

Articles

Speaking Truth to Power: The Language of Civil Rights Litigators

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I. CRIES TO HEAVEN, A CRITIQUE

A friend of mine, a public interest lawyer, says, "Give me straw-man plaintiffs. Real clients are such a pain." Yet that is how justice comes in the world, not through you the lawyer, but through crazy people, dybbuks, who briefly take possession of you.¹

Thomas Geoghegan

The clearness of your statements, Mr. Lincoln; the unanswerable style of your reasoning, and especially your illustrations . . . were romance and pathos, and fun and logic all welded together. That story about the snakes, for example . . . was at once queer and comical, and tragic and argumentative. It broke through all the barriers of a man's previous opinions and prejudices at a crash, and blew up the very citadel of his false theories before he could know what had hurt him.²

Rev. J.P. Gulliver



Art Spiegelman³

A. *Hattie's Story*

I once had a client named Hattie Kendrick. She was a woman and an African-American, a school teacher and a civil rights warrior, spit upon, arrested, and tossed out of restaurants and clothing stores that did not "cater to the colored trade." She marched and spoke out for integration and against oppression. Her school fired her, but not before she had taught generations of black children in Cairo, Illinois, that participation in American democracy was their right and their duty. In the 1940's, she sued to win equal pay for black

1. Thomas Geoghegan, *Warren Court Children*, NEW REPUBLIC, May 19, 1986, at 17, 23

2. F.B. CARPENTER, *SIX MONTHS AT THE WHITE HOUSE WITH ABRAHAM LINCOLN: THE STORY OF A PICTURE 311* (New York, Hurd & Houghton 1866) (quoting Rev. J.P. Gulliver) (citation omitted)

3. ART SPIEGELMAN, *MAUS I: MY FATHER BLEEDS HISTORY 108* (1986)

teachers, with Thurgood Marshall as her lawyer. And in the 1970's, she was a named plaintiff in a class action asserting the voting rights of black citizens in Cairo against a city electoral system rigged to reduce the value of their votes to nothingness. All she wanted was to cast a meaningful vote in a democratic election before she died—she was in her nineties, growing blind and weak. Such a woman. Such a story. And such a voice. Listen to how she discerns the problems of her town: “Too long have the two races stood grinning in each other’s faces, while they carry the fires of resentment and hate in their hearts, and with their hands hid behind their backs they carry the unsheathed sword.”⁴ Yet here is how the complaint filed in federal court identifies the named plaintiffs, including Hattie Kendrick: “All plaintiffs are Blacks, citizens of the United States and of the State of Illinois, and residents of Cairo, Illinois registered to vote in Municipal Elections conducted in Cairo.”⁵

This Article springs from the recurring disappointment and frustration I have felt after consultation with clients in cases presenting outrages that, in a phrase loved by my mother, cried out to heaven. I have represented and continue to represent these clients in civil rights cases, broadly defined. These are my clients: a young woman, sexually abused as a child, forced to undergo unjustified strip searches that aroused the nightmares of her childhood. A black laborer finding his lunch in the toilet and racist threats in his locker. A gay man staring death from AIDS in the face and denied the only available treatment because of bureaucratic indifference and homophobia. A recovering drug addict holding his addiction at bay with the support of a group home, yet in jeopardy of losing that home when fearful neighbors complained to a cowardly city government.

My frustration and disappointment began when I reviewed the pleadings I drafted for them. I could barely see over the chasm separating what those clients told me about their lives and what I wrote to the court as factual allegations in the complaint—sterile recitations of dates and events that lost so much in the translation. What is lost in a description that identifies a woman like Hattie only as a registered voter? Details, of course. Passion, certainly, but more than that. We lose the identity of the person harmed, the story of her life. But even more is lost. This was a class action aimed at remedying a systemic problem harming thousands, over generations. The complaint omits the social chemistry underneath the events normally invisible to the law—events that create the injury or compound it. In this complaint, we lose the fullness of the harm done, the scale of the deprivations, the humiliation of the plaintiff class members, the damage to greater society, the significance of it all.

4. PAUL GOOD, *CAIRO, ILLINOIS: RACISM AT FLOODTIDE* 12 (U.S. Comm’n on Civil Rights, 1973) (quoting Hattie Kendrick).

5. First Amended Complaint at 3, *Kendrick v. Moss* (S.D. Ill. filed July 3, 1979) (No. 73-19C) [hereinafter *Kendrick*].

The complaint omits the frustration of the democratic process and the powerful metaphors that claim an exception to the rules restricting the court's involvement. The complaint leaves intact the walls between the clients and the court, the clients and the lawyer. In a strange way, it even effaces the lawyer by denying her the dynamic and creative role of responding to the tragedy witnessed.

I wondered how we, as lawyers, could plead the horror of wrong done on a mass scale. In reviewing the pleadings in other famous civil rights class actions, I found similar failings. This Article explores why we fail and wonders whether we can do better.

To begin with, this Article demonstrates our failure by comparing lawyers' pleadings with the reality of clients' situations as described by journalists and historians. Much is lost by words alone, by the words of journalists and historians no less than those of lawyers.⁶ But with their losses and omissions, these contrasting descriptions will prove useful in my analysis. As Stanley Fish argues, all we have of "what really happened" is a collection of competing descriptions.⁷ The descriptions make visible the extent to which law as a language omits something significant from the reality it purports to portray.⁸

These contrasts are not merely academic. In this Article, we do not observe the legal interpretations of distant or dead judges' precedent.⁹ Rather, we read the work of a lawyer speaking through a complaint to a judge who will then, as part of the interpretive process, engage the lawyer in an ongoing conversation that is begun and framed by the complaint. The conversation ends with a decision, favorable or adverse.

The very high social stakes and moral imperative of civil rights cases invite literary treatment, in order to present worlds in conflict.¹⁰ In a systemic civil rights lawsuit brought by a class against a governmental or corporate system, the surface of everydayness is ripped open and we inspect the layers underneath. We then find the routine that grinds along, churning out the little injustices, the grinning faces that conceal resentment. The civil rights plaintiff

6. JAMES BOYD WHITE, *THE LEGAL IMAGINATION* 207, 268 (abridged ed. 1985) [hereinafter WHITE, *IMAGINATION*] (describing frustrations of legal language as "frustrations of language itself"); see also JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* 217 (1990) [hereinafter WHITE, *JUSTICE*] (discussing historians' use of language).

7. STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 158 (1989).

8. See WHITE, *IMAGINATION*, *supra* note 6, at 4 (asking whether precision of legal language is all gain with no loss).

9. This is the focus of much of the law-as-literature debate FISH, *supra* note 7, at 378 (noting "the almost exclusive focus of contemporary legal debate, judging"); see, e.g., WHITE, *JUSTICE*, *supra* note 6, at 89 (critiquing judicial opinions).

10. James Boyd White tells us of one such world, Greece in the chaotic aftermath of the Peloponnesian War. According to White, Thucydides found that "words themselves lost their meaning", "prudent foresight" became "cowardice" and "recklessness" became "loyalty." JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING* 3 (1984).

may stand in the courtroom as an equal to her adversary,¹¹ but she did not enter the courtroom in that condition and may leave with that inequality deepened. An adverse verdict can mean continued oppression, even death.¹²

But this dramatic quality transcends the civil rights context. Every client has a story that deserves to be told—from the corporate client trying to survive in a harshly competitive climate, to a spouse embroiled in a bitter divorce. While the need to tell a story is present in many different kinds of litigation, the civil rights field is a good place to begin. In Section B of this Part, I explore why the initial pleading before the judge is particularly important in a civil rights lawsuit. In Section C, I examine pleadings in three civil rights cases and identify the lost elements of the stories behind the complaints. Section D offers explanations for the loss but finds none that precludes reintroduction of those lost elements into the stories told by the pleadings. Section E argues that we need to reintroduce them, to change the way we think about pleading. In Part II, I explore the possibilities for change, and then I turn to specific suggestions for that task—from old rhetorical devices to new ones. I demonstrate my method for thicker pleading in Part III by revising a traditional civil rights complaint.¹³ Part IV suggests the benefits we would reap from a change in this direction. Finally, Part V proposes that we try.

B. *Speaking Is What We Do: The Importance of Complaints*

Liberty, lives, fortunes often are at stake, and appeals for assistance and mercy rend the air for those who care to hear. . . . In all questions men are frequently influenced by some statement which, spoken at the eventful time, determines fate.¹⁴

Clarence Darrow

What does it matter? What is wrong with a pleading that simply offers a short and concise statement of the claim, as the rules expect? Why are pleadings so important?

At one time in our history, these questions would have sounded odd to most lawyers. Justice Story wrote that pleading “contains the quintessence of the law, and no man ever mastered it, who was not by that means made a

11. See WHITE, JUSTICE, *supra* note 6, at 24 (discussing equalizing power of legal discourse).

12. As we will see, these crises affect the lives of lawyers as well, driving some into the role of renegade and others into the safety of traditional roles. ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 165, 167, 169, 204 (1973).

13. The Appendix contains a traditional complaint for comparison.

14. CLARENCE DARROW, *VERDICTS OUT OF COURT* 321–22 (Arthur Weinberg & Lila Weinberg eds., 1963).

profound lawyer.”¹⁵ Littleton called pleading “one of the most honourable, laudable, and profitable things in our law.”¹⁶ Of course, Story and Littleton were speaking of common law pleading, long since worn down by waves of reform to simplicity and plainness.¹⁷ Still, the reforms do not lessen the importance of the pleading.

Certainly, the persuasiveness of the stories lawyers tell for their clients matters. “People, including judges and jurors,” Michael Tigar writes, “understand and restate events in terms of stories.”¹⁸ Nevertheless, many lawyers view the complaint simply as the mechanism by which they get the case into a court and in front of a jury—irrelevant once defense motions attacking the pleading have been overcome. Viewed from their angle, the complaint only needs to meet legal sufficiencies; it need not tell a story. These lawyers might think that the trial, specifically the closing arguments, serves as a more appropriate vehicle for telling the tragic stories they seek to remedy.¹⁹

Even so, civil rights pleadings in particular should tell stories, for these reasons: First, in civil rights cases seeking injunctions, there is no jury. The judge is the person who must be persuaded. She is the trier of fact who will then decide to issue an injunction or not.²⁰ The complaint, while certainly not the only opportunity for persuasion, is the first in time and the one that frames the remaining discussion of the case. Second, not only will there be no jury, it is likely that there will be no trial. Years will be spent managing a complex discovery process, punctuated by scrimmages over various motions.²¹ Often the parties bypass trial by negotiating a consent decree, often with guidance from the court.²² While the parties may negotiate the relief, the court must

15. Quoted in JONATHAN LANDERS ET AL., *CIVIL PROCEDURE* 347 (2d ed. 1988).

16. LITTLETON, *TENURES*, bk. 3, ch. 9, § 534 (London, Henry Butterworth 1825) (1481)

17. Common law pleading was reformed by code pleading for modern litigation so that a “person of common understanding [could] know what is intended.” N.Y. CODE CIV. PROC. § 57(5) (1848). Code pleading in turn was reformed such that its distinctions among fact, evidence, and law were abolished and “short and plain statement[s]” of the claim became the only requirement of a pleading. 2A JAMES W MOORE & JO DESHA LUCAS, *MOORE’S FEDERAL PRACTICE* ¶ 8.13, at 8-54 to -55 (2d ed. 1994) (quoting FED. R. CIV. P. 8(a)(2)).

18. MICHAEL E. TIGAR, *EXAMINING WITNESSES* 5 (1993); see also John C Shepard & Jordan B Cherrick, *Advocacy and Emotion*, 138 F.R.D. 619, 622 (1991) (discussing benefits of storytelling).

19. Certainly civil rights litigation is not the only type of litigation that centers on human suffering. Personal injury litigation is another. But in personal injury cases—and in civil rights cases for damages—the audience is not the judge, but the jury—and so the medium of persuasion is the closing argument, not the complaint or petition. And—whether in personal injury or civil rights damages cases—transcripts of closing arguments to juries are more difficult to obtain than complaints, when they are available at all, since fewer cases are appealed than commenced.

20. See, e.g., *Wilson v. Bailey*, 934 F.2d 301, 305 n.4 (11th Cir. 1991) (noting that action for injunctive relief under 42 U.S.C. § 1983 is not triable by jury) (citation omitted). See generally *Lemon v. Kurtzman*, 411 U.S. 197, 200 (1973) (noting that courts have broad discretion to grant injunctive relief), 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2942, at 365 (1973) (same).

21. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV L. REV. 1281, 1298 (1976).

22. *Id.* at 1302.

approve of the terms²³ and maintain a "continuing involvement in administration and implementation."²⁴ Abram Chayes has noted that "[a]ll these factors thrust the trial judge into an active role in shaping, organizing and facilitating the litigation."²⁵ When the decision maker shapes the development of the case and grants the relief without a trial, the complaint grows in significance. It is the first and perhaps the only means of communicating the client's story.

Third, even where a trial results, it will take years to get there.²⁶ Erving Goffman has observed that in most personal encounters, one or the other of the participants in an interaction will shape that interaction, *at the outset*.²⁷ In litigation, one participant—the judge—exercises much more power than the others in deciding who speaks, at what length, and at what time. The complaint—read by the judge, one would hope, before her first face-to-face interaction with plaintiffs' counsel—may present the lawyer with the sole means of shaping the continuing interaction "at the outset." The complaint may color the judge's perception throughout the trial and beyond—from motions, discovery disputes, and settlement conferences, through postdecree enforcement proceedings.

Fourth, the court's construction of the "real" problem dictates how the problem will be considered and addressed. For example, if a prison case is defined as a problem of resources rather than as a dispute over particular rights, the court may rule that it has no power to act. On the other hand, if the case is defined as a dispute over rights, then the lack of resources provides no defense.²⁸

If the right is to an integrated classroom, then the transportation of pupils to achieve that end is appropriate. Suppose, on the other hand, a court asks why a school has become segregated. It may conclude that residential patterns are responsible. If it does, then its order may deal as much with housing as with the school. The definition of the

23. FED. R. CIV. P. 23(e).

24. Chayes, *supra* note 21, at 1284; see also Judy Scales-Trent, *A Judge Shapes and Manages Institutional Reform: School Desegregation in Buffalo*, 17 N.Y.U. REV. L. & SOC. CHANGE 119 (1989).

25. Chayes, *supra* note 21, at 1298. In systemic civil rights cases, "the judge is the dominant figure in organizing and guiding the case." *Id.* at 1284 (remarking on "public law litigation").

26. See *id.* at 1298. In Hattie Kendrick's case, settlement negotiations began in earnest on the eve of trial, six years after the initial complaint was filed. The case finally culminated in a consent decree six months later. Consent Decree, *Kendrick v. Moss* (S.D. Ill. Mar. 11, 1980) (No. 73-19-C). Even when clients are allowed to testify on their experiences during a preliminary injunction hearing, the narrative of their experiences may be lost once the court begins to focus more narrowly upon the more sterile legal issues raised by the complaint. See Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 929 (1992) (demonstrating how this occurred in one such case).

27. GOFFMAN, *supra* note 12, at 10-12.

28. See, e.g., Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1289.

issue dictates the direction of the response and the scope of the resulting remedy.²⁹

Since we criticize judges who reach adverse decisions by using labels that misrepresent our client's reality,³⁰ we should pause to consider how our complaints can educate the judge about that reality.

Fifth, federal judges who sit in isolation, economically and socially, from the problems of poor blacks in Cairo or of felons in maximum security prisons, need more vivid and complete pictures painted for them if they are to understand the problems sufficiently, to care about them enough to guide the litigation, and, ultimately, to remedy those problems.³¹ Beyond the personal life experiences of the judge, other obstacles restrict the view of the judge, e.g., the restraints of the role, limited resources,³² and even more limited access to the facts of a case.

Civil rights lawyers have an opportunity and an obligation to expand that view, starting with the complaint. Unavoidably, they will be reduced to speaking of the case in shorthand—metaphors or clichés—that is cramped by the claims made in the complaint. “Good morning, Judge. This is a Section 1983 prisoner case.” They can advance their persuasion, or fail to: “Counsel, is this that case where the prisoners were herded like cattle?”

One federal judge has candidly written that

[R]egardless of who appointed them, judges react negatively to the “gotcha” lawsuit. By that I mean the lawsuit based on some technical nonobservance of a law or regulation whose consequences are undocumented, or at best vague. We judges want to know the facts, the real-life conditions, the actual practices underlying a legal challenge. . . . Judges search for meaning in what we do. You need to convince us that the law or the regulation is important in poor people's lives.³³

29. *Id.* at 1291 (citation omitted).

30. E.g., Rand Rosenblatt, *Social Duties and the Problem of Rights in the American Welfare State*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 90, 100 (David Kairys ed., rev. ed. 1990) [hereinafter *POLITICS OF LAW*] (“[T]he quasi-empirical claim that the government has not ‘done’ anything to people by withdrawing benefits or providing inadequate services, because it has not made their situation worse than it would have been without any government program at all, denies the preemptive or reliance effects of actually providing services.”); see also Rhonda Copelon, *A Crime Not Fit To Be Named Sex, Lies, and the Constitution*, in *POLITICS OF LAW*, *supra*, at 177, 179 (“To compare homosexuality and contagious disease, as the Chief Justice did in a 1978 opinion, is quintessential homophobia.”)

31. See HENRY R. GLICK, *COURTS, POLITICS, AND JUSTICE* 244–54 (1983) (noting relationship between judges' social backgrounds and their attitudes); Lynne W. Henderson, *Legality and Empathy*, 85 *MICH. L. REV.* 1574 (1987) (explaining role of empathy in judicial decision making)

32. Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 *VA. L. REV.* 43, 106 (1979).

33. Patricia M. Wald, *Ten Admonitions for Legal Services Advocates Contemplating Federal Litigation*, *CLEARINGHOUSE REV.*, May 1993, at 11, 13. On appeal of a trial court's order granting a motion to dismiss, the complaint becomes critical in persuading a panel of judges who are even farther removed than the trial judge from the real world of a civil rights client.

Other judges—and their law clerks—have emphasized, in prisoner cases, that it is the “compelling” story that moves them to act.³⁴

Sixth, the complaint is even more important to lawyers who perceive themselves as representatives of a cause or constituency beyond the immediate client. Civil rights “litigation is itself an excellent constituency-building device.”³⁵ A lawyer can further her larger cause by drafting a pleading that serves as a “dramatic and decisive gesture, stating a claim in its most extreme and visible form—as a legal right.”³⁶ Impact litigation can give poor clients a chance to mobilize for change.³⁷ Robert Jerome Glennon even argues that litigation contributed more to the success of the mid-1950’s civil rights movement in Montgomery, Alabama, than did the bus boycott.³⁸ The complaint, filed with the court and disseminated to clients or “constituents” and the media, communicates what the problem is all about.

Seventh, through the media, the complaint speaks to the greater community. That community includes the defendants, the defendants’ superiors, and possibly their friends and colleagues. That community may come to see hidden problems in a new light, consider change, and press for settlement.³⁹

Eighth, the complaint offers the litigator the only chance to tell the client’s story—a dramatic, compelling story—in a literary way. It is a rare chance for creativity. Civil rights lawyers should not resist this opportunity.⁴⁰ Civil rights complaints, because they are of more recent vintage and so deeply fact sensitive, are rooted less often in common law pleading rules and techniques and written less frequently from formbooks. Civil rights lawyers find themselves compelled to go beyond the boilerplates, which do not lend themselves to portraying the unique position of their clients, who are socially marginalized underdogs.⁴¹

All this is summarized in an aphorism, which echoes from Story’s time as well as from Littleton’s: Pleading matters because it is what we do.⁴²

34. See JIM THOMAS, PRISONER LITIGATION: THE PARADOX OF THE JAILHOUSE LAWYER 148–50 (1988) [hereinafter THOMAS, PRISONER LITIGATION]; Jim Thomas, *Prisoner Cases as Narrative*, in NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW 237, 255, 257 (David Papke ed., 1991) [hereinafter Thomas, *Prisoner Cases*].

35. Diver, *supra* note 32, at 68.

36. *Id.*

37. Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients To Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987–88). For the litigation to serve this purpose, the complaint will have to be intelligible to the client audience. GOFFMAN, *supra* note 12, at 32 (arguing that professional acts of service should be intelligible to clients, but often are not).

38. Robert J. Glennon, *The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955–1957*, 9 LAW & HIST. REV. 59 (1991).

39. STEVE J. MARTIN & SHELDON EKLAND-OLSON, TEXAS PRISONS: THE WALLS COME TUMBLING DOWN 206–14 (1987).

40. WHITE, IMAGINATION, *supra* note 6, at 209 (discussing potential for creativity in lawyering).

41. Cf. EVE SPANGLER, LAWYERS FOR HIRE: SALARIED PROFESSIONALS AT WORK 161–62 (1986).

42. LANDERS, *supra* note 15, at 347 (quoting Littleton and other legal scholars).

C. *Dueling Descriptions*

For the truth is, facts are not enough. It is a great sin to distort them, and surely no good can come from that (I have never known a modern historical instance where the truth was not superior to distortion, by any standard and in every way); but facts can be done without as readily as any of the other components which serve to communicate an event. Stephen Crane's study of Chancellorsville, *The Red Badge of Courage*, though it concentrates on a single soldier, born in the writer's imagination, is at least as interesting—and even as instructive—as, say, Bigelow's. And yet Crane cared so little for facts, as facts, that he did not even give the battle's name.⁴³

Shelby Foote

1. *Cairo: Kendrick v. Moss*

In 1973, Hattie Kendrick and other African-American leaders in Cairo, Illinois, filed a federal class action lawsuit under the Fourteenth and Fifteenth Amendments to the U.S. Constitution. In their lawsuit, they challenged the structure of municipal elections by arguing, in essence, that the at-large system diluted the votes of black citizens. Although Cairo was forty percent black, city officers were elected by citywide vote and racially polarized voting patterns prevailed whenever a black candidate faced a white opponent. As a result, a black citizen's vote for a black candidate would be rendered meaningless. In order to prevail under existing law, the Cairo plaintiffs had to plead and prove a history of segregation in the community, a lack of responsiveness to minority constituents, and unequal access to the electoral process.⁴⁴

A few years after the Lawyers' Committee for Civil Rights Under Law filed the Cairo lawsuit, I arrived in Cairo fresh out of law school and found myself assigned to Hattie's case. Hattie became a grandmother to the little outpost of civil rights lawyers in Cairo and her case came to matter to us as the duty not only of lawyers but of grandchildren. We added a claim under the Voting Rights Act,⁴⁵ named another community activist, Preston Ewing, as

43. Shelby Foote, *The Novelist's View of History*, 17 *MISS. Q.* 219, 225 (1964)

44. See also *White v. Regester*, 412 U.S. 755, 766–67 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish Sch Bd v. Marshall*, 424 U.S. 636 (1976) (“[W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made.”).

45. Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 *et seq.* (1988 & Supp. V 1993)

a plaintiff, and began to push the case toward trial. In other respects, I did not alter the original complaint.

The factual allegations in the complaint can be compared to a 1972 account written by journalist Paul Good and published by the U.S. Commission on Civil Rights after it held hearings in Cairo.⁴⁶ The complaint pleads "systematic" discrimination in employment, citing statistics of higher unemployment and lower median income for blacks.⁴⁷ The journalist's account contains similar statistics but it also includes additional information.

When jobless blacks went on welfare, they were forced to pick cotton in season at substandard wages or lose their welfare rights. Since local plants—including governmental contractors—would not hire black seamstresses, one welfare mother with five children had to travel 50 miles a day to work, arising at 3 a.m. to feed and dress the children before carrying them to a sitter. When eventually she could find no one to mind them, she lost her welfare allotments.

. . . .
Mrs. Rosie Bryant, an 84-year-old welfare recipient so poor that she and her husband had to mortgage their mule, has a more down-to-earth summation of things. [She discussed] at the 1966 meeting [of the Illinois Advisory Commission to the U.S. Civil Rights Commission] what civil rights laws had done for her. "Listen," she says, "I don't see a bit of difference now than I did way back in '51 or '52 in the civil rights. It hasn't reached us. I reckon it's on its way, but it ain't got here yet."⁴⁸

The complaint plainly lacks colorful prose; but more than that, it misses the poignant personal stories of the two women. Additionally, it loses the context of their problems, which involve far more than the Voting Rights Act. "The problem" encompasses even more than a poor economy in which the few employers hire fewer blacks than they might. Employers, cotton growers, and the local welfare office combined their power to control Cairo's black citizens. Finally, the complaint fails to note that the purported racial progress of recent decades had yet to reach Cairo. As lawyers, we failed to argue that racial justice would only reach the town if the court brought it.

The complaint alleges the maintenance of segregation throughout the history of Cairo, and cites examples:

46. GOOD, *supra* note 4.

47. The complaint alleges:

. . . The overall unemployment rate for Alexander County was 9 percent in 1970; 6.5 percent for white males and 16.2 percent for Black males. . . . While the median income for a white family residing in Alexander County in 1969 was \$6,428, the median income for a Black family was only \$2,809. . . . Three-quarters of the Black families of Alexander County earned less than \$3,000 in 1969, while only one-third of the white families earned less than this amount.

Kendrick, *supra* note 5, at 7.

48. GOOD, *supra* note 4, at 13-14.

Public facilities owned by private individuals have been historically operated on a racially segregated basis. . . . Entertainment facilities in Cairo often have been closed to avoid court ordered integration. The only public swimming pool was closed in the mid-1960's.⁴⁹

Contrast this with the journalist's version:

[Anthony Patterson] was eight when Cairo's only swimming pool closed rather than integrate; through quiet hot summers he watched weeds grow until they choked the pool. . . . He says: "This town is so far behind and backwards, it's really a shame. You don't think about staying and looking for a job. You can't even work as a bagboy in a supermarket. You just think about going away all the time."⁵⁰

There were small, sporadic boycotts by blacks trying to force desegregation of public accommodations, and answering violence from whites. In 1962, the city's only swimming pool, which had been operated by the Rotary Club, integrated for two weeks after blacks complained to state officials, then closed for good. From that day until now, the young people of Cairo during the scorching southern Illinois summers have had to drive 30 miles to swim in a pool or risk the Mississippi currents where some have died.⁵¹

On this issue, the complaint loses the personal perspective, here a story of hopelessness. This hopelessness can only be contagious when those who would otherwise be hopeful are confronted by a resistance to integration so fierce as to deny all children the benefit of a pool in the near-tropical temperatures of Cairo.

The complaint misses something else: the role blacks played in the racial history of their town. They were more than numbers, more than passive observers awaiting the intervention of the federal government. They demanded equality and fought for it. Elsewhere in his account, the journalist turns to another example of segregated public facilities:

At the roller skating rink, there was no bargaining. When blacks in 1964 picketed to gain admission, vigilantes were waiting with clubs and chains. Among those beaten was a 16-year-old named Charles Koen who was destined to become a minister and leader among the blacks, and a living symbol to whites of criminal anarchy seeking to destroy the old order.⁵²

49. *Kendrick*, *supra* note 5, at 7.

50. *GOOD*, *supra* note 4, at 6.

51. *Id.* at 12.

52. *Id.*

This symbol is important to a court that will hear the defendants' worries about black militants and criminal anarchists as an excuse for not involving blacks in their own government.

The journalist reports his interview with John Holland, the City Attorney, and Tom Madra, a leader of the White Hats, a white vigilante group:

"Listen," Holland says, "I told Preston Ewing [leader of the local NAACP chapter] a dozen times I'm looking for a good colored leader who can control his people. Everybody looks for a good black man nowadays. You find one and you've got liquid gold."

"They put one on the Fire Department," Madra says, "Even though he couldn't pass the test. He quit. Said he didn't like to sit around."

Holland relaxes in a smile and adds, "He must have been a pretty good kind of Negro," he says, "If he didn't like to sit around."

Madra . . . sits on the edge of his chair, feet drumming and says: "There's no good black leadership in this community. There are some good Negro undertakers and doctors. But that's all."

. . . .

Do blacks have any legitimate complaints? Housing, for example?

"There's no doubt," Madra replies, "That blacks from other states did gravitate here into Illinois because of the welfare programs and did inherit bad housing. They came here for the largesse. They were unemployed and unemployable. They live by preference in a shanty."

Attorney Holland explains that there are no blacks in government because "there are very few to choose from. There's nothing better than having a good black man on your city council. But the black militants drive them out. We're thinking now of putting two on the council."⁵³

The complaint pleads only the result of this matrix of attitudes:

Black residents of Cairo have been systematically excluded from elective politics in the community. The political processes leading to the nomination and election of partisan candidates for elective office have not been open to Black residents of Cairo. . . . Only one Black, Jacob Amos, has ever been elected to office in the Cairo city government . . . in 1894. . . . Black residents of Cairo have been systematically denied appointment to and membership on various boards, departments and agencies⁵⁴

Compare the following passages. Which justifies more compellingly a court's intervention in the electoral politics of a city?

Option One:

53. *Id.* at 91-92.

54. *Kendrick, supra* note 5, at 8.

The abolition of a ward system of election, and the adoption and perpetuation of the present at-large system for electing City Council members have resulted and will continue to result in immediate and irreparable injury to plaintiffs herein, who have no adequate remedy at law.⁵⁵

Or, Option Two:

It is said by some veteran observers, white and black, that the Cairo power structure . . . discerned in this century that the city was never going to make it big. Many of the vast warehouses along the Ohio levee, once burgeoning with goods in transit among river, road or rail lay empty, padlocked. The bulk of industry coming in was runaway, lured by the promise of cheap, tractable, non-union labor that included unskilled and impoverished men off broken-down farms on the far side of both rivers. A desperate competition among whites for jobs guaranteed their continuing solidarity against blacks who, in turn, could be had for next-to-nothing to do whatever dirty or menial work whites disdained. . . . All these elements, according to observers like former Cairo newspaper publisher Martin Brown, persuaded white men of authority to run the city as a limited fief, resisting change that might challenge their entrenched position, reaping the fruits of stagnation.⁵⁶

Robert Lansden, a 62-year-old white attorney and banker whose grandfather wrote Cairo's official history and has a park named in his honor, says: "There are a lot of white people who would sooner see Cairo float down the Mississippi than give a black man a break."⁵⁷

Given my lack of experience in law and life at that time, we might conclude that I omitted these stories from the amended complaint because of my inability to reconcile my two halves (lawyer and person) in a whole life. Another young lawyer, cautious and unskilled. But even the most seasoned attorneys have made similar omissions. In the next Subsection, let us examine a pleading filed by the legendary criminal defense lawyer, William Kunstler.

2. *Attica*: Inmates of Attica Correctional Facility v. Rockefeller

In 1971, the inmates of Attica Correctional Facility in upstate New York rioted, seized control of the prison, and held it for four days. At the end of the four-day period, the prison was retaken by prison guards and state police at a cost of forty-three lives, thirty-two of which were inmates.⁵⁸ During that time, a team of "observers" attempted to mediate a resolution of the conflict between

55. *Id.* at 14.

56. GOOD, *supra* note 4, at 11.

57. *Id.* at 5.

58. TOM WICKER, A TIME TO DIE 301 (1975).

the inmates' demands for reform and New York's obligation to run its prison. Among those observers were Tom Wicker, a columnist for *The New York Times*, and William Kunstler, a lawyer of some repute as an advocate for radical activists and their causes.⁵⁹ Tom Wicker wrote a book about the events at Attica⁶⁰ and William Kunstler filed a class action lawsuit on behalf of the prisoners.⁶¹

While the lawsuit complains of conditions in the prison giving rise to the inmate uprising, the complaint principally targets the State's takeover, accusing the State's officers as follows:

The assault began with a massive and indiscriminate hail of bullets and buckshot. At the same time, about 10:00 A.M., on Monday, September 13, 1971, a helicopter began dropping tear gas into "D" Yard. Next, a force of armed State Police and Correction Officers broke into "D" Yard indiscriminately firing their weapons and another force fired weapons from the catwalk overlooking "D" Yard.

