

**ONCE UPON A TIME, HAPPILY EVER AFTER, AND IN A GALAXY FAR, FAR AWAY: USING NARRATIVE TO FILL THE COGNITIVE GAP LEFT BY OVERRELIANCE ON PURE LOGIC IN APPELLATE BRIEFS AND MOTION MEMORANDA**

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*The law is reason unaffected by desire.*<sup>1</sup>

I. INTRODUCTION

Given that “rule-based analysis is the dominant form of reasoning” used by lawyers,<sup>2</sup> it is probably safe to say that most lawyers would agree with Aristotle’s sentiment. After all, this is how lawyers are taught to think in law school.<sup>3</sup> Three years of their lives are slavishly devoted to the pursuit of logic with little to no emphasis on other forms of reasoning.<sup>4</sup> Therefore, it is not surprising that logic is the primary tool in a lawyer’s toolbox.

Aristotle knew that it takes more than pure logic to effectively persuade an audience. According to Aristotle and other classical rhetoricians, an effective appeal must incorporate three concepts: ethos (the speaker’s credibility), pathos (an appeal to the audience’s

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1. ARISTOTLE, POLITICS 140 (Benjamin Jowett trans., Oxford Univ. Press 1963) (circa 350 B.C.E.).

2. MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 259 (2002); Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 127, 143 (2008).

3. See Chestek, *supra* note 2, at 143–44; Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Fact Sections*, 32 RUTGERS L.J. 459, 462–63 (2001).

4. Chestek, *supra* note 2, at 143.

emotions, values, and beliefs), and logos (the message's logical power).<sup>5</sup> An appeal based on logos is an appeal based on the persuasive power of logic and reason. Through logos an advocate uses rule-based reasoning to persuade his or her audience "through substance and logical argument,' including legal argument based on" statutes, regulations, cases, and policy.<sup>6</sup> The concept of ethos "refers to establishing and maintaining credibility in the eyes of the audience by showing 'intelligence, character, and good will.'" <sup>7</sup> Pathos refers to persuading an audience by appealing to the individual audience member's emotions, values, beliefs, and interests (including their interests in doing justice, being fair, and so on).<sup>8</sup> Narrative reasoning, or storytelling, is one technique that can be used to appeal to logos, ethos, and pathos.

While classical rhetoricians recognize pathos as equal to logos,<sup>9</sup> some legal commentators view appeals to emotions, values, and beliefs as inferior to appeals to reason.<sup>10</sup> The critics of pathos believe that appeals to reason are "rigorous and linear, cold and dispassionate, impersonal and objective"<sup>11</sup>—all traits the law should aspire to. They view the use of narrative primarily as a tool for appealing to pathos and as "insufficiently analytical."<sup>12</sup> Narrative "is seen as literary rather than literal, [as] a matter of emotions and aesthetics rather than cool reason."<sup>13</sup> These critics believe that the use of narrative is "the height of subjectivity"<sup>14</sup> and suggest that "one-sidedness is an

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5. KRISTEN KONRAD ROBBINS-TISCIONE, RHETORIC FOR LEGAL WRITERS: THE THEORY AND PRACTICE OF ANALYSIS AND PERSUASION 101 (2009); SMITH, *supra* note 2, at 22–23.

6. Brian J. Foley, *Applied Legal Storytelling, Politics, and Factual Realism*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 17, 41 (2008) (quoting SMITH, *supra* note 2, at 22–23).

7. *Id.* (quoting SMITH, *supra* note 2, at 23, 103).

8. SMITH, *supra* note 2, at 22.

9. *Id.*

10. Many Western philosophers have preferred abstraction over context. For instance, Plato feared that poets and dramatic storytellers would undermine truth and justice. PLATO, *Republic*, in THE COLLECTED DIALOGUES OF PLATO INCLUDING THE LETTERS 832 (Edith Hamilton & Huntington Cairns eds., Lane Cooper et al. trans., 1961) (circa 380 B.C.E.). Immanuel Kant and John Rawls also valued dispassionate rationality over personal stories and contextual judgments. IMMANUEL KANT, CRITIQUE OF JUDGMENT 199 (J.H. Bernard trans., Hafner Press Publ'g. Co. 1951) (1790); JOHN RAWLS, A THEORY OF JUSTICE 131 (1971).

11. STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND 128 (2001).

12. *Id.* at 125–26.

13. *Id.* at 128.

14. *Id.*

endemic risk of the literary depiction of reality.”<sup>15</sup> Thus, they view narrative as dangerous because it is “a parlor trick designed to draw attention away from the logic of the law”<sup>16</sup> and to lead the audience astray.

Recent developments in cognitive research reveal this to be untrue. In fact, cognitive researchers have discovered that narratives are an inherent way for humans to structure and understand human experience.<sup>17</sup> When faced with a new set of circumstances, humans draw on a pool of “stock stories.”<sup>18</sup> Such stories provide a frame of reference regarding the significance of those circumstances, guide an individual’s interpretation of what happened, and shape that individual’s judgment regarding what should happen in the future.<sup>19</sup> These stock stories “shape [an individual’s] perceptions and reasoning processes, often” without the individual knowing that the stock stories are operating.<sup>20</sup> Their effects are not easily overcome.<sup>21</sup>

Because of the impact narrative has on cognition, narrative is a powerful tool for persuasion.<sup>22</sup> It appeals to all three forms of reasoning—not only does narrative appeal to pathos, as traditionally believed, but it also appeals to ethos and logos. Given that narrative is one cognitive technique that people use to evaluate, interpret, and judge new experiences, its appeal is actually based, at least in part, on reason. Furthermore, given that credibility determinations “are a matter of the same tacit cognitive processes as comprehension,”<sup>23</sup> narrative can also be used to appeal to ethos. Given the way the mind operates (using narrative as a primary form through which to

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15. *Id.* at 133 (quoting RICHARD A. POSNER, *OVERCOMING LAW* 380 (1995)).

16. Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client’s Story Using the Characters and Paradigm of the Archetypal Hero’s Journey*, 29 SEATTLE U. L. REV. 767, 769 (2006). Some commentators view the use of narrative techniques as “cosmetics added to the unadorned face” of logic. Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763, 809 (1995) (quoting GARY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* 148–49 (1992)).

17. Foley, *supra* note 6, at 55.

18. J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 53, 59 (2008).

19. Foley, *supra* note 6, at 68.

20. Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 262 (2009).

21. *Id.* at 299.

22. Foley, *supra* note 6, at 40.

23. WINTER, *A CLEARING IN THE FOREST*, *supra* note 11, at 135.

configure ideas and experience), narrative reasoning can add something to the more traditionally accepted pure logic-based reasoning often employed by lawyers.<sup>24</sup> Thus, in order to be more effective advocates, lawyers should gain an understanding of narrative reasoning and how it can be used to craft more persuasive appellate briefs and motion memoranda.

While many lawyers have recently come to recognize the value of narrative in appellate briefs and motion memoranda,<sup>25</sup> and have endeavored to use narrative as a persuasive tool in those documents, some have undoubtedly done so unconsciously. They have not given any thought to the pool of stories that the facts of their client's case may evoke or to how those stories affect the judgment of their audience, namely the judge. Nor have many lawyers likely devoted attention to the elements of effective storytelling. In other words, they are trying to tell stories without giving any thought to what competing stories may be exerting influence over their audience, or how to tell a good story.

This article proposes that lawyers can draft more persuasive appellate briefs and motion memoranda<sup>26</sup>—documents that convince the court of the authenticity and correctness of the outcome they suggest—by paying more attention to what stories they tell, and to the elements of narrative.<sup>27</sup> To that end, this article first reviews the current state of cognitive research with regard to narrative and establishes the importance of narrative as a tool for persuasion. Next, this article discusses the elements of a story and establishes how they might be used to mold an appellate brief or motion memoranda into a persuasive narrative.<sup>28</sup>

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24. Foley, *supra* note 6, at 63.

25. Chestek, *supra* note 2, at 131.

26. *Id.* at 131–32.

27. The use of narrative may have other consequences as well. By allowing each party to tell his or her story, to be *heard*, the use of narrative will aid the litigants in “buy[ing] into” the legal process. Berger, *supra* note 20, at 285. Furthermore, by using narrative reasoning, a lawyer would avoid overreliance on logic, or rule-based reasoning, which makes efforts at persuasion seem cold and mechanical. By refusing to value abstract principles over human experience, the outcome suggested by the lawyer would convince not only the court and the litigants of the legitimacy of the outcome, but it would have the added benefit of convincing lay persons as well.

28. Chestek, *supra* note 2, at 132.

## II. COGNITIVE DEVELOPMENTS—OR WHY LAWYERS SHOULD USE NARRATIVE REASONING WHEN PERSUADING THE COURT IN APPELLATE BRIEFS AND MOTION MEMORANDA

### A. Cognitive Developments

According to cognitive researchers, human perception and cognition require some interpretive framework with which to construct meaning and reality.<sup>29</sup> Consequently, humans make sense of new experiences by fitting them into “cognitive structures,” or “categories in the mind,” called schemas.<sup>30</sup> Schemas are “mental structure[s] which contain[] general expectations and knowledge of the world”<sup>31</sup> and are based on “simplified models of experiences [an individual has] had before.”<sup>32</sup> Thus, schemas serve as “mental blueprints” that organize an individual’s experiences and knowledge of the world into an existing framework that allows him or her to assess new situations and ideas without having to “interpret things afresh.”<sup>33</sup> Nor does the individual have to go to the trouble of “construct[ing] a diagram of inferences and relationships for the first time.”<sup>34</sup> Thus, schemas allow an individual to conserve mental energy by functioning as a form of “shorthand that transcribes [an individual’s] stored knowledge of the world . . . .”<sup>35</sup> Schemas also help the individual understand people, events, objects, and their relationships to each other in a way that is meaningful “based on what [that individual has] come to believe is natural through experience within a particular culture.”<sup>36</sup> Schemas, therefore, function as cognitive “shortcuts” that transform unfamiliar situations into events that are within an individual’s range of experience.<sup>37</sup>

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29. Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 717 (1994).

30. Clive Baldwin, *Who Needs Facts When You’ve Got Narrative? The Case of P, C & S v. United Kingdom*, 18 INT’L J. SEMIOTICS L. 217, 236 (2005); Berger, *supra* note 20, at 264.

31. Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1133 (2004) (quoting MARTHA AUGOUSTINOS & IAIN WALKER, *SOCIAL COGNITION: AN INTEGRATED INTRODUCTION* 34 (1995)).

32. Sherwin, *supra* note 29, at 700.

33. *Id.*; Berger, *supra* note 20, at 265.

34. Berger, *supra* note 20, at 265.

35. Sherwin, *supra* note 29, at 700.

36. Berger, *supra* note 20, at 265.

37. *Id.*

In order to construct meaning in a new situation, an individual must go beyond the information that the new situation supplies.<sup>38</sup> That is where schemas come into play; schemas allow an individual to fill in the gaps and to “draw inferences about what has happened in the past and about what is likely to happen in the future.”<sup>39</sup> For example, consider the following situation: “John went to a party. The next morning he woke up with a headache.”<sup>40</sup> While no explanation is offered regarding why John had a headache the morning after the party, an individual will have no trouble supplying one.<sup>41</sup> A schema quickly provides the explanation: “[I]t is common knowledge that people drink too much at parties and wake up the next morning feeling hungover.”<sup>42</sup> The schema fills in the gap by tapping into an individual’s inherent knowledge and providing an explanation that goes beyond the information given.<sup>43</sup>

These schemas, or interpretative frameworks, are always at work helping individuals to quickly assess what they “should be seeing and feeling in a given situation.”<sup>44</sup> Consequently, schemas constantly “filter and affect what [an individual] see[s] and think[s].”<sup>45</sup> They function on an unconscious level, shaping an individual’s perceptions and reasoning processes<sup>46</sup> “like a ‘hidden hand’ that shapes how [the individual] conceptualize[s] all aspects of [his or her] experience.”<sup>47</sup>

Narratives, or stories, serve as an interpretative framework in which multiple schema are operating at once. Humans have a “predisposition to organize experience into narrative form”;<sup>48</sup> in fact, “this predisposition toward narrative is . . . as natural to human comprehension of the world as [an individual’s] visual rendering of

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38. Sherwin, *supra* note 29, at 700–01.

