing explanation for its absence.\(^{23}\) Appellate review of this determination by the immig-
tion judge is very limited as well. Moreover, when making the all-important credibility assessment, inconsistencies may be invoked as a basis for denial without much fear of reversal by the Board of Immigration Appeals. Small mistakes, a lack of access to resources such as expert witnesses, and unfamiliarity with the expectations and norms of the United States legal system, all contribute to the failure of pro se applicants to secure asylum, even when the facts of the case potentially might be strong enough to deserve relief.

Since legal representation alone makes such an enormous difference to the success of an asylum application, and since not all lawyers are equally proficient, it is vital to educate and train asylum advocates how to present the most effective and persuasive case.

As every experienced asylum advocate knows, the personal statement describing the grounds for asylum is the “centerpiece” of the asylum application. A thorough lawyer also will submit a memorandum arguing and synthesizing all of the evidence, which might include both adjudicative (what actually happened) and legislative (general conditions about the homeland) facts as well as the applicable law.

Refugee adjudication is a specialized field, characterized by a particular set of procedures before fact finders who are professionals with experience and expertise in these cases. An asylum officer or immigration judge may preside over three to four cases a day. Asylum officers receive training about specific countries and issues. Immigration judges are required by statute to be attor-

---

24 Section 208(b)(1)(B)(ii) of the I.N.A., as amended by the REAL ID Act, says that “[n]o court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence . . . unless the court finds . . . that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.”

25 Although credibility determinations are subject to administrative and judicial review, since 2003 when standards of review tightened, the Board of Immigration Appeals can reverse the credibility findings of an immigration judge only if they are “clearly erroneous.” 8 C.F.R. § 1003.1(d)(i). Judicial review of fact finding by federal circuit courts is similarly deferential, authorizing reversal only if the evidence compels a conclusion contrary to that of the fact finder. I.N.A. § 242(b)(4)(B).


27 Martin et al., supra n. 16, at 539–547. In addition to the application form and the applicant’s affidavit, a typical evidence packet might include personal documents corroborating identity and the claim, evidence of general country conditions as well as specific materials relating to this claim, expert affidavits, and fact witness affidavits.

28 “The Director of International Affairs shall ensure that asylum officers receive special training in international human rights law, nonadversarial interview techniques, and other relevant national and international refugee laws and principles. The Director of International Affairs shall also, in cooperation with the Department of State and other appro-
and the job description calls for experience in immigration law and trial procedures. Unlike lay jurors, who listen to evidence in a single case and evaluate facts in isolation, they may hear similar claims from the same country on repeated occasions. This foreknowledge must be taken into account in presenting the case theory and evidence in order to both fit preexisting expectations of a stock story and to present the singularity of the individual.

Any affidavit crafted by a lawyer would improve a pro se application for no other reason than the attorney’s presumed basic skills. Even affidavits written by lawyers, however, tend to be cautiously neutral, tracking closely to the conservative approach of a straightforward, direct, and unembellished chronological recitation of events. Students in an asylum clinic, however, are taught to strive for a more comprehensive, creative, and painstakingly detailed document that delicately balances the case theory and the client’s voice but also tells a story of courage, suffering, loss, sacrifice, and exile. They are taught that a well constructed asylum claim must relate a story that uses all of the persuasive tools of classical rhetoric (logos, pathos, and ethos) contained within a narrative structure to produce a story that is convincing to even the most dubious audience. The messy, arduous, and lengthy process of eliciting facts, figuring out how to organize and prioritize them, and then reduce them to writing is critical to the construction of

29 I.N.A. § 101(b)(4).
30 The job qualifications are not codified presently. In a recent posting by the Executive Office of Immigration Review, the description of the position included seven years of practice, substantial knowledge of the I.N.A. and its regulations, considerable litigation experience, ability to conduct administrative hearings, and knowledge of judicial practices. USAJOBS, http://www.usajobs.gov/ (accessed July 2003). Section 703(a)(2) of the Comprehensive Immigration Reform Act of 2006, Senate Bill 2611, passed by the Senate on May 25, 2006, but never enacted into law, set forth the following qualifications for immigration judges: an attorney in good standing of a bar of a State or the District of Columbia with at least five years of professional or legal expertise or at least three years professional or legal expertise in immigration and nationality law.
31 In Fajans et al., supra n. 3, the authors note favorably about their sample affidavit that its drafter “has resisted the temptation to use intensifiers, instead providing a largely neutral, straightforward account.” The authors comment that the single use of “overtly persuasive” language is all the more persuasive for its uniqueness. Id. at 115 n. 33.
32 There is a concern that the affidavit not be so detailed as to risk possible inconsistencies when the affiant relates the facts under the pressure of oral testimony. For example, an adequately detailed affidavit might state that the person was at a party when the police arrived, but omit the nature of the celebration in case he or she forgets or gets confused on the witness stand.
the story, to its coherence and credibility, and to empowering the asylum seeker to communicate confidently and believably at the interview or hearing.

III. EXPROPRIATING SELECTIVELY FROM THEORIES OF WRITING

All advocates know how consequential their written presentation of the case theory and the facts can be. In the case of refugee representation, where the stakes are so high, sometimes life-or-death, the pressure to tell a compelling story is enormous. Yet, even the most conscientious and expressive lawyer may simply be building a case from a template without necessarily understanding all of the tools and materials they are using.\(^{33}\) It is critical to provide the means to liberate the affidavit drafter from the constraints of third-person objectivity, a degree of freedom comes from understanding the power of stories, voice, image, theme, and plot and a willingness to express forcefully and vividly the words that propel the reader to the desired conclusion.

One set of training materials for representatives of asylum seekers offers some excellent advice. The affidavit should tell the asylum officer why your client deserves asylum. It should be detailed, consistent and supported by country conditions documents. It should be a compelling, well written account which intrigues and involves the reader. It should horrify if your client suffered horrible persecution; it should offend the sense of what is right and wrong; it should reflect your client’s strength of convictions and character and his determination to be who he is and not to be intimidated. By the end of the declaration, the reader should feel that there is no choice but to grant asylum.\(^{34}\)

Probably because this writer is an experienced advocate who understands the process and the audience,\(^{35}\) this instruction forcefully captures several theories of writing and advocacy. It sets forth all of the elements of classical argumentation proving that the best

\(^{33}\) Many writers simply type away guided by the conventions of the particular document without being consciously analytical about the process itself. Like other skills, legal writers develop expertise with practice and reflection. See generally Donald A. Schön, The Reflective Practitioner: How Professionals Think in Action (Basic Bks., Inc. 1983).

\(^{34}\) Schlenger, supra n. 26.

\(^{35}\) Kirsten Schlenger is a founder and managing partner of Weaver, Schlenger & Mazel, an immigration law firm in San Francisco. For a biography of Kirsten Schlenger, see http://www.weaver-schlenger.com/kirsten-schlenger.html.
advocates, perhaps unwittingly, and in different proportions, insert time-honored rhetorical techniques into the asylum seeker’s affidavit. As this advice also suggests, these rhetorical devices support what should become a riveting narrative that engages and influences the audience to reach a desired outcome. The final product emanates from a process of recursive writing to construct a story that fulfills the expectations of the fact finder.

The next Sections will break down and also build upon this sound advice. In thinking about affidavit drafting, I discovered a patchwork of related ideas that struck me as particularly germane to the work of asylum advocates. I will briefly describe aspects of several theories that seem particularly relevant to affidavit writing and that could be used to enhance and give texture to the asylum affidavit. Moreover, they help explain to students how to create a forceful document. The following section will apply these theories to a specific fact pattern to demonstrate how revisions to a story to emphasize, deepen, and strengthen the facts, themes, language, and story progression can arrive at the “no choice but to grant asylum” result this commentator rightly posits as the ultimate goal for the affidavit writer. Along the way, this illustration will show a drafting process that enhances the writer’s understanding of the facts, assists in the formulation of a coherent case theory, produces a more forceful written account, and fortifies the client for the eventual testimony.

A. Classical Rhetoric

Logos, pathos, and ethos are the three pillars of classical rhetoric. Logos is the process of using logic and reason to persuade. It is the most familiar approach for lawyers whose training prepares them to routinely argue about rules and policies and to draw inferences by analogy. Pathos persuades through the use of argumentation designed to stir an emotional response in the listener such as pity, horror, jealousy, patriotism, or pride. Unlike other areas of law where logic and reason dominate, emotions are at the core of

---

36 My understanding of the issues and debates in legal writing pedagogy is admittedly superficial. Thus, I selected those aspects of these theories that best advanced my thesis of how they can be applied to affidavit drafting.

asylum law and are at the forefront of argumentation even when camouflaged in arguments that sound like legal analysis.

The third type of persuasion is ethos, which refers to the relationship between the writer or speaker and the audience. Witnesses, the principal storytellers at a legal proceeding, need to make this connection so that the adjudicator is inclined to credit their version of the facts. Lawyers arguing to a jury always want to establish personal authority and credibility that bolster the arguments they make. Sometimes their positive personal connections with the jury camouflage less savory clients. In the context of legal writing, ethos can be conveyed in familiar ethical terms: accurate and honest recitations of fact and law, candor to the tribunal, zealous representation, and professionalism.\textsuperscript{38}

It is easy to see each of these techniques reflected in the paragraph quoted above. The sentence “It should be detailed, consistent and supported by country conditions documents” appeals to reason and logic, as well as indirectly sets forth the relevant legal standard of proof. The direction that “It should be a compelling, well written account” also addresses the lawyer’s craft. This, too, is logos. Appeals to emotion, pathos, are embodied in the phrases “It should horrify if your client suffered horrible persecution; it should offend the sense of what is right and wrong. . . .” The reader’s sympathies about severe, inhumane mistreatment are invoked as is the consequent outrage against such injustice. Finally, ethos, a strong identification with the client as a heroic figure who deserves admiration and respect is found in the statement “[I]t should reflect your client’s strength of convictions and character and his determination to be who he is and not to be intimidated.” These are traits with which most people would like to identify.

The forceful conclusion of this advice-giver merits attention because it really is a version of pathos now directed at the audience of would-be refugee advocates: “By the end of the declaration, the reader should feel that there is no choice but to grant asylum.” This exhortation motivates the listener by stating a clear goal for the written product.

How can this sound counsel be translated into the kind of affidavit that pushes the reader/fact finder to an inexorable conclusion? Obviously, as the advice suggests, a well-organized, readable, and emotionally engaging recitation of facts is the ideal. But putting meat on this skeleton is the hard part, requiring not only artful composition but also excellent storytelling skills. Both can be accomplished through a demanding spiral process of interviewing,

\textsuperscript{38} Smith, supra n. 37, at 103–122.
drafting, fact investigation, legal research, more drafting, more interviewing, and so on.

B. Narrative Theory

Lawyers have adopted narrative theory as applied legal storytelling in several contexts.\(^{39}\) Legal stories and the documents that relate them are not simply factual recitations, but are powerful methods of communicating ideas and experiences, especially those that are either foreign to the experience of an adjudicator, or so familiar that they raise suspicions of appropriation. The engaging story clearly establishes the protagonists, their conflicts and struggles, finds themes and images, and thus supports the audience’s mental models. A story also can challenge and provide alternative explanations to skeptics whose opinions are predetermined.\(^{40}\)

Applied storytelling is most prominent at trial where stories are a powerful method of communicating with juries.\(^{41}\) It also has a place in other lawyering tasks such as negotiation.\(^{42}\) Storytelling also can serve as a post hoc method for explaining or understanding court decisions.\(^{43}\)

Building on legal narrative theory,\(^{44}\) and adding this approach to more standard chronological, linear, and elemental ways of organizing facts and connecting them to law,\(^{45}\) clinical law teachers


\(^{40}\) “Stories, parables, chronicles, and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place.” Richard Delgado, Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative, 87 Mich. L. Rev. 2411, 2413 (1989).


\(^{45}\) Stephan H. Kreiger & Richard K. Neumann, Jr., Essential Lawyering Skills 150–
have embraced the concept of “case theory as story line.” Some discuss storytelling as a tool for raising ideological issues concerning client-centeredness, or for fleshing out student (and perhaps audience) biases, or for constructing evidence and drafting documents.

In the affidavit drafting process, that debate surfaces over questions of language, cultural competency, communication between client, lawyer (law student), and fact finder, and is played out in the quest for the creation of an authentic, believable “compelling, well written account which intrigues and involves the reader.” This admonition is basically a plea for a good story that draws in the reader quickly, that keeps the reader interested and involved, and that ultimately satisfies the reader’s highly developed expectations for factual and legal coherence and persuasiveness.

This can be accomplished by developing plot and character and articulating themes that are transmitted in an ascertainable narrative structure. The use of classical rhetorical techniques in service of a well-told tale in an affidavit results from a laborious process of questioning both the clients and the facts revealed, measuring those facts against other standards such as historical facts and common sense, and identifying truthful and accurate language to convey facts and emotions. To accomplish this, any mentor or instructor inevitably will employ the techniques of recursive writing, a hallmark of the New Rhetoric.

C. New Rhetoric

Modern legal writing teaching and scholarship has been influenced heavily by New Rhetoric, a composition theory that offers an


46 See e.g. Binny Miller, Give Them Back Their Lives: Recognizing Client Narrative, 93 Mich. L. Rev. 485 (1994); Binny Miller, Teaching Case Theory, 9 Clin. L. Rev. 293 (2002). In clinical teaching, there is considerable discussion of storytelling as an aspect of client representation raising questions about who determines the nature of the story, how the advocate shapes it, and what happens if there are disagreements about inclusion, exclusion, or emphasis.


48 Peter Margulies, writing about how difficult it is to elicit compassionate responses to Haitian refugees, suggests framing their stories in terms of the more familiar and undeniably sympathetic Holocaust narrative might improve their reception. Peter Margulies, Difference and Distrust in Asylum Law: Haitian and Holocaust Refugee Narratives, 6 St. Thomas L. Rev. 135, 152 (1993). His argument is strengthened by telling his own family’s World War II refugee story.

49 There are other places where a good story can make a big difference. See e.g. Brian J. Foley & Ruth Anne Robbins, Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Fact Sections, 32 Rutgers L.J. 459 (2001).
alternative to conventional legal discourse.\textsuperscript{50} New Rhetoric sees reading and writing as a process of “creating knowledge, not merely a means for communicating it.”\textsuperscript{51} Writing, thus, can be instrumental in thinking through a problem and in generating ideas for how to solve it.\textsuperscript{52} This theory emphasizes writing to meet the expectations of the reader-audience rather than to simply record the findings, thoughts, and conclusions of the writer.\textsuperscript{53}

The New Rhetoric approach offers two important lessons for affidavit drafting. First, it recognizes that writing can be a long and interconnected chain of fact-gathering, thinking, composition, reflection, and rewriting leading to identifying themes, locating gaps and inaccuracies, and connecting facts and law. Building the facts one block at a time is a means of discerning the best legal theory, constructing a factual case that tells a “compelling story” within the boundaries of the legal elements, and building attorney-client relationships. Thus, the task of affidavit drafting serves multiple goals in addition to a finished product.

Second, it is a process that is inextricably connected to a particular audience. Asylum officers and immigration judges, as noted above, often approach adjudication skeptically with an inclination to disbelieve the applicant. Most are intelligent, patient, and respectful under quite stressful conditions. They listen to many people tell tales of difficult lives, sacrifices, fears, and hopes, hour after hour, day after day. This repetition and volume has an inevitable, inuring effect on their attitudes. While they must be objective, they also are listening carefully for inconsistencies, mistakes, or inaccuracies, in other words, a reason to deny relief. They sometimes even seem to be trying to trap or trip up the applicant, or they may be aggressive in their questioning and probing.\textsuperscript{54} In addi-


\textsuperscript{52} Rideout & Ramsfield, supra n. 50, at 55.


