

VIGNETTES FROM A NARRATIVE PRIMER

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[S]omewhere along the way one discovers that what one has to tell is not nearly so important as the telling itself.¹

—Henry Miller

I. WHY TEACH NARRATIVE PERSUASION?

Let me begin by positing a broad initial claim: Attorneys, especially litigation attorneys, work in what is largely a storytelling or narrative culture. Legal arguments are, perhaps, best understood as disguised and translated stories. Even arguments whose structure is seemingly more formal and legalistic (as in appellate briefs or the judicial rhetoric of a United States Supreme Court opinion)² may be best understood as narrative. It may appear initially that paradigmatic forms of legal reasoning “tame” narrative³ and bring narrative impulses under control, translating and reshaping the story for purposes of argumentation. But let us assume, momentarily, that our notions of justice and right outcome are fundamentally grounded in and governed by narratives.⁴ Let us assume that we are truly narrative creatures and that we construct our sense of how the world works, of who we are, and of how events transpire, with the stories that are told to us, that we tell to others, and that we tell to ourselves. We use stories to order and mediate overwhelming environments of perceptions, informational

* © 2006, Philip N. Meyer. All rights reserved. Professor of Law and Director of Legal Writing, Vermont Law School. I am grateful to Anthony G. Amsterdam for allowing me to reproduce portions from initial drafts of work-in-progress, and to borrow insights and analyses as well. Errors, problematic observations, and misjudgments are my own, exclusively. I also offer my thanks to Johanna Evans and Evelyn Marcus for excellent research assistance.

¹ Henry Miller, *Reflections on Writing*, in *The Wisdom of the Heart* 20 (New Directions Paperback 1960).

² Anthony J. Amsterdam & Jerome Bruner, *Minding the Law* 54–109 (Paperback ed., First Harvard U. Press 2002).

³ Jerome Bruner, *Actual Minds, Possible Worlds* 11–43 (Harvard U. Press 1986); Jerome Bruner, *On Knowing: Essays for the Left Hand* (Belknap Press of Harvard U. Press 1964).

⁴ I use the synonyms “stories” and “narratives” interchangeably and trust that this will not confuse readers.

data, and factual noises that might otherwise be incomprehensible. Stories are enabling and empowering and, indeed, fundamental to how we fashion our beliefs and how we act upon them.

Further, assume that our determination of the appropriate law governing a particular case, what is “right” in a particular case, what the outcome “should be,” is likewise shaped by stories. Thus, perhaps more often than we care to admit, it is narrative that truly does the persuasive work in legal advocacy. If this is so, then it behooves legal writing professors teaching persuasion, law students who will become attorneys, and attorneys litigating cases, to better understand how stories work, and to develop a narrative tool kit supplementing the analytical skills traditionally taught in law school and emphasized in legal writing programs. This requires building upon the clinician’s admonition to her students that it is crucial in advocacy to *tell a good story*, albeit one subject to the constraints and conventions of legal storytelling practice, by developing a methodology for teaching narrative persuasion.

Narrative skills may seem intuitive to us, since we are so much the product of stories. We are immersed in films, commercials, literature, advertisements, news narratives, etc. But is it apparent what a “good” (effective) story is—especially in the context of legal writing and skills training? What, for example, are the components of a “plot” or a narrative “theme”? What is narrative structure? What are some recurring and effective plots in the various areas of legal practice? Who are the “characters” in a law story? How are they “cast” on stage? What roles do various characters play, and how are they best depicted or developed? What, exactly, is narrative time, and how is it best represented in narrative, e.g., chronologically or through such techniques as flash-back and flash-forward? What is the role of settings or environments? What stylistic lessons might lawyers learn from other masterful storytellers, e.g., practitioners of creative non-fiction or practitioners of the modern novel and short story?

Of course, legal storytelling is a carefully circumscribed business. The stories told and their tellings must be truthful, factually accurate, and meticulous. Further, there would be danger and destabilization in legal pedagogy if the law were taught and understood exclusively as merely the battle of competing narratives built upon shifting legal foundations, rather than legal argumentation based upon principles, precedent, and *stare decisis*. 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. Within this framework, some lawyers seem remarkably sensitive to, and adept at selecting the “right” narratives and—especially in written appellate argumentation—knowing how to carefully translate core narratives into the language of analytical positivism. This is especially so when narratives more broadly encompass stories about the law and not just stories about the facts. Specifically, narrative 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.

Yet, our pedagogy in legal writing and reasoning does not traditionally emphasize narrative persuasion. Instead, we emphasize the assumptions of analytical positivism embodied in the doctrinal curriculum. Simply put, legal writing professors rarely provide law students with the narrative tools necessary to supplement the analytical tools placed into their fledgling-lawyers’ tool kits. Why do we fail to emphasize the narrative dimensions of legal writing? Perhaps legal writing courses are shaped to embody the presumptions of a doctrinal curriculum that, at least initially, tips the legal world upside down and elevates doctrine over the often-disputed and ever-shifting factual terrains of practice. Law students are already confused when the facts are fixed in place, and the students (especially during their first year) struggle to tease out legal doctrine from complex appellate cases. Perhaps, like some doctrinal colleagues, legal writing professors are also suspicious of the power of narratives and tend to think of stories as inherently fictional. Further, students are traditionally tested on their ability to identify and retrieve relevant doctrinal rules and apply doctrine within often rigidly organized analytical formats that fix into place what one of my students has called the “floating factoids” presented in typical law school examination hypotheticals. It might be premature (and perhaps disastrous) to suggest to first-year law students the notion that creative narrative persuasion is often outcome-determinative in legal advocacy.

Perhaps many legal writing professors are still somewhat defensive politically based upon our historical status within the law school; this may affect choices in legal writing pedagogy to create curricula that is shaped, and perhaps misshaped, to fit into the shadows and presumptions of the doctrinal courses. Or perhaps, alternatively, we may fear that emphasizing narrative persuasion might make students cynical or somehow undermine their work dissecting and teasing doctrinal legal rules from opinions and ap-

plying doctrine to predigested facts. Finally, when we talk about narrative persuasion, perhaps we simply do not have an adequate vocabulary that allows us to systematically isolate and teach the various skills necessary. Unfortunately, we then tend to ignore or deny what effective practitioners know: litigation attorneys need to be effective storytellers. Further, narrative skills can be developed.⁵ And it is possible to envision an effective pedagogy for teaching narrative persuasion in law school legal writing programs.

Assuming that some of what I assert is correct, how might legal writing professors better provide law students with the narrative tools to become more effective practitioners? How might we supplement the clinician's admonition that it is crucial for an attorney to tell a good story? What might be the content of these narrative lessons? What sources might we recommend to our students as instructional models? In this Essay, I provide some preliminary responses to these questions. In doing so, I present brief sections from a text-in-progress. I hope these slivers are not unduly fragmented; rather, I hope that they will suggest vocabulary and illustrate what some of this pedagogy might look like. These excerpts from a narrative primer (Part II) are intended to initiate a discussion of this fascinating topic and the possibilities of a new writing and skills pedagogy to enhance advocacy training, rather than to formulate an agenda or provide a complete text. I reserve that project for another day.⁶

A. About the Narrative Primer

I am currently teaching collaboratively with clinicians, legal writing professors, and advanced-level practitioners a class on narrative persuasion for practitioners (primarily federal public defenders) at a Persuasion Institute, which meets annually. Presentations, exercises, and workshops explore and teach the art of narrative persuasion. Moreover, I am co-author of a narrative primer-

⁵ For example, I learned a great deal about effective storytelling during two years well spent at the Iowa Writers' Workshop. Also, there is well-developed literature about storytelling practice by many masterful novelists, short story writers, and practitioners of the art of creative non-fiction.

⁶ This Essay extracts illustrative fragments from an initial draft of a proposed work-in-progress, Anthony G. Amsterdam & Philip N. Meyer, *Retelling the Story: A Guide to Narrative for Attorneys Representing Condemned Inmates* (unpublished ms., 2006) (copy on file with Author).

in-progress designed to incorporate some of the lessons from this larger project. The purpose of the exercises and materials in the primer, like the purpose of the Persuasion Institute, is to teach defense attorneys in post-conviction relief cases about narrative persuasion.

This is a different type of project for me. For the past twenty-five years I have worked primarily as a professor and Director of Legal Writing. It has been a long time since I practiced law and many years since I worked as a clinician in a law school civil legal clinic. Although I teach the first-year doctrinal criminal law course in addition to teaching legal writing, I am not an expert in habeas corpus, appellate criminal law practice and procedure, or post-conviction relief practice in death penalty cases. Other clinicians and practitioners serving as faculty at the Persuasion Institute, and, indeed, most of the participants at the Persuasion Institute, have more practice experience. Consequently, although I serve as faculty, I find myself learning more than I am teaching; I am learning, especially, from my co-author of the primer that may someday serve as a supplement to the Persuasion Institute. Based in large measure upon materials presented initially at the Persuasion Institute, the primer is titled *Retelling the Story: A Guide to Narrative for Attorneys Representing Condemned Inmates*. Recently, with the advice, suggestions, and materials provided by my co-author, I completed drafts of several lessons.

At the request of Marilyn Walter and Elizabeth Fajans, and with some trepidation about letting incomplete and undeveloped materials out into the world prematurely, I presented several preliminary excerpts from an initial draft to an audience of legal writing teachers at the Brooklyn Legal Writing Symposium celebrating twenty-five years of the Brooklyn Law School Legal Writing Program. After the presentation, colleagues requested copies of the illustrations from creative non-fiction (e.g., excerpts from Norman Mailer's *Executioner's Song* and Truman Capote's *In Cold Blood*) and from a narrative critique of the Statement of the Case in a post-conviction brief, *Tison v. Arizona*.⁷ Presumably, these professors believed that the excerpts and the accompanying commentary were suggestive of exercises that could be incorporated into their writing courses to teach narrative persuasion.

The Legal Writing Institute agreed to publish the excerpts. Since these pieces are fragmented and somewhat acontextual, I

⁷ 481 U.S. 137 (1987).

thought initially about submitting for publication the draft of a single lesson from the primer rather than vignettes. After some waffling, however, I decided to replicate the fragmentary nature of my oral presentation and publish vignettes from several lessons to provide a sampling of the types of materials and analyses that the narrative primer will present. I also added to my introduction a “roadmap” explaining why these particular excerpts were chosen, and identifying how they fit into the overall scope or structure of the proposed primer. Moreover, I identified the other materials included in each of the lessons selected, and explained how the excerpts fit within individual lessons. Finally, because these are excerpts from a text with no scholarly footnotes, I added references to some of the academic sources that inform the text.

B. Proposed Structure of the Primer

The primer’s target audience is attorneys representing convicted persons and condemned inmates in appellate and post-conviction relief proceedings. The text identifies skills that are especially relevant to legal writing and advocacy and provides a narrative “tool kit” that supplements the traditional analytical, organizational, and writing skills taught in law school legal writing and reasoning courses. The aim of the primer is not to be comprehensive. Rather, it focuses upon a limited number of concepts fundamental to narrative persuasion. The language employed in the primer is pragmatic and functional; the text avoids high literary theory and academic terminology and defines the vocabulary introduced.

The primer is organized thematically by “lessons.” Substantively, these lessons analyze various components and principles of narrative persuasion. Lessons are also included on topics especially relevant to legal writers that are not generally included in other narrative primers. For example, a lesson is included on detective and mystery stories. Many legal arguments, especially in post-conviction relief cases, typically assume forms that closely resemble detective and mystery stories, and a typology of various structures of mystery stories may provide a useful inventory for practitioners. Likewise, it is important for practitioners to critique and deconstruct the stories underlying opposing briefs. Thus, another lesson emphasizes the skill of narrative critique.

In this Essay, I excerpt vignettes from four lessons⁸ in the primer: Style, Plotting, Character, and Setting. I selected excerpts that may be relevant for legal writing professors teaching about narrative persuasion. For example, the excerpts on “showing rather than telling” and “how to use quotations” are relevant for first-year law students, and the critique of the Statement of the Case in *Tison v. Arizona* may provide a helpful exercise in an appellate advocacy course or a moot court program. Alternatively, other excerpts provide fundamental narrative vocabulary (e.g., definitions of plot and theme) that might be useful to law students.

C. Excerpts from Four Lessons

The first sequence of vignettes is from the lesson on Style. “Style” in this primer means something different than the components of legal writing style traditionally taught in legal writing courses and often emphasized in legal writing texts. Subtopics include, for example, using visual details to construct scenes (*showing*) as a powerful alternative to summaries (*telling*), and understanding *rhythm* in narrative as the purposeful alternation between scene and summary. The excerpt from Norman Mailer’s *Executioner’s Song*⁹ illustrates how to construct a powerful scene through the use of compelling visual details, and how to develop a scene through showing rather than telling. Second, since narratives in legal briefs are often composites of quotations, transcripts, and excerpts from opinions assembled in a purposeful bricolage, another subtopic is *telling in different voices*. In the illustration taken from Truman Capote’s *In Cold Blood*,¹⁰ Capote employs witness testimony exclusively to recreate the initial discovery of the Clutter family murders. A third subtopic in this lesson is perspective or point of view.¹¹ I use Gardner’s basic description of five per-

⁸ Three asterisks (***) indicate major elisions from the larger work. Because these are fragments from a larger text, this Essay is necessarily incomplete. Its purpose is merely to provoke initial inquiry into this fascinating topic.