39. Baldwin, *supra* note 30, at 236; Chen & Hanson, *supra* note 31, at 1133 (“Schemas ‘guide what we attend to, what we perceive, what we remember and what we infer.’” (quoting AUGUSTINOS & WALKER, *supra* note 31, at 33)).

40. Sherwin, *supra* note 29, at 700.

41. *Id.*

42. *Id.*

43. *Id.* at 701.

44. *Id.* at 700.

45. Berger, *supra* note 20, at 266; Sherwin, *supra* note 29, at 717.

46. Berger, *supra* note 20, at 262.

47. GEORGE LAKOFF & MARK JOHNSON, *PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT* 13 (1999).

48. JEROME BRUNER, *ACTS OF MEANING* 45 (1990); ROBERT P. BURNS, *A THEORY OF THE TRIAL* 159 (1999); Rideout, *supra* note 18, at 57.

what the eye sees.”<sup>49</sup> Consequently, narrative form is “an innate schema” for the organization and understanding of human experience.<sup>50</sup> Because humans learn by interacting with their environment,<sup>51</sup> they understand concepts expressed in the form of stories better than they understand abstract principles.<sup>52</sup> Thus, narratives are “central to [an individual’s] ability to make sense out of a series of chronological events.”<sup>53</sup>

Stock stories, also referred to as master stories or myths,<sup>54</sup> provide ways for an entire culture to interpret certain experiences<sup>55</sup> and are “infused with social meaning.”<sup>56</sup> Stock stories serve as “an idealized cognitive model” of a story that provides a template, or path, for a wide variety of other similar stories to follow.<sup>57</sup> They supply a way of viewing events that allow individuals to understand their experiences and to predict the outcome,<sup>58</sup> offering “mental models” of the ordinary course events should take<sup>59</sup> based on individuals’ preconceived “understandings of common events and concepts, configured into a particular pattern of story-meaning.”<sup>60</sup> These narratives serve as “recipes for structuring experience itself, . . . for . . . guiding the life narrative up to the present [and] directing it

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49. Rideout, *supra* note 18, at 58.

50. BURNS, *supra* note 48, at 159; Rideout, *supra* note 18, at 55, 58.

51. SMITH, *supra* note 2, at 260.

52. *Id.* at 259.

53. Berger, *supra* note 20, at 266; ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 30–31 (2000).

54. Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor and Authority* 7 (August 26, 2009) (unpublished manuscript, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1462570](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1462570)). Stock stories are also referred to as “archetypes,” “meta-stories,” or “scripts.” *Id.*; Berger, *supra* note 20, at 268; Foley, *supra* note 6, at 40; Rideout, *supra* note 18, at 59.

55. Berger, *supra* note 20, at 268; Judith Olans Brown et al., *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 *UCLA WOMEN’S L.J.* 457, 457–58 (1996). Examples of stock stories include the biblical stories of Adam and Eve, Lot’s Wife, Mary Magdalene, King Solomon, etc.

56. Rideout, *supra* note 18, at 59.

57. WINTER, *A CLEARING IN THE FOREST*, *supra* note 11, at 106–13; Steven L. Winter, *Making the Familiar Conventional Again*, 99 *MICH. L. REV.* 1607, 1629 (2001); Berger, *supra* note 20, at 268.

58. ANTHONY AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 17 (2000); Berger, *supra* note 20, at 268.

59. Berger, *supra* note 20, at 268.

60. Rideout, *supra* note 18, at 59; Winter, *Making the Familiar Conventional Again*, *supra* note 57, at 1628–29.

into the future.”<sup>61</sup> Thus, narratives not only allow individuals to predict what will happen in a particular situation, but what they will need to do in response to the circumstances.<sup>62</sup> Moreover, “[s]tock stories not only contain standard models for human action but also allow generalizations about the meaning of those actions.”<sup>63</sup>

In addition to “creating the context in which ideas or events will be interpreted,”<sup>64</sup> stock stories also cast people and things in particular roles.<sup>65</sup> These archetypal roles serve as templates for the characters that may be encountered in a given situation.

Narratives, like other schema, generally operate on a subconscious level. They affect how an individual thinks in any given situation without the individual being aware of their impact.<sup>66</sup> The subconscious effect of narrative allows an individual to make sense of new situations

because [humans] compare what [they] see with a stock of socially transmitted narrative models, each one of them accompanied by a particular social evaluation. The one which most resembles that which [humans] observe renders [their] observation not only intelligible in a cognitive sense; it also provides an evaluation of it.<sup>67</sup>

Thus, stock stories not only function as cognitive shortcuts that provide meaning to a set of events that would otherwise seem random, but they also reinforce traditional cultural and societal values.<sup>68</sup> So while stock stories allow humans to understand new situations by giving them a cognitive framework in which to comprehend those situations, this understanding is attained at the expense of complexity and individuality.<sup>69</sup> Once the individual’s

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61. Berger, *supra* note 20, at 266; Jerome Bruner, *Life as Narrative*, 71 SOC. RES. 691, 708 (2004).

62. Berger, *supra* note 20, at 266.

63. Rideout, *supra* note 18, at 68 (footnote omitted).

64. Edwards, *supra* note 54, at 7.

65. *Id.*

66. Berger, *supra* note 20, at 268; Brown, *supra* note 55, at 458.

67. BERNARD JACKSON, LAW, FACT, AND NARRATIVE COHERENCE 99 (1988).

68. WINTER, A CLEARING IN THE FOREST, *supra* note 11, at 114; Berger, *supra* note 20, at 268; Brown, *supra* note 55, at 458. “Because [humans] produce and communicate stories within a social context,” these stories reflect and reproduce traditional cultural and societal values. Mary Ellen Maatman, *Justice Formation from Generation to Generation: Atticus Finch and the Stories Lawyers Tell Their Children*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 207, 211 (2008).

69. Berger, *supra* note 20, at 268; Brown, *supra* note 55, at 461.



cognitive mind has selected a stock story within which to interpret the situation, that individual's judgments will be based on the assumptions derived from the social knowledge embedded in the story rather than on the unique characteristics of the current situation.<sup>70</sup> Furthermore, the outcome suggested by the stock story will seem inevitable, as though it is the natural result of the events that preceded it.<sup>71</sup> It will be extremely difficult for the individual to deviate from what the story has taught him or her about the world and how it operates once the "biasing effects" of the stock story are triggered. In fact, the only way to change the mind of an individual once a stock story has been triggered is to present the individual with evidence that is relevant (as defined by the activated stock story) and inconsistent with the expectations or inferences created by that interpretive framework.<sup>72</sup> Such evidence will only overcome the biasing effects of the stock story if the individual is not "too cognitively busy" when presented with the information.<sup>73</sup> But even when such evidence is presented under the proper circumstances, the individual will rarely change his or her mind.<sup>74</sup> On the rare occasion when an individual does change his or her mind, the change will generally be slight.<sup>75</sup>

### B. How Lawyers Can Use Narrative Techniques to Their Advantage

What do the cognitive developments regarding narrative mean for lawyers? The importance of narrative to cognition and the fact that humans understand concepts expressed in the form of stories better than they understand abstract principles<sup>76</sup> mean that narrative reasoning is an essential tool in the lawyer's toolbox and should not

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70. Berger, *supra* note 20, at 299; Chen & Hanson, *supra* note 31, at 1231.

71. Berger, *supra* note 20, at 265; *see, e.g.*, David F. Chavkin, *Fuzzy Thinking: A Borrowed Paradigm for Crisper Lawyering*, 4 CLINICAL L. REV. 163 (1997).

72. Chen & Hanson, *supra* note 31, at 1229–30. If the evidence is not relevant according to the activated schema, then it will be ignored so as to conserve mental energy. *Id.* at 1229. On the other hand, evidence that does not fall within the expectations or inferences of the schema requires the individual to do more cognitive work in order to find an acceptable niche for it. *Id.* at 1230.

73. *Id.* at 1229; Berger, *supra* note 20, at 299 (quoting Chen & Hanson, *supra* note 31, at 1228–30). When an individual's mind is cognitively busy, he or she must resort to cognitive shortcuts like narratives or schemas in order to conserve mental energy. Chen & Hanson, *supra* note 31, at 1229.

74. Berger, *supra* note 20, at 299; Chen & Hanson, *supra* note 31, at 1231.

75. Berger, *supra* note 20, at 299; Chen & Hanson, *supra* note 31, at 1231.

76. SMITH, *supra* note 2, at 259.

be ignored.<sup>77</sup> The effects of stock stories on cognition make narrative more than just a literary tool used to persuade an audience. Narrative “does more than put logical propositions and legal arguments into narrative form.”<sup>78</sup> The structure and understanding offered by narrative is itself “analytic, forming an essential part of the basis for making judgments about the outcome of the [case] and thus serving as an important part of the formal legal process.”<sup>79</sup> In fact, given that narrative is a cognitive method of finding meaning in a series of events, “there is no difference in kind between [narrative] and more orthodox argumentation.”<sup>80</sup> “[N]arrative is just a particularly powerful kind of rational argument.”<sup>81</sup>

Narrative reasoning, however, goes deeper than simply appealing to logic and reason. Narrative reasoning, through the embedded knowledge structures associated with particular stock stories, also appeals to an audience’s emotions, values, and beliefs. In addition, the same process that an individual uses to comprehend new experiences also shapes that individual’s view of the lawyer-writer’s credibility.<sup>82</sup> If the story the lawyer tells does not comport with the court’s understanding of the world, the lawyer’s credibility suffers. The court will view the story, and the outcome suggested by the lawyer, with skepticism.

Therefore, the “deeper” logic of narrative reasoning can add to the more traditional models for legal argumentation,<sup>83</sup> namely rule-based reasoning. By using narrative reasoning in conjunction with pure logic-based reasoning,<sup>84</sup> lawyers can make more sophisticated

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77. Berger, *supra* note 20, at 263.

78. *Id.* at 268.

79. Rideout, *supra* note 18, at 54.

80. WINTER, A CLEARING IN THE FOREST, *supra* note 11, at 126.

81. *Id.* at 106.

82. *See id.* at 135.

83. Rideout, *supra* note 18, at 60.

84. One commentator refers to the dual strands of rule-based reasoning and narrative reasoning as “the DNA of persuasion.” Chestek, *supra* note 2, at 137. Chestek based his description of rule-based reasoning and narrative-based reasoning as the DNA of persuasion on Robert Burns’s observation that trial lawyers

construct their case from a double helix of norms. One of those strands is constituted by the law of rules. The other strand is constituted by the norms that find their natural home within the life-world of the judge and jury. These common sense norms are embedded primarily in the different sorts of narratives that the trial lawyer may employ at trial.