\textsuperscript{54} Recurrent offensive and abusive behavior by immigration judges has recently drawn fire from United States Circuit Court judges reviewing immigration court records on appeal. See e.g. Bo v. Gonzales, 2007 LEXIS 3976 (2d Cir. Feb. 21, 2007); Guo-Le Huang v. Gonzales, 453 F.3d 142, 148 (2d Cir. 2007); Islam v. Gonzales, 469 F.3d 53, 56 n. 3, 56–57 (2d Cir. 2006); Shah v. Attorney General, 446 F.3d 429, 430 (3d Cir. 2006); Lopez-Umanzor v. Gonzales,
tion, decision-making by both asylum officers and immigration judges can be wildly disparate nationwide and even among the judges sitting on the same court. Since the decision makers are so divergent, and in some instances statistically predictable in their inclination to deny relief, the affidavit must take into account this imbalance by drafting a document that will satisfy the most demanding, dubious, and least generous adjudicator.

Since there are enough similarities between teaching writing in a writing course and supervising student writing in a clinical course, the teaching methodology of the New Rhetoric is applicable to teaching in a clinical setting. The practice of providing extensive comments and feedback at each writing stage designed to teach students the rubrics necessary to engage in legal discourse is integral to learning to write an affidavit in a clinical setting with one critical difference. Clinical teaching situates its pedagogical goals in the midst of client-centered objectives. The client’s needs and goals must surround, and sometimes supersede, those of the students. The demands of an actual case thus alter the relationship between teacher and student.

Moreover, the goals of clinical supervision and teaching extend far beyond the production of a single, high-quality document. A hallmark of clinical supervision is the development of independent critical thinking and performance skills by giving students responsibility for all aspects of the case. Comments on affidavit drafts are designed to raise questions about fact and case theory development rather than to impose a structure of legal analysis and argumentation. The finished product might even be imperfect, but it is much better than the first effort, benefits from extensive non-directive feedback, and belongs to the student as much as possible.


See generally Ramji-Nogales et al., supra n. 18. One empirical study of asylum denial rates between 1999–2004 found four immigration judges in New York denied in more than 90% of the cases they heard while two granted in 90% of their cases. See Transactional Recs. Clearing House, Syracuse U., http://trac.syr.edu/immigration/reports/160/include/judge_0005_name-r.html (accessed Feb. 8, 2008).
IV. WHAT THESE THEORIES CAN TEACH ABOUT AFFIDAVIT DRAFTING

Lawyers write and edit as “experts” (or as experts-in-progress) but without much regard for theories of writing. As their careers progress, their writing presumably becomes more competent, expressive, and persuasive. Even more accomplished writers are not particularly reflective about the task, however. Clinical teachers generally feel responsible to novice students to help them develop long-term self-reflective skills by imparting advice that will increase their ability to be independent and creative learners and thinkers. Classical and New Rhetoric, as well as narrative theory, offer structures to help students to become better affidavit writers, and better lawyers generally.

If writing normally is a recursive process of acquiring knowledge, constructing meaning, and then communicating that meaning to an audience, then the interviewing-drafting-interviewing-fact-gathering-redrafting helix that continues almost up to the last minute before submission of an affidavit is a specialized sub-set of that process. It is an end—a document that adds flesh and substance to the bare bones of the form application. It is also a means to a more complex goal—drafting a document that contains a persuasive story that itself sets forth the legal and factual elements required to meet the burden of proof for asylum. This includes an accessible and understandable case theory, a coherent and moving client narrative, and a portrait of a sympathetic, even heroic, individual client that articulates the most convincing evidence submitted to prove the claim.

Even more importantly, affidavit drafting is a process by which the asylum case builds incrementally as the client is probed and questioned during interviews for the details that render a story credible. It is a process of trust-building between lawyer and client that slowly yields more nuanced and specific information. And, it is a process of case-building during which the client’s memory, confidence, and eloquence improve and grow so that by the time the hearing occurs he or she truly understands both what has to be articulated and what has to be explained. Finally, it is a cycle of rehearsals for the asylum seeker who, after months of remembering and repeating, is transformed into a more comfortable storyteller before an audience other than sympathetic law students.
At the beginning, asylum-seeking clients usually have gathered some basic understanding of what facts are relevant to an asylum claim.\textsuperscript{56} They also know what actually has happened to them. They believe, therefore, that they know what is important to reveal. Yet, they fail to appreciate the significance of the particulars so they omit details, go off on tangents, and drift between time frames.

Some interviewing texts suggest that initially the lawyer allow the client to talk about what is important to him or her without too much interruption or control.\textsuperscript{57} This openness and lack of apparent judgment, while sometimes inefficient, usually assists the development of the client-attorney relationship and is an investment in its long-term success. Open-ended questioning is the preferred model for most initial interviews and is particularly suited to asylum seekers who are victims of recent traumas, are newcomers to United States legal practices, and are divulging very private details to strangers.

Given this lack of structure, many clients relate their stories in a burst of information regardless of the complexity and amount of facts involved. They gallop through years of troubles, sometimes incorrectly assuming the listener’s familiarity with the history and culture and failing to realize how many holes need filling with details. There are several reasons for choosing to tell a story of victimization and fear in an abbreviated fashion as possible. First and foremost, the facts are painful to recall and relate to strangers however friendly and helpful. As one client told his student-lawyers, “You are asking me about things I have been trying to forget.” Second, genuine trauma may interfere with recollection or with the ability to talk about the events. Third, the individual simply may lack the language to describe feelings or occurrences even when speaking in their native tongue. This deficiency is even more limiting when the facts are filtered through an interpreter.

A contradictory impulse also surfaces in many cases. Clients want to make their lawyers understand everything. They appreciate an audience that is attentive and respectful rather than interruptive and judgmental. They drift off onto tangents about history,

\textsuperscript{56} In their search for pro bono representation, asylum seekers often go to many agencies and offices where they provide their histories. Many cases are referred to law school clinics and other pro bono cases by other organizations such as Human Rights First or the Asylum Project of the New York City Bar Association. Those interviews are intake assessments for purposes of a referral to a volunteer lawyer.

culture, politics, and social organization. The advocate has to rein in this tendency while identifying which information is actually useful.

The paradoxical instincts to both abbreviate and elaborate reflect the clients’ priorities but usually stray widely from the needs of the “law story.” Their stories need both elaboration and editing. This is the task ahead as the students repeatedly interview the client and start to use the information to finalize the case theory and the affidavit that expresses it. This sifting and sorting of information is daunting enough; the task of reducing it to a persuasive written document is even more challenging.

V. APPLYING THESE THEORIES TO THE CASE OF A TIBETAN ASYLUM SEEKER

The world is full of displaced persons fleeing war, carnage, pogroms, ethnic cleansing, starvation, disease, and other human misery.\textsuperscript{58} Refugee receiving countries, such as the United States,\textsuperscript{59} set limits on how many refugees they are willing to absorb.\textsuperscript{60} Embodied in the framework of the refugee definition is the “paradigmatic refugee,” in other words, the person for whom the law was written. Familiar examples are Jews during World War II, anti-Communist dissidents, and anti-Castro Cubans. Today, the borders of the refugee definition are being stretched to include gay men and women,\textsuperscript{61} victims of domestic violence in some contexts,\textsuperscript{62}

\begin{footnotes}
\item[58] As of June 2007, there were 32.9 million refugees, asylees, internally displaced, or stateless people. UNHCR 2006 Global Trends, http://www.unhcr.org.au/pdfs/globaltrends2006.pdf (July 16, 2007).
\item[59] According to the United Nations High Commission for Refugees, 16 of 192 member states of the United Nations have established annual resettlement quotas, including Australia, Canada, Denmark, Finland, Ireland, New Zealand, the Netherlands, Norway, Sweden, the United Kingdom, and the United States. See United Nations High Commissioner for Human Rights, http://www.unhcr.org/basics/BASICS/3b0280294.html#country%20quotas (accessed Feb. 8, 2008).
\item[60] The President, in consultation with Congress, makes an annual determination for authorized overseas refugee admissions. I.N.A. § 207. In 2007, that number was 70,000, although far fewer actually were processed. There are no corresponding numerical limits on asylum seekers applying within the U.S.
\item[62] See e.g. Matter of S-A., 22 I & N Dec. 1328 (BIA 2000); see also 65 Fed. Reg. 76588-98 (proposed regulations amending definitions of “membership in a particular social group” and “persecution” to be more amenable to claims of domestic violence).
\end{footnotes}
The harm that amounts to persecution can include female genital mutilation or forced marriage. The job for the asylum advocate is much easier if the client’s story fits the paradigm: the harm is unquestionably sufficient, the basis for persecution fits squarely into one of the five categories, and the nexus is clear. For the advocate, therefore, building a foundation of a recognizable legal claim, even if it pushes the boundaries of existing law, is essential. But the soundness of the structure always depends on the credibility of the applicant. Even a perfect story may not result in a grant of asylum if the client submits false documents, delivers inconsistent testimony, or makes an unfavorable impression on the witness stand.

These two pieces of the claim—the legal and the personal—combine forces in the affidavit. Because the logical order of the fact finder is first to account for all, or discount some, of the legal elements of the claim, the affidavit must provide a forceful, legally comprehensive factual statement that also establishes quickly the bona fides of the applicant.

This Section will suggest techniques that assist the student to become a more accomplished affidavit writer and advocate generally. The setting is the Safe Harbor Project, a law school clinic that represents asylum seekers. Teams of two or three students work with a single client to prepare the case for either an interview or hearing. The standard materials we would submit in addition to the mandatory application form include the client’s own affidavit, personal materials that would support the claims, information about the particular conditions in the native country, a memorandum of law, and, when available and relevant, statements in the form of affidavits, letters, or reports from experts or fact witnesses. This is a body of work that usually takes the entire semester to complete and can be several inches thick.

Since our clinic does not conduct general intake, we rely on referrals from various organizations that initially interview potential asylum applicants. Our clinic typically receives from the screening organization a referral letter or memo that summarizes the essential facts. This memo is both a help and a crutch because we prefer the students to begin with a clean slate and elicit the facts from scratch. But this memo does provide a good starting point to make some preliminary observations about the basic facts and to conduct

---

63 Tchoukhrova v. Gonzales, 404 F.3d 1181 (9th Cir. 2005), vacated on other grounds, 127 S. Ct. 57 (2006).
some introductory legal and factual research. Then, the spiral of interviewing and writing begins.

A. The Referral Letter

Human Rights First (HRF), formerly known as Lawyers Committee for Human Rights, was one of the original, and is certainly the best known, organizations to refer asylum cases to volunteer lawyers. Many law school clinical programs turn to them for well screened and supported cases. Sometimes HRF sends out announcements to pro bono lawyers about pending cases in need of representation. Here is a recent case description that I post as an example of a well developed summary of a case that might be a base line for students interviewing a new client.

Mr. X is a twenty-year-old man from Tibet. His persecution at the hands of Chinese authorities arose out of his decision in early 2004 to assist a friend and distant relative to hang up two posters that supported the Dalai Lama and an independent Tibet. Later that year, Chinese authorities arrested Mr. X at his home and brought him to a police station, where they interrogated and tortured him. Despite his initial resistance, Mr. X confessed to having put up the posters with his friend when officers told him that his friend was already in custody and had confessed. As a result of his acts and subsequent confession, Mr. X was imprisoned at the local prison for 15 months. He was held in a crowded cell and survived on minimal food while being taunted, interrogated, and abused regularly.

After his release, Mr. X was required to check in to the local security bureau twice a week and was prohibited from leaving his area. Authorities regularly came to Mr. X’s home, often searching it and questioning him. These officers would also order him to report to the local security bureau for further interrogation. During these interrogations, which lasted anywhere from two to five hours and occurred about twice a month, Mr. X was subjected to further physical and mental abuse. Authorities insisted that he was part of a larger pro-independence organization which they wanted information about.

Unable to deal with his state of virtual house arrest and the constant interrogations, threats and abuse, Mr. X fled Tibet in March 2007. He traveled through Nepal and finally made it to the United States in June. Upon his arrival at JFK airport, he was detained and brought to the Elizabeth Detention Center in New Jersey. If forced to return to his country, Mr. X fears that
he will be killed or will be sent back to prison to serve an even longer term.\footnote{E-mail from Ruthie Epstein, Refugee Prot. Program, Human Rights First, to N.Y. and N.J. Pro Bono Coordinators (July 24, 2007, 6:38 EST). Information about Human Rights First is available at http://www.humanrightsfirst.org.}

A quick reaction to this “first draft”: It describes a straightforward case, a good first project for students.\footnote{The referral letter is a good example of “authorial summary,” a form of “telling” rather than “showing.” Philip N. Meyer, Vignettes from a Narrative Primer, 12 Leg. Writing 228, 241 (2007) (discussing the advice in David Lodge, The Art of Fiction 122 (Penguin 1992)).} The Chinese government’s brutal suppression of Tibetan dissidents, even those participating on such a low level, is well known. To an experienced eye, the potential legal theory is self-evident—past persecution on account of political opinion—but there are also some equally obvious potential pitfalls such as identity and corroboration. The summary is informative yet bare of humanizing detail or narrative thrust. As written it sets forth all of the elements of the refugee standard, but it does not satisfy the standard of a story that leaves “no choice but to grant asylum.”\footnote{Schlenger, supra n. 26, at 8.} It is a typical scenario, yet its very typicality means that it could be a “borrowed” story. The credibility hurdles will be significant.

1. First Assignment

The students’ first assignment is to circle every word, term, or concept in this letter that presents a fact and to indicate whether and how that fact is verifiable.\footnote{The marginal comments represent the observations students might make as they read the statement for the first time. Since circling is impossible here, the terms they might have circled are in bold instead.} At the same time, they are told to identify facts that directly support the legal elements.\footnote{These facts will be in bold italics.} Finally, they are asked to brainstorm how the facts might be verified.\footnote{These ideas appear in marginal bubbles.} Below is an illustration of what might be their finished product. Frankly, most novice students, whether working collaboratively or alone, would not have spotted all of these possible factual questions, and there may even be more to spot, so this example is a bit idealized.

---

\footnote{E-mail from Ruthie Epstein, Refugee Prot. Program, Human Rights First, to N.Y. and N.J. Pro Bono Coordinators (July 24, 2007, 6:38 EST). Information about Human Rights First is available at http://www.humanrightsfirst.org.}

\footnote{The referral letter is a good example of “authorial summary,” a form of “telling” rather than “showing.” Philip N. Meyer, Vignettes from a Narrative Primer, 12 Leg. Writing 228, 241 (2007) (discussing the advice in David Lodge, The Art of Fiction 122 (Penguin 1992)).}

\footnote{Schlenger, supra n. 26, at 8.}

\footnote{The marginal comments represent the observations students might make as they read the statement for the first time. Since circling is impossible here, the terms they might have circled are in bold instead.}

\footnote{These facts will be in bold italics.}

\footnote{These ideas appear in marginal bubbles.}
Mr. X is a 20-year-old man from Tibet. His persecution at the hands of Chinese authorities arose out of his decision in [early 2004] to assist a [friend] and [distant relative] to hang up [two posters] that supported the Dalai Lama and an independent Tibet. Later that year, [Chinese authorities arrested Mr. X] at his home and brought him to a police station, where they [interrogated and tortured him]. Despite his initial resistance, Mr. X confessed to having put up the posters with his friend when officers told him that his friend was already in custody and had confessed. As a result of his acts and subsequent confession, Mr. X was [imprisoned at the local prison for 15 months.] He was held in a [crowded cell] and survived on minimal food while being taunted, interrogated, and abused regularly.