. . . Troopers and State Police knocked down tents in "D" Yard where inmates were hiding and fired weapons into the fallen canvas

. . . Inmate Willie West was killed by a Trooper after he had surrendered and had his hands over his head

. . . Within a few minutes of the gassing, inmates Baines and Fuller were picked up by Troopers from the ground and killed by the firing of numerous shots into their bodies at close range⁶²

The complaint alleges that the violence did not stop with the takeover:

Immediately after the assault, and for over a week thereafter, inmates were severely beaten, tortured, threatened, harassed and verbally abused by State Troopers and Correction Officers. . . .

. . . State Officers beat scores of inmates as they crawled or walked into "A" Yard after the initial assault. . . . State Officers stuck a gun barrel into inmate Sam Green's wound.

. . . After the inmates were in "A" Yard they were forced to run naked through a gauntlet of about fifty Correction Officers, State

59. In representing his radical clients, Kunstler sometimes engages in radically spirited courtroom behavior. During the trial of the Chicago Seven, he was held in contempt for the stridency and vigor of his advocacy. See *In re Dellinger*, 357 F. Supp. 949 (N.D. Ill. 1973).

60. WICKER, *supra* note 58.

61. Class Action Complaint, *Inmates of Attica Correctional Facility v. Rockefeller* (E.D.N.Y. filed Sept. 13, 1971) (No. 71 Civ. 7751) [hereinafter *Attica Complaint*].

62. *Id.* at 13-15.

Police and Troopers who beat them with rubber truncheons, sticks, straps and bats.⁶³

Wicker adds only a little to the story, dramatic descriptions such as: "It was like driving cattle"⁶⁴ and "A long snakelike line of naked inmates . . . was formed from A-yard . . . to what had once been No Man's Land."⁶⁵

One could debate which is the more terrifying version of the story. The complaint competes in part because of our surprise at the straightforwardness of its language. Yet once again, certain narrative elements found in Wicker's account are missing from the complaint, such as the cruel irony of a helicopter overhead announcing that inmates would not be hurt if they kept their hands above their heads.⁶⁶

Perhaps more important, the complaint's more graphic pleading may weaken its own persuasiveness. We can see this effect through comparison of the complaint with the journalist's purportedly more neutral account. Wicker acknowledges the pent-up frustration of the guards—frustration released when they recaptured the prison—which makes the brutality more awful since it admits the only possible excuse for the violence, juxtaposed with a description of brutality that no court could excuse. Wicker's narrative makes clear what the complaint does not—the resistance was over, and there was no just cause for the violence to continue. The complaint may assume the perspective of the clients too fully to persuade a judge reading the complaint from a different perspective.

Both the complaint and the book deal with the failure of state and local prosecutors to charge any of the state troopers or correctional officers with crimes, although charges were filed against inmates. The complaint characterizes this failure as part of a cover-up of the crimes committed by state actors during the prison takeover.⁶⁷ Wicker does not assume, as the complaint apparently does, that a neutral fact finder will credit this version of events.

Even more important, he calls upon the reader to admit a fundamental—but almost subterranean—presumption that cannot help but alter one's view of the case, once exposed. It centers on the hostages taken by the inmates when they took over the prison. On the fate of the correctional officers taken by the prisoners as hostages, the complaint says only this: "Each hostage was assigned a personal guard to protect him from possible harm. The hostages were treated well At no time were any knives or other sharp instruments placed at the throats of any of the hostages."⁶⁸ And:

63. *Id.* at 16–17.

64. WICKER, *supra* note 58, at 287 (quoting Attica inmate).

65. *Id.* at 289.

66. *Id.* at 285.

67. *Attica Complaint*, *supra* note 61, at 20–24; WICKER, *supra* note 58, at 309–10

68. *Attica Complaint*, *supra* note 61, at 11.

Within an hour after the assault, [Executive Deputy Corrections Commissioner] Dunbar falsely claimed that nine hostages had had their throats cut. The fact was that all were killed by the state's own bullets. Defendant Dunbar also related the story that a hostage had been castrated—a story that was wholly false.⁶⁹

Contradicting the complaint, Wicker notes that each hostage stood blindfolded with a blade placed at his throat or chest, and photographs bear him out on this point.⁷⁰

But far more is happening here, as Wicker confesses:

On September 14, Dr. John Edland, the Monroe County Medical Examiner, found the bodies of eight hostages and 19 inmates awaiting his examination. True to prison custom, the dead guards were tagged with their names, but the dead inmates were tagged "P-1," "P-2," and so on. That afternoon, Dr. Edland—after what he later called "the worst day of my life"—made public his findings. Not a single hostage had been killed by knife wounds. None had been castrated or mutilated. All had died on Monday morning, September 13. All had been killed by bullets or buckshot—some hit as many as "five, ten, twelve times."

When queried, Corrections Department officials said that no firearms had been found among the "hundreds" of weapons taken from the inmates when D-yard was recaptured. . . .

Many in Attica town continued to believe that the inmates had killed the hostages⁷¹

This belief is not unexpected, and not unique to the citizens of the town, who live in fear of dangerous convicts behind those nearby walls.

Wicker also returned, again and again, to one essential contradiction. All the state officials, all the observers—so far as he knew—had believed explicitly that the inmates would kill the hostages if D-yard was attacked. But the inmates *had not done it*.

Some of the black and Puerto Rican observers might have expected the inmates to kill the hostages only because they believed the inmates to be desperate enough to do anything. But Wicker, trying to analyze his own attitudes, playing back scenes from Attica until they formed a nightmare movie in his mind, saw finally that from the start this had been a classic case of "we" and "they." Inmates were vengeful blacks, the embittered poor. Inmates were from the underside of life, the criminal side. So inmates would kill. "They" were that kind of people. Whatever his sympathies, however he had rationalized, his conditioned instinct, too, had been that the Attica

69. *Id.* at 17–18.

70. WICKER, *supra* note 58, at 280–81 (photographs).

71. *Id.* at 302–03 (citation omitted).

brothers were killers, outlaws, different—something less than “we” are.

Why should he have supposed, then, that the state police, the corrections officers, the state officials, Nelson Rockefeller would not feel the same? . . . In the long run, the power of the state had not believed it possible that the men of D-yard could behave with decency and humanity.⁷²

Wicker’s narrative forces his readers, “us,” to deal with “our” conditioned instincts. It calls upon us to grapple with our own limitations as people in order to understand the situation of others whom we would label “them.” It humanizes us as it humanizes the inmates. A complaint to a federal court, asking it to protect these inmates, might do so as well.

The observers felt deeply affected by the prison’s recapture, including Kunstler, who later filed this lawsuit, and Wicker, who later wrote this book.⁷³ Kunstler’s complaint reduces the tragedy to a legal problem, although one with more graphic and gripping description than we might expect. Wicker finds himself backing away from the reality of what happened. Attempting to leave the prison in a police car, Wicker found a reporter named Pressman in his way.

Pressman held a microphone near Wicker’s face and asked for his reaction to what had happened. It was a fair question, the usual question. In other circumstances, Wicker had asked it himself of dozens of shocked or dazed or bewildered people. It wrenched him from the prison world into the ordinary cruelties of life. The one reality began to fade, as reality does, into the next. He tried to order his words professionally:

As an individual, speaking for myself . . . I suppose many other people . . . I think any event in which 35 people are dead is. . . .

Several voices from the crowd of reporters around Pressman informed him that there were 37 dead.

Is it 37? Whatever the figures are . . . any event of that kind can only be termed . . . can only be termed a tragedy . . . ah . . . any event of that kind, one is certain . . . you just feel that somehow all of us who were involved should have avoided it. Some way we should have found some way not . . . not to have 37 people dead.

. . . .
 . . . As the police car pulled out of the parking lot and wound down the hill . . . he was not even angry. He was just tired, but not too tired to be professional again. He calculated that if he could catch

72. *Id.* at 308–09.

73. Kunstler was not present for the recapture, however, because authorities barred him from the prison. *Id.* at 274.

a midafternoon plane to LaGuardia, he could make his first edition deadline.

But he knew there would have to be a time for anger.⁷⁴

Wicker, having bridged the gap between "us" and "them," needed to retreat to his accustomed side, but he carried with him a new insight. The advocate—unlike the reporter—may identify too closely with felons as clients, such that she loses the audience. Such identification might not even be possible where the clients are even farther away from the lawyer's life, as in the world of the profoundly mentally retarded. An examination of a pleading in such a case follows.

3. *Willowbrook*: New York State Association for Retarded Children v. Rockefeller

The year after the Attica case, Bruce Ennis, a lawyer for the New York Civil Liberties Union, filed a lawsuit challenging conditions in the Willowbrook State School for mentally retarded persons, asserting a right to treatment and decent care under the First, Eighth, and Fourteenth Amendments.⁷⁵ Ennis had left a Wall Street firm to work for the ACLU, and began its mental health project.⁷⁶ His complaint charges that "Willowbrook is not a therapeutic institution. It more closely resembles a prison . . ." ⁷⁷ Continuing the prison theme, the complaint further alleges:

The environment at Willowbrook is inhumane and psychologically destructive. Examples of the anti-therapeutic environment include, without limitation, the following:

a) . . . Residents are forced to live and sleep in barn-like structures, often 40, 50 or a hundred to a room, with six inches or less between beds.

b) Residents have no privacy, and no place to keep personal possessions.

. . . .
e) The areas in which the residents live are sparsely furnished, and are almost totally devoid of . . . ac[c]outrements of normal living.

f) Residents are not properly clothed. . . . [They] are forced to wear dirty clothes and clothes soiled with urine and feces.

g) Many of the living areas give off an overpowering stench of sweat, urine and human excrement.

. . . .

74. *Id.* at 297-98 (citation omitted).

75. Class Action Complaint, *New York State Ass'n for Retarded Children v. Rockefeller* (E.D.N.Y. filed Mar. 17, 1972) (Nos. 72 Civ. 356, 72 Civ. 357) [hereinafter *Willowbrook Complaint*]. The case is reported at *New York State Ass'n for Retarded Children v. Carey*, 393 F. Supp. 715 (E.D.N.Y. 1975).

76. DAVID J. ROTHMAN & SHEILA M. ROTHMAN, *THE WILLOWBROOK WARS* 50 (1984).

77. *Willowbrook Complaint*, *supra* note 75, at 20.

j) Residents are not protected from frequent and continuing physical assault and injury.

k) Approximately two to three residents die at Willowbrook each week. Many of them—at least three or four a month—die aspirating their own food or vomit because there are not enough employees to care for them.⁷⁸

The complaint continues:

Because of the foregoing, the vast majority of residents at Willowbrook have actually regressed and deteriorated since their admission. Many of them exhibit stylized and stereotyped behavior, such as constant bobbing, head-nodding, unusual body postures, etc., which is not the result of mental retardation but instead is the result of prolonged deprivation in a barren, prison-like environment.⁷⁹

Ennis tells a sad story, triggering legal rights and human pity.

In contrast to the Cairo and Attica cases, the complaint provides us with the personal stories of the named plaintiffs.

Plaintiff Lara R. Schneps, aged four, has resided at Willowbrook, Building 14, Ward B, since July 31, 1969. She is profoundly retarded, as are most of the 45–50 children, aged 1–7, who reside in her ward. In addition, she suffers from severe motor complications and physical disabilities.⁸⁰

The complaint pleads similar facts for each of the named plaintiffs, identifying them as persons.⁸¹ These allegations also bring their parents into the litigation, referring often to visits to the institution by the parents and their inability to find alternative places for their children to live. For example:

Recently, Lara's mother visited and found only one attendant to care for the children in Lara's ward. . . .

. . . .

. . . Her parents did not want to place Lara in Willowbrook, and would like to take her out, but they have been unable to find any private or community facilities to assist them in her care, and are unable to care for her at home on a permanent basis.⁸²

78. *Id.* at 20–22.

79. *Id.* at 35.

80. *Id.* at 2.

81. *Id.* at 3–13.

82. *Id.* at 3.

Parents visit and “almost always discover new physical problems and injuries, including fresh bruises, deep scratches, pulled out hair.”⁸³ “Clothes delivered by . . . parents ‘seem to disappear.’”⁸⁴

Contrast this with an account of these same conditions again by a journalist, this time a television journalist. In 1972, New York television station WABC broadcast a special report entitled *Willowbrook: The Last Great Disgrace*. The television show actually triggered the lawsuit.⁸⁵ The report recounts how the station had been contacted by a doctor named Wilkins, fired from Willowbrook for encouraging parents to organize for improved conditions.⁸⁶ Sneaking onto the wards to film conditions, the cameras show residents huddled and twisted like brambles in corners or wandering the crowded dayrooms.⁸⁷ The audience sees them like this both before and after visits by high-echelon officials, however cleaner and safer they appeared during those official “inspections.” The reporter describes the residents he sees

lying on the floor naked and smeared with their own feces. They were making a pitiful sound, a kind of mournful wail that is impossible for me to forget. This is what it looked like. This is what is sounded like. But how can I tell you about the way it smelled? It smelled of filth. It smelled of disease. It smelled of death.⁸⁸

The reporter interviews the discharged doctor who tells of residents sitting and rocking with no one talking to them, staring at the floor for hour upon hour. He describes residents “fighting for a small scrap of paper [on the floor to play with].”⁸⁹ Referring to residents who were curled up on the floor like fetuses and others who were shaking their hands wildly for no apparent reason, the doctor says, “[I]f you or I were left to sit on a ward surrounded by other mentally retarded people, we would probably begin to look like this, too.”⁹⁰ As a result of understaffing, the doctor explains, residents were fed in two or three minutes. When the reporter asks the doctor how long residents should have to eat, the latter answers, “[T]he time your or my children would want to eat breakfast.”⁹¹

83. *Id.* at 5.

84. *Id.* at 6.

85. ROTHMAN & ROTHMAN, *supra* note 76, at 45–51.

86. *Id.* at 16–17.

87. GERALDO RIVERA, *WILLOWBROOK* (1972) (partial transcript of television broadcast).

88. *Willowbrook: The Last Disgrace* (WABC television broadcast, Jan. 6, 1972) [hereinafter *The Last Disgrace*]; see RIVERA, *supra* note 87, at 22 (describing this scene). Pictures, as well as the written word, have their own limitations, as was revealed by the different reactions of jurors and the public to the videotape of the police beating of Rodney King. Hugh Davies, *American Riots: Why Did the Jury Find Police Innocent?*, DAILY TELEGRAPH, May 2, 1992, at 3; *The Jury's View*, WASH. POST, May 1, 1992, at A33.

89. RIVERA, *supra* note 87, at 25.

90. *The Last Disgrace*, *supra* note 88.

91. *Id.*

After the reporter visits California facilities that are better staffed and more successful in habilitating mentally retarded people, he returns to Willowbrook and characterizes it as a place of "degradation" that treats the mentally retarded like "animals," a "real life horror story," a "dark corner," New York's "leper colony."⁹² He notes that no state officials would appear on the broadcast to defend conditions. The reporter ends the broadcast with a quote he attributes to the patron saint of broadcast journalism, Edward R. Murrow: "[For] some stories, there is no other side."⁹³

Because the reporter, Geraldo Rivera, is now a notorious talk show host, one might wonder whether he embellished upon what he saw and heard at Willowbrook. His description, however, is confirmed by historians who have written on the making of the documentary. David and Sheila Rothman have written that

with cameras rolling, Wilkins [the fired doctor] unlocked first an outer door and then a heavy metal inner door. Rivera entered, and breathing in foul air, hearing wailing noises, and seeing distorted forms, momentarily lost his bearings. As a floodlight pierced the darkened space, he exclaimed, "My God, they're children." To which Wilkins responded, "Welcome to Willowbrook."

They shot quickly. . . . The images had a jumpy and elusive quality. This spindly and twisted limb was a leg; that grossly swollen organ was a head. The blotches smeared across the wall were feces; the white fabric covering the figure in the corner was a straitjacket. That crouching child, back to the camera, was naked and so was the one next to him. Both of them were on the floor; there was no furniture in the room save for a wooden bench and chair. The camera focused for a few seconds on an oddly smiling person, the only one fully clothed. That had to be the single attendant.

Even as he stood there, Rivera thought of the Nazi concentration camps. One could see similar scenes in the newsreels of American soldiers freeing the inmates of Dachau: the bulging, vacant eyes in emaciated faces, the giant heads and wasted bodies. Was Willowbrook America's concentration camp? Did we have such horrors too?⁹⁴

The Rothmans tell of one set of television viewers who watched the broadcast and thought of their daughter at Willowbrook:

The scene that Raymond and Ethel Silvers saw on the screen that evening was a familiar one, but they had never described it to anyone Every Sunday morning they left their home . . . to visit their daughter, Paula, at the facility, a visit that they dreaded but

92. RIVERA, *supra* note 87, at 115.

93. *The Last Disgrace*, *supra* note 88.

94. ROTHMAN & ROTHMAN, *supra* note 76, at 17.

would not skip. They never knew in what condition they would find her. . . .

They would pack a bag of freshly laundered clothes, include soap and a towel, and set out for Willowbrook. Once there, they would sit around for an hour in a barren waiting room until Paula arrived. They were never allowed to see her ward. . . . When Paula finally came, they took her to a nearby washroom, scrubbed her from head to toe, and dressed her in clean clothing. In the washroom they learned about life on the wards. Her bruises told them all they needed to know about supervision and care.⁹⁵

What do the journalist and historian tell us that the lawyer does not tell the court? The complaint, while it artfully pleads horrible conditions, enforces the “us/them” dichotomy similar to the one that worried Wicker at Attica.⁹⁶ At the same time the complaint treats the plaintiff class members as victims of an institutional regime, it also leaves them as foreigners, as different, as “them.” Perhaps the complaint assumes a familiarity with the institutionalized mentally retarded person and with life in prison. If so, characterizing Willowbrook as a prison might persuade the judge that action must be taken to rescue the residents. Still, that familiarity may be absent. In cases where the judge holds misconceptions about mentally ill people, she may conclude that little more than warehousing can be done with such creatures. By reinforcing the conception of the plaintiffs as “other,” the complaint fails to educate the judge about events and people she will see later in the case. When this happens, the complaint may allow the judge to presume that the horrific sights evoked by the complaint are the natural state of mentally retarded people.

In contrast, Rivera asks the listener to identify with the retarded by broadcasting the doctor’s insistence that we would look like this, too, if left on these wards. Rivera broadcasts the doctor saying that these people should be given the same time to eat breakfast as “your children or mine.”⁹⁷ Similarly, the Rothmans urge us to permit our eyes to focus for a moment before we miss noticing that the bloated organs and twisted limbs are heads and limbs of people. They invite us to guess with them about whether the one fully clothed person is a resident or an attendant—one of “them” or one of “us.”

The Rothmans also bridge the gap between “them” and “us” by telling of parents who visit their institutionalized daughter on Sunday mornings.⁹⁸ Like us, they are not permitted onto the ward. Like them, we can surmise what life is like on the wards from what we do see. Certainly, the complaint helps its audience, the court, identify with the plaintiffs by mentioning more about the

95. *Id.* at 17, 19.

96. *Willowbrook Complaint*, *supra* note 75, at 20–22 (using spare and clinical language to describe inhumane conditions).

97. *The Last Disgrace*, *supra* note 88.

98. ROTHMAN & ROTHMAN, *supra* note 76, at 17.

parents than their legal role as next friend for their children who cannot themselves litigate. The complaint also refers to details such as scratches and missing clothing. But it does not tell us—except in the case of Lara’s mother—whether or not the parents could visit the wards.⁹⁹ If they frequently visited the wards, the disappearance of clothing might seem ordinary, like the missing clothing of a child gone away to live in a college dormitory. From this limited perspective, one might even expect scratches in an institution so regrettably large. But when the expected becomes evidence of things unseen, small details take on a larger, more provocative significance.

Despite the possible similarities between us and them, stark differences separate “our” world from the world of Willowbrook. Possession of a single piece of paper is of slight importance in our world, unless the paper’s contents have some special significance. Compare the allegations of the Willowbrook complaint protesting the “sparse[ness]” of furnishings and the absence of a “place to keep private possessions,”¹⁰⁰ with the television report of residents fighting over a scrap of paper. Ask which tells you how “sparse” their lives are. In the bare hallways of Willowbrook, to the naked and idle residents, a scrap of paper has importance beyond our own retarded imagining. The journalist’s account accomplishes two important things with respect to that scrap of paper. It educates us that things insignificant in our world are very critical in that world.¹⁰¹ Moreover, it measures the distance between our world and theirs, illustrating how far from the Constitution they must now live. It tells us that the distance must be narrowed.

The journalist and historian achieve still more. They involve their audience in a conversation about Willowbrook by reporting how they and others react to Willowbrook. Rivera is able to share with his viewers his feeling that it was impossible to forget the moans of the children at Willowbrook, while he simultaneously acknowledges his inability to convey the smells of the institution. The Rothmans describe Rivera’s reaction when his eyes focus in the darkness and he realizes that the residents are only children. The Rothmans also tell us how the Silvers watch Rivera’s television report. Although the Silvers dread their visits with their daughter, they make them because they must.¹⁰²

The historian and journalist persuade us, while the complaint does not, that we must make that trip, as well. While the complaint pleads facts that support a claim for constitutional violations to which a court might respond, Rivera and the Rothmans demand that we take notice. Rivera reports the failure of the

99. *Willowbrook Complaint*, *supra* note 75, at 3.

100. *Id.* at 21.

101. Much of the criticism of prisoner litigation stems, in part, from a perception that prisoners will sue over any trivial matter. Law clerks and court-appointed lawyers can recite endless examples from cases on which they have worked. *E.g.*, THOMAS, PRISONER LITIGATION, *supra* note 34, at 142, 150

102. ROTHMAN & ROTHMAN, *supra* note 76, at 17.

system to remedy conditions by showing the cover-up of conditions when officials visit and the discharge of a doctor who tried to change things.¹⁰³ The court must make that trip to the wards on Willowbrook, because Dr. Wilkins and the parents of Paula Silver cannot, because Rivera had to sneak his cameras behind the locked doors.¹⁰⁴ As Paula's parents had to make that trip because they are parents, so must the court go there, because it is the court.

Rivera and the Rothmans persuade us, as the complaint fails to do, that the court must exercise its powers to change things because there is no alternative. This is an exception to the usual rules of discretion and balancing interests that might mitigate against the relief sought by the plaintiffs.¹⁰⁵ This is not just a prison, it is Dachau. It is a case for which there is no other side.

4. *The Point So Far*

The three cases we have looked at so far all date from the 1970's. Yet the pattern does not change in cases from the dawn of the civil rights era through its more recent twilight.¹⁰⁶ Why can't lawyers tell these stories? What stops us from amplifying clients' voices so they are heard? Lawyers are not simply dull writers. On the contrary, our profession produces some stirring and beautiful prose; most of the famous examples are written by judges, not lawyers, and explain a principle of law or morality, and rarely portray a point of fact.¹⁰⁷ The issue is not just writing, but also analysis; not just what we write, but what we see as important.

103. *The Last Disgrace*, *supra* note 88. Dr. Wilkins is mentioned in the complaint but no reference is made to his role in exposing conditions or to his discharge. *Willowbrook Complaint*, *supra* note 75, at 7.

104. Ultimately, the judge did visit the institution, after a preliminary injunction hearing. ROTHMAN & ROTHMAN, *supra* note 76, at 83-86 (quoting judge's notes from field trip to Willowbrook).

105. See Herbert A. Eastman, *Metaphor and Madness*, *Law and Liberty*, 40 DEPAUL L. REV. 281, 309-11 (1991) (describing specific examples of judicial discretion in context of health care jurisprudence).

106. Compare Complaint, *Briggs v. Elliott* (E.D.S.C. filed Dec. 22, 1950) (No. 2657), reported at 98 F. Supp. 529 (E.D.S.C. 1951) (one of four cases consolidated in *Brown v. Board of Education*, 347 U.S. 483 (1954)) with RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976) (providing rich historical account of *Brown* case and surrounding civil rights struggle); compare Complaint, *Coker v. Bowen* (D.D.C. filed Sept. 2, 1986) (No. 86-2448), in *THE RIGHTS OF THE HOMELESS* 305 (PLI Litig. & Admin. Practice Course Handbook Series No. 331, 1987) (seeking to compel the United States Department of Health and Human Services to enforce the state's statutory and regulatory obligations to provide emergency shelter) with JONATHAN KOZOL, *RACHEL AND HER CHILDREN: HOMELESS FAMILIES IN AMERICA* (1988) (describing homelessness crisis in United States through biographical accounts). This contrast is especially pointed where one writer crafts documents in two different genres. Compare Complaint at 10, *Prince v. Pittston Co.* (S.D.W.V. filed Sept. 3, 1972) (No. 3052) (seeking damages for massive pollution of West Virginia creek by coal mining company) with GERALD M. STERN, *THE BUFFALO CREEK DISASTER* (1976) (describing factual background and litigation strategy of *Prince* case).

107. Read Justice Holmes' opinion in *United States v. Schwimmer*, 279 U.S. 644, 653-55 (1929) (Holmes, J., dissenting), and listen to Clarence Darrow, pleading for the lives of Loeb and Leopold. CLARENCE DARROW, *ATTORNEY FOR THE DAMNED* 86-87 (Arthur Weinberg ed., 1957).

At this point, we need only acknowledge three propositions. First, there is something in the language journalists and historians use to describe events and people that is missing from the language lawyers use to describe and analyze that same reality. Second, the missing element may have some significance. Third, given the persuasive importance of complaints, it is unlikely that lawyers omit that missing element through mere accident.

In *Kendrick*, we had no other chance to present the lost elements to the court because the case settled.¹⁰⁸ During the years of pretrial discovery and motions, the court acted without the benefit of the stories that make judicial intervention a moral imperative. After the entry of the consent decree, the court enforced the decree. But even then, the court did not act because it truly had been persuaded by force of the story. As one of the lawyers, I grasped some of the elements omitted from our pleading that were present in Good's account of Cairo's history. Hattie told me these stories. I had read Good's book, but I never placed these stories in the complaint.¹⁰⁹ Instead, the complaint thinly pleads the Cairo story, with omissions that are glaring only when we squint past them to the story as told by others. Why do we write complaints so that we must squint to see the stories behind them?

D. *Partial Explanations: Constraints on Thicker Pleading*

A language is like a map; it *is not* the territory represented, but it may be a good map or a bad map.¹¹⁰

Alfred Korzybski

In attempting to answer, I refer to "thicker pleading" to distinguish it from the "thin" conceptual speech of most legal expression.¹¹¹

108. The plaintiffs and other community representatives had only one opportunity to tell the judge a portion of their story. This occurred when defense counsel tried to withdraw on the eve of trial and plaintiffs opposed that withdrawal. To convey the importance of the issue, busloads of class members came to court to watch and to be seen by the judge. Counsel was permitted to withdraw, new counsel appeared, and negotiations started.

109. It is my signature at the end of the *Kendrick* complaint, but the original complaint was drafted by other lawyers. I basically tracked much of the original complaint's substance in the amended complaint, content that it did that which I asked of it.

110. ALFRED KORZYBSKI, *SCIENCE AND SANITY: AN INTRODUCTION TO NON-ARISTOTELIAN SYSTEMS AND GENERAL SEMANTICS* 498 (4th ed. 1988).

111. See, e.g., WHITE, *JUSTICE*, *supra* note 6, at 9 (lamenting thinness or lack of "life" in professional discourse). I will explain the concept of thin speech more fully in a later section. As we shall see, "thick" does not necessarily entail longer pleadings.

1. *Signs, Signs, Everywhere Are Signs: The Constraints of Pleading Rules*

The Federal Rules of Civil Procedure do not provide an excuse for failing to plead more thickly. Rule 8 requires a short and plain statement of the claim.¹¹² It is designed to liberate lawyers from code pleading. It is not intended to restrict how they may choose to plead.¹¹³ Tom Wicker is hardly verbose; there are no "heretofores" in his prose. He offends no "short and plain" rule.

Rule 11's threat of sanctions for pleading a case not based in fact¹¹⁴ might intimidate the creative lawyer, since the sanctions seem to be imposed against civil rights lawyers more often than against lawyers practicing in other areas.¹¹⁵ Still, in the cases studied here, no hint of an improper purpose lurks behind the filing of the pleadings; the reported facts existed and the law colorably supported the claims for relief. Besides, Rule 11 did not have its feared impact until after it was toughened by the 1983 amendments¹¹⁶ and

112. FED. R. CIV. P. 8.

113. The Advisory Committee Report of October 1955 says that the "short and plain" language of Rule 8(a)(2) is designed "to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted." 2A MOORE & LUCAS, *supra* note 17, ¶ 8.01[3]. Some courts think that Rule 8 means more, and that evidence should not be pleaded. *Id.* ¶ 8.13, at 8-63 nn. 21-22. The Supreme Court has recently made clear that Rule 8 overcomes any requirement of "heightened" pleading of facts enforced by some courts for actions brought under 42 U.S.C. § 1983 (1988). *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993).

114. Rule 11 permits a court to impose sanctions when "reasonable inquiry" would show that a complaint is not supported by the evidence and not "warranted by existing law or by a nonfrivolous argument" for a change in the law, and filed for an improper purpose, such as harassment. FED. R. CIV. P. 11. The standard to be applied by the courts in Rule 11 cases thus requires a determination as to whether a lawyer made reasonable inquiry into the facts, whether she made reasonable inquiry into the law, whether the action was taken to harass or delay the case, and whether the lawyer met her continuing obligation to reevaluate the litigation position. *Thomas v. Capital Sec. Serv.*, 812 F.2d 984, 989 (5th Cir. 1987). To determine whether there was reasonable inquiry into the facts, courts may look at the time available for investigation, the extent to which the lawyer relied upon the client for factual support, the feasibility of a pre-filing investigation, the complexity of facts and law, and the extent to which factual development requires discovery. *Smith v. Our Lady of the Lake Hosp.*, 135 F.R.D. 139, 145-46 (M.D. La. 1991). In a civil rights case—involving prison conditions, for example—all of these factors might operate to delay a lawyer's opportunity to assess adequately the factual basis for the claims, with a client behind bars and a defendant in control of most if not all of the information.

115. Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775, 1776-77 (1992). The reason for this phenomenon is unclear; however, two explanations have been suggested. First, a civil rights lawyer reacting to a study in the Ninth Circuit attributed the disparate application of Rule 11 to judicial hostility toward civil rights cases and the attorneys bringing them. Philip Carrizosa, *Rights Lawyers More Frequent Rule 11 Targets, 9th Circuit Study*, L.A. DAILY J., Sept. 25, 1992, at 1. On the other hand, the chairperson of the Ninth Circuit committee conducting the study suggested that the civil rights bar might be more willing than their peers "to push the envelope." *Id.* Tobias describes this point in a slightly different manner, arguing that it is the nature of civil rights cases to "challenge conventional understandings of what is acceptable." Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 497 (1988-89).

116. Carl Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105, 106 (1991).

so did not affect pleadings in the 1970's. Under the more liberal 1993 amendments, it should not affect our pleading today.¹¹⁷

Rule 12(f) simply permits a court to strike any "impertinent or scandalous matter."¹¹⁸ The Rule could hardly be read to proscribe the elements that are missing from civil rights pleadings.¹¹⁹ Courts commonly limit "scandalous pleading" to mean language that "improperly casts a derogatory light on someone, most typically on a party to the action,"¹²⁰ or that "'reflect[s] cruelly' upon the defendant's moral character, use[s] 'repulsive language' or 'detract[s] from the dignity of the court.'"¹²¹ No person's character is impugned by the descriptions of Wicker, Good, Rivera, or the Rothmans, aside from the negative associations an audience member or reader may infer from government officials' actual conduct and statements.

Even where a court is persuaded by a defendant's motion to strike the details of a story, the process of entertaining and deciding the motion informs the court of the story behind the complaint. Nonetheless, some lawyers might feel uncomfortable pleading more life into their cases for fear of peer criticism. Other lawyers might feel that this is not good lawyering, without knowing exactly why.¹²²

117. Even before the 1993 amendments—which loosen the structures on plaintiffs' counsel considerably by permitting them to make allegations that "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery," FED R CIV P 11(b)(3)—courts had loosened their scrutiny of civil rights pleadings. Tobias, *supra* note 116, at 110-16. As one court has noted, "Rule 11 sanctions should not chill creative legal advocacy." *Chrs & Todd, Inc v Arkansas Dep't of Fin & Admin.*, 125 F.R.D. 491, 495 (E.D. Ark. 1989).