*Id.* (quoting Robert P. Burns, *Studying Evidence Law in the Contest of Trial Practices*, 50 ST. LOUIS U. L.J. 1155, 1171 (2006)).

appeals to logos, as well as appeals to ethos and pathos. In fact, efforts at persuasion that combine pure logic-based and narrative reasoning will be more effective because the audience will view the recommended outcome as more authentic than it would otherwise seem. The use of narrative reasoning will not only demonstrate to the court that it is legally permissible to rule in the client's favor but it will also give "the court a reason to *want* to rule in favor of the . . . client."<sup>85</sup>

While the deeper cognitive effects of narrative are well and good, how can lawyers use narrative on a more practical level? Stock stories are a pitfall for the unwary lawyer, given that they work beneath the surface to free us from the necessity of critical thinking,<sup>86</sup> reinforce traditional cultural views, make certain preordained outcomes seem inevitable, guide our judgments and evaluations in new situations, and make it difficult for us to see beyond what the stories teach. Therefore, in order to be effective advocates for their clients, lawyers must be able to recognize the stock stories that the facts of their client's case may trigger.<sup>87</sup> Lawyers must also be aware of the limiting and potentially harmful effects that some of those stories may have on their client's case.<sup>88</sup> Consequently, if one possible stock story will further an outmoded cultural view harmful to the client's case, it is imperative that the lawyer successfully match the client's story to an alternative story that reinforces views beneficial to the client.

For instance, say a lawyer represents a client who seeks to maintain primary custody of her daughter, Mary.<sup>89</sup> "The client has a

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85. Chestek, *supra* note 2, at 147. Richard Neumann describes this process as providing both motivating arguments, which make the court *want* to rule in a certain manner, and justifying arguments, which are based on the law and *allow* the judge to rule in that manner. RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY AND STYLE* 319–323 (5th ed. 2005); Chestek, *supra* note 2, at 137 n.33. Neumann states:

A persuasive theory is a view of the facts and the law "intertwined together" that justifies a decision in the client's favor and motivates a court to make that decision.

A persuasive theory explains not only *what* happened but also *why* through a compelling story that "has both rational and psychological appeal" and this is "persuasive both to the mind and to the heart."

NEUMANN, *supra*, at 305 (quoting DAVID BINDER & PAUL BERGMAN, *FACT INVESTIGATION: FROM HYPOTHESIS TO PROOF* 140, 184 (1984)).

86. Berger, *supra* note 20, at 268; Brown, *supra* note 55, at 458.

87. Berger, *supra* note 20, at 305; Edwards, *supra* note 54, at 2.

88. Edwards, *supra* note 54, at 2.

89. Berger, *supra* note 20, at 304.

full-time, low-paying job, and Mary is cared for during the day by other caregivers.”<sup>90</sup> On the other hand, “[t]he more affluent former spouse has remarried and re-formed a ‘family’” that falls into our tradition view of the family (“a married husband and wife, one or more children, and a division of responsibility between wage-earning and care-giving”).<sup>91</sup>

Given that child custody cases generally arise in the context of the breakup of a marriage, the underlying theme is often that “divorce is a tragedy for lovers or a battleground for combatants.”<sup>92</sup> Thus, the focus is on the husband and wife, and their actions will be associated with ending the marriage and splitting up the family.<sup>93</sup> When we think of divorce (and consequently child custody issues) we think in terms of broken homes and broken families.<sup>94</sup> The solution seems easy—“we need to repair the family.”<sup>95</sup> The family could be repaired in several ways: by marrying off a “single” mother, by getting a “working” mother to return to her role as a nurturer,<sup>96</sup> or giving custody to the parent who has formed a new family. Because the single parent client and her child do not fit the traditional image of family, it will seem inadequate and not within the best interests of the child.<sup>97</sup> “[T]he client will lose the contest of beneath-the-surface images”<sup>98</sup> and will, consequently, lose custody of Mary to her former husband, who has reformed a traditional nuclear family. The lawyer needs to find an alternative story to tell.

The lawyer could tell a story not about the broken nuclear family, but about the need to preserve the child’s relationships with all the important people in the child’s life.<sup>99</sup> The focus of this story would be not on the husband and wife, but on the parents, as well as on the other individuals who play a role in the child’s growth.<sup>100</sup> This

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90. *Id.*

91. *Id.*

92. *Id.* at 306.

93. *Id.*

94. *See id.* at 301.

95. *Id.*

96. *Id.*

97. *Id.* at 304.

98. *Id.*

99. *Id.* at 306.

100. *Id.*

story is about the future, about supporting the child, not about the end of a marriage or the breakup of the family.<sup>101</sup>

In the absence of a suitable alternative, a lawyer must find ways to present his or her client's story from a different perspective, one that will not evoke the unfavorable embedded knowledge structures triggered by stock stories.<sup>102</sup> These unfavorable knowledge structures can be avoided by looking at the information afresh—taking facts out of context, taking a contrarian view, moving from the initial view of the story to one that is more specific or more general, presenting contradictory information, or creating a new label or category.<sup>103</sup> These techniques enable a lawyer to tell a “counterstory,”<sup>104</sup> which “make[s] the familiar strange”<sup>105</sup> and presents the client's circumstances with “new eyes.”<sup>106</sup> Consequently, these counterstories “may overcome the mind's natural tendency to take [cognitive] shortcuts” that transform unfamiliar situations into events that are within an individual's range of experience.<sup>107</sup> These “[c]ounterstories . . . can open new windows into reality, showing us that there are possibilities for life other than the ones we live . . . .”<sup>108</sup> Using stock stories that are favorable to the client or techniques designed to short-circuit the generic structure and understanding that is provided by stock stories will enable judges to more closely examine the actual situations and contexts of the individual litigant's case.<sup>109</sup> Thus, the effective use of narrative may allow “the decision making process [to] better accommodate individual circumstances.”<sup>110</sup>

Despite the fact that lawyers should tell stories that avoid unfavorable embedded knowledge structures, it is important to remember that the stories lawyers tell should “take a familiar form, assuring the judges . . . that the outcome follows as night follows

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101. *Id.*

102. See Berger, *supra* note 20, at 299–300.

103. *Id.* Think of these alternative views as looking “from the outside in [or] from the inside out.” See BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* ix (1984).

104. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2414 (1989).

105. See generally AMSTERDAM & BRUNER, *supra* note 53, at 1 (explaining that unlike other books, the intent of this book is to make “strange again” that which is already familiar).

106. Berger, *supra* note 20, at 300 (construing AMSTERDAM & BRUNER, *supra* note 53, at 1).

107. *Id.* at 299.

108. Delgado, *supra* note 104, at 2414.

109. See Berger, *supra* note 20, at 305.

110. See *id.* at 306.

day.”<sup>111</sup> The story a lawyer tells on behalf of the client must be plausible.<sup>112</sup> It must correspond with what the judge “knows about what typically happens in the world” and not contradict that knowledge.<sup>113</sup> The lawyer needs to convince the judge that the events in her client’s story “could . . . have happened that way”<sup>114</sup> because the client’s narrative comports with the model provided by a stock story.<sup>115</sup> Thus, when drafting a client’s narrative, a lawyer must be sure to organize the evidence so that it “makes logical sense based on the [judge’s] experience with stories and expectations of how a story will develop and end.”<sup>116</sup>

### III. ELEMENTS OF A STORY—OR HOW TO DRAFT A PERSUASIVE NARRATIVE

Given that lawyers should use narrative techniques to draft more persuasive appellate briefs and motion memoranda, this article next examines how to tell an effective story. While it is true that many lawyers tell stories during jury trials or in the facts section of a brief or motion memorandum, they should also be more conscious of narrative during the structuring and drafting of the argument section of those documents. Lawyers can improve the stories they tell by using effective storytelling techniques in both the facts and argument sections of briefs and motion memoranda.

Many elements help a writer tell an effective story: character, conflict, plot, point of view, setting, theme, voice, and style.<sup>117</sup>

111. *See id.* at 285.

112. *See Rideout, supra* note 18, at 66.

113. *See id.*

114. *See id.* (quoting BURNS, *supra* note 48, at 168).

115. *See id.* at 67. *See also* W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 50 (1981) (noting that the groups of connections and various constraints in a story help the listener to use background information to draw appropriate inferences); BERNARD S. JACKSON, LAW, FACT AND NARRATIVE COHERENCE 58–59 (1988) (arguing that a story appears credible so long as it is in concert with the social models already known to a jury).

116. *See* James Parry Eyster, *Lawyer as Artist: Using Significant Moments and Obtuse Objects to Enhance Advocacy*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 87, 89 (2008) (citing BENNETT & FELDMAN, *supra* note 115, at 8–10).

117. *See* Chestek, *supra* note 2, at 137; Foley & Robbins, *supra* note 3, at 466. Some overlap occurs between the elements. Chestek, *supra* note 2, at 138 n.38. For instance, characterization and point-of-view are very closely related concepts. *Id.* The elements of conflict and theme are closely related as well. *See* Foley & Robbins, *supra* note 3, at 469 (“How the writer defines the conflict defines the ‘theme.’”). However, this article will discuss each of these elements separately because, while related, they are not the same.

Because legal writing convention requires a lawyer to use a formal style, the elements of style and voice are largely determined by legal writing conventions;<sup>118</sup> thus, this article will not discuss those elements of a story. Additionally, point of view (the perspective from which the story is told)<sup>119</sup> is largely determined by legal writing convention. While a fiction writer may write a story in the first person,<sup>120</sup> the limited third person, or the third person omniscient,<sup>121</sup> the point of view available to a lawyer is more limited. When crafting a narrative, a lawyer may not use the first person point of view (or his or her own point of view) because that perspective would improperly interject the lawyer into the controversy, resulting in a loss of credibility.<sup>122</sup> Furthermore, a lawyer cannot use the omniscient third person point of view because the lawyer is not a god—the lawyer is not privy to the thoughts, senses, and emotions of all the parties to the litigation.<sup>123</sup> Attempting to seem so would seriously undermine the attorney's credibility.<sup>124</sup> Thus, lawyers generally use only the limited third person point of view<sup>125</sup> and tell the story from their client's perspective.<sup>126</sup> After all, it is the client's story; it only makes sense to tell it from the client's point-of-view.<sup>127</sup> Finally, if a lawyer

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118. See Foley & Robbins, *supra* note 3, at 466.

119. *Id.* at 479.

120. The writer uses "I" when writing from the first person point-of-view.

121. The third person point-of-view uses "he," "she," "it," and "they." With the omniscient third person point-of-view, the narrator is not a part of the story, but knows everything about the characters in the story, including their thoughts and actions. With the limited third person point-of-view, the narrator experiences the story through the thoughts and senses of just one character, generally the protagonist. The narrator may know everything about that character, including all his or her thoughts and emotions, but the narrator cannot describe things that are not known by the character.

122. Chestek, *supra* note 2, at 145.

123. See *id.*

124. See *id.*

125. See *id.*

126. *Id.*; Foley & Robbins, *supra* note 3, at 479. While lawyers generally tell the story from their client's perspective, occasions may arise where it is effective to tell the story from the opposing party's point-of-view:

For example, a lawyer representing a corporation defending against an employment discrimination suit, in a brief on the issue of damages, may discover that the plaintiff has fared well since she was fired. Perhaps she has landed a job she enjoys. As a result, the lawyer may write the facts section for the brief on this issue from the [point-of-view] of the plaintiff, detailing her situation to show that the damages are not so great as alleged.

Foley & Robbins, *supra* note 3, at 480.

127. See Foley & Robbins, *supra* note 3, at 479.

attempted to tell the story from the opposing party's point of view, it would undermine the lawyer's credibility.<sup>128</sup> The lawyer is not privy to how the opposing party perceived the events that occurred, nor does the lawyer know what motivated the opposing party.<sup>129</sup>

While style, voice, and point of view are largely determined by legal writing convention, the remaining elements are not. Thus, the elements of conflict, character, setting, plot, and theme will be examined.