After his release, [Mr. X was required to check in to the local security bureau twice a week and was prohibited from leaving his area.] Authorities regularly came to Mr. X's home, often searching it and questioning him. These officers would also order him to report to the local security bureau for further interrogation. [During these interrogations, which lasted anywhere from two to five hours and occurred about twice a month, Mr. X was subjected to further physical and mental abuse.] Authorities insisted that he was part of [a larger pro-independence organization] which they wanted information about.

Unable to deal with his state of virtual house arrest and the constant interrogations, threats and abuse, [Mr. X fled Tibet in March 2007.] He [traveled through Nepal]
and finally made it to the United States in June. Upon his arrival at JFK airport, [he was detained.] If forced to return to his country, [Mr. X fears that he will be killed or will be sent back to prison to serve an even longer term.]

After this initial mark-up, the students are ready to prepare for their first client interview. They may decide to do some country or historical research, including some legal research or on-line investigations about any United States policies and practices regarding Tibetan asylum seekers. They create an interview plan or outline based on the models they encounter in assigned readings.72

2. The Initial Interview and Beyond

“Put away the intake statement,” I instruct the students before meeting the client. “You need to listen to the client without preconceived notions. The HRF interview is at best sketchy and at worst might even be inaccurate in places.” So, the students will let the client talk, establish a relationship, answer questions, and take the first of many steps toward formulating a final case theory.

In almost every case, students conduct multiple client interviews to elicit facts, identify a tentative case theory, and engage in the process of preparing the client to relate his own story aloud and in writing. Usually, their strategy follows a rough chronology of the client’s life beginning with background information, leading up to the central facts supporting the refugee elements, and ending with flight and entry into the United States. Sometimes language impedes comprehension; sometimes clients take detours through personal, social, or political history that may be very important to them but tangential to the claim; sometimes the emotion and trauma of their experiences inhibit their ability to talk about certain events.

This process usually resembles a looping conversation—forward movement, circling back, occasional tangents, reiteration, verification, elaboration, explanation—until finally, a full factual cycle is completed. Then, the students believe they are ready to begin to write the affidavit. Fatigued by the endless rounds of

72 We assign Chapter 8 of Krieger & Neumann, supra n. 45, at 81–108. Other options include Binder et al., supra n. 57, at 80–111, or David F. Chavkin, Clinical Legal Education: A Textbook for Law School Clinical Programs 66–72 (2d ed., LexisNexis 2007).
questions and answers, they are eager to tackle the “real” first draft of their client’s statement. At this point, they almost always believe that they have the facts and that the story just needs to be written down.73

B. Beginning to Write the “I”

When students read or hear about a client’s story from another source such as the referral letter, they encounter the facts from an objective distance created by the third-person voice. After talking with a client for many hours, however, students can make a transition from third to first person fairly easily. Indeed, the very small adjustment from “He” to “I” instantly transforms the facts into a more moving, poignant, disturbing personal account. This conversion has a decidedly liberating effect on the tone and language of the student’s own composition. Already trained in the use of logos, they begin to introduce pathos.

Another important transformation comes from the students’ personal contact with the client. First, Mr. X is telling them his story in his own words, terms, and expressions. The students have access to his vocabulary, his images, and his point of view. From their notes, they are able to incorporate his exact words and phrases into the story. Second, they are forming a sympathetic, supportive relationship with Mr. X. That compassion motivates creative energy and echoes in their writing.

But their first effort also exposes, sometimes painfully, how many assumptions, omissions, interruptions, and unfounded assertions plague the personal statement. An example of just one paragraph that might purport to “improve” on and “expand” the referral letter by adding details demonstrates the limits of their initial progress:74

73 Even this step can be complicated by different styles of clinical supervision since the determination of how to allocate and approach the work is part of the students’ growing autonomy. Usually they just plunge into drafting. This often results in a few pages of facts that are only slightly more detailed and elaborate than the referral letter. This is an eye-opening teaching moment because they quickly realize that all of their hours of interviewing are not that easily captured in an effective statement.

74 The balance of the facts developed represents a composite of several cases on which Safe Harbor Project students worked over the past ten years. Since many Tibetan asylum seekers present a fairly standard story, these facts are quite typical. Their frequency, however, should not detract from their individual courage and a justly horrified reaction to the inhumane treatment they received as punishment for acting on their beliefs. Because the United States does not calculate statistics regarding asylum seekers from Tibet separately from China, there is no way to determine how many actually are granted asylum. A representative story is reported in Diana Britton, Flight from Violence and Persecution—Tibetans Find Freedom in Brooklyn, Courier-Life (June 9, 2007).
My friend [Tashi,] who is also the son of my wife's cousin, asked me to help him hang pro-Dalai Lama [posters] at the county fair. I [hung up] two posters. I helped because I disagree with the Chinese [government.] The government destroyed my country. Until then, I had never had a chance to show my [opposition.] I was [glad] to be able to express my beliefs through actions.

This revision earns a set of marginal notes that is a dose of cold water. It was one thing to have made lots of comments on the intake letter written by someone else, but seeing the work in which they enthusiastically and confidently engaged annotated so extensively is often a bit discouraging. Fortunately, clinic students are resilient, so they jump back into writing the next drafts.

After allowing them full control over their first effort, the second draft can benefit from a few techniques that allow the students to see what is missing, ineffective, or illogical. These techniques provide a structure for the multiple, subsequent re-readings and revisions of the affidavit, the number of which eventually can be reduced as the students’ instincts for spotting weaknesses sharpen with experience.

1. Creating a Time Line

Time lines are a standard technique for organizing and testing propositions and proof. A time line is a very effective tool to foster an understanding of the entirety of a story, to uncover possible additional evidence, and to assure an eventual seamless story. In other settings, stories are not always told in basic chronological order—think about flashbacks, or parallel yet intersecting story lines, or psychological accounts—but most listeners feel comfortable with a temporal starting and ending point. Even if the final

---

Comment [ec19]: Does he have a full name? Is Mr. X afraid to expose his friend? Can we reassure him in any way?

Comment [ec20]: What did the posters say? How did he get them?

Comment [ec21]: Do we have any details about this event? Can we confirm that it occurred?

Comment [ec22]: Where did he hang them?

Comment [ec23]: Can he explain what he finds objectionable? Can we count on him to have any knowledge of the politics and history of the Chinese annexation? Is this enough to establish a political opinion?

Comment [ec24]: What does this mean? Why not?

Comment [ec25]: Can this emotion be stronger?

75 The use of time lines in the information-gathering process is discussed extensively in Binder et al., supra n. 57, at 112–148, and Krieger & Neumann, supra n. 45, at 148–158. The format of a time line in Krieger and Neumann recommends the following categories: date/time, episode, source, gaps/internal consistency. Krieger & Neumann, supra n. 45, at 152–154. These categories usually are too limited for asylum cases since the events can transpire over years if not decades and often are not confined to one person’s chronology.
story is not told in strictly linear fashion, the time line is helpful in eliciting and ordering the story, but, because it is essentially objective, it offers fewer opportunities to appeal to emotion than does a narrative structure.

Given the context of the asylum claim within broader historical and social movements, many of which extend over long periods of time, students working with asylum seekers are wise to prepare parallel time lines. The first level, of course, establishes the client’s chronology. This strand itself might have several tracks, tracing personal, political, or societal highlights in the applicant’s own life. The second would track the political and other events of relevance to the case in the applicant’s homeland, or perhaps even more broadly geographically in the case of widespread trans-border conflicts, for example. Another line, if appropriate, would organize the important events in the applicant’s family. Because dates and details are all-important to the fact finder, this exercise not only yields information for the advocate, but also allows the client to remember and then reinforce the chronology, acceding to American cultural expectations about how important milestones are recalled and often commemorated by documents.

After the time line is complete, a process that could require more evidence gathering from the client as well as other sources, examining the time line both horizontally and vertically is an excellent technique for understanding cause and effect, how events link together, and connecting the who, the what happened, the why, and the when of the story. Using the time line as a basis for questioning the applicant or for fact gathering from other sources is very productive, but this chronology needs to be plowed back into the affidavit’s more dramatic narrative.

2. **Highlighting to Categorize Facts**

Law students love highlighters—yellow for the facts, pink for the issue, green for the holding, blue for the dissent. This technique works for briefing cases, so why not import it into clinical supervision? The color-coding method assists the students to visualize the difference between asserting a fact and proving it. For example, in almost every asylum case, the last question posed to the applicant would be a version of “What do you think would happen to you if you went back to your homeland?” The response legally impelled by the refugee standard would refer to a genuine

---

76 See Binder et al., supra n. 57, at 142–143.
and reasonable fear of serious harm inflicted on account of one or more of the protected grounds. So, the applicant might say, “I am afraid I will be killed (or tortured or jailed or beaten up).” However dramatic this assertion, it does not make much of an impact on a fact finder who has heard that same claim repeatedly.

The drafter’s task, therefore, is to build a story leading up to this statement that makes its conclusion believable. “This is a person who actually will be killed.” First, lay a foundation of the legal frame, then add the factual structure, paint with rhetorical brushes the emotional impact of the story, and seal everything already set forth by eliminating any disputable or contested facts or inferences and corroborating enough facts to bolster the entire story.

a. Identifying Gaps, Assumptions, and Inconsistencies

It is axiomatic that details, internal consistency, and consistency with external events, explanations for conduct, and recollection all bolster credibility. To elicit this credibility-enhancing information, the interviewer must probe gaps and refuse to allow the audience to inject incorrect assumptions or conclusions to fill the blanks.

Take out that yellow highlighter to indicate every place where there is a factual gap concerning people, places, events, timing or appearance. Taking the paragraph above, the yellow highlights would demand answers to the following questions that provide motivation for and explanation of his choices and conduct that constitute his political opinion, which, so far, seems to be the ground on which the claim will be based. Moreover, by providing these answers, the affidavit will avoid gaps that lead to assumptions based on the fact finders’ schemas and experiences:

My friend Tashi:

What is his full name? How do you know him? How long? Where does he live? How old is he? Did he get caught too? What happened to him?

asked me to help him hang . . . :

How did he know to ask you? What made him think you could be trusted? Had you ever expressed anti-China or pro-Dalai Lama views? Why did you trust him and agree to do something so dangerous? Where did he get the posters?

pro-Dalai Lama posters:

77 Id. at 186–191; Chavkin, supra n. 72, at 99–100.
What did the posters say? How big were they? From whom did he/youse get them?

*at the county fair:*

Where was the fair? What kind of fair? How did he get there? How many people attend? Why did Tashi pick this fair to hang posters? Were there a lot of police or authorities around? Was it particularly risky to hang posters at a large public event?

*I hung up two posters:*

Where did you hang them? What did you use to hang them? How did you hang them?

*I helped because I disagree with the Chinese government. The government destroyed my country:*

What is the basis of your disagreement? Explain your political views. Were any of your family members anti-Chinese? If so, what happened to them? What do you mean by “destroy?”

*Until then, I had never had a chance to show my opposition:*

Why had you been silent in the past? What made this opportunity such a turning point?

*I was glad to be able to express my beliefs through actions:*

Explain your beliefs. Why did you think that hanging posters would be effective? Weren’t you afraid of being caught?

Little by little, as the blanks exposed by this paragraph and every other paragraph are filled, the students learn about his childhood as the son and grandson of anti-Chinese resisters who died in prison and how his family was stigmatized as separatists. These outcasts even have a name, “the black hat class,” a nice verifiable detail. We learn that he is illiterate because he was prevented from attending school, first because of his family’s politics then because his mother was sent to live in a rural community where there were no schools.

Every paragraph and chapter of the story starts with sketchy descriptions and, after highlighting omissions and uncertainties, the students tease out the rest of the story. Mr. X also describes in detail his arrest, his incarceration, his daily beatings and interrogations. He uses words like torture and abuse, but it takes weeks of interviews for him finally to talk about the electrodes and the freezing cell where he stood naked for hours in between beatings. After a week, without a trial he was “convicted” of separatist activities. He draws a verbal picture of a broken, filthy body barely standing before a magistrate whose words he did not understand.
He was delirious with hunger and fatigue. He was sent to a prison for two years (yes, the referral memo was incorrect) where he worked on road construction every day regardless of the weather. Although the students’ questions force him to recall very painful times, he provides descriptions of how he was treated physically and how he survived psychologically. He relates how his demeaning probation requiring regular reporting to the police and repeated house intrusions sparked further rebellion. Despite enormous risk, he again distributed palm-card pictures of the Panchen Lama to villagers in disobedience of the law. After the authorities learned of his new defiance, he was warned that they would arrest him again. He describes his narrow escape from re-arrest and his month-long journey to Nepal in treacherous winter conditions. His story is full of poignant details like the photo a friend gave him that showed the Dalai Lama receiving the Nobel Peace Prize, his excitement at seeing a video of the Dalai Lama, and how he told his neighbor he wanted to watch a soccer match in order to borrow a television to watch the tape in secret.

The most dramatic episode in his story was revealed only in a much later interview when the students finally got around in their chronology to discussing his flight. Mr. X recounts how he joined a group of about fifteen pilgrims walking across the Himalayas to Nepal. As they trudged along, Chinese border guards opened fire on the group, killing three people, and capturing nine others. He and one other man were able to escape and cross the border into Nepal by hiding in the camps of some European climbers until the guards left the area.\textsuperscript{78} The details of this harrowing ordeal slipped into the interview almost accidentally. The students were just filling in the gaps about his journey when he told them about this. They certainly had no reason to suspect such an unusual occurrence so their questions were routine, based on the assumption that he had crossed the border, presumably with much physical difficulty, but without violence. His saga is unimaginable to the students given our legal system and the freedoms we take for granted. His resignation and acceptance, almost equanimity, is also a surprise, giving the students some clues about the internal differences between an illiterate Tibetan farmer and a Western law student.

\textsuperscript{78} I appropriated this true incident that happened to other Tibetans for its obvious impact in this hypothetical case.
b. Turning Disputed Facts into Undisputed Facts

Identifying gaps and inconsistencies is only one use for highlighters. Switch to the pink marker and indicate all facts that are not in dispute. Are there any? In some cases, for example, race, gender, or age may be undisputed simply based on the appearance of the asylum seeker. Wounds, scars, or other lasting physical effects are usually demonstrable, although their origins may be challenged. In some cases, identity is established by passports, national ID cards, or birth certificates, but in many the easy access to fraudulent documents in a particular country may well cast even identity in doubt.

In the case of Mr. X, it would seem that every fact is in dispute. He traveled on a Nepalese passport and has no Chinese identity documents in his own name. He has nothing to prove any of his activities concerning the posters at the county fair, his arrest, his prison term, his parole, his flight, or his time in Nepal. Some applicants may have medical, legal, or travel records; this client has none.79

If pink is useless here, then take out green and mark any disputed fact that has the slightest chance of being corroborated, then think about possible sources. The students easily can put a big green circle around a few facts that seem promising:

_The border crossing incident:_ There may be news accounts about it, or some reference to it in reports written by NGOs.

_Scars from his beatings or torture, or psychological damage consistent with his mistreatment:_ Medical examinations could substantiate the abuse.

_The county fair:_ Where did it take place? How often? Is this a well known event? Are there reports of incidents at this fair or others like it?

_His identity:_ Is there someone (credible) in the United States who knew him in Tibet or who knew his family? Are the available documents from the Tibetan community in the United States? Does he know details about his religious practices, his farming, or the geography of his region that could be matched to

---

79 Even if he had documents, they might not be admissible, or they might be found fraudulent. There are formal rules concerning authentication of foreign documents, 8 C.F.R. § 1287.6, that some immigration judges apply rigorously. See Virgil Wiebe, _Maybe You Should, Yes You Must, No You Can’t: Shifting Standards and Practices for Assuring Document Reliability in Asylum and Withholding of Removal Cases_, 06-11 Immig. Briefings 1 (Nov. 2006). Also, Immigration and Customs Enforcement (ICE) attorneys in Immigration Court often subject documents to forensic analysis to detect document fraud.
other sources, including ethnologists? Are there any family photos in recognizable settings?