118. FED. R. CIV. P. 12(f).

119. It should be noted, however, that words less eye-catching than the Attica complaint's allegation of murder by state police have earned sanctions, where courts have found that they were used in a hyperbolic fashion. *Chrs & Todd, Inc.*, 125 F.R.D. at 494-95 ("rape"), *Roberts v Chevron U S A*, 117 F.R.D. 581, 583 (M.D. La. 1987) ("fraudulent"). Similarly, courts have stricken words such as "concentration camp," "brainwash," "torture," and "Chinese communists in Korea" on the ground of scandalousness. *Alvarado-Morales v. Digital Equip. Corp.*, 843 F.2d 613, 618 (1st Cir 1988). The cases should not be read out of their contexts, however. For instance, the *Alvarado-Morales* court stated that plaintiff's reference to concentration camps was "repugnant" and had "no place in the pleadings before the court." But from the context of the case, it appears that the court reacted so strongly because plaintiff's allegations—regarding working conditions made worse when jobs were phased out by the employer—were inconsistent with the reality the court perceived. Thus, the court found that these allegations were not substantive elements of the plaintiff's cause of action. *Id.* Where the court's understanding of reality corresponds more closely to the reality portrayed by plaintiffs, the court may be less offended.

120. 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1382, at 682, 712 (2d ed. 1990).

121. *Skadegaard v. Farrell*, 578 F. Supp. 1209, 1221 (D.N.J. 1984) (quoting 2A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 12.21, at 2429 (1983)). Examples might include the "concentration camp" language in *Alvarado-Morales*, 843 F.2d at 618, and adjectives like "sniveling" and "whining" when used to refer to an Assistant U.S. Attorney, see *Carone v Whalen*, 121 F.R.D. 231, 234 (M.D. Pa. 1988).

122. James Boyd White writes: "[O]ne could say that lawyers think and talk in distinct ways which we could hardly imagine being changed, for good or ill." WHITE, IMAGINATION, *supra* note 6, at 6.

2. *All the Other Guys Are Doing It: The Constraints of Professional Standards of Practice*

While nothing in the rules precludes thicker pleading, lawyers interpret the Rule 8 requirement against a background of the way law is commonly practiced.¹²³ Lawyers also interpret the rule by predicting the views of “unseen” colleagues, including the lawyers for the opposing party.¹²⁴ These other lawyers might argue that stories are fine for an argument to a jury, but misplaced in a pleading. They think of a familiar context, jury trials. But they must stop and ask: Are judges any less interested than juries in the larger questions? And are juries more likely than judges to base their decisions on empathy? The available evidence suggests that the answer to both questions is in the negative.¹²⁵

Still, the instinct not to overplead is one shared by a number of lawyers, probably arising from professional training and socialization.

3. *My Parents Were Too Poor To Buy Us a Real Dog: The Constraints of Legal Education*

It is easy to criticize legal education, specifically for its tendency to divorce law students from human context.¹²⁶ As Professor Griswold described it, legal education “sharpens the mind by narrowing it.”¹²⁷ Legal

123. See, e.g., FISH, *supra* note 7, at 125 (“[U]pon hearing or remembering the rule, ‘Take only good shots,’ a player will glance around a field already organized in terms of relevant pieces of possible behavior.”). Lawyers and judges attending a June 10, 1994, conference for adjunct faculty in the clinical programs of the law schools of Washington University and Saint Louis University gave mixed reviews to the literary pleading presented later in this Article. It didn’t feel “right” to some, without reference to a rule. Even one judge who liked its persuasiveness thought he might strike it. Another judge, however, thought it permissible and persuasive.

124. GOFFMAN, *supra* note 12, at 81, 160 (noting that professionals will bend their behavior to suit colleagues who might disagree with them).

125. In a recent review of studies of personal injury litigation, Michael Saks concludes both that “the great majority of jury verdicts reach the same result that judges would reach in the same cases” and that jury verdicts “on average undercompensate plaintiffs.” Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1287 (1992). Based on their own study of the federal courts, Clermont and Eisenberg conclude that “virtually no evidence exists to support the prevailing ingrained intuitions about juries. In fact, existing evidence is to the contrary.” Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1125–33, 1149–51 (1992).

126. See ELIZABETH DVORKIN ET AL., *BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM* 2 (1981); FRANCES K. ZEMANS & VICTOR G. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* 200, 205 (1981); Curtis J. Berger, *The Legal Profession’s Need for a Human Commitment*, 3 COLUM. U. GEN. EDUC. SEMINAR REP. 13 (1975); Interview with Robert McCrate, in *A.B.A. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR & MCGEORGE SCH. OF LAW, A DIALOGUE ABOUT LEGAL EDUCATION AS IT APPROACHES THE 21ST CENTURY* (J. Clark Kelso ed., 1987) [hereinafter *McCrate Interview*]; John O. Mudd, *Beyond Rationalism: Performance-Referenced Legal Education*, 36 J. LEGAL EDUC. 189, 191 (1986).

127. Erwin N. Griswold, *Intellect and Spirit*, 81 HARV. L. REV. 292, 299 (1967). Although Griswold was criticizing the “unthoughtful” application of traditional methods, his point may be read more broadly. No matter how thoughtful the application, the method cannot escape its context—discussion of appellate

education may contribute to a lawyer's unease with thicker pleadings in two contexts, the academic classroom and the law clinic. In the former, pedagogy is strongly influenced by the maxim, "Think like a lawyer." In the clinical setting, teachers focus on interpersonal skills.¹²⁸ Because of this more personal focus, it may appear at first that clinical education would encourage thicker pleading. But in fact, the clinic is as likely as the classroom to discourage this method.

Many critics of legal education consider clinical programs to be an answer to their complaints.¹²⁹ As a clinician, I believe in the value of clinical courses, yet I suspect that they may reinforce the reduction of complex tales of human tragedy to sterile legal claims because they teach lawyering skills by treating the nonlegal dimension of a client's problem as a simple matter of technique. The message is that you should know a bit about human psychology to improve your interpersonal skills, which are the true heart of practice.¹³⁰ The message is true but incomplete, since it continues to stuff these human considerations into the ill-fitting box of legal decision making. The method helps us listen better, but does not expand the scope of what we listen for, or propose a way to analyze what we hear. Specifically, the textbooks for clinical courses advise the following for pleading:¹³¹ "You can find examples of how to draft pleadings in form books. . . . You must tailor the form so that the pleading you draft meets your client's needs";¹³² "A reasonable description of an event that provides the opposing party with sufficient factual and legal information will usually be sufficient";¹³³ and, "Pleadings are not the place to disclose the detailed facts on which you base your claims. . . . The official Appendix of Forms gives excellent examples of complaints."¹³⁴ In short, they encourage brevity and discourage creativity.¹³⁵

court decisions in a classroom.

128. Whatever the methodology, the result is the same. Fish argues that "the initiated student who has thoroughly internalized the distinctions, categories, and notions of relevance and irrelevance that comprise 'thinking like a lawyer,' cannot see anything but the practice (nor can he remember what it was like to not see it)." FISH, *supra* note 7, at 364.

129. A.B.A. TASK FORCE ON LAW SCH. & THE PROFESSION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 238 (1992); McCrate Interview, *supra* note 126, at 29.

130. DAVID BINDER & PAUL BERGMAN, FACT INVESTIGATION FROM HYPOTHESIS TO PROOF 11 (1984); DAVID BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 5 (1991).

131. In fact, many textbooks may not give an instruction on pleading at all, since they focus almost exclusively on writing appellate briefs. See, e.g., HENRY WEIHOFEN, LEGAL WRITING STYLE (2d ed. 1980).

132. KAREN K. PORTER ET AL., INTRODUCTION TO LEGAL WRITING AND ORAL ADVOCACY 118 (1989).

133. ROGER S. HAYDOCK ET AL., FUNDAMENTALS OF PRETRIAL LITIGATION 95 (1985).

134. THOMAS A. MAUET, FUNDAMENTALS OF PRETRIAL TECHNIQUES 111 (1988).

135. One author's advice, however, is not inconsistent with thicker pleading: "Avoid allegations such as this: 'In perhaps the greatest outrage of all, defendant, in a frenzy of rage, sadistically beat the plaintiff.' . . . Instead . . . consider merely alleging: 'Defendant then hit Steven Smith at least seven times in the face with the butt of his revolver.'" R. LAWRENCE DESSEM, PRETRIAL LITIGATION: LAW, POLICY, AND PRACTICE 136 (1991). Nethertheless, he advises caution. *Id.*

One text dissents to some extent. Cooper's *Writing in Law Practice*¹³⁶ admits the legitimacy of pleading more than the facts technically necessary to support a legal claim.¹³⁷

Thus, there is little, if any, danger involved in pleading a few evidentiary details as to certain critical points of plaintiff's case. Many draftsmen believe that, notwithstanding the practice books, evidence should be pleaded when to do so adds color to the complaint, and when such pleading can be utilized as a method of compelling defendant to make admissions¹³⁸

But Cooper's text precedes by four years the change worked by *Conley v. Gibson*,¹³⁹ in which the Supreme Court directed that courts tolerate pleadings that simply provide notice of the claim to the defendant.¹⁴⁰ Since that time, rather than becoming the analytic and persuasive document it could be, the complaint has been used merely as the mechanism that starts the ball rolling.

Even more critically than the deficiencies of our textbooks, the ascendancy of interpersonal skills—once woefully neglected by legal academicians and now the all-important focus of clinical programs—also plays its part in discouraging thicker pleading. Most schools permit only a limited number of clinical teaching hours but expect that a wide range of skills will be taught, with little room left for analysis of the kind called for here. Because clinics choose factually simple cases to allow for greater student responsibility, students have few opportunities to learn factual analysis. The economic pressures to increase the number of students trained in clinical programs may pressure law schools to offer more simulation courses, in which a fictional client's reality is neatly packaged into fact patterns and handed out to students role playing as witnesses or clients. As Jerome Frank observed over sixty years ago, this is like teaching "prospective dog breeders who never see anything but stuffed dogs."¹⁴¹

The teaching of factually sensitive analysis falls into the chasm between the clinic and the classroom.¹⁴² Unless students learn factual analysis, they

136. FRANK E. COOPER, *WRITING IN LAW PRACTICE* (1963).

137. *Id.* at 187.

138. *Id.* at 191.

139. 355 U.S. 41 (1957).

140. *Id.* at 47-48.

141. Jerome Frank, *Why Not A Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 912 (1933).

142. Both clinical and nonclinical faculty criticized earlier drafts of this Article on this point. Clinical professors argued that clinical scholarship and clinical education have moved past a narrow focus on interpersonal skills. The nonclinical critics insisted that doctrinal courses require factual analysis as a component of the general analysis of cases presented in the casebooks. My response is simple. Whatever we aspire to in clinical education, the press of business requires that we ultimately fall back on the teaching of interpersonal skills because students commonly lack sophistication in those skills. Some clinics attempt more, such as teaching through client stories, but I suspect that we talk about it more often than we actually do it. There is no time. Also, the kind of factual analysis I refer to encompasses more than simple scrutiny of appellate decisions that contain a packaged set of 10 or so factual points, which are then whittled down

are unlikely to learn advocacy skills. Until then, the ablest of lawyers may still write the thinnest of pleadings. Law students may be socialized into believing that thin pleading is part of their job.

4. *It's Not Our Job: The Constraints of Professional Roles*

Lawyers may protest: "It's not our job to plead more of a client's reality, more thickly. We are just trying to solve a legal problem, perhaps a problem with nonlegal dimensions, but a legal problem nonetheless." In part, this response reflects a traditional model of lawyering: a lawyer with a client, focused on winning, unconcerned with his own policy preferences and "essentially indifferent about whom he represents."¹⁴³ For the traditional advocate, thicker and more creative pleading will be assessed strictly in terms of its persuasive value. If it helps, fine. If its effect is uncertain, then perhaps one should stick with the tried-and-true, peer-approved formbook pleading styles—the ones more commonly used in the cases and more comfortably handled by the advocate.¹⁴⁴ Given this risk-averse, traditional tendency, we expect thin pleading from most lawyers.

In other areas of the law, we know of alternative models of lawyering that might also be suitable for civil rights lawyers. Some lawyers represent only particular interests, groups, or issues.¹⁴⁵ But public interest lawyers who have such a limited clientele might be less inclined to adopt thicker pleadings because they are less interested in the client than in what the client represents.¹⁴⁶ It may be precisely because they feel so committed to their client's cause that they ignore the client's reality. To quote one legal services

to the one or two points upon which the legal principle turns. The factual analysis that I find lacking in legal education requires the analysis of thousands of facts that become material or immaterial as advocacy for the litigants progresses. This analytic process begins with the lawyer's perception of those facts as important.

143. Jonathan D. Casper, *Supreme Court Lawyers*, in *COURTS, LAW, AND JUDICIAL PROCESSES* 95, 96 (S. Sidney Ulmer ed., 1981). This model reflects a more traditional legal system that developed at a time when we, or at least the courts, did not believe that a remedy existed for the mass social ills attacked by civil rights litigation. Colonial-era Americans viewed problems such as mental illness, poverty, and crime as inevitable attributes of social life. See DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (rev. ed. 1991). This attitude changed by the close of the 18th century, when courts in at least some colonies began to entertain occasional challenges to slavery. See PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 41 (1981). Still, courts did not become so strategically and critically involved in the conquest of social problems until the NAACP's *Brown* strategy succeeded. JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM* 1 (1978).

144. Such a conservative pleading style is typical in personal injury litigation.

145. See Casper, *supra* note 143, at 96.

146. See SPANGLER, *supra* note 41, at 168; Kenney Hegland, *Beyond Enthusiasm and Commitment*, 12 *ARIZ. L. REV.* 805, 811–12, 813 (1971); Gabe Kaimowitz, Comment, *Legal Services Marching to a Different Drummer, A Response to Alan Houseman's Thoughts on the Future of Legal Services*, *NLADA BRIEFING*, June 1978, at 66. The plaintiffs' lawyers in *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), never met their institutionalized clients and dealt with their clients' guardians only in a limited way. Tinsley E. Yarbrough, *The Political World of Federal Judges as Managers*, 45 *PUB. ADMIN. REV.* 660, 661 (1985).

lawyer: "We don't care about what happened, we only care about what is going to happen."¹⁴⁷

On the other hand, it could just as easily be true that these lawyers lean toward thicker pleadings precisely because they identify with their clients, whom they have selected because of the reality the clients present. Many a radical lawyer during the 1960's might have said, "[T]he cause of my clients is my own cause."¹⁴⁸ A more recent statement from a civil rights and labor lawyer—more appropriate for our less radical times—expresses less fire but more warmth:

After the trial, over a beer, there is some long, post-cathartic wrap-up. Your client comes alive, after sitting in court for days, dazed, the whole trial like a dream, everyone up there attacking him, defending him. "Oh, I loved it when you asked . . ." And: "Did you see the judge when he said . . ." For an hour or so, you may be the closest friend he ever had. A retired teamster, a Vietnam vet—he and you will never be this way again. . . . In 1981, an old truck driver came and asked our firm's help for some 200 retirees. A Teamster pension fund had cut their benefits by nearly two-thirds. The case was hopeless, but he wore us out, so we took it. For the next four years we lost, lost, lost, and lost, and then, home run, bottom of the ninth, we won. Everything. Suddenly, after all that losing, the case was over, and the men will now recover millions of dollars. For our client, the shock has still not worn off. He keeps calling me up, and says in his thick mountain drawl, "Well, now, the men are very well pleased." Then, tickled to death, he starts to laugh. And laughs and laughs. And in the great tradition of our profession, one that I find irresistible, I start laughing too.¹⁴⁹

This relationship exemplifies the "backstaging" described by Goffman, where the professional admits the client into the inner sanctum of the professional role.¹⁵⁰ Public interest lawyers may be more prone to backstaging, desiring intimacy with clients and distance from colleagues to

147. Carl J. Hosticka, *We Don't Care About What Happened, We Only Care About What Is Going To Happen: Lawyer-Client Negotiations of Reality*, 26 SOC. PROBS. 599, 608 (1979). Speaking from his own experience, Professor Alfieri might agree. See Anthony Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2122 (1991). This could operate as well in the case of civil rights lawyers, even in a close lawyer-client relationship such as that between Thurgood Marshall and his clients in *Briggs*. Derrick Bell has argued that Marshall and the other NAACP lawyers pressed for integration—which was more consistent with their ideological commitments—rather than improved education, which was closer to their clients' desires. Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 482-87 (1976) [hereinafter Bell, *Serving Two Masters*]; Derrick Bell, *Law, Litigation and the Search for the Promised Land*, 76 GEO. L.J. 229, 234-36 (1987) (reviewing MARK V. TUSHNET, *THE NAACP: LEGAL STRATEGY AGAINST SEGREGATED EDUCATION* (1987)).

148. Beverly Axelrod, *The Radical Lawyer*, in *RADICAL LAWYERS* 69, 72 (Jonathan Black ed., 1971).

149. Geoghegan, *supra* note 1, at 20, 23.

150. GOFFMAN, *supra* note 12, at 128 (discussing interpersonal interactions in general).

maintain their renegade status.¹⁵¹ This possibility is perhaps too idiosyncratic and personal to be studied in any dispositive way. We can only make guesses from our own experience.

5. *It's a Black Thing: The Constraints of Culture*

A growing body of literature argues that minorities and women have a distinct "voice," one shaped by different experiences, that cannot be funneled by ventriloquism through white, male speakers.¹⁵² The historical record demonstrates that a political and legal system dominated by its white majority culture cannot recognize outrages against minorities when they happen, but only years later, as the cultural labels evolve into others.¹⁵³ From this, it might follow that white lawyers, born into their culture, cannot understand the realities experienced by minority clients and so cannot speak that reality to the court.

Many public interest and civil rights lawyers may wish to believe that "[b]y exposing ourselves to ennobling narratives, we broaden our experience, deepen our empathy, and achieve new levels of sensitivity and fellow-feelings" and enable ourselves to "think, talk, read, and write our way out of bigotry and perspective."¹⁵⁴ Richard Delgado admits the possibility but "only to a very limited extent."¹⁵⁵ This "very limited extent," even if it is all we can hope

151. Goffman notes that this type of behavior is typical of renegade members of a professional group *Id.* at 165.

152. See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982); Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280 (1989); Richard Delgado, *The Imperial Scholar Reflections on a Review of Civil Rights Literature*, 132 U PA L. REV. 561 (1984); Mani Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV WOMEN'S LJ 1 (1988); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

153. See Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1277-79 (1992) It is often the case, however, that these new labels are just as false and pervasive as the ones they supplant

154. *Id.* at 1261.

155. *Id.* Delgado and Stefancic admit that occasionally someone breaks through to another culture by creating "a work that recognizes and denounces the racism of the day." They note, however, that those who successfully transcend cultural barriers have no audience. *Id.* at 1281. The victories in *Brown*, *Willowbrook*, and other cases suggest other possibilities. Also, I assume that Delgado would not argue that a member of the oppressed group would necessarily express her reality in a pleading better than her lawyer could. Some plaintiffs may indeed be more eloquent than their lawyers. For example, few prisoners could write as eloquently of prison life as Jack Henry Abbott does in describing solitary confinement

The air in your cell vanishes. You are smothering
Your eyes bulge out, you clutch at your
throat; you scream like a banshee. Your arms flail the air in your cell. You reel about the cell,
falling.

Then you suffer cramps. The walls press you from all directions with an invisible force
You struggle to push it back. The oxygen makes you giddy with anxiety You become hollow
and empty. There is a vacuum in the pit of your stomach. You retch

You are dying. Dying a hard death. One that lingers and toys with you

JACK HENRY ABBOTT, *IN THE BELLY OF THE BEAST: LETTERS FROM PRISON* 25 (1981) Most plaintiffs, however, lack the training necessary to write a complaint. Prisoners litigating *pro se* often attempt a legal writing style that amuses lawyers while unwittingly caricaturing the lawyers' lifeless style. See THOMAS, *PRISONER LITIGATION*, *supra* note 34, at 146. I recall one asserting "constitutionistcal rights."

for, remains critical because white lawyers like William Kunstler still represent African-American prisoners. One must hope that the dynamic of the lawyer-client relationship will provide the understanding of client reality that we fail to secure through “linguistic means alone.”¹⁵⁶ Yet this relationship could also reinforce the misunderstanding.¹⁵⁷ Then again, this may happen with clients regardless of their cultural roots. White lawyers may be less willing or able to credit the stories of minority clients.

6. *It's Lonely at the Top: The Constraints of Hierarchy*

Another explanation for thin pleading comes from the proponents of Critical Legal Studies (“Crits”): Law is only politics by other means; precedent and principles simply mask the exercise of power, and our true natures have been suppressed and distorted by the “facts” imposed by the prevailing capitalist marketplace ideology.¹⁵⁸ Peter Gabel puts it, “Legal reasoning is an inherently repressive form of interpretive thought which limits our comprehension of the social world and its possibilities.”¹⁵⁹ Lawyers, schooled in legal reasoning, see a limited world in which problems between people are discrete and legally defined—not social and politically defined.¹⁶⁰ Furthermore, that political definition is authoritarian and designed to protect the status quo.¹⁶¹ As a result, liberal lawyers—members of the elite—cannot see the reality and so they cannot write about it.

More important, lawyers are not innocent dupes, but rather act to maintain their own status and power over clients. In the representation of clients,

[c]lient narratives are tolerated only to the extent they do not rupture the ordered system of meanings and relationships defined by lawyer narratives. When rupture is threatened by client resistance, the lawyer engages in a series of interpretive moves to restore hierarchy by characterizing client story in the vocabulary of dependence.¹⁶²

The Crits also have a remedy. Their solution is to politicize discrete cases and the lawyer-client relationship in general.¹⁶³ This is to be accomplished

156. Delgado & Stefancic, *supra* note 153, at 1261 (using the phrase to discuss the difficulty of communicating across cultural boundaries).

157. *See generally* Alfieri, *supra* note 147.

158. *See generally* CRITICAL LEGAL STUDIES (Allan Hutchinson ed., 1989); POLITICS OF LAW, *supra* note 30.

159. Peter Gabel, *Reification in Legal Reasoning*, in CRITICAL LEGAL STUDIES 17, 17 (James Boyle ed., 1992).

160. *Id.* at 25.

161. *See* Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, in CRITICAL LEGAL STUDIES, *supra* note 159, at 363, 366 (arguing that people accept status quo based upon “false consciousness”).

162. Alfieri, *supra* note 147, at 2126.

163. Gabel & Harris, *supra* note 161, at 386, 401.

through “[c]ountercommunicative language,” which “resists the coercion” of the given dogma.¹⁶⁴ Lawyers must use language that tells “[t]he truth,” which “is the sociopolitical truth which the court normally considers to be irrelevant to the legal resolution of the dispute.”¹⁶⁵ Can we tell “the truth”? Is such a language possible?

7. *One Word Is Worth a Thousand Pictures: The Constraints of Language*

Two prominent critics, James Boyd White and Stanley Fish, provide elements of an answer in their analyses of language. They would claim that, for the interpretive community of lawyers and judges, the meaning of the pleading’s language has little to do with the client’s reality or the intent of the pleader.¹⁶⁶ It is the inclusion in the pleading, White would say, that gives the words their meaning, since words derive their meaning from their context,¹⁶⁷ in which the “gesture”¹⁶⁸ or the “speech act”¹⁶⁹ is made. A pleading in a lawsuit is such a gesture or speech act. By this gesture, addressed to its judicial audience, the other members of our interpretive community give the words of the pleading their meaning. The lawyer’s meaning and the judge’s meaning are not coterminous, but shared, and different from the meaning given to the same words by journalists reading them in a colleague’s newspaper story.¹⁷⁰ These meanings differ, as well, from the reality each complains about, since

[e]ach of us loads any expression with significances that derive from our prior experience of language and of life, an experience that is obviously different for each of us. . . . What is behind the shimmering and fluid world of language is not a world of potentially clear and in principle sharable ideas or understandings, as our talk about concepts assumes, but a world of private meanings, radical silences, incommunicable sensations, experience and images. Each of us is a

164. FISH, *supra* note 7, at 450.

165. Gabel & Harris, *supra* note 161, at 396–97

166. Fish and White start at opposite sides of the notion of “interpretive communities.” Fish says the same text can be interpreted similarly within one set of persons, which disagrees with other such sets, or communities. Within each community, members share “assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance.” FISH, *supra* note 7, at 141. The members’ agreement on an interpretation arises, not from the text, but from their community. *See id.* White characterizes this process as “look[ing] at it the other way round,” as a “text created by a community of interpreters.” WHITE, JUSTICE, *supra* note 6, at 99. For White, the community of author and audience creates the text by its interpretation, *id.*, and yet on occasion he refers to “[t]he kind of community a text creates,” *id.* at 100.

167. WHITE, JUSTICE, *supra* note 6, at 37 (analyzing meaning of “to deliberate” in context of first sentence of *Federalist Papers*).

168. *Id.* at xii.

169. *See, e.g.*, FISH, *supra* note 7, at 40 (quoting Richard Ohmann, *Speech Acts and the Response to Literature* (Dec. 1976) (paper delivered at meeting of Modern Language Association)).

170. *Cf.* WHITE, JUSTICE, *supra* note 6, at xi (“[O]ur words get much of their meaning from the gesture of which they are a part . . .”).

circle of experiences and meaning that can occasionally, through language, meet or overlap with others, at least at the edges.¹⁷¹

The lawyer's language of concepts has worse luck than most languages in communicating across experience: "Talk about concepts seems to assume that language can be pierced and some underlying reality exposed. I think it cannot be done. What lies beyond language is real all right, but it is not communicable, certainly not in a language of concepts."¹⁷² When lawyers focus on a surface reality of concepts, they lose another reality—one of voices, a "world of people speaking to each other across their discourses, out of their languages, out of their communities of knowledge and expertise, and speaking as people seeking to be whole."¹⁷³ In the process, they lose what grasp they once had on those realities "over time, by discarding possibilities for speech and thought as well as by making them."¹⁷⁴

Litigators' language surrenders the most power of all. This happens, in part, because of what White calls the "thinness" of this speech of concepts, of propositional, adversarial speech.¹⁷⁵ In our rush to counter the reality we anticipate from the adverse party, pleadings lose the depth of reality experienced by our clients. Ironically, litigation speech is also thinned by its reduction to a form "equally congenial" to the lawyers' colleagues, judges, and opposing counsel.¹⁷⁶

For White, the resulting loss is tragic.¹⁷⁷ In the world according to Fish, there is no tragedy; things are just the way they are.¹⁷⁸ Fish also doubts that "words have clear meanings" that compel an accurate perception of these meanings—meanings that do not shift with changes in context and that remain impervious to distortions attributable to the perspective of the one doing the perceiving.¹⁷⁹ It is interpretation that provides meaning,¹⁸⁰ and our membership in interpretive communities shapes our interpretation.¹⁸¹ Adversarial speech does not trouble Fish. Rather, he asserts that interpretation turns on intent, that intent must "itself be interpretively established, and that

171. *Id.* at 35.

172. *Id.*

173. *Id.* at 20.

174. *Id.* at 262 (urging lawyers to confront and resist tendency to lose touch with realities).

175. *Id.* at 9 ("Part of the problem [with legal and other professional discourse] is what I have called thinness—so little life; but part of it is too much life of a certain kind, an insistent assertiveness . . .").

176. *Cf.* GOFFMAN, *supra* note 12, at 85 (discussing team behavior and speech). Goffman says further: "Instead of a rich definition of the situation, reality may become reduced to a thin party line, for one may expect the line to be equally congenial to the members of the team." *Id.*

177. James Boyd White, *Translation as a Mode of Thought*, 77 CORNELL L. REV. 1388, 1396 (1992) [hereinafter White, *Translation*].

178. FISH, *supra* note 7, at 26–27.

179. *Id.* at 6.

180. *See id.* at 4.

181. *Id.* at 152.

it can be established only through persuasion."¹⁸² Whether we lose some of reality or the chance for persuasion, the constraint of our language must be acknowledged.

While lawyers live in a "rhetorical world,"¹⁸³ so do others—journalists, historians, novelists. And yet our competing descriptions of these horrible realities pale in comparison to theirs. What keeps us on our side of the fence?

8. *This Is a Hard Hat Area: The Constraints of Self-Preservation*

All lawyers feel the tug of these constraints on the depth of their vision and the creativity of their pleading. All lawyers are socialized by their legal education and their peers. They try to conform to the rules and standards of their profession—whether or not those forces would actually prohibit thicker, more realistic pleading. All civil rights and public interest lawyers must work to bridge the gap between "us" and "them." All must wrestle with the language they would use to build that bridge, whether they believe their task to be translation or rhetoric.

One can see Ennis struggling to portray the awfulness of institutionalization so that the court could bridge the gap between "us," the legal profession and "them," the mentally retarded. Given the enormity of the gap between black and white in 1952, Thurgood Marshall may have chosen to leave the "us" behind in order to convince "them" to order desegregation. Perhaps Kunstler chose to remain with the "us," leaving the "them" to take it or leave it. In Hattie Kendrick's case and in others, I felt, and continue to feel, these constraints working on me as I sat before sheets of paper completely blank except for the caption at the top of the page, worried about the sanctions of judges, the ridicule of peers, and the disapproval of teachers. Sometimes I wondered who my client was—the person with the name, the class she represented, or the issue behind her—and which of these induced me to endure the stress of litigation.

But still more remains to be said—an idea that may be implicit in my attempts at explanation thus far: Perhaps we write like lawyers to avoid responding as people.¹⁸⁴ In fulfilling our mission, we stand on the horns of a dilemma: How should we speak truth about a social injustice to the powers that can remedy that injustice? The truth is a terrible one—hard to comprehend, hard to imagine. The truth not only implicates legal rights but challenges the legitimacy of the social order. When a lawsuit is filed, we ask, "What kind of society would permit such things to happen?" The lawyer who

182. *Id.* at 25.

183. Fish notes that we all do. *Id.*

184. I cannot, of course, speak for the lawyers whose pleadings I have criticized. But they appear to be lawyers who feel less inhibited about "pushing the envelope," who care deeply about their clients, and who have committed their careers to crossing the barriers of culture and class.

pledges to seek a remedy must acknowledge her privileged position in a social order that allowed, encouraged, or even insisted upon the injustice. The lawyer might feel shame inside the outrage—shame that blurs the lawyer's vision.

In the *Kendrick* case and the Attica litigation, white lawyers such as myself trip over more than misperceptions of the black experience. We must confront our own racism and the lingering stereotypes that rattle around in the back of our consciousness. We must also face our guilt over the cruelty of racist acts by members of our own race, as well as the suspicion that we have yet to wash ourselves clean of the stain. Racism creeps all through the culture in which we are socialized, often going unnoticed or just denied.¹⁸⁵ Lawyers are not immune. It is the pain of confronting this reality that might lead us to distance ourselves from our clients' stories.

Similarly, people commonly fear the mentally retarded and psychiatric patients.¹⁸⁶ Once, while touring an institution for the retarded that was the object of a lawsuit, and facing all manner of "twisted limbs" without blinking, I was summoned by one resident to examine her new watch. She was hydrocephalic, her head enlarged sixfold. I could hardly bear it. The Rothmans report a similar reaction by Bruce Ennis, plaintiffs' counsel in the Willowbrook case, upon entering another institution for the mentally retarded: "Hardened to institutional sights and smells, he still gagged upon entering Partlow—even the standard practice of taking short breaths inside the building and gulping air outside did not work."¹⁸⁷

Should we expect lawyers to be any freer than journalists like Tom Wicker of unspoken assumptions about the threat posed by prisoners? While lawyers may accept and translate accusations of racism or other prejudice directed toward the defendant they sue, any suggestion that they themselves have dealt with the client in a racist way—whether that suggestion is made by the client or implied by the circumstances—will likely distress the lawyer.¹⁸⁸ That distress intensifies in direct proportion to the lawyer's commitment to equality and revulsion toward racial prejudice. On some level, the lawyer may interpret any discussion of the racial dimensions of the attorney-client relationship as an accusation rather than an exploration of possible realities.¹⁸⁹

185. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987). Whether or not an individual has any reason to feel guilty about racism, many white people feel such guilt. We react to it in different ways—resentfully insisting it isn't there, submerging in it, or looking it squarely in the face and moving on.

