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Not So Very Bad Beginnings: What Fiction Can Teach Lawyers about Beginning a Persuasive Legal Narrative before a Court

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NOT SO VERY BAD BEGINNINGS: WHAT FICTION CAN TEACH LAWYERS ABOUT BEGINNING A PERSUASIVE LEGAL NARRATIVE BEFORE A COURT

Cathren Page *

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INTRODUCTION

If you are interested in stories with happy endings, you would be better off reading some other book. In this book, not only is there no happy ending, there is no happy beginning and very few happy things in the middle.¹

So begins the satirical middle-grade book, *A Series of Unfortunate Events: The Bad Beginning*.² Telling readers not to read the book might seem like a bad way to entice them into reading it; however, the beginning is actually genius.³ Agent and movie producer Fiona Kenshole says, “It contains the conceit of the entire book.”⁴ It also makes us curious.⁵ Readers are likely to wonder why the author would discourage them.⁶ In fact, the over-the-top remarks may make readers doubt the tale is so bad. Still, it is gloomy, albeit satirically gloomy.⁷ That satire appears in the

¹ LEMONY SNICKET, *A SERIES OF UNFORTUNATE EVENTS: THE BAD BEGINNING 1* (HarperCollins 1999).

² *Id.*

³ Cf. *16 of the Best Opening Lines from Children’s Books*, BUZZFEED: COMMUNITY (July 23, 2013, 9:05 AM), <http://www.buzzfeed.com/harpercollins/16-of-the-best-opening-lines-from-childrens-books-9npd#.jidjllgvp> [<https://perma.cc/3MNX-YTFM>] (ranking *A Series of Unfortunate Events: The Bad Beginning* first).

⁴ Fiona Kenshole, Agent, Kenshole Agency, Address at the Pacific Coast Children’s Writers Workshop (October 4, 2013).

⁵ Cf. Jane Lichtenberg, *Classics for Kids*, INDIANAPOLIS STAR, Dec. 12, 2004, at E6 (describing children as hooked on the series as a whole).

⁶ Cf. Frances Atkinson, *Ah, Sweet Misery: Interview with Lemony Snicket*, SYDNEY MORNING HERALD, Aug. 18, 2001, at 17 (indicating that children might not put the book down because they want plot, suspense, and intrigue as much as adults).

⁷ See Patricia Bailey, *A Reading List While You’re Waiting*, OTTAWA CITIZEN, Mar. 4, 2000, at E6 (describing the book as “wildly satirical”); *The Bad Beginning*, PUBLISHERS WEEKLY, <http://www.publishersweekly.com/978-0-06-440766-3> [<https://perma.cc/BAE9-6HZP>] (book review describing the book as full of misfortunes and as satirical) (last visited Feb. 1, 2014); see generally Christina Hardymont, *Books: A Word in Your Ear*, INDEPENDENT UK, Feb. 23, 2002 (describing the book as satire).

first line. So readers already know the genre and the premise and remain curious nonetheless.

This kind of first line is often called “the hook.”⁸ In most good stories, the hook raises curiosity while also establishing the premise of the story and priming the audience for what is to come.⁹

Persuasive legal narratives also require a hook.¹⁰ The first line of the legal story is the lawyer’s first chance to persuade the audience and prepare them to accept the client’s version of events. By establishing the tone and premise of the story, the lawyer can prime the audience to believe the client’s story and theme.¹¹

Moreover, the hook satisfies an additional goal—getting the audience’s attention.¹² An audience is going to have difficulty believing the client’s story if they have never heard it.¹³ However, if the lawyer can engage the audience in the story, they are more likely to not only hear the client’s full story but also to step into

⁸ Cf. NANCY LAMB, *THE WRITER’S GUIDE TO CRAFTING STORIES FOR CHILDREN* 35 (Writer’s Digest Books 2001) (stating that a writer has at most two to three pages to “hook” the reader).

⁹ See *id.* at 38-39 (stating that the beginning of a story should raise a question for the reader and hint at the conflict to come); Steven J. Johansen, *Coming Attractions: An Essay on Movie Trailers & Preliminary Statements*, 10 *LEGAL COMM. & RHETORIC: JALWD* 41, 42, 46 (2013) (stating that a movie trailer should intrigue the viewer into seeing the movie).

¹⁰ Cf. Amy Bitterman, *In the Beginning: The Art of Crafting Preliminary Statements*, 45 *SETON HALL L. REV.* 1009, 1010 (2015) (stating that the preliminary statement in the brief should be like a short pitch to a book agent).

¹¹ See *id.* at 1009-10 (discussing use of first impressions and priming in preliminary statements); Kathryn M. Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 *OR. L. REV.* 305, 306 (2010) (discussing how first impressions prime the audience); Johansen, *supra* note 9, at 44-45 (discussing how beginnings of movie trailers and preliminary statements prime the audience to believe a theme); Michael J. Higdon, *Something Judicious This Way Comes . . . the Use of Foreshadowing as a Persuasive Device in Judicial Narrative*, 44 *U. RICH. L. REV.* 1213, 1214 (2010) (discussing how foreshadowing earlier in the story can help the reader to believe events that happen later in the story); cf. DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 82-83 (2011) (explaining how last impressions are filtered through first impressions).

¹² Johansen, *supra* note 9, at 46 (stating that a movie trailer should intrigue the viewer into seeing the movie).

¹³ Cf. *id.* (stating that a movie trailer should intrigue the viewer into seeing the movie).

the client's point of view and empathize.¹⁴ This job of attention getting starts with the first line.¹⁵

Using both fiction examples and legal examples, this Article identifies the traits of good openings. Part I provides a brief overview of Applied Legal Storytelling. Part II provides a list of great opening lines from both fiction and law. Part III identifies the traits of good beginnings, explains how those traits are persuasive, and examines both fiction openings and legal openings.

While the concepts in this Article may apply to various other types of fiction writing and other non-legal writing, for the sake of focus and brevity, this Article only examines novels. Likewise, these concepts may also apply to a variety of legal narratives, such as those in memorandums, but this Article limits its focus to beginnings at trial and on appeal. Examples include the first lines of opening statements from famous trials and the first lines of narratives in both a recent brief and a recent petition to the Supreme Court of the United States.

¹⁴ Cf. Cathren Koehlert-Page, *Come A Little Closer So I Can See You My Pretty: The Use and Limits of Fiction Techniques for Establishing an Empathetic Point of View in Appellate Briefs*, 80 UMKC L. REV. 399, 423-24 (2011) (discussing various point of view techniques in fiction and legal narratives and how those techniques can increase empathy).

¹⁵ Cf. Johansen, *supra* note 9, at 42 (discussing how beginnings of movie trailers and preliminary statements prime the audience to believe a theme); William Allison, *Tell Your Story Through Opening Statement*, 34 TRIAL 78, 81 (1998) (stating that the first line of opening statement should hook the jury). Various sources advocate hooking or grabbing the attention of the jury generally in opening statement. See Bill Kanasky, Jr., *The Primacy and Recency Effects: The Secret Weapons of Opening Statements*, 33 TRIAL ADVOC. Q. 26, 26 (2014); George A. Googasian, *Opening Statements*, 92 MICH. B.J., June 2013, at 54, 54; Karen R. Roberts, *Grand Openings: Just As a Strong Lead Draws a Reader into a News Story, an Engaging Opening Statement can Grab the Jury's Interest Right from the Start. Follow These Simple Rules of Storytelling to Get Jurors' Attention—and Keep It Throughout Trial*, 44 TRIAL 58, 59 (2008); Thomas A. Demetrio, *Opening Statement: Some Initial Thoughts and Bullet Points*, 13 CHI. B. ASS'N RECORD, Nov. 1999, at 40, 40; THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 43 (Little, Brown and Company, 3d ed. 1992); Tom Riley, *The Opening Statement: Winning at the Outset*, 3 AM. J. TRIAL ADVOC. 225, 227 (1979); see also BARNABY CONRAD, 101 BEST BEGINNINGS EVER WRITTEN ix (Quill Driver Books 2009) (discussing the importance of grabbing an editor's attention with the first line).

I. A BRIEF OVERVIEW OF APPLIED LEGAL STORYTELLING AS APPLIED TO THIS ARTICLE

Scholars, judges, and practitioners advise lawyers to tell a story to persuade or even to inform.¹⁶ While the storytelling movement may have its detractors, the applied legal storytelling movement has become well-accepted.¹⁷ Applied legal storytelling scholars propose that lawyers study story not simply for esoteric and philosophical value, but also for practical application of storytelling techniques to legal narratives.¹⁸

Within both applied legal storytelling and persuasion scholarship and craft books regarding fiction, lawyers and writers alike are advised to prime their audiences to prepare them to

¹⁶ See generally RUTH ANNE ROBBINS ET AL., *YOUR CLIENT'S STORY: PERSUASIVE LEGAL WRITING* 37-49 (Wolters Kluwer 2013) (encouraging attorneys to craft narratives); Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275, 275 (2011); James Parry Eyster, *Lawyer as Artist: Using Significant Moments and Obtuse Objects to Enhance Advocacy*, 14 J. LEGAL WRITING INST. 87, 87 (2008); J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 J. LEGAL WRITING INST. 53, 60 (2008) (stating that traditional legal modalities are incomplete); see also *Old Chief v. United States*, 519 U.S. 172, 188-89 (explaining that jurors may understand evidence better after hearing a coherent story); Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767, 767-68 (2006); Gerry L. Spence, *How to Make a Complex Case Come Alive for a Jury*, 72 A.B.A. J., Apr. 1, 1986, at 62, 63-64; cf. Derek H. Kiernan-Johnson, *A Shift to Narrativity*, 9 LEGAL COMM. & RHETORIC: JALWD 81, 81-82 (2012) (explaining the difference between the more character centered storytelling and the broader concept of narrative and calling for clarity in the application of these terms to law).