Other aspects of his story that might be verifiable through outside reports that describe similar details include accounts of torture, prison and parole conditions, patterns of migration into Nepal, and reports about treatment of Tibetan refugees in Nepal.

All of this brainstorming has produced results in our clinic’s cases, so that the final evidence packet might contain NGO reports, doctor’s reports, news articles, or fact witness affidavits. Most spectacularly, the students uncovered a videotape made by climbers who witnessed the border slaughter. The videotape begins with the unseen narrators saying, “They’re shooting them like dogs.”

3. Identifying the Details that Really Make a Difference

Most legal fact finders zero in on details for several reasons. Detailed testimony seems more truthful. Detailed testimony permits the listener to make comparisons to other sources of knowledge. Detailed testimony contains the core information upon which to base a decision. Most advocates learn right away that consistent, plausible details are the key ingredients of success.

Some details matter more than others, especially when they directly relate to the legal elements. At early stages of the interviewing process, students are listening for those fine points, hoping to focus attention on them by including them in the affidavit.

At the beginning of the case, students are always enthusiastic and excited about the work that lies ahead, but they also can be overwhelmed by its unfamiliarity and what is expected of them. One technique that helps to overcome this anxiety is demonstration. Despite the legitimate pedagogical principle that they should learn from scratch (even though lawyers routinely use boilerplate), there is no reason to hide a good example of a finished product from them. The work of their predecessors will clarify expectations, provide models, and even inspire them.

Even more importantly, reading and reacting to the finished product of the affidavit drafting process in a case with which they are unfamiliar puts them in the shoes of the fact finder encounter-
ing the affidavit for the first time. They can experience the impact of details, language, and facts. They can assess the effectiveness of the story and the storytelling with untested eyes and ears. As receivers of information, they become better senders.

Our Tibetan client’s initial story, particularly as summarized in the referral letter, describes his detention and beatings but is distant and fails to attract the reader to the individuality of Mr. X and the particularity of his story. Eventually he is able to convey this horrible episode with images that show the reader/listener uncomfortably tragic specifics that produce understanding, sympathy, and compassion, all desirable reactions in this context. In the completed affidavit, his language is simple since he is a simple person who experienced these horrors in simple terms:

I was beaten by four or five officers. They beat me with their black colored batons. The officers randomly hit me everywhere. They kicked and punched me. They hit me with anything they could find. I would fall down on the hard floor and lose consciousness. I would wake up on the floor of my freezing cell but could not remember how I got back there. I was always bruised and swollen on my body and face after these encounters.

Small details like the color of the batons, the number of the officers, the temperature of his cell, the location of his bruises allow the reader to see the scene and almost feel the beatings and their aftermath. The writer adds details in the voice of the storyteller, not in the lawyer’s voice or in terms bounded by legal expectations. This paints a picture that the reader can accept as fact. This paragraph brings to life the external, physical dimensions. The final affidavit also exposes nicely the client’s psychological, internal motivations in simple yet evocative terms:

I ran into an old friend, Namko, who said he knew about my arrest and wanted to let me know that I had done nothing wrong, that I was courageous and correct in my beliefs. We talked about many things, and he made me feel proud that I had survived prison. A few days later, Namko gave me pictures of the real Panchen Lama and a video of the Dalai Lama giving a reli-

---

82 Hopefully, this illustration is not confusing. I have included extracts from the final affidavit of the Tibetan case example that not only illustrate this technique of showing, but also demonstrate the progress made from the beginning to end of the affidavit drafting process. In reality, current students would be examining the work of their predecessors on different cases.

83 Experts in creative non-fiction writing urge the writer to “show” not “tell” the story through the use of description and voice. See e.g. Theodore A. Rees Cheney, Writing Creative Nonfiction 12 (Writer’s Dig. Bks. 1987).
gious speech. He also gave me a present that was specially for me, a picture of the Dalai Lama getting the Nobel Peace Prize. I went home to start passing out the pictures. It was the first time people in my small village would have access to picture of the real Panchen Lama, so everyone was very excited. People were crying and putting the pictures in their hats or hanging them around their necks. I was scared but the happy reaction of the villagers gave me courage to continue.

The students can understand how personal values, courage, and pride account for his risk-taking. Most students are very impressed by the transformation from bland writing to more moving and convincing prose. They can see how minor additions make major improvements. By assuming the role of reader-decision maker, they become better writer-advocates.\textsuperscript{84}

4. \textit{Unlocking the Client’s (and the Writer’s) Voice [but Ethically]}

Two related problems collide when students attempt to draft a first-person narrative. First, student writing is generally inhibited and restrained, conditioned by lessons from writing classes where objectivity and detachment are stressed. They learn to eliminate intensifiers (adjectives, adverbs, words that suggest the emotion the reader should feel) or at least use them sparingly. With the exception of an appellate brief, which has its own formalities, students rarely write persuasively. They worry about sounding “biased,” “unprofessional,”” or “informal,” so they stick in their insecurity with the practices they have barely begun to master. They have to be given explicit permission to relax and to write naturally and descriptively.\textsuperscript{85}

The other problem derives from the clients who themselves frequently recount their stories in language that is colorless and repetitious. Their vocabularies limit their ability to capture the

\textsuperscript{84} This aspect of the writing process is influenced by the work of Susan Bryant on cross-cultural communication, which is usually assigned to clinic students for its framework for working with clients whose differences may pose challenges to the lawyer-client relationship. Susan Bryant, \textit{The Five Habits: Building Cross-Cultural Competence in Lawyers}, 8 Clin. L. Rev. 33 (2001). By imagining how others in the legal system may react to and judge a client’s story, the advocate can understand better how to present the facts. \textit{Id.} at 68–70.

\textsuperscript{85} James White urged lawyers to see “law as a process of imagination.” James White, \textit{Imagining the Law}, in \textit{The Rhetoric of Law} 55 (Austin Sarat & Thomas R. Kearns eds., U. Mich. Press 1994). Students have to be given license to free their writing from mechanical constraints and formalisms and to use persuasive imagery and language that make sense to the audience in the context of the case in order to communicate their theories and achieve desired results.
drama of their actual stories. For example, a client may use the word “hurt” to include a wide range of physical harm or the word “scared” to describe truly terrifying experiences. It is axiomatic that a lawyer would not insert facts in an affidavit unless the client articulates them, but when the drafter is confronted by their clients’ vocabulary deficiencies, the temptation to embellish and overstate facts is hard to resist. Ironically, despite their usual writing inhibitions, here student writing starts to flower but must also prudently avoid hyperboles and inauthenticity.

It seems easy to substitute “torture” for “hurt” or “petrified” for “scared.” But at the oral examination, these words, which are not natural to the client, probably will vanish, leaving the impression that the affidavit was exaggerated and the product of lawyer manipulation. To the adjudicator who is inclined to want to find reasons to deny relief, this incongruity may provide sufficient grounds.

Instead of taking the comparatively easy road of inflating meaning by substituting words, the student can take the more demanding route of eliciting more details so that the client’s own words actually are sufficient. By asking for more details, for explanations, for images that the client is capable of invoking, the affidavit can express more credibly the depth and intensity of events. For example, when Mr. X was hiking across the Himalayas, the strenuousness of that trip might not be apparent to an audience whose romanticized idea of this mountain range comes from National Geographic magazine. For example, he initially may have said nothing more descriptive than “It was snowing and very cold. We walked many miles each day.” Probing questions to elicit images (the clouds, the quality of his breathing, his thoughts as he placed one foot in front of the other for hours) probably will result in words and phrases that the writer can adopt without manufacturing meaning or attributing vocabulary inappropriately.

It is important, however, not to get carried away by pathos. While encouraging students to give texture and vitality to their client’s voice, they have to be aware of the risks to both their client’s and their own ethos. Authenticity is critical. The fact finder’s antennae are primed to detect a rehearsed story or manufactured emotions. Language, phrasing, and imagery unsuitable to the education, articulateness, and imagination of the client might have a devastating effect on credibility that might have been avoided by balancing the reality of the client’s abilities against the need to be persuasive.
Exaggeration or appropriation of voice might damage the advocate’s credibility also. The sincerity and trustworthiness of the lawyer are generally seen as central to his or her effectiveness. Just as important in the clinical setting is the impressionability of the students. At this nascent stage of their careers, they have to be protected against excesses. Their storytelling enthusiasm has to be carefully monitored to avoid any impropriety or appearance of dishonesty. They must retain their ethos even at the expense of some pathos.

5. Telling the Story

Knowing how important detail is to the fact finder, students devote tremendous energy to resolving doubts, closing gaps, and securing the chain of factual inferences. Sometimes developing a narrative takes a back seat to all of this concentration on detail and chronology. A conscious return to narrative thinking during the writing process should take place in order to frame and enhance the story. A few techniques can enhance the students’ ability to tell a story using fiction writing conventions that help them see that there are formulas that writers use to introduce themes, to develop plots and characters, and to push forward the action of the story to resolution.

a. Writing a Short Story

Law students deal with “facts” and “rules” but not “stories.” Most of them are not natural storytellers to begin with. They need an opportunity to practice storytelling to be convinced of the power of stories in advocacy.

---

86 A leading authority on trial advocacy claims that a lawyer’s most important asset is personal credibility and that credible people have three key attributes: trustworthiness (and impartiality), expertise, and dynamism (and confidence). Thomas A. Mauet, Trial Techniques 18–19 (7th ed., Aspen Publishers 2007) [hereinafter Trial Techniques]; Thomas A. Mauet, Trials; Strategy, Skills and the New Powers of Persuasion 2 (Aspen Publishers 2005) [hereinafter Trials].

87 In Writing for Law Practice, the authors’ chapter on persuasion references a formula developed by a fiction author that is a very useful template. Fajans et al., supra n. 3, at 183–184 (citing Lamott, supra n. 50, at 62, which in turn quotes Alice Adams, a novelist and short story writer who says, “You begin with action that is compelling enough to draw us in, make us want to know more. Background is where you let us see and know these people, so that we learn what they care most about. The plot—the drama, the actions the tension—will grow out of that. You move them along until everything comes together in the climax, after which things are different for the main characters, different in some real way. And then there is the ending, what is our sense of who these people are now, what they left with, what happened and what did it mean.”).
At the beginning of the semester, Safe Harbor clinic students are assigned several immigration stories to read, both fiction and autobiographical. They also write their own or their families’ stories. These stories range from pre-Colonial migration by northern Europeans, mid-19th century migration by the Irish and Germans, early 20th century passages through Ellis Island, and the more recent arrival of Asian and South Asian professionals and Jewish refugees from Russia. Quite a few students are born outside the United States, some are not United States citizens, and many are representative of a multi-generational “melting pot.” In writing their stories, many opt to write in the first-person voice of a relative they knew, while some whose immigration histories are less well known adopt the voice of an unknown ancestor and invent many facts. This exercise stretches their creative muscles to prepare them for the task of relating their client’s case in a gripping and persuasive manner.

b. Locating Theme, Character, Plot, and Struggle

During the process of affidavit drafting, students should be able to identify the narrative components of their client’s story since a compelling account usually can be identified and extracted easily given the fundamental nature of asylum relief. The theme is located in the essence of the refugee definition—nations must protect their citizens from harm inflicted on account of their essential characteristics and beliefs. The David v. Goliath parable in modern terms of the brave individual struggling for freedom and democracy against a vicious tyrant is often at the heart of the claim. Valiant, despised groups fighting for identity and survival offer another familiar plot. Resistance to or suffering at the hands of authorities are other possible themes. The protagonist will be trying to assert rights recognized universally as deserving protection—freedoms of identity, belief, expression, or action—that the governments of their native countries have failed to safeguard.

In Mr. X’s case, the theme is very straightforward. The history of China’s annexation and suppression of religion in Tibet and the pro-democracy movement is well-known in the West, especially to asylum adjudicators who have presided over many such cases. The Free Tibet movement itself provides a theme of freedom, independence, autonomy, and sustained resistance to oppression that

88 E.g., Nadine Gordimer, The Ultimate Safari, in Jump and Other Stories 33–46 (Far-rar, Straus & Giroux 1991); Five Stories: Rites of Passage from the Old World to the New, Nat. History 50 (Mar. 1998).
strikes at the heart of Western ideals. Many historical facts, therefore, are not disputed; only the bona fides (i.e., identity, actual participation in prohibited activities, ensuing punishment) of the particular asylum seeker are at issue.

Character—in both the literary and moral sense of the term—is vital to establish. The small details of childhood, family, education, environment, work, and Mr. X's personal qualities create a portrait of a real person, not a paradigm, in whom the listener can endow positive attributes that enhance credibility. Dangerous choices of conduct that might incur violent costs are more understandable in light of principles, beliefs, and traits. Character development allows the fact finder to see the asylum seeker as a person not a prototype.

Mr. X is good “hero” material. He is an uneducated farmer who made a brave, life-changing choice to express his beliefs. He is basically an “everyman,” not a leader. His so-called wrong-doing was neither original, momentous, nor particularly consequential. The brutality of his fate, therefore, is far out of proportion to the scale of his actions. His decision to continue political opposition in the face of near-certain punishment is another sign of his integrity. Moreover, his life-long vulnerability to further oppression is a permanent limitation on his choices and free will. His ultimate decision to flee is not a weakness but a courageous sacrifice of home and family.

The plot of his story is also gripping as he takes a brave step to free expression but then pays a tremendous price for this small act. The spectacular and tragic mountain journey, culminating in a murderous firestorm, provides a narrative climax for which asylum “must” be the only denouement. The freedom and safety provided by asylum bring his story of courage, suffering, and sacrifice to a satisfying conclusion.

c. Finalizing the Case Theory—Fifty Words or Less

The first page of the affidavit is the “trailer” to the upcoming feature film. It is the hook that catches the reader’s eye, and shapes expectations for the balance of the statement. On occasion, we have noticed that the asylum officer or judge has highlighted what we have termed “case theory in a nutshell” paragraphs.

These one or at most two paragraphs efficiently capture the case theory in non-legal, narrative terms. The closest analogy is to an opening statement that effective trial lawyers use to provide an introduction to the plot and characters that follow, and thereby shape the jury’s expectations about the forthcoming evidence.90

At the mid-point of the semester, the students usually have completed their interviewing, have tossed around many potential case theories, and have started to gather supporting evidence. It is time to articulate exactly why the client should be granted asylum so that the affidavit is drafted to confirm this theory. But students are almost always confused about how to knit together the legal elements and the narrative. A very helpful in-class exercise instructs students how to compose this lead-in.91 “Set forth the case theory in 50 words or less and avoid legalese.” This simple assignment is harder than it seems. Here are a few examples of their efforts (with their inevitable legalese italicized):

Mr. X’s case theory is fear of persecution on account of his support for the Dalai Lama in Tibet in opposition to the official position of the Chinese government. He has been jailed and tortured so he fears persecution if he were to return to Tibet

* * *

Mr. X, a supporter of the Dalai Lama has hung posters picturing the Dalai Lama, has been jailed and tortured, and then escaped Tibet. He has a well-founded fear of persecution if he were to return of receiving similar treatment again.

* * *

Our client is a supporter of the Dalai Lama. He left Tibet in order to escape prison, physical abuse, and torture. He has a well-founded fear of persecution based on his opposition to China if he is returned to Tibet.

* * *

Mr. X has been arrested, beaten, tortured, and imprisoned for more than one year by the Chinese police for engaging in pro-Dalai Lama activities. My client is in the United States and unable to return to Tibet because of a well-founded fear of persecution on account of his pro-democracy activities and his escape to the United States.

90 Mauet, Trial Techniques, supra n. 86, at 64–67; Mauet, Trials, supra n. 86, at 95–96 (recommending storytelling in opening statements); Oliver, supra n. 44, at 319–329.