186. See, e.g., Jordana Hart, *Neighbors' Fears Stall New Homes for Mentally Ill*, BOSTON GLOBE, Apr. 11, 1989, at 22; see also Amerigo Farina et al., *Reactions of Workers to Male and Female Mental Patient Job Applicants*, 41 J. CONSULTING & CLINICAL PSYCHOL. 363, 370-71 (1972) (suggesting that one's sex is important variable in one's reaction to mental patients).

187. ROTHMAN & ROTHMAN, *supra* note 76, at 57.

188. For a brave response by a lawyer to that very dilemma, see Clark D. Cunningham, *Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992).

189. Peter Shane, *Why Are So Many People So Unhappy? Habits of Thought and Resistance to Diversity in Legal Education*, 75 IOWA L. REV. 1033, 1046 (1990). Blame is inferred even if not implied.

The lawyer charged with seeking a remedy also knows that the court is unlikely to solve the real problem, to correct the injustice at its roots and to repair all the damage done. The lawyer must act, or nothing will be done. But she knows the limits of her power, and may feel inadequate to meet her clients' expectations of relief from their oppression. It is, in part, the overwhelming enormity of the problem they are charged with remedying that may narrow lawyers' vision and language. One finds hints of this in the descriptions by public interest lawyers of their practice. A legal services lawyer says:

When people come to us, they're in immediate crisis. They literally come in, "My God, what is going to happen to me and my two-year-old kid [who] has muscular dystrophy, my four-year-old [who] is lead poisoned, and me, who has emphysema and 85 percent overweight and can't walk up the stairs?" We're people who have a lot of our clients die on us. There are all these questions and choices they have to make, and they're crying during the whole time that you talk to them and they just say, "Will you please do what you think is best? You're the lawyer."¹⁹⁰

By multiplying that client's troubles by the number of cases in a typical legal services caseload, one gathers some sense of the enormous pressure on the average legal services lawyer.¹⁹¹ In a civil rights class action, the lawyer sweats over a pretrial motion all day and stays up half the night wondering what kind of country she lives in where the problems of thousands of institutionalized retarded children, more twisted into pretzels that day than the day before—both of those days years from a trial date—could depend on her. The lawyer bears an additional emotional burden when her case reminds her of some personal tragedy: I doubt that I am alone among such lawyers in seeing a relative—in my case, my eldest sister, profoundly disabled and bedridden—in the faces of my clients.

Goffman notes that professionals occasionally use "cynicism as a means of insulating their inner selves from contact with the audience."¹⁹² This self-protective cynicism is particularly attractive for lawyers because they perversely must use the client's suffering to advance the cause of the client's legal rights. Listen to the search for an appropriate class representative in a welfare rights case:

At one point, the lawyer turned to me and said, "I just talked with a woman who'd be a great plaintiff; for years she has walked seven miles to the nearest source of water, but she is finding it hard now

190. SPANGLER, *supra* note 41, at 167–68.

191. *See id.*; Hosticka, *supra* note 147, at 609.

192. GOFFMAN, *supra* note 12, at 20.

because she just had one leg amputated. The department won't give her extra money so she can install plumbing in her house." "Great," I said gleefully. But it wasn't great; it was part of the horror of poverty in which I don't live, and it should have outraged me. It did not because I was playing lawyer. The game had made it better for me, the worse it was for her.¹⁹³

Worse yet, the lawyer still must speak these difficult truths to judges who have power over their careers. To make matters worse, judges are often hostile to cases of this kind and do not appreciate being asked to intervene.¹⁹⁴ In all likelihood, the defendants—state officials, civic leaders, and corporate executives—and their lawyers come from the same social and economic class as the judge and the plaintiffs' lawyer. The civil rights lawyer is asked to risk sanction and ostracism for clients she may not even understand or know.¹⁹⁵ When one's cause may be perceived as radical, one may wisely appear conservative and mainstream—to "pass."¹⁹⁶

Even while passing as a member of the mainstream, some of us "do not even feel like real lawyers."¹⁹⁷ That fear of not authentically belonging to one's profession can compromise the clarity of the lawyer's perspective:

At the start of every case, you are pumped up with noble outrage. You fight some heartrending injustice, some crime against widows and orphans. Then your facts start to fall apart. Then your theories start to fall apart. Worst of all, you begin thinking, maybe this housing agency, or this pension fund, was doing the best it could. The other side says, "Look at the real world, look at the constraints, look at what your clients do not see." They appeal to your education, your profession, your common allegiance to the cult of complexity. To your arguments, they have counter-arguments, some of them devastating. Your clients only say "Oh." Somehow, you have to hang on to your original sense of outrage. You sublimate it into some new technical argument.¹⁹⁸

You begin drafting short and plain statements of the claim. Given a desire to identify with clients, a lawyer could easily adopt, like F. Scott Fitzgerald, a tragic attitude toward tragedy by becoming the object of one's horror or

193. Stephen Wexler, *The Poverty Lawyer As Radical*, in *RADICAL LAWYERS*, *supra* note 148, at 225.

194. In granting a stay of a district court order requiring population reductions in a prison with unconstitutionally inhumane conditions, Justice Rehnquist wrote that "nobody promised them a rose garden." *Atiyeh v. Capps*, 449 U.S. 1312, 1315-16 (1981).

195. See *GOFFMAN*, *supra* note 12, at 85. The civil rights plaintiffs' team carries the additional burden of garnering less respect, compared to the defense, from laypeople. *Id.* at 84.

196. In fact, it might have been even more important for Thurgood Marshall to frame his pleading to resemble the most commonplace of pleadings because of his personal sense of exclusion. *Cf. infra* note 367 and accompanying text.

197. Geoghegan, *supra* note 1, at 17.

198. *Id.* at 22.

compassion.¹⁹⁹ It is a small wonder, then, that lawyers leave their clients' reality out of the pleading, shoving important pieces of themselves to the margins of their pleading.²⁰⁰

E. *The Need for Change*

[T]he Constitution became for them a sort of abracadabra which would cure all disease.²⁰¹

Thurman Arnold

The consequences of thin lawyer speech are twofold—they affect both the problems we wish to remedy and ourselves. The language of individuals and societies cannot help but influence the conduct of both, for “[o]ur behavior is a function of words we use. More often than not, our thoughts do not select the words we use; instead, words determine the thoughts we have. We can say with some assurance that language develops out of social conditions and in turn influences social behavior.”²⁰² The way in which lawyers describe the problems of their clients—as legal concepts—can shape how the rest of our community, including the courts and other citizens, understand those problems. The words can serve as a filter that determines which features of a problem pass through to common understanding. This in turn affects how we respond to news of the problem—empathy and outrage, or complacency and indifference.

199. Cf. *infra* note 462 and accompanying text.

200. Members of other disciplines have noticed that colleagues who face massive suffering are caused to suffer themselves. One study noted that stress causes hospital residents “to give up humanistic beliefs, and to increase emotional detachment.” John M. Colford & Stephen J. McPhee, *The Ravelled Sleeve of Care: Managing the Stresses of Residency Training*, 261 JAMA 889, 890 (1989) This study also attributed this in part to physicians’ belief system, which maintains that the residents should be all-knowing, that technical expertise provides satisfaction, and that “uncertainty is a sign of weakness.” *Id.* see also BEVERLY RAPHAEL, WHEN DISASTER STRIKES: HOW INDIVIDUALS AND COMMUNITIES COPE WITH CATASTROPHE 224–34 (1986) (explaining that experiences of care givers and injured persons are interwoven so that no distinction between their experiences is possible); RANDALL S. SWORD & JANET KELLER, TRAUMA CENTER THREE DAYS IN THE LIFE OF AN EMERGENCY ROOM DOCTOR (1984) (describing psychological and physical suffering of doctors); Paula S. Butterfield, *The Stress of Residency: A Review of the Literature*, 148 ARCHIVES INTERNAL MED 1428, 1429 (1988) (reporting that sleep deprivation is associated with various antisocial attitudes); R. Andrew Schultz-Ross, *The Prisoner’s Prisoner: The Theme of Voluntary Imprisonment in the Staff of Correctional Facilities*, 21 BULL. AM. ACAD. PSYCHIATRY & L. 101, 104 (1993) (describing shared sense of helplessness). While there is ample literature about depression and alcoholism among lawyers, no studies have attempted to find links between these problems and client service. See Benjamin Sells, *Attorneys Under Stress: A Few Facts About Depression in the Legal Profession*, 6 ILL. LEGAL TIMES, Aug. 1992, at 24; see also Mike Snider, *Even Lawyers Get Blues*, USA TODAY, Nov. 27, 1990, at A1 (reporting Johns Hopkins study finding lawyers 3.6 times more likely to suffer depression than people in other fields).

201. THURMAN W. ARNOLD, *THE FOLKLORE OF CAPITALISM* 79 (1937)

202. Weller Embler, *Metaphor and Social Belief*, in LANGUAGE, MEANING, AND MATURITY 125, 125 (S.I. Hayakawa ed., 1954).

This is especially true in this country, where the language of lawyers has infected or "legalized" the language of the society. Mary Ann Glendon demonstrates that our legal discourse has become everyone's common language and has also legalized our view of society.²⁰³ Glendon describes de Tocqueville's observations of the infiltration of legal language into everyday life:

Wherever he went, he found that lawyers' habits of mind, as well as their modes of discourse, "infiltrate through society right down to the lowest ranks." . . . Not only was legal language "pretty well adopted into common speech," but a legalistic spirit seemed to pervade "the whole of society, penetrating each component class and constantly working in secret upon its unconscious patient, till in the end it has molded it to its desire."²⁰⁴

Glendon also cites Judge Learned Hand's warning against the "legalization" of the United States, a warning delivered on the eve of the "rights revolution" of the 1950's, 1960's, and 1970's:²⁰⁵

I often wonder whether we do not rest our hopes too much on constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.²⁰⁶

Glendon argues that the civil rights movement's entry into the courts accelerated the work begun during de Tocqueville's time, that of legalizing the society and its language.²⁰⁷

In the years following the civil rights era, the language revolution has turned against us. Social injustice, now legalized in our language, is stuck with its legality. Glendon suggests the harm done in her discussion of the Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services*.²⁰⁸ The Court's holding that government had no legally enforceable duty to protect vulnerable children²⁰⁹ seems to tell society-at-large that it had

203. See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

204. *Id.* at 1-2 (citation omitted); see also *id.* at 3 ("In the phrase of legal historian Lawrence Friedman, life in modern America has become 'a vast, diffuse school of law.'") (citation omitted).

205. *Id.* at 143.

206. LEARNED HAND, *The Spirit of Liberty*, in *THE SPIRIT OF LIBERTY 189-90* (Irving Dilliard ed., 1960).

207. GLENDON, *supra* note 203, at 2, 4.

208. 489 U.S. 189 (1989).

209. *Id.* at 194.

no politically enforceable obligation to those children.²¹⁰ The progenitors of the civil rights revolution desired no such result. Law was meant to empower, not to enervate. This is the ironic consequence for civil rights lawyers who shallowly frame social problems as narrowly conceived legal problems. Their litigation, intended as a new and powerful remedy for change, becomes the sole, or at least primary, remedy sought by the victims of civil rights violations.²¹¹ Both Glendon and Derrick Bell agree that this faith in law led civil rights advocates to choose litigation as the road to salvation—largely ignoring other avenues, such as political activity,²¹² and diverting the scarce resources of the client community.²¹³

More dangerous yet, when litigation over a “constitutionalized” social problem then succeeds, i.e., with a favorable judgment or a settlement, the client community tends to perceive the problem as solved. As Gerald Rosenberg puts it,

symbolic victories may be mistaken for substantive ones, covering a reality that is distasteful. Rather than working to change the reality, reformers celebrate the illusion of change.²¹⁴

Even when the legal victories appear more substantial, the reformers risk complacency. Rosenberg quotes abortion rights advocates who saw the negative consequences of *Roe v. Wade*:²¹⁵ “‘Everyone assumed that when the Supreme Court made its decision in 1973 that we’d got what we wanted and the battle was over. The movement afterwards lost steam.’”²¹⁶ For those on the sidelines, the hope that the problem is solved becomes a belief that they need no longer worry about it.²¹⁷ This hope among civil rights victims in the courts should surprise us no more than the insight that the “rights talk”

210. GLENDON, *supra* note 203, at 95.

211. Glendon’s concern is that this language of rights leaves out the language of responsibility and has made political resolution through accommodation and compromise difficult since rights are being claimed as absolutes and at a growing rate. *See id.* at xi–xii. For a leftist criticism of rights, see Martin J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393 (1988) (noting that rights talk tends to keep intact artificial wall between private and public and to discount group claims), Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984) (arguing that rights discourse impedes advances by progressive social forces).

212. GLENDON, *supra* note 203, at 6; *see* DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 70 (1989).

213. GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 313, 339 (1991). This is arguably true of both prisoners’ rights and abortion rights advocates. *Id.*

214. *Id.* at 340.

215. 410 U.S. 113 (1973).

216. ROSENBERG, *supra* note 213, at 339 (quoting National Abortion Rights Action League member Janet Beals) (citations omitted).

217. In *And We Are Not Saved*, Bell tells Geneva, his partner in dialogue, that “Much has changed. But a great many whites view black claims for justice in the voting area as elsewhere as unjustified bellyaching, and secretly harbor a deep-seated belief that the real cause of the blacks’ plight is the inferiority of the black race.” BELL, *supra* note 212, at 73. Bell concludes that this belief in African-Americans’ inferiority has prevented any progress beyond formal equality. *Id.* at 14.

transformation followed the civil rights revolution. For the victims, rights talk is perhaps all there is.²¹⁸

Yet the primary vehicle for talking rights fails them. Traditional pleading in civil rights litigation covers the dramatic events that underlie the litigation with a thin coat—leaving some spots untouched and missing other surfaces altogether. The stories vanish, becoming almost unrecognizable when wrapped inside the obtuseness of legal concepts. Along with those stories, other rich elements disappear as well: graphic and powerful details, ironies, metaphors, the impassioned voice of a narrator reacting to the horror witnessed, and other possibilities for changing the way we think, and the way a judge thinks, of these events. Without the stories, the complaint's paper wall between the court and these clients stands like a concrete bunker.

If there is an alternative, it starts with the complaint. Our complaints do not translate those stories in the fullness of their drama. Nor do they persuade with the full force of their potential. We can do better.

II. SUGGESTIONS FOR THICKER PLEADING

The difference between the *almost*-right word and the *right* word is really a large matter—it's the difference between the lightning bug and the lightning.²¹⁹

Mark Twain

A. *The Possibilities for Change*

Historically, pleading has evolved to shed any skin that interferes with understanding the claims presented. Code pleading replaced common law pleading so that a “person of common understanding [could] know what is intended.”²²⁰ The Federal Rules of Civil Procedure call for a short and plain statement to communicate the claim without code pleading's technical obstacles that contributed nothing to the case.²²¹

We now find ourselves entering the era of plain writing.²²² Plain writing refers to “a level of language immune from contextual variation and therefore resistant to interpretation”²²³ but, as Fish wryly observes, “nothing is more

218. See *id.* at 59.

219. BARTLETT'S FAMILIAR QUOTATIONS 527 (Justin Kaplan ed., 16th ed. 1992) (quoting Letter from Mark Twain to George Bainton (Oct. 15, 1888)).

220. N.Y. CODE CIV. PROC. § 57(5) (1848).

221. See *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957).

222. For a typical example of the “plain writing” school, see Richard R. Wydick, *Plain English for Lawyers*, 66 CAL. L. REV. 727 (1978).

223. FISH, *supra* note 7, at 508.

common than disputes concerning the meaning of supposedly plain or literal language."²²⁴ Perhaps the reason lies in the assumptions about reality that are held by advocates of plain writing.

Believers in "artless" or "plain" speech think that rhetoric is added to some prior natural thing, like cosmetics added to the unadorned face. But human faces are *born*, like kitten faces. Words are not born in that way. . . . Simple prose depends on a complex epistemology—it depends on concepts like "objective fact."²²⁵

These premises are assumptions about language and reality that we can no longer accept as true. If plain means unadorned, then plain writing is artless. The art of lawyering demands more.

Most problematic of all for the plain speakers, this pretense of objectivity is not self-critical, and it assigns to itself an undeserved neutrality of belief and values.²²⁶ In any case, plain writing must evolve in some direction since it situates itself on untenable premises. While no one need defend the virtue of abandoning nineteenth-century legalese, it does not follow that plain writing is anything more than the twentieth century's version of legalese, greatly improved but still improvable. More literary devices may creep into our practice, as I propose here.

We need to consider alternative tools for our repertoire. We can use literary techniques that allow us to communicate more elements of our clients' realities and perhaps enhance the persuasiveness of our pleadings as well. These are techniques other than the traditional argument by analogy, which lawyers master.²²⁷ Analogizing is not enough by itself, since making our civil rights case look like those with roots in common law fulfills only half of our persuasive job, the half that comforts the court with traditional forms of legal relief. The other half of persuasion is to present the compelling case for transcending the real past. This Part considers means of doing that through some new techniques and by using some standard rhetorical devices often overlooked by lawyers but urged by rhetoricians like Chaim Perelman.²²⁸

224. *Id.*

225. GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* 148–49 (1992).

226. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2440–41 (1989) [hereinafter Delgado, *Storytelling for Oppositionists*]. I would agree that plain speech assumes an equality that does not exist, thus concealing the inequality that then cannot be seen and remedied.

227. And the active voice, which many have yet to master

228. See CHAIM PERELMAN & LUCIE OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 187–92 (John Wilkinson & Purcell Weaver trans., 1969)

B. *Dramedy*

At the outset, we can borrow the voices of Wicker the journalist and Rothman the historian. Here we consider the grafting of two voices into one medium—journalism or history, and law. This combination is similar to the technique of “dramedy,” a term invented by the television industry to refer to programs, such as *Hill Street Blues*, that portray serious subjects in a story that alternates between light comedy and dark tragedy.²²⁹ This Section could also be called docudrama or performance art, since all three forms share the technique of blending different expressive forms into one gesture. Or we could borrow the term “ambiguity” from James Boyd White and use it in the same sense as he does in *The Legal Imagination*—mixing different kinds of language so that the reader is asked to sustain a tension between them, to find the meaning in the words somewhere between the languages, or above them, through some integration.²³⁰ As White demonstrates in *Justice as Translation*, the power of a poem derives from difference, the tension between the sound of the words as they would be spoken in ordinary conversation or prose, and the meter and rhythm of poetry.²³¹ The stirring of two opposed ways of speaking creates a third way with its own beauty, meaning, and force.

Another classic example is Shelby Foote’s three-volume work, *The Civil War: A Narrative*,²³² in which the attitude of the novelist pervades the writing of history such that the work product is neither novelistic nor historical, but a new language. More recently, Art Spiegelman wrote and drew *Maus*,²³³ a cartoon account of the Holocaust in which Jews are mice and Nazis are cats. *Maus* borrows cartoon devices to present the most terrible events imaginable, to shake us from our half-conscious perception of these familiar events into a wide-awake look at that horror.

Without announcing our technique, we can borrow from the styles of other kinds of writing—e.g., literature, journalism, history—and graft them onto the legal concepts of our pleading language. The effect of combining these two—“the mind that tells a story and the mind that gives reasons”²³⁴—is something beyond mere legalese, beyond mere journalism or history.

229. Richard Zoglin, *Not Playing It for Laughs*, TIME, Nov. 9, 1987, at 96; Richard Zoglin, *Old Comics, Boy Wonders*, TIME, Sept. 18, 1989, at 69.

230. WHITE, IMAGINATION, *supra* note 6, at 57 (using example of Melville’s inclusion in *Moby Dick* of extracts from other writings about whales). White concludes that the tension between two kinds of language ultimately is fraught with indeterminacy. *Id.* at 57–58.

231. WHITE, JUSTICE, *supra* note 6, at 4.

232. SHELBY FOOTE, THE CIVIL WAR, A NARRATIVE: FORT SUMTER TO PERRYVILLE (1958); SHELBY FOOTE, THE CIVIL WAR, A NARRATIVE: FREDERICKSBURG TO MERIDIAN (1963); SHELBY FOOTE, THE CIVIL WAR, A NARRATIVE: RED RIVER TO APPOMATTOX (1974).

233. SPIEGELMAN, *supra* note 3; ART SPIEGELMAN, MAUS II: AND HERE MY TROUBLES BEGAN (1991).

234. WHITE, IMAGINATION, *supra* note 6, at 243.

The juxtaposition of facts (as Wicker the journalist reports them)²³⁵ with the invocation of the Constitution of the United States mirrors the distance of the powerless prisoner from the federal judiciary. It does not attempt to mask powerlessness in a language that pretends to conduct business as usual, that pretends to offer the equality of voice hoped for by James Boyd White. Rather, it admits to the tension and tries to resolve it.

The art—it is the art of “integration”—lies in writing two ways at once. In this respect law is naturally literary, for the legal case as we normally think of it can be neither an exercise in abstract analysis nor the presentation of mere particulars, but requires the interaction of both modes of discourse²³⁶

As a lawyer, I could have achieved this integration by including Hattie Kendrick’s voice in the Cairo complaint. Lawyers can offer the voice of the defendant—the city attorney in *Kendrick* who cannot find a “good black man.”²³⁷ They can recount the unfolding of events at Attica as they happened, discovering gradually, as Wicker did, how many died and how the hostages were believed to have been killed by the prisoners but were, in fact, killed by the state police and prison guards during the violent assault.²³⁸

Lawyers might even experiment with the Willowbrook television reporter’s reference to Edward R. Murrow’s journalistic aphorism that for some stories—or cases—there can be no other side.²³⁹ Of course, in litigation, we insist upon the legitimacy of two sides. But in borrowing Murrow’s contrary view from journalism, we remind the court of the unique territory it has entered with this particular lawsuit—this isn’t Kansas anymore. Looking squarely at those cruelly, unnecessarily twisted limbs and wasted lives of Willowbrook, the pretense of another side to this atrocity is easily revealed.

C. *Client Narrative*

Recently scholars have debated the power and legitimacy of narratives to elucidate legal problems.²⁴⁰ Narrative has unquestionable utility in pleading, for many of the same reasons as its scholarly proponents expect.²⁴¹ By telling

235. WICKER, *supra* note 58.

236. WHITE, JUSTICE, *supra* note 6, at 40.

237. GOOD, *supra* note 4, at 92.

238. WICKER, *supra* note 58, at 287, 297–98, 308–09.

239. RIVERA, *supra* note 87, at 26.

240. Richard Delgado, *On Telling Stories in School. A Reply to Farber and Sherry*, 46 *VAND. L. REV.* 665, 675–76 (1993); Daniel A. Farber & Suzanna Sherry, *Telling Stories out of School: An Essay on Legal Narratives*, 45 *STAN. L. REV.* 807, 854 (1993).

241. Joseph Singer argues that empathic narratives persuade by making readers “aware of values they already have,” but worries that the narrative may be ineffective nonetheless. Joseph Singer, *Persuasion*, 87 *MICH. L. REV.* 2442, 2455–56 (1989). Thomas Ross is more optimistic, believing that narrative can even topple racist assumptions. Thomas Ross, *The Rhetorical Tapestry of Race. White Innocence and Black*

the stories of our clients, we concretize the abstract values the lawsuit turns on—justice or equality—and permit the reconciliation of conflicting abstractions.²⁴² In the Cairo case, for example, one can harmonize the respect for democracy that would restrain a federal judge from restructuring a city government with the demand for equality that calls for a leveling intervention. The case is not about the right to vote, we can say. It is about the vote, specifically, the vote of Hattie Kendrick and others like her,²⁴³ and so is about both equality and democracy.

These narratives can do more than concretize; they can unearth. Richard Delgado, who has argued that majority culture lawyers are unlikely to comprehend their minority clients' realities,²⁴⁴ nonetheless advocates the story as a way to understand, to persuade.

Stories, parables, chronicles, and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse take place. . . . Ideology—the received wisdom—makes current social arrangements seem fair and natural. Those in power sleep well at night—their conduct does not seem to them like oppression.

The cure is storytelling [S]tories can shatter complacency and challenge the status quo. Stories told by underdogs are frequently ironic or satiric; a root word for “humor” is humus—bringing low, down to earth. . . .

. . . Counterstories, which challenge the received wisdom . . . can open new windows into reality, showing us that there are possibilities for life other than the ones we live. . . . Counterstories can quicken and engage conscience. Their graphic quality can stir imagination in ways in which more conventional discourse cannot.

. . . They can show that what we believe is ridiculous, self-serving, or cruel. They can show us the way out of the trap of unjustified exclusion. They can help us understand when it is time to reallocate power.²⁴⁵

Abstraction, 32 WM. & MARY L. REV. 1, 40 (1990).

242. “[C]oncrete values can always be harmonized; the very existence of the concrete implies that it is possible, that it achieves a certain harmony. Abstract values, on the other hand, when carried to extremes, are irreconcilable: it is impossible to reconcile, in the abstract, such virtues as justice and love.” PERELMAN & OLBRECHTS-TYTECA, *supra* note 228, at 79.

243. The careful selection of a “good” class representative in a class action is a classic example of argumentation by example, of persuading that what is true of the individual case is true of the class. *Id.* at 350–56.

244. See Delgado & Stefancic, *supra* note 153, at 1284 (“[M]embers of the majority race forget how to see and condemn racism.”).

245. Delgado, *Storytelling for Oppositionists*, *supra* note 226, at 2413–15 (citations omitted). Others who have written about socioeconomic differences between client and lawyer agree that while the lawyer can only gain incomplete understanding of a client’s reality, the narrative method can help the lawyer to glean what can be had and to interpret as best she can. Alfieri, *supra* note 147, at 2131–32.

White also believes stories to be persuasive because they are not “propositional” and “coercive,” but rather “experiential” and “invitational”—“they offer an experience, not a message, and an experience that will not merely add to one’s stock of information but change one’s way of seeing and being and talking.”²⁴⁶ He hopes that, with stories, we could reach even a Chief Justice Taney²⁴⁷ and reverse the process by which “Dred Scott is converted before our eyes from a person into an object.”²⁴⁸

The defendants, too, are persons, not objects. Even in litigation, where the objective is to challenge and to defeat, the defendants may be better described in their own words; for example, the city attorney in the *Kendrick* case:

I told Preston Ewing [leader of the local NAACP chapter] a dozen times I’m looking for a good colored leader who can control his people. Everybody looks for a good black man nowadays. You find one and you’ve got liquid gold.²⁴⁹

As Shelby Foote suggests, “[t]he proper and effective way to accomplish the destruction of a man is to show him sympathy, and in the course of showing that sympathy, permit the man himself to show that it is undeserved.”²⁵⁰

These client narratives must do more than bid for sympathy, segregated from the legal argument. They must enliven the legal argument, drive it, and shape it.²⁵¹ It is the dynamic role of the narrative within a legal argument—rather than the narrative standing alone, perhaps unheard—that gives it persuasive force.²⁵² At the outset of this Article, I quoted a contemporary of Abraham Lincoln, who praised the lawyer and President for his ability to accomplish with a story what a civil rights lawyer might strain to do with a legal argument: to break “through all the barriers of a man’s previous opinions and prejudices at a crash.”²⁵³ While we might envy Lincoln’s skill, we can aspire to do the same.

The complaint in the Cairo case could have gained persuasive power by telling the story of how Cairo’s African-American citizens had themselves struggled for equal rights and faced despair, how the white majority’s violent determination to maintain a segregated roller rink transformed a boy into a

246. WHITE, JUSTICE, *supra* note 6, at 42.

247. *See id.* at 139.

248. *Id.* at 133.

249. GOOD, *supra* note 4, at 92.

250. Foote, *supra* note 43, at 221. He adds that “[t]here is no danger that this self-condemnation, this self-damnation will not occur; for in the clear light of truth, all things come clear, the only thing that can muddy its depths is muddy writing.” *Id.*

251. Gilkerson describes a case in which client narrative failed to enliven the legal argument because the two elements became disconnected from one another. Gilkerson, *supra* note 26, at 943.

252. *See* Calvin Morrill & Peter C. Facciola, *The Power of Language in Adjudication and Mediation: Institutional Contexts as Predictors of Social Evaluation*, 17 LAW & SOC. INQUIRY 191, 210 (1992) (comparing “powerful” and “powerless” forms of speech in legal settings).

253. CARPENTER, *supra* note 2, at 311 (quoting Rev. J.P. Gulliver).

seemingly militant leader whom the city fathers would then malign.²⁵⁴ It could have told the reader how Hattie Kendrick lost her career as a teacher as the price paid by one who would not surrender her rights.²⁵⁵ So might the Willowbrook complaint have responded to the story of Paula, one of the institutionalized residents of Willowbrook, by recounting her parents' grim Sunday trips to see her in the institution.²⁵⁶ The complaint in the Attica case could have told the story of the "faceless men" it identified only by name, walking the gauntlet between two rows of guards who beat them as they passed.²⁵⁷

This may call for somewhat longer pleadings. The added length, however, is justified by the complaint's greater value. Rhetoricians recognize that amplitude, although perhaps inconsistent with short and plain statements, is the essential difference between argumentation and mere demonstration, where brevity is desired.

In a rigorous demonstration, only the links essential to the development of the proof need be shown, but none of these can be omitted. In argumentation, on the other hand, there is no absolute limit to the accumulation of arguments, and it is also permissible not to state all the premises essential to an argument.²⁵⁸

Perhaps amplitude can be reconciled with plain—if not short—statements if we write carefully, not casually. In Twain's words, we would thus get the effect of the lightning, not the lightning bug.

D. *Metaphor*

At the end of it all, the court and the lawyer will reduce the narrative through the legal process, ending in a decision by the judge. Like all language, client narratives will lose their full meaning when reduced to a paraphrase.²⁵⁹ Yet, the reduction to some shorter form becomes inevitable and even helpful because we can then speak of the case intelligently yet efficiently. In the context of civil rights litigation, this reduction creates danger given the plenitude of petrifying legal labels and paste-on fact patterns, what White likes to call "clichés."²⁶⁰ So, the Cairo history of racial strife and struggle becomes

254. GOOD, *supra* note 4, at 12, 92.

255. See *supra* part I.A. Argument of the speaker's sacrifice is a classic rhetorical device. PERELMAN & OLBRECHTS-TYTECA, *supra* note 228, at 248.

256. ROTHMAN & ROTHMAN, *supra* note 76, at 17–20.

257. WICKER, *supra* note 58, at 290–91. Perhaps referring to them as "faceless men," as I have here, might deepen the court's perspective of the case.

258. PERELMAN & OLBRECHTS-TYTECA, *supra* note 228, at 474.

259. See WHITE, JUSTICE, *supra* note 6, at 32–33.

260. WHITE, IMAGINATION, *supra* note 6, at 257.

another “civil rights case” and Attica’s recapture, “cruel and unusual punishment,” or worse, “another prisoner case.”

To combat the deadening effect of clichés, one might try metaphors, recasting the complex facts into a few words that quicken those facts with a new meaning, free of the dangerous cliché. The classic role of metaphor is to “enhance the standing of the analogy.”²⁶¹ The question is, then, to what do we wish to analogize? To “just another prisoner case,” or to some unacknowledged contradiction of a deeply held value of our society? For examples drawn from the lawsuits I have examined, the metaphor of a suicidally stagnant fiefdom,²⁶² and all that feudalism implies, might have persuaded a federal judge of the need to intervene in Cairo, where antidemocratic or predemocratic social structures and dynamics retarded the democratic process. In the Attica case, the metaphor of numbers, as in the numbers on the toe tags of the dead prisoners,²⁶³ or the competing versions of the casualty count Wicker heard,²⁶⁴ or the image of cattle driven to slaughter,²⁶⁵ might have started the judge thinking of these prisoners as people instead of numbers or animals.