⁹ Norman Mailer, *The Executioner’s Song* 223–224 (Vintage Intl. ed. 1998).

¹⁰ Truman Capote, *In Cold Blood* 58–60, 62–65 (Vintage Intl. ed. 1994).

¹¹ In an e-mail dated October 11, 2003, Anthony Amsterdam suggested reading Mieke Bal’s study of focalization in *Madame Bovary*. E-mail from Anthony G. Amsterdam, Prof. of L., N.Y.U. Sch. L., to Philip N. Meyer, Prof. of L. & Dir. Leg. Writing, Vermont L. Sch., *Narrative Primer* (Oct. 11, 2003) (copy on file with Author) (citing Mieke Bal, *On Meaning and Descriptions*, 6 *Stud. in 20th Cent. Literature* 100, 134–142 (1981 & 1982)) [hereinafter *Narrative Primer e-mail*].

spectives typically employed by writers¹² and provide an excerpt from analyses of several legal briefs.¹³

The next sequence of vignettes is from the lesson on Plotting. Subtopics in this lesson include, for example, developing and translating legal issues into narrative themes; converting arguments into stories; how to use beginnings, endings, and temporality in plotting (e.g., where do you begin the story in time, and where do you end it?); and how to develop a narrative structure in legal briefs (e.g., starting with a difficulty or trouble that breaks the initial steady-state and moving purposefully into the progressive complications of the middle of the plot towards the climax, resolution, and coda). There is analysis of topics particular to post-conviction relief practice, in particular, whether the story should call for a transformative ending or a return to an initial “steady-state.” That is, the lesson on Plotting anticipates “the distinctive characteristics of stories that make a return to the anterior steady-state feel like the right ending and stories that need to project a new-and-different steady-state in order to come out right in the end” and “how to set up [the] story from the beginning so that the reader is cued into either a restorative or a transformative dynamic.”¹⁴ This lesson also develops the idea that it is “not only in the composition of the obviously ‘factual’ sections of a brief or pleading but also in the legal sections that one can use narrative techniques.”¹⁵ The narrative structures of literary and legal examples are analyzed. Finally, the lesson concludes with an exercise that enables readers to plot the narrative in a complex case based upon the facts presented in Richard North Patterson’s novel *Con-*

¹² John Gardner, *The Art of Fiction* 155–159 (1st Vintage Bks. ed. 1985); David Lodge, *The Art of Fiction* (Penguin Bks. 1992).

¹³ Excerpts from a subtopic on sentence structure included in the lesson on Style are omitted from these vignettes. Amsterdam describes this topic, “The remaining subtopic has to do with the use of sentence structure (particularly the allocation of material to dominant and subordinate clauses, the crafting of different levels and kinds of subordinate clauses, and the use of appositive phrases and other forms of ‘asides’), verb tense and mood, modal verb, and vocabulary choice to embed in the narrative [or exclude from it] conceptions of agency, causality, logical connections, and other visions of How the World Works” *Narrative Primer* e-mail, *supra* n. 11. For illustrations of this type of analysis, see Amsterdam & Bruner, *Minding the Law*, *supra* n. 2, at 177–192, 195–199; Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y. L. Sch. L. Rev. 55, 67–69 (1992).

¹⁴ *Narrative Primer* e-mail, *supra* n. 11.

¹⁵ *Id.*

viction.¹⁶ These illustrations and exercises are not included in this article.

The final vignettes are from the lesson on Character. Briefly, the Character lesson includes subtopics such as how to create character; the importance of character and internal motivation; character as action; and the use of psychological details and physical descriptions to shape characters. Another subtopic is the selection and *casting* of characters, including how characters, particularly in the legal arguments in briefs, can be legal actors, prior decisions, or even legal entities (e.g., a renegade court of appeals). In this Essay I include an excerpt from Tobias Wolff's memoir *This Boy's Life*;¹⁷ it illustrates superbly Fitzgerald's dictum that "ACTION IS CHARACTER."¹⁸

The last vignettes are excerpts from the lesson on Setting. Coverage includes settings as crucial components of narrative and environments as potentially outcome-determinative in some legal narratives. The excerpts include a brief illustration of the depiction of a setting from an essay by Joan Didion¹⁹ and a critique of several paragraphs from the Statement of the Case from the petitioner's brief in *Tison v. Arizona*.²⁰

D. Suggested Readings

Scholarly literature about narrative, narratology, and narrative theory is vast; it is pervasive and ever-expanding in diverse academic fields from film theory to literary studies to continental philosophy. In law, there is a newly emergent, vigorous, and extensive scholarship focused upon narrative jurisprudence.²¹ The purpose of the primer is not to provide extensive references to this literature. Instead, the purposes of the primer are to simplify academic terminology without reducing the complexity of ideas and to turn academic exploration into a pragmatic text useful to attor-

¹⁶ Richard North Patterson, *Conviction* (repr. ed., Ballantine Bks. 2005).

¹⁷ Tobias Wolff, *This Boy's Life* (Grove Press 1989).

¹⁸ F. Scott Fitzgerald, *The Last Tycoon* 163 (Charles Scribner's Sons 1970).

¹⁹ Joan Didion, *The White Album: Essays by Joan Didion* (Farrar, Straus & Giroux 1979).

²⁰ 481 U.S. 137 (1987).

²¹ Some years ago, in an introduction to a symposium on legal storytelling, I attempted to categorize the various strands of the then newly-emergent narrative jurisprudence. See Philip Meyer, *Will You Please Be Quiet, Please?: Lawyers Listening to the Call of Stories*, 18 Vt. L. Rev. 567 (1994).

neys. At the suggestion of the editors of this Journal, I provide some references for readers interested in exploring the scholarship on legal storytelling and narrative jurisprudence. In doing so, I identify several sources that deepened my own understanding of the narrative components of legal argument. These readings may serve as starting points or, perhaps, suggest a reading strategy for legal writing professors.

My recommendations begin with the relevant sections on narrative from Anthony Amsterdam and Jerome Bruner's path-breaking book *Minding the Law*.²² This core text, written by two of the preeminent practitioners of narrative theory applied to the law, covers three primary topics that have profoundly influenced recent thinking about the nature of law: categorization theory, rhetoric, and narrative. The theoretical material in Chapter Four, entitled "On Narrative," provides a brilliant synthesis of narrative theory in relation to legal analysis.²³ The writing is clear and accessible. Of equal importance are the notes to this chapter.²⁴ These notes provide a syllabus for a graduate-level self-study course in narrative theory, and my bookshelf is gradually accumulating these books. In Chapter Five, the theory is applied to macro- and micro-analytic readings of the narrative components of two United States Supreme Court civil rights decisions.²⁵ Taken together, the theory, applications, and notes provide a thorough and informative introduction to narrative theory applied to the law. As a supplement, or for a more general introduction to narrative theory, I recommend Jerome Bruner's engaging book *Making Stories: Law, Literature, Life*.²⁶ As its subtitle suggests, this short book provides a reader-friendly introduction to the import of narrative in law, literature, and life, and serves as a complement to *Minding the Law*. Finally, I recommend reading the initial chapter in Peter

²² Amsterdam & Bruner, *Minding the Law*, *supra* n. 2, at 110–164.

²³ *Id.* at 110–142.

²⁴ *Id.* at 355–163. Notes provide precise references to significant narrative theorists with thoughtfully annotated footnotes, including leading scholars such as Paul Ricoeur, Aristotle, Jerome Bruner, Roland Barthes, Victor Turner, Mircea Eliade, Northrop Frye, William Labov and Joshua Waletzky, Peter Brooks, Paul Grice, Hayden White, Tzevetan Todorov, Vladimir Propp, Kenneth Burke, Mikhail Bakhtin, and Michael Riffaterre. The work of prominent legal scholars writing about narrative and law, such as Robert Cover and James Boyd White, are also noted.

²⁵ *Freeman v. Pitts*, 503 U.S. 467 (1992); *Prigg v. Pa.*, 41 U.S. 539 (1842); Amsterdam & Bruner, *Minding the Law*, *supra* n. 2, at 143–164.

²⁶ Jerome Bruner, *Making Stories: Law, Literature, Life* (Farrar, Straus & Giroux 2002).

Brooks's *Reading for the Plot: Design and Intention in Narrative*.²⁷ Brooks, the preeminent American narrative theorist, serves as core faculty at the Persuasion Institute; his analysis of plotting (narrative design and construction) was a significant influence on the primer's approach.

Next, I recommend two texts that provide excellent models for applying narrative theory to legal argumentation. These texts provide templates for my own work and for the work of many others. The first is Anthony G. Amsterdam and Randy Hertz's now classic article, *An Analysis of Closing Arguments to a Jury*.²⁸ The second is a more recent collection of articles analyzing the various narrative components of the Rodney King trial.²⁹ I particularly encourage legal writing professors to read the introduction by Anthony G. Amsterdam, Randy Hertz, and Robin Walker-Sterling. This introduction explains the authors' focus on narrative through careful and systematic analysis of (1) why narrative is important in litigation, (2) the specific uses that a litigator can make of narrative, and (3) the basic structure and process of narrative. Of particular interest to legal writing professors desiring to try out some of these approaches in their own scholarly work is a list of lawyering theory articles applying these macro- and micro-analytic techniques based upon narrative theory³⁰ and a companion list of recent articles exploring the "theoretical underpinnings" for this type of work.³¹

I also recommend several narrative primers by well-established writers and teachers of writing (fiction and journalism). The first two are written by John Gardner and David Lodge. Curiously, both have the same title.³² John Gardner's *The Art of Fiction* presents Gardner's passionate beliefs about integrity in writing, and provides structured guidance that is often as relevant for the legal writer as it is for the novelist. David Lodge's book is lighter and perhaps more engaging; it is also full of marvelous illustrations. And I recommend James B. Stewart's excellent primer

²⁷ Peter Brooks, *Reading for the Plot: Design and Intention in Narrative* 1–36 (1st paperback ed., Harv. U. Press 1992).

²⁸ Amsterdam & Hertz, *supra* n. 13, at 55.

²⁹ Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 Clin. L. Rev. 1 (2005).

³⁰ *Id.* at 2 n. 2.

³¹ *Id.*

³² Gardner, *supra* n. 12; Lodge, *supra* n. 12.

on narrative journalism, *Follow the Story*.³³ Stewart is a Pulitzer Prize winning journalist and a former editor of the front page of the *Wall Street Journal*. He supplements wisdom about narrative journalism with a sampling of articles that apply the lessons he teaches. Finally, I recommend the ruminations on technique and the self-reflective insights provided by writers in the Paris Review series of interviews “Writers at Work.”³⁴

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II. VIGNETTES FROM THE PRIMER

A. Style

*Every sentence has a truth waiting at the end of it and the writer learns how to know it when he finally gets there.*³⁵

—Don DeLillo

1. *From the Introduction to the Lesson*

This lesson looks at the various stylistic components of narrative. It is helpful to develop a pragmatic vocabulary for systematically analyzing alternative approaches to “story elaboration” in legal practice. These choices initially appear to take place “on the surface”³⁶ of the storytelling, but are connected to and embedded within other aesthetic choices that are not so readily apparent, such as those pertaining to plot, character, narrative time, and setting. The choices discussed in this lesson, however, *are* readily apparent on the surface: in the voice of the narrator and in the style of narration; in the choice of who the narrator or narrators will be; in the narrative perspective or perspectives from which the story is told; in the use of images and details to arrest the attention of the judicial reader and, perhaps, to capture the imagination

³³ James B. Stewart, *Follow the Story: How to Write Successful Nonfiction* (Simon & Schuster 1998).

³⁴ *Writers at Work: The Paris Review Interviews* (George Plimpton ed., 2d series, Penguin Bks. 1977); *Writers at Work: The Paris Review Interviews* (George Plimpton ed., 2d series, Viking Press 1963) [hereinafter *Writers at Work 1963*]; *Writers at Work: The Paris Review Interviews* (Malcolm Cowley ed., 1st series, Viking Press 1958).

³⁵ Don DeLillo, *Mao II* 48 (Viking Penguin 1991).

³⁶ Lodge, *supra* n. 12, at 117–120.

of this reader as well; in the selective use of quotations; and in the “showing” versus the “telling” of the story. As in other lessons in this primer, we do not attempt to be comprehensive in raising *all* relevant issues and aspects of style and narrative elaboration. Instead, we choose a range of issues that are particularly relevant to narrative persuasion.

* * *

2. “*Showing and Telling*”³⁷

In another essay for writers entitled *Showing and Telling*, David Lodge identifies the virtues and vices of “showing” as compared to “telling.”³⁸ Initially, he observes, the “purest form of showing” is “quoted speech of characters, in which language exactly mirrors the event,” while the “purest form of telling is authorial summary, in which the conciseness and abstraction of the narrator’s language effaces the particularity and individuality of the characters and their actions.”³⁹ The sophisticated brief writer employs the “virtues” of each technique, often choosing to build briefs largely from verbatim excerpts of transcripts, direct quotations from opinions, and from external and purportedly objective sources.