### A. *Defining the Conflict*

When developing a story to explain the case, a lawyer should begin by defining the conflict. Why? Because “[s]tories *need* conflict.”<sup>130</sup> Conflict fuels the story<sup>131</sup> and captures the reader's interest.<sup>132</sup> The reader wants to understand how the conflict began “and how it [should] be resolved.”<sup>133</sup> Luckily for lawyers, each lawsuit comes with a ready-made conflict.<sup>134</sup> Conflict is the reason the parties are in litigation; conflict is what brought the parties before the court. But, while litigation comes with a ready-made conflict, the difficulty lies in how a lawyer *defines* that conflict. Defining the conflict is essential to success because the conflict determines “how a reader will want the conflict resolved.”<sup>135</sup>

Conflicts fall into several well-recognized categories: person versus person, person versus self, person versus society, person versus machine, person versus nature, person versus God, and God versus everyone.<sup>136</sup> When deciding how to define the conflict in a legal writing context, the lawyer should remember that presenting the

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128. Chestek, *supra* note 2, at 145.

129. *Id.*

130. Foley & Robbins, *supra* note 3, at 469 (emphasis added).

131. *See* Chestek, *supra* note 2, at 140.

132. *See id.* at 140–41.

133. *Id.* at 141.

134. Foley & Robbins, *supra* note 3, at 470.

135. *Id.* Lawyers should think of conflict definition as “issue framing,” or problem construction, a skill with which lawyers are familiar. *See id.* Every time a lawyer drafts a motion memorandum or brief, he or she must frame the issue in a manner that will aid the arguments made later in the document. This same skill is used when defining the conflict for narrative purposes. By viewing the issue framing process as conflict definition, lawyers can focus their presentation of the events in the case in a more uniform, concrete manner.

136. JOSIP NOVAKOVICH, FICTION WRITER'S WORKSHOP 74–75 (1995); Foley & Robbins, *supra* note 3, at 469. *See also* JANET BURROWAY & ELIZABETH STUCKEY-FRENCH, WRITING FICTION: A GUIDE TO NARRATIVE CRAFT 263 (7th ed. 2007).



conflict as person versus person is seldom effective.<sup>137</sup> This is true even with regard to causes of action that seem naturally to fall into the person versus person category, such as negligence, defamation, and breach of contract cases.<sup>138</sup> Conflicts defined as person versus person are difficult to present because no person is entirely good or entirely evil.<sup>139</sup> Attempts to make a client seem entirely good or the opposing party seem entirely evil will be seen as unrealistic.<sup>140</sup> Presenting a party as such will harm the lawyer's credibility and make everything else he or she says suspect.<sup>141</sup> Furthermore, presenting the conflict as person versus person may cheapen the situation by making the dispute seem like nothing more than a personal dispute in which society, and the court, has no greater interest.<sup>142</sup>

How, in a practical sense, should a lawyer define a conflict in a particular case? Several examples are included here. First, in criminal matters, the prosecution will define the conflict as person versus society.<sup>143</sup> From the prosecutor's perspective, the defendant's criminal act did not just harm the victim; it harmed society as a whole. Defense attorneys, on the other hand, will rarely, if ever, wish to present the conflict as person versus society. Rather, defense attorneys representing clients whose behavior is induced by alcohol, drug addiction, or mental illness may find it helpful to define the conflict as person versus self.<sup>144</sup> By presenting the client as struggling against addiction or mental illness, a lawyer may tap into the audience's natural desire to provide assistance.<sup>145</sup> In a criminal matter, this strategy may result in the client spending less time in

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137. Foley & Robbins, *supra* note 3, at 472, 482.

138. See Chestek, *supra* note 2, at 141.

139. See generally Foley & Robbins, *supra* note 3, at 472 (arguing that it is difficult to construe any one individual as totally good or to cast one's opponent as entirely evil).

140. See Chestek, *supra* note 2, at 142.

141. See generally Foley & Robbins, *supra* note 3, at 472 (arguing that attorneys must be cautious in the way they define any particular conflict because the strategy of casting one's own client as entirely good while casting the opposing party as completely evil can backfire).

142. See generally Chestek, *supra* note 2, at 142 (describing a case where the litigant chose to frame the issue as her against society rather than her against another, placing blame upon the legislature for the situation existing in the first place).

143. See *id.* at 141.

144. See Foley & Robbins, *supra* note 3, at 474.

145. See generally *id.* at 470 (arguing that when the conflict is framed as the individual vs. self, readers want the person's "better nature" to come out on top).

prison, or receiving much needed drug rehabilitation or mental health treatment.<sup>146</sup>

When dealing with an opposing party who is a government, business, or otherwise powerful entity, defining the conflict as person versus society or as person versus machine may be helpful.<sup>147</sup> A lawyer can evoke the David versus Goliath story,<sup>148</sup> or other images of a powerful entity (or bully) versus a smaller, weaker opponent (the “little guy” or underdog).<sup>149</sup> In such a situation, many audience members will sympathize with and root for the little guy because they want the underdog to succeed.<sup>150</sup>

Defining the conflict as person versus society may be useful when a client is on the fringes of society or has been marginalized by society and then subjected to discriminatory laws. Any time society (through the legislature) decides that a group of persons (whether that group is defined based on a characteristic such as race, religion, gender, sexuality, etc.) has fewer rights than the majority, defining the conflict as person versus society allows the lawyer to convey “the personal disaster that the legislature’s unilateral and sweeping choice would cause in the” client’s life.<sup>151</sup> Thus, in civil rights or equal protection matters, where societal discrimination may be engrained in the laws, defining the conflict as person versus society allows the lawyer to focus on the devastating effects that such institutionalized discrimination will have on the lives of individuals.<sup>152</sup>

On the other hand, a lawyer may wish to define a conflict as person versus machine<sup>153</sup> rather than as person versus society when the opposing party is a powerful institution, leader, or entity rather

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146. *Id.* at 474.

147. *See id.* at 470.

148. 1 *Samuel* 17:40–51.

149. *See* Foley & Robbins, *supra* note 3, at 470. For example, in the Justice Department’s antitrust case against Microsoft, Inc., both parties portrayed the conflict as one of person versus machine. *Id.* at 471. Microsoft, Inc. presented the United States Government as a machine that was trying to crush Bill Gates, the person (and, consequently, innovation). *Id.* The Justice Department “responded in kind.” *Id.* It presented Microsoft, Inc. and Bill Gates (“the richest man in the world”) as the machine trying to crush “all the budding computer companies” (and, consequently, innovation and competition). *Id.*

150. *Id.* at 470.

151. Chestek, *supra* note 2, at 142.

152. *See id.*

153. NOVAKOVICH, *supra* note 136, at 74–75. This conflict, person versus machine, can also be articulated as person versus institution, person versus leader, or person versus powerful entity. Foley & Robbins, *supra* note 3, at 469.

than a discriminatory law. It is not difficult to envision the government, with its bureaucracy, as a cold, impassive machine that grinds along as the gears of efficiency turn. Nor is it difficult to imagine the government or a large corporation as an automaton that seeks to crush its smaller, weaker opponent under the weight of its might.<sup>154</sup>

### B. Theme

In literary writing, the theme is the main point that the story is making;<sup>155</sup> it is the lesson that the author wants the reader to take away from the story.<sup>156</sup> In other words, the theme is the “moral of the story.”<sup>157</sup> It is “the overarching, seemingly universal ‘plight that a story is about: human jealousy, authority and obedience, thwarted ambition.’”<sup>158</sup>

In legal writing, the theme is the “theory of the case.”<sup>159</sup> It is the “overriding message” that the document should convey to a reader.<sup>160</sup> The theme “is an idea on which a decision can be based”<sup>161</sup> or “the ultimate reason why the client should prevail.”<sup>162</sup> “A good theme is a statement about the law, the facts, or about how the law and the facts intersect, and it is a statement that is true even in the face of [an] opponent’s best argument.”<sup>163</sup> A good theme will be consistent with

154. See example *supra* note 149.

155. See SMITH, *supra* note 2, at 51.

156. Chestek, *supra* note 2, at 146.

157. *Id.* The theme may be a moral point, but it may also be an ethical point, a general principle, or a logical resolution of a conflict. JOEL WINGARD, LITERATURE: READING AND RESPONDING TO FICTION, POETRY, DRAMA, AND THE ESSAY 1714 (1996).

158. Berger, *supra* note 20, at 267 (quoting Bruner, *Life as Narrative*, *supra* note 61, at 696).

159. LINDA H. EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS AND ORGANIZATION 327 (4th ed. 2006). At the trial level, the theme is referred to as the “theory of the case.” NEUMANN, *supra* note 85, at 305. However, when the court must resolve a motion or an appeal, the theme may be referred to as the “theory of the motion” or as the “theory of the appeal.” *Id.*

160. Chestek, *supra* note 2, at 146 (quoting RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENTS 197 (2d ed. 2003)).

161. NEUMANN, *supra* note 85, at 305. When resolving a matter, “judges need more than raw information about the law and the facts. They make decisions by *choosing between theories*, and you will lose if your adversary’s theory is more attractive than yours is.” *Id.*

162. ROBBINS-TISCIONE, *supra* note 5, at 180.

163. MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 38 (2d ed. 2006). A theory of the case, or theme, “combines appeals to logic, emotion, and credibility in the form of factual, legal, and policy arguments, but the emphasis is on emotional appeals.” ROBBINS-TISCIONE, *supra* note 5, at 180.

the facts of the case, explain away as many of the unfavorable facts as possible, and have a solid basis in the law.<sup>164</sup> Moreover, a good theme will “cast [the] client in a sympathetic light” and will be consistent “with a common sense notion of fairness.”<sup>165</sup> On the other hand, a theme should not ask the judge “to believe that people have behaved in improbable ways.”<sup>166</sup>

Consequently, when a lawyer develops a theme, or theory of the case, the lawyer should consider what the client’s case is *about*.<sup>167</sup> Thus, theme is closely related to how the conflict is defined.<sup>168</sup> When developing a theme, the lawyer should concentrate on how to finish the following statement: “My client should win because . . . .”<sup>169</sup> In seeking to finish that sentence, the lawyer should search for answers that allow him or her to fill in the blanks of the following statements: “This is a story about a (man) (woman) who (is) (was) . . . [describe client] . . . and who is struggling to . . . .”<sup>170</sup> Once the lawyer can complete the previous statements, the lawyer should identify a public policy that supports an outcome in his or her client’s favor.<sup>171</sup> “Good themes are often policy-based . . . .”<sup>172</sup> This is true given that, when a court chooses between competing interpretations of the law, it generally does so based on a particular public policy consideration that is relevant to that litigation.<sup>173</sup> Thus, when all else is equal, a good theme may help to sway the court in a client’s favor.<sup>174</sup>

### C. Character Development

Character development is the most important aspect of a story.<sup>175</sup> People care more about characters than they care about the action in a

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164. EDWARDS, LEGAL WRITING, *supra* note 159, at 328; NEUMANN, *supra* note 85, at 306–07.