If the metaphor is new and fits, it can change the reality brought before the judge:

Figures of speech, when they are fitting and felicitous, and especially when they occur in print, give poetic sanction, as it were, to hitherto dimly felt, inarticulated beliefs. When metaphor is new, and when the reader does not enjoy the perspective vouchsafed by time, the metaphor is taken literally, and its function is not that of rhetorical device, but of statements of fact.²⁶⁶

Metaphors can achieve this because of two traits of the metaphor, each one corresponding to its author and its reader. On the one hand, a metaphor, simple in appearance, leaves “unused parts”²⁶⁷ of the concept unspoken, but still available to the author. For example, the metaphor “family tree” uses certain parts of the “tree” concept—e.g., roots, branches, growth—and not others—e.g., certain species crowding out others, the absence of any planning to the growth. Yet those parts remain and can be called upon to create new understandings of old subjects through newly fashioned metaphors.²⁶⁸

261. PERELMAN & OLBRECHTS-TYTECA, *supra* note 228, at 400

262. *See* GOOD, *supra* note 4, at 11.

263. WICKER, *supra* note 58, at 302–03.

264. *Id.* at 297.

265. *See id.* at 285–86.

266. Embler, *supra* note 202, at 125, 128. Metaphors that have been used become “dormant” and need reactivation by some fresh application. PERELMAN & OLBRECHTS-TYTECA, *supra* note 228, at 405.

267. *See* George Lakoff & Mark Johnson, *Conceptual Metaphor in Everyday Language*, 77 J. PHIL. 453, 471 (1980) (internal quotation marks omitted).

268. *See id.*

On the other hand, from the reader's perspective, metaphors carry with them, in the words of linguists Lakoff and Johnson, "a large and coherent network of entailments."²⁶⁹ In their example of "[l]ove as a [c]ollaborative [w]ork of [a]rt,"²⁷⁰ love's entailments—patience, sacrifice, joy, pain—are applied to art and then applied once more to love, based upon the reader's experiences in life.²⁷¹ These applications "reverberat[e] down through the network of entailments which awakens and connects our memories of past love experiences and serves as a possible guide for future ones."²⁷²

Metaphors of this kind have formidable power. Historian James McPherson argues that a factor essential to Lincoln's victory in the Civil War was his ability to communicate effectively through his creative and skillful use of figurative language, especially metaphor.²⁷³ It is important to note, however, that old metaphors become clichés and die. They are so frequently used and casually misused that "we often do not realize that they *are* metaphors."²⁷⁴ We forget that they represent anything true, meaningful, or relevant.

Even staler clichés can be refreshed. In Willowbrook, the all-too-familiar prison metaphor might have taken on new life if it had been recast, as by the television reporter, as a concentration camp, suggesting all the horrors of the Holocaust, or as a leper colony with its connotations of eliminating those who are different through no fault of their own.²⁷⁵ Some might think this metaphor needs a little reworking as well.

In his treatise on rhetoric, Perelman uses the example of the "wheel of fortune," which has become a cliché but can be reactivated as it was by Pascal: "The great and the humble have the same misfortunes, the same griefs, the same passions; but the one is at the top of the wheel, and the other near the centre and so less disturbed by the same revolutions."²⁷⁶ The words "wheel," "of," and "fortune" never appear next to each other, but the metaphor is invoked in an exciting and persuasive way. Similarly, we could say Willowbrook is "like a prison" or "like a concentration camp," or we could say that the residents of Willowbrook, though innocent, have been "concentrated in a camp" where most will die because they are different.

269. *Id.* at 482.

270. *Id.* at 481.

271. *Id.* at 481–82.

272. *Id.* at 482.

273. JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION 103 (1990) (titled chapter containing this argument, "How Lincoln Won the War with Metaphors"). As Garry Wills, no cynic when it comes to the power of language, observes, to claim that Lincoln won the war with metaphors would be an exaggeration. *See* WILLS, *supra* note 225, at 170.

274. MCPHERSON, *supra* note 273, at 95.

275. *See The Last Disgrace*, *supra* note 88.

276. PERELMAN & OLBRECHTS-TYTECA, *supra* note 228, at 406 (quoting BLAISE PASCAL, PENSÉES § 2, at 62 (W.F. Trotter trans., Random House 1941) (1670)).

Sharp metaphors cut from a different angle. In Paul Good's account of Cairo's troubles, he sharpens several dull metaphors. He gives "backwardness" a new slant by describing how the all-white youth center called itself "Oriac" or Cairo, backwards.²⁷⁷ Reporting on how the police department refused federal grants to increase professionalism, Good tells us about a flyer that "achieves a bumper-sticker condensation of this philosophy: 'We need to support our local police by turning down Federal grants.'"²⁷⁸ Creating a new metaphor not about the South but of the South, Good quotes a local black minister as lamenting that discrimination is a national problem because "'South' has moved all over the country."²⁷⁹

In a town called Cairo, the temptation to invoke the people of Israel struggling to free themselves from the rule of Pharaoh would strain the integrity of most writers, and stretch the readers' patience as well. Good follows Pascal's example and plants parts of the metaphor throughout the book—a reference to "Little Egypt"²⁸⁰ and, a few pages later, to an exodus of young black people;²⁸¹ a recitation of troubles resembling plagues befalling an unyielding power structure sprinkled throughout;²⁸² the ostracism of one local prophet, a white lawyer;²⁸³ and a near-biblical description of civil rights leader Charles Koen, "still not recovered from his long fast; his body is wispy and his eyes seem to stare at you from some far place he has been."²⁸⁴

The Rothmans also present a potent new version of the dustier metaphor of an institution as a "hellhole." A few pages after referring to Willowbrook as a "hellhole,"²⁸⁵ they subtly remind us of Dante while recounting the visit of Dr. James Clements, a visiting expert who tells the story of

meeting a Catholic priest who was doing penance by working at the institution. The priest was pacing around an enclosed pen for the children at Building 16, "not verbalizing or making any attempt at verbal communication, and the youngsters there were so eager for human contact that there was a youngster holding onto each leg, being dragged around and around this endless circle within this pen." Clements could imagine the sins that brought the priest into the circle, but what could the children have done to belong in it too?²⁸⁶

277. GOOD, *supra* note 4, at 23.

278. *Id.* at 34.

279. *Id.* at 4.

280. *Id.* at 10.

281. *Id.* at 14.

282. *Id.* at 11, 86.

283. *Id.* at 89.

284. *Id.* at 92. Not all of Good's metaphors are new and powerful. He has his share of "color lines," *id.* at 12, 17, "psychic wounds," *id.* at 23, and "rivers of time," *id.* at 5.

285. ROTHMAN & ROTHMAN, *supra* note 76, at 66.

286. *Id.* at 76-77. The Rothmans also use stale metaphors like the "wheels of justice." *Id.* at 66.

To open the prison doors and give his readers a peek inside, Wicker uses metaphors more sparingly. Still, he uses them with great power, vaulting over the gap between prisoner and citizen by quickly spinning the native-foreigner metaphor so that we find ourselves on both sides of the gap:

[The prisoners] seemed far away, too, because they were on the underside and he was not. That made a long distance between them, a gap across which he wondered if he could ever reach—a gap not so much between losers and winners, fortunate and ill-starred, or even rich and poor as between native and foreigner. Across that gap, they eyed one another without hostility, but without much understanding, either. Perhaps it could go either way. But Wicker had no more time to think about that as he and Jones approached the brick facade of D-block, or to reflect upon who—he or they—was native and who, foreigner.²⁸⁷

When the spinning stops—when he leaves the prisoner-held portion of the prison—Wicker staggers, uncertain which side of the prison he should call home:

When they passed through the iron gates that frowning guards held open for them, back into the civilized world, Wicker was at once conscious of the troopers and the guns. . . . He knew the troopers were on “his side,” the representatives of society, clad and armed for society’s work. He knew the guns were for his protection

Yet, the troopers and the guns did not reassure him. He could sense (perhaps it was anticipation) the growing if controlled hostility of the troopers—as if it was dawning on them that it was unseemly, indecent for good Americans to deal as equals with thieves and rapists and addicts, blacks at that. . . .

“Funny thing,” [another observer] said. “I get the feeling they liked us better in there than they do out here.”²⁸⁸

By leading the judge to think of the lawsuits in new, compelling ways, instead of the deadening clichés of “Section 1983” or “cruel and unusual punishment,” we also take measured steps toward transforming the definition of those terms as well, giving them new life. Cruel and unusual punishment, for the judge, will mean something different after the Attica case than it did before. As Perelman teaches, one of the functions of rhetoric in law is to find “new examples react[ing] on earlier ones and modify[ing] their meaning”²⁸⁹ so that what was different is now alike:

287. WICKER, *supra* note 58, at 49–50.

288. *Id.* at 56.

289. PERELMAN & OLBRECHTS-TYTECA, *supra* note 228, at 357.

Language is often one step ahead of the jurist. In turn, the jurist's decision—for language does not impose a decision on him, but facilitates his task—may react on the language. In particular, his decision may have the result that two words which could, at a given time, be regarded as homonyms will be interpreted as stemming from a single concept.²⁹⁰

This is especially likely in civil rights where the stories of the litigants have transformed our concepts of equal protection and individual rights.²⁹¹

If we start saying it in the complaint, it will become true. "As lawyers know—to their cost—it is very difficult to say things habitually, even things one doubts, without coming to believe them."²⁹² Once the judge begins to think of the case in this new way and to talk about the case in this way, the justification for remedial action by the court becomes stronger. "More often than not, our thoughts do not select the words we use; instead, words determine the thoughts we have."²⁹³

E. *Irony*

Irony manipulates a text to facilitate the disappearance of one set of meanings and its replacement with other meanings²⁹⁴—"saying one thing and meaning, not just another, but its opposite."²⁹⁵ The success of ironic expression depends on the commonality of assumptions between author and reader²⁹⁶—e.g., among lawyers and judges—regarding the imperatives of equality, due process, fairness, and reasoned decision making. On more controversial matters such as the greater society's relationship to the poor, irony often fails. A reader who is committed to a New Deal or Great Society view may find ironic the argument that "illegitimacy causes poverty," since she sees illegitimacy less as a cause of welfare rolls and more as a consequence of the limited options available to the poor. In contrast, a reader influenced by Reaganomics finds not irony, but insight.

Where lawyer and court share assumptions—for example, the inappropriateness of judicial meddling with democratic processes, the value of racial equality, and the role of the court in guarding fundamental constitutional rights—irony can persuade. The need for court intervention can be argued with irony by pleading that despite our commonplace expectations, the system did

290. *Id.*

291. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 163 (1991).

292. WHITE, *JUSTICE*, *supra* note 6, at 54.

293. Embler, *supra* note 202, at 125. For a consideration of the role socially common metaphors have played in the law, see Eastman, *supra* note 105.

294. FISH, *supra* note 7, at 193.

295. WHITE, *IMAGINATION*, *supra* note 6, at 54.

296. See WAYNE C. BOOTH, *A RHETORIC OF IRONY* 33 (1974); PERELMAN & OLBRECHTS-TYTECA, *supra* note 228, at 208.

not work. Democracy and the normal political process have failed. To call for the extraordinary help of the court, the lawsuit must not appear commonplace.²⁹⁷ It should seem ironic to a court that it must intervene to guarantee rights that should inhere in the democratic process itself.

At its zenith, the subversive power of irony “undermines clarities, opens up vistas of chaos, and either liberates by destroying all dogma or destroys by revealing the inescapable canker of negation at the heart of every affirmation”²⁹⁸—that is, if it works. Typically, irony succeeds by stating a proposition that the author pretends to believe, in a manner that invites the reader to peer through that statement and conclude that the author actually believes its opposite. Booth offers one example of an ironic statement from a solicitation for contributions to a relief fund: “Ignore the hungry and they’ll go away.” The advertisement’s audience is expected to understand that the author actually means, “Give to our fund or the hungry will die.”²⁹⁹ They will go away in the sense that they will die.

Irony presents its own challenge. The author intends that the audience reject the argument on the surface, but not because of anything observable about the “pretend” argument. The speaker could be absolutely serious, albeit callous or indifferent. How does one make it clear that ironic statements are intended to be ironic? The speaker—if observed, and not just read—could, of course, wink. Or a picture of a starving child could appear next to the argument. Where these sorts of clues are not available, the audience mistakes the pretended argument for its intended opposite, because the audience

refuse[s] to dwell with anyone who holds this whole *set* of beliefs. And then, because [the reader] cannot believe that the author of the statement can be that kind of person, [she is] forced (through psychological and intellectual pressures which [she] will not even pretend to understand or explain) to make sense out of the statement by concluding that it is ironic.³⁰⁰

Given the adversarial nature of the legal profession, the clarity of an ironic message cannot depend solely on the shared assumptions of our interpretive community. Ironic clues may prove necessary. For instance, in the Cairo case, plaintiffs’ counsel might plead something like, “The city leadership has committed itself to serving all of its citizens.” Without other indications of irony, the judge might only assume a typographical error. Similarly, an allegation that “Cairo’s Black citizens have gained access to all city agencies and offices” may seem simply quirky unless it is accompanied by clues such

297. PERELMAN & OLBRECHTS-TYTECA, *supra* note 228, at 468.

298. BOOTH, *supra* note 296, at ix.

299. *Id.* at 35.

300. *Id.*

as a companion sentence about the racial demographics of the city's personnel; e.g., "Blacks are hired only as janitors to sweep out those agencies and offices." This kind of signal highlights what Wayne Booth describes as an incongruity between the pretended statement and known historical fact, conventional judgment, or other statements of fact within the same writing.³⁰¹

A clash of styles may also suggest irony by juxtaposing formal pleading style with something, well, "funkier." For example, "Blacks in Cairo—40% of the voting age population—have never elected one of their race to the City Council. Guess that's all they deserve, right?" Cuteness and sarcasm, however, should not be confused with irony. They raise eyebrows, but not consciousness. A more persuasive clash arises from following the first statement with a quotation from the city attorney: "There are very few to choose from. There's nothing better than having a good black man on your city council. . . . We're thinking now of putting two on the council."³⁰²

If, as argued elsewhere in this Article, the pleading includes the lawyer's own voice, then the readers of an ironic allegation "may be alerted whenever [they] notice an unmistakable conflict between the beliefs expressed and the beliefs [they] hold and suspect the author of holding."³⁰³ This is risky business, and the lawyer may wish to use irony only with clues or, absent clues, only when the judge knows the lawyer sufficiently that she can mutter to herself, "This lawyer could not have meant what she just said." Even so, the judge may pass over the real meaning intended by others, instead constructing other meanings and rendering the irony unstable, and if not dangerous, then useless.³⁰⁴

The case studies offer several examples of discernable, more stable ironies. In the Cairo case, one can ironically demonstrate the point by pleading white city officials' claim that blacks come to Cairo for the welfare benefits,³⁰⁵ and then relating the story of the welfare mother leaving Cairo each morning at 3:00 to work in another city, fifty miles away.³⁰⁶ The complaint could quote the city attorney on the difficulties of finding good black leaders³⁰⁷ and then quote the despairing voice of a young man who cannot find a job or a future,³⁰⁸ or offer Hattie Kendrick's eloquence.

In the Attica case, one could report what the helicopter announced to the prisoners in the yard: "Put your hands above your head . . . you will not be

301. *Id.* at 58–67.

302. GOOD, *supra* note 4, at 92. This also has the benefit of making the city attorney the speaker. As Booth notes, the "author of the original irony is himself an ironic victim." BOOTH, *supra* note 296, at 37. By attributing the quotation to the city attorney, the lawyer signals to the reader that it is the city attorney, not the lawyer, who is the victim of the irony.

303. BOOTH, *supra* note 296, at 73.

304. *Id.* at 6.

305. GOOD, *supra* note 4, at 92.

306. *Id.* at 13.

307. *Id.* at 92.

308. *Id.* at 6.

harmed," and follow it with the death toll even among those who did.³⁰⁹ One could plead that the local and state law enforcement authorities began prosecution of those they believed guilty of violations of the law, then cite the one-sided statistics of indictment,³¹⁰ to show why these authorities cannot be trusted with the plaintiffs' constitutional rights.

Lawyers could invoke Willowbrook's mission to care for and treat the mentally retarded children of the state's families and then state that Paula's parents were barred from the ward.³¹¹ They could characterize the institution as a place where professionals were charged with the care of these vulnerable persons and then report a doctor's discharge for trying to do just that.³¹²

F. Poetry

Through the use of poetic elements, lawyers may enhance the persuasive power of their pleadings. Pleadings may properly borrow rhythm and meter from poetry since, like poetry, pleadings are often read aloud. Once again, Abraham Lincoln provides the best examples of poetic techniques applied to persuasive speech. As Edwards and Hankins discovered in their study, *Lincoln the Writer*,³¹³ Lincoln often wrote lines that were "metrically regular" and had "more pronounced rhythm than is common in prose."³¹⁴ Among many examples, they analyze the Gettysburg Address, accentuating syllables to show the meter:

1. Fore-score/and sev-len years/a-go.
2. Now we/are en-gaged/in a great/civ-il war.
3. Can long/en-dure.
4. We are met/on a great/bat-tle field/of that war.
5. For those/who here/gave their lives/that that na-/tion might live.
6. It is/al-to-lge-ther/fit-ing.
7. We can/not ded-li-cate,
We can/not con-lse-crate
We can/not hal-low/this ground.
8. The world/will lit-tle note,/nor long/re-mem-ber.
9. Have thus far/so no-bly/ad-vanced.
10. That from/these hon-ored dead
We take/in-creased/de-vo-tion
To that cause/for which/they gave
The last/full mea-/sure of/de-vo-tion.
11. These dead/shall not/have died/in vain.
12. Of the/peo-ple,

309. WICKER, *supra* note 58, at 285-86.

310. *Id.* at 309-10.

311. ROTHMAN & ROTHMAN, *supra* note 76, at 17, 19.

312. *The Last Disgrace*, *supra* note 88.

313. HERBERT EDWARDS & JOHN E. HANKINS, *LINCOLN THE WRITER* (1962).

314. *Id.* at 93.

*By the/peo-ple,
For the/peo-ple,
Shall not/per-ish
From the/earth.*³¹⁵

The rhythm, which pushes the words along, advances their power as well, since we more easily memorize and recall verse than prose.³¹⁶ Similarly, Lincoln used repetition (“of the people, by the people”), assonance (“whether/ever”), rhyme,³¹⁷ and alliteration (“lives/live” and “world/will”) to promote the ideas embodied in these techniques.³¹⁸

Like poets, who write with an ear to the sound of their writing spoken aloud, lawyers should listen, as they write, to how their pleadings sound. Indeed, a law clerk might read our pleadings to a judge, “summing up a wide area of emotional experience in a single telling phrase.”³¹⁹ For example, prisons are dark, ugly places. True enough, we knew that already. But listen to the way Wicker expresses this commonplace thought: “The great world goes about its business, but the prison is a dark pocket of mystery and silence—‘the black flower of civilized society,’ Hawthorne called it.”³²⁰

G. *Homilies*

Like lawyers, preachers must choose the words that best translate their message and arrange them in the most persuasive order. Homilies do differ from pleadings in the manner of their reception—they are heard, not read by the audience. But to the extent that the judge hears in her own mind the words she reads, or hears the words read to her by a law clerk, homilies have something to teach us.

Preachers choose words that “imitate,” that “match cadence and the sounds of words to what we are speaking about.”³²¹ Repetitive things are repeated. Quick things are said quickly; long processes are described with a long series of phrases. David Buttrick provides a vivid sample. To describe death, we could write: “We all die. Though life-support systems may keep our bodies going, sooner or later, by accident or heart failure or merely growing old, we

315. *Id.* at 95. For a brilliant consideration of the Gettysburg Address and its persuasive power to transform our concept of equality, see generally WILLS, *supra* note 225

316. EDWARDS & HANKINS, *supra* note 313, at 93

317. From the Second Inaugural Address: “Fondly do we hope—fervently do we pray—that this mighty scourge of war may speedily pass away.” ABRAHAM LINCOLN, Second Inaugural Address (Mar 4, 1865) [hereinafter Second Inaugural Address], in SPEECHES AND WRITINGS 1859–1865, at 687 (Don E. Fehrenbacher ed., 1989) [hereinafter SPEECHES AND WRITINGS].

318. See EDWARDS & HANKINS, *supra* note 313, at 96–97 (discussing Lincoln’s use of literary techniques).

319. *Id.* at 98.

320. WICKER, *supra* note 58, at 33.

321. DAVID BUTTRICK, HOMILETIC: MOVES AND STRUCTURES 190 (1987)

will die."³²² Or, we could write: "We all die. Oh, medical science can keep us going, pump the pump of the heart, or measure the slow ooze of intravenous feeding, drop by drop; we will live, but without aliveness. Sooner or later, we'll stop."³²³ "Pump the pump" sounds like a heart. "Drop by drop" recalls an intravenous tube. The long process of prolonging life is prolonged in words, only to end abruptly with "we'll stop."

Preachers might use harsh, guttural sounds to describe cruelty, "s" or "f" sounds to speak of gentleness, polysyllabic Latin words for profundity, and fast words for action.³²⁴ So can we. For the Attica case, read this aloud:

Hands behind their necks, single file. The inmates made their way down D-tunnel, through the mud and the debris of the uprising and the attack, through A-yard, with bodies lying all about and the remnants of the gas clinging in the damp air. To the A-block door. No trial, but only judgment, *res ipsa loquitur*. No presentence investigation, but sentencing. The same for each, *res judicata*. Kicked and clubbed and punched and stabbed.

In this effort I dare to take some of Wicker's prose³²⁵ and emphasize its homiletic potential.

Lawyers might also borrow the combination of opposites from homiletic technique. Among the great preachers whose lectures on theology and morality are remembered, we think of the Reverend Martin Luther King, Jr. One of his techniques for making a lasting impression on his audience was a cadence of opposites: "the sons of former slaves and sons of former slave-owners," and "not be judged by the color of their skin but by the content of their character."³²⁶

One great lawyer, Abraham Lincoln, employed this technique with great effect.³²⁷ In his posing of opposites, Lincoln drew upon the power between them; for example, "malice" and "charity" in the Second Inaugural Address.³²⁸ Much of the power of remembered quotations flows from the

322. *Id.*

323. *Id.*

324. *See id.* at 205.

325. WICKER, *supra* note 58, at 287-88.

326. Martin Luther King, Jr., I Have a Dream, Speech at the Civil Rights March on Washington (Aug. 28, 1963), in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 217, 219 (James M. Washington ed., 1986).

327. Lincoln liked to mimic preachers in his youth and apparently borrowed from them as an adult. According to his stepmother, Lincoln "would hear sermons [by the] preacher, come home, take the children out, get on a stump or log, and almost repeat it word for word." PHILIP B. KUNHARDT, JR. ET AL., *LINCOLN: AN ILLUSTRATED BIOGRAPHY* 42 (1992) (alteration in original).

328. Second Inaugural Address, *supra* note 317, at 687. ("With malice toward none; with charity for all . . ."). Lincoln demonstrated as well the "ladder method" or "chain method" of building to a point by linking phrases to ones preceding them. DONALD L. HAMILTON, *HOMILETICAL HANDBOOK* 70 (1992). Look again at the Gettysburg Address: "We are engaged in a great civil war . . . We are met on a great battlefield of that war."

tension between two things in opposition or at least in distinction; for example, between the lightning and the lightning bug, in Twain's remark quoted at the beginning of this Part. No one knew this better or used its insight more effectively than Lincoln, for whom language was a fascination.³²⁹ Read the First Inaugural Address:

We are not *enemies*, but *friends*. . . . Though passion may have *strained*, it must not *break* our bonds of affection. The mystic chords of memory, stretching from every *battle-field* and *patriot grave*, to every *living heart* and *hearthstone*, all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the *better angels* of *our nature*.³³⁰

The persuasive power of tension between opposites is available in litigation pleadings as well. In the Willowbrook case, we could recite the contrast between what we see in entering the institution—twisted limbs and swollen heads (again a set of two)³³¹—and who these people are. In the Attica case, the tension between opposites is embodied in the difference between our expectations as to what the killer-prisoners did to the hostages, and the fact that the guardians of law and order were the actual killers.³³² In Cairo, the hopelessness of young men contrasts with the determination of Hattie Kendrick.³³³ The tension created between these contrasting points of expectation and actuality can enable us to “displac[e] the dulling sense of familiarity”³³⁴ with a new vision of things.³³⁵

H. *Oxymorons*

'[T]is better to be lowly born
And range with humble lives in content
Than to be perked up in a glist'ring grief
And wear a golden sorrow.³³⁶

329. See WILLS, *supra* note 225, at 153–54 (describing Lincoln's early experiments with language) Lincoln often affirmed his interest in language. *Id.* (“[T]o it we owe everything which distinguishes us from savages.”); see also F.B. CARPENTER, SIX MONTHS AT THE WHITE HOUSE WITH LINCOLN 24–29 (John C Freeman ed., Century House 1961) (1866) (recounting Lincoln's eloquent moments)

330. ABRAHAM LINCOLN, First Inaugural Address (Mar 4, 1861), in SPEECHES AND WRITINGS, *supra* note 317, at 224 (italics added).

331. ROTHMAN & ROTHMAN, *supra* note 76, at 17

332. See WICKER, *supra* note 58, at 302–03 (indicating that police, not prisoners, shot hostages)

333. See GOOD, *supra* note 4, at 6 (quoting 19-year-old Anthony Patterson)

334. Cunningham, *supra* note 188, at 1342 (quoting CLIFFORD GEERTZ, *Thick Description*, in THE INTERPRETATION OF CULTURES 3, 19 (1973)).

335. For an example, see WHITE, JUSTICE, *supra* note 6, at 138 (discussing *Dred Scott* and how the Constitution's silence on slavery could have been presented differently)

336. WILLIAM SHAKESPEARE, THE LIFE OF KING HENRY THE VIII act 2, sc 3

The “golden sorrow” is an example of a oxymoron, a favorite of literature, transforming the expected meanings of both “golden” and “sorrow.” Perelman, the rhetorician, proposes that we can transform meaning and “dissociate notions” by recognizing the many meanings of words as we use them.³³⁷ As an example, he quotes Schiller’s couplet, which distinguishes between apparent and true religion:

What religion do I profess? None of all those That you mention.
—and why none? —For religion’s sake!³³⁸

In law, we can also use this technique fruitfully. Fish notes the persuasive power emanating from Catharine MacKinnon’s use of oxymoronic phrases in her essays on pornography and rape:

What she does is employ a vocabulary that departs from ordinary (or as she might say “ideologically frozen”) usage in ways that cannot be ignored. Often she will drop in a provocative phrase without announcing or even appearing to notice its provocativeness; and then she will surround the “oddness” of the phrase with neighboring oddnesses until at a certain point (presumably a different point for different readers) what was once odd is suddenly ordinary. One such phrase is “rape in ordinary circumstances.” . . . If rape is reconceived as a constitutive ingredient of everyday heterosexual intercourse, including intercourse in marriage, an entire legal structure (and much else) will have to be dismantled and replaced by another.³³⁹

One can think of examples for our Cairo litigation, referring to the stranglehold whites had on Cairo’s blacks, and to the entire community’s future as “plantation democracy.”

Prisoner advocates sometimes use the phrase “free world” to refer to, among other things, medical care that would be available in the outside community. The phrase’s Cold War meanings are hard to duck. One might refer to the prosecutions that followed the Attica takeover and retakeover as “free world justice,” or juxtapose the guards’ need to maintain order and their frustration at losing control of their prison with the inexcusable violence that followed the takeover, linking them with a phrase such as “routine brutality.” Another possibility, “lawful brutality,” is suggested by Wicker’s revealingly redundant reference to “the corrections officers, public employees of the state

337. PERELMAN & OLBRECHTS-TYTECA, *supra* note 228, at 442.

338. *Id.* at 442–43.

339. FISH, *supra* note 7, at 17–18 (analyzing Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983) and Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1982)); *see also* CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 3–12, 171–83 (1989) (revised versions of foregoing essays).

of New York, agents of law enforcement” who beat inmates in the gauntlet.³⁴⁰

I. *The Free Word*

Deconstructionists have observed that we often say much more than we mean; that is, that our words carry unintended meanings. Derrida called this “the ‘free play’ of text.”³⁴¹ Examples include puns as well as phrases in statutes or constitutions that have, for the reader, a meaning unimagined by the drafter.³⁴² White thinks it possible to harness the power of these unintended meanings.³⁴³ A more expert view simply recognizes the explosive power of the unpremeditated word. Clarence Darrow wrote:

The courts may be unavailing, lawyers stupid, and both as dry as dust, but the combination makes for something interesting and exciting, and it opens avenues that seem to lead somewhere. Liberty, lives, fortunes often are at stake, and appeals for assistance and mercy rend the air for those who care to hear. In an effort to help, often a casual remark may determine a seemingly vital situation, when perhaps the remark, of all the palaver, was the least important one breathed forth. In all questions, men are frequently influenced by some statement which, spoken at the eventful time, determines fate.³⁴⁴

This phenomenon seems to operate in the pleadings of prisoner cases. One law clerk says of *pro se* prisoner pleadings that

[i]t may not be the merit that the plaintiff intended when he or she filed the law suit. We might see something in it that they did not see. The Sears catalogue—he may just want the catalogue, and he may want to win, and that’s all. But we might go back to a different viewpoint, you know, First Amendment or due process or whatever.³⁴⁵

The phenomenon also operates when lawyers draft their pleadings. One famous example is lawyer George Dean’s request for a temporary restraining order enjoining implementation of a new “team” approach to staffing in a mental hospital, in order to protect the jobs of hospital staff:

340. WICKER, *supra* note 58, at 289–90.

341. J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 *YALE L.J.* 743, 777 (1987) (quoting JACQUES DERRIDA, *WRITING AND DIFFERENCE* 292 (1978)) In his article, Balkin explicates Derrida’s work and explores its applications in the law.

342. *Id.* at 777–78.

343. WHITE, *IMAGINATION*, *supra* note 6, at 249 Goffman calls this task the “maintenance of expressive control” over the incidental meaning. GOFFMAN, *supra* note 12, at 51

344. DARROW, *supra* note 14, at 321–22.

345. THOMAS, *PRISONER LITIGATION*, *supra* note 34, at 149 (quoting federal law clerk (1986))

“Judge Johnson listened to George give his impassioned plea about the livelihood of these people and their families. . . .

He looked at George and said, ‘I don’t mean in anyway to minimize the impact that this new team approach is going to have on the professionals . . . but there is something that really does concern me even more so, and that will be the effect of these dismissals on the rights and the mental well-being of the patients of the hospital.’

All of a sudden, George—one of the smartest, most astute lawyers around—saw which way the wind was blowing and said, ‘That’s my real concern, too, Judge.’”³⁴⁶

George Dean was not only smart, he was lucky that he was present to notice the different spin the judge was giving to this case so that he could deal with that spin.³⁴⁷

In this post-civil rights revolution era, and in a language as concept-bound as law, any unintended meanings of phrases such as “cruel and unusual” or “discrimination” reverberate against the interests of civil rights plaintiffs and their lawyers. For example, phrases that, for civil rights lawyers, sound in images of emancipation or the rationalization of injustice carry different meanings to the audience—meanings connected to disfavored judicial activism and unpopular people. To others, judges among them, these concepts will be silenced quickly if expressed through a dull cliché that permits the court to file the case into its ordinary categories—diversity, torts on federal lands, civil rights—rather than capturing the imagination and triggering outrage.

If free play is to help the civil rights plaintiff, it will happen with more concrete words, words that may “crystallize or condense”³⁴⁸ the author’s message, words that will, as Derrida imagined, be liberated more easily from the author’s intentions and take on varied meanings in different settings while remaining syntactically the same.³⁴⁹ Graffiti has this quality; its words are abandoned by their authors and conjure up different images for each passerby.

We cannot predict how the meaning of the words “swimming pool” in the Cairo lawsuit³⁵⁰ will resonate with a judge’s memory of childhood. We cannot control what else a judge, also a citizen and perhaps a parent, will see when asked to imagine two mentally retarded children wrestling over the only

346. JACK BASS, *TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR., AND THE SOUTH’S FIGHT OVER CIVIL RIGHTS* 281 (1993) (quoting Howard Mandell, law clerk to Judge Johnson). This case became the famous *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), the first decision declaring a constitutional right to treatment for involuntarily committed individuals. The plaintiffs in *Willowbrook* tried to follow *Wyatt*.