Lodge admonishes the young writer that overuse of authorial summary is not only deadening, it may also be “unreadable.”⁴⁰ Many briefs, however, despite the best intentions of the writer, are often painful to read because the writer fails to know what to put in, what to leave out, and how and when to use showing instead of telling. Nevertheless, summary has its uses, and these functions can be made explicit, as Lodge observes, “it can, for instance, accelerate the tempo of a narrative, hurrying us through events which would be uninteresting, or *too* interesting—therefore distracting, if lingered over.”⁴¹

Norman Mailer is masterful in striking an aesthetic balance between showing and telling; he knows when to weight showing over telling. Here, from Norman Mailer’s *The Executioner’s Song*,

³⁷ *Id.*

³⁸ *Id.* at 122.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* (emphasis added).

is a brief description of the murder of Max Jensen by Gary Gilmore.⁴² Mailer takes great pains to show the murder rather than tell about it; he scrupulously avoids mediating the images with fancy language—there are no visible screens of perception placed over events, no “authorial summaries” to interfere with the impact of the spare words. But there are also apparent strategies in the intentionally minimalist description: Mailer focuses upon imagery. He sketches in only the most basic physical details of the interior of the bathroom where the shooting takes place, and describes only a few crucial physical traits of the victim in reaction to the events.⁴³ He makes no deeply intrusive psychological observations about Gary Gilmore; he leaves it to the reader to make those judgments. Mailer has the confidence in his reader and his own authorial command of the material to simply get out of the way; in his nonfiction writing, Mailer often prefers to stay on the rich surface of the images. It is as if the imagery is a documentary film clip shot from the objective perspective of an omniscient and unseen narrator who, only briefly and in the most delicate way, dips into the mind of Jensen, the victim, to observe the meaning of Jensen’s misplaced smile.⁴⁴ There is no room for extraneous description. Mailer’s style is purposefully spare, yet precise; the words facilitate, rather than disturb, the reader’s clear visualization of the scene:

Gary walked around the corner from where the truck was parked and went into a Sinclair service station. It was now deserted. There was only one man present, the attendant. He was a pleasant-looking serious young man with broad jaws and broad shoulders. He had a clean straight part in his hair. His jawbones were slightly farther apart than his ears. On the chest of his overalls was pinned a name-plate, MAX JENSEN. He asked, “Can I help you?”

Gilmore brought out the .22 Browning Automatic and told Jensen to empty his pockets. So soon as Gilmore had pocketed the cash, he picked up the coin changer in his free hand and said, “Go to the bathroom.” Right after they passed through the bathroom door, Gilmore said, “Get down.” The floor was clean. Jensen must have cleaned it in the last fifteen minutes. He was trying to smile as he lay down on the floor. Gilmore said, “Put

⁴² Mailer, *supra* n. 9, at 223–224.

⁴³ *Id.*

⁴⁴ *See id.* at 223.

your arms under your body.” Jensen got into position with his hands under his stomach. He was still trying to smile.

It was a bathroom with green tiles that came to the height of your chest, and tan-painted walls. The floor, six feet by eight feet, was laid in dull gray tiles. A rack for paper towels on the wall had Towl Saver printed on it. The toilet had a split seat. An overhead light was in the wall.

Gilmore brought the automatic to Jensen’s head. “This one is for me,” he said, and fired.

“This one is for Nicole,” he said, and fired again. The body reacted each time.

He stood up. There was a lot of blood. It spread across the floor at a surprising rate. Some of it got onto the bottom of his pants.

He walked out of the restroom with the bills in his pocket, and the coin changer in his hand, walked by the big Coke machine and the phone on the wall, walked out of this real clean gas station.⁴⁵

* * *

3. *Telling in Different Voices*

Often, the strongest narratives are not created through the voice of the author. Rather, they are provided by the voices of other speakers and writers. The brief writer must assemble and transform compelling collages of quotations into structured compositions of pieces, developed from previous tellings and retellings of the story. These pieces are often reconfigured in some new way that makes this retelling compel the responsiveness of the court. The voices that speak through the brief are often in the form of quotations from transcripts, testimony, and judicial opinions. The use of other voices, from purportedly objective or disinterested sources, like prior appellate opinions, is a powerful narrative tool. In an important sense, the brief writer is rendering the statement of the case through the use of quotation, another technique employed in nonfiction, in which the art is often in the quality of the investigation, and in the meticulous exploration and reassembly of what the pieces of testimonial evidence reveal. Nonfiction is usu-

⁴⁵ *Id.* at 223–224.

ally characterized by a *monologic* or fixed narrative perspective, in contrast to the multiple and shifting perspectives, or *dialogic* structure, that often characterize narrative in the complex structures of the modern novel. This integrated relationship, in part, explains our choice of nonfiction illustrations in this lesson of our primer.

*In Cold Blood*⁴⁶ is an illustration from nonfiction, where Truman Capote undertakes an investigation into the murder of the Clutter family in Kansas in 1959, retelling the story from a deeper literary perspective than was usual in the journalistic accounts of that time. Capote's deeper literary perspective returns "to the surface," when Capote reveals the scene of the murder itself, by replacing his own novelist's eye and voice with that of the journalist's. Capote relies exclusively on direct quotations from a witness who accompanies the sheriff to the Clutter residence to investigate the possibility of a crime.⁴⁷ Capote interviews this witness extensively, and then knows enough to simply employ the witness's story with remarkable verbatim quotation. Capote's "writer instinct" allows him to see the specialness of the material. He uses that material extensively to reveal the horror of the murder scene discovery. In making this choice, Capote adopts a voice that is completely authentic; this authentic voice then provides an eye for visual detail and unintended ironic insight that surely would seem contrived and manipulative if spoken directly in Capote's own authorial voice. The witness, Larry Hendricks, is a schoolteacher who had taught one of the murdered Clutter children.⁴⁸ Before beginning his dark journey to the Clutter farmhouse, he "decided I'd better keep my eyes open. Make a note of every detail. In case I was ever called on to testify in court."⁴⁹

In the initial part of Larry Hendricks's story, Capote relates how Hendricks discovers the murder victims, the members of the Clutter family.⁵⁰ We quote this excerpt from Capote's *In Cold Blood* at some length. Note how the story, even in partial excerpt, moves purposefully, like a miniature, self-contained Gothic horror tale; Hendricks enters the Clutters' family farmhouse and then goes room to room, each door opening upon a new discovery more

⁴⁶ Capote, *supra* n. 10.

⁴⁷ *Id.* at 62–65.

⁴⁸ *Id.* at 60, 62.

⁴⁹ *Id.* at 61–62.

⁵⁰ *Id.* at 62–65.

gruesome and frightening than the previous one.⁵¹ Note also how the quotation is shaped into a complete elliptical piece, like the mini-story of the social worker in the *Williams v. Taylor* brief,⁵² framed within the larger narrative. It begins with a steady-state, and the steady-state is breached by the discovery of a trouble; the conflict or tension is progressively developed as the narrator moves from room to room making his horrific discoveries. The situation is eventually resolved, at least temporarily, as the “[a]mbulances arrived,” and “the house began to fill up.”⁵³ The darkness lifts a bit, and this sliver of light permits the narrator to back off, psychologically, from his powerful recollections—to remove himself, and the reader as well, from the narrative reinvention of the murder scene and what had happened within it.

It is as if the narrator has the psychological need to shape the images into narrative forms, not so much for the benefit of the listener, but for himself—to gain some control over the material, and some sense, perhaps, of psychological closure upon the horror of the unfolding images. Capote has the authorial confidence to rely extensively upon these blocks of external voices and quotations, carefully shaped and set within the context of a larger narrative:

Well, the TV was on and the kids were kind of lively, but even so I could hear *voices*. From downstairs. Down at Mrs. Kidwell's. But I didn't figure it was my concern, since I was new here—only came to Holcomb when school began. But then Shirley—she'd been out hanging up some clothes—my wife, Shirley, rushed in and said, “Honey, you better go downstairs. They're all hysterical.” The two girls [Hendricks's children]—now they really were hysterical. Susan never has got over it. Never will, ask me. . . . Even Mr. Ewalt [a middle-aged farmer], he was about as worked up as a man like that ever gets. He had the sheriff's office on the phone—the Garden City sheriff—and he was telling him that there was “something *radically* wrong over at the Clutter place.” The sheriff promised to come straight out, and Mr. Ewalt said fine, he'd meet him on the highway

[Hendricks accompanies Ewalt to meet the sheriff on the highway.]

The sheriff arrived; it was nine thirty-five—I looked at my watch. Mr. Ewalt waved at him to follow our car, and we drove

⁵¹ See *id.*

⁵² *Infra* pt. II(A)(4).

⁵³ *Id.* at 65.

out to the Clutters'. I'd never been there before, only seen it from a distance. Of course, I knew the family. Kenyon [Clutters' son] was in my sophomore English class, and I'd directed Nancy [Clutters' daughter] in the "Tom Sawyer" play. But they were such exceptional, unassuming kids you wouldn't have known they were rich or lived in such a big house—and the trees, the lawn, everything so tended and cared for. After we got there . . . [the sheriff] radioed his office and told them to send reinforcements, and an ambulance. Said, "There's been some kind of accident." Then we went in the house, the three of us. Went through the kitchen and saw a lady's purse lying on the floor, and the phone where the wires had been cut. The sheriff was wearing a hip pistol, and when we started up the stairs, going to Nancy's room, I noticed he kept his hand on it, ready to draw.

Well, it was pretty bad. That wonderful girl—but you would never have known her. She'd been shot in the back of the head with a shotgun held maybe two inches away. She was lying on her side, facing the wall, and the wall was covered with blood. The bedcovers were drawn up to her shoulders. Sheriff Robinson, he pulled them back, and we saw that she was wearing a bathrobe, pajamas, socks, and slippers—like, whenever it happened, she hadn't gone to bed yet. Her hands were tied behind her, and her ankles were roped together with the kind of cord you see on Venetian blinds. Sheriff said, "Is this Nancy Clutter?"—he'd never seen the child before. And I said, "Yes. Yes, that's Nancy."⁵⁴

Hendricks then describes the discovery of the victims in the next rooms, Mrs. Clutter and then Hendricks's former student, Kenyon.⁵⁵ Hendricks seems to relive the discoveries, literally, each more frightening and vivid than the one before. It is akin to a victim of post-traumatic stress rediscovering an immutable past that makes the present pale by comparison. The horrible discoveries are mingled with small visual details and observations that starkly contrast with the facts of the deaths themselves that seem, somehow, beyond commentary. This unconscious "technique" seems to re-emphasize the horror for the reader. Finally, there is the discovery of Mr. Clutter's body in the sixth page of the quotation as Hendricks tells his story.

⁵⁴ *Id.* at 61–62.

⁵⁵ *Id.* at 63–64.

Then the sheriff said, "Where's this go to?" Meaning another door there in the basement. Sheriff led the way, but inside you couldn't see your hand until Mr. Ewalt found the light switch. It was a furnace room, and very warm. Around here, people just install a gas furnace and pump the gas smack out of the ground. Doesn't cost them a nickel—that's why all the houses are overheated. Well, I took one look at Mr. Clutter, and it was hard to look again. I knew plain shooting couldn't account for that much blood. And I wasn't wrong. He'd been shot, all right, the same as Kenyon—with the gun held right in front of his face. But probably he was dead before he was shot. Or, anyway, dying. Because his throat had been cut, too. He was wearing striped pajamas—nothing else. His mouth was taped; the tape had been wound plumb around his head. His ankles were tied together, but not his hands—or, rather, he'd managed, God knows how, maybe in rage or pain, to break the cord binding his hands. He was sprawled in front of the furnace. On a big cardboard box that looked as though it had been laid there specially. A mattress box. Sheriff said, "Look here, Wendle." What he was pointing at was a bloodstained footprint. On the mattress box. A half-sole footprint with circles—two holes in the center like a pair of eyes. Then one of us—Mr. Ewalt? I don't recall—pointed out something else. A thing I can't get out of my mind. There was a steampipe overhead, and knotted to it, dangling from it, was a piece of cord—the kind of cord the killer had used. Obviously, at some point Mr. Clutter had been tied there, strung up by his hands, and then cut down. But why? To torture him? I don't guess we'll ever know. Ever know who did it, or why, or what went on in that house that night.

After a bit, the house began to fill up. Ambulances arrived, and the coroner, and the Methodist minister, a police photographer, state troopers, fellows from the radio and the newspaper. Oh, a bunch. Most of them had been called out of church, and acted as though they were still there. Very quiet. Whispery. It was like nobody could believe it. A state trooper asked me did I have any official business there, and said if not, then I'd better leave . . . I started walking home, and on the way, about half-way down the lane, I saw Kenyon's old collie and that dog was scared. Stood there with its tail between its legs, didn't bark or move. And seeing the dog—somehow that made me *feel* again. I'd been too dazed, too numb, to feel the full viciousness of it. The suffering. The horror. They were dead. A whole family.

Gentle, kindly people, people *I* knew—*murdered*. You had to believe it, because it was really true.⁵⁶

Capote, although a masterful stylist in his fiction, steps out of the way and allows the power of the voices to speak. He does this throughout *In Cold Blood*. He is equally masterful as an interviewer, extracting stories and images from his interviewees. He is also a superb investigator, unearthing letters, correspondence, and introspective scribblings. Perry Smith is one of the two men convicted of these murders. Capote's sensitivity allows him to see deeply into Perry's psychology through artful shaping and editing of Perry's letters and diary. These materials allow the reader to establish a deep empathy for and understanding of Perry's character, his motivations, and even his rage. It would have been ineffective, or certainly less powerful, to describe, through "authorial summary," the horrors of Perry's childhood or incarceration or familial relationships. Perry's own testimony, and the testimony culled from documents and letters, is shaped into a complex and subtle mitigation argument, allowing the reader to emerge with a transformative sense that while the death sentence may match the horror of the crime, there is no logic or fit with the soul of the perpetrator.