¹⁷ See generally ROBBINS, *supra* note 16, at 37-49 (encouraging attorneys to craft narratives); Berger, *supra* note 16 (discussing metaphors in legal narrative); Eyster, *supra* note 16 (discussing objects in legal narratives); Rideout, *supra* note 16, at 60 (stating that traditional legal modalities are incomplete); see also *Old Chief*, 519 U.S. at 189 (explaining that jurors may understand evidence better after hearing a coherent story); Robbins, *Harry Potter*, *supra* note 16, at 768 (proposing use of hero's journey in legal narratives); Spence, *supra* note 16; MYRON MOSKOVITZ, *WINNING AN APPEAL* 26 (Michie Co., rev. ed. 1985); cf. Kiernan-Johnson, *supra* note 16 (explaining the difference between the more character centered storytelling and the broader concept of narrative and calling for clarity in the application of these terms to law).

¹⁸ See generally ROBBINS, *supra* note 16, at 171-80 (encouraging attorneys to craft narratives); Eyster, *supra* note 16, at 88; Rideout, *supra* note 16, at 58; see also *Old Chief*, 519 U.S. at 189 (explaining that jurors may understand evidence better after hearing a coherent story).

accept what is to come later.¹⁹ Other scholars have advocated using storytelling techniques for priming in various articles, including Professor Michael Higdon's article on foreshadowing, Professor Maureen Johnson's article on persuasive hooks in introductory statements, and Professor Steve Johansen's article comparing movie trailers to preliminary statements in briefs.²⁰ Additionally, various articles advise storytelling in opening statements as a whole.²¹ This Article builds on these ideas. It is the first scholarly legal article to apply these fiction first-line techniques to both the first lines of opening statements and the first line of the story in briefs and petitions to the United States Supreme Court.²² In doing so, the Article examines great first

¹⁹ See Johansen, *supra* note 9, at 44-45 (discussing how beginnings prime the audience); Higdon, *supra* note 11 (discussing how foreshadowing earlier in the story can help the audience to believe events that happen later in the story); Stanichi, *supra* note 11 (discussing how first impressions can shape an audience's impression of later events in persuasive legal writing); KAHNEMAN, *supra* note 11 (explaining how last impressions are filtered through first impressions).

²⁰ See Higdon, *supra* note 11, at 1215-16; Maureen Johnson, *You Had Me at Hello: Examining the Impact of Powerful Introductory Emotional Hooks Set Forth in Appellate Briefs Filed in Recent Hotly Contested U.S. Supreme Court Decisions*, 49 IND. L. REV. 397, 397 (2016); Johansen, *supra* note 9, at 42.

²¹ See, e.g., Michael A. Kelly, *Once Upon an Opening*, 50 TRIAL 12, 12 (2014); Kanasky, *supra* note 15; Googasian, *supra* note 15; James A. Johnson, *Persuasion in Opening Statement: Generating Interest in A Convincing Manner*, 90 MICH. B.J., Jan. 2011, at 42, 44; Jim M. Perdue Sr., & Jim M. Perdue Jr., *Grand Openings Open the Door to Effective Jury Persuasion. Combine Recent Discoveries About the Psychology of Public Perception with Time-Tested Techniques, and Help Jurors See That Justice for Your Client Means Justice for All*, 46 TRIAL 46, 48 (2010); Roberts, *supra* note 15; Jeffery P. Robinson, *Opening Statements Become Opening Stories*, 30 CHAMPION 18, 18 (2006); Kenneth J. Melilli, *Succeeding in the Opening Statement*, 29 AM. J. TRIAL ADVOC. 525, 534-37 (2006); Allison Wood, *Opening Statement*, 17 CHI. B. ASS'N RECORD, Jan. 2003, at 36, 48; Note, *The Art of Trial Advocacy: "It's Like Deja Vu All over Again!" Yet Another Look at the Opening Statement*, ARMY LAW., June 2000, at 34, 35 (June 2000); Peter B. Carlisle, *In Cold Blood and the Fine Art of Opening Statement*, 34 PROSECUTOR, Mar./Apr. 2000, at 37, 37-38 [hereinafter Carlisle, *In Cold Blood*]; Peter B. Carlisle, *In Cold Blood and the Fine Art of Opening Statement*, 3 HAW. B.J., Nov. 1999, at 9, 10; Robert L. Hollingshead & John C. Maloney, Jr., *The Opening Statement*, N.J. LAW., Dec. 1998, at 16, 19; Allison, *supra* note 15, at 80; MAUET, *supra* note 15, at 43.

²² In his article, Steve Johansen focuses on preliminary statements, and the article is invaluable for anyone studying these issues. Johansen, *supra* note 9, at 43. In contrast, this article focuses on any portion of a brief or petition that could be considered the beginning of the story and focuses exclusively on the first lines.

sentences from novels. These ideas are discussed in greater detail below.

II. A FEW GREAT OPENING LINES FROM LAW AND LITERATURE

The following section examines some of these lines in greater detail to explore why and how they work. Readers may notice how some of these lines capture their interest immediately.

A. Fiction

Notice how these lines may capture attention and raise questions. In a competitive market, fiction books must grab readers immediately. However, in Section III, this Article will discuss how intrigue plays a critical role in persuasion, and how that intrigue can work in legal beginnings as well. The Article will also examine why and how these lines persuade.

“I was born twice: first, as a baby girl, on a remarkably smogless Detroit day in January of 1960; and then again, as a teenage boy, in an emergency room near Petoskey, Michigan, in August of 1974.”²³

“My name was Salmon, like the fish; first name, Susie. I was fourteen when I was murdered on December 6, 1973.”²⁴

“There was a boy called Eustace Clarence Scrubb, and he almost deserved it.”²⁵

THE LITTLE GIRLS who found the body of the missing boy were not angels, although that is how the newspaper described them, the following morning, beneath the headline.²⁶

“Morgaine speaks . . . In my time I have been called many things: sister, lover, priestess, wise-woman, queen.”²⁷

²³ JEFFREY EUGENIDES, *MIDDLESEX* 3 (Picador 2002).

²⁴ ALICE SEBOLD, *THE LOVELY BONES* 5 (Little, Brown and Company 2009).

²⁵ C. S. LEWIS, *THE VOYAGE OF THE DAWN TREADER* (HarperCollins 1994).

²⁶ SCOTT HEIM, *WE DISAPPEAR* 1 (Harper Perennial 2008).

²⁷ MARION ZIMMER BRADLEY, *MISTS OF AVALON* ix (Del Rey Books 1982).

“All children, except one, grow up.”²⁸

B. Law

Legal narratives can often be just as intriguing as fiction narratives if not more. While a few of these lines and their persuasiveness are examined in greater detail in Section III, notice how, in isolation, each of the lines compels the audience to read further.

“This case presents the extraordinary circumstance in which Petitioner faces imminent execution, despite the fact that the sole court to conduct a hearing on his *Atkins* claim concluded that he was in fact mentally retarded.”²⁹

“Petitioners married seeking a cherished status that protects families throughout life, from cradle to grave. But Ohio refuses to respect the dignity and status conferred on Petitioners’ marriages by other states.”³⁰

“This case involves a young Muslim woman, Samantha Elauf, who was denied a job at an Abercrombie & Fitch store. The denial was based on an interview with a store official who, seeing she wore a headscarf, thought Ms. Elauf would likely require an accommodation of the store’s ‘Look Policy,’ which prohibits headgear.”³¹

“At 10:21 p.m. on March 23, 2010, an officer of the Tulia, Texas, Police Department attempted to serve an arrest warrant on Israel Leija, Jr. at a Sonic drive-in restaurant. When the officer informed Leija that he was under arrest,

²⁸ J.M. BARRIE, *PETER PAN* 3 (Millennium Publications 2014).

²⁹ Petition for Writ of Certiorari at 2, *Brumfield v. Cain*, 135 S. Ct. 2269 (2015) (No. 13-1433), 2014 WL 2446754, at *2.

³⁰ Brief for Petitioners at 3, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 WL 860738, at *3.

³¹ Brief of *Amici Curiae* Fifteen Religious and Civil Rights Organizations in Support of Petitioner at 4, *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015) (No. 14-86), 2014 WL 7794005, at *4.

Leija sped away in his car toward Interstate 27, which he entered near mile marker 77.”³²

This is a case about obstruction. It is about lying to federal agents. It is about perjury. It is about fabricating evidence, and it’s about cheating investors in the stock market. These crimes were part of a cover-up, a cover-up by the defendants Martha Stewart and Peter Bacanovic, about something that happened on December 27, 2001.³³

“The evidence in this case will show that Michael Jackson literally put his life in the hands of Conrad Murray. The evidence in this case will show that Michael Jackson trusted his life to the medical skills of Conrad Murray.”³⁴

III. AN EXAMINATION OF GOOD AND BAD, FICTION AND LEGAL BEGINNINGS

Intrigued? If so, these beginning have performed one key role in persuasion already; some of them will be examined in greater detail below.

These beginnings form the first impression in the audience’s mind and is one of the most important opportunities to persuade;³⁵ people generally assign greater weight to what they

³² Petition for Writ of Certiorari at 5, *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (No. 14-1143), 2015 WL 1262912, at *5.

³³ Transcript of Plaintiff’s the USA’s Opening Statement at 769, *U.S. v. Stewart* 323 F. Supp. 2d 606 (2004) (No. 03CR717), 2004 WL 5563104, at *1.

³⁴ *Conrad Murray Trial Opening Statement by Prosecution, Sept. 27, 2011, (Part 1)*, YOUTUBE, (Sept. 27, 2011) <https://www.youtube.com/watch?v=701EXbmG6F8> [<https://perma.cc/2G7M-P5DW>] (last accessed Feb. 10, 2016).

