

## WHEN THE TRUTH AND THE STORY COLLIDE: WHAT LEGAL WRITERS CAN LEARN FROM THE EXPERIENCE OF NON-FICTION WRITERS ABOUT THE LIMITS OF LEGAL STORYTELLING

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In Chechovian drama, chest pains are followed by heart attacks, coughs by consumption, life insurance policies by murders, telephone rings by dramatic messages. In real life, most chest pains are indigestion, coughs are colds, insurance policies are followed by years of premium payments, and telephone calls are from marketing services.<sup>1</sup>

With these words, the never-reticent Alan Dershowitz throws cold water on the legal storytelling movement. According to Dershowitz, “life is not a dramatic narrative.”<sup>2</sup> Indeed, such was the title of his article criticizing legal storytelling.<sup>3</sup> And the problem with lawyers, he thinks, is not that they do not make a sufficient effort to tell a legal story. Rather, the problem is that they confuse the canons of literature with real life.<sup>4</sup>

The literature<sup>5</sup> emphasizes the many values of using the techniques of story and narrative when teaching and practicing

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1. Alan M. Dershowitz, *Life Is Not a Dramatic Narrative*, in *Law's Stories* 99–105, 100–101 (Peter Brooks & Paul Gewirtz eds., Yale U. Press 1996).

2. *See generally id.*

3. *Id.*

4. *Id.* at 102.

5. There has been at least one law review symposium issue devoted to legal storytelling. “Chapter One” of the Legal Writing Institute’s conference on this issue was held in London in 2007 and was commemorated in Volume 14 of *Legal Writing: The Journal of the Legal Writing Institute*. Symposium, *Applied Legal Storytelling*, 14 *Leg. Writing* 3 (2009); see e.g. Symposium, *Lawyers as Storytellers & Storytellers as Lawyers: An Interdisciplinary Symposium Exploring the Use of Storytelling in the Practice of Law*, 18 *Vt. L. Rev.* 565 (1994). Nineteen essays and comments on the use of story in legal writing and argument are collected in the book, *Law's Stories: Narrative and Rhetoric in the Law* (Peter Brooks & Paul Gewirtz eds., Yale U. Press 1996). A number of academic articles have been pub-

legal writing. But Professor Dershowitz's point should be well-taken. Life is not a dramatic narrative. Indeed, sometimes our clients' real-life stories do not jive at all well with the conventions of such narratives. This can be particularly true when we try, as has been suggested, to tell our clients' stories using the forms of myth and archetype.<sup>6</sup> As valuable as those paradigms can be to legal writing, we must always be aware that sometimes the demands of truth and demands of story can collide.

In facing the dangers of such a collision, we can learn from our predecessors in adopting the techniques of fiction and narrative when telling a true story: the New Journalists. After Truman Capote published *In Cold Blood* in 1965,<sup>7</sup> he was heralded for writing a "non-fiction novel": a book that told a true story while brilliantly using the techniques of fiction.<sup>8</sup> Capote, along with a number of other "New Journalists," launched a new movement in non-fiction writing that remains both influential and controversial today.<sup>9</sup> While this movement was praised for bringing a literary quality to non-fiction work,<sup>10</sup> its members were also accused of believing that "fiction is the only shape we can give to facts."<sup>11</sup>

As legal writers, we must be vigilant in assuring we keep what is best about storytelling, while avoiding the criticisms writers like Capote faced about shaping the facts to meet their literary goals.<sup>12</sup> Legal writers have a professional and ethical obliga-

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lished on the subject as well. See e.g. Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 Leg. Writing 127 (2008); Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 Rutgers L.J. 459 (2001); J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 Leg. Writing 53 (2008); Shaun B. Spencer, *Dr. King, Bull Connor, and Persuasive Narratives*, 2 J. ALWD 209 (2004).

6. See Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of an Archetypal Hero's Journey*, 29 Seattle U. L. Rev. 767, 768-769 (2006).

7. Truman Capote, *In Cold Blood* (Random House 1965).

8. John Hollowell, *Fact & Fiction: The New Journalism and the Nonfiction Novel* (U. N.C. Press 1977).

9. See Robert Boynton, *The New New Journalism: Conversations with America's Best Non-Fiction Writers on Their Craft* (Vintage Original Bks. 2005) (containing interviews with present-day writers of long-form non-fiction including Jon Krakauer, Michael Lewis, Calvin Trillin, and Susan Orlean).

10. See Lee Gutkind, *The Creative Non-Fiction Police?* in *In Fact: The Best of Creative Non-Fiction* xix, xix-xxxiii (Lee Gutkind ed., W.W. Norton & Co. 2005).

11. Michael Wood, Book Review, *The New Journalism*, N.Y. Times (June 22, 1973) (available at [www.nytimes.com/books/98/11/08/specials/wolfe-journalism.html](http://www.nytimes.com/books/98/11/08/specials/wolfe-journalism.html)).

12. See e.g. Phillip K. Tompkins, *In Cold Fact*, Esquire Mag. (June 1966) (reviewing

tion to be wholly factual in their written work.<sup>13</sup> But equally important, we should not discount the other powerful tools at our disposal—precedent, reason, and analysis—while working too hard to shape our legal writing into stories. A too-enthusiastic embrace of the power of storytelling might cause us to walk too close to the line between brief writing and fiction,<sup>14</sup> while at the same time failing to capitalize on the other potent weapons in our legal arsenal. In short, we should not succumb to believing that “fiction is the only shape we can give to facts.”<sup>15</sup>

With this in mind, this essay examines what can be gained and what can be lost by using storytelling in legal writing. After reviewing some basic principles of legal storytelling, the essay reviews some lessons that can be learned from the experience of the New Journalists who adopted literary techniques in their non-fiction work. In the end, the essay concludes that while there is much value in using the tools of fiction in legal writing, it is only with a blend of narrative and analysis that we most successfully do our jobs as lawyers.