* * *

4. *Perspective*

David Lodge observes, "[t]he choice of the point(s) of view from which the story is told is arguably the most important single decision that the [writer] has to make, for it fundamentally affects the way readers will respond, emotionally and morally."⁵⁷ To this insight John Gardner adds, "[i]n contemporary writing one may do anything one pleases with point of view, as long as it works."⁵⁸ What "works" for legal practitioners involves answers to such initial questions as: What, exactly, is point of view? Why should the writer/practitioner privilege one perspective over another? What are the advantages and disadvantages of differing perspectives, and their possible utility in the tool kit of the legal storyteller? Is it

⁵⁶ *Id.* at 64–66 (emphasis added).

⁵⁷ Lodge, *supra* n. 12, at 26.

⁵⁸ Gardner, *supra* n. 12, at 155.

possible, or appropriate, to shift points of view within the text of an argument without “breaking the frame” of the narrative?

A starting point for answers to such questions appears in Gardner’s identification of five common points of view or perspectives in narrative composition.⁵⁹ The “first person” is, perhaps, the most “natural” voice, because it allows the writer to write as he thinks and talks, and to write simply about how he perceives the world.⁶⁰ The second often-adopted narrative perspective, according to Gardner, is the “third person subjective, a point of view in which all the ‘I’s are changed to ‘he’s or ‘she’s and emphasis is placed on the character’s thoughts.”⁶¹ The third “point of view” or perspective Gardner labels is the “third-person objective,” which is “identical to the third-person subjective except that the narrator not only never comments himself but also refrains from entering any character’s mind. The result is an ice-cold camera’s-eye recording. We see events, hear dialogue, observe the setting, and make guesses about what the characters are thinking.”⁶² Fourth, there is the “authorial omniscient point of view.”⁶³ In this fourth voice,

the writer speaks as, in effect, God. He sees into all his characters’ hearts and minds, presents all positions with justice and detachment, occasionally dips into the third-person subjective to give the reader an immediate sense of why the character feels as he does, but reserves to himself the right to judge (a right he uses sparingly).⁶⁴

Finally, Gardner identifies the “essayist omniscient” and differentiates this perspective from that of the authorial omniscient: “The language of the authorial-omniscient voice is traditional and neutral Every authorial-omniscient voice sounds much like every other.”⁶⁵ In contrast, “[t]he essayist-omniscient voice, though it has nearly the same divine authority, is more personal.”⁶⁶ The “essayist-omniscient” voice is more personal because the fact of a speaker, and the identity of the speaker, is intimated by “personal” qualities in the “voice” of the writer.

⁵⁹ *Id.* at 155–159 (setting out points of view).

⁶⁰ *Id.* at 155.

⁶¹ *Id.*

⁶² *Id.* at 157.

⁶³ *Id.* at 157–158.

⁶⁴ *Id.* at 157.

⁶⁵ *Id.* at 158–159.

⁶⁶ *Id.* at 159.

[Note to readers: Literary excerpts illustrating the various “perspectives” are omitted.]

* * *

[Note to readers: This section presents excerpts from legal briefs illustrating techniques such as (1) showing rather than telling; (2) using quotations; and (3) using a limited perspective.]

While David Lodge and John Gardner’s audience is a literary audience in the purest sense, many of the techniques and stylistic innovations they describe are already apparent in the careful choices of legal practitioners. For example, arguing ineffective assistance of counsel and raising powerful mitigating evidence that was not presented in the capital sentence in *Williams v. Taylor*,⁶⁷ defendant’s counsel first speaks of omitted evidence abstractly, based upon a “traumatic childhood,” and a mother who “drank herself into a stupor almost daily while pregnant with him.”⁶⁸ By itself, these abstractions are merely cliché and without impact upon the reader. However, it is the imagery and details from “uncontroverted juvenile records,”⁶⁹ presumably from the notes and direct observations of an “objective” social worker who had visited the family’s home, and who was charged with protecting the children on behalf of the State, that visually capture the quality of Williams’s childhood, and manage to bring “the sordid conditions of Williams’s home” to life for the reader:⁷⁰

Lula and Noah [the parents] were sitting on the front porch and were in such a drunken state, it was almost impossible to get them up. They staggered into the house to where the children were asleep. Terry, age 1, and Noah Jr., age 3, were asleep on the sofa. There was an odor of alcohol on the breath of Noah Jr. . . . Oliver [Olivia] had just awakened and was very sick. She said she was hungry and had been drinking whiskey. Ohair was completely passed out and never could be awakened. He did not have on any clothes

The home was a complete wreck. . . . There were several places on the floor where some one had had a bowel movement. Urine was standing in several places in the bedrooms. There

⁶⁷ 529 U.S. 362 (2000).

⁶⁸ Br. for Petr. at 3, *Williams v. Taylor*, 529 U.S. 362 (2000).

⁶⁹ *Id.*

⁷⁰ *Id.*

were dirty dishes scattered over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash. . . . The children were all dirty and none of them had on under-pants. Noah and Lula were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them. There was stuffed pickle scattered on the floor in the front bedroom.

Noah and Lula were put in jail, each having five charges of neglect placed against them. The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey. When Dr. Harvey examined them, he found that they had all been drinking bootleg whiskey. They were all hungry and very happy to be given milk, even the baby [Terry] drank a pint of milk before stopping. Oliver [Olivia] said they had not had any food all day. Ohair was still so drunk he could not talk.⁷¹

The writer recognizes the power of this imagery, and highlights these paragraphs as a frame for the argument. He does not comment upon the meaning of this evidence. But he has the confidence to present the images, and simply conclude, “Williams’[s] parents were jailed for criminal neglect, and the children were placed in a foster home where they were badly treated before being returned to their parents three years later.”⁷² The understatement serves the vivid imagery well, as it is left to the reader to understand the defendant as a product of his bleak social history. The imagery, conveyed through hard visual detail *invites*—but the understated framing language does not *force*—the reader to enter momentarily into the horrific world of the defendant as a small boy.

But what, specifically, is it in these paragraphs that gives them power? Is it merely that the images are compelling in and of themselves? Is it that the speaker’s voice is that of an objective third party, a social worker who is charged with protecting the children? Or is there something about the style of the presentation itself that is compelling? The stenographic quality of the sentences? The concreteness of the imagery? The use of specific names? The active verbs giving shape to the images? The unmediated quality of the social worker’s storytelling, set prominently at the start of the legal argument? There is a certain awkwardness

⁷¹ *Id.* at 4.

⁷² *Id.* at 4–5.

and almost physical repulsion that the social worker and the reader may feel when forced to look upon the imagery. Perhaps some of the same stylistic devices and strategies that professional writers employ intentionally are here incorporated intuitively or unconsciously to draw the reader into the darkly compelling imagery of this discrete vignette.

The social worker's voice and perspective is that of a camera watching the sequence of events unfolding. The social worker arrives at the home and records in narrative sequence what she looks upon. First, the parents are sitting on the porch, so drunk that it is "almost impossible for them to get up." She follows them "staggering into the house" and there sees the sleeping children. There is the compelling sensory detail as she smells the drunken breath of one child, and then sees another naked child so drunk that he could not be awakened. In the next paragraph she surveys the disarray of the room, so disgusting and congested that the parents could not find any clothes to put on the children. She concludes with the unintended irony and authenticity of observing "stuffed pickle scattered on the floor." The vignette has a third paragraph: the children are temporarily safe at the hospital, yet under the influence of bootleg whiskey; all the children say they are hungry because they had not eaten; the baby drinks a pint of milk; one of the children is so drunk that he still cannot talk.

The details carry a concussive forcefulness that is emphasized through use of concrete detail and visual images captured in the short staccato rhythm of the sentences. Likewise, the power of the details is compressed into a stand-alone vignette, a mini-story with a beginning (the social worker arriving at the house), and a middle (the trouble immediately apparent at the house that deepens as the social worker enters with the drunken parents). At the end of the three-part story structure, the situation is momentarily resolved as the children are temporarily safe at the hospital. The writer of the brief has framed this completed vignette, a story-within-a-story, making it stand out visually for the reader.

The power of images and concrete visual detail do not have to be presented through external voices, however. They may, with equal effect, be presented through the "voice" of the advocate. Thus, for example, in describing a defendant drugged for trial and unable to participate effectively in his defense in *Riggins v. Nevada*,⁷³ the brief-writer implicitly assumes the fixed perspective

⁷³ 504 U.S. 127 (1992).

(the third-person limited perspective) of a juror watching the trial, employing a voice that confidently embodies either an understated irony, or, perhaps, an unstated sense of moral outrage about the defendant's predicament. The writer's emotional response is not translated into explicit rhetoric, and the emotional or psychological response of the writer is not revealed to dissipate the power of simple repetitive visual images. Rather, the writer "stays on the surface"⁷⁴ through the use of equally simple language, and active verbs, to stylistically complement the images. There is purposefulness and economy in the selection of images and in the sentences; these stylistic choices are buttressed by careful selection of quotations, and consistency of perspective, to keep the reader's attention riveted.

The opening in the *Riggins* brief is deceptively simple. Unlike the use of the social worker's perspective in *Williams*, there is a writer's shrewdness and intentionality apparent in the stylistic choices that, at first glance, may seem intuitive. Specifically, the "emotional pivot"⁷⁵ of this narrative argument is captured in a single crucial image that is highlighted repetitively throughout the text of the argument; yet it is an image that does not call attention to itself or make the repetition monotonous or off-putting to the reader. Initially, it is the image of the defendant Riggins sitting as a "zombie" at trial, unable to participate in his own defense, as the jury misinterprets the psychological meaning of his passivity and calmness. The evocative Statement of the Case begins

Petitioner David E. Riggins is presently under sentence of death after he was so heavily drugged by the State of Nevada that he appeared like a zombie throughout his trial. Despite Riggins'[s] objection while competent to receiving medication during his trial, and despite substantial evidence that Riggins would have been competent to stand trial without medication, the State of Nevada forced Riggins to ingest extremely high dosages of the antipsychotic drug Mellaril each day of his trial. The medication sedated Riggins; it made him appear apathetic, uncaring, and without remorse. Riggins was therefore prevented from presenting the best evidence he had—his unmedicated demeanor—to support his only defense—that he was legally insane at the time of the crime.⁷⁶

⁷⁴ Lodge, *supra* n. 12, at 117–120.

⁷⁵ Thanks to Barry Scheck for suggesting this term.

⁷⁶ Br. of Petr. at 2, *Riggins v. Nevada*, 504 U.S. 127 (1992).

After compressing the legal particulars of the case, providing the background of Riggins's illness in a brief, vivid, and straightforward explanation of the psychiatric diagnosis, the writer presents an equally brief and clear description of the effects of the antipsychotic drug Mellaril. He then returns to the image that provides the "emotional pivot" for his argument, which will subsequently be translated into an equally vivid and imagistic legal theme. The writer continues, careful not to make the repetition of imagery monotonous, or to appear overly calculated and precious. That is, the technique does not call attention to itself, or to the language. It does not reveal the writer's deeper intentionality in setting up his legal argument, but "stays on the surface," emphasizing the image of Riggins being force-fed massive over-dosages of Mellaril:

Accordingly, Riggins was forced to ingest 800 milligrams of Mellaril each day of his trial, a dosage every psychiatrist considered excessive. Dr. Jurasky . . . described this dosage as enough to "tranquelize an elephant. . . ." It was no surprise, therefore, that Riggins was seen closing his eyes during the hearing on his motion to terminate the medication and had a zombie-like appearance throughout his trial.

Riggins'[s] sole defense was insanity, and he took the stand to prove this. [The writer then presents a vivid selection of Riggins's delusions from his testimony that allegedly provided the reasons why he was compelled to kill the victim.] The state exploited Riggins'[s] drug-induced demeanor during his trial, and in so doing, directly contradicted its pre-trial representations to the court⁷⁷

The writer explains, by quoting from the prosecutor's closing argument, how the state's expert witnesses and argument focused upon Riggins's demeanor at trial, a condition that they had authorized: "Does Riggins express sorrow, no. Does he express remorse, no."⁷⁸ He then returns to the imagery of the "zombie," and how Riggins's demeanor, caused by the Mellaril, undermined the mitigation arguments based on "extreme emotional disturbance" and "remorse" at sentencing:

Rather than looking like the emotionally disturbed individual that he is, the heavily sedated Riggins sat calmly and impas-

⁷⁷ *Id.* at 6–7.