347. Judge Johnson, not unlike many judges, did not easily reveal his feelings on most matters, see BASS, *supra* note 346, at 239, and like many judges, rarely heard oral arguments from lawyers, preferring to “hear” their arguments in writing. ROBERT FRANCIS KENNEDY, JR., *JUDGE FRANK M. JOHNSON, JR.: A BIOGRAPHY* 70 (1978).

348. Balkin, *supra* note 341, at 777 (discussing discovery of unintended connections between words).

349. *Id.* at 780.

350. GOOD, *supra* note 4, at 12.

toy available, a scrap of paper.³⁵¹ No one can know how the judge's own exposure to death or war will interact with the numbered toe tags affixed to the dead inmates of Attica, or to the intriguing "No Man's Land" separating the prison under state control from that portion held by the inmates.³⁵²

Because the judge, like the lawyer, belongs to several interpretive communities, she will interpret the pleading as more than just a lawyer; she will read it as a judge, a citizen, perhaps also as a parent, a taxpayer, a veteran, a churchgoer. The free play of a pleading's "graffiti" might help integrate those communities within the judge, in and for the moment that she reads it.³⁵³

J. *The Lawyer's Own Voice*

White's ambition for the lawyer is that she write in a way that integrates the segmented parts of the world and of ourselves. While a purely personal voice in our writing would be "as empty" as the purely professional, he asks hopefully, "Can we find ways to talk that will reflect more fully what we actually know to be true of ourselves and our minds, of our languages and our cultures?"³⁵⁴ This may run afoul of the admonition that, before the jury, the lawyer is not to argue her personal convictions concerning the case's merits or the truth of a particular witness' testimony.³⁵⁵ Yet that admonition, by its terms, does not preclude such statements in a pleading. Is it good for us to find in our pleadings a place for the expression of our own voice? If a lawyer is well regarded, her voice can be persuasive, as both Aristotle³⁵⁶ and the Supreme Court³⁵⁷ acknowledge. Certainly, it is inevitable. An identity between speaker and speech is implied, and even if not implied, inferred. Counterarguments will be mustered to oppose the argument based on the identity of the speaker.³⁵⁸ Judges look at arguments differently, depending on whether they are made by a major law firm, a legal services office, a favored federal agency such as the Justice Department, or a disfavored one

351. RIVERA, *supra* note 87, at 17 (stating that Willowbrook had not one toy). Alternatively, the judge might think of the lawyers in the case fighting over the scrap of paper entitled "Complaint" and think of what that paper means to the two sets of combatants.

352. WICKER, *supra* note 58, at 24, 302-03.

353. See WHITE, JUSTICE, *supra* note 6, at 12 (discussing "double segregation of the culture and mind" in professional discourse, which stems from boundary between professional speech and other forms of communication).

354. *Id.*

355. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(c)(4) (1980)

356. ARISTOTLE, RHETORIC, *reprinted in* THE RHETORIC AND POLITICS OF ARISTOTLE 25 (W Rhys Roberts trans., Random House 1954).

357. *Ladue v. Gilleo*, 114 S. Ct. 2038 (1994).

358. See PERELMAN & OLBRECHTS-TYTECA, *supra* note 228, at 318 (discussing *ad hominem* attacks). I can say from personal experience that opposing counsel often have dismissed my case before a judge in pretrial conference by calling it "another Lawyers' Committee case," making a reference to the Lawyers' Committee for Civil Rights Under Law, which founded the office in Cairo where I worked.

such as the Equal Employment Opportunity Commission. Since the identification is inevitable, then let it be an advantage. So we must ask, who are we that our speech becomes a representative of ourselves? Are we hired guns, indifferent to the cause we represent, and technicians in gray flannel suits? Or are we passionate advocates for persons oppressed, values denied, justice delayed?

Speaking in our personal voices can be persuasive for precisely the reasons the historian and journalist are more persuasive, with speech that is invitational and not coercive. Such speech invites the judge to experience the tragedies as the authors have. It involves the judge in a conversation about that tragedy.

I think of Wicker describing how the town still feared the prisoners because they assumed, as did Wicker, that the prisoners killed the hostages.³⁵⁹ Did the inmates' lawyer, William Kunstler, think that as well? If so, how might he have improved the power of his argument if he had admitted that he himself had believed it and then found it to be untrue? Might it have disarmed the judge's prejudices about the prisoners and about Kunstler? Similarly, would a recitation of the sickened reaction of the plaintiff's counsel, similar to the reporter's,³⁶⁰ to his first view of an institution for the mentally retarded³⁶¹ help take the judge there? Wicker invites us to share his response to Attica from inattention³⁶² to curiosity,³⁶³ through the fear³⁶⁴ and finally to concern for the fate of the prisoners about to die.³⁶⁵ Might a similar invitation in the lawyer's complaint have been as effective?

Would mention of the bullet hole in the Cairo Lawyers' Committee photocopy machine³⁶⁶ or of Thurgood Marshall's experience of using segregated washrooms and restaurants while he was representing clients before the courts of the United States³⁶⁷ trigger some impulse in the judge to see the bridges and canyons between members of the same profession and citizens of the same country in a different light?³⁶⁸ Could I have told the judge that, for

359. WICKER, *supra* note 58, at 303, 308-09.

360. *Id.* at 294.

361. ROTHMAN, *supra* note 143, at 57.

362. WICKER, *supra* note 58, at 4.

363. *Id.* at 6.

364. *Id.* at 36.

365. *Id.* at 56.

366. GOOD, *supra* note 4, at 21.

367. KLUGER, *supra* note 106, at 324.

368. Marshall clearly could identify with his client. He was himself the victim of discrimination by the University of Maryland Law School, which would not admit him because of his race. ROGER GOLDMAN & DAVID GALLEN, *THURGOOD MARSHALL: JUSTICE FOR ALL* 25 (1992). Yet, he kept his role as lawyer separate, kept himself behind his prose, kept his "[r]ights wrapped in cellophane." JACK GREENBERG, *CRUSADERS IN THE COURTS* 134 (1994).

That ability to absorb such psychological punishment kept Thurgood Marshall in one piece. "I ride in the for-colored-only cabs and in the back of the street-cars—quiet as a mouse," he told interviewers. "I eat in Negro cafes and don't use white washrooms. I don't challenge the customs personally because I figure I'm down South representing a client—the NAACP—and not myself."

the plaintiffs' lawyers, the most important thing in the Cairo case was that ninety-year-old Hattie Kendrick vote before she died?

We need not replace legal argument with such personal appeals, nor with any of the techniques and voices discussed in this Section. These techniques and voices can simply begin the legal argument, move it forward and, if not end it, linger in the mind of the judge as the decision is made.

K. Jazz

The discussion under this heading does not suggest that civil rights lawyers play their complaints rather than write them.³⁶⁹ Instead, I borrow a particular meaning of the term "jazz" from Cornel West:

I use the term "jazz" here not so much as a term for a musical art form, as for a mode of being in the world, an improvisational mode of protean, fluid, and flexible dispositions toward reality suspicious of "either/or" viewpoints, dogmatic pronouncements, or supremacist ideologies. To be a jazz freedom fighter is to attempt to galvanize and energize world-weary people into forms of organization with accountable leadership that promote critical exchange and broad reflection.³⁷⁰

To be a jazz civil rights lawyer, then, is to open oneself to new paradigms for civil rights problems and new strategies to address, if not resolve, them—to lead the law, not follow it.³⁷¹

Those paradigms may come from committed intellectuals such as West and Derrick Bell. They may come from clients, and appropriately so, since the mobilization of the client community is among the civil rights lawyer's

KLUGER, *supra* note 106, at 324–25. Through the cellophane, we can see him drafting his pleading to appeal as much as possible to the "them," the white court, perhaps leaving some of the "us" behind

369. Still, as art historian Walter Pater wrote, "In music is to be found the true type or measure of perfected art." WALTER PATER, *THE RENAISSANCE* 114 (Random House 1919) (1873) Tracy Chapman's song about homelessness, *Fast Car*, certainly tells us much about that life and moves us to understand more:

You got a fast car
I want a ticket to anywhere
Maybe we make a deal
Maybe together we can get somewhere
Anyplace is better
Starting from zero got nothing to lose
Maybe we'll make something
But me myself I got nothing to prove.

TRACY CHAPMAN, *Fast Car*, on TRACY CHAPMAN (Elektra/Asylum Records 1988)

370. CORNEL WEST, *RACE MATTERS* 105 (1993)

371. In another article, I argue that the courts have followed, not led, reform in mental patients' rights. Eastman, *supra* note 105, at 360. In a similar vein, Alan Freeman points out the conservative effect of the Supreme Court's refusal to shift from a "perpetrator perspective," which focuses on abstract norms, to a "victim perspective," which focuses on social reality. Alan Freeman, *Antidiscrimination Law: The View from 1989*, in *POLITICS OF LAW*, *supra* note 30, at 121, 123–26

objectives. These paradigms differ from the metaphors discussed earlier since they are intended less to communicate the problem to others than to understand the problem anew in the first instance. They are yet another way for the lawyer to incorporate her voice and her client's voice into the case.

Our strategic thinking needs the retooling that new paradigms can spur.³⁷² In this age of blaming the victim, new paradigms that refocus on the causes of homelessness³⁷³ or humanize the frightening underclass³⁷⁴ can lead to strategies that might actually work. But we may finally reject these retooled strategies as too futile, dangerous, or ultimately counterproductive in this more conservative era.³⁷⁵ The paradigms antecedent to these strategies may not even be amenable to litigation.³⁷⁶ Yet other paradigms, such as Cornel West's politics of conversion, designed to combat nihilism in the African-American community,³⁷⁷ may help reshape the lawyer-client relationship in a direction that empowers clients.³⁷⁸ His call to move beyond

372. Derrick Bell has long argued that civil rights organizations' attachment to racial balance has harmed African-American schoolchildren and undercut the original goals of improving their education. Bell, *Serving Two Masters*, *supra* note 147, at 487-88. While the successful legal strategy underlying *Brown v. Board of Education*, 347 U.S. 483 (1954), was a work of originality and genius, its integrationist paradigm dates back at least as far as 1849, when Charles Sumner made a not dissimilar, though unsuccessful, argument in *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849). See KLUGER, *supra* note 106, at 75-76. Similarly, basing an argument for mental patients' rights on an analogy to prisoners' rights may leave us with no meaningful right to treatment, but only with the convict's right to safety.

373. KOZOL, *supra* note 106, at 11-14.

374. *Id.* at 20.

375. For example, consider the controversy over Lani Guinier's ideas for furthering the political power of minorities through the Voting Rights Act. For an exposition of her ideas, see Lani Guinier, *Voting Rights and Democratic Theory: Where Do We Go from Here?*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 283 (Bernard Grofman & Charles Davidson eds., 1992); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991). For a critique of Guinier's ideas, see Abigail Thernstrom, *Guinier Miss*, NEW REPUBLIC, June 14, 1993, at 16; *Withdraw Guinier*, NEW REPUBLIC, June 14, 1993, at 7; cf. Lani Guinier, *What I Would Have Told the Senate*, WASH. POST, June 13, 1993, at C7 (responding to critics).

A second example: For a time mental health advocates urged a paradigm of anti-institutionalization and a community imperative instead of the more traditional deinstitutionalization remedies, arguing that the institution itself was the unconstitutional evil—almost independent of its particular conditions. David Ferleger & Penelope A. Boyd, *Anti-institutionalization and the Promise of the Pennhurst Case*, 31 STAN. L. REV. 717, 721-23 (1979). It is telling that plaintiffs sued the institution itself, and not just its administrators. This strategy worked only for a while in the famous *Pennhurst* litigation, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981). The trial court was convinced, see Ferleger & Boyd, *supra*, at 733-49, but its remedies were later cut back as the litigation survived into a more conservative era.

376. See, e.g., DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 47-49 (1992) (illustrating depth of society's racial animus by creating imaginary legislative act).

377. WEST, *supra* note 370, at 18.

378. Ruth Buchanan and Louise Trubek describe how collaboration with a client can lead to a new conception of a client's problem and a strategy that entails both gains and losses. Ruth Buchanan & Louise Trubek, *Resistance and Possibilities: A Critical and Practical Look at Public Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 19 N.Y.U. REV. L. & SOC. CHANGE 687, 700 (1992). This is not all that new. As long ago as 1827, free African-Americans in the abolitionist press insisted:

We wish to plead our own cause. Too long have others spoken for us. Too long has the public been deceived by misrepresentations in things which concern us dearly . . . The civil rights of a people being of the greatest value, it shall ever be our duty to vindicate our brethren, when oppressed; to lay our case before the public.

FREEDOM'S J., Mar. 18, 1827, at 1, reprinted in ROBERT C. DICK, *BLACK PROTEST: ISSUES AND TACTICS* 3 (1974).

traditional liberal/conservative arguments and racial reasoning³⁷⁹ may yield even more potent arguments to overcome conservative resistance to civil rights demands.

In any case, the exploration of new paradigms for civil rights can only enrich our strategic thinking. Perhaps we yet can dare to hope for the transforming effect worked by Lincoln in his Gettysburg Address, leading his audience and its descendants to read a commitment to equality into the Constitution, where it had not previously been discovered.³⁸⁰

III. RHETORIC IF NOT TRANSLATION: A NEW CAIRO COMPLAINT

Law alone is not enough.³⁸¹

Lawyers' Committee for Civil Rights Under Law

In this Part, I demonstrate the method of thicker pleading through a more literary revision of the amended complaint we actually filed in the Cairo case. The revised complaint is shorter than the more traditional complaint, which is appended to this Article. Certainly, one could write a more concise statement of the claim than is presented in either complaint.

There are three possible ways to introduce thicker pleadings. One is simply to attach to a traditional pleading a competing description from the historian or journalist. This method preserves the integrity and apparent authority of the competing description. By "apparent authority," I mean that if the audience were inclined to credit a nonlegal account, that would be possible with this option. On the other hand, it maintains the distance between legal and nonlegal language and may strip the nonlegal description of its authority.

Another option is to incorporate and quote directly from the competing description by a journalist or historian. For instance, a pleading might recite a fact, then follow that recitation with something along the lines of "According to historian David Rothman" This option may enhance the authority of the nonlegal description, and should maintain its integrity. But with either of these two techniques, the two languages still remain apart.

The third option attempts the fullest integration, by writing the pleadings as a journalist or historian would, even borrowing at times from the style of a novelist. Using this method, the lawyer intertwines legal and nonlegal language. This is the option I have selected, although my artistry remains suspect and invites further critique. By integrating the nonlegal language in a

379. WEST, *supra* note 370, at 12.

380. Cf. WILLS, *supra* note 225, at 38 (describing transformation worked by Lincoln)

381. A common slogan when the committee operated an office in Cairo

legal pleading, it calls upon the persuasive authority of both. It tests the insights of this Article to the fullest.

In this literary pleading, I try to employ the techniques suggested in the Article. By pleading in the language of journalists and clients—and by quoting clients and others in the pleading—the complaint attempts to make the most powerful use of ambiguity. While the pleading begins and ends with language more recognizable and acceptable to a traditional audience—and retains the customary numbered paragraphs—the client stories dominate the pleading. In particular, Hattie's story is kept central, to draw upon the compelling attractiveness of her story. The story is allowed to develop, inviting and not coercing. At one point, the complaint mentions that the meaning of a fact—the employment of blacks as precinct committeemen—will be understood later.

The pleading offers the language of voices rather than of concepts. Sometimes these voices jar against the rest of the pleading; for example, Hattie's reference to "Negroes"—not unexpected from a person of her age—is incongruous with the term "African-Americans" in the complaint. All the required legal concepts are present, but they are secondary to the voices. The logic of the concepts flows from the voices. Consistent with Shelby Foote's advice, the defendants and their associates are quoted without any explicit characterizations.³⁸²

As argued in this Article, the feudal metaphor and the juxtaposition of "plantation" with "democracy" argue for the court's intervention. The pleading makes some effort at poetic meter and tension (e.g., "in denying a future to one race in order to control the future of the other"). The irony of the defendants' claims of inadequate leadership in the black community should be apparent in a lawsuit brought by people like Hattie Kendrick and Preston Ewing. Hattie herself ironically asks why segregation prevails in Illinois, a Northern state and the land of Lincoln, the Great Emancipator.

The lawyer's voice is included, as well. Although I have not done it here, one might make the lawyer's voice appear less foreign in a class action pleading by slipping it into a discussion of the adequacy of representation, i.e., stating that the lawyers will vigorously prosecute the case because of their commitments.

In the hopes of practicing as a jazz civil rights lawyer and trying on a different paradigm for racial discrimination, the pleading tries to speak in terms of an entire community harmed by racism, rather than of a black people oppressed by a white people. In this sense, I emulate Hattie, who referred to white people as "brother" even as she talked about subjugation. To further explore this paradigm, the complaint refers to European-Americans and African-Americans. This may help us to think in terms of a common

382. Foote, *supra* note 43, at 222–23 ("[I]t might be well . . . to warn against 'character' sketches and the use of brief invective to characterize a man.").

immigrant history and also remind us of the diversity of persons with roots in those continents. Borrowing Cornel West's suggestion that we step beyond the structural-cultural debate of liberals and conservatives,³⁸³ the complaint is forthright about the vote-buying yet places it in a context. The pleading hopes for the power of free play in the concrete words "swimming pool."

This graffitilike effect may work through photographs as well. Perhaps the most unconventional aspect of the pleading is the use of photographs. In this complaint, the photographs are part of an effort to include the client's voice, since Preston is a photographer and uses photography to express his view of the world. They are placed in the pleading at his suggestion. But in any case, photographs can express aspects of a problem beyond the power of words. Sometimes the full significance of the photographs is not explained but left to the audience's perceptive powers, as in the words "racial integrity" on the white citizens' council sign.

As technology develops—from faxed pleadings, computer artistry, and desktop publishing—more innovations may be possible. Aside from "scratch and sniff" patches on a pleading, I know of no way to capture, as the television reporter wished to, the smells of Willowbrook.³⁸⁴ My own imagination is more limited. I assume the continued power of the printed word.

In some respects, this pleading closely resembles traditional ones, as in the style of its beginning and ending and the numbering of paragraphs. Yet a further step away from traditional pleading would involve a more novelistic approach: "When Hattie Kendrick arrived from New Orleans, she stepped down from the train and squinted in the hot Cairo sun toward the train station restrooms. Whites Only, read the handpainted rectangle weaving lazily in the breeze above the door. She wondered if she had indeed caught a northbound train." I think this approach strains the audience's tolerance for the new and focuses more attention on the style than on the content of the story. Besides, I'm not sure anything like that happened, and I agree with Shelby Foote that nothing good comes from distorting facts.³⁸⁵ The appropriate question is, always, what facts are important, and why.

This complaint may not "crash through" the prejudices of a hostile audience with the power and skill of Abraham Lincoln. But it sure beats notice pleading.³⁸⁶

383. WEST, *supra* note 370, at 12.

384. *The Last Disgrace*, *supra* note 88.

385. Foote, *supra* note 43, at 225.

386. This pleading drops some of the class representatives whose stories are not so well known to me. It pleads the case of Hattie Kendrick, who has since died, and of Preston Ewing, Jr. Hattie's quotations are from her testimony before the Illinois Advisory Council to the United States Civil Rights Commission, which held hearings in Cairo in the late 1960's. GOOD, *supra* note 4. In our conversations, Preston often repeated the words I have quoted. He consents to the use of his photographs and of his father's story. The other photographs are by unknown photographers. Quotations from defendants and persons identified with them are taken either from Paul Good's book or from *Lost in the Past*, an article published by the *Chicago Tribune* magazine. Brian Kelly, *Lost in the Past*, CHICAGO TRIB., July 21, 1985, § 10 (Magazine), at 11.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

HATTIE KENDRICK, PRESTON)	
EWING, JR., individually and)	
on behalf of all others)	
similarly situated,)	
)	
Plaintiffs,)	
)	
-vs-	)	CIVIL ACTION
	)	NO. 73-19C
ALLEN MOSS, individually and)	
as Mayor of the City of Cairo,)	
Illinois; the CAIRO CITY)	
COUNCIL; and the CITY OF	)	EQUITABLE
CAIRO, a Municipal	)	RELIEF
Corporation,	)	REQUESTED
)	
Defendants.)	

COMPLAINT

1. This is a class action brought before this Court by Hattie Kendrick and Preston Ewing, Jr. for the benefit of a class of all African-American citizens who are residents of Cairo, Illinois, and who are or will be entitled to vote in Cairo City Council elections. This action challenges, through 42 U.S.C. § 1983, the at-large election basis for conducting City Council elections in Cairo as a violation of the Fourteenth and Fifteenth Amendments to the United States Constitution and the Voting Rights Act, 42 U.S.C. § 1973.

2. Hattie Kendrick is an African-American, born in Mississippi, who moved to Cairo in the early 1920's. She has taught for decades in the racially segregated Cairo public schools, teaching generations of African-American children that participation in American democracy is their right and their duty. To set an example, she has worked throughout her life to better her community through neighborhood organization, peaceful demonstration, political activity, and litigation. She has paid a price for her dedication: She has been forced out of segregated business establishments, arrested by the police during peaceful

marches, and fired by the school system. While many African-American leaders have advocated racial separatism, Ms. Kendrick has remained a fervent believer in peaceful integration with European-Americans living in Cairo.

3. Preston Ewing, Jr., a former student of Ms. Kendrick, is an African-American whose family has lived in Cairo for generations. Mr. Ewing's father worked to make his family economically secure through great personal sacrifice. When he worked as a postal deliverer, his supervisors forbade him from using the post office men's room. Mr. Ewing, Sr. therefore suffered the humiliation of asking people on his route to allow him to use their bathrooms, keeping this secret from his wife and children for years to spare them the embarrassment. Mr. Ewing, Jr. has followed his father's example and dedicated his career to his community, organizing the local NAACP chapter and advocating for the educational needs of all children, both African-American and European-American. When he heard of racial conflict breaking out in his hometown, he immediately left school in California and returned to Cairo to see what he could do to solve the town's problems. Most of the photographs appearing in this complaint were taken by Mr. Ewing, Jr.

4. Hattie Kendrick, Preston Ewing, and the class they represent challenge the at-large form of voting for City Council because it denies them the right to vote. It does so through this formula: An at-large voting scheme for city council; racially polarized voting so extreme that European-American voters never vote for African-American candidates; a sixty-percent majority for European-American voters in the electorate; and a political system that excludes African-American citizens from participating. These factors together dilute the African-American vote to nothingness.

5. When she moved to Cairo from Mississippi, Ms. Kendrick found that Cairo government operates as a plantation democracy.

nominally extending the vote to all citizens of age, yet enforcing an antidemocratic feudal system that keeps African-Americans, forty percent of the city population, in a state of poverty, dependence, and despair. It has been so for generations.

6. The median income for African-American families in Cairo is less than half that of European-American families and unemployment is much higher for African-Americans. As Preston Ewing says, "There is a job in Cairo for everyone who wants to work. But take a walk through the parking lots of the major employers. You'll see they are filled with license plates from Missouri and Kentucky. Cairo businesses would rather hire whites from across the Ohio and Mississippi Rivers than hire blacks who live here in the same town." Unions exclude African-Americans from membership. Predictably, this forces African-Americans onto welfare rolls. The welfare office has conspired with the local cotton growers so that while they are on welfare, African-Americans are forced to choose between picking cotton at substandard wages or forfeiting their welfare payments.



African-Americans picking cotton near Cairo

7. African-American leaders in Cairo believe education is the straightest road to equality. Ms. Kendrick recalls that, "As far back as 1883 the Negro in Cairo tried to break up segregated

schools, only to find the doors locked in their faces. Why has this been? How did this happen in Illinois, the Land of Lincoln? Yet despite the repeated demands of Hattie Kendrick and others for equal and integrated schooling, schools were segregated until the late 1960's. When the federal government forced the inevitable desegregation upon the schools, European-Americans withdrew their children from the public schools and formed the private and racially pure Camelot Academy.

8. In virtually every aspect of life in Cairo, African-Americans have been told they have no place but down. Public housing is segregated. Until recently, only European-Americans were permitted to use the public library, certain public parks, the National Guard Armory, and other public facilities.

9. In the mid-1960's, the Rotary Club closed the town's only swimming pool rather than integrate. Now all children of both races, out of school during Cairo's near-tropical summers, risk drowning in the treacherous currents of the Mississippi River. Restaurants, hotels, movie theaters—all were segregated until African-Americans demanded an equal seat at the counter, room at the inn, ticket for a movie. Some desegregated, some closed, some remain racially separate.

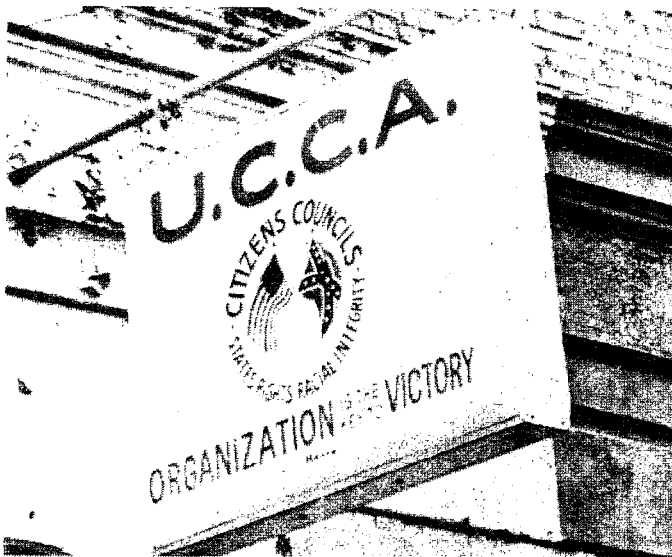
10. The City Council and Mayor jointly execute, under Illinois law, all legislative, administrative, and executive powers, controlling city finances, streets and public property, and public health and safety.

11. Although nominally nonpartisan, city elections are dominated by the Democratic and Republican parties. These parties have historically excluded African-Americans. The Republican Party did not open its membership until the 1960's. While the Democratic Party permitted African-American members in the 1940's, no African-American—in either party—has ever held a major leadership position. The only role the two parties have permitted

to African-Americans has been that of precinct-committeeman, which, as we shall see later, has served only to solidify the racial monopoly on political power.

12. Successive city administrations have yet to appoint an African-American to almost all city boards. A few other public agencies have appointed only a few African-Americans who have been willing to submit to direction by the European-American majorities on those boards. One notable exception is the Reverend John Cobb, a leader of the African-American community, who was appointed to the police board, but was never told when or where meetings were to be held.

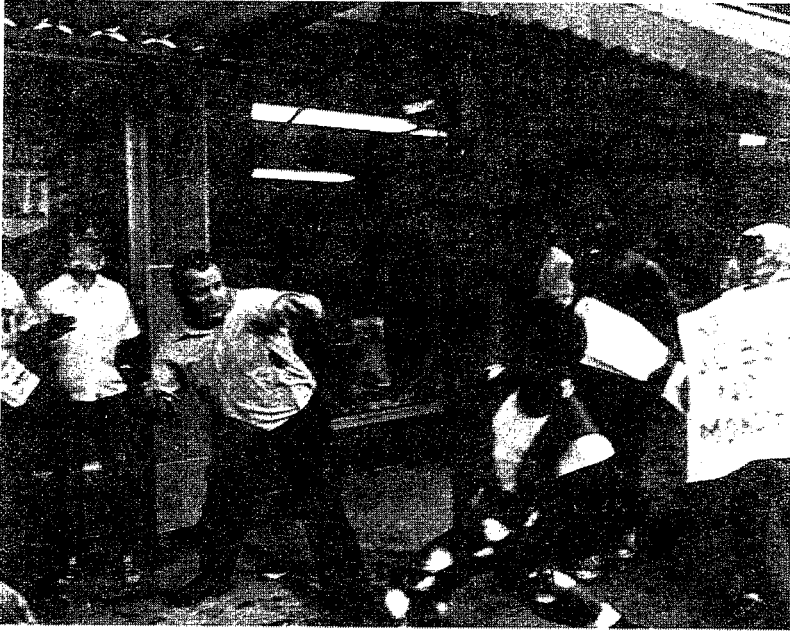
13. In recent citywide elections, African-American candidates have confronted newspaper advertisements urging the European-American majority to "vote for the white candidates" and to "save Cairo." Not surprisingly, the African-American candidates have lost. Mayor Moss and his City Council were elected as a slate openly organized and campaigned for by the United Citizens for Community Action (UCCA), a white supremacist group.



14. As Ms. Kendrick has said, "many times has the Negro tried to emerge from his position of servitude, only to be pushed back into submission by his white brother." Believing that they have a right to participate in their own community, and pushed out of the democratic process, Cairo's African-American citizens have demonstrated against segregation in peaceful marches past the guns of police.



15. Police and vigilantes have beaten the demonstrators. Pictured below is the current Mayor of Cairo swinging a movie camera at a picketer and a member of the City Council armed with a rifle and eyeing a march.



16. Vigilantes—known as White Hats because of their white helmets—have launched sniper attacks against African-American neighborhoods. They have used clubs and chains to beat young African-Americans who wanted to skate in the Cairo roller rink in 1964. Among those beaten was 16-year-old Charles Koen, another of Ms. Kendrick's students who would later train for the Christian ministry and lead the United Front, an organization coordinating civil rights efforts in Cairo. He would become a lightning rod for the resistance of European-Americans to change. They would label him a criminal and anarchist.



Charles Koen with Hattie Kendrick today

17. The Cairo police have done nothing to stop them. Not only have the Cairo police failed to protect African-American citizens, they have themselves laid siege to a Catholic Church in which African-Americans worshipped. African-American community leaders organized civil rights activities, shooting bullets into the church until the Illinois State Police rescued the priests and others inside the church. The City Council passed an ordinance making it illegal to picket or for two or more

individuals to congregate. The Cairo Police Department organized the White Hats, and deputized them to help control the city.

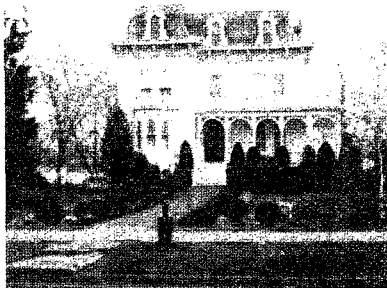
18. Little has changed in Cairo since Ms. Kendrick arrived here in the 1920's. The at-large form of government was adopted in the early years of this century as a response to a public perception of widespread city corruption—connected by the contemporary press to the "criminal Negro element" in the community. Before the at-large system, African-Americans were elected to the City Council. Since its adoption, none has been elected. This at-large system has been maintained and used since its inception with the intent of discriminating against African-Americans in Cairo and denying them the vote.

19. Some African-Americans have despaired of change. Yet another of Ms. Kendrick's students, Anthony Patterson—and a member of this plaintiff class—was eight years old when the Rotary Club filled in the swimming pool. He survived the river and, now a man, he says, "This town is so far behind and backwards, it's really a shame. You don't think about staying and looking for a job. You can't even work as a bagboy in a supermarket. You just think about going away all the time." Change has seemed impossible.

20. With no chance to cast a vote for an electable candidate of their choice, some African-American voters have resorted to selling their votes on election day to whichever of the candidates standing some chance of victory—all European-American—pays the most. Ms. Kendrick, who has seen this go on for generations, election after election, says, "Sometimes he sells himself so often he forgets for whom he is going to vote and he ends up with this pitiful statement, although it is true, 'This little money is all I'm going to get anyway.'" The going rate is three to five dollars per vote, collected by the precinct committee chairmen. In the plantation democracy of Cairo, the

fundamental American right, the right to vote, has been diluted to almost nothing, reduced in value to a few dollars.

21. This state of affairs suits the European-American men in power just fine. When asked if African-Americans in Cairo have any legitimate complaints, Tom Madra, the leader of the White Hats, has replied that "blacks from other states did gravitate here into Illinois because of the welfare programs They came here for the largesse." Presumably, the largesse he speaks of includes the privilege of picking cotton for slave wages to protect their benefits. This leader insists that "[t]hey were unemployed and unemployable. They live by preference in a shanty." Pictured below is Riverlore, the home of William Wolters, a businessman owning one of Cairo's major employers, and next to that is a photograph of those shanties, which Mr. Wolters described to a *Chicago Tribune* reporter as "those nigger shacks."