### I. *STORYTELLING: THE BASICS*

The basic concept of storytelling in legal writing is to turn the client/plaintiff/defendant into the main character of a story with a

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the many factual inaccuracies in Capote’s book and suggesting these inaccuracies existed to serve Capote’s desired plot and character development).

13. Model R. Prof. Conduct 3.3(a)(1) (ABA 2009) (providing that a lawyer may not knowingly make a false statement of fact to a tribunal); Model R. Prof. Conduct 4.1(a) (ABA 2009) (providing that in the course of representing a client, a lawyer shall not knowingly make a false statement of fact to a third party).

14. The exact location of that line is also of interest to fiction writers. When writing this essay, this Author was struck by the irony that at the same time that the legal academy has been so interested in molding factual accounts into the form of fictional stories, fiction writers are preoccupied with the blurriness of the line between fact and fiction. In the course of the last year, this Author has read a number of novels that involve the line between story and truth and that contain endings that leave the reader in serious doubt about what “really” happened. These novels include the classic of its kind, Ian McEwan’s *Atonement*, as well as Charles Baxter’s *The Soul Thief*, and P. F. Kluge’s *Gone Tomorrow*. An author even recently had great success with a mystery novel in which the central mystery was left unsolved. See Tana French, *In the Woods* (Penguin Bks. 2007).

In addition, this urge to capture reality in fictional forms has spread to television. After eight years, the HBO show *The Sopranos* failed to present a clear cut ending to the show. The final episode famously cut to black as Tony Soprano and family sat down to dinner, creating uncertainty as to whether Tony survived the meal. *The Sopranos* (HBO June 10, 2007) (TV series).

15. See Wood, *supra* n. 11.

compelling plotline.<sup>16</sup> There has been a fascination with this type of legal storytelling among a segment of the academy for some time now.<sup>17</sup> The fundamental principle espoused by most of these scholars is that there is a power in stories that lawyers should harness in their advocacy. Those promoting storytelling in the law contend that well-constructed stories have as much power to persuade as well-developed and well-reasoned legal arguments that rely on logic and precedent.<sup>18</sup> In view of this, proponents of legal storytelling contend that lawyers should learn to use the common story elements of character, conflict, resolution, organization, and point-of-view.<sup>19</sup> Indeed, proponents argue, failure to use these components of storytelling leaves a fertile means of persuasion unexploited. This is particularly true because lawsuits, unlike novels and short stories, have no pre-determined ending. This lack of resolution places the judge or other fact-finder in the position to create the ending to the story. Accordingly, when lawyers tell an effective story, they empower the fact-finder to choose the most satisfying resolution to the tale.<sup>20</sup>

This mode of thinking has found a home in the legal writing classroom. Most legal writing texts, at a minimum, encourage students to present the facts from their clients' point of view; to emphasize positive facts; and to make an emotional appeal where appropriate.<sup>21</sup> But some texts more explicitly encourage storytelling. For instance, in their book for first-year law students, *Legal*

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16. See Chestek, *supra* n. 5, at 142, 147; Philip N. Meyer, *Vignettes from a Narrative Primer*, 12 *Leg. Writing* 229, 235 (2006).

17. See *supra* n. 5.

18. See Chestek, *supra* n. 5, at 134 (stating that “fiction writing is not so different from brief writing” because they share the traits of plausibility, readability and “most importantly both evoke an emotional response from the reader”); Foley & Robbins, *supra* n. 5, at 465 (asserting that “[t]he most powerful tool for persuasion may be the *story*” (emphasis in original)); Rideout, *supra* n. 5, at 60–62.

19. Chestek, *supra* n. 5, at 138–150 (explaining how the techniques of storytelling such as setting, character, plot, and theme can be used in brief writing); Foley & Robbins, *supra* n. 5, at 466.

20. Foley & Robbins, *supra* n. 5, at 467.

21. See e.g. Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* § 29.2, 360 (6th ed., Aspen Publishers 2009) (suggesting students “breathe life into the facts by telling a compelling story about people”); Helene S. Shapo et al., *Writing and Analysis in the Law* 413–414 (5th ed., Found. Press 2008) (encouraging students to use a “narrative approach” in constructing statements of fact to keep the reader’s attention); Robin Slocum, *Legal Reasoning, Writing, and Persuasive Argument* 462–471 (2d ed., Matthew Bender & Co. 2006) (urging students to “create an appealing story” that emphasizes positive facts about their clients and de-emphasizes negative facts).

*Writing*, authors Richard Neumann, Jr. and Shelia Simon encourage students to “build” a story when writing a brief.<sup>22</sup> They assert that most stories start in a state of equilibrium.<sup>23</sup> Then, “bad things happen to disrupt the equilibrium.”<sup>24</sup> The story continues as the client, or protagonist, struggles to restore matters to their rightful place.<sup>25</sup> When the story is presented in this way, the authors assert, the judge will naturally want to restore equilibrium by deciding the case in the favor of the client/protagonist.<sup>26</sup> Some legal writing professionals have encouraged legal writers to employ even more sophisticated literary techniques in their efforts to persuade. For instance, Michael Smith, in his book *Advanced Legal Writing*, explores the use of metaphor and literary allusion as persuasion techniques.<sup>27</sup>

Going even one step further, Ruth Anne Robbins has suggested that the legal writer can and should intentionally affect the subconscious desires of the decision maker.<sup>28</sup> She asserts that lawyers should not only use the techniques of plot and character in legal writing; they should also seek to transform the client’s story to an archetypal journey.<sup>29</sup> Robbins argues that “[b]ecause people respond—instinctively and intuitively—to certain recurring story patterns and character archetypes, lawyers should systematically and deliberately . . . subtly portray[ ] their . . . clients as heroes on a particular life path.”<sup>30</sup> She emphasizes that this is not simply a means to make the client’s legal matter more interesting to the judge. Rather, it is a means to “influence the judge at the unconscious level.”<sup>31</sup>

This encouragement to target the subconscious impulses of the judge appears to move legal writers beyond providing a well-told story from the perspective of their client. Attorneys have traditionally viewed themselves as using the dispassionate tools

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22. Richard K. Neumann, Jr. & Sheila Simon, *Legal Writing* § 28.3, 201 (Aspen Publishers 2008).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 202.