⁷⁸ *Id.* at 8.

sively through the sentencing hearing. Although he wanted to express the grief and sorrow he felt for killing Wade [the victim], the medication prevented him from doing so, and, in fact, prevented him from reading a statement he had prepared expressing these sentiments.⁷⁹

The elliptical storytelling returns to the image of the zombie that is translated and spun deeply into the fabric of the legal argument. There are careful repetitions that avoid becoming obvious and rhetorically manipulative. The writer begins by describing the ways that the state may permissibly “advance a compelling interest to restrict a defendant’s fundamental right to testify” by the “least restrictive [alternative] available” including the least acceptable of these alternatives in some situations, “binding and gagging the witness.”⁸⁰ The writer then translates the image of the zombie into the imagery of the witness who was effectively “bound and shackled” by the forced ingestion of massive doses of Mellaril preventing him from presenting an effective defense thus violating his right against self-incrimination by “effectively present[ing] evidence against himself by compelling him to appear unremorseful, apathetic and sane.”⁸¹

The image of the defendant, zombie-like, is the emotional pivot at the core of the defendant’s powerful yet simple legal argument. Like the brief writer in *Williams* who, by using quotation effectively, steps back and out of the way of the mini-story told by the social worker, the writer distills and compresses his emotional response into compelling visual imagery. He translates and shapes his comparatively simple legal argument into a law story woven around the image, paring down the story, and employing a writing style as close to the surface of the imagery as possible. This invites even the skeptical judicial reader to respond directly to the powerful and unmediated imagery.

* * *

⁷⁹ *Id.*

⁸⁰ *Id.* at 21.

⁸¹ *Id.* at 17.

B. Plotting

*Plot, let us say in preliminary definition, is the logic and dynamic of narrative, and narrative itself is a form of understanding and explanation.*⁸²

—Peter Brooks

What is plot? Simply put, plot sequences events into a story. Plot provides a meaning to the sequence—a purposeful and intentional context, rather than a random selection of images and scenes, or pieces of perceptions and experiences. Plot points to something larger—a meaning and order beyond the events as merely interchangeable links in a random chain, or discarded pieces in a pile. Formulating the plot of a story implies that there is some causal relationship between the events, that they are more than just a list of unrelated occurrences. The relationship is cumulative; notions of plot make the whole greater than the mere sum of its parts, and the connection of events has a larger significance. What does this mean? First, that a plot “goes somewhere.” It has purpose and trajectory; a forward momentum, as events build purposefully upon one another, directed toward some culmination or termination. An implicit promise is made that with the ending will come revelation of some meaning beyond merely the simple completion of the action.

Peter Brooks observes in *Reading for the Plot*, that the dictionary definitions of the various alternative meanings of plot share a conceptual sense of restraint and “closed shape.” They include: (1) a small piece or measured area of land; (2) a background plan or diagram; (3) a series of events outlining the action of a narrative or drama; or, (4) a secret plan or scheme.⁸³ All these alternatives are characterized by “the idea of boundedness, demarcation, the drawing of lines to mark off and order.”⁸⁴ Plots establish an internal coherence, and this story-logic is violated at the peril of the author who then risks losing the *imaginative attention* of the reader; this is especially crucial for the legal storyteller because the attention of the always-skeptical judicial reader is especially precious.

⁸² Brooks, *supra* n. 27, at 10.

⁸³ *Id.* at 11–12.

⁸⁴ *Id.* at 11.

What are the characteristic pieces of a plot? An initial definition is taken from *Minding the Law*:

A narrative . . . needs a *plot* with a beginning, a middle, and an end, in which particular characters are involved in particular events. The unfolding of the plot requires (implicitly or explicitly):

- (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*.

That is the bare bones of it.⁸⁵

Before analyzing more complex examples from legal storytelling, it may be instructive to provide a brief and simple illustration of this narrative structure in action,⁸⁶ adapted from the narrative primer by the novelist/critic and teacher David Lodge based upon a one-paragraph short story by Leonard Michaels:

THE HAND

I smacked my little boy. My anger was powerful. Like justice. Then I discovered no feeling in my hand. I said, “Listen, I want to explain the complexities to you.” I spoke with seriousness and care, particularly of fathers. He asked, when I finished, if I wanted him to forgive me. I said yes. He said no. Like trumps.⁸⁷

⁸⁵ Amsterdam & Bruner, *supra* n. 2, at 113–114 (emphasis in original).

⁸⁶ For additional illustrations, see introductory essay by Anthony G. Amsterdam, Randy Hertz, and Robin Walker-Sterling in Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, *supra* n. 29.

⁸⁷ Lodge, *supra* n. 12, at 215.

Lodge observes that *The Hand* “conforms to the classic notion of narrative unity”⁸⁸ with its beginning, middle, and end. These three movements are defined in a more pragmatic and economical way than even our austere definition provides: “a beginning is what requires nothing to precede it, an end is what requires nothing to follow it, and a middle needs something both before and after it.”⁸⁹ *The Hand* is an emotionally complex and subtle story, despite the fact that it is only one paragraph long. The first three sentences are the beginning of the story. The initial implicit “anterior” steady-state of presumed domestic tranquility is immediately broken: the narrator has “smacked his little boy.” This clearly marks the arrival of the *trouble* or *conflict* in the story. *Trouble* takes many forms. It may be internal, such as a conflict within the character of the protagonist. Or the *trouble* may be caused by an external force (e.g., an antagonistic force in the environment) or by a clear antagonist (e.g., a villain in melodrama). In *The Hand*, the *trouble* caused by the hand is within, and yet simultaneously, beyond the control of the narrator-protagonist.

The narrator then attempts to describe his emotional state, and identify the nature of the problem: His anger is “powerful. Like justice.”⁹⁰ This movement marks a rapid shift into the middle or what is sometimes referred to as the *progressive complications* of the plot. This movement is marked by the deepening conflict between father and son, and within the psychology of the father. The narrator/father discovers that he has “no feeling in [his] hand.” As Lodge observes, the hand is “both a synecdoche and metaphor for the ‘unfeeling’ parent.”⁹¹

And then the father speaks directly to his son, attempting to justify his actions to resolve the conflict. Here, in the language of our definition, the narrator is *evoking efforts at redress*. That is, the narrator *struggles to return* to the implied prior *anterior steady-state* before he inflicts punishment upon the son and the written narrative begins. “Listen, I want to explain the complexities to you,” the father says, apparently speaking to his son, although it is left to the attention of the careful reader to understand who is speaking to whom.⁹²

⁸⁸ *Id.* at 216.

⁸⁹ *Id.*

⁹⁰ *Id.* at 217.

⁹¹ *Id.*

⁹² *Id.*

Lodge notes Michaels's choice of the adult word "complexities," and the narrator's speaking to his young son with "seriousness and care, particularly of fathers."⁹³ The reader perceives the narrator's discomfort in his struggle for the *return* to reestablish his previous relationship with his son (the implied anterior steady-state of presumed tranquility). There is irony in the father's meticulous choice of words, as the father sensitively attempts to explain the situation to his son—especially when in the previous sentence he admits that he has "no feeling" in his hand, and it seems to operate independently of his will. But, in the end, at the climax, it is the son, perhaps, who truly understands the predicament. The son asks, when the father finishes speaking, "if I wanted him to forgive me" (*not*—as may be anticipated in a "stock" story script that conforms to normative expectation—whether *he*, the son, *is* forgiven after his punishment). Thus, the son attempts a reversal,⁹⁴ and attempts to move forward establishing a new or *transformed* steady-state and a different relationship of power between father and son. And then there is the climax: "I said yes. He said no." There is no clear return to the implied anterior steady-state that preceded the story. Nor is there movement to a different (*transformed*) steady-state identified in our definition. Instead, there remains an uncomfortable disequilibrium or irresolution; the climax does not fully resolve the situation.

The coda acknowledges the situation at the end of the story, as the father stands in a curious and ambivalent relationship with his son, captured in the two-word comment from a card-game metaphor, almost like a stand-off but not quite, "like trumps."

* * *

C. Themes

Closely connected with plot is the concept of narrative theme. The dictionary defines theme as "a subject on which a person

⁹³ *Id.*

⁹⁴ The term from narratology for reversal is "peripeteia." For those interested, a dictionary of narratology defines *peripety* as "[t]he inversion (reversal) from one state of affairs to its opposite. For example, an action seems destined for success but suddenly moves towards failure, or vice versa. According to Aristotle, peripety (peripeteia) is, along with recognition (anagnorisis), the most potent means of ensuring the tragic effect." Gerald Prince, *Dictionary of Narratology* 71 (U. Neb. Press 2003).

speaks, writes, or thinks; a topic of discussion or composition.”⁹⁵ The second definition is, perhaps, even more relevant: a theme is “a subject which provokes a person to act; a cause *of* or *for* action or feeling.”⁹⁶ Also relevant is the definition of theme as “the principal melody or plainsong in a contrapuntal piece; a prominent or frequently recurring melody or group of notes in a composition.”⁹⁷ Characteristically, the narrative theme is deeply embedded in the plot, and the plot often returns to this “recurring melody.”

Robert McKee, the screenwriting teacher, suggests a synonym to help students better understand the concept of *theme* also at the core of plot structure in movie-making:

Theme has become a rather vague term in the writer’s vocabulary. . . . I prefer the phrase *Controlling Idea*, for like theme, it names a story’s root or central idea, but it also implies function: The Controlling Idea shapes the writer’s strategic choices. It’s yet another *Creative Discipline* to guide your aesthetic choices toward what is appropriate or inappropriate in your story, toward what is expressive of your Controlling Idea and may be kept versus what is irrelevant to it and must be cut.⁹⁸

McKee emphasizes that this idea must be expressed, and then proved through depiction of events, without explanation: “Storytelling is the creative demonstration of truth. A story is the living proof of an idea, the conversion of idea to action. A story’s event structure is the means by which you first express, then prove your idea . . . without explanation.”⁹⁹

McKee’s advice to prospective screenwriters regarding theme is applicable to legal storytellers. For example, many post-conviction relief briefs on behalf of condemned inmates are about betrayal—typically betrayal of the defendant by the system and the actors within it—and the failure of the system to operate effectively. A “betrayal story” as an articulation of theme seems flat and generic. It merely identifies a stock script from a generic bag of story themes. Nevertheless, the identification and articulation of a theme, or controlling idea, often enables a lawyer to more care-

⁹⁵ *Shorter Oxford English Dictionary* vol. 2, 3234 (5th ed., Oxford U. Press 2002).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Robert McKee, *Story: Substance, Structure, Style, and the Principles of Screenwriting* 114–115 (Regan Bks. 1997).

⁹⁹ *Id.* at 113.

fully and systematically plot the story; gradually a more sophisticated and particularized narrative theme evolves.

John Gardner observes that the

writer sharpens and clarifies his ideas, or finds out exactly what it is that he must say, testing his beliefs against reality as the story represents it, by examining every element in the story for its possible implications with regard to his theme.¹⁰⁰

This is good advice for the legal storyteller just as for the novelist. To this he adds, “theme . . . is not imposed on the story but evoked from within it—initially an intuitive but finally an intellectual act on the part of the writer.”¹⁰¹ This seems especially true in the creation of compelling legal narratives, in which the plot must be carefully developed in relation to the articulation of an underlying theme, capturing the imagination, emotion, or intellect of the skeptical judicial reader.

* * *

D. Character

“Character is fate for a man.”¹⁰²

—Heraclitus

Character is “arguably the most important single component” of some modernist storytelling forms.¹⁰³ Character is often at the core of legal storytelling as well. But what is character? Is it a composition of psychological traits and attributes? Is it an accumulation of roles and behaviors? Is it a core identity? Is it the shell of physical description? Is it some controlling myth that dominates us, inhabits our soul, and compels us mysteriously in our conduct and behavior? Is it the transposition of “real life” onto the page? Or is character primarily a function of narrative? Do we intuitively adopt certain storytelling notions about character from narratology and folk psychology and fit these into the conventions of legal storytelling?

¹⁰⁰ John Gardner, *The Art of Fiction: Notes on Craft for Young Writers* 70 (Vintage Bks. 1991).

¹⁰¹ *Id.* at 177.

¹⁰² Heraclitus, *Heraclitus*, in G.S. Kirk, J.E. Raven & M. Schofield, *The Pre-Socratic Philosophers* 210, 210–211 (2d ed., Cambridge U. Press 1983).

¹⁰³ Lodge, *supra* n. 12, at 67.

Let us begin by observing that “character” has multiple, disparate and, often, conflicting meanings. As Heraclitus observed, a man’s character is his fate.¹⁰⁴ The Gods, however, at least in his time, were largely in control of the fates and, consequently, of character. Individuality was stolen at the expense of the Gods. Sophisticated and literary notions of complex psychological characterizations, motivations, and individuated personalities simply were not possible. Nevertheless, this long-ago definition anticipates the pragmatic concerns of modernist storytelling, including legal storytelling practices.

The confusions and contradictions in defining and understanding various notions of “character” in modern storytelling, psychology, and philosophy are apparent as we look to provide a clear definition of what character is; even before we begin to address the “technical” dimensions of how to compose and construct characters. David Lodge observes that “character is probably the most difficult aspect of the art of fiction to discuss in technical terms.”¹⁰⁵

For the legal storyteller, just as for the novelist, character is often an important component of narratives, yet equally difficult to distill. Our notions of character and identity enable us to fulfill deep “psychological” needs or yearnings, and, simultaneously, to attribute power and purposeful clear-headed intentions to our actors. Character exists as a crucial component of our legal plot-driven stories, fixing responsibility, establishing causality, and providing meaningful closure to our stories. Thus, character enables us to arrogate the power of an omniscient Deity on behalf of actors who are often held singularly responsible, not only for their own conduct, but also for plotting the consequences of their actions, and knowing in advance how those actions factor into the stories that we later tell. “Character” enables actors to do in narratives what many of us have difficulty doing in our own lives—to control the story and the outcome of the plot through actions determined by some force residing within the actor—that explains the choices she makes, and how and why she exercises her free will to control the outcome of the story.