165. EDWARDS, LEGAL WRITING, *supra* note 159, at 328.

166. NEUMANN, *supra* note 85, at 308.

167. BEAZLEY, *supra* note 163, at 38.

168. FOLEY & ROBBINS, *supra* note 3, at 469.

169. ROBBINS-TISCIONE, *supra* note 5, at 180.

170. EDWARDS, LEGAL WRITING, *supra* note 159, at 328.

171. BEAZLEY, *supra* note 163, at 38.

172. *Id.*

173. *Id.* A theme is also of particular importance when a lawyer is “arguing issues for which no mandatory authority governs the outcome, or when arguing to a court of last resort.” *Id.*

174. *Id.*

175. See CHESTEK, *supra* note 2, at 142.

story.<sup>176</sup> The conflict of the story is only relevant to the extent it affects the characters and shows the reader something about who the characters are.<sup>177</sup> Conflict exposes the characters; it reveals their true nature.<sup>178</sup> The way in which a character responds to conflict or “struggles [to overcome adversity] reveals who he is.”<sup>179</sup>

A variety of characters exist in any story, but the most important characters are the protagonist and the antagonist. The protagonist is the main character of the story.<sup>180</sup> The protagonist is the person or institution you want the reader to empathize with and cheer on.<sup>181</sup> On the other hand, the antagonist is the person or institution that is in conflict with the protagonist.<sup>182</sup> The antagonist is the protagonist’s nemesis<sup>183</sup> or the entity against whom the protagonist struggles. As such, when crafting a story in a legal writing context, a lawyer should ensure that the client is generally the protagonist of his or her own story—the judge should empathize with and root for the client.<sup>184</sup> If the judge sympathizes with the client, the court is more likely to rule in the client’s favor.<sup>185</sup>

Again, it is important to remember that stock stories provide “a ready stock of characters”<sup>186</sup> and that they “cast both people and things in particular archetypal roles.”<sup>187</sup> These archetypal roles include “champions, children, tricksters, mentors, kings, mothers, demons, and sages.”<sup>188</sup> Other roles include that of companion, gatekeeper, damsel in distress, and shape-shifter.<sup>189</sup> Individuals as well as institutions, such as corporations, agencies, courts, legislatures, or prosecutor’s offices, can fill these archetypal roles.<sup>190</sup> Even an abstract concept or a “reified idea” can be a character in a

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176. Foley & Robbins, *supra* note 3, at 470.

177. *See id.* at 468.

178. *Id.* at 470.

179. *Id.* at 470.

180. *Id.* at 468.

181. Chestek, *supra* note 2, at 142.

182. *See* Foley & Robbins, *supra* note 3, at 468.

183. *Id.*

184. Chestek, *supra* note 2, at 144.

185. *Id.*

186. Edwards, *supra* note 54, at 7.

187. *Id.* at 8.

188. *Id.*; *see also* Robbins, *supra* note 16, at 778.

189. Robbins, *supra* note 16, at 775.

190. Edwards, *supra* note 54, at 6, 8.

legal story.<sup>191</sup> The law itself, “a principal or a policy, a statute or a case holding,” is an example of a “reified idea” that can be a character.<sup>192</sup> “[W]hen we think about a legal theory or a statute or the holding of a case, we think about it metaphorically, as if it were a sentient being or a concrete thing.”<sup>193</sup> For example, a legal principle may be made a character in a law story when the client (who is an unsympathetic criminal defendant) is made “a proxy for an ‘ideal,’ such as the Fourth . . . Amendment.”<sup>194</sup> In that circumstance, the focus shifts from the particulars of the individual defendant to the Fourth Amendment, and “a holding against the client is a holding against the Fourth Amendment.”<sup>195</sup> In such a story, the Fourth Amendment, not the client, is the protagonist of the story.

Although stock stories may cast people, institutions, and ideas in archetypal roles that serve as templates for characters, the lawyer still needs to develop those characters so that they seem true to the reader rather than like a two-dimensional cardboard cutout.<sup>196</sup> This is particularly important for the protagonist, who is generally the lawyer’s client. If the client does not seem like a real person to the reader (a person with thoughts, feelings, and dreams) then the reader will not empathize with the client and will not have a desire to resolve the matter in the client’s favor.

So how does a lawyer get a judge to empathize with and cheer on a client? By enabling the judge to sympathize with the client as a real person.<sup>197</sup> It is equally important to make the client likable.<sup>198</sup> Both of these goals can be accomplished by objectively presenting detailed facts regarding the client’s character.<sup>199</sup> These facts include identifying more than just the name and title of the client.

Demonstrating that the client is a valuable, productive member of society is one of the easiest ways to humanize a client and make him or her likable.<sup>200</sup> Any number of facts can demonstrate this,

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191. *Id.* at 8.

192. *Id.* at 6, 8.

193. *Id.* at 6.

194. Foley & Robbins, *supra* note 3, at 473.

195. *Id.*

196. Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 LEGAL WRITING: J. LEGAL WRITING INST. 3, 30 (2009).

197. *See* Chestek, *supra* note 2, at 144.

198. *See* Foley & Robbins, *supra* note 3, at 468.

199. Chestek, *supra* note 2, at 142.

200. Foley & Robbins, *supra* note 3, at 481 app. A.

including graduation from an educational institution (high school, college, etc.), employment (particularly long-term employment), volunteer work, or membership in social clubs that improve society. Furthermore, if the client has served our country or the international community through service in the military, Peace Corps, or the Red Cross, this too will humanize the client and make him or her seem productive, and consequently, likable.<sup>201</sup> A client may also be likable if the client is good at his or her job (assuming that the client is not a career criminal!),<sup>202</sup> if the client has any notable achievements or received awards,<sup>203</sup> or if the client has overcome past adversity.<sup>204</sup>

Furthermore, examining the client's goals and motivations may make him or her seem more real and more likable, but only if the reader agrees with, or at a minimum, understands those goals or motivations.<sup>205</sup> Character development identifies who the parties to the litigation truly are by revealing *why* they acted in the manner in which they did.<sup>206</sup> If the client's goals and motivations seem sensible, then the reader will understand and possibly agree with them.<sup>207</sup> Finally, presenting the client's goals and motivations may have the added benefit of appealing to the reader on an emotional level, resulting in the reader empathizing with the client.<sup>208</sup>

Humanizing the client becomes difficult when the client is a business or government agency. A lawyer can hardly make a client seem like a "real person" when it is not a person at all. The lawyer can overcome this problem by presenting attributes of an institutional client that make it likable and evoke empathy. For instance, if the client provides products or services that benefit society in some fashion, then the lawyer should make the reader aware of any such socially beneficial functions.<sup>209</sup> Examples of socially beneficial products include medical equipment or pharmaceuticals. An example of a socially beneficial service is the Department of Justice's role in prosecuting civil rights violations as well as crimes.

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201. *Id.*

202. *Id.*

203. *Id.* at 483 app. C.

204. *Id.* at 481 app. A.

205. *Id.* at 470.

206. Chestek, *supra* note 2, at 143.

207. *Id.*

208. *Id.* at 144.

209. Foley & Robbins, *supra* note 3, at 474.

If an institutional client fails to provide socially beneficial goods or services, or only minimally does so, several other facts can make the client more appealing. For instance, a client that employs numerous individuals from the community or engages in philanthropy is more likable than one that does not.<sup>210</sup> Additionally, as with individual clients, an institutional client that has overcome adversity to become successful or has any notable achievements will appeal to the reader.<sup>211</sup> Furthermore, if the institutional client has served the country in times of need, then this will contribute to the client's likability.<sup>212</sup> For example, Wal-Mart shipped supplies into New Orleans following Hurricane Katrina.<sup>213</sup>

When the law itself is a character in a story, its character can be developed using the same techniques used to develop the character of individuals and institutions. A lawyer can show that the law has goals and motivations, as well as notable achievements. The law can even have a flaw or suffer from some inner turmoil. Take, for example, the Fourth Amendment to the United States Constitution. The Fourth Amendment has the worthy goal of preventing the government from conducting unreasonable searches of persons and places.<sup>214</sup> It seeks to protect our right to privacy, to enforce our right to be left alone. And each time the courts strike down a police practice as violative of the Fourth Amendment, that Amendment has achieved something great. And while we all know that the Fourth Amendment does not *actually* think, or want, or do anything, a lawyer can give the Amendment these qualities when presenting the Amendment as a character in a story.

#### *D. Setting*

The setting, which is the time and place in which the story occurs,<sup>215</sup> provides the reader with context for the story. The time when the story takes place is the historical setting,<sup>216</sup> or the historical

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210. *Id.*

211. *Id.* at 483 app. C.

212. *Id.*

213. Michael Barbaro & Justin Gillis, *Walmart at Forefront of Hurricane Relief*, WASH. POST, Sept. 6, 2005, at D1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/05/AR2005090501598.html>.

214. U.S. CONST. amend. IV.

215. Chestek, *supra* note 2, at 139.

216. *Id.* Chestek also refers to the historical setting as the "social setting" for the story. *Id.*



context, for the story. The location where the story occurs is the physical setting for the story.<sup>217</sup> This context helps the reader understand the events that are taking place in the story and why they are happening. In literary writing, a writer may set the story in any time and place that the writer desires. However, once the writer has set the story, the historical and physical aspects of the setting are immutable.<sup>218</sup> The writer is limited by the context that has been created. For example, the physical and historical setting in Harper Lee's *To Kill a Mockingbird* was Maycomb, Alabama in the 1930s.<sup>219</sup>

Although in literary writing the setting is limited to the historical and physical setting, in legal writing, the lawyer must also provide the factual and legal setting for the reader.<sup>220</sup> The factual setting provides the reader with facts regarding the dispute between the parties and is designed to assist the reader in understanding why and how that dispute arose.<sup>221</sup> Therefore, a lawyer should include in the factual setting all "legally relevant" facts as well as any necessary or helpful background facts that the reader needs to know to make sense of the legally relevant facts.<sup>222</sup> The factual setting in legal writing is circumscribed by the facts that the court may examine when making its decision. Thus, the pertinent facts will be found in the appellate record<sup>223</sup> or, for motion memoranda, in affidavits and discovery.

The legal setting, on the other hand, provides the legal backdrop against which the dispute between the parties will be evaluated.<sup>224</sup> Creating the legal setting involves identifying the relevant area of law, and setting forth and describing the legal rules that govern the legal question.<sup>225</sup> The lawyer's description of the legal setting is controlled by the governing statutes, regulations, case law, and other laws of a given jurisdiction.<sup>226</sup>

Finally, just as the historical and physical settings are immutable in literary writing, the factual and legal settings are immutable in legal

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217. *Id.*

218. *Id.*

219. HARPER LEE, *TO KILL A MOCKINGBIRD passim* (1960).

220. Chestek, *supra* note 2, at 139.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

writing.<sup>227</sup> Thus, a lawyer cannot ignore aspects of the factual or legal setting that may impede his or her arguments on behalf of the client.<sup>228</sup> A lawyer cannot omit important facts, ignore counter-arguments, or overlook relevant issues without sacrificing plausibility and credibility.<sup>229</sup> Rather, if facts exist in the record that do not seem to “fit” with the lawyer’s version of events or the protagonist’s character, the lawyer must find a way to explain those facts away, minimize the importance of those facts, or juxtapose those facts with other more favorable facts to lessen the harm those facts may do. Likewise, with regard to the legal setting, if adverse authority exists, the lawyer cannot ignore it. Rather, the lawyer must distinguish the client’s case from the adverse authority, establish that the adverse authority is not controlling, or provide another legal theory that supersedes that adverse authority.<sup>230</sup>

### *E. Plot*

Plot is another important element of a story. “The plot is the structure of the story. It is what happens and in what order. It is cause and effect. And without [a plot], a fiction writer doesn’t have a . . . story. They have just a bunch of words on a page.”<sup>231</sup> Thus, it is important to remember that the plot line is more than just a sequence of events organized to show connections between those events. “The plot line is the glue that holds all the elements [of a story] together.”<sup>232</sup>

#### *1. Stages of Plot Development*

Naturally, all stories have a beginning, middle, and an end.<sup>233</sup> Yet the plot line develops in a manner that is somewhat more complex than those three simple stages. The development of the plot

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227. *Id.*

228. *Id.* at 140.