27. Michael R. Smith, *Advanced Legal Writing* 199–303 (2d ed., Aspen Publishers 2008).

28. Robbins, *supra* n. 6, at 769.

29. *Id.*

30. *Id.* at 768–769.

31. *Id.* at 769.

of logic, reason, and precedent to make their cases in court.<sup>32</sup> The suggestion that a lawyer should supplement those tools by seeking to manipulate the subconscious impulses of a judge is an interesting one, and it is perhaps debatable whether lawyers should even make the attempt. Nonetheless, the question addressed here is whether, in the attempt to craft a story that conforms to the conventions of myth and archetype, the legal writer runs the risk of elevating the needs of the story over the details of the legal problem. Here, it can be helpful to look at the quandaries faced by the New Journalists who tried to weave the techniques of fiction into traditional reporting without sacrificing what was important about their message in the first place.

## II. LESSONS FROM THE NON-FICTION WORLD

The journalist and novelist Tom Wolfe popularized the term New Journalism when he released an anthology in 1973 of works that he believed reflected a new movement in non-fiction writing.<sup>33</sup> The New Journalism can be distinguished from the old journalism by the use of four literary techniques in the creation of non-fiction pieces: (1) scene-by-scene construction as opposed to historical narrative; (2) large amounts of dialogue in the story; (3) recording “status details” or pattern of behavior and possessions; and (4) a marked point of view within the story.<sup>34</sup>

Included in Wolfe’s anthology of the New Journalism is an excerpt from Truman Capote’s *In Cold Blood*.<sup>35</sup> Capote’s work

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32. Chestek, *supra* n. 5, at 135. The public debate over the nomination of Justice Sonia Sotomayor to the United States Supreme Court was to some extent a contest of the value of story versus the value of pure reasoning. In a comprehensive review of the nomination and confirmation process, Lauren Collins noted the ways in which the proponents of Justice Sotomayor’s nomination emphasized her compelling life story over explanation of her judicial philosophy. Lauren Collins, *Number Nine: Sonia Sotomayor’s High-Profile Debut*, *New Yorker* (Jan. 11, 2010). This contrasted with the view of judge as umpire merely calling balls and strikes that Chief Justice Roberts promoted during his own nomination process. Jeffrey Toobin, *No More Mr. Nice Guy: The Supreme Court’s Stealth Hard-Liner*, *New Yorker* (May 25, 2009). In these statements, opponents ignored the fact that there was no single way to apply the law in the cases before the Court—and that indeed the most common reason a case lands before the Supreme Court is because there has been disagreement on how the existing law applies to a particular factual scenario.

33. Tom Wolfe, *The New Journalism: With an Anthology* (Tom Wolfe & E. W. Johnson eds., Harper & Row Publishers 1973).

34. Hollowell, *supra* n. 8, at 25 (citing Tom Wolfe’s description of what separates the New Journalism from the old).

35. *See* Capote, *supra* n. 7.

crystallizes the considerable advantages, along with the serious pitfalls, of using fictional devices in non-fiction work, be it the story of a murder or a legal brief on behalf of a murder defendant. Truman Capote characterized his book about the murder of the Clutter family in Holcomb, Nebraska in 1959 as a “non-fiction novel.”<sup>36</sup> Capote’s use of the term “novel” for *In Cold Blood* was not meant to imply that there was anything fictional about the book. He was not, for instance, asserting that it was like historical fiction—based on the truth, but not true in every detail. To the contrary, in the preface of the book Capote vouched for the accuracy of his book:

[a]ll the material in this book not derived from my own observations is either taken from official records or is the result of interviews with the persons directly concerned, more often than not numerous interviews conducted over a considerable period of time.<sup>37</sup>

Capote’s use of the term “novel” was instead based on the style and presentation of a non-fiction story.<sup>38</sup> The book reads like a novel, and a good one at that, because of its expert use of setting, point of view, re-created dialogue, and character development. Impressively, Capote, using the techniques of a novelist, is able to build a level of suspense both when leading up to the murder of the Clutter family and to the execution of the killers, even though presumably most readers know that both events had happened before even opening the book.

There is no question that Capote’s book works from a storytelling standpoint. In fact, Capote was successful at creating a myth out of archetypal characters in the way that legal writers have been encouraged to tell their clients’ stories.<sup>39</sup> In the view of John Hollowell, Capote worked a myth from a “passionless” recitation of facts.<sup>40</sup> According to Hollowell,

despite Capote’s relentless care to present only the facts and his reluctance to impose a too easy moral, his story achieves in the end a kind of mythic significance. The destiny of an

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36. Hollowell, *supra* n. 8, at 64.

37. Capote, *supra* n. 7, at Acknowledgments page.

38. Hollowell, *supra* n. 8, at 63.

39. *See generally* Robbins, *supra* n. 6.