22. Madra and the White Hats believe that "[t]here's no good black leadership in this community." Public officials claim to agree and maintain a purported willingness to welcome African-American participation. But City Attorney John Holland has defended the absence of African-Americans from city government because "there are very few to choose from. There's nothing better than having a good black man on your city council. But the

black militants drive them out. We're thinking now of putting two on the council."

23. Who are those two African-Americans they are thinking of? Not Charles Koen, Hattie Kendrick, or Preston Ewing. They would not meet the minimum qualification the city administration expects of any African-American permitted into the inner sanctum of city government. Holland defines that criterion: "I've told Preston Ewing a dozen times I'm looking for a good colored leader who can control his people. Everybody looks for a good black man nowadays. You find one and you've got liquid gold."

24. There are European-Americans in Cairo who see things differently. Newspaper publisher Martin Brown has concluded that the declining river-and farm economy along the river banks-left those employers who remained in Cairo with the power to ration jobs and to pit European-American and African-American workers against each other. This permitted "white men of authority to run the city as a limited fief, resisting change that might challenge their entrenched position, reaping the fruits of stagnation." Other businesses have left and new businesses have passed over Cairo due to its shortage of skilled labor and decent housing and its bounty of racial strife and suicidal leadership-a leadership that refuses to cooperate with those prospective new industries and returns federal funds to the government rather than dispense them for the benefit of its African-American citizens. As European-American Cairo lawyer, Robert Lansden, says, "There are a lot of white people who would sooner see Cairo float down the Mississippi than give a black man a break."

25. This suicidal leadership can only lead all of Cairo's citizens to ultimate disaster. The African-American community has struggled to save Cairo from the inevitable fate of all feudal societies throughout history-extinction. Their struggle has included marches to call attention to injustices, boycotts of businesses that discriminate, development of alternative

economies, applications for federal grants, and litigation to desegregate public housing, win appointments to city boards and stop mistreatment by local police and prosecutors. This began in the mid-1940's when Ms. Kendrick and other African-American teachers sued for equal pay, with Thurgood Marshall as their lawyer.

26. But after decades of struggle, in the words of classmember Rosie O'Bryant, an 84-year-old welfare recipient who had to mortgage her mule in order to survive, "I don't see a bit of difference now than I did way back in '51 or '52 in the civil rights. It hasn't reached us. I reckon it's on its way, but it ain't got here yet."

27. This Court possesses the authority to bring civil rights and the Constitution to Cairo. Congress has authorized actions such as this one under 42 U.S.C. § 1983 and bestowed jurisdiction on this Court to hear them under 28 U.S.C. §§ 1331 and 1343. Rule 23 of the Federal Rules of Civil Procedure authorizes class actions where, as here: (a) the class of thousands of African-Americans of voting age in Cairo is so numerous that joinder is impracticable; (b) there are common questions of law or fact in their challenge to the lawfulness of a citywide electoral system; (c) the claims of the class representatives are typical of the claims of the other class members; (d) Ms. Kendrick and Mr. Ewing will adequately represent those class interests; and (e) these two plaintiffs seek injunctive relief with respect to the class as a whole by a change in the electoral system that will benefit the entire class.

28. In the Voting Rights Act, 42 U.S.C. § 1973, Congress has further provided for litigation challenging at-large forms of government that dilute the votes of racial minorities. The Fourteenth and Fifteenth Amendments make it unlawful for local governments to deny equal protection of the laws or deny or abridge the right to vote on account of race.

29. The plaintiff class has suffered and continues to suffer irreparable harm. Its members have no adequate remedy at law. As Plaintiff Hattie Kendrick says, "Too long have the two races stood grinning in each other's faces, while they carry the fires of resentment and hate in their hearts, and with their hands hid behind their backs they carry the unsheathed sword."

30. With one hand, Cairo's plantation democrats pay three dollars for a vote and, in the other, they wield that unsheathed sword against those who cannot be bought. Their fiefdom hurts black and white alike, denying a future to one race—the European-Americans—in order to control the future of the other race, just as it drives the children of both races into the muddy eddies of the Mississippi for a swim. The pretense of plantation democracy is that it is a democracy. The truth is that it is a plantation. Plaintiffs Hattie Kendrick and Preston Ewing come to this Court to ask it to protect their right to vote and to replace Cairo's plantation democracy with a real one.

31. Specifically, they ask the Court to declare that the at-large city council system in Cairo violates the Constitution and the Voting Rights Act and to enter an order dividing Cairo into aldermanic wards so that neighborhoods where African-Americans live have some chance of electing candidates of their choice.

32. Plaintiffs have retained lawyers from legal services and civil rights organizations who, in turn, are expending scarce resources in this litigation. These lawyers live in Cairo and are committed to the representation of this cause. To the lawyers, it is critical that the Court order relief that will, at the earliest possible time, provide for a democratic election in which Hattie Kendrick, who is over ninety years old and in poor health, may cast an equal, undiluted vote for a candidate of her choice.

WHEREFORE, plaintiffs ask that this Court:

(A) Declare that Cairo's at-large form of government violates the Fourteenth and Fifteenth Amendments to the United States Constitution and the Voting Rights Act; and

(B) Enter a preliminary and permanent injunction enjoining the operation of the at-large system and dividing the city into wards in a manner that does not again dilute the votes of the plaintiff class; and

(C) Order a new City Council election; and

(D) Award plaintiffs their reasonable attorney's fees and expenses; and

(E) Grant such further equitable and additional relief as the Court may deem equitable, just, and proper.

IV. THE FRUITS OF CHANGE

A grocer who dreams is offensive to the buyer, because such a grocer is not wholly a grocer.³⁸⁷

While civil rights realities lose much in the translation to civil rights pleadings, they also stand to gain. They gain the possibility of changing those realities. They gain the possibility of changing civil rights law as well. The demand by civil rights plaintiffs that the Constitution and laws apply to them has remade those laws and those constitutional rights. The result was the rights revolution. Patricia Williams describes the process beautifully:

[B]lacks believed in [rights] so much and so hard that we gave them life where there was none before; we held onto them, put the hope of them into our wombs, mothered them and not the notion of them. And this was not the dry process of reification, from which life is drained and reality fades as the cement of conceptual determinism hardens round—but its opposite. This was the resurrection of life from ashes four hundred years old. The making of something out of nothing took immense alchemical fire—the fusion of a whole nation and the kindling of several generations.³⁸⁸

In the civil rights lawsuit, they find a place where their “unheard voices can be heard.”³⁸⁹ Once these voices were heard, the Equal Protection Clause, which had supported school segregation, began to outlaw it. And over time, this renewed law became the basis for a court’s holding that the segregation of mentally retarded children is also unlawful.³⁹⁰ And so on. And so on.

Yet civil rights plaintiffs hope for more immediate change. In the lawsuits examined, would the outcomes have differed if the pleadings reflected less of the law and more of the clients? Of course we can only speculate, but a review of the cases is illuminating. The district court dismissed the initial complaint in *Kendrick*, a decision later reversed by the Court of Appeals for the Seventh Circuit.³⁹¹ Could the trial court have been brought to see the case differently? The *Willowbrook* court declined to dismiss the complaint, but instead of declaring a right to treatment sought by plaintiffs, it found a more limited right to protection from harm.³⁹² The court found a right akin to the right of

387. GOFFMAN, *supra* note 12, at 76.

388. WILLIAMS, *supra* note 291, at 163.

389. WHITE, JUSTICE, *supra* note 6, at 267.

390. See *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Ass’n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), *modified*, 343 F. Supp. 279 (E.D. Pa. 1972).

391. *Kendrick v. Walder*, 527 F.2d 44 (7th Cir. 1975).

392. *New York State Ass’n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973).

prisoners, following a metaphor offered by the complaint. Could a metaphor suggesting isolation and abandonment of people who are part of our society have been more persuasive?³⁹³

Similarly, the trial court dismissed that portion of the Attica complaint asking the court to enjoin the prosecutions against the inmates and to mandate prosecutions against state actors.³⁹⁴ While explaining its reluctance to interfere with the state's prosecutions, the Second Circuit stated, "The serious charge that the state's investigation is proceeding against inmates but not against state officers, if shown to be accurate, might lead the Governor to supplement or replace those presently in charge of the investigation or the state legislature to act."³⁹⁵ Could any judge who had read Wicker's account of the governor's involvement in the brutal retaking of the prison have spoken seriously of trusting this question to the governor?

Civil rights plaintiffs are not alone in yearning for change. Their lawyers do so as well.³⁹⁶ A thin, sterile complaint reflects the thin, sterile professional who slices away her fully human role. Written differently, the complaint can serve as a way of integrating the two parts of the lawyer—the personal and the professional.³⁹⁷

The lawyers' motivation to change is not simply personal. It is also professional, consistent with their mission to advocate. For Fish, unlike White, the task is not translation of truths, but rather persuasion "by the litigant having at the time being the greater power of persuading the trier of fact"³⁹⁸ This is not cynical because rhetoric still offers a possibility of meaningful discourse, however constrained:

393. Indeed, the court did not find the prison metaphor persuasive, in part because of the nominally voluntary nature of the Willowbrook residents' confinement. ROTHMAN, *supra* note 143, at 70. Throughout the early days of the case, the judge worried about the propriety of judicial intervention and urged the parties to negotiate, in the hope of avoiding the necessity of deciding. *Id.* at 71, 74.

394. *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 382-83 (2d Cir. 1973).

395. *Id.* at 382.

396. See Alfieri, *supra* note 147; Cunningham, *supra* note 188. A few commentators propose a new form of "rebellious," or "collaborative," lawyering. See Buchanan & Trubek, *supra* note 378, at 690-91; Gerald Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989). To humanize the legal problem and to empower the client are not especially radical ideas, at least from a political perspective. See DONALD A. SCHON, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* 21-69 (1983); see also DONALD A. SCHON, *EDUCATING THE REFLECTIVE PRACTITIONER: TOWARD A NEW DESIGN FOR TEACHING AND LEARNING IN THE PROFESSIONS* (1987).

397. See WHITE, JUSTICE, *supra* note 6, at 12. White urges that we "write that way [as people seeking to be whole] ourselves." *Id.* at 20.

398. FISH, *supra* note 7, at 25. Fish thus adopts a less grandiose vision of the lawyer's function, and also dismisses the equality of voices in the courtroom, which White values, in favor of differing powers of persuasion. There is no cause for despair, however, because that is the way things are:

[T]hat is to make the mistake of thinking that by telling people that there is something that they have never been able to do—leave the realm of practice for a realm more general and abstract—you take something away from them; but of course you can't take away a capacity no one has ever had

Id. at 26-27.

[I]f the highest truth for any man is what he believes it to be . . . , the skill which produces belief and therefore establishes what, in a particular time and particular place, is true, is the skill essential to the building and maintaining of a civilized society. In the absence of a revealed truth, rhetoric is that skill³⁹⁹

Can we translate? Can we persuade? Can we change?

Quite possibly, we cannot alter our pleading practices to report more truly the realities of our clients simply by achieving a clearer understanding of what we've been doing and then reflecting on how to change from a distance. We practice as fully licensed members of a particular interpretive community.⁴⁰⁰ An objective point for reflection cannot be located on our map. According to Stanley Fish, the Critical Legal Studies movement makes this error, by assuming that one can shake the interpretive dust of the past off one's sandals and go to another town, see injustice there objectively, and change that town. The Crits forget that if reality must be interpreted—as they would concede about ideological givens—one cannot cease to interpret, one simply alters the interpretation.⁴⁰¹

From Fish's response, one might read him to argue that we cannot change the way we write since all meaning derives from interpretation and our vision of our mission as lawyers cannot grow through the offer of new evidence or arguments external to our community.⁴⁰² Certainly, these arguments and this evidence will not make it through to us from their yet-to-be-interpreted world without our interpretation sticking to them. Yet change becomes probable, for Fish, because the possibility of change already forms part of our interpretive posture: "[N]either interpretive communities nor the minds of community members are stable and fixed, but are, rather, moving projects—engines of change—whose work is at the same time assimilative and self-transforming."⁴⁰³ For different reasons, James Boyd White also thinks change likely. Legal speech cannot help but change since it contrasts one narrative of reality with another and maintains a tension between them.⁴⁰⁴ Certainly, we accelerate the change when we attempt to graft some of the language of other competing voices from journalism or history.

So, in what direction do we change? Pause to consider the object of our persuasion. As an unrepresentative sample, White cites several famous opinions by illustrious judges—Supreme Court Justices far removed from the facts at hand, not trial judges. He suggests that judges have also tired of the

399. *Id.* at 480.

400. See FISH, *supra* note 7, at 141; WHITE, JUSTICE, *supra* note 6, at 99.

401. See FISH, *supra* note 7, at 157.

402. Indeed, Fish explicitly suggests this possibility. *Id.* at 152.

403. *Id.* at 152.

404. WHITE, JUSTICE, *supra* note 6, at 24.

strictly “legal” argument. For example, in *Rochin v. California*,⁴⁰⁵ Felix Frankfurter “plainly seeks to discourage arguments of some kinds, most notably of the mechanically ‘legal’ variety, and to encourage others,”⁴⁰⁶ ones sounding in decency and fairness, invoking the “conscience of the community.”⁴⁰⁷

Nonetheless, we must move slowly. Our profession’s commitment to change means change within the parameters of the interpretive community, i.e., as lawyers.⁴⁰⁸ Our membership in a particular interpretive community restrains us from stepping too far from the boundaries of that community. We should not, and cannot, see and write as journalists or historians. We cannot be other than who we are—lawyers educated in a technique, an approach to rules, and an insistence upon reasoned criteria for decision.

When words become part of a pleading filed by a lawyer, their meaning changes. The gesture is no longer a history, but a legal argument. As one cannot separate the dancer from the dance, one cannot separate the argument from the history.⁴⁰⁹ How far should we step toward change? We must keep in mind our audience, the judge. A poet-lawyer can be as useless as Goffman’s dreaming grocer.⁴¹⁰ Aside from whatever allegiance we have to client truths and to our own self-expression, our function and mission is to persuade. Through our persuasive translation of Hattie Kendrick’s reality into a cause of action, lawyers can replace the swords of the two races in Cairo in their sheaths.

Even when faced with thicker pleadings, some judges will feel confined by the law, as Justice Harlan did in many of his opinions.⁴¹¹ And even when the law does not dictate a direction, the judge is still confined by legal traditions.⁴¹² Trial judges, although closer to the facts, are particularly

405. 342 U.S. 165 (1952).

406. WHITE, JUSTICE, *supra* note 6, at 110.

407. *See id.* at 111. White continues the litany of opinions Justice Story, who decided *Pngg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), required lawyers to “engage in the appearance of legal argument . . . but to expect to win or lose on the basis of unarticulated or barely articulated assumptions of fact (or value).” *See* WHITE, JUSTICE, *supra* note 6, at 122. In *Olmstead v. United States*, 177 U.S. 438 (1928), Chief Justice Taft demonstrated that his method of persuading a reader was to “rel[y] more than anything else upon the very power of characterization” of the issue in the case. WHITE, JUSTICE, *supra* note 6, at 145. White notes that Taft’s “opinion invites a conversation of countering characterizations, conclusory in form, between which the judge will choose, or which he will resolve by making characterizations of his own.” *Id.* at 148. Judging from his *Olmstead* dissent, Justice Brandeis, on the other hand, would have found persuasive the argument that we must look at history and values, rather than literal readings, in order to decipher the meaning of constitutional passages. *See id.* at 150. In his dissent in *United States v. White*, 401 U.S. 745, 756 (1971), Justice Douglas writes of the majority opinion “The issue in this case is clouded and concealed by the very discussion of it in legalistic terms.” *See* WHITE, JUSTICE, *supra* note 6, at 165 (quoting *White*, 401 U.S. at 756 (Douglas, J., dissenting)). All of these judges seem open to persuasion by a pleading that goes beyond the sterile recitation of fact and citation to law-supporting claims.

408. *See* FISH, *supra* note 7, at 157.

409. *See* WHITE, JUSTICE, *supra* note 6, at xi–xii.

410. *See* GOFFMAN, *supra* note 12, at 76.

411. WHITE, JUSTICE, *supra* note 6, at 167–75.

412. *Id.* at 171.

restrained in their judging. The reality we attempt to understand and manipulate is not simply the client's, for the client wins or loses redress within a legal system. Part of the pertinent reality for the judge—and therefore, for the lawyer—is the law. And arguments sounding too unfamiliar might not be credited at all.⁴¹³ Arguments invoking legal traditions and values permit the judge to decide in the direction in which she is persuaded.⁴¹⁴ Because our legal traditions admit to the possibility of change, the judge can see the law and realities in a new light through language that translates the law and translates the realities in ways that give the judge occasion to reinterpret and to change both.⁴¹⁵

Such an occasion is illustrated by Justice Blackmun's dissenting opinion in *DeShaney v. Winnébagó County Department of Social Services*,⁴¹⁶ where the majority found no constitutional violation and no cause of action under 42 U.S.C. § 1983 in the failure of a child protection agency to protect a child named Joshua DeShaney from abuse. He wrote:

Today, the Court purports to be the dispassionate oracle of the law, unmoved by "natural sympathy." . . . But, in this pretense, the Court itself retreats to a sterile formalism which prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts.

. . . .
Like the antebellum judges who denied relief to fugitive slaves, the Court today claims that its decision, however harsh, is compelled by existing legal doctrine. On the contrary, the question presented by this case is an open one, and our Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them. Faced with the choice, I would adopt a "sympathetic" reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.

Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing, except, as the Court revealingly observes, "dutifully recorded these incidents in [their] files."⁴¹⁷

Of course, it was Justice Blackmun and it was a dissent.⁴¹⁸ Yet, as Clarence

413. See FISH, *supra* note 7, at 460–61. Even the judge wanting to rule out of bias or passion must find legal basis for a decision. *Id.* at 366.

414. *Id.* at 366; see also PERELMAN & OLBRECHTS-TYTECA, *supra* note 228, at 75.

415. See FISH, *supra* note 7, at 146–47; WHITE, JUSTICE, *supra* note 6, at 81.

416. 489 U.S. 189, 212 (1989) (Blackmun, J., dissenting).

417. *Id.* at 212–13 (citations omitted) (alterations in original).

418. It is Justice Blackmun who, in a dissent in *Beal v. Doe*, 432 U.S. 438 (1977), called upon the other Justices to remember that "[t]here is another world 'out there'"—a world of poverty and injustice

Darrow often observed, in these agonizing cases where courts can hide behind law, there is always one judge or juror who will not.⁴¹⁹

There may be more than one who will listen to things left out of the complaints we reviewed—the social context of the problems facing our clients, the identity of our clients and their stories, the wall of “us/them” separating our clients from the court and from us, and our own voices—our own response to the tragedies we witness.

Writing in this new way presents a host of risks for a multitude of players. Not surprisingly, I think the risks are worth running.

A. *Art*

We might write badly. This would not be a real change since, at present, our analytic writing misses important truths and our persuasive writing passes up rhetorical opportunities. Still, we might see a lot of poorly written pleadings. This is unavoidable, as any *pro se* clerk in a federal court or patron of chain bookstores can testify. We should avoid the purple, muddy prose of both the poor novelist and the bad pleader. Recalling the counsel of rhetoricians that restraint in writing suggests balance and sincerity,⁴²⁰ we can write with the clear and modern, less floral prose of Lincoln⁴²¹ or Twain.⁴²²

B. *Integrity*

We need to remember who we are—lawyers, not journalists or historians. To abandon writing as lawyers would be to abandon law. We must speak to each other, to other lawyers and to judges, in a vocabulary intelligible to our profession. We must do this if we are to persuade other lawyers, including those who wear robes. To the extent that we borrow the language of journalists and historians, we should also heed their ethics. C. Vann Woodward writes that the historian risks “betraying his calling” if he mixes fact with imagination.⁴²³ One journalist contrasts the power of words “to confront us with the vivid, the frightening or the unaccustomed,” with their power “to muffle any such alarms” and concludes that “[a] distinguishing feature of good

toward the poor. *Id.* at 463 (Blackmun, J., dissenting)

419. IRVING STONE, CLARENCE DARROW FOR THE DEFENSE 134, 306 (1970)

420. PERELMAN & OLBRECHTS-TYTECA, *supra* note 228, at 466

421. Garry Wills says of Lincoln that “[t]he spare quality of Lincoln’s prose did not come naturally but was worked at.” WILLS, *supra* note 225, at 161 Wills further argues that “all modern political prose descends from the Gettysburg Address.” *Id.* at 148

422. No less an authority on modern, lean prose style than Ernest Hemingway said (through one of his characters) that modern American literature began with Twain’s *Huckleberry Finn* ERNEST HEMINGWAY, GREEN HILLS OF AFRICA 22 (1935)

423. C. VANN WOODWARD, THE FUTURE OF THE PAST 236 (1989)

reportage is that it combats the inevitable and planned retreat of language from the real."⁴²⁴ This is an appropriate mission for good lawyering as well.

C. *Fidelity*

We must avoid distorting our clients' stories. As translators for those voices, we have a responsibility to translate as truly as we can. We must adopt the ethics of the translator, to listen and translate with respect for the original voice.⁴²⁵ If language proves incapable of capturing the truth, if we cannot translate reality accurately, we can nonetheless translate meaningfully. Our language will be "judged by its coherence, by the kinds of fidelity it establishes with the original, and by the ethical and cultural meaning it performs as a gesture of its own."⁴²⁶

Our writing must negotiate a true course between discounting aspects of the clients' stories that we find objectionable or foreign to our experience and romanticizing the clients into people they are not. Jonathan Kozol's moving and enlightening report of the lives of homeless families gives sound advice for avoiding both problems. First, he advises that "if we listen to some of these parents carefully we may be no less concerned by their impaired abilities, but we may be less judgmental or, if we remain compelled to judge, we may redirect our energies in more appropriate directions."⁴²⁷ Kozol also observes: "I have been cautioned by some of the shelter organizers in New York not to romanticize these people. Have I observed this warning? Not enough perhaps. It is very hard to strike a balance."⁴²⁸ The result of the balancing for Kozol? He "end[s] up with a crazy quilt of details that have stirred [him]."⁴²⁹ It is the details, not the romance, which should stir us. Not a bad place to end up, even for a lawyer, or a judge.

D. *Honesty*

Creative writing tempts exaggeration, that is, lying to the court and to the defendants. In the Cairo complaint, I resisted the temptation to create a

424. John Carey, *From Eyewitness to History*, ET CETERA, Spring 1989, at 35, 36. *Et Cetera* is a journal of general semantics. I don't mean to suggest that the writing of journalists is free from bias or agenda. I only suggest that contrasting their writing with our own, we can see more clearly the biases and agendas inside ours.

425. WHITE, JUSTICE, *supra* note 6, at 258; *see also* Gilkerson, *supra* note 26, at 918–19 ("Preserving and advancing the integrity of the client's story and voice requires providing the legal forum with a contextualized presentation of the client, her situation and her experience.").

426. WHITE, JUSTICE, *supra* note 6, at 256.

427. KOZOL, *supra* note 106, at 62.

428. *Id.* at 185. Wicker also worries about romanticizing the Attica brothers who, "whatever the conditions in the prison and the world . . . by any recognized definition, were not political prisoners but hardened criminals." WICKER, *supra* note 58, at 52.

429. KOZOL, *supra* note 106, at 185.

scene—Hattie’s arrival in Cairo—which, however consistent with the story as I know it happened, may not have happened. There is a difference between Stephen Oates’ biography of Lincoln⁴³⁰ and Gore Vidal’s novel, *Lincoln*⁴³¹—a difference, beyond style, that is worth remembering. We should not invent dialogue. The use of photographs—which do lie, and do so readily⁴³²—offers no protection. I recall a photograph of Nazis in swastikas who had come from Chicago to march in Cairo. The photographer had snapped the picture just as the Nazis were moving past a store sign that read “Cairo News and Music” and a placard emblazoned with the words, “Save Cairo.” The Nazis were there: it would not be a lie to put the photograph in the pleading. But it wouldn’t be the truth either. The white Cairoites, however similar to these Chicago Nazis in the moral offensiveness of their racism, were not Nazis.

We can only hope that other licensed lawyers would worry about this issue as much as this jailhouse lawyer:

Once in a while you run into a jailhouse lawyer who will [file “bullshit” suits] to be a real bastard, but it gets old. Even to them guys, it gets old. You keep filing stuff like that, and you’re just wasting your time. There’s enough real stuff around to do it, to really fight the system on real issues where they’re really doing wrong to people.⁴³³

For those licensed lawyers capable of worry, there is the admonition of the father of rhetoric, Aristotle, who warns against rhetoric that forgets what is true.⁴³⁴ For the rest, there is the mother of all rules, Rule 11.

E. *Competence*

We can comfort ourselves that even if our clients do not prevail, their story has been heard. Law calls for stories from the two sides of a dispute. No matter what the outcome, all participants know there were at least two sides to the story, even if one of those stories sounds foreign to the judge. The telling of the stories at a minimum “creat[es] a world in which differences can coexist.”⁴³⁵ The court is one place where “unheard voices can be heard.”⁴³⁶

430. STEPHEN B. OATES, *ABRAHAM LINCOLN: THE MAN BEHIND THE MYTHS* (1984)

431. GORE VIDAL, *LINCOLN* (1984).

432. *E.g.*, *FORREST GUMP* (Paramount 1994) (creating fictional interactions between protagonist and U.S. Presidents via special effects); *ZELIG* (Orion Pictures/Warner Brothers 1984) (creating fictional newsreels).

433. THOMAS, *PRISONER LITIGATION*, *supra* note 34, at 144 (quoting interview with jailhouse lawyer)

434. *See* FISH, *supra* note 7, at 479 (discussing Aristotle’s underlying assumption that there is a “true” to forget).

435. WHITE, *JUSTICE*, *supra* note 6, at 225.

436. *Id.* at 267.

Tell that to the client, after he loses. We have a dual ethical role as well. Our translation is not just for the purpose of truthfully telling the story of the present and past, but also for changing the future for our clients. The language of the law empowers us to do that; it gives the story of our clients a new meaning. It loses much in the translation, of course, as we have seen. But it also gains; it gains the possibility of change.⁴³⁷

To change the story through a happy ending, we need to win.⁴³⁸ That means omitting from our thicker pleadings facts we may not be able to prove. It also means omitting facts we prefer to conceal until the most strategic time. It may even mean leaving out whole areas pertinent to the cause. This is less troublesome in the new Cairo complaint since the cases make the entire racial history of the town relevant.⁴³⁹ The inclusion of "disputed facts alleged with particularity" triggers the mandatory disclosure provisions of the newly amended Federal Rule of Civil Procedure 26(a)⁴⁴⁰—at least where the court has not opted out. On the other hand, the particularized allegations contained in a thicker complaint impose the full disclosure of facts, witnesses, and documents known to the defendant as well.

We may sacrifice creativity in situations where translation matters less than persuasion, and persuasion may demand resort to plainer language. For some audiences (in some cases, on some occasions), we aim more to comfort than to alarm, to persuade by ordinariness instead of outrage. Some conservative judges might not like being alarmed. Lincoln's prose in the Emancipation Proclamation does not resemble the Second Inaugural or the Gettysburg Addresses, a difference noted by Civil War correspondent Karl Marx, who described the Proclamation as the "mean pettifogging conditions which one lawyer puts to his opposing lawyer."⁴⁴¹ Lincoln wrote it as a war measure much as we might draft a motion—important, but not the place for a lawyer to "unleash the full powers of his language."⁴⁴²

F. Professionalism

Thicker pleading that includes the lawyer's voice may run afoul of our traditional admonition to not vouch for clients.⁴⁴³ As suggested above, the

437. White, *Translation*, *supra* note 177, at 1395 (quoting divorce lawyer).

438. The new Cairo complaint otherwise satisfies the requirements of pleading a cause of action, *Kendrick v. Walder*, 527 F.2d 44 (7th Cir. 1975), and jurisdiction. See FED. R. CIV. P. app. form 2.

439. See cases cited *supra* note 43.

440. FED. R. CIV. P. 26(a).

441. KARL MARX & FREDERICK ENGELS, *THE CIVIL WAR IN THE UNITED STATES* (Richard Enmale ed., 1937), quoted in MARK E. NEELY, JR., *THE LAST BEST HOPE OF EARTH: ABRAHAM LINCOLN AND THE PROMISE OF AMERICA* 113 (1993).

442. NEELY, *supra* note 441, at 116 (explaining that Lincoln's purpose in using dry, stale language was to "calm fears, anticipate critics, and frustrate those who might doubt its constitutionality").

443. See Thomas L. Shaffer, *The Legal Profession's Rule Against Vouching for Clients: Advocacy and "the Manner That Is the Man Himself"*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 145, 158 (1993)

identity of lawyer and client's cause is hard to avoid. The usual trick is to persuade by appearing convinced yourself, yet never expressing your opinion on the merits of the cause or the character of your client.⁴⁴⁴ The challenge here slips onto a somewhat different plane—to persuade by including yourself within the client's story. It is a more difficult trick, with greater risks. In the Cairo case, it can be finessed by explicitly stating the lawyer's motivation—to give Hattie a chance to vote before she dies, without labeling this statement as the lawyer's motivation. It could be finessed by inserting it into a statement of the lawyer's intent to prosecute the action vigorously, in satisfaction of Rule 23(a)(4)'s requirement of adequate representation.⁴⁴⁵

To avoid alienation from our peers, to have our pleading read seriously by our precedent-bound profession, change must be seen as change yoked to continuity, as an evolution in legal writing.⁴⁴⁶

G. Civility

We need not make civil rights conflicts worse. Storytelling as argument could have the same effect Glendon diagnoses in rights talk—polarizing antagonists through a competition of foreign voices such that no settlement is possible. Storytelling, then, must travel inside legal argument. We must do this if we are to resolve these disputes, by providing a “rhetorical coherence to public life by compelling those who disagree about one thing to speak a language which expresses their actual or pretended agreement about everything else.”⁴⁴⁷ This coherence is in our own interest, as lawyers for civil rights complainants. Legal reasoning accommodates one set of rights and interests to other interests with less nonlegal power, such as the interests of civil rights plaintiffs.⁴⁴⁸ It facilitates the decision that would protect the less powerful. White is correct when he states that the insistence on reasoned decisions is the source of equality under the law.⁴⁴⁹ It may be all that oppressed people have.

This process could lead to peace as well as justice. Our clients could become reconciled to a system in which they feel themselves to be participants. They, and we, and the powers-that-be may see these tragedies as

(discussing rule against both honest and deceptive vouching for clients)

444. *Id.* at 146, 163.

445. FED. R. CIV. P. 23(a)(4) (requiring that counsel adequately represent the absent class members), *see Serritella v. Engelman*, 339 F. Supp. 738, 748 (D.N.J. 1972) (“Plaintiffs will doubtless fairly and adequately represent class members. They are represented by Legal Services attorneys who have both the expertise and the dedication necessary to press their claims.”).

446. FISH, *supra* note 7, at 157 (“In short, the very point of the legal enterprise requires that its practitioners see continuity where others . . . might feel free to see change.”), *see also id.* at 95 (discussing invented history among jurists).

447. WHITE, JUSTICE, *supra* note 6, at 179.

448. *Id.* at 166 (criticizing Justice Douglas for ignoring legal distinction in reaching decision in *United States v. White* and losing authority because of that failure).

449. *Id.* at 202.

real problems, not just as legal problems that can only be fixed by law. Clients might mobilize to attack these problems, and governments and societies might respond. And we might attack these problems as more than just lawyers, but as ourselves.

Still, let's not get carried away. As Fish sagely notes, society changes because of changes in the conditions under which people live, not because of the musings of philosophers or lawyers. What he says about philosophers applies doubly to lawyers and law professors: "[A]ll that will tremble when the hit parade of theory undergoes a change is the structure of philosophy departments."⁴⁵⁰

H. Education

Writing in this way could subvert legal education, but not in any effective way. This possibility is not simply due to the intense resistance to change in law school faculties that was diagnosed by Dean Mudd,⁴⁵¹ but also to the admittedly difficult necessity of teaching the new vocabulary of the law.⁴⁵² While some change is possible,⁴⁵³ we can hardly expect the law school to

450. FISH, *supra* note 7, at 28.

451. Mudd, *supra* note 126, at 190.

452. Susan U. Philips, *The Language Socialization of Lawyers: Acquiring the "Cant"*, in *DOING THE ETHNOGRAPHY OF SCHOOLING* 177 (George Spindler ed., 1982).