³⁵ *Cf. Melilli, supra* note 21, at 525-27 (emphasizing the importance of opening statements); James R. Lucas, *Opening Statement*, 13 U. HAW. L. REV. 349, 351 (1991); Carlisle, *In Cold Blood, supra* note 21, at 37-38; Carlisle, *supra* note 21, at 10 (stating that the first line of opening statement is one of the most important); John J. Eannace, *An Art-Not A Science: A Prosecutor’s Perspective on Opening Statements*, 31 PROSECUTOR 32, 33 (1997) (stating that the first paragraph of the opening statement is the most important, that people believe what they hear first, and that the opening statement is the most important part of the trial). Various sources emphasize that opening statements are likely to be formative. *See MAUET, supra* note 15, at 41; JAMES W. MCELHANEY, *TRIAL NOTEBOOK* 88 (2d ed. 1987). A number of sources inaccurately assert that eighty percent of jurors are likely to make up their minds by the end of opening statement. *See Demetrio, supra* note 15; Hollingshead & Maloney, *supra* note 21, at 16-17; Jim Moody, *Opening Statement*, 29 ARK. LAW. 29, 29 (1995); Riley, *supra*

learn first or at least filter other information through information that they learn first.³⁶

A good beginning should: 1) set the tone;³⁷ 2) intrigue the audience;³⁸ 3) allude to story's theme;³⁹ and 4) prime the audience to accept what is to come.⁴⁰

note 15, at 226. However, that assertion turns out to be based on a myth about a study's conclusion. See Melilli, *supra* note 21, at 525-26.

³⁶ Stanchi, *supra* note 11, at 346; Kanasky, *supra* note 15; Googasian, *supra* note 15; Riley, *supra* note 15, at 228; Captain David A. Shaw, *The Opening Statement-Setting the Stage for A Successful Defense: A Note from Defense Appellate Division*, ARMY LAW., July 1975, at 39, 40.

³⁷ Cf. Moody, *supra* note 35 (advising that opening statement as a whole should set the tone); MAUET, *supra* note 15, at 51 (advising that delivery and demeanor in the first minutes of opening statement should convey confidence and integrity); cf. Johansen, *supra* note 9, at 42 (discussing how movie trailers must capture the "feel" of the story).

³⁸ Cf. Bitterman, *supra* note 10, at 1011 (stating that preliminary statements in briefs should establish a theme); Johansen, *supra* note 9, at 42 (discussing how beginnings of movie trailers and preliminary statements prime the audience to believe a theme); Allison, *supra* note 15, at 81 (stating that the first line of opening statement should hook the jury). Various sources advocate hooking or grabbing the attention of the jury generally in opening statement. See Kanasky, *supra* note 15, at 27; Googasian, *supra* note 15; Roberts, *supra* note 15; Demetrio, *supra* note 15; MAUET, *supra* note 15, at 4, 43; Riley, *supra* note 15, at 226; see also CONRAD, *supra* note 15, at ix. (discussing the importance of grabbing an editor's attention with the first line).

³⁹ Riley, *supra* note 15, at 89 (advocating placing the theme first or second in the opening statement). A number of sources advocate developing a theory, a theme, or both in the opening statement generally. See Kelly, *supra* note 21, at 13 (theme); Kanasky, *supra* note 15, at 27 (theme); Googasian, *supra* note 15 (theory and theme); Johnson, *supra* note 21, at 43 (theme); Perdue, *supra* note 21 (theme); Robinson, *supra* note 21, at 19 (theory and theme); Melilli, *supra* note 21, at 537-41 (theory and theme); Wood, *supra* note 21 (theory); Hollingshead & Maloney, *supra* note 21, at 18-19 (theory and theme); Lucas, *supra* note 35, at 349 (theory); Eannace, *supra* note 35, at 33, 35 (theme); Moody, *supra* note 35 (theme); Steven H. Goldberg, *What Your Opening Statement Should and Shouldn't Do Some Surprising Advice*, 2 CRIM. JUST., Fall 1987, at 11, 12 (theme).

⁴⁰ Cf. Stanchi, *supra* note 11, at 306 (discussing throughout how priming helps the audience to focus on and accept what is to come); Kanasky, *supra* note 15, at 26-27 (stating that jurors can filter the rest of what they learned through trial through the opening statements with either positive or negative effects); Perdue, *supra* note 21 (explaining that an opening statement should provide a context for understanding the evidence); Lucas, *supra* note 35, at 350 (noting that opening statement's purpose is "to apprise the jurors of a factual context in which to assimilate and integrate the evidence as it unfolds during the trial"); Johansen, *supra* note 9, at 43-44 (in the context of an article on preliminary statements, describing various studies that reveal how people form lasting first impressions in milliseconds).

A. Overview of the Tasks Beginnings Perform

1. Tone Setting

The tone setting of the first line plays a role in persuading the audience/reader in both fiction and legal narratives. Tone reflects a writer's attitude towards readers.⁴¹ In fiction, a well-established tone can aid readers' suspension of disbelief in a supernatural tale, plant mistrust in an unreliable narrator, establish a conversational rapport, or evoke childlike delight. In law, tone establishes credibility and creates a professional rapport.⁴² In so doing, the tone can create trust and maintain attention, and, thus, persuade.

A few key traits establish a credible, realistic, or sometimes emotional tone in the fiction and legal openings explored in subsections and II.A and II.B. First, a logical order and logical sentence structure, rather than rambling, instills more trust in the narrator's reasoning. Second, a few concrete facts convey a sense that the narrator is telling a true or real story based in fact. Third, careful and selective use of adjectives and adverbs, or even total omission of these words, seems less argumentative. Fourth, a few appropriate adjectives paired with concrete and contrasting facts can establish a tone of rightful indignation.

⁴¹ J.A. CUDDON, *DICTIONARY OF LITERARY TERMS AND LITERARY THEORY* 920 (Penguin Books 1999); Bret Rappaport, *Using the Elements of Rhythm, Flow, and Tone to Create A More Effective and Persuasive Acoustic Experience in Legal Writing*, 16 J. LEG. WRITING INST. 65, 99 (2010); see also Andrea McArdle, *Teaching Writing in Clinical, Lawyering, and Legal Writing Courses: Negotiating Professional and Personal Voice*, 12 CLINICAL L. REV. 501, 503 (2006) (discussing tone as relates to voice).

⁴² See ROBBINS, *supra* note 16, at 49 (explaining how the proper tone establishes credibility); Rappaport, *supra* note 41, at 99-101 (explaining how tone enhances the credibility of legal writing); Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 J. LEG. WRITING INST. 257, 277 (2002) (indicating that judges prefer a tone that strikes a balance between fairness and advocacy); cf. MICHAEL R. SMITH, *ADVANCED LEGAL WRITING THEORIES AND STRATEGIES IN PERSUASIVE WRITING* 243 (Aspen Law & Business 2008) (explaining how a metaphor that strikes the wrong tone, such a humorous tone regarding unfortunate circumstances, can undermine credibility and destroy emotional appeal); Ian Gallacher, *Do RoboMemos Dream of Electric Nouns?: A Search for the Soul of Legal Writing*, 4 CASE W. RESERVE J.L. TECH. & INTERNET 41, 54-55 (2012) (examining the persuasive tone set by a single phrase written by Lawrence Tribe).

2. Intrigue

Likewise, intrigue, including the contrasts mentioned above, can persuade the audience.⁴³ Upon seeing an intriguing set of facts that raises questions and piques curiosity, the audience may take a heuristic leap and start subconsciously answering the questions posed.⁴⁴ In doing so, the audience is more primed to accept similar answers once they receive them.⁴⁵ For conclusions the audience arrives at on their own appear more logical.⁴⁶

Intrigue performs another role as well—grabbing the audience’s attention.⁴⁷ Juries and judges cannot be persuaded by stories they did not hear. Two ways that the beginnings create intrigue are by (1) including contrasting elements or (2) presenting a set of facts that seem impossible despite being true. In both instances, some sort of factual references are often needed to plant a seed of credibility.

3. Theme

This intrigue helps the audience to hear the theme.⁴⁸ Writer Nancy Kress describes theme as, “The most fraught word in literature.”⁴⁹ It has been described as an implied worldview,⁵⁰ as a

⁴³ Cathren Koehlert-Page, *Breaking Bad Facts: What Intriguing Contradictions in Fiction Narratives can Teach Lawyers about Coping with Harmful Evidence*, 13 LEGAL COMM. & RHETORIC: JALWD 1, 6 (2016).

⁴⁴ Cf. *Higdon*, *supra* note 11, at 1213-17 (explaining that foreshadowing often causes the audience to anticipate what will happen later in a narrative so that they find later happenings more believable); LAMB, *supra* note 8, at 37 (stating that the beginning should give the reader a good sense of what the conflict is).

⁴⁵ See *Higdon*, *supra* note 11, at 1213-17 (explaining that foreshadowing often causes the audience to anticipate what will happen later in a narrative so that they find later happenings more believable); LAMB, *supra* note 8, at 37 (stating that the beginning should give the reader a good sense of what the conflict is).

⁴⁶ See *Higdon*, *supra* note 11, at 1213-17 (explaining that foreshadowing often causes the audience to anticipate what will happen later in a narrative so that they find later happenings more believable); LAMB, *supra* note 8, at 37 (stating that the beginning should give the reader a good sense of what the conflict is).

⁴⁷ See Koehlert-Page, *Breaking Bad*, *supra* note 43, at 6.

⁴⁸ See *id.* at 7.

⁴⁹ NANCY KRESS, DYNAMIC CHARACTERS: HOW TO CREATE PERSONALITIES THAT KEEP READERS CAPTIVATED 247 (Writer’s Digest Books 1998).

⁵⁰ *Id.* at 253.

general subject,⁵¹ the “why it matters” of a book,⁵² the central idea,⁵³ and the moral of the story.⁵⁴ For the sake of ease, this Article uses theme to mean the moral of the story. A good beginning shows a relationship regarding key concepts by using key words to allude to or even capture the theme.

In persuasive legal writing, once the audience is convinced of the theme, the audience is persuaded that ruling in the client’s favor is fair and just.⁵⁵ A good allusion using keywords that evoke the theme in the beginning plants a seed in the audience members’ minds.