91 My former colleague, Melissa Crow, introduced me to this very effective exercise.
These paragraphs demonstrate how difficult it is for the students to capture a story that bridges the law and the facts. Note how often they resort to terms like “persecution,” “well-founded fear,” or “on account of” that are found in the statute. They are indecisive about the voice, sometimes saying “my client,” or “our client,” sometimes referring to him by name, and others by pronoun. Indeed, they seem to never even consider using the first-person singular.

The next step in this exercise is to eliminate all of the legalese and conclusory language italicized above. Not much remains. Then, start over and complete this sentence: “I am entitled to asylum because . . . .” This clause is a very effective springboard to a more robust iteration of the facts. A better version of the case theory might sound like this student’s version:

Immediately after hanging posters of the Dalai Lama, I was arrested, severely beaten with sticks, shocked with cattle prods, and interrogated for many hours every day. I was imprisoned for two years in brutal conditions after which I was subjected to frequent detentions, house searches, and regular humiliation by Chinese authorities. Despite this horrible experience, I continued my activities until hearing that my rearrest was imminent; I fled to Nepal but, on the Himalayan peaks, Chinese soldiers murdered my companions. I was barely able to escape.

Admittedly, this paragraph cheats a little. The word count is actually 87, but quite a lot happened to Mr. X so the surplus is understandable. The reader has a clear picture of what would constitute the persecution (years of arrest, beatings, torture, interrogations, prison, detentions, house searches, and regular humiliations), the basis (his political and religious support for the Dalai Lama), the future fear (rearrest, murder), and the nexus between the persecution and the ground (immediately after hanging the offending posters). The paragraph also portrays a man of convictions and bravery who risked harm and who fled at great cost. *Logos, pathos, ethos.*

This efficient paragraph manages to establish themes and images without very much detail. It also provides explanations, motivations, and subjectivity. There is one striking question, however. Succinctness and excitement both may have been achieved at the expense of the client’s authentic voice, another example of the difficult balance discussed above. The drafter might want to reconsider words the client is unlikely to utter like “brutal,” “subjected,” “humiliation,” and “imminent,” even at the sacrifice of brevity.
d. Crafting Engaging Chapter Titles or Headings

A section heading—indented, bolded, and descriptive—is a simple visual and literary device that organizes an affidavit to stress important topics, assist transitions, and break the reader's attention into bite-sized pieces. Too often, however, headings are sterile transitions that lack argumentation. Instead, section headings can articulate the themes of the story and emphasize the qualities of the hero. The story of an affidavit thus might include chapters such as “The Tragic Consequences of My Family’s Resistance to Chinese Occupation” instead of “My Background.” Other chapters might be “My Difficult Decision to Join the Pro-Democracy Movement,” “I Am Tortured and Imprisoned for Two Years Because of My Political Activities,” or “My Terrifying Flight from Tibet That Almost Cost My Life.” Each of these headings may sound a bit melodramatic, but so is his story. Why not capture the heroic elements of his life, sound a theme of the individual struggling valiantly against a brutal military and political power, and the lengths to which he would go to both voice his principles and escape lethal harm.

VI. CONCLUSION

Read, reflect, and revise. These are the polestars of any writer, and they guide affidavit drafters as well. The personal statement, however, demands special attention. It must be compelling, authentic, and convincing. The challenge is to instill in students instincts and abilities to be engaging and persuasive storytellers. By self-consciously stressing narrative elements, introducing exercises to flex that approach to writing, and using the personal statement to continuously question both the logic and the persuasiveness of the story, effectively writing the “I” can produce the single most important document in an asylum case. Even where the themes, characters, and storylines are less dramatic and emotional, these techniques can still be helpful to free the drafter to engage the audience to achieve the goals of the case.
Better Revision: Encouraging Student Writers to See through the Eyes of the Reader

Patricia Grande Montana*

Introduction

Revision is an integral part of the first-year legal writing curriculum. Students rewrite most of their writing assignments for a grade, and, in many cases, the rewrites are weighted more heavily than the first drafts. The purposes of a rewrite in legal writing, as with other writing, are to resolve any inconsistencies and fill in gaps, strengthen the analysis and reasoning, and present the information in the clearest way possible.1 Though legal writing professors devote substantial time to the rewrite phase of assignments, in my experience, law students traditionally treat an assignment as completed as soon as they turn in their first draft for a grade. Rather than making substantive revisions during the rewrite phase, they concentrate on superficial edits to word choice, grammar, spelling, sentence structure, and citation. Thus, it is not uncommon for students to submit rewrites that are substantively unchanged from their first drafts.

These typical revising habits suggest that first-year legal writing students follow the traditional linear model of writing, in which the writing process is organized in a fixed linear sequence and rewriting is the final stage in that sequence.2 They also suggest that the students severely truncate the rewriting stage by focusing on mostly surface changes while ignoring whether the text makes sense to the reader.3 When students are taught to use

---

* © 2008, Patricia Grande Montana. All rights reserved. Associate Professor of Legal Writing, St. John's University School of Law. The Author wishes to thank Elyse Pepper and Robert Ruescher of St. John’s University School of Law for their invaluable feedback. The Author also wishes to thank her research assistants, Christine Hogan and Elizabeth Rabinowitz, for their extensive research.


2 See id. at 41–42 (comparing habits of first-year legal writing students to experienced legal writers and finding that students are “stuck in the correcting mode of the linear stage process theory,” id. at 42).

3 See id. at 38–39. Anzidei found that the law students in a survey he conducted “overwhelmingly focused their revising processes on micro-revisions,” id. at 38, including edits to spelling, grammar, word choice, and word order, id. at 37–38. He also found that
the linear model of writing or to address mainly surface edits during revision, they are in effect discouraged from revisiting their original decisions. This impairs their ability to see the weaknesses in their writing and to transform the structure to meet their reader’s needs. To encourage students to revise more globally and to do so throughout their writing experience, not just at the end, professors need to help students understand that the writing process is recursive, not linear. Under a recursive model, writers continually revisit all aspects of their writing experience so that they can discover the best way to organize and communicate their thoughts to the reader. This model presents an opportunity for law students to see their writing through the reader’s eyes and thereby produce better revision.

Part I of this Article describes the problem that prevents law students from revising effectively. Part II addresses the underlying cause of the problem. Part III evaluates the recursive method of composing. Finally, Part IV recommends teaching tools aimed at helping students employ substantive “re-visions” techniques that can raise their writing to the next level.

I. LAW STUDENTS DO NOT REWRITE EFFECTIVELY BECAUSE THEY CONCENTRATE ON SUPERFICIAL “CLEAN UP” CHANGES INSTEAD OF SUBSTANTIVE REVISIONS

The ability to effectively revise their own work is a skill that requires law students to set aside their perspectives as writers and review the text from the reader’s standpoint. It is from the vantage point of the reader that writers are able to see whether they communicated the entire analysis and whether the presentation is clear. This allows them to make meaningful, rather than mere superficial, changes to their drafts. In my experience, most first-year legal writing students struggle with this transformation from writer to reader, especially in the fall semester when they have to revise a graded assignment for the very first time. They struggle because they mistakenly believe that a first draft is the most important part of the writing process when it is, in fact, only the beginning of the writer’s journey.

The students made few macro-revisions—revisions he defines as “altering the substantive meaning of their texts.” Id. at 39.


5 It is only after many revisions that a first draft even begins to communicate what
have a narrow view of what revision entails. They equate it with polishing—adding topic sentences or conclusions where needed, changing words, editing grammar, and fixing citation. As a result, they rarely use the time before the rewrite is due to step into the legal reader’s shoes to discover new legal arguments, reassess their original analysis, and resolve any dissonance in their work.

Because first-year law students spend a great amount of time researching and understanding the subject matter of their writing, deciding on an organization, arranging sentences, and then selecting the precise words to communicate their ideas, they develop a deep knowledge of the origins of their text. This makes it difficult for them to detect faults in their writing. When they do revise, it is not uncommon for them to focus solely on text that has already been marked up by the professor or that contains obvious defects and then leave the remainder of the text untouched. Although the students’ line edits are important, they rarely move the students’ writing to the next level, and they typically do not cure the documents’ more significant problems, such as faulty analysis, lack of organization, or inadequate support for legal rules. In other words, the students’ cursory edits mislead them into believing that they have adequately revised the document, when, in reality, they have yet to begin any real revision.
Studies at the undergraduate level show that inexperienced writers focus primarily on surface changes when they revise. Nancy Sommers’s study reveals just how narrow an inexperienced writer’s view of revision is. Her study was of twenty experienced adult writers—including journalists, editors, and academics—and also twenty college student writers. In the study, she had each writer write three essays and rewrite each essay twice, thereby producing nine written products. The data showed that the student writers understood revision as a rewording activity. Notably, most of the students did not even use the word “revision” or “rewriting” to describe their writing efforts. According to the students’ own description, the aim of revision was “to clean up speech.” They “place[d] a symbolic importance on their selection and rejection of words as the determiners of success or failure for their compositions.” They were unable to see revision as a process in which they review their work from the reader’s perspective to assess whether they have communicated their intended meaning.

Lester Faigley and Stephen Witte also examined the differences in revision choices between experienced and inexperienced writers using a taxonomy that separated revision changes into meaning and surface changes. Meaning changes are those changes in which “new information is brought to the text or . . . old information is removed in such a way that it [could not] be recovered through drawing inferences.” They divide meaning changes into microstructure and macrostructure changes. Macrostructure changes are changes that “affect the reading of other parts of the

10 See e.g. Hayes & Flower, supra n. 6, at 1110; Sondra Perl, Unskilled Writers as Composers, 10 N.Y.U. Educ. Q. 17, 17–18 (Spring 1979). Perl studied five adult unskilled student writers and found that they were “prematurely concerned with the ‘look’ of their writing; thus, as soon as a few words are written on the paper, detection and correction of errors replaces writing and revising.” Perl, supra n. 10, at 17.


12 Id. at 380.

13 Id.

14 Id. at 381.

15 Id. at 380–381.

16 Id. at 381.

17 Id.

18 See id. at 382.

19 Lester Faigley & Stephen Witte, Analyzing Revision, 32 College Composition & Commn. 400 (1981). Faigley and Witte examined these groups of writers in two separate studies. The first study is described in the text accompanying infra notes 20–31. Their second study is described infra note 102.

20 Id. at 402 (emphasis omitted).

21 Id. at 403–405.
text,” while microstructure changes are changes that do not change the meaning of other parts of the text.\textsuperscript{22} Surface changes are all other changes and include both formal changes—such as edits to spelling, punctuation, and format—and meaning-preserving changes—such as additions, deletions, or substitutions of words.\textsuperscript{23}

In Faigley and Witte’s study, the inexperienced writers included inexperienced students who participated in a writing laboratory designed for students with weak writing skills.\textsuperscript{24} The experienced writers included advanced student writers from an upper-level expository writing course and expert adults who were professional writers with journalistic experience.\textsuperscript{25} Each writer had one day to plan, one day to write a first draft, and one day to revise.\textsuperscript{26} As expected, the inexperienced writers’ revisions were mostly surface changes; only twelve percent of the revisions were meaning changes.\textsuperscript{27} The experienced writers, on the other hand, made more revisions of every kind during their writing of the first draft than did the inexperienced writers.\textsuperscript{28} For example, with respect to meaning changes, the expert adults made on average 15.4 changes per 1000 words and the advanced students made on average 10.4 changes per 1000 words, whereas the inexperienced students made on average only 3 changes per 1000 words.\textsuperscript{29}

Moreover, the inexperienced writers made predominately surface changes between the first and second drafts—98 per 1000 words—and rarely made macrostructure meaning changes—only 1.3 per 1000 words.\textsuperscript{30} The students’ “most frequent single changes were Meaning-Preserving Substitutions (32.2 per 1000 words),” which were “by and large . . . substitution[s] of synonyms.”\textsuperscript{31} Overall, Faigley and Witte’s research shows that inexperienced writers are in serious need of tools to force them to see global issues when they revise.

First-year law students, especially those who come to law school right from college, are not far removed from the undergraduate setting. Similar to the undergraduate students studied by the

\textsuperscript{22}Id. at 405.
\textsuperscript{23}Id. at 402–403.
\textsuperscript{24}Id. at 406.
\textsuperscript{25}Id.
\textsuperscript{26}Id.
\textsuperscript{27}Id. at 407.
\textsuperscript{28}Id.
\textsuperscript{29}Id.
\textsuperscript{30}Id.
\textsuperscript{31}Id.
composition theorists, first-year legal writing students make mostly surface changes when they revise.\footnote{Anzidei, \textit{supra} n. 1, at 38–39.} Applying Faigley and Witte’s theories to law students, Christopher Anzidei emphasized that revision cannot serve as “the last stage on an assembly line where the writer corrects errors.”\footnote{Id. at 25.} Anzidei conducted a study in which he compared the revision habits of eighty first-year law students at Georgetown University Law Center with the practices of experienced legal writers there (such as legal research and writing professors, clinical professors, and graduate students).\footnote{Id. at 36.} His conclusions illustrate that, for law-student writers, revision does indeed resemble the last phase of an assembly line.\footnote{See \textit{id.} at 41–42.}

Borrowing from Faigley and Witte’s taxonomy, Anzidei divided the revision techniques into two categories: micro-revisions, which include changes “that would correct a perceived surface error in the text without providing new information or changing the substantive meaning of the text,” and macro-revisions, which include any changes “that would change the substantive meaning of the text, whether by adding new information or deleting existing content.”\footnote{Id. at 37.} He found that the law students “overwhelmingly focused their revising processes on micro-revisions,”\footnote{Id. at 38.} whereas the experienced writers “saw everything when they revised.”\footnote{Id. at 39.} Specifically, “eighty-eight percent of the students responded that they revised the content of individual sentences, eighty-three percent changed word choice or word order, and eighty-three percent changed spelling and grammar.”\footnote{Id. at 39.} Notably fewer students made macro-revisions.\footnote{Id. at 38.} “Only forty percent of the law students revised their large-scale organization, forty-six percent made audience-oriented changes related to their rhetoric (including their tone, perception of clarity, style, etc.), and thirty-one [percent] made audience-oriented organizational changes (such as providing topic headings, roadmaps, and outlines).”\footnote{Id. (footnote omitted).} The data demonstrated that the law students saw in smaller units like sentences and words when they revised.\footnote{Id.} They were not conscious of resolving disso-
nance in their writing and did not view revision as a chance to discover new themes, alternative theories, or solutions to the questions posed.43

My own teaching experience likewise confirms that many first-year legal writing students do not view revision as an opportunity to re-see their work. After I comment on and grade on the students’ first drafts, they usually have two weeks to revise them before submitting a final draft for a grade. During that time, I meet with the students in individual conferences to discuss how they plan to approach the rewrite. Before I implemented the strategies discussed in Part IV, there were two common themes during these conferences that told me that students were looking to simply polish their work for the rewrite. The first was that students would routinely ask questions regarding surface-level changes that they contemplated. They would not only begin the conference with such questions, but also would use most of our time together on them. They would ask questions about how to cite a particular case, the difference between “it’s” and “its,” appropriate paragraph lengths, and the use of passive voice, among other inquiries. I do not mean to suggest that these were unimportant or inappropriate questions for students to ask. However, the fact that they asked them with more frequency than questions that contemplated substantive changes and, in some cases, to the exclusion of questions about substantive changes, suggests that the students were unable or unwilling to go back over everything they had written when they revised, or perhaps that they simply did not seriously consider doing so.