40. Hollowell, *supra* n. 8, at 79.

archetypal American family crosses paths with warped killers whose vengeance is portrayed more as the result of fate than of human motivation.<sup>41</sup>

In essence, Capote achieved the creation of a mythic story out of bare facts in the way that legal writers have been encouraged to shape the stories of their clients.<sup>42</sup>

But although there is little dispute that *In Cold Blood* is a successful work of art,<sup>43</sup> is it a successful piece of factual journalism? Capote's success here is far less clear. Capote's assertion that every word that he wrote was true has not held up well under exacting scrutiny.

In a 1966 *Esquire* magazine article, Phillip Tompkins undertook a painstaking fact-check of *In Cold Blood* and found it wanting in many respects.<sup>44</sup> Some of Capote's factual inaccuracies, Tompkins admits, are not important. For instance, it is relatively inconsequential that one of the murder victim's horses sold for much more money at an auction than Capote reported in the book.<sup>45</sup> What is crucially important, however, are the questions surrounding a focal point of the book, Capote's portrayal of one of the killers, Perry Smith. As Tompkins demonstrates, it is difficult, if not impossible, to determine exactly what happened in the Clutter household on the night of the killings from Smith's various and contradictory retelling of the events.<sup>46</sup> What is clear, however, is that Capote reported just one version of Smith's story in the book. Even more problematic is that this version of the story was heard only by Capote, who did not take notes in his meetings with Smith, but rather wrote up the conversations within hours of returning to his room after their meetings.<sup>47</sup> Capote's

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41. *Id.*

42. *See* Robbins, *supra* n. 6, at 768–769.

43. A Capote biographer collected a number of the glowing reviews of *In Cold Blood* in his book. Gerald Clarke, *Capote: A Biography* (Simon & Schuster 1988). Clarke reported that Conrad Knickerbocker of the *New York Times* Book Review called it a “masterpiece,” *id.* at 363, and Rebecca West of *Harper's Magazine* wrote that “[n]othing but blessing can flow from Mr. Capote's grave and reverent book,” *id.* at 364. F. W. Dupee wrote in the *New York Review of Books* that “*In Cold Blood* is the best documentary account of an American crime ever written . . .” F. W. Dupee, *Truman Capote's Score*, 6 *N.Y. Rev. Bks.* 3, 3 (Feb. 3, 1966).

44. *See* Tompkins, *supra* n. 12.

45. *Id.* at 127.

46. *Id.* at 166–170.

47. *Id.* at 170.

report of his conversations with Smith was corroborated by no one and contains significant contradictions to the verbatim transcripts of Smith's conversations with the police.<sup>48</sup>

In Tompkins's view, Capote's motivation to use the account that only he had heard, as opposed to a prior account, or even reporting Smith's several accounts of the murder, was clear. The "novel" Capote was writing needed "a dramatic climax, a moment of truth."<sup>49</sup> Because of this need, "there followed a subtle but significant alteration of the facts to fit a preconception of the novelistic, transforming an unexciting confession into a theatrical catharsis."<sup>50</sup> As Tompkins saw it, in order to fit his needs as a novelist, Capote transformed Perry Smith, who most evidence showed was a cold, unrepentant, premeditated murderer, into a man who killed in the grip of a "brain explosion"<sup>51</sup> and who cried at the end of his life and felt shame at what he had done.<sup>52</sup> It is, Tompkins says, a "moving portrait" but not the portrait of Perry Smith as he actually existed.<sup>53</sup>

What this means for the reader of *In Cold Blood* depends on the needs of the individual reader. Capote provides a convincing depiction of a spree killer.<sup>54</sup> Some readers may not care very much that this depiction is not an absolutely accurate one, nor that the words that Capote put in Smith's mouth may not be exactly what he said. Because the desire to get into the mind of such a killer is a primary reason we read the book (and is indeed the same reason we might read a high quality novel on the same subject), our goal as a reader is satisfied despite questions about the literal truth.

Capote's methods may have indeed created a work of art. But legal writers do not have the luxury of being able to be selective about the details of their cases to achieve storytelling goals. When we as lawyers represent a spree killer, we represent a par-

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48. *See id.* at 166–170.

49. *Id.* at 170.

50. *Id.*

51. *Id.* at 171.

52. *Id.*

53. *Id.*

54. One reviewer said that Capote's interpretation of the facts made the reader see Smith and his co-defendant not as "illiterate, cold-blooded murderers" but as "literate, psychopathic heroes." Hollowell, *supra* n. 8, at 74 (citing Sol Yurick, *Sob-Sister Gothic*, in *Truman Capote's In Cold Blood: A Critical Handbook* 76, 80 (Irving Malin ed., Wadsworth Publg. Co. 1968)).

ticular spree killer, not an archetypal one. The facts and the argument must of necessity focus on what really happened, no matter how prosaic, and not a “theatrical catharsis.”<sup>55</sup> It is at this point that the legal writer must be very cautious about attempts to build mythic stories out of archetypal characters in the attempt to affect the subconscious of the decision maker.<sup>56</sup> The legal writer, like Capote, may have a story that he or she wants to tell about the client. But the legal writer may also face the same problem as Capote—the story is not precisely true. In such circumstances, the temptation to tell an archetypal story, on the theory that this story is an effective means of persuasion and will place the judge in the position to provide an emotionally satisfying resolution, must be resisted—not encouraged.

### III. AN EXAMPLE FROM LEGAL PRACTICE

The warning about truth-telling in legal stories may seem as self-evident as to go without saying. But the attractions of telling a tightly constructed and forceful story may at times have a subtle pull on the legal writer that could work to blur the line between good storytelling technique and complete accuracy.