4. Priming

Finally, good openings prime the audience to accept what is to come.⁵⁶ Priming is planting seeds in the audience’s mind to condition them to accept what comes later.⁵⁷ A good storyteller plants seeds that then grow as the story develops. Priming is actually the result of a related concept known as primacy. The audience filters its perception of later information based on information that it hears first.⁵⁸ Priming establishes the filter through which later information will be processed.⁵⁹

The beginnings examined in this Article prime audiences by revealing a contrast or conflict that is at the heart of the story. These beginnings show a relationship between these contrasts that illustrates how the story’s theme could be fitting. They also

⁵¹ JOHN GARDNER, *THE ART OF FICTION: NOTES ON CRAFT FOR YOUNG WRITERS* 70 (Vintage Books 1991).

⁵² Bonny Becker, *Lost in the Woods of Plot? Here’s a Way Out*, in 2004 CHILDREN’S WRITER’S AND ILLUSTRATOR’S MARKET 31 (Writer’s Digest Books 2003).

⁵³ CUDDON, *supra* note 41, at 913.

⁵⁴ ROBBINS, *supra* note 16, at 45.

⁵⁵ *Id.*

⁵⁶ Johansen, *supra* note 9, at 43-44 (describing studies that show that people make lasting first impressions and filter other information through their first impressions).

⁵⁷ *See id.* at 44; Stanchi, *supra* note 11, at 308; *see also* Higdon, *supra* note 11, at 1215-16 (indicating that when planted seeds cause the audience to anticipate events, those events are more believable once they happen).

⁵⁸ *See* Bitterman, *supra* note 10, at 1011 (stating that the preliminary statement in briefs should reveal the conflict).

⁵⁹ *See* Johansen, *supra* note 9, at 44; Stanchi, *supra* note 11, at 306-09; *see also* Higdon, *supra* note 11, at 1215-16.

provide some support or proof, either by way of select concrete facts or by virtue of an unreliable narrator's actions. In some instances, these beginnings present an alternate lens for viewing events. These techniques are how good storytellers prime the audience.

B. Fiction Opening Lines Analyzed

In the best opening lines the traits of tone-setting, intrigue, theme, and priming work together as part of an organic whole. Thus, four opening lines of novels are examined below to illustrate how each works together. In the subsections that follow, this Article will examine how the opening lines work similarly in legal narratives and will draw comparisons.

1. Mists of Avalon

"Morgaine speaks. . . In my time I have been called many things: sister, lover, priestess, wise-woman, queen."⁶⁰

In the opening lines of *Mists of Avalon*, Marion Zimmer Bradley establishes a prophetic tone, intrigues readers familiar with Arthurian legend who are curious about Morgan Le Fay's⁶¹ perspectives, alludes to a theme regarding the conflict inherent in filling multiple major roles, and primes readers to accept that theme.

a. Tone

The first words "Morgaine speaks" seem almost prophetic. They create a sense of eeriness particularly in combination with "priestess" and "wise-woman," which indicate a spiritual or fantasy element to the book.⁶² She speaks directly to readers in the first person, involving us in her prophetic-seeming revelation.

⁶⁰ BRADLEY, *supra* note 27.

⁶¹ See generally Steve Greenlee, *Old-Fashioned Women's Lib*, BOSTON GLOBE, July 15, 2001 (discussing how Morgan Le Fay has been recast as Morgaine); Lyn Gardner, *The Legend of King Arthur Bloomsbury Theatre, London*, GUARDIAN UK, Nov. 3, 2003.

⁶² BRADLEY, *supra* note 27.

This tone can lull readers into suspension of disbelief regarding the supernatural⁶³ tale to follow.

Hypnotized, readers become more prepared to believe the fantasy story. So this story persuades readers to accept its truth, including Morgaine's truths.

b. Intrigue-Past Knowledge

The *Mists of Avalon* hook regarding Morgaine's truths depends somewhat on readers' prior knowledge.⁶⁴ Presumably the reader who has seen the cover, knows the name, "Avalon," the mythical island in King Arthur's kingdom and read the dust jacket has some rough idea that this book is an Arthurian fantasy.⁶⁵ As such, readers familiar with the legend of Arthur might suspect that Morgaine is Morgan Le Fay, the half-sister who destroyed him, a villain in Arthurian legend.⁶⁶ Yet, here, this villain's contemporaries have used positive terms for her "priestess," "wise-woman," and "queen" sound like particularly rosy names.⁶⁷ Thus, the contrast between villainy and reverence creates curiosity and pushes readers forward seeking an answer to the question, "Was Morgan Le Fay unfairly maligned?"

The placement of "sister" next to "lover" may also evoke greater curiosity in those familiar with Arthurian legend as Morgan Le Fay is alleged to have bewitched her brother in other tales.⁶⁸ Wondering whether this Morgaine's tale is consistent, many readers may turn the page to find the answer.

Because the passage is in first person, it creates greater curiosity. Readers see through the eyes of someone whom they may have once reviled and wonder how that could be so—what her story might be.

⁶³ The book itself involves fairies, occasional spells or charms, and prophetic sight. See, e.g., BRADLEY, *supra* note 27, at ix, 4-5, 22 (noting a few pages that reference fairies, charms, or sight).

⁶⁴ Cf. Johansen, *supra* note 9, at 58-59 (discussing how some movie trailers are star-based and explaining that the star with which people are already familiar is the hook).

⁶⁵ See BRADLEY, *supra* note 27 (cover and blurb).

⁶⁶ See generally Greenlee, *supra* note 61; Gardner, *supra* note 61.

⁶⁷ BRADLEY, *supra* note 27.

⁶⁸ See *id.*

That push to hear her story and seek an answer is the first step in persuasion. The audience seeks consistency within these contradictions and turns the page to see whether the author will deliver on this implicit promise of coherence.

c. Theme

The contradictions implied in the first lines also set up the theme of the whole book. As a woman, and as so many woman then and now,⁶⁹ Morgaine plays many roles—some of which involve sacrifice, others that may involve her own heart and her own hurt.⁷⁰ Yet she was vilified nonetheless, often because of the conflict between the roles that she must play.⁷¹ Her world expected her to be all of these things and yet grew angry at her for not being any one of them exclusively.⁷²

In her role as an acolyte and future priestess and as wise-woman of Avalon, Morgaine develops strength and independence.⁷³ However, this role costs her several potential lovers, Lancelet, Kevin, and Accolon. She falls for Lancelet, who has a hero/rescuer complex, and chooses the helpless Gwenhwyfar over her.⁷⁴ Later, Morgaine and her lover, Kevin, the Merlin of

⁶⁹ See Dana Milbank, *The Sexist Double Standards Hurting Hillary Clinton*, WASH. POST (Feb. 12, 2016), https://www.washingtonpost.com/opinions/the-sexist-double-standards-hurting-hillary-clinton/2016/02/12/fb551e38-d195-11e5-abc9-ea152f0b9561_story.html?utm_term=.474a2b3d432f [<https://perma.cc/9T4P-B6HH>] (opining that Hillary Clinton is boxed in regarding her roles and reactions in the election); *Can Women Have it All?*, EVENING STANDARD, Aug. 5, 2010, at 39 (protesting that it is too hard for women to have it all); Paula Davis Laack, *Can Women Have It All? A New Model*, HUFFINGTON POST (Feb. 13, 2014), http://www.huffingtonpost.com/paula-davislaack/can-women-have-it-all-a-n_b_4769266.html [<https://perma.cc/Y988-KV4V>] (proposing how to work through various roles); Anne-Marie Slaughter, *Why Women Still Can't Have it All*, THE ATLANTIC (July/August 2012), <http://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020/> [<https://perma.cc/2YCC-EKSQ>] (explaining the conflicts that prevent women from having it all).

⁷⁰ See BRADLEY, *supra* note 27 (foreshadowing that throughout the book Morgaine sacrifices and experiences heartbreak).

⁷¹ See *id.*

⁷² See *id.* These problems occur throughout the book.

⁷³ See *id.* at 129-71 (telling the story of Morgaine's time in training at Avalon).

⁷⁴ See, e.g., *id.* at 155-59 (telling the story of the first instance where Morgaine feels attracted to Lancelet yet is spurned for Gwenhwyfar).

Britain, part ways after he betrays Avalon and buries the priestess, Vivianne, at a Christian site.⁷⁵ Ultimately, when her brother, Arthur, turns his back on Avalon, Morgaine pits her lover Accolon against him.⁷⁶ Accolon dies.⁷⁷

Morgaine's role as future priestess costs her the role of sister as well when she is fooled into lying with her own brother, Arthur, during an entranced spiritual ritual.⁷⁸ This act creates a rift between the two.⁷⁹

Ironically, the rift between them also temporarily costs Morgaine her role as priestess.⁸⁰ Instead of using the sway she once had over her brother to secure Avalon's place, she relinquishes her hold on him.⁸¹

Later, her role as sister to the king costs her a lover when she misunderstands Arthur when he asks her whether she will consent to marry.⁸² She agrees, thinking she will marry her lover, and, instead, winds up married to King Uriens.⁸³ Morgaine then becomes a queen.⁸⁴

In the end, the events set in motion when Morgaine lay with Arthur become the undoing of Camelot. The son of the union, sent to foster care, is raised without their wisdom and turns his back on them.⁸⁵ He challenges his father for the throne in the end, and they both die.⁸⁶

Ultimately, the old religion fades, and Morgaine, who was caught in too many conflicting roles, is vilified in other tales.⁸⁷

⁷⁵ See *id.* at 502-05.

⁷⁶ See *id.* at 732-35, 739.

⁷⁷ See *id.* at 742-43.

⁷⁸ See *id.* at 171-81 (telling the story of the ritual).

⁷⁹ See, e.g., *id.* at 212 (touching on Morgaine's angst).

⁸⁰ See *id.* at 228-29.

⁸¹ See *id.* at 211-12.

⁸² See *id.* at 565-66.

⁸³ See *id.*

⁸⁴ See *id.*

⁸⁵ See *id.* at 222, 230-31, 248-51, 650.

⁸⁶ See *id.* at 650, 865-68.

⁸⁷ See *id.* at 869-76 (showing how the old religion fades but still has influence in the new religion); Steve Greenlee, *Old-Fashioned Women's Lib*, BOSTON GLOBE, July 15, 2001, at 3 (discussing how Morgan Le Fay has been recast as Morgaine); see generally Lyn Gardner, *The Legend of King Arthur*, Bloomsbury Theatre, London, GUARDIAN UK, Nov. 3, 2003 (discussing how Morgan Le Fay malfeases).