The second theme was that students often wanted to use the conference time as an opportunity to gather more intelligence on what I, the professor, not the legal reader (i.e., the supervising attorney in the case of the memorandum assignment), thought about their work. So, I typically was asked some version of the following question: Is there anything else you think I should work on besides what you wrote in your comments? My answer was typically “you should reexamine the entire text” because my comments are meant as a starting point, intended to motivate the students to revisit everything they have written, not just the text I evaluated. In addition to its obvious relationship to their concern over their final grade, this question reveals that students have a narrow view of revision, equating it with correcting what the professor marked wrong. It also suggests that students prefer not to revisit their

43 See id.
original substantive decisions unless professors instruct them to do so.

The fact that the majority of students submitted rewrites that were substantively unchanged from their first drafts is further evidence that they equate revision with polishing. Many students made primarily superficial changes to the document for the rewrite even though I assigned substantially more weight to the rewrite than the first draft (in the case of the first memorandum assignment, 20% more) and gave them two weeks to revise it. Though the students would make substantive changes when I instructed them to do so, they usually did not apply my instruction to the remainder of their writing.\footnote{Students sometimes failed to apply even surface-level comments to other parts of their writing. Oftentimes, this would happen when a student cited incorrectly. I would correct the error once in the document and instruct the student to fix it throughout. Yet, for the rewrite, I would find that the student ignored my global instruction and corrected the marked error only.} For example, I might have commented that the discussion of a case supporting the rule was unpersuasive because it did not discuss all of the relevant facts. My comment would be written generally so that the students understood that including all the pertinent facts is an important part of explaining the cases that support their rules. I expected that the students would consider such a comment while working on their rewrites as they reviewed all of their rule-support discussions. I also expected that students would make the appropriate changes to their fact discussions where these discussions were inadequate, even if I did not mark them on the first draft. Nevertheless, few students made this leap and used the comments in one part of the document to evaluate another part.\footnote{I know this because I collect copies of their first drafts with my comments when they submit their rewrites so that I can compare the two.}

Further, the students' expectation that they should have received substantially better grades after they had simply cleaned up their first drafts also implies that they follow a limited approach to revision. Students were routinely surprised to learn that their grade stayed the same or moved up only slightly from the grade they received on their first draft. Given our vastly different approaches to revision, it is understandable that we had different expectations for the rewrite. As an experienced writer, I treated it as an opportunity to make meaningful or global changes, whereas my students, all inexperienced legal writers, did not yet do so.
II. LAW STUDENTS HAVE DIFFICULTY MOVING FROM WRITER TO READER BECAUSE THEY USE A LINEAR MODEL OF COMPOSING

A. The Linear Model of Composition Is a Step Approach That Encourages Students to Maintain a Writer’s Perspective, Rather Than a Reader’s Perspective

The traditional linear model of the writing process does not adequately reflect how writers actually compose. Under that familiar model, there are three distinct stages of writing organized in a linear sequence: prewriting, writing, and rewriting. That is an oversimplified description of the writing process that follows the development of the written product. The final stage of rewriting is when, among other things, the writer polishes his or her work and fixes mistakes to sentence structure and spelling. However, for years, composition theorists have argued that this description is inadequate because it fails to capture the inner process of the person producing the written work. Research shows that experienced writers are continually planning and revising as they compose, and not composing in clean-cut stages. Therefore, when students compose in stages, they miss the opportunity to revisit their original decisions, which prevents them from seeing their work from the reader’s perspective.

By focusing mainly on superficial rather than global changes during revision, inexperienced writers typically ignore whether their text will be understandable to their reader. Because writing is “inevitably a somewhat egocentric enterprise,” at some point in the process, most writers will express ideas in the same pattern in which they learned them or stored them in their memory without altering them to meet the needs of the reader. This is referred to

46 Flower & Hayes, supra n. 4, at 366–367.
47 See id. at 367.
48 Id.; Sondra Perl, Understanding Composing, 31 College Composition & Commun. 363, 364 (1980); Nancy I. Sommers, The Need for Theory in Composition Research, 30 College Composition & Commun. 46, 47–48 (1979). Sommers argues that the conventional conception of revision as the final tidying up activity of the composing process, one that is “separate in quality and isolated in time from writing,” is misguided; rather, educators should view the entire composing process as a process of revision. Perl, supra n. 48, at 48. She views revision “as a process of making a work congruent with what a writer intends.” Id.
49 See e.g. id. at 364 (advocating that writing is a recursive process). Perl argues that “throughout the process of writing, writers return to substrands of the overall process, or subroutines (short successions of steps that yield results on which the writer draws in taking the next set of steps).” Id.
50 Linda S. Flower & John R. Hayes, Problem-Solving Strategies and the Writing Pro-
as Writer-Based prose.\textsuperscript{51} Although it is a very natural part of the composing process, it is typically ineffective in reaching the reader because the order in which the writer learned or stored the material usually does not carry the same meaning for the reader.\textsuperscript{52}

“One of the tacit assumptions of the Writer-Based writer is that, once the relevant information is presented, the reader will then do the work of abstracting the essential features, building a conceptual hierarchy, and transforming the whole discussion into a functional network of ideas.”\textsuperscript{53} Not surprisingly, legal readers are often disinclined to do this. More likely than not, the reader will become frustrated by the text because its meaning is not readily apparent and will reread it in an attempt to fill in the gaps (with little luck) or will stop reading altogether. When students postpone revision until the last stage in the composing process and limit it to superficial edits, they typically do not evaluate whether what they have written satisfies their goals and makes sense to the reader. Thus, their writing rarely shifts from Writer-Based prose to Reader-Based prose.

Writer-Based prose typically manifests itself in two ways.\textsuperscript{54} It may reflect either the writer’s own discovery process or the structure inherent in the material the writer examined.\textsuperscript{55} If it reflects the writer’s own discovery process, it is often narrative—the organization of ideas reflects the writer’s own thought process, often serving as a substitute for any real analytical thinking.\textsuperscript{56}

By burying ideas within the events that precipitated them, a narrative obscures the more important logical and hierarchical relations between ideas. Of course, such a narrative could read like an intellectual detective story, because, like other forms of drama, it creates interest by withholding closure. Unfortunately, most academic and professional readers seem unwilling to sit through these home movies of the writer’s mind at work.\textsuperscript{57}

\textsuperscript{51} Linda Flower, \textit{Writer-Based Prose: A Cognitive Basis for Problems in Writing}, 41 College English 19, 20–21 (1979) (drawing upon the works of Jean Piaget and Lev Vygotsky in the area of child psychology, which show that children sometimes make no concessions to the needs of the listener when they talk, to suggest a source for the cognitive patterns that underlie Writer-Based prose).

\textsuperscript{52} See id. at 19–20.

\textsuperscript{53} Id. at 28.

\textsuperscript{54} Flower & Hayes, supra n. 50, at 459.

\textsuperscript{55} Id.

\textsuperscript{56} See id.

\textsuperscript{57} Flower, supra n. 51, at 25.
Similar to prose that reflects the writer's internal thinking, prose that reflects the structure inherent in the material is often not adapted to the reader's needs.\textsuperscript{58} To write that type of prose, the writer simply surveys the information before him or her and borrows whatever structure the source uses.\textsuperscript{59} Because the writer fails to transform the writing into a structure easily understandable by the reader, the reader is forced “to do most of the thinking, sorting the wheat from the chaff and drawing ideas out of details.”\textsuperscript{60}

In addition, Writer-Based prose routinely uses code words, which carry meaning for the writer, but not for the reader.\textsuperscript{61} This is very common among subject-matter experts, such as engineers, who become so fluent in their technical language that they lose touch with the needs of less informed readers, as well as among individuals who have a deep connection with the experiences about which they write.\textsuperscript{62} For example, a first draft of a summer internship application reads as follows: “By having these two jobs, I was able to see the business in an entirely different perspective.”\textsuperscript{63} The code term is “different perspective.” The reader has no idea what it means to the writer and its meaning is not explored or expressed anywhere in the application. If asked what that “different perspective” involved, the applicant would be able to explain it because the applicant had the experience. That explanation, however, never made it to paper because, as an inexperienced writer, she was unable to uncover the buried meanings of her text on her own.

“Taking the perspective of another mind is . . . a demanding cognitive operation. It means holding not only your own knowledge network but someone else’s in conscious attention and comparing them.”\textsuperscript{64} Thus, good revision is the “cognitively demanding transformation of the natural but private expressions of Writer-Based thought into a structure and style adapted to [the] reader.”\textsuperscript{65} Experienced writers do this by building “a unique representation not only of their audience and assignment, but also of their goals involving the audience, their own persona, and the text.”\textsuperscript{66} This is a

\textsuperscript{58} Id.
\textsuperscript{59} Flower & Hayes, supra n. 50, at 459.
\textsuperscript{60} Flower, supra n. 51, at 25.
\textsuperscript{61} Id. at 29.
\textsuperscript{62} Hayes & Flower, supra n. 6, at 1108.
\textsuperscript{63} Flower, supra n. 51, at 32.
\textsuperscript{64} Id. at 36.
\textsuperscript{65} Id. at 20.
\textsuperscript{66} Linda Flower & John R. Hayes, The Cognition of Discovery: Defining a Rhetorical Problem, 31 College Composition & Commun. 29 (1980); see also Carol Berkenkotter, Understanding a Writer’s Awareness of Audience, 32 College Composition & Commun. 388, 388, 395 (1981). Berkenkotter conducted a study of ten expert writers, who included profes-
major challenge for new writers who lack the skills needed to set aside their perspective and adopt their readers’ instead.

B. Law Students Get Stuck in Writer-Based Prose

1. Student Writing Reflects Their Private Process of Discovery

Legal readers expect the writer to identify the legal issue, explain the entire applicable legal rule, and then apply it to resolve the issue.67 The biggest challenge for first-year law students is to organize their analysis into this structure, commonly referred to as IRAC.68 Students often omit, combine, or blur the analytical elements of IRAC because they typically organize the material in the order in which they found it.69 In my experience, one common problem with a draft that mimics the order of the legal authority is that it does not lay out an explicit statement of the rule. In its place is usually an overly detailed description of the relevant cases. Although this occasionally happens because the student does not understand the rule and assumes (wrongly) that if he or she tells the reader everything about the cases, the reader will figure out the rule, it primarily occurs because the student lacks the ability to transform his or her discovery process into an issue-centered rhetorical structure.

That transformation is particularly difficult because the student’s own discovery process follows a sequence that is not congruent with the way legal readers expect the analysis to be written.70 Based on my conferences with students, the students’ discoveries seem to follow these steps: reading each case, examining all of the information (relevant and irrelevant) contained within each case, synthesizing the cases, distilling a rule, and then applying the rule to the facts at issue in order to reach a conclusion. In contrast, the

---

67 See Mary Beth Beazley, The Self-Graded Draft: Teaching Students to Revise Using Guided Self-Critique, 3 Leg. Writing 175, 177–178 (1997) (describing how there are predictable “intellectual locations” within legal documents and how such documents usually follow a prescribed format).

68 Legal writing professors use paradigms other than IRAC, including, for example, CRAC (Conclusion, Rule, Application, Conclusion) and BARAC (Bold Assertion, Rule, Application, Conclusion). All of these paradigms share the common feature of first identifying the issue and explaining the relevant legal principle before applying it to reach a conclusion.


70 See id.
legal reader expects to see the conclusion first, followed by the rule and an explanation of it (including only the relevant information from the cases), and then an application to the question posed.\textsuperscript{71}

When it comes time to write the analysis, if the student organizes the material in the order in which he or she learned it, the writing will not satisfy the reader’s expectations.\textsuperscript{72}

2. \textit{Code Words Are Widespread}

Moreover, because first-year legal writing students are caught up in their discovery process, they are unable to recognize when they have used code words. Students frequently lift terms of art that they learned from their examination of the cases without ever describing what the terms mean, even when their meaning is essential to a complete understanding of the analysis. For example, in a recent memorandum assignment, I asked the students to decide whether a female reality television personality was a limited-purpose public figure for purposes of a New York defamation claim.\textsuperscript{73} If she thrust herself into a public controversy with a view toward influencing it, the New York courts would treat her as a limited-purpose public figure, thereby requiring her to allege actual malice in her defamation claim against the publisher of the false statements about her.\textsuperscript{74} The terms “public controversy” and “thrusting . . . with an intent to influence” have special meaning under New York defamation law.\textsuperscript{75}

In order to assess whether she fit that standard, the students needed to develop a rule for each term and explain how these rules were applied in analogous situations. The majority of the students, however, failed to include any explanation of what constitutes a public controversy or the requisite influence. They stated the general requirement—that the reality television personality is a limited-purpose public figure if she thrust herself into a public controversy with a view toward influencing it—but then immediately skipped to a discussion of the cases.\textsuperscript{76} Furthermore, because they


\textsuperscript{72} Writer-Based prose is also apparent when students borrow the structure of the cases—that is, the way the courts have framed the problem—without adapting it to the question they must resolve.

\textsuperscript{73} My colleague, Elyse Pepper, Associate Professor of Legal Writing at St. John’s University School of Law, designed this creative problem.

\textsuperscript{74} See e.g. James v. Gannett Co., 353 N.E.2d 834 (N.Y. 1976).


\textsuperscript{76} Even in the better drafts that discussed all (and only) the relevant material from
did not see the importance of explaining the key concepts, they neglected the facts and reasoning of the opinions that related to them. The natural consequence was a draft that confused the reader, who did not share the same knowledge base as the writer.

3. Students Fail to Reevaluate Conclusions and Analysis

The students’ inability to critique their work from the reader’s viewpoint also prevents them from reevaluating their original conclusions and analysis. Students often get stuck with what they wrote in the first draft because they cannot imagine any other alternatives.\(^7\) I usually see this when students reach the “wrong” answer on the first draft of the memorandum assignment. Even though I encourage students to reread the precedent cases and reconsider the reasoning that led to their conclusions, most students are hesitant to change their original ideas. For some, they do not want to waste their hard work by starting over. For others, despite my encouragement, they are unsure whether a change will really pay off in the end. They are not used to turning their writing on its head because the linear approach to writing leads them to polish, not rework, their writing once they have produced a draft. Thus, they are afraid to take the risk of being more “wrong” the second time. They would rather make what is “wrong” less “wrong” by working within their original framework. As a consequence, they do not notice that they have not fully discussed the relevant facts and reasoning of precedent cases or have included irrelevant cases. Without the correct or complete information, their analogies are usually faulty and unpersuasive. Thus, their decision to stick with the analysis in their first draft means that any improvements to the document are likely superficial in nature.

III. TEACHING STUDENTS A RECURSIVE MODEL OF COMPOSITION WILL HELP THEM MOVE FROM WRITER TO READER

In an attempt to address the inadequacies of the linear model, composition theorists began studying the stages of mental processes that occur during composing, rather than the stages of the writ-

\(^7\) See Anzidei, supra n. 1, at 46. For example, one of the students surveyed in Anzidei’s study stated, “I tend to get stuck with what I first write and it’s hard to really change it.” Id. (alteration in original).
ten product alone, and found that writing is a recursive process. Linda Flower and John Hayes, leaders in this effort, developed a well-known cognitive process model based on “protocol analysis”—that is, they ask the writer to think aloud during the act of composing itself, rather than asking the writer to reflect on the process after it is complete. They learned that “writing is best understood as a set of distinctive thinking processes which writers orchestrate or organize during the act of composing.” Separate stages do not exist; instead, writers write, plan, and revise throughout the composing process. The writing processes “are hierarchically organized, with component processes embedded within other components,” but, unlike in the linear organization, the writing does not occur in rigid stages. This means that a writer can call upon any process at any time, as needed, during the writing process.