This enticement can arise in an area in which this Author practices—appeals of child protection cases. A lawyer representing children in these cases may find the encouragement to present legal stories in the form of myth and archetypes, or stories that allow the judge to side with the hero,<sup>57</sup> very attractive because these cases at their simplest level seem tailor-made for presentation in the form of a classic fairy tale. Specifically, the “plot” could revolve around the child who is cruelly abused or neglected. As the action unfolds, the lawyer could portray the child as facing danger and deprivation. However, the lawyer would have a hero, in the form of the state child protection agency, at the lawyer’s disposal to swoop in to protect the child. New heroes could then appear in the form of selfless foster parents who step in to provide love, care, and protection. The lawyer could next portray a struggle in which the villainous parents attempt to regain custody of the child. Then, according to at least one theory of

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55. See Tompkins, *supra* n. 12.

56. See *supra* nn. 16–20 and accompanying text.

57. See Robbins, *supra* n. 6, at 768–769; Neumann & Simon, *supra* n. 22, at § 28.3.

legal storytelling,<sup>58</sup> at the culmination of the appellate case, the court will naturally want to assume the role of the latest hero in the story by affirming the trial court's decision to terminate the bad parents' rights and allow the child to be adopted by the foster parents. In short, everyone lives happily ever after.

However attractive it is to tell the story of a child protection case in this manner, it likely is simply a fairy tale and not the real story. This Author's own experience has shown that it is extremely common for children to remain strongly and stubbornly attached to their natural parents and to long to return to their original homes. Thus, although to outsiders, the natural parents may appear to be the villains in the story, the children themselves have placed the state in that role. In addition, the foster parents identified by the state may not be the paragons of generosity and affection that a fairy tale requires. Instead, the foster parents may be considerably flawed themselves and have questionable motivations for wanting to adopt the child. The reconstituted family may be facing years of struggle and, in some cases, even dissolution.

The struggle, therefore, for the legal storyteller is not to tell the story that seems most satisfying for the court to resolve or the one that conforms to an archetype. Rather, the legal storyteller must shape a more complex story where the choice between natural parent and foster parent is unclear; the state agency is more of a faceless bureaucracy rather than a heroic character; and the child's fate is uncertain no matter what decision the factfinder makes. This is a story that is far more likely to send a judge home troubled by doubts about his or her decision than with a sense of deep satisfaction at playing the hero. This is not to say that there is no role for narrative techniques in telling the story of the client. However, the story may be more complicated than the archetypal story with a clear-cut ending. In other words, the legal writer should make the choice that Truman Capote did not make in *In Cold Blood*<sup>59</sup> and present the story in all its complexity instead of choosing the plot and characterizations to serve the needs of a pre-determined narrative.

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58. See Neumann & Simon, *supra* n. 22, at § 28.3.

59. See *supra* nn. 35–53 and accompanying text.

## A. Another Plot Problem—Reality Intrudes

Another roadblock in storytelling can occur when the story one wants to tell is basically true, but there are inconvenient detours along the way that complicate the narrative. The New York Times media writer, David Carr, recently wrote a memoir that epitomizes this scenario. He wrote a “junkie memoir,” one of the many books in recent years that recount the author’s story of addiction and recovery.<sup>60</sup> Carr at first assumed that his memoir would have the typical arc of the genre: he was a talented, but troubled professional; he succumbed to the temptations of drugs; he engaged in despicable but extremely interesting behavior while in the throes of addiction; he had an epiphany; and then he triumphed over the addiction.<sup>61</sup> Before writing this story, Carr, perhaps in order to distinguish his book from others of the same genre, or to assure the unassailability of the truth of his story, decided to use his professional skills as a reporter to investigate his own life story.<sup>62</sup>

What he found, by his account, surprised him. The basic arc of his story fit the traditional junkie memoir narrative. He was a promising young writer, who succumbed to drug addiction, lived a life of depravity, ultimately cleaned up after his twin daughters were born, and became a successful reporter and father.<sup>63</sup> At the outset he assumed that his story was the stuff of “a Joseph Campbell monomyth in which our hero embraces his road of trials, begins to attain his new goals, and hotfoots it back to the normal world.”<sup>64</sup> In other words, Carr believed he had the raw material for the type of mythical story that theoretically could serve not just the needs of the memoirist but also the legal writer.<sup>65</sup>

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60. David Carr, *The Night of the Gun: A Reporter Investigates the Darkest Story of His Life. His Own* (Simon & Schuster 2008).

61. *Id.* at 22–25.

62. *Id.* at 25–27. Carr provides a cautionary tale for those who seek to make their stories too much like fiction. He wrote that before embarking on his own project he “read some of the classics of the genre” and was immediately skeptical. *Id.* at 25. “After reading four pages of continuous ten-year-old dialogue magically recalled by someone who was in the throes of alcohol withdrawal at the time, I wondered how he did it. No I didn’t. I knew he made it up.” *Id.*

63. *See generally id.*

64. *Id.* at 167.

65. *See* Robbins, *supra* n. 6, at 768–769.

Nonetheless, by investigating his own past, Carr discovered that his life story was indeed “a myth, but not the kind Joseph Campbell had in mind.”<sup>66</sup> Or, in other words, Carr had the material for the type of myth no legal writer should create.<sup>67</sup> One myth punctured by his reporting was that he quickly sobered up after his twins were born. Carr determined that even after his twins were born, he continued to use drugs for eight months before he took his first stab at a rehabilitation program. During this period, he repeatedly placed the children in danger, at one point leaving them alone in a car when they were only a few months old, while he spent at least an hour of that winter night in Minnesota inside an apartment too seedy to bring the twins into, buying and using drugs.<sup>68</sup> Carr also was disabused of his conviction that when he was released from rehab his lawyer viewed him as a man on a mission to regain custody of his children.<sup>69</sup> To the contrary, his lawyer thought he appeared to be so dysfunctional she wondered whether this was a “realistic goal.”<sup>70</sup> In other words, Carr’s redemption story had elements of truth, but it also had many inconvenient details and detours.