For readers familiar with Morgan Le Fay, the first sentence alludes to all of these ideas. In so doing, it broadly summarizes the plot. It contains the theme, “How can she be so vilified if she was all of these good things?” Yet, the potential conflict between these roles also hints an answer to this question.

Ultimately, the sentence conveys a theme—the world often expects women to fill so many roles, yet frequently maligns them when in fulfillment of one role conflicts with another.

d. Priming

This beginning also primes readers to accept the theme of conflict, the outcome, and even Morgaine herself. The writer primes readers by providing them with a contrast. These roles, “sister, lover, priestess, wise-woman, and queen,” are large roles.⁸⁸ Moreover, people seldom think of “sister” in conjunction with “lover,” or “queen” in conjunction with “priestess.”⁸⁹ Thus, the line plants a seed in the subconscious of many readers—these roles are in conflict.

Yet, the positive connotations associated with these roles plants another seed—perhaps Morgaine has been unfairly maligned in other tales. After all, are not many of us sisters, lovers, and wise-women—or perhaps, daughters, wives, lovers, mothers, and breadwinners?⁹⁰ Maybe some of us are sons, husbands, lovers, and wage-earners. All readers may relate in some way to the demand of filling multiple roles and may feel that first seed of empathy for Morgaine and for all women in similar circumstances. Thus, readers may see a relationship between these contrasts that make the theme fitting.

Finally, the beginning seems to be supported by concrete facts. Morgaine has been called these things.⁹¹ Thus, it seems that the storyteller is about to tell readers “the real truth.”

⁸⁸ BRADLEY, *supra* note 27.

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *See id.*

2. *Catcher in the Rye*

In contrast, the first sentence of *The Catcher in the Rye* seems to tell the biased truth. It establishes a casual and conversational tone with an unreliable narrator, makes readers curious about the conflict between Holden Caulfield's education and irreverence as well as the conflict between his actions and words, alludes to a theme about the struggle between the rejection and embrace of innocence, and primes readers to accept that struggle.

"If you really want to hear about it, the first thing you'll probably want to know is where I was born, and what my lousy childhood was like, and how my parents were occupied and all before they had me, and all of that David Copperfield kind of crap, but I don't feel like going into it, if you want to know the truth."⁹²

a. *Tone*

This contrasting beginning establishes voice and tone. Caulfield rambles, uses informal word choices, including cuss words.⁹³ Caulfield speaks in the first person as though he is sitting down with his readers to have a conversation.⁹⁴ Yet, he also makes a literary reference—David Copperfield.⁹⁵ So readers may feel as though they are sitting down at a bar for a casual, yet intellectual conversation with a somewhat educated person.⁹⁶

This tone achieves two persuasive goals—convincing the audience to listen to Caulfield's tale and persuading them of the theme. Caulfield's chatty combination of the intellectual reference

⁹² J.D. SALINGER, *THE CATCHER IN THE RYE* 3 (Little, Brown & Company 1945).

⁹³ See CONRAD, *supra* note 15, at 83 (saying that Caulfield begins "chattily"); see ROBBINS, *supra* note 16, at 25 (discussing how word choice affects tone).

⁹⁴ See Roy Peter Clark, *For Banned Books Week: An X-Ray Reading from Catcher in the Rye*, POYNTER (Sept. 24, 2014), <http://www.poynter.org/2014/for-banned-books-month-an-x-ray-reading-from-catcher-in-the-rye/271127/> [<https://perma.cc/7Z97-SFQD>] (stating that the beginning "sounds like someone talking"); see generally Larry Muhammad, *How Kids Regard Salinger These Days*, COURIER JOURNAL, Feb. 1, 2010 (saying it is as though readers are in the room with Caulfield).

⁹⁵ See generally CHARLES DICKENS, *DAVID COPPERFIELD* (Wordsworth Ed. Ltd. 1997).

⁹⁶ See Clark, *supra* note 94 (indicating that Caulfield has made a mature literary allusion).

and crass cynicism is interesting in and of itself, and this tone compels readers to tune in.⁹⁷ These contrasts also lend themselves well to the theme of waffling between adulthood and innocence, which is described in more detail in subsection (c) below.

b. *Intrigue*

This beginning hooks readers, compelling them to read forward.⁹⁸ Readers may be curious about the contrast between Caulfield's educated background and his irreverent tone.⁹⁹ They read forward wanting to see how these two things fit together.

Caulfield also establishes himself as a bit of an unreliable narrator in his first sentence, further creating curiosity.¹⁰⁰ Despite all that, Caulfield refuses to tell readers about his upbringing and history. We learn so much about him in that single sentence.¹⁰¹ He's educated enough to be familiar with David Copperfield,¹⁰² yet he uses everyday word choices and cusses. He has rejected his background and is cynical, perhaps a bit put upon. When he states, "I don't feel like going into it, if you want to know the truth," despite already rambling a lot and revealing much, readers holding a volume in their hands suspect that he may be about to

⁹⁷ See LAMB, *supra* note 8, at 38 (describing Caulfield as resentful in the opening line); Hannah Lenkey, *The Best Opening Lines in Books*, THE ODYSSEY (July 21, 2013), <http://theodysseyonline.com/oglethorpe/books-best-opening-lines/128128> [<https://perma.cc/7VHD-WSQ3>] (describing Caulfield as "pessimistic"); Mark Dark, *12 Things We can Learn About Holden Caulfield from the Opening Para.*, SREENWRITE.ORG (Nov. 5, 2014), <http://screenwrite.org/2014/11/05/opening-chapter-the-catcher-in-the-rye/> [<https://perma.cc/UP5D-LP76>] (describing Caulfield as "apathetic").

⁹⁸ Michelle W., *Writing 201: Intros and Hooks*, DAILY POST (July 27, 2014), <https://dailypost.wordpress.com/assignments/intros-and-hooks/> [<https://perma.cc/L9N9-CPH3>] (stating Caulfield sets up the entire novel with the first sentence).

⁹⁹ Cf. LAMB, *supra* note 8, at 38 (describing Caulfield as resentful in the opening line); Lenkey, *supra* note 97 (describing Caulfield as "pessimistic"); Dark, *supra* note 97 (describing Caulfield as "apathetic"); Clark, *supra* note 94 (noting that the David Copperfield reference sounds like a mature literary allusion).

¹⁰⁰ Cf. Dark, *supra* note 97 (indicating that readers are unsure in the beginning whether Caulfield is an unreliable narrator); Clark, *supra* note 94 (questioning whether Caulfield is a reliable narrator).

¹⁰¹ See Lenkey, *supra* note 97 (stating that readers learn a lot from the beginning); Dark, *supra* note 97 (listing things readers learn about Caulfield from the beginning).

¹⁰² Cf. Clark, *supra* note 94 (noting that the David Copperfield reference sounds like a mature literary reference); Dark, *supra* note 97 (noting that the reference shows us that Caulfield is a reader).

reveal a whole novel's worth of his story.¹⁰³ Again, this contrast makes readers curious regarding how the contrast fits together.

c. Theme

These contrasts comprise the overall theme of the story. When we stand on the precipice of adulthood, many of us struggle with simultaneous rejection and embrace of the loss of innocence.¹⁰⁴ Caulfield rejects the adult world of his culture,¹⁰⁵ and he complains often of “phonies.”¹⁰⁶ Yet, he himself lies. “I’m the most terrific liar you saw in your life If I am on my way to the store to buy a magazine, even, and somebody asks me where I am going, I’m liable to say I’m going to the opera.”¹⁰⁷

He tries to cling on to childhood and vaunts examples of innocence. He appreciates the child-like nature of his little sister Phoebe and would rather speak to her than his parents.¹⁰⁸ He waffles between wanting sex, wanting to handle girls with care, and reproaching himself for not continuing after girls tell him to stop.¹⁰⁹ Even the title of the book springs from Caulfield’s statement about a dream regarding catching children who go over the edge of a cliff of rye.¹¹⁰ He speaks of wishing that things would stay frozen in time.¹¹¹ Yet, ultimately, Caulfield asserts that

¹⁰³ SALINGER, *supra* note 92.

¹⁰⁴ Clifford Terry, *Frontline Looks at the Man Who Shot Lennon*, CHICAGO TRIBUNE, Feb. 9, 1988, at 7 (characterizing the theme broadly as “anti-phony”) (broadly categorizing the theme as “coming of age”). Various works broadly categorizing theme as alienation, angst, innocence, or coming of age. *See generally, e.g.*, JONATHAN COUPLAND, *THE CATCHER IN THE RYE* AND J.D. SALINGER (2014) (discussing alienation, angst, and innocence); BOOKHACKER, *THE CATCHER IN THE RYE: A BOOKHACKER SUMMARY* (2013) (discussing belonging, alienation, coming of age, and identity).

¹⁰⁵ *See, e.g.*, SALINGER, *supra* note 92, at 131-33.

¹⁰⁶ *See, e.g., id.* at 3-4, 14, 49-50, 59, 83-86, 100, 106, 116, 138.

¹⁰⁷ *See id.* at 22.

¹⁰⁸ *See id.* at 87-90.

¹⁰⁹ *See id.* at 63-64, 120-21. Caulfield alludes to rape. He says, “You take a girl when she really gets passionate, [and] she just hasn’t any brains. . . . They tell me to stop, so I stop.” *Id.* at 121. More than once, Caulfield lies about his age to do things that society views as reserved for adults yet that that fail to exemplify maturity, such as drinking or having sex with a prostitute. *Id.* at 91, 119.

¹¹⁰ *See id.* at 224-25.