229. Rideout, *supra* note 18, at 65. A lawyer can be sure that opposing counsel will point out these omissions.

230. Chestek, *supra* note 2, at 140.

231. Melanie Martin, *Fiction Writers Must Include Three Things for a Quality Tale*, ASSOCIATED CONTENT, Nov. 15, 2006, [http://www.associatedcontent.com/article/85062/three\\_essential\\_plot\\_elements\\_of\\_a.html?cat=38](http://www.associatedcontent.com/article/85062/three_essential_plot_elements_of_a.html?cat=38).

232. Chestek, *supra* note 2, at 147.

233. ARISTOTLE, ARISTOTLE’S THEORY OF POETRY & FINE ART 65 (Francis Fergusson ed., S.H. Butcher trans., 4th ed. 1961); Berger, *supra* note 21, at 267; Foley & Robbins, *supra* note 3, at 476.

line has five stages: (1) introduction, (2) rising action, (3) climax, (4) falling action, and (5) resolution.<sup>234</sup>

The first stage of plot development, the introduction, serves as an exposition that “set[s] the stage”<sup>235</sup> by providing background information about the characters, the setting, and the events. This background information provides context for the story and permits the reader to understand the story that is to come. The introduction may also establish what two commentators refer to as the “steady state,” or the status quo.<sup>236</sup>

Once the writer has set the stage in the introduction, he or she is ready to introduce the rising action, or the complicating event or events that upset the status quo.<sup>237</sup> The rising action sets forth the “Trouble” that gives birth to the conflict.<sup>238</sup> The rising action may arise from one complicating event, or from a series of complicating events that build upon each other.<sup>239</sup> By clearly describing the complicating events that comprise the rising action, the writer reveals the conflict to the reader.<sup>240</sup>

The rising action builds until the climax of the story. “In literature, the climax occurs when the protagonist is at the height of peril.”<sup>241</sup> The climax is the most exciting point of the story, the point at which the reader’s interest is the greatest.<sup>242</sup> It is the point when the reader is on the edge of his or her seat, wanting to know how the events will unfold, how the story will end, and hoping for a return to the status quo (or at least an outcome that is beneficial to the protagonist).<sup>243</sup> The climax is the moment when the protagonist accomplishes some great feat, such as getting the girl, defeating the monster, or making some profound discovery. Because the climax is

234. Chestek, *supra* note 2, at 147.

235. *Id.* at 148.

236. AMSTERDAM & BRUNER, *supra* note 53, at 113–14. Amsterdam & Bruner refer to the “steady state” as a condition of “stasis” or “tranquility.” *Id.*

237. Chestek, *supra* note 2, at 148.

238. *Id.*; AMSTERDAM & BRUNER, *supra* note 54, at 113–14. According to Amsterdam and Bruner, this “trouble” “consist[s] of circumstances attributable to human agency or susceptible to change by human intervention.” AMSTERDAM & BRUNER, *supra* note 53, at 113–14.

239. Chestek, *supra* note 2, at 148.

240. *Id.*

241. *Id.* at 149.

242. *Id.*

243. *Id.*

the point at which the story's main conflict is resolved, it necessarily occurs "near the end of the story."<sup>244</sup>

While the climax resolves the story's main conflict, some other more minor plot threads may remain unresolved. The falling action quickly wraps up those unresolved plot threads and brings the story to a satisfying close.<sup>245</sup> An example of falling action includes Frodo Baggins and his hobbit friends' return to the Shire following the destruction of the one ring in J.R.R. Tolkien's *The Return of the King*.<sup>246</sup> Another example of falling action includes Harry Potter's marriage to Ginny Weasley and the family that they go on to have following Harry's defeat of Lord Voldemort in *Harry Potter and the Deathly Hallows*.<sup>247</sup>

The final stage in plot development is the resolution, or conclusion, of the story.<sup>248</sup> In literary terms, it is referred to as the "denouement."<sup>249</sup> The resolution ensures that all the conflicts and tensions are resolved in a plausible manner.<sup>250</sup> Furthermore, because readers generally like happy endings,<sup>251</sup> the resolution often ushers in a return to the status quo that existed at the start of the narrative, or it may result in a "new, yet tranquil and satisfying, condition."<sup>252</sup> This happy ending must be plausible and reasonable.<sup>253</sup> If the resolution does not seem plausible, the reader will not be sufficiently persuaded by the story.

## 2. Basic Plots

In addition to understanding the basic stages through which a plot progresses, an effective storyteller must also be aware that several basic plots exist and almost all stories conform to one of these. A lawyer who is aware of the basic plots has the knowledge to choose the one which best promotes the client's cause. When the obvious plot is unfavorable to the client, the lawyer can consider

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244. *Id.*

245. *Id.*

246. J.R.R. TOLKIEN, *THE RETURN OF THE KING* 309–347 (Ballantine Books 1993) (1955).

247. J.K. ROWLING, *HARRY POTTER AND THE DEATHLY HALLOWS* 753–759 (2007).

248. Chestek, *supra* note 2, at 150.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

“whether there might be other possible stories and whether those other stories [have plotlines that] might make better sense of the situation.”<sup>254</sup> The basic plots include (1) overcoming the monster, (2) rags to riches, (3) the quest, (4) voyage and return, (5) comedy, (6) tragedy, (7) rebirth, (8) rebellion against the one, and (9) the detective story.<sup>255</sup> The most likely plots in the legal context are the quest, rebirth, tragedy, and rebellion against the one. Although not in a literal sense, overcoming the monster could also be used in the legal context.

#### IV. PUTTING IT ALL TOGETHER: MAPPING THE ELEMENTS OF A STORY IN APPELLATE BRIEFS AND MOTION MEMORANDA

##### A. *The Map*

Where do the various elements of the story fit in a legal document such as an appellate brief or a motion memorandum? Clearly, “lawyers should ‘tell a story’ in facts sections” of briefs or motion memoranda.<sup>256</sup> But the facts section is not the only part of a brief or motion memorandum where a narrative can be told. The story told in the facts section is incomplete; the facts reveal only part of the story. To tell an effective story, a lawyer must continue the story in the argument section of the brief or motion memorandum. Thus, the various stages of plot development, as well as the other elements of a story, span both the facts and argument sections. For the most part, with regard to the stages of plot development, the introduction and rising action stages take place in the facts section and the remaining stages of plot development occur in the argument section of the brief or motion memorandum.<sup>257</sup>

Just as a story is more than a series of facts “organized sequentially to show connected events,”<sup>258</sup> a story is also more than a recitation of the law using one of the traditional structural paradigms

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254. Edwards, *supra* note 54, at 8.

255. CHRISTOPHER BOOKER, *THE SEVEN BASIC PLOTS: WHY WE TELL STORIES* (2004).

256. Foley & Robbins, *supra* note 3, at 465.

257. Chestek, *supra* note 2, at 148–50. Unlike the physical, historical, and factual settings, the legal setting is not generally identified in the facts section of a brief or motion memorandum. *Id.* at 148–49. Rather, the legal landscape, as well as the legal conflict, tends to be established in the argument section of a brief or motion memorandum. *Id.* at 148–49.

258. Stephen V. Armstrong & Timothy P. Terrell, *Organizing Facts to Tell Stories*, 9 *PERSP.: TEACHING LEGAL RES. & WRITING* 90, 90 (2001).

for legal analysis, whether the paradigm is “Issue, Rule, Analysis, Conclusion” (IRAC),<sup>259</sup> “Conclusion, Rule, Analysis, Conclusion” (CRAC),<sup>260</sup> or one of the other formulations.<sup>261</sup> Under one of these formalistic structural paradigms, the lawyer would begin the argument section of a brief or motion memorandum by identifying “the current governing law supported by a discussion of the most recent authorities. If the current law is favorable, the [lawyer] would add a policy discussion to support it. If not, the [lawyer] would argue for change using other authorities and policy discussions.”<sup>262</sup> The problem with the recitation of the law under one of these structural paradigms is that there is no action, no movement, and consequently, no plotline.<sup>263</sup>

## *B. The Petitioner’s Story in Gideon v. Wainwright*

### *1. Background*

Clarence Earl Gideon was charged in a Florida court with breaking and entering a poolroom with intent to commit a misdemeanor.<sup>264</sup> This offense, petit larceny, was a felony under Florida law.<sup>265</sup> Gideon repeatedly asked the court to appoint counsel for him since he was indigent and unable to afford a lawyer.<sup>266</sup> The trial judge refused Gideon’s request on the basis that Florida law only permitted him to appoint counsel in capital cases.<sup>267</sup> Gideon represented himself at trial.<sup>268</sup> He gave an opening statement, cross-examined the prosecution’s witnesses, presented witnesses in his defense, and argued that he was innocent to the charge.<sup>269</sup> The jury

259. See, e.g., DEBORAH A SCHMEDEMANN & CHRISTINA L. KUNZ, SYNTHESIS: LEGAL READING, REASONING, AND WRITING 101–110 (3d ed. 2007).

260. See, e.g., NEUMANN, *supra* note 85, at 101.

261. Other formulations include “Conclusion, Rule, Explanation, Application, Connection-Conclusion” (CREXAC), BEAZLEY, *supra* note 163, at 61–76; “Thesis, Rule, Explain, Apply, Thesis” (TREAT), MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, LEGAL RESEARCH, WRITING AND ANALYSIS 95–112 (2006); and “Conclusion, Rule, Proof of Rule, Application, Conclusion” (CRuPAC), NEUMANN, *supra* note 85, at 101.

262. Edwards, *supra* note 54, at 9.

263. *Id.*

264. *Gideon v. Wainwright*, 372 U.S. 335, 336 (1963).

265. *Id.* at 336–37.

266. *Id.* at 337.

267. *Id.*

268. *Id.*

269. *Id.*

convicted Gideon of the crime and he was sentenced to the maximum period of incarceration under the statute.<sup>270</sup>

The Florida Supreme Court denied Gideon's petition for habeas corpus,<sup>271</sup> and Gideon filed a petition for a writ of certiorari with the United States Supreme Court, which the Court granted.<sup>272</sup> The question on appeal was whether the United States Constitution requires the states, namely the State of Florida, to provide counsel to indigent defendants.<sup>273</sup>

The Court was not working with a blank slate. In 1942, a divided Court had decided *Betts v. Brady*,<sup>274</sup> which declared that in the absence of special circumstances, the denial of counsel is not so "offensive to the common and fundamental ideas of fairness" as to amount to a denial of due process.<sup>275</sup> Special circumstances included characteristics of the defendant that made it unlikely he could defend himself, such as illiteracy, mental incompetence, extreme youth, or inexperience; the complexity of the charge or defenses; and events at trial that caused prejudice.<sup>276</sup> The administration of the "special circumstances" doctrine was a continuing source of controversy and litigation in both state and federal courts.<sup>277</sup>

The U.S. Supreme Court appointed Abe Fortas to represent Gideon in connection with the appeal.<sup>278</sup> Fortas, who was to become a member of the United States Supreme Court in 1965, was considered "one of the best lawyers of his time. He was a superlative legal craftsman—an artist in the law."<sup>279</sup> Let's examine the narrative he crafted, looking closely at the elements of a story.

## 2. *Abe Fortas: Master Storyteller*

One common plot structure begins with the status quo, which reveals the world to be in a state that "needs fixing" or that "lacks

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270. *Id.* at 337 (1963); Brief for the Petitioner at 3, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 155).

271. Brief for the Petitioner, *supra* note 270, at 4.

272. *Gideon*, 372 U.S. at 338.

273. *Id.*

274. 316 U.S. 455 (1942).

275. *Id.* at 473.

276. *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

277. *Gideon*, 372 U.S. at 338.

278. *Id.* at 335, 338.