In short, Carr’s story could take the general form of a heroic myth, but to be accurate it had to incorporate the unsavory details as well. Lawyers are frequently faced with this dilemma: the essence of their clients’ stories allows them to be cast in the role of hero, but the detours are significant. For lawyers, however, the choice is not as simple as it was for Carr, who merely needed to come up with a different way to pitch his book—one that probably made it more interesting and marketable.

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66. Carr, *supra* n. 60, at 167.

67. Of course, the ultimate lesson to be learned from non-fiction writers is that it is incumbent on legal writers not to transform a factual story into fiction, lest they end up in the position of memoirist James Frey. Frey famously converted his true, but fairly prosaic story of drug addiction, into a false, but dramatic, tale of crime, punishment, and dental surgery without anesthesia in his book, *A Million Little Pieces* (Anchor Bks. 2003). Frey succumbed to the temptation to elevate the needs of the story over the need for a memoir that at least attempted to approximate the truth. As a consequence, he went from being the author of an Oprah-endorsed best-seller to being humiliated on Oprah’s couch. See Edward Wyatt, *Author Is Kicked Out of Oprah Winfrey’s Bookclub*, N.Y. Times (Jan. 27, 2006) (available at [www.nytimes.com/2006/01/27/books/27oprah.html](http://www.nytimes.com/2006/01/27/books/27oprah.html)). None of us wants to go through the lawyer-equivalent of Frey’s journey by elevating the needs of a narrative over the particulars of our case.

68. Carr, *supra* n. 60, at 162–167.

69. *Id.* at 239–240.

70. *Id.* at 240.

This Author recently dealt with this type of narrative problem in a case on appeal to the Massachusetts Supreme Judicial Court. The basic narrative arc was a story of redemption. But the devil was in the details.

At the time the story began, the Author's client was the father in a house with three young children and his baby daughter.<sup>71</sup> While removing one of his many guns from underneath his bed, he accidentally shot his eighteen-month-old daughter. (She recovered.) The father served four years in prison for offenses related to the shooting and drug charges.<sup>72</sup> During this period, his three-year-old son was placed in a series of foster homes. The son did not find a permanent home in any of these placements. During the trial in which both of his parents' parental rights were terminated, which did not occur until he was nine years old, the child's fourth placement disrupted, and he was once again left without any prospects for permanency.<sup>73</sup> Throughout all of this time, the child continued to have visits with the father.<sup>74</sup>

It was these visits that were the question on appeal before the Supreme Judicial Court. Although there was little question that the father would not be a good custodial parent for the child, there was substantial evidence that visits with the father were crucial to the psychological well-being of the child.<sup>75</sup> In short, although the father was clearly a flawed character, his redeeming feature was the role he played in his son's life.

It would have been helpful in writing the brief on this matter if the story followed the arc of a typical redemption story: the hero-father starts out as a troubled individual; makes a terrible mistake; is forced to atone; and then achieves redemption by being the loving father his troubled son needs.<sup>76</sup> But the story did not take that exact route. At trial, the father continued to minimize his responsibility for the shooting. He also provided contradictory testimony about his current relationship with the child's moth-

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71. *Adoption of Rico*, 905 N.E.2d 552, 554 (Mass. 2009).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 554–555.

76. As David Carr notes, the theme “of abasement followed by salvation is a durable device in literature” but does not have much to do with how things really happen. Carr, *supra* n. 60, at 9.

er.<sup>77</sup> The evidence showed that he loved the child, but did not know many of the details of the child's life, including where he went to school, what grade he was in, or whether he had special educational needs.<sup>78</sup> The father did not comply with any of the tasks on his service plan other than visitation.<sup>79</sup>

In short, it was hard to find an archetypal story here. Instead, there was a sad story of a parent who was responsible for many of the blows and disruptions that affected his child's short life. Ensuring that the child had continued contact with his loving, but deeply imperfect biological father, did not place the court in the position of creating a happy ending. The hero-father was still flawed, and the child still faced an uphill struggle. All the court could do was hope that permitting the father to have continued visits with the child would provide him with a modicum of continuity while the father continued on the path of redemption.

As Alan Dershowitz asserts, "life is not a dramatic narrative."<sup>80</sup> Nonetheless, this does not mean that we should consequently abandon the goals and practices of legal storytelling. Instead, there is a middle ground between abandoning the principles of narrative for cold hard facts and logic and trying to shoe-horn our clients' real-life stories into archetype, myth, and heroic journeys. Here again, the critique of the New Journalism provides valuable lessons about storytelling in legal writing.

#### B. New Journalism or Just Good Journalism?

In reviewing Tom Wolfe's anthology, *The New Journalism*, New York Times critic Michael Wood questioned whether Wolfe had correctly identified the ways in which the New Journalism differed from the old.<sup>81</sup> He concluded that the real preoccupation of the New Journalists was not a matter of technique as expressed in Wolfe's four guiding principles<sup>82</sup> but rather "its insistence on the resemblances between fact and fiction."<sup>83</sup> He notes that while the New Journalists were adamant that their work

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77. *Adoption of Rico*, 889 N.E.2d 974, 977 (Mass. App. 2008).