¹¹¹ *See id.* at 158.

children must be allowed to take risks.¹¹² And in the end of the novel, Caulfield speaks about returning to school.¹¹³

These ideas are reflected in the opening line. Already, readers see Caulfield contradicting himself in a simultaneous rejection and embrace of story. He protests that he is not going to tell his whole story, yet he has already revealed so much. His cynicism for the adult world rings through. “All of that David Copperfield kind of crap” seems to be the first hint that Caulfield finds the world and its stories disingenuous. Yet, he has already misrepresented himself when he claims, “I don’t feel like going into it” Then to layer his misrepresentation on thick, he adds, “to tell you the truth,” when he is doing exactly the opposite.¹¹⁴

d. Priming

This intriguing contradiction primes readers to accept the dual theme.¹¹⁵ Like the beginning in *Mists of Avalon*, this beginning reveals contrasts that are at the root of the story. Caulfield seems educated yet casual. He seems to deride revelation of a story. Yet he is telling one. These contrasts are in relationship to one another. Caulfield likely comes across as someone who has armored up but is not being honest with himself or others with his struggle between authenticity, adulthood, and innocence.

Salinger provides readers with concrete facts that support this theme. Here, these facts come in the form of Caulfield’s own behavior as a narrator and his dialogue. He has some literary acumen.¹¹⁶ He is poking fun of story while his own behavior in telling a story contradicts that.¹¹⁷

¹¹² See *id.* at 273-74.

¹¹³ See *id.* at 276.

¹¹⁴ *Id.* at 3.

¹¹⁵ Michelle W., *supra* note 98 (stating Salinger sets up the entire novel with the first sentence).

¹¹⁶ See SALINGER, *supra* note 92, at 3.

¹¹⁷ See *id.*

3. *Peter Pan*

Like the story of the boy struggling to grow up, the story of the boy who never will also achieves these tasks with its beginning. In J.M. Barrie's *Peter Pan*, the beginning achieves a magical tone for children, makes readers curious about the child who never grows, alludes to a theme of nurturance and anti-conventionality, and primes readers to accept this theme.

"All children, except one, grow up."¹¹⁸

a. Tone

This beginning effectively sets the tone as a magical children's story. The sentence is bare—a simple sentence, one subject and one predicate. Even the modifier, "except one" is short, almost Spartan.¹¹⁹ Writing at a young child's reading level is one way Barrie sets the tone for a children's story. Readers are further cued that the adult narrator is addressing children just two words in when they see the word "children."¹²⁰

As a reader, I hear a man with a deep English voice and feel as though I am a child sitting crossed legged by the fireside hearing this story. Other readers may hear a different voice or have a different feeling, but the line has a cozy, let-me-tell-you-a-story quality nonetheless. This quality derives not just from the bare language and simple structure but from the use of an action verb, "grow," and from the contrast that creates the intrigue described below.¹²¹

This tone setting convinces the reader sit and "listen" to this cozy voice and to suspend disbelief regarding the magical tale.

b. Intrigue

This sentence grabs reader's attention and makes them curious. Readers take the sentence literally—meaning that Peter is not only emotionally a child but also physically a child.

¹¹⁸ BARRIE, *supra* note 28, at 3.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

Otherwise, Barrie could not use the word “all” as people might often say that immature adults are not grown up.¹²² Yet, readers know that all children do grow up physically. They read forward wondering how it could be so and what this child who never grows up could be like.

Another implicit question in this first sentence is “Why do children grow up?” This question hints at the central question of the book itself, “Will the Darling children return home and grow-up or stay forever and play in the world of imagination with Peter Pan in Neverland?” The question has already answered itself in the first line of the story since the narrator has told readers that only one child does not grow up. Nonetheless, readers stick with the novel to see how and why the Darling children grow up and why Peter Pan never does.

c. Theme

This first sentence alludes to the theme of nurturance and unconventionality in *Peter Pan*. A theme of the story is likely that children need parents’ nurturing but not the abuse of their authority, not convention for convention’s sake alone, and not smothering of imagination. Regarding imagination, the very idea of a child who never grows up is in and of itself imaginative. Moreover, for many, children represent imagination and lack of societal convention. That this child has never grown up hints at rebellion against the abuse of authority and convention for convention’s sake alone.

Ultimately, the Darling children need the nurturance and attachment of their real parents as opposed to living in a world where sometimes even the food is imaginary.¹²³ They forget how their father abused his authority when he tricked the youngest, Michael, into drinking medicine and upheld convention when he banished the dog, Nana, to the outdoors.¹²⁴ They return home to find a father who has learned his lesson and does penance as he

¹²² *Id.*

¹²³ *Id.* at 23, 86.

¹²⁴ *Id.* at 12, 59.

resides in the kennel, flouting all convention and sacrificing his vaunted position of authority.¹²⁵

Peter, however, is too afraid that he might have to work in an office.¹²⁶ He refuses to embrace convention and give up the world of imagination,¹²⁷ but still needs nurturance nonetheless. So, he comes back periodically for Wendy and her offspring so that they might do his spring-cleaning.¹²⁸ And forever, he calls them, "Mother."¹²⁹

The first sentence essentially reveals this outcome. That sentence also alludes to all of the potential implications of childhood. The idea is imaginative. Yet a child who never grows up sounds rebellious and in need of nurturance.

d. Priming

This beginning primes readers to accept the nurturing, anti-convention, pro-imagination theme. In this beginning, the writer gives readers a seemingly impossible event—a child who does not grow-up. Barrie also contrasts this child with other children. To support this relationship, Barrie presents readers with one fact we know is true—all other children grow up. Then he states the rest as though it is fact—"except one."¹³⁰ For many readers, the word "children" alone may trigger nurturing associations.¹³¹ The thought of a child who never grows-up is likely to arouse empathy for some readers and trigger their protective instincts. At the same time, the idea is rather fantastical and imaginative and anything but conventional. The writer has planted the first seed of this theme that is then itself nurtured as readers see various adults uphold foolish conventions and abuse their authority, and then see Pan's desperate need for mothering along with the other children's needs.

¹²⁵ *Id.* 83.

¹²⁶ *Id.* at 88. Some readers of this Article may admire Pan's wisdom upon working in an office.

¹²⁷ *Id.*

¹²⁸ *Id.* at 89.

¹²⁹ *Id.* at 93.

¹³⁰ *Id.* at 3.

¹³¹ *Id.*

4. *Middlesex*

Like the boy who never grew up, the girl who grew up to be a boy also begins zir¹³² story in a manner that performs all of these tasks. In Jeffrey Eugenides *Middlesex*, the beginning sets a realistic newspaper reporter tone, intrigues readers by presenting both a rare event (unheard of by some) and a contrast, alludes to a theme of amorphous gender categories, and primes readers to accept that theme. “I was born twice: first, as a baby girl, on a remarkably smogless Detroit day in January of 1960; and then again, as a teenage boy, in an emergency room near Petoskey, Michigan, in August of 1974.”¹³³

a. *Tone*

This beginning alerts readers that they are in for a rich and gritty tale of contemporary realistic fiction. It seems so real that readers may feel as though it is true.¹³⁴ “Smogless,” “Detroit,” and “Michigan” all cue readers that this story is contemporary realistic fiction before they ever see the date.¹³⁵ In combination with the other details, straight facts with little embellishment, these words make readers believe this story is true or based on a true story, though it is not. The narrator seems intelligent and reliable, like a news reporter. The details, the more complex, yet quite readable sentence structure, and the logical organization all create this impression. Note that the first clause is like an overall conclusion followed by a sing-posted roadmap supporting that conclusion. It seems so well-ordered. As a result of this logical, realistic tone, readers are more likely to trust the narrator.

¹³² Since Cal is a hermaphrodite, this article uses the gender-neutral pronouns “ze” and “zir” when referring to the portions of the story where Cal is no longer being raised as a girl. See *Glossary: Some Common (and Uncommon) Gender-Neutral Pronouns*, Huffington Post (Sept. 18, 2015), <http://www.huffingtonpost.com/huffwires/20150918/us-colleges-gender-pronouns-glossary/> [<https://perma.cc/4Q2Y-CUQG>] (via the ASSOCIATED PRESS).

¹³³ EUGENIDES, *supra* note 23, at 3.

¹³⁴ Cf. Alastair Harper, *Token Magical Realism Is a Cheap Trick*, GUARDIAN (Dec. 16, 2009), <https://www.theguardian.com/books/booksblog/2009/dec/16/token-magic-realism-cheap-trick> [<https://perma.cc/N9ZA-2PPT>] (describing the book as a whole as realistic).

¹³⁵ EUGENIDES, *supra* note 23, at 3.

b. Intrigue

Not only do readers trust the narrator, but they are likely also curious.¹³⁶ How can someone be born more than once and first as a boy then as a girl? Seeking an answer, they read forward.

Here Eugenides creates that curiosity by providing a rare event, similar to the unheard-of event in *Peter Pan*, and showing a contrast between genders. The concrete details lending the writing an air of reality fan the flame of this curiosity because, though it seems unusual, it also seems quite real.

c. Theme

This first sentence alludes to the theme of the entire story. Society tries to categorize us all as male or female, black or white, and so on, but these gender categories are too broad and harshly defined.¹³⁷ In the first sentence, readers see that Cal seems to have fit both gender categories at different points. The reference to an emergency room seems to hint at some trauma regarding being shoved into this category.

When Callie was born, she appeared to be a girl due to being born as a 5-Alpha-Reductase Hermaphrodite.¹³⁸ Her parents

¹³⁶ See Connie Ogle, *Friends Prepare for the Real World*, CHARLESTON GAZETTE & DAILY MAIL, Oct. 23, 2011, at 3F (describing the opening as “riveting”).