279. Abe Krash, *Remembering Abe Fortas and Hugo Black*, CHAMPION MAG., Jan.–Feb. 2003, at 12, 12.

something important.”<sup>280</sup> The story follows the protagonist’s struggle to fix the world, which often requires the protagonist to create “an important new tool or idea.”<sup>281</sup> Quest stories often utilize this structure. In a quest story, the protagonist struggles to achieve a “distant, all-important goal,”<sup>282</sup> such as Sir Galahad’s search for the Holy Grail. Along the journey, the protagonist must overcome obstacles and forces that are attempting to prevent him or her from achieving the goal.<sup>283</sup> However, because the goal “has become more precious and desirable to [the protagonist] than anything else in the world,”<sup>284</sup> the protagonist plods on, seeking to achieve his or her goal.<sup>285</sup> This perseverance is rewarded when the protagonist achieves the goal. This is the plot structure that Fortas used in telling Gideon’s story. His brief to the Court tells the story of Gideon’s quest to obtain legal counsel.

Much like any other quest story, Gideon’s story begins in crisis. In the statement of the case, Fortas informed the reader that Clarence Earl Gideon was charged in the Circuit Court of Bay County, Florida, with breaking and entering the Bay Harbor Poolroom with intent to commit a misdemeanor in the building.<sup>286</sup> This began Gideon’s conflict with the State of Florida, and Fortas quickly moved into a description of the rising action, or the events that began Gideon’s quest for counsel. He informed the reader that, at the start of trial, Gideon requested counsel and the trial court denied that request.<sup>287</sup> When Gideon told the trial judge that “the United States Supreme Court says I am entitled to be represented by Counsel,”<sup>288</sup> the reader gets the distinct feeling that Gideon viewed the right to counsel as an object of great importance, as a talisman of sorts. Furthermore, when the reader studies the quoted exchange between Gideon and the trial judge,<sup>289</sup> he or she unwittingly joins Gideon on his quest for counsel.

After the trial court denied Gideon’s request for counsel, Fortas explained that “Gideon represented himself. He directly examined

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280. Edwards, *supra* note 54, at 4.

281. *Id.*

282. BOOKER, *supra* note 255, at 83.

283. *Id.* at 73–77, 78–79, 83.

284. *Id.* at 71.

285. *Id.*

286. Brief for Petitioner, *supra* note 270, at 1–2.

287. *Id.* at 2.

288. *Id.* at 3.

289. *Id.* at 2–3.



several witnesses called in his behalf; he cross-examined the state's witnesses; and he made a closing argument. He was found guilty by the jury."<sup>290</sup> Gideon's conviction is no surprise to the reader; Fortas presented the conviction as the natural consequence of the absence of counsel. The reader could expect nothing else. In fact, the reader would have been surprised if Gideon had *not* been found guilty of the crime. This passage suggested Fortas's theme—that the failure to appoint counsel to represent indigent defendants is fundamentally unfair because they cannot effectively represent themselves.

Gideon's conviction did not end his search for justice. Gideon's quest for legal counsel continued, taking him to the Florida Supreme Court.<sup>291</sup> His petition for habeas corpus alleged that United States Supreme Court decisions required that the State of Florida provide counsel for any defendant charged with a felony.<sup>292</sup> The Florida Supreme Court summarily denied his petition.<sup>293</sup> Still, Gideon refused to give up. He took his quest for legal counsel to the United States Supreme Court, where the Court granted his petition for a writ of certiorari.<sup>294</sup>

Who are the characters in this tale? Fortas identified Clarence Earl Gideon by name in the first line of the statement of the case,<sup>295</sup> but other than mentioning that Gideon was charged with petit larceny in Florida, Fortas offered no other personal information about the man.<sup>296</sup> The only other information about Gideon that Fortas shared with the reader was the detailed account of Gideon's quest for legal counsel.<sup>297</sup> When Fortas first described the events that started Gideon on this path, Fortas shifted from using his client's name to referring to him in a more generic manner. He told the reader that "Petitioner informed the trial judge that he was 'not ready' because [he had] 'no counsel.' Petitioner expressly requested that counsel be appointed to assist him at the trial, but the request was denied by the trial court."<sup>298</sup> Fortas then set forth the exchange between Gideon and the trial judge. The lengthy quotation began with "[t]he Defendant," and with one

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290. *Id.* at 3.

291. *Id.*

292. *Id.* at 3–4.

293. *Id.* at 4.

294. *Id.* at 5.

295. *Id.* at 1.

296. *Id.*

297. *Id.* at 2–5.

298. *Id.* at 2.

exception, the transcript continued to refer to Gideon in this fashion.<sup>299</sup> The shift from Gideon's proper name to a generic reference like "Petitioner" and "Defendant" was not just sloppy writing. This shift distanced Gideon from the action. This shift, as well as Fortas's failure to develop Gideon's character, suggested that Gideon was a proxy for every defendant who might find himself unfortunate enough to be hailed into court and too poor to afford an attorney. Thus, the protagonist of the tale Fortas told was not Clarence Earl Gideon; rather, Gideon was the embodiment of every man who might find himself in this position. This was not just Gideon's quest—it was every man's quest.

Gideon's position as a proxy for every man was solidified in the summary of the argument, when Fortas informed the reader that this case "illustrates the denial of due process and equal protection consequent upon the refusal to appoint counsel in a state felony prosecution; but we cannot urge that the circumstances presented by the case are 'special' rather than typical. The Petitioner is not illiterate, mentally incompetent, or inexperienced."<sup>300</sup> In other words, Gideon himself is not special or unusual. He is an ordinary man, like any other.

Fortas established the State of Florida as the antagonist in this tale. Gideon's statement in his petition for habeas corpus made it apparent that the State of Florida was the bad actor. Gideon stated that "the State of Florida should see that everyone who is tried for a felony charge should have legal counsel."<sup>301</sup> But Fortas noted that, instead, "[f]our of the last eight right-to-counsel cases decided by this Court originated in Florida."<sup>302</sup> This suggests to the reader that the State of Florida is less than innocent when it comes to these types of cases, that it has a history of denying defendants a fair trial by denying them the right to counsel. Furthermore, while the trial judge and the justices on the Florida Supreme Court actually denied Gideon the right to counsel, they were merely minions of the State of Florida. This was made clear by the fact that the trial judge initially denied Gideon counsel because "the laws of the State of Florida" only allowed him to appoint counsel to defendants charged with a capital

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299. *Id.* at 2–3.

300. *Id.* at 7.

301. *Id.* at 4.

302. *Id.* at 4 n.5 (citing *Carnley v. Cochran*, 369 U.S. 506 (1962); *Reynolds v. Cochran*, 365 U.S. 525 (1961); *McNeal v. Culver*, 365 U.S. 109 (1961); *Cash v. Culver*, 358 U.S. 633 (1959)).

offense.<sup>303</sup> The trial judge even apologized to Gideon for having to deny his request for counsel.<sup>304</sup>

The protagonist and the antagonist were not the only characters in this story. When Gideon declared to the trial judge that “[t]he United States Supreme Court says I am entitled to be represented by Counsel,”<sup>305</sup> he identified another character. At this point, the reader does not know whether Gideon’s assertion about the Court was correct. However, by granting certiorari, the Court seemed to be an uncertain champion of the right to counsel. At the end of the statement of the case, the Supreme Court seems to have joined Gideon’s quest.<sup>306</sup>

Thus, by the end of the statement of the case, Fortas had identified characters in this story. He had also established the point of view from which the story would be told (an indigent defendant), and introduced the reader to the factual dispute (the State of Florida’s refusal to appoint counsel to represent Gideon, and other ordinary defendants like him, in trial). Furthermore, the rising action began when Fortas followed Gideon on his quest for counsel, detailing the State of Florida’s denials of his request.

Fortas began the argument section of the brief by establishing that, just as Gideon’s story began with a crisis, so too does the story of the law. He explained that, in 1942, the Supreme Court decided *Betts v. Brady*, which held that “the 14th Amendment does not require that the state furnish counsel to an indigent defendant in a non-capital case unless total facts and circumstances in the particular case show that there has been a ‘denial of fundamental fairness, shocking to the universal sense of justice.’”<sup>307</sup> Fortas hurried on to note that, for the past twenty years, “[t]he experience [of the courts in administering the *Betts* rule] has not been a happy one.”<sup>308</sup> This is presumably because the “special circumstances” rule “has not achieved its basic constitutional objective: It has not assured and cannot be expected to assure that counsel will be provided where necessary in the interests of fundamental fairness in state criminal proceedings.”<sup>309</sup>

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303. *Id.* at 2–3.

304. *Id.* at 3.

305. *Id.*

306. Given that Fortas’s primary audience is the Supreme Court, the reader that he previously duped into following Gideon on his quest was the Court. *See id.* at 4.

307. *Id.* at 10 (citing *Betts v. Brady*, 316 U.S. 455, 462 (1942)).

308. *Id.* at 10–11.

309. *Id.* at 11.

Consequently, according to Fortas, “the quality of criminal justice . . . [has] suffered as a result of *Betts v. Brady*.”<sup>310</sup> As a result, Fortas informed the reader, “‘time has set its face’ against *Betts v. Brady*” and the case “should be overruled.”<sup>311</sup>

As Fortas continued, the first plot thread became apparent, as did the theme of his story. He noted that “petitioner [failed] to allege special circumstances” and that he could not claim “extreme youth, inexperience, mental incapacity, nor illiteracy.”<sup>312</sup> He pointed out that because Gideon, whom Fortas continued to refer to as “petitioner” or “defendant,” could not have understood how to adequately defend himself, he was denied “a fair trial in the constitutional sense.”<sup>313</sup> But here is the rub: Gideon was not alone. Fortas informed the reader, “[T]hese points are not peculiar to Gideon’s case . . . [but] are present in every criminal prosecution. In short, we believe that the circumstances of this case are no more ‘special’ than in other criminal cases—unless we are to draw a line between tweedledee and tweedledum.”<sup>314</sup> Now the reader sees clearly what he or she has suspected from the start. The reader understands why Fortas failed to develop Gideon’s character and why Fortas presented him as the embodiment of every man. What was true for Gideon rings true for every man in his situation: the state’s denial of counsel to *any* indigent defendant is fundamentally unfair and deprives that individual of due process and equal protection under the law.

With the momentum and the tension building, Fortas stated the obvious: the need for counsel in criminal cases “is too plain for argument.”<sup>315</sup> “To expect that an accused person . . . can or will rise to the level of operating skill and efficiency necessary to functioning in the criminal process, is to expect the impossible.”<sup>316</sup> He provided a litany of reasons why this is true:

No individual who is not a trained or experienced lawyer can possibly know or pursue the technical, elaborate, and sophisticated measures which are necessary to assemble and appraise the facts, analyze the law, determine contentions, negotiate the plea, or

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310. *Id.*

311. *Id.* (quoting *Mapp v. Ohio*, 367 U.S. 643, 653 (1961)).

312. *Id.* at 12.

313. *Id.* at 13.