453. First, we can stop smugly assuming that the plain writing school of legal writing is the only modern way to write about legal issues. Second, we can learn from Clark Cunningham's efforts to teach students that they are habitually framing problems and excluding important elements by the frame. See Cunningham, *supra* note 188, at 1334. Third, we can cite to journalism, history, and literature in law-and-literature courses and in clinical courses, to remind students that they are learning a new language, one of many possible languages, and that others may more fully translate the reality of clients and persuasively advance the legal argument for change. See generally *Pedagogy of Narrative: A Symposium*, 40 J. LEGAL EDUC. 1 (1990). Fourth, we can continue to urge the integration of clinical courses with the overall curriculum so that the students' educational experience will not be so fractured between a careful legal analysis that is nonetheless factually impoverished and clinical education, rich in facts but shallow in analysis. See, e.g., Paul J. Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 J. LEGAL EDUC. 243, 251 (1988). The drafting of a pleading offers an excellent occasion for merging factual and legal analysis, learning persuasive skills, and telling the client's story. Only through the clinic's experiential method can students internalize the imperative to continue to learn from practice by reflecting on that practice. See James S. Coleman, *Differences Between Experiential and Classroom Learning*, in *EXPERIENTIAL LEARNING* 49, 54 (Morris T. Keeton ed., 1976) (discussing experiential learning in general). Only an educationally guided practice in live-client clinics will introduce the richness of reality with all its unpredictability and undiscovered, uninterpreted meanings. In particular, clinics that serve the poor present middle-class students with the ethnographer's opportunity to study different worlds and voices.

In my courses, I have experimented with a number of devices. In the introductory lecture to a large simulation course on pretrial practice, I ask my students to read and brief in class the edition of *Walker v. City of Birmingham*, 388 U.S. 307 (1967), that is reprinted in PAUL D. CARRINGTON & BARBARA A. BABCOCK, *CIVIL PROCEDURE* 52 (3d ed. 1983). Then, after a discussion of the facts and legal issues, none of which refers to Martin Luther King's campaign to desegregate Birmingham, I show them a portion of the documentary *Eyes on the Prize* (PBS television broadcast, Jan. 21, 1987). I got the idea from David B. Oppenheimer, *Martin Luther King, Walker v. City of Birmingham, and the Letter from Birmingham Jail*, 26 U.C. DAVIS L. REV. 791 (1993). In that course, I also compare different ways of writing about an age discrimination case, using sterile pleadings, plain statements of fact in affidavits, and the clients' simulated stories, borrowing from two plays, Arthur Miller's *Death of a Salesman* and Jerry Sterner's *Other People's*

teach successfully this vocabulary and its concomitant mode of thinking while the school simultaneously undermines both at every turn.⁴⁵⁴

I. *Peace of Mind*

This pleading puts our safety at risk. It will be tougher to retreat into a role to protect ourselves from these risks, as well as from the court, from our peers, and from our clients' terrible truths. Stripped of the armor of our professional role and divested of the only sword that our profession permits us,⁴⁵⁵ these awful problems become merely legal problems. Once we reduce the problems to legal problems, narrowly defined, we will respond to them as people (perhaps) and as lawyers (certainly), but not as people who are lawyers. We will respond to them in a prescribed way, a safe way.

But I doubt that we will feel safe. Even while we insist upon writing in this thin, lifeless way, we can sense the bifurcation, the segmentation of ourselves.⁴⁵⁶ We still will remember that legal language is not the only language and that other tongues are translated into our own.⁴⁵⁷ We can yet see something of that larger reality and understand it in another vocabulary, one more personal and human. This memory is inescapable, since we belong to interpretive communities other than our professional association. We are parents and children, citizens and bystanders, victims and offenders. As White says, our lives are richer than our professional writing would indicate.⁴⁵⁸ So are the lives of our clients, obviously. We will still see something of the client "truths," still feel inadequate in the power of our traditional advocacy to translate, to persuade.

We would suspect that there is an alternative way, as White hopes, to live our lives and practice our profession in a fuller sense, as both "performers" and "characters"⁴⁵⁹ and, simply, as people. Perhaps we could, through practice, overcome the constraints of rule, custom, and socialization. Perhaps integrating our own voices into the real stories of our clients would help us to

Money. In both a simulation course on client counseling and the live-client clinic, I have assigned for discussion Clark Cunningham's article. Finally, in the clinic, I ask students to critique a pleading using Delgado's plea for narrative.

454. White's description of learning to think "like a lawyer" suggests the dilemma WHITE, IMAGINATION, *supra* note 6, at 7; see also Farber & Sherry, *supra* note 240, at 807 (describing task of learning traditional legal language and narrative); Sandra C. McKenzie, *Storytelling: A Different Voice for Legal Education*, 41 KAN. L. REV. 251 (1992) (same).

455. As I have already noted, Goffman says the "grocer who dreams is offensive to the buyer, because such a grocer is not wholly a grocer." GOFFMAN, *supra* note 12, at 76. Civil rights clients, even when backstaged, may prefer a more "lawyerly" approach, a preference their lawyers can sense.

456. To protect against this feeling, we may be tempted into collusion with our colleagues to preserve our solidarity with them. *Id.* at 177, 184. Goffman warns that "an individual may be taken in by his own act or be cynical about it." *Id.* at 19.

457. WHITE, JUSTICE, *supra* note 6, at 81.

458. *Id.* at 11.

459. GOFFMAN, *supra* note 12, at 252.

see complaints of racism and oppression less as accusations aimed in part at us and more as descriptions of realities in which we live, realities we can help transform.⁴⁶⁰ Perhaps we would find some therapeutic benefit to writing about the tragedy we see and cannot change, allowing us to look at that tragedy with greater courage.⁴⁶¹

Perhaps we can negotiate a course that avoids the fate of F. Scott Fitzgerald, who wrote: "I had developed a sad attitude toward sadness, a melancholy attitude toward melancholy and a tragic attitude toward tragedy—*why I had become identified with the objects of my horror or compassion.*"⁴⁶²

V. LITERARY PLEADING

[We] should be able to argue persuasively on either side of a question, just as in the use of syllogisms, not that we may actually do both (for one should not persuade what is debased) but in order that it may not escape our notice what the real state of the case is.⁴⁶³

Aristotle

When I sat down to redraft the original *Kendrick* complaint, I was three years out of law school. I checked the voting rights case law and the forms used in other cases, careful not to invite a motion to dismiss or criticism from the bench. I found little reason to alter the complaint other than adding the Voting Rights Act provisions and Preston Ewing as a class representative. Before filing it in the federal court in Benton, Illinois, about an hour and one-half north of Cairo, I showed it to Hattie and Preston. Hattie read it over quickly, trusting my judgment in such matters. Preston scrutinized it more carefully, but said nothing.

Only years later, as I started work on this Article and discussed the complaint with him, did Preston say to me, "I always wondered why you lawyers wrote about Cairo the way you did." Rummaging through my file of Cairo memorabilia after that conversation, I rediscovered a newspaper article

460. See Shane, *supra* note 189, at 1053. The curative power of such integration may be particularly strong since we are telling the stories of other people. See Letter from Richard Delgado to Kevin Kennedy, Editor-in-Chief, *Michigan Law Review* (June 1, 1988), in Kim L. Scheppelle, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2075 (1989) (presenting storytelling and narrative method for analysis and critique of dominant paradigm).

461. Some therapists report a benefit to having their patients write in journals as "denial busters." Bo Emerson, *The Journal Keepers*, ATLANTA J. & CONST., Jan. 1, 1993, at C1. Listening to our clients' stories, naked of theory, can help us better to understand them and ourselves, and how we might help them. See, e.g., ROBERT COLES, *THE CALL OF STORIES* 7 (1989).

462. F. SCOTT FITZGERALD, *The Crack Up*, in *THE CRACK UP* 69, 80-81 (1945).

463. 1 ARISTOTLE, *ON RHETORIC* § 1355, at 34 (George A. Kennedy trans., 1991).

quoting me on Cairo: “‘The point of Cairo to me was always the swimming pool,’ says Eastman bitterly. ‘When they filled it in, it said to me, “Now little black kids and little white kids can drown in the Mississippi.”’”⁴⁶⁴ I don’t recall feeling bitter, only sad.⁴⁶⁵ I also remember the sad faces of the pallbearers, black and white, at Hattie’s funeral, escorting her casket down the church steps.

Preston’s remark echoed as I fingered a photograph of Cairo’s Ohio River levee. On the concrete wall that kept the Ohio and most things north and east out of Cairo, someone had painted in letters a foot high: “Preston Ewing’s grandfather was a slave.” I looked once more at the pleading. Where in all this was Cairo? Where were Hattie and Preston? Where was I? Could I have written it differently?

James Boyd White asks the same question:

Can we find ways to talk that will reflect more fully what we actually know to be true of ourselves and our minds, of our languages and our cultures? Can we find or create voices that are more fully our own, speaking to audiences more fully recognized as the minds and people they actually are?⁴⁶⁶

I think so. We can write the pleading as a story, the story as an argument for change.⁴⁶⁷

That’s no small trick. That means writing while astride a canyon, one foot on each side, over the great distance between the civil rights client and the court, between “us” and “them,” stretching ourselves between the languages of the client, of other observers of reality, and of our profession:

I see the lawyer, then, as engaged in a set of linguistic and literary activities, just as the poet or novelist is This kind of work on law and literature is . . . a bringing to consciousness of the nature of our own intellectual and linguistic practices, both literary and legal, with the hope of holding them in the mind at once in such a way as to change our sense of both.⁴⁶⁸

We stretch as well, between our hope that we can do this and our fear that we cannot, our doubt that we will “sell out” our clients or sacrifice ourselves, forgetting what is real and what is performance.⁴⁶⁹ Others have

464. Kelly, *supra* note 386, at 17.

465. I wasn’t in Cairo when they closed the pool. But I did make the statement, and it is true that the pool struck me as an apt metaphor for the town.

466. WHITE, JUSTICE, *supra* note 6, at 12.

467. *See id.* at 256 (noting that pleading will take on the “ethical and cultural meaning it performs as a gesture of its own”). By including the story in a pleading, both pleading and story are changed.

468. *Id.* at 19.

469. GOFFMAN, *supra* note 12, at 216. We must avoid “faking it.” *Id.* at 251 (discussing misrepresentation).

noted this straddling imperative. For example, Richard Sherwin says that we must fight for our balance between “the desire for belief” offered by White and “the fear of deception” confessed by the deconstructionists.⁴⁷⁰ Sherwin achieves the straddle by hoping, like White, to translate truly, while remaining critical of the attempt, like the Critics.⁴⁷¹ This strikes me as a very lawyerly approach; a good litigator advances his cause, while analyzing its weaknesses and ramifications.

Yet the straddling imperative suggested by White poses greater risk because White hopes that eventually we can cease to straddle and begin to

integrate, to put together in a complex whole, aspects of our culture, or of the world, that seem to us disparate or unconnected, and in so doing to integrate, to bring together in interactive life, aspects of our own minds and beings that we normally separate or divide from each other.⁴⁷²

Will it work?

White’s characterization of lawyers as novelists and his admonition to “hold in the mind at once” two conflicting voices conjure the ghost of one of our greatest novelists, F. Scott Fitzgerald. We need to remember Fitzgerald’s posture toward life, as expressed below, quoted a few pages ago—a posture of losing out to despair.⁴⁷³ We must remember as well that, either despite or because of this straddling posture, Fitzgerald did, indeed, “crack up.”⁴⁷⁴ Still, the lawyer as novelist may emulate Fitzgerald’s wiser posture toward life. Fitzgerald’s insight serves as wise counsel to the civil rights litigator who would speak truth to power: “[T]he test of a first-rate intelligence is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function. One should, for example, be able to see that things are hopeless and yet be determined to make them otherwise.”⁴⁷⁵

470. Richard K. Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 MICH. L. REV. 543, 551 (1988). Sherwin observes that White naively overlooks the difficulty of power relationships and the maintenance of the status quo in his call for democracy through translation. *Id.* at 558 n.40.

471. *Id.* at 597–98. Goffman similarly says that “[w]hile we can expect to find natural movement back and forth between cynicism and sincerity, still we must not rule out the kind of transitional point that can be sustained on the strength of a little self-illusion.” GOFFMAN, *supra* note 12, at 21.

472. WHITE, JUSTICE, *supra* note 6, at 12.

473. See *supra* text accompanying note 462. For further exposition on the balance between despair and determination in civil rights, see generally BELL, *supra* note 376; Cornel West, *The Role of Law in Progressive Politics*, 43 VAND. L. REV. 1797 (1990).

474. K.G.W. CROSS, SCOTT FITZGERALD 92 (1964) (describing Fitzgerald’s alcoholism, mental depression, and physical collapse).

475. FITZGERALD, *supra* note 462, at 69.

APPENDIX: THE ORIGINAL CAIRO COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

HATTIE KENDRICK, LULAR HOLLIS,)	
WILLELLA FLOWERS, WILLIAM)	
BOOKER, MABLE HOLLIS, PRESTON)	
EWING, JR., individually and)	
on behalf of all others)	
similarly situated,)	
)	
Plaintiffs,)	
)	
-vs-	)	CIVIL ACTION
	)	NO. 73-19C
ALLEN MOSS, individually and)	
as Mayor of the City of Cairo,)	
Illinois; ANDY CLARKE, WILLIAM)	
EGAN, CARL HORNBEAK, and)	
WILLIAM S. WINTER,)	
individually and as)	
Commissioners of the City of)	
Cairo, Illinois; MARTHA A.)	
SMITH, as City Clerk of Cairo,)	
Illinois; The CAIRO CITY	)	EQUITABLE
COUNCIL and the CITY OF CAIRO,	)	RELIEF
a Municipal Corporation,	)	REQUESTED
)	
Defendants.)	

FIRST AMENDED COMPLAINT

I

This action arises under the Fourteenth and Fifteenth Amendments to the Constitution of the United States, and United States Code, Title 42, Sections 1973 and 1983. This Court has jurisdiction over this cause pursuant to United States Code, Title 28, Section 1343. Venue is proper in this District pursuant to United States Code, Title 28, Section 1391.

II

This proceeding challenges the constitutionality and legality of conducting City Council elections in Cairo, Illinois, on an at-large basis as authorized by Chapter 24, Sections 4-3-2 and 4-3-5 of the Illinois Revised Statutes and other provisions of Illinois law. The at-large voting system employed in Cairo requires city-wide elections of the five members of the City Council and permits all elected City Council members to be

residents of predominantly white areas of Cairo. The adoption and use of the at-large voting system has resulted in the dilution of voting strength of Black residents of Cairo and has precluded the election of Black Cairo residents to the Cairo City Council. The exclusion of Black residents from the City Council has caused that body to be unresponsive to the needs of the Black community, has caused Blacks to be excluded from appointive positions in City government, and has furthered racial discrimination in the community.

III

Plaintiffs request four specific forms of relief in this action:

(A) Plaintiffs seek a declaratory judgment pursuant to Title 28, Sections 2201 and 2202 of the United States Code declaring: (1) that the at-large voting system employed in City Council elections in Cairo, Illinois denies the right of Black residents to vote in said elections contrary to the Equal Protection Clause of the Fourteenth Amendment, and the proscription against abridging voter's rights on account of race, color or previous condition of servitude of the Fifteenth Amendment, and Section 1983 of Title 42 of the United States Code, and the prohibition against practices or procedures that deny or abridge the right to vote on account of race or color of Section 1973 of Title 42 of the United States Code and (2) that Chapter 24, Section 4-3-2 and 4-3-5 of the Illinois Revised Statutes are unconstitutional as applied to City Council elections in Cairo, Illinois.

(B) Second, plaintiffs seek a permanent injunction: (1) restraining all Defendants, their agents, servants, employees, successors and all other persons participating or acting in concert with them, from enforcing the at-large election provisions of the Illinois Municipal Code, Ill. Rev. Stat. ch. 24, §§4-3-2 and 4-3-5, insofar as they authorize the present at-large voting system for City Council in Cairo, Illinois, and (2)

restraining all named Defendants, their agents, employees, successors and all other persons participating or acting in concert with them from conducting City Council elections in that city under the present at-large voting system prescribed by said statutes.

(C) Third, plaintiffs request that this Court retain jurisdiction over this proceeding in order to approve a plan for the establishment of a ward voting system for the election of City Council members that will not minimize or cancel the voting strength of Black residents of Cairo.

(D) Fourth, plaintiffs request that this Court order a new City Council election pursuant to a ward voting system which would not cancel the voting strength of Black residents of Cairo.

IV

(A) The named plaintiffs are: HATTIE KENDRICK, LULAR HOLLIS, WILLELLA FLOWERS, WILLIAM BOOKER, MABLE HOLLIS, JANICE WHITFIELD, and PRESTON EWING, JR. individually and on behalf of all others similarly situated.

(B) All plaintiffs are Blacks, citizens of the United States and of the State of Illinois, and residents of Cairo, Illinois registered to vote in Municipal Elections conducted in Cairo.

V

Plaintiffs bring this action on their own behalf and, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of a class comprised of all Black citizens who are residents of Cairo, Illinois, and who are or will be entitled to vote in Cairo City Council Elections. The members of said class are so numerous as to render their joinder in this action impracticable; there are common questions of law and fact which predominate the claims of the class members; the claims of the named plaintiffs are typical of the claims of the class members;

the named plaintiffs will fairly and adequately represent the interests of other class members; and, the criteria of Rule 23(b)(2) of the Federal Rules of Civil Procedure are satisfied in this action, wherefore final declaratory and injunctive relief with respect to the class as a whole is appropriate. (The named plaintiffs and the class which they represent are hereinafter referred to as "Plaintiffs.")

VI

(A) The Defendants are: ALLEN MOSS, as Mayor of the City of Cairo, Illinois; ANDY CLARKE, WILLIAM EGAN, CARL HORNBEAK and WILLIAM S. WINTER, as City Commissioners of Cairo, Illinois; MARTHA A. SMITH, as City Clerk of Cairo, Illinois; the CAIRO CITY COUNCIL; and the CITY OF CAIRO, a Municipal Corporation.

(B) All defendants herein are sued in their official capacities as hereafter indicated:

(1) The Mayor of Cairo and the four City Commissioners constitute the City Council of Cairo, Illinois. Ill. Rev. Stat. ch. 24, §4-5-1 (1972). The City Council is authorized by Article VII, Section 7 of the Illinois Constitution "to provide, by referendum for their officers, manner of selection and terms of office." It is given all the rights, duties and powers specified in Articles 4 and 9 of the Municipal Code of 1961, Ill. Rev. Stat. ch. 24, §§4-5-2 (1972).

(2) The City Clerk of Cairo is appointed by the City Council pursuant to Article 24, Section 4-5-4 of the Illinois Revised Statutes and is charged with maintaining the official records of the municipality. The City Comptroller, appointed by the City Council in accordance with the same statutory authority, is responsible for maintaining the fiscal records of the local government.

(3) The City of Cairo and the City Council. The City and its Council have an official policy and practice of at-large municipal elections by reason of the city having adopted the at-large municipal form in 1913, having maintained the at-large form since 1913, and having conducted and authorized, sanctioned, and ratified the conducting of all eighteen municipal elections held since 1913, pursuant to the at-large form.

VII

Blacks have constituted a substantial segment of the population of Cairo throughout the history of that community. Blacks presently comprise approximately forty percent of the 6,277 inhabitants of Cairo.

VIII

For over 100 years, up to and including this date, Cairo, Illinois has been a racially polarized community. (A copy of a report on Cairo by the United States Commission on Civil Rights is attached hereto and incorporated herein by reference as Exhibit A.)

(A) Public agencies and officials have maintained racially segregated public facilities throughout the history of Cairo:

(1) Cairo has a long-standing policy of support for segregated schools. A dual school system was maintained until 1952. While some Blacks were admitted to formerly all-white schools in 1952, the Black schools remained exclusively Black until 1967. Prompted by intensified efforts to desegregate Cairo's public educational facilities, white residents opened the Camelot School in 1969. This privately financed institution has an all-white student body and faculty and is accorded tax exempt status by the Internal Revenue Service. Following the matriculation of white students to Camelot School, Blacks have comprised approximately seventy percent of the student body of the Cairo public schools.

(2) The Alexander County Housing Authority has maintained segregated public housing projects since 1941. While eight public housing projects presently are operated by the Housing Authority, only a single housing complex for the elderly is integrated.

(3) Until well into the 1960's Black residents of Cairo were required to sit in segregated sections of public meeting places and buildings by officially sanctioned custom. This custom was followed until 1963 with respect to seating in the county court house. A similar policy was observed in public school teachers' meetings until 1967.

(4) Blacks were customarily denied use of the National Guard Armory well into the 1950's although the building was erected in 1931.

(5) Blacks were denied access to public library facilities until the 1950's. Although Blacks were permitted to use a separate library annex in the formerly all-Black high school, they were not issued library cards by the public library until 1952.

(6) The largest city park in Cairo, St. Mary's Park, was segregated until 1962, with one side of the park reserved for whites, while the other was designated for Blacks.

(B) Public facilities owned by private individuals have been historically operated on a racially segregated basis.

(1) Entertainment facilities in Cairo often have been closed to avoid court ordered integration. The only public swimming pool was closed in the mid-1960's.

(2) Until the mid-1950's, public restrooms and waiting areas in the Cairo bus station were operated on a racially segregated basis.

(3) All hotels, motels and restaurants in Cairo were racially segregated until 1962.

(C) Black residents of Cairo have systematically been the subject of racial discrimination in employment.

(1) The overall unemployment rate for Alexander County was 9 percent in 1970; 6.5 percent for white males and 16.2 for Black males.

(2) While the median income for a white family residing in Alexander County in 1969 was \$6,428, the median income for a Black family was only \$2,809.

(3) Three-quarters of the Black families of Alexander County earned less than \$3,000 in 1969, while only one-third of the white families earned less than this amount.

(4) Black residents of Cairo who are employed are relegated to low paying unskilled jobs.

(5) Craft unions in Cairo have discriminated and continue to discriminate against Black residents by excluding them from membership therein.

(D) Black residents of Cairo have been systematically excluded from elective politics in the community.

(1) The political processes leading to the nomination and election of partisan candidates for elective office have not been open to Black residents of Cairo. Until the mid-1940's, the Democratic Party of Cairo, Illinois was strictly segregated while a similar policy was observed by the Republican Party well into the 1960's. No Black has ever attained a major leadership position in either Party, although several Blacks have been elected as Committeemen.

(2) Only one Black, Jacob Amos, has ever been elected to office in the Cairo city government. Elected as a city alderman from the Fourth Ward in 1894, prior to the adoption of the at-large voting system, Mr. Amos remained an alderman for one year.

(E) Black residents of Cairo have been systematically denied appointment to and membership on various boards, departments and agencies operating in Alexander County pursuant to state law. No Black has ever been appointed to the Library Board, Building Commission, Police Pension Board or the Airport Authority. Only one Black has ever been a member of either the Land Commission or Health Board, while the Welfare Committee, Plan Commission and Zoning Board have only had three Black members throughout their history.

(F) Although many of the public facilities in Cairo have been integrated, the legacy of racial discrimination fostered by this history of segregation remains a basic fabric of life in Cairo.

IX

The City of Cairo in 1913 adopted the City Commission form of government authorized by Chapter 24, Section 4-1-1 *et seq.* of the Illinois Revised Statutes.

(A) Chapter 24, Section 4-3-1 of the Illinois Revised Statutes mandates the election of a City Council comprised of a mayor and four Commissioners.

(B) According to authority vested in the City Council pursuant to Chapter 24, Section 4-5-2 of the Illinois Revised Statutes, the Council and its members are given all the "executive, administrative, and legislative" powers and duties authorized by the Illinois constitution and statutes of the State of Illinois.

(C) Each member of the City Council is responsible for supervising one of the following departments: (1) Department of Public Affairs; (2) Department of Accounts and Finances; (3) Department of Public Health and Safety; (4) Department of Streets and Public Improvements; (5) Department of Public Property. Ill. Rev. Stat. ch. 24, §4-5-3 (1972).

X

Acting under color of authority conferred upon them by Chapter 24, Section 4-3-2 of the Illinois Revised Statutes and by other laws of the State of Illinois, the named Defendants are presently pursuing a plan, policy and practice requiring at-large City Council Elections.

(A) Chapter 24, Section 4-3-2 of the Illinois Revised Statutes provides that: "[t]he mayor and four commissioners of the municipality shall be nominated and elected at large."

(B) Chapter 24, Section 4-3-5 of the Illinois Revised Statutes provides: "[a]ll candidates for nomination to be voted at all general municipal elections at which a mayor and four commissioners are to be elected . . . shall be nominated from the municipality at large by a primary election . . ."

(C) The maintenance and use of this at-large voting system in Cairo, Illinois, which has a long-standing and pervasive policy of racial discrimination, has: (1) discriminated invidiously against Blacks by minimizing and cancelling-out the voting strength of Black voters in City Council Elections in contravention of the Equal Protection Clause of the Fourteenth Amendment, and; (2) denied and abridged their right to vote because of race, color or previous condition of servitude in contravention of the Fifteenth Amendment to the United States Constitution; and Section 1973 of Title 42 of the United State Code, and; (3) deprived them of rights, privileges and immunities secured by the Constitution in violation of Section 1983 of Title

42 of the United States Code, and; (4) effectively excluded Blacks from election to the City Council and from appointment to positions in local government.

XI

Prior to the adoption of the mandatory at-large voting system, the City of Cairo had an aldermanic form of government in which elections were conducted by ward.

XII

As a direct result of the legacy of racial discrimination and the adoption and maintenance of the at-large voting system, no Black has ever been elected to the City Council in the sixty years of its existence during which no less than fifteen elections were conducted for that purpose, and despite the fact that Blacks have constituted a sizable portion of the population of that Community.

XIII

Race is a constant and dominant factor in elections in Cairo, Illinois, and Black voters are particularly disadvantaged in at-large voting elections because[:]

(A) Voting patterns in county and municipal elections show that whites do not vote for Black candidates and that where Black candidates oppose white candidates, the whites consistently vote for the white candidates.

(B) White candidates for local office in Cairo have supported anti-integration policies and have employed racial campaign tactics in seeking election to local office.

(C) Adopting a firm anti-Black editorial position, local news media have supported and encouraged voting along racial lines.

XIV

The adoption and use of the at-large voting system in Cairo has discouraged Blacks from running for office in City Council elections. The few Blacks who have run for office have invariably lost due to the dilution of Black voting strength caused by the at-large election system for choosing City Commissioners.

XV

Faced with the pervasive racial polarization in Cairo, Black candidates and voters have been unable to form effective political coalitions with white candidates and voters.

XVI

Black residents of Cairo have been excluded from the political process leading to the nomination and election of City Council members.

(A) While City Council elections are nonpartisan, nomination and election to the Commission has been customarily confined to individuals who run on all-white slates of candidates.

(B) These slates are selected by groups of white residents of Cairo, without any participation whatsoever by Black residents.

(C) Because Black residents of Cairo are excluded from the groups which select these slates of candidates, Blacks are excluded from running as members of these slates and thereby have less opportunity than whites to participate in the political processes and to elect City Council representatives of their choice.

XVII

White councilmen in Cairo, Illinois, the City Council and its subordinate bodies, are unresponsive to and unrepresentative of Black residents and their interest.

(A) Not only has no Black ever been elected at-large to the City Council, but the whites elected to the City Council reside in a single area of the community where very few Blacks reside.

(B) Certain members of the City Council are former members of a white vigilante group denoted the White Hats and were organizers of the United Citizens for Community Action, an affiliate of the White Citizens Council of America. These groups were expressly organized to further racial discrimination.

(C) The City Council in 1970 specifically refused to rezone a former school site to permit construction of a shopping center by Black entrepreneurs.

(D) The City Council has been unable to control sniper shootings into Pyramid Courts, an all-Black public housing project. The City Police Department has not responded to these repeated acts of lawlessness and terrorism and has failed to provide adequate police services in Black areas of Cairo.

(E) The City Council refused to establish a Community Relations Board to improve relations between city police and Black residents despite the fact that this program was to be funded by a \$75,000.00 grant from the Illinois Law Enforcement Commission.

(F) The City Council has systematically excluded Blacks from appointive positions in local government and has confined the few Black public servants to lower level general services positions.

(G) The City Council has refused to cooperate with a bi-racial housing corporation, financed by federal and state funds to develop single-family dwelling units in Cairo. The City Council has failed to pass an ordinance which would make City lots available for construction of homes.

XVIII

Not only have the City Council, its members and subordinate bodies been unresponsive to the needs of the Black residents of Cairo, but they have openly furthered racial discrimination and the denial of Black civil rights in the community.

(A) The City Council openly opposed efforts of civil rights workers to eliminate racial discrimination in employment among the operators of Cairo downtown retail stores. To hamper and to prevent protest demonstrations, the City Council passed an ordinance in 1970 which was designed to eliminate picketing in the downtown areas. Only a threat of a lawsuit in 1971 prevented the continued enforcement of the patently unconstitutional ordinance.

(B) To repress civil rights demonstrators attempting to obtain employment equality, the Chief of Police, the Sheriff and the Coroner of Alexander County, deputized former members of the White Hats, a local white vigilante group. Unidentifiable members of this "auxiliary police force" wantonly clubbed and beat Black demonstrators who were clearly engaged in constitutionally protected activity.

(C) To prevent unfettered news coverage of the wanton police brutality surrounding the demonstrations in 1970, the police confiscated a local reporter's camera to remove the incriminating documentation of their unlawful acts.

XIX

Black residents of Cairo, Illinois, share a community of interest based upon race, poverty and the legacy of racial discrimination. This legacy has forced upon Blacks an additional community of interest derived from their common effort to achieve equal rights under law including equal opportunity in education, jobs and housing.

XX

Blacks constitute a majority of the registered voters in certain areas of Cairo and could elect representatives of their choice from these areas if elections were conducted according to a ward voting system which did not dilute Black voting strength.

XXI

The abolition of a ward system of election, and the adoption and perpetuation of the present at-large system for electing City Council members have resulted and will continue to result in immediate and irreparable injury to plaintiffs herein, who have no adequate remedy at law.

WHEREFORE, Plaintiffs respectfully pray that this Court:

(A) Enter a Declaratory Judgment:

(1) Declaring Illinois Revised Statute, chapter 24, Sections 4-3-2 and 4-3-5 unconstitutional as applied in Cairo, Illinois, because said statutes have the effect of preventing Blacks from being elected to the City Council in violation of the Equal Protection Clause of the Fourteenth Amendment, the Fifteenth Amendment proscription against denying or abridging voters' rights on account of race, color or previous condition of servitude, and Section 1983 of Title 42 of the United States Code, and

(2) Declaring the at-large form of municipal elections in Cairo, Illinois to be a violation of Section 1973 of Title 42 of the United States Code, as a practice and procedure that denies and abridges the right to vote on account of race.

(B) Issue a permanent injunction:

(1) Restraining all named Defendants, their agents, servants, employees and all other persons participating or acting in concert with them from enforcing the provisions of said statute, and from conducting City Council Elections in Cairo, Illinois, under the present at-large voting system; and

(2) Requiring that a plan be established dividing Cairo, Illinois, into wards and providing for the election of councilmen

from such wards by vote of the electors residing therein in a manner that does not dilute the voting strength of Black residents of Cairo, Illinois;

(C) Retain jurisdiction of this proceeding to approve a plan for the establishment of a ward voting system within Cairo, Illinois, which does not have the effect of minimizing or cancelling out the voting strength of Black residents of said city and to rule accordingly.

(D) Order a new City Council election pursuant to a ward voting system which would not cancel the voting strength of Black residents of Cairo.

(E) Grant Plaintiffs their costs therein, including reasonable attorneys' fees to the extent permitted by law.

(F) Grant Plaintiffs such further and additional relief as said Court may deem equitable, just, and proper.