¹³⁷ “The ending is ambiguous, as suits the tone and theme. Cal, writes the author, has ‘the ability to communicate between genders, to see not with the monovision of one sex but in the stereoscope of both.’” Roger Harris, *Gender Bender*, STAR LEDGER Sept. 22, 2002, at 4 (also labeling “sexual ambiguity” as the theme of the book); see also, EUGENIDES, *supra* note 23, at 217 (“Emotions, in my experience, aren’t covered by single words. I don’t believe in ‘sadness,’ ‘joy,’ or ‘regret.’ Maybe the best proof that the language is patriarchal is that it oversimplifies feeling. I’d like to have at my disposal complicated hybrid emotions, Germanic train-car constructions like, say, ‘the happiness that attends disaster.’ Or: ‘the disappointment of sleeping with one’s fantasy.’ I’d like to show how ‘intimations of mortality brought on by aging family members’ connects with ‘the hatred of mirrors that begins in middle age.’ I’d like to have a word for ‘the sadness inspired by failing restaurants’ as well as for ‘the excitement of getting a room with a minibar.”); cf. Brad Zellar, *Androgynous in America: Jeffrey Eugenides’ Ambitious Novel Is a Classic Immigrant’s Tale with a Sexual Twist*, STAR TRIBUNE, Sept. 8, 2002, at 24F (labeling the theme as being about the androgynous muddle of childhood and adolescent yearning).

¹³⁸ EUGENIDES, *supra* note 23, at 3.

raised her as a girl, and she believed that she was one—she even identified with girls in many ways.¹³⁹

However, she begins to notice her differences and develops feelings for other girls.¹⁴⁰ Eventually, Callie gets run over by a tractor during a fight with her brother over a girl, winds up in the emergency room, and the doctors discover zir gender.¹⁴¹ A doctor in New York recommends surgery to make Cal a girl permanently, and Cal then flees to San Francisco, and embraces zir condition as a hermaphrodite.¹⁴²

This theme of gender ambiguity that echoes through the plot is already alluded to in the very first sentence about being born both a boy and a girl.

d. Priming

The beginning uses a rare event, two seemingly contrasting ideas, and concrete facts to prime readers to accept this theme. Like *Mists of Avalon*, this beginning starts with a contrast, the contrast of the two genders, and somewhat like *Peter Pan*, it starts not with an impossible but a rare event, a person being born twice, once a girl and later as a boy. The ideas are stated as fact, and the additional concrete facts, “smogless Detroit day” and “emergency room in Petoskey, Michigan,” make this rareness and this contrast seem more believable.¹⁴³ In fact, the term “emergency room” may lead some readers to start hypothesizing various medically-related outcomes, so that they later accept the ambiguity of gender once they hear the full story.¹⁴⁴

C. Legal Opening Lines Analyzed

The same traits used to prime readers to accept themes, suspend readers’ disbeliefs, and capture their attention in stories

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See Higdon, *supra* note 11, at 1215 (discussing how foreshadowing earlier in the story can help the reader to believe events that happen later in the story).

that are, in fact, completely false¹⁴⁵ can be used in legal narratives to persuade judges and juries. Opening lines of good legal narratives share the same traits as the opening lines of good fiction stories. They set the tone. They intrigue the audience, and that intrigue plants a seed of persuasion. This intrigue is particularly important in a petition to the Supreme Court of the United States where the attorney is trying to convince the Court to grant certiorari and must grab the Court's attention.¹⁴⁶ The opening lines should not only intrigue the audience but also should reflect a theme and theory of the case.¹⁴⁷ Finally, these opening lines prime the audience to believe the client's ultimate assertion.¹⁴⁸

These techniques are reflected below in four different openings to legal narratives, two of which are from a brief and a petition to the United States Supreme Court and two of which are from famous trials.

¹⁴⁵ While the facts of fiction stories may be invented, one aspect of a particularly good story can be true—the theme. Multiple award-winning novelist, Rita Williams-Garcia, has referred to the truths stories tell, meaning universal truths. Moreover, while the facts as a whole may not be true in fiction, some facts, such as “Detroit, Michigan,” are real in the sense that society generally agrees they exist. Detroit, Michigan, is a real place in that sense. See Rita Williams-Garcia, Vermont College of Fine Arts MFA in Writing for Children and Young Adults Faculty Lectures: You Can Handle the Truth (July 2007) (on file with Vermont College of Fine Arts).

¹⁴⁶ Cf. MOSKOVITZ, *supra* note 17, at 111 (discussing the importance of piquing the Court's interest in a petition for review).

¹⁴⁷ Cf. Riley, *supra* note 15, at 233-34 (advocating placing the theme first or second in the opening statement). A number of sources advocate developing a theory, a theme, or both in the opening statement generally. See Kelly, *supra* note 21, at 13 (theme); Kanasky, *supra* note 15, at 27 (theme); Googasian, *supra* note 15, at 54 (theory and theme); Johnson, *supra* note 21 at 43 (theme); Perdue, *supra* note 21, at 49 (theme); Robinson, *supra* note 21, at 19-20 (theory and theme); Mellili, *supra* note 21, at 537-41 (theory and theme); Wood, *supra* note 21, at 48 (theory); Hollingshead & Maloney, *supra* note 21, at 18-19 (theory and a theme); Lucas, *supra* note 35, at 350 (theme); Eannace, *supra* note 35, at 32-33 (theme and theory); Moody, *supra* note 35, at 29 (theme); Goldberg, *supra* note 39, at 12 (theme).

¹⁴⁸ See Johansen, *supra* note 9, at 44-45 (discussing priming); Stanchi, *supra* note 11, at 306-09 (discussing priming); Higdon, *supra* note 11, at 1215, 1218-27 (indicating that when planted seeds cause the audience to anticipate events, those events are more believable once they happen); see also Koehlert-Page, *Breaking Bad*, *supra* note 43, at 8 (referencing ultimate assertions).

1. *Brumfield v. Cain*

“This case presents the extraordinary circumstance in which Petitioner faces imminent execution, despite the fact that the sole court to conduct a hearing on his *Atkins* claim concluded that he was in fact mentally retarded.”¹⁴⁹

Just as with the fiction openings above, the opening sentence of this petition for writ of certiorari establishes a logical yet astounded tone, makes the reader curious as to why *Brumfield* is being executed under these circumstances, suggests a theme regarding the unreasonableness of executing an intellectually disabled man, and primes readers to accept that theme.

a. Tone

Without exaggerating, the attorneys for Kevan *Brumfield* reveal that they are aghast at the circumstances in this case and then provide readers with a factual and logical reason why they should be astounded as well.¹⁵⁰ Notice the lack of adverbs; this bareness is similar to the beginnings in *Middlesex* and even *Peter Pan* and *Mists of Avalon*. Often, adverbs and adjectives can be hyperbolic,¹⁵¹ flowery,¹⁵² or conclusory.¹⁵³ Here, the attorneys

¹⁴⁹ Petition for Writ of Certiorari at 2, *Brumfield v. Cain*, 135 S. Ct. 2269 (2015) (No. 13-1433), 2014 WL 2446754, at *2.

¹⁵⁰ See generally ROBBINS, *supra* note 16, at 49 (discussing how lawyers have to set a professional tone that conveys seriousness and respectfulness); TERRILL POLLMAN ET AL., LEGAL WRITING: EXAMPLES AND EXPLANATIONS 10 (Wolters Kluwer 2011) (advocating for a formal tone in legal writing).

¹⁵¹ Cf. MAUET, *supra* note 15, at 46 (warning against overstating the evidence in opening statements).

¹⁵² See POLLMAN ET AL., *supra* note 150, at 10 (generally advising avoiding attempting to be flowery); Greg Johnson, Esq., *Sweat the Small Stuff*, 40 VT. B.J., Fall 2014, at 37, 38 (encouraging writers to pare away excess adverbs and adjectives); cf. RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING 228 (Aspen, 5th ed. 2005) (“The simpler word often says more than the more dignified one.”); BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES 17-18 (2001) (advising against verbosity).

¹⁵³ “Argument by adjectives and adverbs is cheap argument. It is only slightly more sophisticated than *ad hominem*, which in turn is only slightly more sophisticated than a fistfight outside of a bar.” Jonathan K. Van Patten, *On Editing*, 60 S.D. L. REV. 1, 32 (2015) (discussing how these modifiers can be conclusory and argumentative); see also Maryt L. Fredrickson, *Book Review: The Seven Deadly Sins of Legal Writing*, 35 WYO. LAW. Aug. 2012, at 20, 20 (“Adverbs tend to foreshadow the response you hope the

avoided conclusory adverbs, but still chose two adjectives that fit the circumstances “extraordinary” and “imminent.”¹⁵⁴ Without layering on qualifiers too thick, the attorneys seem to convey the sentiment—it’s alright to be shocked that the state is executing an intellectually disabled man¹⁵⁵ even after conducting a hearing into his mental capacity.

This restraint from exaggeration makes the attorneys more reliable narrators than Caufield with his embellishments—

readers will make on their own.”); KAMELA BRIDGES & WAYNE SCHIESS, WRITING FOR LITIGATION 90 (Wolters Kluwer 2011) (advising to avoid hyperbolic adverbs and inflammatory adjectives); Koehlert-Page, *Come A Little Closer*, *supra* note 14, at 424 (explaining that adverb elimination can often lead to more vivid writing); Jonathan K. Van Patten, *Twenty-Five Propositions on Writing and Persuasion*, 49 S.D. L. REV. 250, 269 (2004) (discussing how adverbs can be conclusory); *see also* NANCY KRESS, CHARACTERS, EMOTION & VIEWPOINT 110 (Writer’s Digest Books 2005) (advising that carefully chosen adverbs can convey tone of voice and cautioning against overuse); *cf.* Lance N. Long & William F. Christensen, *Clearly, Using Intensifiers Is Very Bad-or Is It?*, 45 IDAHO L. REV. 171, 179 (2008) (indicating based on study data that overuse “intensifiers,” such as “clearly” is often disapproved of by judges, that it is often associated with negative outcomes, and advising others to use with caution); FRANCINE PROSE, READING LIKE A WRITER 16-17, 28 (HarperCollins 2006) (praising author Flannery O’Connor’s lack of adverb use and discussing how a character’s misuse of a word puts the reader in the character’s point of view); STEPHEN KING, ON WRITING: A MEMOIR OF THE CRAFT 125 (10th Anniversary ed. Scribner 2010) (“I believe the road to hell is paved with adverbs, and I will shout it from the rooftops.”); Sidney Powell, *Federal Appeals in the Fifth Circuit: Tips for the Texas Practitioner*, 42 BAYLOR L. REV. 97, 124 (1990); *but see* Scott Moise, *Adverbs: So Much Undeserved Hate for Such A Little Part of Speech*, 26 S.C. LAW., Nov. 2014, at 56, 56 (admitting to some problems with adverbs but arguing that legal readers need them to reach conclusions, yet not explaining how).