78. *Id.*

79. *Id.*

80. See Dershowitz, *supra* n. 1.

81. See Wood, *supra* n. 11.

82. Wolfe, *supra* n. 33.

83. Wood, *supra* n. 11.

was factually true, they were highly dependent on the techniques of fiction because they believed that only fictional forms permitted them to effectively craft the facts.<sup>84</sup> We can certainly hear the echoes of that preoccupation in the scholarship of legal storytelling, which suggests that life can best be understood if packaged in the form of a well-told story.<sup>85</sup>

Unraveling the question of whether the forms and devices of fiction are the only effective way to shape facts is difficult both for journalists and legal writers. But the question has less to do with whether legal writers employ the forms of story or myth than with what they do with the raw materials of a legal case. Wood was not convinced that the works anthologized in Wolfe's book genuinely constituted a new genre, but he was convinced that "[t]he writing is remarkable, . . . and if this is the New Journalism, one can hardly be against it."<sup>86</sup>

Legal writers, like the New Journalist, can strive to make their writing "remarkable" and they do not necessarily have to conform to the conventions of myths, fables, and other stories to achieve this result. This point can be gleaned from reading Philip N. Meyer's article, *Are the Characters in a Death Penalty Brief Like the Characters in a Movie?*<sup>87</sup> In this article, Meyer made an exhaustive comparison between the classic movie *High Noon* and the brief written on behalf of the defendant in *Atkins v. Virginia*.<sup>88</sup> In *Atkins*, the United States Supreme Court outlawed the death penalty for mentally retarded individuals on the ground that it constituted cruel and unusual punishment.<sup>89</sup>

Curious about the question posed in Meyer's title, this Author read the petitioner's brief in *Atkins*.<sup>90</sup> The answer to the question was—no, not really.<sup>91</sup> That aside, the *Atkins* brief is an outstand-

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84. *Id.* Wood theorized that the thin line between fact and fiction was sometimes alarming to the New Journalists. He noted that when the New Journalists came "close to the universe of myth and fable," they became so unsettled that they "rushed out into the real world again, . . . to be reassured by the tangible, shapeless, incontrovertible facts of motiveless murder and random war." *Id.*

85. *See supra* nn. 16–31 and accompanying text.

86. Gutkind, *supra* n. 10.

87. Philip N. Meyer, *Are the Characters in a Death Penalty Brief Like the Characters in a Movie?* 32 Vt. L. Rev. 877 (2008).

88. 536 U.S. 304 (2002).

89. *Id.* at 321.

90. Br. of Petr., *Atkins v. Va.*, 2001 WL 1663817 (U.S. Nov. 29, 2001).

91. Meyer himself concluded that the answer to the question is "[i]n some ways, yes; in many ways, no." Meyer, *supra* n. 87, at 916.

ing piece of legal advocacy. While Meyer's cinematic comparisons can be quibbled with, he precisely identified some of the literary techniques employed in the brief that helped make it so successful. It is these qualities, discussed below, that seem far more valuable to us as legal writers than artificial attempts to conform legal stories into myth or fable.

By way of example, the brief demonstrates that an overarching theme is as important to a persuasively written brief as it is to a classic movie. The reverberating theme of the petitioner's brief in *Atkins* is that it is of highly questionable morality to execute a mentally retarded individual for a crime. This theme permeates all sections of the brief and not just the Statement of the Case.<sup>92</sup>

The brief further borrowed from techniques of fiction in several ways.<sup>93</sup> First, it featured many quotes (or in fiction parlance, dialogue). The use of direct quotations was far more effective in demonstrating Atkins's limitations than declaratory statements about his IQ or record of impairment would have been. Atkins's words, which are marked by a limited vocabulary and improper grammar, established convincingly his intellectual shortcomings.<sup>94</sup> Then, using a technique that is highly effective, but was probably difficult to execute, the brief intertwined Atkins's words with the story told by his friend, Jones, who was indisputably involved in the kidnapping of the victim, but claimed that Atkins pulled the trigger.<sup>95</sup> This technique was effective because the jux-

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92. See Br. of Petr., *Atkins v. Va.*, 2001 WL 1663817.

93. Using techniques of fiction can be difficult in legal writing, if only because of the raw materials involved. For instance, the fact sections of appellate briefs are constrained by the requirement that only information contained in the record can be relayed in the brief. See e.g. Fed. R. App. P. 28(a)(7), 28(e). Thus, unlike fiction writers, legal writers are limited by the material contained in depositions, answers to interrogatories and documents—sometimes very dry documents—submitted in response to requests for production. The material contained in deposition or trial transcripts is similarly difficult to transform into sparkling dialogue. For tactical reasons, trial lawyers often encourage their witnesses to answer questions with “yes” or “no” whenever possible and to restrain themselves from lengthy, detailed explanations of events and behavior. Thus, the material contained in the record is rarely the stuff of myth or a character-driven story.

94. The brief quoted Atkins's statement regarding the kidnapping and murder for which he received the death penalty at some length. At one point, Atkins said, “Me and William Jones was on the side of the 7-Eleven, and we was planning to rob somebody. And William Jones had the gun.” Br. of Petr., 2001 WL 1663817 at \*3. Later, Atkins described driving the victim to an automatic teller machine so he could use his “credit card” to withdraw money. *Id.* at \*5.