To clarify—in our legal stories, just as in realist novels, plots do not open outwards upon confusion, nor does an external environment usually dictate events. Despite Heraclitus’s observation, actors are not directed by “the Gods” or by forces outside of them-

¹⁰⁴ Heraclitus, *supra* n. 102, at 210–211.

¹⁰⁵ Lodge, *supra* n. 12, at 67.

selves. We emphasize free will in law stories; causation results from the deliberate choices and decisions of our actors. Further, in narrative persuasion in the law, we specialize in telling “hard,” compressed, plot-based narratives, inviting readers of our briefs to judge actions, make inferences about causation, and assign responsibility, based upon their “readings” of character, especially when there is little else to go on to explain behavior.

* * *

1. *Character Composition*

Vivid character can often be developed economically and elegantly through use of selected details. Depiction of character need not be comprehensive in design. In fact, an overload of psychological description and the baggage of too many identifying details may detract from effective characterization, especially in legal narratives. Effective characterization captures appropriate traits in images, or in careful descriptions, often through the selection of vivid details. These enable the reader to pull the pieces together into a composition—to construct the whole from the closely observed details, and thus, to compose the “character’s character.” What is left out is often as important as what is included. This does not mean that characterization is precious or self-conscious, or that it calls attention to itself in the writing; it flows from the story, as if the narrative and argument compel what is called forth from within. Nevertheless, effective depiction of character in legal storytelling, just as in literature, is a composition of choices that compels the imaginative attention and interest of the reader in the story, and often affords the reader sufficient room to do much of the composing herself.

Second, character does not have to be fixed or static. Characters develop as the story progresses with the actors’ motivations and actions often driving the narrative forward. Alternatively, the full dimensions of characters are typically revealed in the aftermath of dramatic events. Nor does character usually change or “move” at the same speed or trajectory as the plot itself; character may be revealed as actions responsive to the events depicted in the story—what Katherine Anne Porter identifies as “reverbera-

tions.”¹⁰⁶ When asked about “character change,” Hemingway observed, “Everything changes as it moves Sometimes the movement is so slow it does not seem to be moving. But there is always change and always movement.”¹⁰⁷

Third, character can and does indeed imply conduct, not only attributing motivation and explanation to what has already happened, but also foreshadowing what will happen next. That is, the reader intuitively draws upon folk psychology and stock stories, metaphors, and psychological schema, to look forward as well as to look back into the past. Katherine Anne Porter, as she watched her fictional characters head towards their fates, observed,

Every once in a while when I see a character of mine just going towards perdition, I think, “Stop, stop, you can always stop and choose, you know.” But no, being what he was, he already *has* chosen, and he can’t go back on it now. I suppose the first idea that man had was the idea of fate, of the servile will, of a deity who destroyed as he would, without regard for the creature. But I think the idea of free will was the second idea.¹⁰⁸

We illustrate these three observations about character with excerpts from Tobias Wolff’s literary memoir, *This Boy’s Life*.¹⁰⁹ In the first of a sequence of scenes, the reader is introduced to the character “Dwight,” who is a suitor of ten-year-old Tobias Wolff’s beloved mother. Dwight is described physically. Then, in a second scene, Dwight’s character is developed into a central figure in the narrative—Dwight, the distant suitor, will prospectively become Toby’s stepfather: Toby is being driven from Seattle toward his new home with Dwight in rural Washington. On the way, there are revelations of darker aspects of Dwight’s character. The character’s identity is revealed in actions and “reverberations.” The physical details of the initial depiction of Dwight, initially a minor character, now open like porous cracks or fissures upon Dwight’s “soul” as perceived through Toby’s eyes. Dwight emerges as the antagonist.

The compositional structure—through description, then action, and then dialogue—creates narrative momentum and the sense of unease and of foreboding about what will happen next.

¹⁰⁶ *Writers at Work 1963*, *supra* n. 34, at 151.

¹⁰⁷ *Id.* at 233.

¹⁰⁸ *Id.* at 152.

¹⁰⁹ Wolff, *supra* n. 17, at 63.

There is no opportunity for Toby to “stop and choose” on his road to perdition. The language is deceptively simple. The story is bound by the “glue” of the narrative—the conflict between the two characters—and by an emotional intensity and the style of Toby’s voice—by what is unsaid as well as what is revealed in the dialogue itself. The whole is recreated from the pieces vividly in the mind of the reader, as if she is sitting uncomfortably in the car with Toby, watching the boy on his journey toward the fate that awaits him at his new home.

Dwight was a short man with curly brown hair and sad, restless brown eyes. He smelled of gasoline. His legs were small for his thick-chested body, but what they lacked in length they made up for in spring; he had an abrupt, surprising way of springing to his feet. He dressed like no one I’d ever met before—two-tone shoes, hand-painted tie, monogrammed blazer with a monogrammed handkerchief in the breast pocket. Dwight kept coming back, which made him chief among the suitors. My mother said he was a good dancer—he could really make those shoes of his get up and go. And he was very nice, very considerate.

I didn’t worry about him. He was too short. He was a mechanic. His clothes were wrong. I didn’t know why they were wrong, but they were. We hadn’t come all the way out here to end up with him. He didn’t even live in Seattle; he lived in a place called Chinook, a tiny village three hours north of Seattle, up in the Cascade Mountains. Besides, he’d already been married. He had three kids of his own living with him, all teenagers. I knew my mother would never let herself get tangled up in a mess like that.¹¹⁰

* * *

Dwight drove in a sullen reverie. When I spoke he answered curtly or not at all. Now and then his expression changed, and he grunted as if to claim some point of argument. He kept a Camel burning on his lower lip. Just the other side of Concrete he pulled the car hard to the left and hit a beaver that was crossing the road. Dwight said he had swerved to miss the beaver, but that wasn’t true. He had gone out of his way to run over it. He stopped the car on the shoulder of the road and backed up to where the beaver lay.

¹¹⁰ *Id.*

We got out and looked at it. I saw no blood. The beaver was on its back with its eyes open and its curved yellow teeth bared. Dwight prodded it with his foot. "Dead," he said.

It was dead all right.

"Pick it up," Dwight told me. He opened the trunk of the car and said, "Pick it up. We'll skin the sucker out when we get home."

I wanted to do what Dwight expected me to do, but I couldn't. I stood where I was and stared at the beaver.

Dwight came up beside me. "That pelt's worth fifty dollars, bare minimum." He added, "Don't tell me you're afraid of the damn thing."

"No sir."

"Then pick it up." He watched me. "It's dead, for Christ's sake. It's just meat. Are you afraid of hamburger? Look." He bent down and gripped the tail in one hand and lifted the beaver off the ground. He tried to make this appear effortless but I could see he was surprised and strained by the beaver's weight. A stream of blood ran out of its nose, then stopped. A few drops fell on Dwight's shoes before he jerked the body away. Holding the beaver in front of him with both hands, Dwight carried it to the open trunk and let go. It landed hard. "There," he said, and wiped his hands on his pant leg.

We drove farther into the mountains. It was late afternoon. Pale cold light. The river flashed green through the trees beside the road, then turned gray as pewter when the sun dropped. The mountains darkened. Night came on.¹¹¹

* * *

I played the radio softly, thinking I'd use less power that way. Dwight came out of the tavern a long time after he went in, at least as long a time as we'd spent getting there from Seattle, and gunned the car out of the lot. He drove fast, but I didn't worry until we hit a long series of curves and the car began to fishtail. This stretch of the road ran alongside a steep gorge; to our right the slope fell almost sheer to the river. Dwight sawed the wheel back and forth, seeming not to hear the scream of the tires. When I reached out for the dashboard he glanced at me and asked what I was afraid of now.

¹¹¹ *Id.* at 87-88.

I said I was a little sick to my stomach.

“Sick to your stomach? A hotshot like you?”

The headlights slid off the road into the darkness, then back again. “I’m not a hotshot,” I said.

“That’s what I hear. I hear you’re a real hotshot. Come and go where you please, when you please. Isn’t that right?”

I shook my head.

“That’s what I hear,” he said, “Regular man about town. Performer, too. That right? You a performer?”

“No sir.”

“That’s a goddamned lie.” Dwight kept looking back and forth between me and the road.

“Dwight, please slow down,” I said.

“If there’s one thing I can’t stomach,” Dwight said, “it’s a liar.”

I pushed myself against the seat. “I’m not a liar.”

“Sure you are. You or Marian. Is Marian a liar?”

I didn’t answer.

“She says you’re quite a little performer. Is that a lie? You tell me that’s a lie and we’ll drive back to Seattle so you can call her a liar to her face. You want me to do that?”

I said no, I didn’t.

“Then you must be the one that’s the liar. Right?”

I nodded.

“Marian says you’re quite the little performer. Is that true?”

“I guess,” I said.

“You guess. You *guess*. Well, let’s see your act. Go on. Let’s see your act.” When I didn’t do anything, he said, “I’m waiting.”

“I can’t.”

“Sure you can. Do me. I hear you do me.”

I shook my head.

“Do me, I hear you’re good at doing me. Do me with the lighter. Here. Do me with the lighter.” He held out the Zippo in its velvet case. “Go on.”

I sat where I was, both hands on the dashboard. We were all over the road.

“Take it!”

I didn’t move.

He put the lighter back into his pocket. “Hotshot,” he said. “You pull that hotshot stuff around me and I’ll snatch you bald-headed, you understand?”

“Yes sir.”

“You’re in for a change, mister. You got that? You’re in for a whole nother ball game.”

I braced myself for the next curve.¹¹²

* * *

2. *Casting*

What is “casting” and why is it particularly crucial to legal storytellers? Casting relates to (1) the identities of various players in the story—those excluded as well as those included; (2) the timing of the characters’ appearances “on stage”; and, (3) the roles that the various actors play in relation to one another and in relation to the theme of the plot. Casting decisions are critical to develop and transform the narrative theme into the architecture of the plot. The cast of characters determines how the theme is developed into plot. Initially, we identify a brief inventory of relevant questions and related concerns pertaining to casting that may suggest possibilities and options to make a story work more effectively, and to make the story achieve its purpose as a tool for persuasion, transformation, and motivation of the reader.¹¹³ These questions and concerns include: What players are on the roster of potential characters? Who are they, and what kind of beings are they: individuals, groups, corporate entities, abstract concepts? What players are more or less central to the action? Which players are stable, which evolve? (As previously noted, some characters

¹¹² *Id.* at 89–91.

¹¹³ Identified originally in a Persuasion Institute Planning Conference handout adapted from Appendix II to Nancy Morawetz & Anthony G. Amsterdam, *Applying Narrative Theory to Litigation Planning* A-2 (Nov. 20, 1999 dft.), distributed at the Planning Conference for a Possible Persuasion Institute, New York University School of Law Clinical Law Center, May 15–17, 2003 (copy on file with Author).

remain unchanged by the action—their goals, values, motives, attitudes, and emotions are reflections of an identity that remains stable; others progress, regress, vacillate.) What players are active, passive, dominating, or dominated in relation to others? What are the relationships and interdependencies among the players?

* * *

There are many different ways to compose characters, and these methodologies reveal how the writer understands and constructs her world, including the nature and identities of the people or “characters” who inhabit it. This is equally true for the legal storyteller as for the creative artist. Characters’ motivations may often be apparent—simply a desire to achieve a particular result within a scene. Or, motivation may be more complex—a product of past events, embodying subtle situational and environmental influences, etc. Characters in complex narratives are often motivated in ways that explain their actions to the reader and, equally important, provide the reader with belief in the authenticity of the story. Stories of greater complexity or subtlety demand a different approach to characterization. What is omitted is as important as what is included.

The point is that there is no one-size-fits-all approach to characterization. There are multiple possibilities and choices that must be strategically explored and—after the choices are made—artfully executed by the effective practitioner taking into account the purposes she is attempting to achieve, the nature and dynamics of the story itself, and, indeed, the talents, vision, and inclination of the writer/attorney.

* * *

E. A Sense of Place—Settings, Description, and Environments

Beyond the lines of printed words in my books are the settings in which the books were imagined and without which the books could not exist. . . . I'm a writer absolutely mesmerized by places; much of my writing is a way of assuaging homesickness, and the

*settings my characters inhabit are as crucial to me as the characters themselves.*¹¹⁴

—Joyce Carol Oates

This lesson explores settings and the depiction of complete environments, as compelling forces instigating and shaping stories and, indeed, often controlling specific narrative outcomes. While creating a sense of place in stories often does not have the power or significance of “character” in modern storytelling practices, descriptions of settings and environments are more significant than they may initially appear. To underestimate the potential of this important aspect of narrative, or to unintentionally diminish the power of settings and environments by inadvertence rather than strategic planning, is a risky choice. For example, mitigation stories in death penalty cases are often about how environments, rather than characters and human agency, control narrative outcomes. These stories shift responsibility away from individual characters exercising their free will, towards perceiving actions as dictated by environments and factors within those environments. Depicting the force of controlling environments may facilitate understanding and foster empathy, and may even compel imposing an alternative narrative outcome. Often, however, in reading many practitioners’ briefs, settings are minimal and descriptions are underutilized.