Flower and Hayes proposed that the act of writing involves three major elements: (1) the task environment (the rhetorical problem and the written text); (2) the writer’s long-term memory; and (3) the writing processes, which include planning, translating, and reviewing. Each of the writing processes may occur at any time in the composing process, and all are under the control of the writer’s internal “Monitor.” The “Monitor” acts as a “writing strategist” and tells the writer when it is time to move to a different writing process. The first process, planning, occurs when “writers form an internal representation of the knowledge that will be used in writing.” It involves generating ideas, organizing, and goal-setting. The second process, translating, involves transforming those ideas into written language. And, finally, reviewing involves evaluating and revising:

Reviewing, itself, may be a conscious process in which writers choose to read what they have written either as a springboard to further translating or with an eye to systematically evaluating and/or revising the text . . . . [T]he reviewing process can also occur as an unplanned action triggered by an evaluation of

78 See Flower & Hayes, supra n. 4, at 368.
79 Id. at 366.
80 Cf. Hayes & Flower, supra n. 6, at 1106 (noting that “when people compose, the activities of prewriting, writing, and rewriting do not typically occur in fixed sequence but rather are interwoven with each other in a complex way”).
81 Flower & Hayes, supra n. 4, at 375.
82 Id. at 369.
83 See id.
84 Id. at 374.
85 Id. at 372.
86 Id. at 372–373.
87 Id. at 373.
either the text or one’s own planning . . . . The sub-processes of
revising and evaluating, along with generating, share the spe-
cial distinction of being able to interrupt any other process and
occur at any time in the act of writing.88

Flower and Hayes’s model thus teaches that revising is not the
final stage in a linear process; rather, writers invoke the entire
writing process when they revise, regenerating or recreating their
own goals in light of what they learn.89

Sondra Perl’s theory of revision is similarly centered on the
belief that writing is a recursive process and is also helpful in un-
derstanding how writers revise.90 She asserts that effective writers
consistently return to sub-strands or sub-routines of the overall
process in order to yield an end result: “recursiveness in writing
implies that there is a forward-moving action that exists by virtue
of a backward-moving action.”91 Based on observations of her stu-
dents and fellow teachers, Perl identified the following common
recursive actions of writers: (1) re-reading previously written
words; (2) re-reading a particular keyword or topic information;
and (3) returning to what has been called “felt-sense.”92 Felt-sense
is a physical sensation, generated within the writer, which shifts
the writer’s attention back on the feelings that surround the
words:

Usually, when [writers] make the decision to write, it is after
they have a dawning awareness that something has clicked,
that they have enough of a sense that if they begin with a few
words heading in a certain direction, words will continue to
come which will allow them to flesh out the sense they have.93

This internal sensation guides skilled writers during revision
and produces images, words, and concepts.94 The calling up of this
felt-sense during the writing process is what Perl calls “retrospe-
tive structuring.”95 It is a process that takes what the writer has
already written as well as what is inchoate and uses it to bring the
text forward by using language in a structured form.96 First, the
writer pays attention to what kind of physical sensations the al-

88 Id. at 374.
89 See id. at 381–386.
90 See Perl, supra n. 48, at 364.
91 Id.
92 Id. at 364–365.
93 Id. at 365.
94 See id. at 365–366.
95 Id. at 367.
96 See id.; see also Perl, supra n. 10, at 17.
ready-written words or topic information induces.\textsuperscript{97} This evokes felt-sense.\textsuperscript{98} Then, as the writer matches words to the felt-sense, he or she begins to generate new ideas and sentences.\textsuperscript{99} When the words do not produce the sought-after meaning, the writer goes back, re-reads, and again focuses his or her attention on the text in order to produce felt-sense.\textsuperscript{100}

The work of Flower and Hayes, Perl, and others\textsuperscript{101} establishes that revision is not a unique stage in composing. Rather, it is a thinking process that can occur at any time the writer chooses to evaluate or review his or her text. It is also a process that encourages writers to evaluate their work from the reader’s perspective. A study done by Nancy Sommers of the revision processes of student writers and experienced adult writers illustrates how experienced writers follow the recursive model and evaluate their writing through the eyes of the reader.\textsuperscript{102} In that study, experienced writers described their goals when revising as reshaping the organization and content of their argument as well as addressing the needs of their readership.\textsuperscript{103}

The experienced writers imagine a reader (reading their product) whose existence and whose expectations influence their revision process. They have abstracted the standards of a reader and this reader seems to be partially a reflection of themselves and functions as a critical and productive collaborator—a collaborator who has yet to love their work. The anticipation of a

\textsuperscript{97} See Perl, supra n. 48, at 366–367.
\textsuperscript{98} See id.
\textsuperscript{99} Id. at 366–368.
\textsuperscript{100} Id.
\textsuperscript{101} See e.g. Carol Berkenkotter, \textit{Decisions and Revisions: The Planning Strategies of a Publishing Writer}, 34 College Composition & Commun. 156 (1983); Donald M. Murray, \textit{Response of a Laboratory Rat—Or, Being Protocoled}, 34 College Composition & Commun. 169 (1983) (studying the composing process of the skilled writer, Donald Murray, through think-aloud protocols and his own introspective accounts). The study found that the writer collapsed planning and revising into a single activity that Berkenkotter called “reconceiving.” Berkenkotter, supra n. 101, at 162. “To ‘reconceive’ is to scan and rescan one’s text from the perspective of an external reader and to continue re-drafting until all rhetorical, formal, and stylistic concerns have been resolved, or until the writer decides to let go of the text.” Id. It was clear that “the writer move[d] back and forth between planning, drafting, editing, and reviewing” as he wrote. Id. at 166.
\textsuperscript{102} See Sommers, supra n. 11, at 379–380; see also Faigley & Witte, supra n. 19, at 400. In their article entitled \textit{Analyzing Revision}, Faigley and Witte discuss two relevant studies they conducted. In the first study, discussed supra notes 19 to 31 and accompanying text, “[b]oth the expert adults and the advanced students made more revisions of all kinds during the composing of the first draft . . . than did the inexperienced students.” Faigley & Witte, supra n. 19, at 407. Additionally, in their second study, they gave the expert writers three drafts written by inexperienced writers, asked them to revise those drafts, and then compared their revisions to the revisions of the inexperienced writers. Id. at 409. Notably, sixty-five percent of the expert writers’ changes were macrostructure meaning changes. Id.
\textsuperscript{103} See Sommers, supra n. 11, at 384–385.
reader’s judgment causes a feeling of dissonance when the writer recognizes incongruities between intention and execution, and requires these writers to make revisions on all levels. Such a reader gives them just what the students lacked: new eyes to “re-view” their work.\textsuperscript{104}

Thus, experienced writers do not focus solely on surface changes when they revise; they also evaluate whether the text satisfies the reader’s needs and attempt to discover a better way to communicate their intentions.

Moreover, in a number of studies discussed by Flower and Hayes, “good writers create[d] a particularly rich network of goals for affecting their reader” and represented the writing problem they were asked to solve in greater breadth and depth than the poor writers did.\textsuperscript{105} They created “far more connections among their goals than did the novices.”\textsuperscript{106} Also, the experts generally spent more time on revision.\textsuperscript{107} They “tended to read the whole text through before beginning revision and created global goals to guide the revision process.”\textsuperscript{108} It was clear that they developed their image of the reader as they wrote.\textsuperscript{109} They focused on the effect they, as writers, wanted to have on their reader.\textsuperscript{110}

In addition, Anzidei’s study at Georgetown University Law Center established that, unlike law student writers, experienced writers see that the form and shape of their writing is affected by how they view rhetorical goals, such as purpose, audience, scope, and stance.\textsuperscript{111} “More than seventy-three percent of the experienced writers . . . made changes in large-scale organization, sixty-seven percent made organizational changes designed to better present the material for their audience, and seventy-three percent . . . made rhetorical changes in anticipation of their audience.”\textsuperscript{112} Moreover, ninety-three percent, as compared to seventy-six percent of the student writers, made changes to small-scale organization.\textsuperscript{113} Anzidei concluded that “[i]n sum, experienced writers differ

\textsuperscript{104} Id. at 385.
\textsuperscript{105} Flower & Hayes, supra n. 66, at 30; see also Hayes & Flower, supra n. 6, at 1109–1110.
\textsuperscript{106} Hayes & Flower, supra n. 6, at 1109.
\textsuperscript{107} Id. at 1110.
\textsuperscript{108} Id.
\textsuperscript{109} Flower & Hayes, supra n. 66, at 30.
\textsuperscript{110} See id. at 29–30.
\textsuperscript{111} See Anzidei, supra n. 1, at 49.
\textsuperscript{112} Id. at 40; see also id. at 57.
\textsuperscript{113} Id. at 40; see also id. at 57.
from student writers because they see revision as a deep, dynamic process.”

IV. TEACHING THE INTEGRATED RECURSIVE APPROACH

A. Give Reader-Based Feedback That Encourages Macrostructure Meaning Changes

If law professors want to encourage students to treat revision as an opportunity to discover new legal arguments, resolve dissonance in their analysis, and question their original decisions, then their comments on students’ drafts, both oral and written, need to show that revision entails seeing their work through new eyes. As research on composition shows, because the ability to effectively revise one’s own work turns on the law student’s ability to set aside his or her perspective as a writer, and review the draft from the reader’s standpoint, professors’ feedback needs to reflect comments that the legal reader, not a professor intimately familiar with the subject, would have. If professors can respond to their students’ text like the reader would, students should be able to better see where and how their text confused, misled, or did not reach the reader, helping them transform their Writer-Based prose into Reader-Based prose as they revise.

To that end, when professors comment on student papers they should simulate the legal reader’s response and frame the questions and comments accordingly. For my first-year legal research and writing classes, this means that I act as the supervising attorney when I review their memoranda and as the judge or opposing counsel when I review their briefs. I not only repeatedly tell my students that I will be assuming these roles when I read their work, but I also make them write “Supervising Attorney” in the “To” line of the heading for their memorandum assignment and turn in a title page addressed to the relevant court for their brief assignments. Although these instructions might seem insig-

---

114 Id. at 40.
115 Cf. Nancy Soonpaa, Using Composition Theory and Scholarship to Teach Legal Writing More Effectively, 3 Leg. Writing 81, 97 (1997) (“Responding to text as in-process helps students to follow the behavior of skilled writers.”).
116 Id. at 103 (suggesting that professors role-play the audience to help students understand the audience’s response); Susan M. Taylor, Students as (Re)visionaries: Or, Revision, Revision, Revision, 21 Touro L. Rev. 265, 291 (2005) (arguing that one goal for commenting on law students’ papers should be to “[d]ramatiz[e] the role of the reader . . . to let writers know whether they have attended to or ignored the targeted reader’s needs or interests”).
significant, their purpose is to remind the students that their audience is someone other than me, the professor.\textsuperscript{117}

The type of comments professors make on their drafts, however, is far more important than how they address their assignments. It is critical that professors show students how their text needs to be revised to meet the needs of the reader by asking questions that the reader would have. If professors simply correct the text or insert missing information, the students will not see why their text failed to have its intended impact on the reader and will not learn to make the necessary changes on their own. Therefore, when I comment, I ask questions from the reader’s standpoint. For example, if the writer failed to include a fact from one of the assigned cases that would be beneficial to the analysis, I will not simply fill in the fact, or point out that a fact is missing, or even ask why the writer did not include it. Rather, I will write a comment that forces the student to see how what they put in words does not adequately communicate to the legal reader how the cases are analogous because an essential element of the case is lacking. Thus, I might write: “It doesn’t seem like this case is analogous enough to support your point. Is there a better case? If not, explain why the similarities between the authority and our case directly support your point.” Now, as the professor, I know that there is no better case and that all that the writer needs to do is complete the analogy, yet, as a supervisor or a judge, I would likely not have this knowledge. My comment pushes the student to answer that there is no better case and explain why. The “why” is what the writer will need to revise, making explicit the factual similarities between the authority and our case.\textsuperscript{118} These types of questions lead students to “feel” that there is a disconnect between what they wrote and what they intended to say, encouraging them to call up their felt-sense, create a new set of goals aimed at communicating their intention, and revise on their own.

Reader-Based comments are also helpful in forcing students to “decode” the code words in their text. To use the defamation exam-

\textsuperscript{117} See Linda S. Flower, \textit{Revising Writer-Based Prose}, 3 J. Basic Writing 62, 65 (Fall/Winter 1981). Flower also recommends that teachers design realistic assignments for their students. \textit{Id.} at 68. “Creating vivid, realistic assignments centered around a clearly defined ‘real’ reader is a first step in leading students towards reader-based prose.” \textit{Id.} at 67; see also Soonpaa, \textit{supra} n. 115, at 95 (suggesting that law professors “develop[] assignments with specific, real-world purposes and a realistic audience”). For this reason, law professors should create real-world problems. Using phony names (like Paul Plaintiff) or creating fake jurisdictions minimizes the effect of a “real” legal reader.

\textsuperscript{118} Similarly, if the student writer has adopted the structure inherent in the cases or outlines his or her own discovery process, I will ask questions that reveal that the text is not centered on the questions presented.
ple from above, a writer who explains that New York courts will treat as a limited-purpose public figure any person who influences a public controversy is using a code word, “public controversy,” without defining it. Although that expression has meaning to the writer, who read many cases giving examples of what constitutes a public controversy, it has no meaning to a reader unfamiliar with the concept. When professors comment on student papers, they need to ask questions that reveal to students that their use of code words prevents the reader from fully understanding their point. Returning to the defamation example, my comment about the use of the code word “public controversy” might be one of the following: “How do the courts define public controversy?” “What is a public controversy?” “It’s unclear to me what a public controversy means.” I might follow-up by asking: “Are there any relevant examples of public controversies to support your prediction on this point?” I would ask these kinds of Reader-Based questions instead of simply telling the writer that he or she is missing an explanation of the term public controversy because I want to avoid suggesting that I, the professor, found an error. Rather, I want to convey to the writer that the reader was left in the dark about the meaning of an important element of the limited-purpose public-figure analysis. When the writer revisits the text, one of his or her goals must now be to enlighten the reader.

I also try to encourage students to think about revision in a more meaningful way by limiting the number and types of comments I make relating to surface issues, such as spelling, grammar, punctuation, and even bluebooking. I do not want to reinforce their misconception that revising is a tidying-up activity. Instead, I want to encourage students to make macrostructure meaning changes as they revise. I want them to develop an image of the reader and move beyond the word and sentence level. When commenting on student drafts, professors should not overemphasize errors in usage, diction, and style because “such comments give the student an impression of the importance of these errors that is all out of proportion” to how the errors ought to be viewed. They mislead the students into thinking that all they

---

119 See supra sec. II(B)(2).
120 See Soonpaa, supra n. 115, at 99–100. Soonpaa suggests that professors should not put marking for “correctness,” meaning “punctuation, usage, and grammar,” high on their list of priorities. Id. at 100. Rather, professors “should have a clear hierarchy of importance in mind” while critiquing. Id. at 99. “[G]lobal concerns, such as organization, purpose, [and] idea development [should be] near the top of the list.” Id.
121 Nancy Sommers, Responding to Student Writing, 33 College Composition & Commun. 148, 150 (1982); see also W. U. McDonald, Jr., The Revising Process and the Marking of Student Papers, 29 College Composition & Commun. 167, 168 (1978) (encouraging teach-
need to do is “patch and polish their writing.” Moreover, they do not give the students a reason to revise the structure and meaning of their text “since the comments suggest to students that the meaning of their text is already there, finished, produced, and all that is necessary is a better word or phrase.” Law professors must direct genuine revision of the text as a whole:

Instead of finding errors or showing students how to patch up parts of their texts, we need to sabotage our students’ conviction that the drafts they have written are complete and coherent. Our comments need to offer students revision tasks of a different order of complexity and sophistication from the ones that they themselves identify, by forcing students back into the chaos, back to the point where they are shaping and restructuring their meaning.

In that vein, I limit my comments suggesting surface changes. I also try not to place them in the margins of the page because I do not want to distract the writer from focusing on more important meaning and structure issues. Instead, I will write a global comment at the end asking the student to address those issues on the rewrite. If the issue is pervasive, I will refer the student to an example in the draft and illustrate how the student can correct it. If there are other end comments, I will put this type of comment last. My intent is to emphasize that sound analysis and coherent organization take priority over micro-changes.