95. *Id.* at \*6.

juxtaposition of Jones's relatively more articulate speech with the unsophisticated speech of Atkins highlighted his impaired intelligence.<sup>96</sup>

The brief used another technique of fiction—the use of the telling detail—when establishing Atkins's diagnosis of mental retardation. Rather than stating that Atkins had serious academic difficulties, the brief noted that Atkins “flunked second grade.”<sup>97</sup> It then described Atkins's high school career, during which his ninth grade average of D+ fell to D- the “first time” he attended tenth grade.<sup>98</sup> The brief quoted the psychologist who evaluated Atkins on the effects of mental retardation on daily life. The psychologist testified that people who are mentally retarded are more likely to be involved with group offenses because they are followers.<sup>99</sup> He also explained that for people with mental retardation

it is harder for them to succeed in school and they are quicker to get frustrated. It means it's harder for them to do just about anything in life, whether it's to get a job or work out a relationship, benefit from the feedback of a supervisor or the teacher, and they just don't get as far.<sup>100</sup>

Regarding Atkins, the psychologist said he showed “a lack of success in pretty much every domain of his life.”<sup>101</sup>

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96. In this excerpt from the brief, in which both Jones and Atkins describe the shooting of the victim, Jones says,

Mr. Atkins got out. He directed Mr. Nesbitt out. . . . As soon as Mr. Nesbitt stepped out of the vehicle and probably took two steps, the shooting started. . . . I had rolled down the window . . . and jumped out . . . [o]n my hands and knees. [Jones then went to the back of the truck][t]o get the gun away from Mr. Atkins . . . [t]o stop him from killing [Mr. Nesbitt].

See *id.* at \*6. In contrast, Atkins is quoted as saying,

[Jones] told me to get out, me and Eric Nesbitt to switch places. He never said why. So I hand—he told me to hand him the gun. I hand him the gun. I got out first. Eric Nesbitt got out behind me. I got back in. Eric Nesbitt got back in. William Jones still had the gun. He put it in a holster that he had on his belt . . . . And then he backed up, parked the car, and he opened up the door. . . . He told Eric Nesbitt to get out . . . . Eric Nesbitt got out. . . . He—Eric Nesbitt bend over and William Jones told him to get up. And he didn't get up. And then the shooting started.

*Id.* at \*\*6–7.

97. *Id.* at \*11.

98. *Id.*

99. *Id.* at \*11.

100. *Id.* at \*\*16–17.

101. *Id.* at \*15.

None of this portion of the brief reads like a plot-driven story such as *High Noon*. Indeed, the extensive citation to the record and periodic footnotes insured that the fact this is a legal brief is never far from the reader's mind.<sup>102</sup> Nonetheless, the quotations and the descriptions of Atkins's life-long inability to function successfully created a clear picture of a limited, even pathetic individual, who could elicit the reader's sympathy despite his participation in a brutal murder. In this way, the *Atkins* brief shares much with Capote's description of Perry Smith, whose experiences were described in exacting detail, often in Smith's own words.<sup>103</sup>

According to Meyer, the *Atkins* brief does not lose its similarity to *High Noon* once it reaches the argument section. Instead, in his view, the argument assumes the form of a classic melodrama that pits good against evil.<sup>104</sup> In his view, "The forces of antagonism are aligned against Atkins. The Supreme Court is called upon to intervene heroically and save Atkins and similarly situated defendants from their fate—the doom that awaits them."<sup>105</sup> However, this is not the only way to read the argument section of the *Atkins* brief. Instead, it can be read as a highly organized, well-researched, clearly reasoned legal argument. At the same time, the argument skillfully contrasted the inability of retarded individuals to develop a sense of morality with the moral implications of executing such individuals for their crimes. To paraphrase Michael Wood's comments on the New Journalism,<sup>106</sup> the legal writing in the petitioner's brief is remarkable, and if this is legal storytelling, one can hardly be against it.

Thus, the question of whether the *Atkins* brief cast the Supreme Court in the same role as Gary Cooper in *High Noon*—"to civilize the primitive and violent landscape under a new rule of law that brings peace and order"<sup>107</sup>—does not seem so important.

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102. Indeed, the brief used footnotes as a means to de-emphasize some of the more unattractive facts about Atkins. Most of the information about Atkins's prior criminal history, for instance, is relegated to a footnote. See *id.* at \*14 n. 20.

103. See Capote, *supra* n. 7. In addition to quoting Smith extensively about the events surrounding the murder of the Clutter family, Capote devotes a large portion of the book to Smith's life leading up to the murders, citing family letters, his father's report to the parole board, and Smith's diaries. See *id.* at 123–147.

104. See Meyer, *supra* n. 87, at 910.

105. *Id.*

106. Wood, *supra* n. 11.

107. Meyer, *supra* n. 87, at 911.

The decision to keep the moral conflict front and center for the Justices, while at the same time providing arguments of compelling logic, analysis and precedent, made it possible for the Court to overturn precedent and decide that execution of the mentally retarded is cruel and unusual punishment. That level of success for our clients should be the goal of all legal writing.

#### IV. CONCLUSION

One premise of the legal storytelling movement is that lawyers ignore the story for the sake of emphasis on logic and reason. This is a point well taken. Too often, we forget that our cases involve the flesh and blood, true-life stories of real people. It is our job to make those stories come alive, and we should use all the tools at our disposal, including ones taken from the world of fiction and storytelling. Nonetheless, in our enthusiasm to adopt the conventions of storytelling, we should remember that the value we, as good lawyers, bring to a legal case is not just the ability to tell a captivating tale. Good lawyers also bring the skillful use of logical argument to the case—a skill that even the best storytellers may not value or possess: “[P]ersuasion . . . relies on two strands—one strand of narrative and one of logical argument—related to each other like a twisting double helix that forms a lawyer’s theory of the case.”<sup>108</sup> Perhaps we have sacrificed the first strand for the sake of the latter in the practice of law. But we should not make the mistake of elevating the goal of a good story over the goal of successful legal argument. Instead, we should make it just one of the many tools at our disposal.

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108. Rideout, *supra* n. 5, at 60 (citing Robert Burns, *A Theory of the Trial* 36–38 (Princeton U. Press. 1999)).