* * *

1. *Depicting Settings—A Brief Structural Analysis of a Setting Depicted in Joan Didion’s *The White Album**¹¹⁵

Joan Didion’s essay *The White Album*, in her collection of essays with the same title, is partially, a retelling of the story of the aftermath of the Manson cult murders in Los Angeles in the summer of 1969. The paragraph we analyze is a self-contained descriptive fragment—an elliptical and numbered piece, set in a sequence of carefully arranged and numbered pieces. The arrangement is

¹¹⁴ Joyce Carol Oates, *To Invigorate Literary Minds, Start Moving Literary Feet*, in *Writers on Writing: Collected Essays from the New York Times* 170 (Times Bks., Henry Holt & Co. 2001).

¹¹⁵ Didion, *supra* n. 19. Portions of this analysis are also included in Philip N. Meyer, *Adaptation: What Post-Conviction Relief Practitioners Might Learn from Popular Storytellers about Narrative Persuasion*, in *Law and Popular Culture* vol. 7 (Oxford U. Press 2004).

non-chronological and non-linear, yet, simultaneously, quite systematic and purposeful; there is an apparent narrative logic to the arrangement. Taken together, these pieces tell a story. Although the depiction of setting in the illustrative paragraph may seem like a spontaneous composition, a burst of poetic energy enabling the reader to recall a time and place through sensate fragments suggested by Didion, the evocation of setting is intentional and strategic. Further, this excerpt illustrates a range of techniques that help readers compose the setting for themselves. The excerpt provides a physical and temporal setting and evokes a psychic and internal landscape—a sense of place and a time where “everything was unmentionable but nothing was unimaginable.”¹¹⁶ The reader is transported via this single paragraph, a set-piece of description. Didion makes the setting come alive, and provides a sense of place that is readily familiar, yet simultaneously eerily unfamiliar.

[1] We put “Lay, Lady, Lay” on the record player, and “Suzanne.” We went down to Melrose Avenue to see the Flying Burritos. [2] There was a jasmine vine grown over the verandah of the big house on Franklin Avenue, and in the evenings the smell of jasmine came in through all the open doors. [3] I made bouillabaisse for people who did not eat meat. [4] I imagined that my own life was simple and sweet, and sometimes it was, but there were odd things going on around town. [5] There were rumors. There were stories. Everything was unmentionable but nothing was unimaginable. This mystical flirtation with the idea of “sin”—this sense that it was possible to go “too far,” and that many people were doing it—was very much with us in Los Angeles in 1968 and 1969. [6] A demented and seductive vortical tension was building in the community. The jitters were setting in. [7] I recall a time when the dogs barked every night and the moon was always full. [8] On August 9, 1969, I was sitting in the shallow end of my sister-in-law’s swimming pool in Beverly Hills when she received a telephone call from a friend who had just heard about the murders at Sharon Tate Polanski’s house on Cielo Drive. [9] The phone rang many times during the next hour. These early reports were garbled and contradictory. One caller would say hoods, the next would say chains. There were twenty dead, no, twelve, ten, eighteen. [10] Black masses were imagined, and bad trips blamed. I remember all of

¹¹⁶ Didion, *supra* n. 19, at 41.

the day's misinformation very clearly, and I also remember this, and I wish I did not: *I remember that no one was surprised.*¹¹⁷

There is a great deal going on in this paragraph. The initial sentences [1, 2, 3] describe a scene by selecting details to convey a sense of place. These are not visual details exclusively. Rather they are sensate fragments: sounds, smells, tastes. The "sounds" are of Bob Dylan's "Lay, Lady, Lay," and Leonard Cohen's "Suzanne," popular songs evoking a specific cultural moment. Didion even speaks of going to see "The Flying Burritos," a shorthand for the then popular country-rock band "The Flying Burrito Brothers." The description confidently excludes explanations of these references. The shorthand is sufficient. Likewise, Didion identifies the "smell of jasmine" that comes in through "all the open doors and windows," conveying both inviting sensuality (the jasmine) and vulnerability (through open windows) simultaneously. There is the taste of the bouillabaisse that is made "for people who did not eat meat," implying that there are others who may be predators upon this dangerous landscape.

Didion locates herself here as well, as a character within this scene who imagines that her own life is both "simple and sweet." [4] And then she provides the counterpoint of an interior setting or landscape of psychic dislocation. [5] There are "rumors" and "stories." And there is "this mystical flirtation with the idea of 'sin'—this sense that it was possible to go 'too far,' and that many people were doing it . . ." The personal manifests aspects of a collective psyche: "A demented and seductive vortical tension was building in the community. The jitters were setting in." [6] The interior observations color the exterior landscape in anticipation of what is coming: "[T]he dogs barked every night and the moon was always full." [7].

Here, mid-paragraph, Didion shifts from description to intimations of action; these are echoes of events that have already taken place elsewhere in the city. They seem to bounce off, or resonate from the settings depicted initially in the paragraph, setting up the story that will follow. First Didion locates herself passively "sitting in the shallow end of my sister-in-law's swimming pool in Beverly Hills" when the phone call comes in "about the murders at Sharon Tate Polanski's house on Cielo Drive." [8] The reports are "garbled and contradictory." More dark fragments sur-

¹¹⁷ *Id.* at 41–42.

face and leak out into the world. One caller says “hoods,” the next “chains.” One says, “twenty dead, no, twelve, ten, eighteen.” [9] There are speculations on motives: “[b]lack masses were imagined, and bad trips blamed.” [10] There is, however, one psychological constant in the imagined descriptions—“*that no one was surprised.*”

What, if anything, may the legal storyteller take from a reading of description so personal and idiosyncratic as this one? The aesthetic conventions are seemingly far removed from the work of the lawyer. In John Gardner’s terminology, Didion’s style of description is poetic rather than discursive.¹¹⁸ That is, rather than building up its world “slowly and completely,” it “lights up its imaginary world by lightning flashes.”¹¹⁹ Didion depicts an external landscape through sensate fragments, and, perhaps, simultaneously implies an internal psychic landscape that the writer shares with her readers. Likewise, the premise that external events are called up from or anticipated by a collective consciousness, is something that would seemingly be anathema to, or could not possibly be conveyed by, a legal brief. Or could it? Might a legal brief convey the power of setting, and make the setting into an environment affecting or controlling the narrative outcome? Complete depiction of an environment may provide more than the mere accretion of detail, but can become, instead, a force controlling the outcome of the story.

* * *

2. *A Narrative Critique of an Excerpt from Petitioners’ Brief in Tison v. Arizona*¹²⁰

This lesson concludes with a narrative critique of the initial portion of the Statement of the Case in the petitioners’ brief in *Tison v. Arizona*. In terms of narrative potentials and opportunities, the material in *Tison* is certainly as dramatic and compelling as the material in Didion’s *The White Album* and affords possibilities for constructing transformative narrative. Indeed, in terms of genre, it is the material of classical tragedy. Thematically, the

¹¹⁸ Gardner, *supra* n. 100, at 44–45.

¹¹⁹ *Id.*

¹²⁰ 481 U.S. 137 (1987).

story is about the sins of the father visited upon his sons.¹²¹ The first set-piece of the initial story—the depiction of the crimes that resulted in the petitioners’ convictions for felony murder and sentences of death—is about the sons helping their father, Gary Tison, and his cellmate, Randy Greenawalt, break out of prison. The scene then shifts to the desert, after the jailbreak, and after the Tisons’ car has a flat tire. Gary Tison, his three sons, and Greenawalt flag down and commandeer another car, kidnapping the driver and passengers. Then there is the horror of what takes place after, when Gary Tison and Randy Greenawalt execute the family (a mother, father, their infant son, and fifteen-year-old niece). The legal story picks up after Gary Tison dies in the desert; Donnie Tison is killed in a shootout with the police, and the two surviving sons, petitioners Randy and Ricky Tison, are tried and sentenced to death for felony-murder. There are multiple appeals to the state supreme court in Arizona. In the meantime, between appeals, the United States Supreme Court decides a somewhat analogous case.¹²² The legal narrative in *Tison* is now about whether it is cruel and unusual punishment to execute the two surviving sons, taking into account the sons’ level of participation, and assumptions and inferences about their culpability (*mens rea*). Analytically, it is a complex legal story. But the complexity of the factual narrative of the events that take place in the desert matches, if not exceeds, the complexity of the legal story; in fact, one is inseparable from the other.

¹²¹ Toward the end of his dissenting opinion in *Tison*, Justice Brennan highlights this powerful underlying theme and subtext that seems inescapable, and even cites, in an accompanying footnote, to biblical and literary narrative precursors including *Exodus* 20:5; Horace’s *Odes* III, 6:1; Shakespeare’s *The Merchant of Venice*; and Ibsen’s *Ghosts*. Further, in text, Brennan speculates on *why* the jury sentenced Ricky and Raymond to death, given the public outcry against the family, the fact that the father was already dead, and that the children must pay fully for the sins of the father regardless of culpability:

The urge to employ the felony-murder doctrine against accomplices is undoubtedly strong when the killings stir public passion and the actual murderer is beyond human grasp. And an intuition that sons and daughters must sometimes be punished for the sins of the father may be deeply rooted in our consciousness. Yet punishment that conforms more closely to such retributive instincts than to the Eighth Amendment is tragically [sic] anachronistic in a society governed by our Constitution.

Tison, 481 U.S. at 184 (Brennan, J., dissenting).

¹²² *Enmund v. Fla.*, 458 U.S. 782 (1982).

In terms of the material in this lesson,¹²³ the external settings of the prison jailbreak and the desert are evocative physical landscapes, ripe for description, and the internal psychological environment of the two sons existing within the spell of their powerful father is even more compelling. The appendix, portions of transcripts, and prior opinions provide rich textual sources for this material. These are crucial details awaiting transformation into narrative categories pertaining to the actions and characters of the various players in the drama. These evidentiary “facts” are not mere coloration for the legal argument; they are crucial to it.¹²⁴

Their father dead, the two surviving sons have been convicted of felony-murder and sentenced to die for the murders committed in the desert. Petitioners’ legal argument implicitly foregrounds this narrative, focusing in large measure upon analogizing the

¹²³ We intentionally emphasize depicting the facts over cursory explanations of the law for two reasons: the narrative component, not the legal analysis, is the focus of this text, and the legal analysis, perhaps, can be reconceptualized as flowing from the narrative rather than the other way around.

¹²⁴ Although much of the evidentiary detail is subordinated in the petitioners’ brief and placed in footnotes, or referenced with citations to appendix or record, or omitted altogether, the United States Supreme Court is nevertheless drawn to this compelling material in its opinion. Repeatedly, the Court looks to testimony to better understand petitioners’ internal processes pertaining to issues of culpability and petitioners’ participation in the murders. For example, Justice O’Connor’s opinion looks to “detailed confessions given as part of a plea bargain” but rescinded when the two surviving sons refused to testify against their mother as part of the plea bargain, to better understand what happened in the darkness in the desert (e.g., where the sons were physically at the time of the murder, and what the father was doing and thinking in the moments just before the execution of the Lyons family):

The Lyons and Theresa Tison [the fifteen-year-old niece] were then escorted to the Lincoln and again ordered to stand in its headlights. Ricky Tison reported that John Lyons begged, in comments “more or less directed at everybody,” “Jesus, don’t kill me.” Gary Tison said he was “thinking about it.” John Lyons asked the Tisons and Greenawalt to “[g]ive us some water . . . just leave us out here, and you all go home.” Gary Tison then told his sons to go back to the Mazda and get some water. Raymond later explained that his father “was like in conflict with himself. . . . What it was, I think it was the baby being there and all this, and he wasn’t sure about what to do.”

The petitioners’ statements diverge to some extent, but it appears that both of them went back towards the Mazda, along with Donald, while Randy Greenawalt and Gary Tison stayed at the Lincoln guarding the victims. Raymond recalled being at the Mazda filling the water jug “when we started hearing the shots.” Ricky said that the brothers gave the water jug to Gary Tison who then, with Randy Greenawalt went behind the Lincoln, where they spoke briefly, then raised the shotguns and started firing. In any event, petitioners agree they saw Greenawalt and their father brutally murder their four captives with repeated blasts from their shotguns. Neither made an effort to help the victims, though both later stated they were surprised by the shooting.

Tison, 481 U.S. at 141 (citations omitted).

facts depicted in *Tison* as they related to the United States Supreme Court's then-recent decision in *Enmund v. Florida*. *Enmund* held that imposition of the death penalty upon an accomplice who was the driver of the getaway car in a robbery resulting in murder is disproportional to conviction for felony-murder.¹²⁵ The Tisons' legal argument turns upon persuading the court that *Enmund* is controlling, and that the facts of one case are, as the petitioners' brief put it, virtually indistinguishable from the other. That is, Ricky and Raymond Tison are no more culpable than the defendant in *Enmund*, nor is their degree of participation in the murders readily distinguished from the defendant in *Enmund*.

Nevertheless, a crucial portion of the Statement of the Case describing the crime in petitioners' brief in *Tison*¹²⁶—the depiction of the horrific execution of a young family in the desert—seems minimalist in nature, and comes up short on developing the compelling core story. Nor is the depiction of the events of what took place in the desert, e.g., description of setting and creation of environment, vivid. Nor are the inner worlds, the characters of the various players developed. Consequently, the reader's ability to empathize with or understand the players, their motivations, or their actions is limited,¹²⁷ even though these understandings are crucial to resolving the legal issues of the petitioners' culpability and their degree of participation in the crime. In terms of Hollywood screenwriting vernacular, this narrative is "undercooked," at least in terms of its complex narrative possibilities. The storytelling potential in the material is rich, and alternative choices could have been made. Nevertheless, unlike the excerpt from Didion, there is little that enables the reader to call up the narrative landscape, the various settings, or, perhaps most important, the psychological landscape as perceived by the two surviving Tison brothers, Ricky and Raymond, awaiting sentence of death.