The goal of my student conferences is also to ensure that the writer’s legal analysis and presentation is accurate and clear to the reader. Thus, I avoid beginning a conference with a discussion of surface issues. Rather, I will begin a conference with a discussion of the writer’s legal reasoning because that is what would happen if the students were actually meeting with their supervisor. In fact, I instruct the students to prepare for the conference like it is a meeting with their supervisor. This means that they must come equipped with answers to any questions posed in their

erers to not identify usage errors on early drafts of undergraduate writers because such comments give students “an impression of their importance that is all out of proportion at this stage in the process”). Sommers, along with some of her colleagues, “studied the commenting styles of thirty-five teachers at New York University and the University of Oklahoma.” Sommers, supra n. 121, at 149. They “stud[ed] the comments these teachers wrote on first and second drafts, and intervi[ed] a representative number of these teachers and their students.” Id. “All [of these] teachers also commented on the same set of three student essays.” Id.

122 Id. at 151.
123 Id.
124 Id. at 154.
drafts and a detailed plan on how they will approach the rewrite. This detailed plan is intended to challenge the students to make meaningful changes. The plan must describe all of the global changes the writer will address. These conference requirements and the Reader-Based comments reinforce the idea that revising is an important process that requires a lot more time and attention than simply fixing errors on a first draft.

**B. Have Students Re-Read Their Draft with a Single Purpose**

Because new legal writers cannot easily step into the shoes of the legal reader when they revise, professors need to give them tools, in addition to Reader-Based comments, that they can use on their own to create the reader’s perspective. These tools need to help them transform their private expressions into public Reader-Based expressions. If the new writer is left to revise without help, he or she will likely read and re-read the text to see if what is there makes sense.\(^{125}\) Given that Writer-Based prose most often reflects the writer’s discovery process or the structure of the authority the writer surveyed, it will undoubtedly “make sense” to the writer. My students tell me that when they review their text to check if it makes sense, they evaluate a host of items all at once, including meaning, structure, spelling, citation, and grammar. This proves to be ineffective because it is impossible for them to catch everything when they are not focused on any one thing in particular.\(^{126}\)

Moreover, the writer “lacks the psychological distance necessary to distinguish between the information on the printed page and the information still inside the writer’s head” if he or she simply reads to see if the text works.\(^{127}\) This phenomenon is referred to as an “eclipse of the brain.”\(^{128}\) When writers revise, “they see the words they wrote, and these (often inadequate) words remind their short-term memories of the complete message they had in mind when they were writing.”\(^{129}\) Next, “[t]he short-term memory... ‘tells’ the brain the complete message,” thereby preventing the writer from seeing that the words that he or she actu-

---

\(^{125}\) Beazley, *supra* n. 67, at 180. Beazley states that “[m]any writers review their writing by reading and rereading the document with no definite goal in mind.” *Id.* They read it and simply ask themselves, “Is this okay?” *Id.*

\(^{126}\) See *id.* at 180–181.

\(^{127}\) *Id.* at 175.

\(^{128}\) *Id.* at 181 (crediting Professor Nancy Rapoport with the suggestion of this term).

\(^{129}\) *Id.*
ally wrote fail to communicate the entire message. This explains the shock many students express when they receive feedback that their drafts are missing an essential part of the analysis. It is only after a careful review of their text after some time has passed that they understand that the information never actually made it to paper or, if it did, it was not explained well. In order to prevent this plight, professors must teach students to read their drafts with a specific purpose in mind.

Rather than reading the draft to see if it makes sense—and checking reasoning, spelling, citation, and other areas all at one time—the writer should read his or her draft many times over, each time with only a single goal in mind, ignoring issues in the draft that do not relate to that goal. For example, the student should read his or her draft solely for the purpose of assessing whether the legal analysis follows the IRAC structure. If the student stumbles upon a citation error in the process, the student should ignore it because it does not relate to the defined goal for that read. The student will catch and correct any citation errors when he or she reads for the purpose of checking citation. In subsequent readings, the student should focus on each analytical element of IRAC to check for accuracy, completeness, and clarity. After the student has evaluated his or her analysis, the student can then focus on other important aspects of writing, such as topic sentences, transitions, bluebooking, grammar, and spelling. This goal-oriented approach to reading drafts will force students to concentrate on substantive areas usually overlooked by them because they become so easily distracted by micro-revisions.

130 Id.
131 Id. at 181–182.
132 Flower & Hayes, supra n. 50, at 458 (“A first draft often satisfies a writer; it seems to say just what [the writer] meant. But when [he or she] comes back a day, a week, or a year later, many of the supporting assumptions and loaded meanings [the writer] brought to the first reading have vanished. The gaps, which [the writer] once filled in unconsciously, now stand out in the writing and demand explanation. This week-after experience is often the plight of our readers.”).
133 See e.g. Beazley, supra n. 67, at 182–186.
134 Students must recognize that this approach involves a lot of time and effort. Professors must remind students that their commitment to the revision process is worthwhile as students who devote more time to revision tend to perform better in legal writing. See Anne M. Enquist, Unlocking the Secrets of Highly Successful Legal Writing Students, 82 St. John’s L. Rev. 609, 628–637 (2008) (studying the habits of six law students in a second-year legal writing course). In her study, Enquist found that, among other things, the “highly successful” law students devoted more time to revision than the less successful ones. Id. In particular, the two “highly successful” law students spent three-fifths of their writing time on revising, editing, and proofreading while only two-fifths on creating their initial drafts. Id. at 21–22. In contrast, the “least successful” students started drafting late and submitted drafts that were only partially revised. Id. at 53–54.
C. Use Reader-Based Exercises with a “Sample” Draft

Professors can also help students focus on audience when they revise by designing Reader-Based exercises that direct their attention to specific areas, including the completeness and organization of their writing. I use such exercises with my students after they have turned in a first draft of the assignment.135 I usually tailor them to the particular assignment the students are revising and include ways to address common problems I saw in their drafts. I divide the tasks into separate exercises so that the students do not fall back into the bad habit of reviewing the text to see if everything makes sense.

To illustrate how Reader-Based exercises work, I will describe a sequence that I recently used with my first-year students to aid their revision of a memorandum assignment.136 The exercises are attached as Appendix A. I usually have the students complete a version of these exercises on an unmarked, printed copy of a poorly organized sample draft before they complete the exercise on their own drafts. Because they did not produce the sample draft, they have the distance needed to see the weaknesses in the writing. In short, there is no “eclipse of the brain” phenomenon.137

The first exercise includes a list of elements, ordered properly, that I want the students to incorporate into their writing. The initial step of the exercise simply asks the students to identify the

---

135 My exercises are modeled after Mary Beth Beazley’s self-graded draft. See generally Beazley, supra n. 67. Beazley’s self-graded draft is an exercise in which the writer edits his or her own text. Id. at 175. The exercise is designed to focus the writer’s attention on two parts of the writer’s document: “physical locations, such as beginnings and endings of point heading sections; and ‘intellectual locations,’ such as the articulation of a rule, the applications of a rule to facts, or the conclusion to the discussion of a legal issue.” Id. at 177. During the exercise, the writer is to find these locations and physically mark them (with a highlighter for example) so that the writer can objectively evaluate his or her writing. Id. at 175–177. With his or her attention focused, the writer is then to consider revision questions that are related to that marking. Id. at 177. “The writer will then be able to make any revision decisions based on an accurate understanding of what the draft actually says, rather than on an inaccurate presumption that the draft says what the writer meant to say.” Id. For a discussion of a similar exercise, see Flower & Hayes, supra note 50, at 460 (suggesting that students use a highlighter to isolate the titles, headings, topic sentences, and conclusions in their writing and then to make sure that they correspond to the main points the writer wants the reader to focus on).

136 The assignment, which I discussed in part earlier, supra sections II(B)(2) and IV(A), asked them to evaluate the degree of fault that our client, a reality-television personality, needed to establish in her defamation claim against a web blogger. Although there are several elements to the defamation claim under New York law, the only one in dispute was the degree of fault. Because this element raised two disputed issues—whether our client was a limited-purpose public figure and whether she was a general-purpose public figure—the students had difficulty constructing a coherent thesis. For this reason, the self-editing exercise that I distributed addressed the organization of the thesis in the way shown.

137 Beazley, supra n. 67, at 181.
different parts of the thesis and analytical elements of each issue—Bold Assertion, Rule, Rule Explanation, Application, Reasoning by Analogy, and Conclusion. Using a hard copy of the sample, the students are instructed to “dive into” the document with the purpose of identifying the different parts of the thesis and analytical elements of each issue and labeling them in some fashion. Some students like to annotate the paper in the margins; others prefer to use different color highlighting to distinguish the various parts; and still others like to circle or box out the text using arrows to explain their markings. How the students label the analytical elements does not really matter as long as they have done it in such a way that they can spot the order and check it against the worksheet.

The second step involves comparing the list I distributed to their annotations to see whether the draft has all of the elements and whether they are in the proper order. If they are out of order, the student must rearrange them. If there is a missing element, the student must add it. I then project the text on the screen and use the shading feature in Word to highlight the elements, selecting a different color for each separate element. As a class, we move the highlighted blocks that are out of order and add any missing information.

Up to this point, the first exercise has focused the students on the document’s organization only, and not on whether the discussion of each analytical part is adequate. For that, the students have to read with another purpose. The next three exercises ask the students to “dive into” the document again to assess whether each analytical element is complete. For the rule, I ask the students to check if the writer has synthesized all of the cases. Does the rule pass the rule test? That is, is the rule consistent with the holdings of the cases? For the explanation of the rule, I ask the students to identify whether the writer has discussed the relevant facts, holding, and reasoning of the cases that explain the rule. Does this discussion support the rule? And, for the reasoning by analogy, I ask the students to check whether the writer has addressed the factual similarities between his or her case and the rule explanation cases with holdings that are consistent with the writer’s bold assertion. Has the writer distinguished the factual differences between his or her case and the rule explanation cases with holdings contrary to the writer’s bold assertion? Has the

138 I teach a variation of the IRAC formula, called BARAC, which I adopted from Teresa J. Reid Rambo & Leanne J. Pflaum, Legal Writing by Design: A Guide to Great Briefs and Memos 26 (Carolina Academic Press 2001). The acronym stands for the following: Bold Assertion, Rule, Rule Explanation, Application, Reasoning by Analogy, Conclusion. Id.
writer applied the reasoning of the rule explanation cases to his or her case? If there is an authentic counterargument, has the writer presented it and evaluated its likely success? These questions ask the students to focus all of their attention on each distinct analytical element to make sure it is complete and matches up with the writer's legal reasoning.

Having practiced how to test whether the organization and substance of a legal analysis was sound using another’s work product, the students are usually more equipped to find, label, and fix their own drafts in the same way. This usually results in many “aha!” moments for students, as they are forced to read their work with a specific goal in mind. If time permits, legal writing professors can have the students complete the Reader-Based exercises on their own drafts in class, or the students can work on these exercises at home.

Regardless of where the students do the exercises, however, it is important that they use a clean hard copy of their drafts for each read. Given their reliance on portable computers, students typically do not review their drafts in hard copy form anymore. They spend most of their time revising on the screen. This custom is a bad one, especially when using a goal-oriented exercise. First, an on-screen review makes it difficult to assess whether the text follows the organizational pattern because only one page appears at a time. Also, with the exception of the “insert comments” feature, the students cannot easily annotate the document. Moreover, it is very easy to get distracted by minor edits because they are so simple to fix on the screen.139

The Reader-Based exercises help students develop the discipline of self-editing, allowing them to better see the weaknesses in their writing. The exercises can be tailored to specific macro-revisions and other Writer-Based problems, including the overuse of code words, as well as important micro-revisions.140 For example, the students can circle and explain any code words.141 The possibilities are endless but the purpose is the same: to encourage students to imagine their reader when they revise so that they

---

139 Revising on the computer also results in many unrelated distractions, such as checking e-mail and surfing the Internet.

140 Exercise V of the Appendix addresses the effectiveness of topic sentences and conclusions, which are important for clarifying the text for the reader. Note, however, that this is the last step in the revision exercise because it is less important than the global issues.

141 Flower, supra n. 51, at 32 (recommending that students circle and explain code words because the “process of pushing our own language to give up its buried meanings forces us to make [any] loose connections explicit and, in the process, allows us to examine them critically”).
reexamine all aspects of their legal reasoning from the reader's perspective.

CONCLUSION

Professors must teach students to revise for readers as a separate task. They should teach students to write recursively and see through the eyes of the reader. This can take shape through properly phrased feedback along with exercises that train students to go through their writing a number of times and each time with a different goal. Once professors give students the tools to take the reader into account and manage the back and forth motions of the composing process, they will be in a better position to see their writing through the eyes of the legal reader, and more effectively revise the substance, organization, and other parts of their text on their own.
APPENDIX A

Exercise I

**Step 1:** In your draft memorandum, locate, and label the following analytical elements:

**Thesis:**
- Claim and elements
- Bold assertions and support on undisputed elements
- Bold assertions and support on disputed issues within the disputed element
- Overall conclusion on the disputed element

**Analysis of first disputed issue:**
- Bold Assertion
- Rule
- Rule Explanation
- Application
- Reasoning by Analogy
- Counterargument*
- Conclusion

**Analysis of second disputed issue:**
- Bold Assertion
- Rule
- Rule Explanation
- Application
- Reasoning by Analogy
- Counterargument*
- Conclusion

* This is not meant to suggest that you must address counterarguments in a separate paragraph. It is possible and sometimes more effective to weave them into your application/reasoning by analogy.
STEP 2: REORGANIZE ANY ANALYTICAL ELEMENTS THAT ARE “OUT OF PLACE” AND COMPLETE ANY MISSING ANALYTICAL ELEMENTS. FOLLOW THE ORGANIZATIONAL PATTERN ABOVE.

Exercise II

Examine each rule. Do they all pass the rule test? (Is the rule consistent with the holdings of the cases?)

Exercise III

Find the rule explanations and answer the following questions:

1. Does the rule explanation immediately follow the rule?
2. Is the rule explanation in one place? That is, do you discuss all of the cases that explain the rule before moving on to application and reasoning by analogy?
3. Is there a rule explanation for each case that explains the disputed issue?
4. Does each rule explanation include a discussion of the relevant facts, holding, and rationale, if any? Label or highlight them.
5. Do you discuss the legally significant facts, holding, and rationale of a single case before moving on to a discussion of the next case?
6. Does the rule explanation support the rule?

Exercise IV

Find the application and reasoning by analogy sections and answer the following questions:

Do you use analogies to explain the relationship between the client’s facts and the applicable legal rules?

- Label or highlight (using different colors) the client’s facts and rule explanation facts in this section.
- Do you compare the client’s facts to facts of the rule explanation cases?
• Do you discuss all of the client’s facts on each disputed issue?

• Test the use of the client’s facts against the Statement of Facts section. Do you use all of the relevant facts in your analysis?

• Test the use of the rule explanation facts in this section against the discussion of those facts in the rule explanation section earlier in the memorandum.

**Exercise V**

With the exception of the thesis paragraph(s), read each paragraph and answer the following questions in writing:

1. How does the paragraph relate to the conclusion on the disputed issue?
   • What is the purpose of the paragraph?
   • Does it expressly reflect that purpose?

2. Highlight the first sentence of each paragraph.
   • Does the paragraph need a topic sentence? If yes, what information will you want to convey in that topic sentence?
   • If the paragraph does not need a topic sentence, does it continue a discussion from a preceding paragraph? If yes, does it need a transition phrase or sentence? What type of transition is necessary?

3. Highlight the last sentence of each paragraph (in a different color).
   • Does it conclude the point of the paragraph?
   • If the discussion continues to the next paragraph, is there a transition that makes that clear?