314. *Id.*

315. *Id.*

316. *Id.* at 14 n.11.

marshal and present all of the factual and legal considerations which have a bearing upon his defense . . . . In the absence of counsel an accused person cannot determine whether his arrest is lawful; whether the indictment or information is valid; what, if any, preliminary motions should be filed. He cannot accurately evaluate the implications of a plea to a lesser offense, and he is at a loss in discussions with the prosecuting attorney relating to such a plea . . . . And how unreal it is to suppose that a layman can conduct a *voir dire* of the petit jury, or cross-examine the prosecution's witnesses, or interpose objections to incompetent and prejudicial testimony. See Douglas, J., concurring in *Carnley v. Cochran*, 369 U.S. 506 (1962). The truth is that "[t]he unrepresented defendant in many cases does not really know what is going on . . . ."<sup>317</sup>

Consequently, even when an unrepresented defendant is not guilty, "he faces the danger of conviction because he does not know how to establish his innocence."<sup>318</sup>

Fortas continued this almost frantic pace, noting that "it is patent that many constitutional rights are meaningless in the absence of legal assistance."<sup>319</sup> He pointed out that, in the twenty years since it decided *Betts v. Brady*, the Supreme Court had announced several constitutional principles with regard to state criminal procedure, including the law of involuntary confessions and searches and seizures.<sup>320</sup> Fortas declared:

An uncounseled defendant manifestly cannot be expected, for example, to be a master of the intricacies of the law relating to searches and seizures, e.g., whether a search warrant is required, whether there is "probable cause," whether there has been a waiver, and so on. An inexperienced person cannot possibly appraise the implications of invoking the privilege against self-incrimination or determine whether a statement he wishes to make may constitute a waiver of the privilege.<sup>321</sup>

In light of the daunting task of representing oneself, Fortas advised the reader that "[e]ven a trained, experienced criminal lawyer

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317. *Id.* at 13–15 (citing Samuel Dash, *Cracks in the Foundation of Justice*, 46 ILL. L. REV. 385, 393 (1951); Donald J. Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 780, 782 (1956)) (quoting ASS'N OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE MAGISTRATE'S COURTS VISITATION COMMITTEE 30 (undated)).

318. *Id.* at 15 n.14 (quoting *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)).

319. *Id.* at 16.

320. *Id.* at 17.

321. *Id.* at 17–18.

cannot—and will not, if he is sensible—undertake his own defense.”<sup>322</sup> This statement taps into the reader’s tacit knowledge; all lawyers know that “[h]e that is his own lawyer has a fool for a client.”<sup>323</sup> At this climactic point, Fortas had left an important point unsaid: if a law-trained defendant cannot adequately defend himself, how can we possibly expect a layperson to do so? How in the world can we believe that a trial in which a defendant represents himself is fair and just?

We cannot, and the Supreme Court does not: this is what the reader takes away from Fortas’s next argument. Before examining the specific arguments Fortas made, however, it is important to observe a couple of techniques that he employed. Fortas maintained an almost frantic pace when establishing that average people cannot adequately defend themselves in court. This hurried pace keeps the reader on the edge of the seat, biting his or her nails, dreading what will inevitably happen to the unfortunate indigent defendant who cannot afford an attorney. This frenzy of information and the dread that it evokes also serves another purpose. They suggest how indigent defendants who represent themselves feel during the trial. Like the reader, these defendants feel overwhelmed by the volumes of information that they should, but do not, know. The trial proceeds at a whirlwind pace. And with every word, the defendant’s dread grows as he or she foresees the inevitable conclusion to the trial.

Fortas slowed the pace following the climax. For the indigent defendant, the climax is his or her inevitable conviction. For the reader, it is the point where the reader knows, without a doubt, that a trial where a defendant represents himself is unfair. The falling action began with Fortas establishing that the federal courts knew this fact to be true as well.

When he argued that “[t]he absolute requirement of counsel for federal prosecutions confirms the need for an attorney,”<sup>324</sup> Fortas implied that the federal courts do not even believe that expecting defendants to represent themselves in state courts is fair. Fortas then drew the Supreme Court into the quest for counsel. He noted that the Supreme Court in *Johnson v. Zerbst*<sup>325</sup> held that counsel must be

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322. *Id.* at 14.

323. *Id.* at 14 n.11 (quoting THE OXFORD DICTIONARY OF ENGLISH PROVERBS 112 (2d ed. 1948)).

324. *Id.* at 18.

325. 304 U.S. 458 (1938).

furnished to defendants in every federal prosecution.<sup>326</sup> He quoted the Court, noting that its decision in *Johnson v. Zerbst* was based on “the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned Counsel.”<sup>327</sup>

If this is true in federal prosecutions, the reader wonders, how can it not be true in state prosecutions? It is at this point that Fortas explicitly stated what the reader has been thinking. “It makes no sense,” he declared, “to urge that the availability of counsel is required in the federal courts in order ‘to insure fundamental human rights of life and liberty,’ but that it is not fundamental if the prosecution occurs in a state courthouse.”<sup>328</sup> In fact, the position seems to be ridiculous, nigh indefensible. This leads the reader to think that there must be something more at play, something else driving the distinction. The reader hearkens back to something Fortas said in passing, before declaring that the need for counsel was obvious. He briefly mentioned that the point of contention between those in favor of the “special circumstances” rule and those opposed to it relates more to the requirements of federalism than it does to the issue of whether counsel is required for a fair trial.<sup>329</sup> This statement introduced a second plot thread: the effects of federalism on the right to counsel.

But even relying on federalism as a basis for distinguishing between federal and state prosecutions seemed foolish once Fortas revealed that a huge majority of states provided counsel, in some form, for indigent defendants.<sup>330</sup> As part of the falling action for the federalism plot thread, he noted that thirty-seven states expressly provided for the appointment of counsel to indigent defendants and that, in another eight states, the general practice was to provide legal assistance to an indigent defendant when requested.<sup>331</sup> Fortas pointed out that only five states refused to appoint counsel to indigent defendants in felony cases.<sup>332</sup> He listed them; of course, Florida was

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326. Brief for the Petitioner, *supra* note 270, at 18.

327. *Id.* at 19 (quoting *Johnson v. Zerbst*, 304 U.S. at 462–63).

328. *Id.* at 20 (quoting *Johnson v. Zerbst*, 304 U.S. at 462).

329. *Id.* at 13. Fortas makes several other arguments, but for the sake of brevity, those arguments have not been woven into the story here.

330. *Id.* at 29–30.

331. *Id.* at 30.

332. *Id.*

among the states denying counsel to indigent defendants.<sup>333</sup> The reader is not surprised by this fact given the State of Florida's reputation when it comes to the right to counsel. In fact, the reader could not really have expected anything else from the great State of Florida. Fortas then articulated what the reader has been thinking: given the "widespread consensus among the states that legal assistance should be furnished to indigent persons,"<sup>334</sup> "we do not believe it necessary to dilute, denigrate, and diminish the quality of due process in our criminal proceedings . . . in deference to the few states, like Florida, which continue to defy the general opinion as to the right of counsel."<sup>335</sup> In fact, Fortas informed the Court, its task is simply "to bring into line with the consensus of the states . . . the few 'stragglers' who persist in denying fair treatment to the accused."<sup>336</sup>

Fortas then contrasted this simple task with the future the Supreme Court faced if *Betts v. Brady* was reaffirmed. The falling action for this plot thread continued with Fortas reminding the Court of its unhappy experience trying to administer the "special circumstances" rule. He informed the Court that the "special circumstances" rule "has engendered conflict between the federal and state courts because of the case by case review it entails and because it does not prescribe a clearcut standard which the state courts can follow."<sup>337</sup> This conflict between the state and federal courts had occurred because the "nonabsolute right to counsel" in state courts was "the largest stumbling block in the administration of state criminal law."<sup>338</sup> In fact, Fortas declared, "the 'special circumstances' rule involves federal supervision over the state courts in its most noxious form."<sup>339</sup> It allowed federal courts to scrutinize state court proceedings to determine whether they were "shocking to the universal sense of justice."<sup>340</sup> Fortas proclaimed that "[i]t is difficult to conceive of a test more likely to promote friction between federal and state tribunals."<sup>341</sup> It is this needless conflict between the

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333. *Id.*

334. *Id.* at 32.

335. *Id.* at 28.

336. *Id.* at 32.

337. *Id.* at 33.

338. *Id.* at 33 (quoting Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461, 483 (1960) (emphasis omitted)).

339. *Id.* at 34.

340. *Id.*

341. *Id.*



federal and state courts that federalism prohibits, not the “negation of [a] basic constitutional principle” like the right to counsel.<sup>342</sup>

At this point, Fortas had resolved his two plot lines. He had established that any trial, whether in a federal or state tribunal, is unfair when the defendant is unrepresented. He had also established that federalism is not an appropriate basis for denying a defendant the basic constitutional right to a fair trial. Fortas concluded his story with a quotation that aptly summarized his theme. It is a premise that, according to Fortas, has “been underscored by the passage of time.”<sup>343</sup> This statement reminds the reader that “‘time has set its face’ against *Betts v. Brady*.”<sup>344</sup> Fortas stated:

[A]t a critical period in world history, *Betts v. Brady* dangerously tilts the scales against the safeguarding of one of the most precious rights of man. For in a free world no man should be condemned to penal servitude for years without having the right to counsel to defend him. The right of counsel, for the poor as well as the rich, is an indispensable safeguard of freedom and justice under law.<sup>345</sup>

This having been said, Fortas ended the brief with a legal story’s version of “and they lived happily ever after.” He appealed to the Court with, “[f]or these reasons, *Betts v. Brady* should be overruled and the judgment of the Court below should be reversed.”<sup>346</sup> This resolution asks the Supreme Court to, like time, “set its face” against *Betts* and to establish a new law. This law would require appointment of counsel to indigent defendants in order to ensure for them what all Americans are entitled to—a fair trial. This transformative resolution would place Gideon, and all defendants like him, in a new, satisfying position. And given the story Fortas told, this resolution does not just seem plausible and reasonable. It seems like the only just result.

## V. CONCLUSION

In light of the cognitive limitations of the human mind,<sup>347</sup> and the fact that humans may be unable to comprehend human behavior except as part of a story,<sup>348</sup> lawyers must focus more on narrative

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342. *Id.* at 35.

343. *Id.* at 46.

344. *Id.* at 11 (quoting *Mapp v. Ohio*, 367 U.S. 643, 653 (1961)).

345. *Id.* at 46 (quoting *Bute v. Illinois*, 333 U.S. 640, 678 n.1 (1948)).

346. *Id.* at 47.

347. Chestek, *supra* note 2, at 136 n.28 (citing SMITH, *supra* note 2, at 261).

348. Elyse Pepper, *The Case for “Thinking Like a Filmmaker”*: Using Lars Von Trier’s *Dogville* as a Model for Writing a Statement of Facts, 14 LEGAL WRITING: J. LEGAL WRITING

reasoning when trying to persuade an audience, whether it be a jury of laypersons or a judge. The avoidance of narrative reasoning reflects an impoverished view of reason and cognition.<sup>349</sup> By using narrative reasoning, a lawyer can not only appeal to ethos and pathos but also, on a deeper level, to a reader's logic and reason.

Thus, like Abe Fortas, lawyers must become expert storytellers. They must consciously use narrative techniques in their appellate briefs and motion memoranda to spin tales that persuade.<sup>350</sup> They must avoid unfavorable stock stories and the embedded knowledge structures with which they are loaded. Furthermore, lawyers must consciously craft their stories, paying careful attention to the elements of a story, particularly conflict definition, character development, and plot lines.

If lawyers use narrative reasoning to advocate more effectively for their clients, they will more successfully persuade their audience to take action that favors their clients. However, the increased used of narrative reasoning in legal writing may have tacit effects as well.<sup>351</sup> The outcomes of motions and cases may seem more authentic, more in line with human experience. Thus, over the long run, the public may develop a more favorable attitude about lawyers. The public may come to view lawyers less as pettifoggers and tricksters and more as defenders of the constitution and representatives of justice. Perhaps the public will better understand the meaning of Dick the Butcher's line: "First thing we do, let's kill all the lawyers."<sup>352</sup>

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INST. 171, 174 (2008) (quoting John Luebsdorf, *The Structure of Judicial Opinions*, 86 MINN. L. REV. 447, 455 (2001)).

349. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1575–76 (1987).

350. Berger, *supra* note 20, at 268.

351. *See id.* at 265.

352. WILLIAM SHAKESPEARE, *The SECOND PART OF KING HENRY THE SIXTH* act 4, sc.