Stylistically, the telling of the story in petitioners' brief is equally flat; there is little that enables the readers to imagistically see or emotionally feel the powerful unfolding of narrative events

¹²⁵ 458 U.S. at 801.

¹²⁶ Br. for Petr. at 7, *Tison*, 481 U.S. 137 (1987).

¹²⁷ Employing E.M. Forester's terms, and using language suggested by the novelist Richard North Patterson at the Planning Conference for a Narrative Persuasion Institute (New York University School of Law, May 2003), Ricky and Raymond Tison are depicted as "flat" rather than "round" characters, even though these are the protagonists at the core of the drama, and it is crucial for the reader to visualize and differentiate them, and also to empathize with them.

that take place from the perspective of either Ricky or Raymond. This is so even though the previous tellings provide this dramatic material, and much of the material is ultimately cited in the majority and dissenting opinions in *Tison v. Arizona*. In the petitioners' brief, however, mere fragments of this material are subordinated into footnotes, and the Statement of the Case avoids directly confronting the narrative conflict, focusing instead upon a story that provides a bare scaffolding for legal argumentation in the body of the brief. Perhaps this design and the subordination of the story to the argument are strategic; the narrative perspective is distanced from the events of the story. But does that distance invite a higher level of abstraction in categorizing the factual circumstances of *Tison* that ultimately disadvantages the petitioners? Perhaps the petitioners' attorney strategized that he did not want the literary dimensions of the material to overwhelm the clarity and simplicity of his legal arguments. In retrospect, would an alternative power-to-weight ratio of facts to law have better served his argument, especially given the closeness of the fit between the narrative and resolution of the legal issues in the argument?

* * *

3. *Excerpt from the Statement of the Case in Petitioners' Brief in Tison v. Arizona*

[1] Petitioners Ricky and Raymond Tison were sentenced to death for killings they neither committed nor specifically intended. [2] Ricky and Raymond were convicted of breaking their father Gary Tison and his jailmate Randy Greenawalt out of prison. [3] They were 18 and 19 years old at the time of the breakout. Neither had any prior felony convictions. They lived at home with their mother and older brother Donald, and visited their father nearly every week during his eleven-year imprisonment preceding the breakout. [4] During those eleven years, Gary Tison was a model prisoner who ran the prison newspaper and assisted the prison administration in quieting a riot and strike in 1977.

[5] Despite his excellent prison record, Gary Tison was refused parole. He planned an escape, with the help of his brother Joseph, his three sons, their mother and other relatives. [6] According to the psychologist appointed by the sentencing court to evaluate petitioners prior to sentencing, "there was a

family obsession, the boys were ‘trained’ to think of their father as an innocent person being victimized . . .” [7] Originally it was not intended for the three sons to participate in the breakout, but eventually they decided to become involved after receiving an assurance from their father that no shots would be fired. And indeed no shots were fired during the breakout.

[8] Two days later, the car that was used for the escape—a Lincoln—experienced a second flat tire, thus incapacitating it. A decision was made to try to flag down a car to use to continue the escape. The car that was stopped—a Mazda—contained the Lyons family, consisting of a husband, a wife, a baby, and a niece named Theresa Tyson (no relation to petitioners.).

[9] Both automobiles were driven down a dirt road off the highway. The family was then placed by the side of the road, and the Tisons’ possessions were placed in the Mazda. The Lincoln was then driven 50 to 75 yards further into the desert. To ensure that the family would not be able to move the Lincoln and alert the authorities, Gary further incapacitated the Lincoln by firing into the car’s radiator. Those were the first shots that were fired during the entire episode.

[10] The father, Gary Tison, then told his sons to go back to the Mazda and fetch a jug of water for the Lyons family. [11] This combination of actions—further disabling the Lincoln and sending his sons to fetch water for the Lyons family—was plainly intended to communicate to Ricky, Raymond and Donnie the reassurance that the Lyons family would not be killed. [12] If there had been a plan to kill them, there would have been no need to waste ammunition in further incapacitating the car or to waste water on people who were going to be murdered. [13] The sentencing court itself found that, “It was not essential to the defendants’ continuing evasion of arrest that these persons were murdered.” Thus, the very “senselessness” of the killings made them unpredictable to Ricky and Raymond.

[14] While in the process of fetching the jug of water, the Tison brothers were shocked to hear the sounds and see the flashes of gunshots in the dark night as their father and Randy Greenawalt opened fire and shot the Lyons family. [15] Either their father had changed his mind at the last minute without telling his sons, or he had deliberately misled them into believing that the Lyons would be left alive with water in the incapacitated Lincoln.

[16] It was for these murders—which were neither committed by Raymond or Ricky Tison nor specifically intended or

planned by them—that Raymond and Ricky Tison were sentenced to the penalty of death.

Several days after Gary Tison and Randy Greenawalt killed the Lyons family, the group was apprehended at a roadblock near Casa Grande, Arizona. The oldest brother, Donnie Tison, was shot in the head during the apprehension and died from his injuries. Ricky, Raymond and Randy Greenawalt were arrested. Gary Tison, the father, initially escaped, but was found two weeks later dead of exposure in the desert.

The three surviving defendants were tried together for crimes committed during the breakout. They were convicted and sentenced to long prison terms. Each was then tried separately for the four murders, convicted and sentenced to death.¹²⁸

4. Annotations, Observations, and Questions for the Reader

These annotations revisit the initial paragraphs of petitioners' Statement of the Case in *Tison* describing the escape and the crimes committed in the desert and provide observations about the descriptions of settings and about other narrative dimensions (e.g., character, plot, narrative structure, and style). The purpose is not to criticize petitioners' brief. Rather, it is to identify alternatives and creative choices. More important, it is to stimulate critical thinking in response to the excerpt. Numbered annotations refer back to the sentences in the Statement of the Case.

[1] The opening sentence provides a strong narrative hook for the reader. The observation that Ricky and Raymond were sentenced for death for killings “they neither committed nor specifically intended” identifies a theme (actual innocence). Stylistically, observe the strong rhythm of the sentence, how it covers a great deal of territory cleanly and forcefully, and arrests the reader's attention.

[2] Note that the reader does not see and is not provided with sufficient detail to visualize either the prison setting or the jailbreak. Scenes, settings, and environments are overlooked, deleted, or dispatched quickly. Likewise, there will be little description in the forthcoming scenes in and of the desert. There is little particularity or sense of place. More important, perhaps, it is difficult for

¹²⁸ Br. for Petr. at 7–12, *Tison*, 481 U.S. 137 (1987) (footnotes and citations omitted).

the reader to locate the various characters, in regards to events that occur, although this is crucial to the legal argument.

[3] We have previously observed that the material is potentially that of a classical tragedy, in which the doomed protagonists are destroyed, physically or spiritually, based upon some weakness or flaw in their character. At the end of a tragedy, the protagonist typically comes to some awareness of what has occurred, and assumes some responsibility for shaping the ultimate outcome. The theme in *Tison* is potentially extremely powerful: The sins of the father are visited upon the sons. Why is this theme so understated and deemphasized in petitioners' brief? If you were to redraft these facts, what alternative choices and decisions would you consider making?

There is nothing in the story that reveals how the acts of the two sons are controlled or manipulated by their dominating, charismatic, and powerful father. Would you incorporate additional "facts" that convey this part of the story?

[4] The father is potentially a terrible and powerful character, a true antagonist. It is the antagonist who often initiates the action and shapes the plot of crime stories. Why is Gary Tison's character not fully developed? Why can't the reader see him more clearly, listen to him talk, see him in action? Instead, he is depicted merely as a "model prisoner" who "ran the prison newspaper" and "assisted . . . in quieting a riot." Later, cited briefly in footnotes, there is some of the psychological testimony, including the conclusion that he is "manipulative and controlling." Is this sufficient? If you wrote this brief, how would you strengthen the depiction of Gary Tison as the antagonist?

[5] The reader is provided limited information to understand the characters of Ricky and Raymond Tison. They are *flat* rather than *round* characters—monochromatic rather than multi-dimensional. The reader cannot readily visualize or differentiate Ricky from Raymond Tison, or construct their identities. The reader is never invited inside their thoughts. Nor can the reader identify precisely where they are located and what they were doing at the moment the murders take place. This material is available. Yet none of this material, e.g., through transcripts, psychological observation, or prior judicial opinions, is directly incorporated into the story (although there are citations in footnotes to the joint appendix). Would it have been more effective to incorporate this additional material directly into the retelling of the story?

[6] Here, a single psychological observation is extracted from a psychologist's report submitted to the sentencing court. Why is this quote selected exclusively? It makes an important psychological assertion, and draws a conclusion regarding the boys' motivation to free their father. But is it sufficient? Does this quote raise as many questions for the reader as it suggests answers? For example, how were the boys "trained"? What is the "family obsession"? Is there some way to further develop this? Where, within the plot structure, would you develop the boys' motivation? How would you do it? Assuming the materials are available to draw upon, what specifically would you want to include in the narrative? Where would you put it?

[7] There is only a single footnote in which Raymond asserts that there was an "agreement with my Dad that no one would get hurt."¹²⁹ Is this sufficient to make this point?

[8] This paragraph provides a transition into the action of the story. The Tisons' car has a flat tire, and the Tisons decide to hijack another car to continue the escape. The initial description focuses with particularity on the make of car, identified as a Lincoln, perhaps to differentiate it from the second car stopped by the Tisons, a Mazda. But in a description that, until now, has been abstract, it seems curious that these details are singled out. In contrast, most of the description is presented with passives. For example, "[a] decision was made to try to flag down a car"—there is no identification of who decided to "flag down" the vehicle to continue the escape, and who did what actions. The reader is left to speculate. The Lincoln "experienced a flat tire, thus incapacitating it." The Mazda "contained the Lyons family," "consisting of a husband, a wife, a baby and a niece named Teresa Tyson (no relation to petitioners)." Does the choice of verbs, the imprecision of the description, the use of passives, serve the story?

[9] Again, does the recurring use of passives work? Or does this technique distance the reader from the events of the story? Does it seem manipulative, as if the writer is intentionally refusing to allow the reader to see what is taking place, and is covering up the petitioners' roles in these events?

[10] What, precisely, did the father say? How did he order the sons to "fetch" the water? Was he trying to get rid of them, because he had murder on his mind and did not want them to know of his decision? This is not made clear, and the reader cannot visualize

¹²⁹ *Id.* at 8.

this crucial sequence. Why isn't this material directly incorporated into the text of the story itself? Instead, in the next sentence, the writer intrudes upon the narrative explaining why Gary sent Raymond and Ricky away, why Raymond and Ricky could not have anticipated the killings [11]–[12], and why “the very ‘senselessness’ of the killings made them unpredictable to Raymond and Ricky.” [13] Are these assertions the most effective strategies for persuading the reader? Are there alternative narrative strategies?

[14] Could the phrase “in the process of” be omitted from the initial sentence in this paragraph? There is an assertion that the Tison brothers “were shocked” to hear the sounds and “see the flashes of gunshots in the dark night.” Is there any “proof” of this assertion? Are there more persuasive ways to depict the boys’ reactions? Again, where were the boys during the murders? What was their physical proximity to the murder scene? Is the phrase “flashes of gunfire in the dark night” a cliché? Do these stylistic choices affect the persuasiveness of the story?

There are several long footnotes of evidentiary information from the joint appendix cited. These footnotes pertain to the boys’ beliefs as to whether their father had intended to commit the murders, and their actions and locations just before and during the murders. Also included in the footnotes is analysis of mistaken inferences in the state’s argument and analysis of the date of the boys’ determination to break their father out of jail. These are important points. But the force of a coherent and focused story may be lost in listing and combining this information in a footnote as the reader has difficulty moving from the plot to the information, and back again to the story. Is there an alternative structural design that would have been more effective?

[16] The petitioners’ attorney provides “closure” to the story of what happened before the trial. The two surviving brothers are captured. Although Gary Tison escapes initially, he subsequently dies in the desert. The story concludes by observing the trials of the defendants and their convictions for the various crimes committed during the breakout, and their trials, convictions, and death sentences for the four murders. Is this ending sufficient? How might the ending be rewritten and strengthened?

* * *

III. CONCLUDING REQUEST

Teaching narrative persuasion signals the future for teaching effective legal advocacy in writing and clinical courses. I hope the initial textual fragments presented in this Essay provide a window that enables readers to briefly view discrete aspects of this possibility. (I reemphasize that the excerpts presented in this Essay are merely fragments from a work-in-progress still in its early stages, and the purpose of this Essay is not to provide a systematic approach to teaching narrative persuasion.) I deeply value the insights, observations, and responses of my professional colleagues in the legal writing community. Consequently, I would appreciate readers' specific and general reactions to the excerpts presented in this Essay; it will be extremely helpful to developing and shaping the larger work. Please send responses in hard-copy to me by mail to Vermont Law School, Chelsea Street, South Royalton, Vermont 05068, or by e-mail (pmeyer@vermontlaw.edu or pmeyer6104@aol.com). In advance, I am grateful for your thoughts, comments, annotations, and ideas.