¹⁵⁴ *Cf.* Rappaport, *supra* note 41, at 103 (explaining that a few carefully chosen modifiers can “add color”).

¹⁵⁵ While the determination in the district court was that Brumfield was “mentally retarded,” *Brumfield v. Cain*, 854 F. Supp. 2d 366, 406 (M.D. La. 2012), *rev’d*, 740 F.3d 946 (5th Cir. 2014), *withdrawn from bound volume opinion withdrawn and superseded*, 744 F.3d 918 (5th Cir. 2014), *vacated and remanded*, 135 S. Ct. 2269 (2015), *rev’d*, 744 F.3d 918 (5th Cir. 2014), *vacated and remanded*, 135 S. Ct. 2269 (2015), *aff’d*, 808 F.3d 1041 (5th Cir. 2015), the United States Supreme Court deemed this term to be outdated and has replaced it with “intellectually disabled.” *Brumfield v. Cain*, 135 S. Ct. 2269, 2271 (2015); Carol Garfiel Freeman, *Supreme Court Cases of Interest*, 30 CRIM. JUST., Fall 2015, at 49, 51-52; *see also* Hall v. Florida, 134 S. Ct. 1986, 1990 (2014) (also switching to the use of this term); Robert M. Sanger, *IQ Intelligence Tests, “Ethnic Adjustments” and Atkins*, 65 AM. U.L. REV. 87, 96 (2015) (explaining the medical and psychiatric community has switched to this term). This Article substitutes “intellectually disabled” in place of “mentally retarded” throughout the rest of the discussion.

“really,” “probably,” “lousy,” and “crap.” Notice the narrator does not ramble on like Caufield either. By including a handful of the most salient facts and a reference to case law, the attorneys still maintain a logical tone without being robotic.¹⁵⁶ In that sense, the beginning tone is akin to *Middlesex* with its handful of key facts and concrete details. This tone-setting instills trust¹⁵⁷ while maintaining the aura of rightful indignation.

b. Intrigue

This sentence not only instills trust with its tone, but it also grabs the reader’s attention with two contrasting extremes—execution, the most extreme punishment in our legal system, and intellectual disability, an exceptional condition—often associated with vulnerability and even innocence.¹⁵⁸ This inclusion of contrasts is similar to the inclusion of the contrasting roles, “sister, lover . . .” in *Mists of Avalon* and the gender contrast in *Middlesex*, born twice, once as a girl and later as a boy. The *Brumfield* contrasts raise the following questions. Was Brumfield really intellectually disabled? How did the court reach that conclusion? Why was he sentenced to death under those

¹⁵⁶ Cf. Rappaport, *supra* note 41, at 100 (advising legal writers to strike a balance so as not to be too strident or colloquial); GARNER, *supra* note 152, at 48-49 (advising to be relaxed and natural rather than stuffy, aloof, or chummy).

¹⁵⁷ See ROBBINS, *supra* note 16, at 49 (explaining how the proper tone establishes credibility); Rappaport, *supra* note 41, at 99-100 (explaining how tone enhances the credibility of legal writing); cf. SMITH, *supra* note 42, at 243 (explaining how a metaphor that strikes the wrong tone, such a humorous tone regarding unfortunate circumstances, can undermine credibility and destroy emotional appeal).

¹⁵⁸ See Christin Grant, *The Texas Intellectual Disability Standard in Capital Murder Cases: A Proposed Statute for A Broken Method*, 54 S. TEX. L. REV. 151, 158 (2012) (mentioning naivete and gullibility as factors in the response system of individuals with intellectual disabilities); Anna M. Hagstrom, *Atkins v. Virginia: An Empty Holding Devoid of Justice for the Mentally Retarded*, 27 L. & INEQUAL. 241, 261 (2009) (indicating that intellectually disabled people may frequently be gullible or naive); Lois A. Weithorn, *Conceptual Hurdles to the Application of Atkins v. Virginia*, 59 HASTINGS L.J. 1203, 1222 (2008) (listing innocence and naiveté as characteristics that make intellectually disabled people vulnerable to commission of crimes); Elizabeth J. Reed, *Criminal Law and the Capacity of Mentally Retarded Persons to Consent to Sexual Activity*, 83 VA. L. REV. 799, 810 (1997) (stating that living in protected circumstances often leads intellectually disabled individuals to “the naïve view that everyone is a friend”).

circumstances? How was that conclusion reached? Curious readers will then read on to find answers.

c. Theme

In one sentence, Brumfield's attorneys captured the problem with his entire case—the decision to execute this intellectually disabled man was unreasonable,¹⁵⁹ in conflict with the Court's relevant decisions on an important federal question.¹⁶⁰

Brumfield was sentenced to die prior to the decision in *Atkins* where the Court held that the Eight Amendment substantively restricted the State's power to execute an intellectually disabled offender.¹⁶¹ Since *Atkins* had not yet been decided, Brumfield did not present evidence regarding his intellectual disability.¹⁶² However, mitigation evidence submitted at the sentencing phase of Brumfield's original trial indicated that he had an IQ of seventy-five on one test, a fourth-grade reading level, a learning disability, and past psychiatric challenges.¹⁶³

After *Atkins*, the state court denied Brumfield's request to prove that he was intellectually disabled and explained that the issue had been settled and that Brumfield had not carried his burden on that issue.¹⁶⁴

Brumfield sought habeas corpus relief from the federal district court, which held a seven-day hearing, and concluded that he was intellectually disabled and ineligible for execution.¹⁶⁵ In granting habeas corpus relief, the District Court held that the

¹⁵⁹ See *Brumfield*, 135 S. Ct. at 2273 (citing 28 U.S.C. § 2254(d)(2)) ("That decision, we hold, was 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'").

¹⁶⁰ See SUP. CT. R. 10 (setting the standards for granting a petition for a writ of certiorari); Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 856 (2014) (indicating that a conflict is one of the most important considerations in granting certiorari); cf. Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1630-36 (2008) (discussing empirical analyses demonstrating that lower-court conflict remains the most important consideration in granting certiorari).

¹⁶¹ *Brumfield*, 135 S. Ct. at 2273 (referencing *Atkins v. Virginia*, 536 U.S. 304 (2002)).

¹⁶² *Id.* at 2274-76.

¹⁶³ *Id.* at 2274-75.

¹⁶⁴ *Id.* at 2275.

¹⁶⁵ *Id.* at 2275-76.

state court's ruling "represented an unreasonable application of then-existing due process law."¹⁶⁶ Additionally and alternatively, the District Court held that the state court's decision "suffered from an unreasonable determination of the facts in light of the evidence presented in the state habeas proceeding in violation of § 2254(d)(2)," the statute providing for habeas corpus relief.¹⁶⁷

The Fifth Circuit reversed.¹⁶⁸ It rejected the District Court's holding that the state court's decision rested on an unreasonable determination of the facts and instead found that the state court did not abuse its discretion in denying Brumfield an evidentiary hearing.¹⁶⁹ Based on that determination, the Fifth Circuit did not review the District Court's finding that Brumfield is intellectually disabled.¹⁷⁰

The seeds of this plot and the overall theme are contained in the petitioner's first sentence. First, the attorneys establish a theme regarding grant of review. That first hurdle, grant of certiorari, is difficult to overcome.¹⁷¹ The Supreme Court of the United States receives thousands of petitions for review every year¹⁷² and has absolute discretion regarding a grant of review.¹⁷³ When appealing to the Court, references to the *Atkins* holding, the imminence of the execution, and the defendant's intellectual disability signal to the Court that its decision regarding this important federal issue is critical. In *Atkins*, the Court decided that the Eighth Amendment's prohibition on cruel and unusual

¹⁶⁶ *Id.* at 2275 (internal quotation mark omitted).

¹⁶⁷ *Id.*; see also 28 U.S.C. § 2254(d)(2) (2012).
(the basis for this habeas corpus relief).

¹⁶⁸ *Brumfield v. Cain*, 744 F.3d at 927; see also 28 U.S.C. § 2254(d)(1) (2012) (the basis for this habeas corpus relief).

¹⁶⁹ *Brumfield*, 744 F.3d at 926-27; see also 28 U.S.C. § 2254(d)(1) (2012) (the basis for this habeas corpus relief).

¹⁷⁰ See *Brumfield*, 744 F.3d 926-27; see also 28 U.S.C. § 2254(d)(1) (2012) (the basis for this habeas corpus relief).

¹⁷¹ Cf. Barry Sullivan, *Law and Discretion in Supreme Court Recusals: A Response to Professor Lubet*, 47 Val. U. L. Rev. 907, 924 (2013) (stating that the Court has absolute discretion in granting review).

¹⁷² Mary Garvey Algero, *A Step in the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions*, 70 TENN. L. REV. 605, 613 n.40 (2003); Andrew T. Solomon, *The Texas Supreme Court's Petition System: A System in Need of Reexamination*, 53 S. TEX. L. REV. 695, 715 n.87 (2012).

¹⁷³ SUP. CT. R. 10; Sullivan, *supra* note 171, at 924.

punishment barred the execution of the intellectually disabled.¹⁷⁴ Since these references raise Eighth Amendment concerns,¹⁷⁵ they imply an important federal issue.¹⁷⁶ Therefore, these references establish the standard for granting review, “a state court or a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court.”¹⁷⁷

The beginning also captures the theme that likely persuaded the Court to decide the case itself in *Brumfield*’s favor after granting review. Executing an intellectually disabled man after determining that he is “mentally retarded” is unreasonable. The only court to conduct an *Atkins* hearing determined that a man was intellectually disabled¹⁷⁸—yet a higher court still allowed his execution to continue.¹⁷⁹ This idea raises questions about the reasonableness of the trial court’s determination of the facts—the standard under the habeas corpus statute.¹⁸⁰

Aside from capturing the legal theme of this case, the beginning captures a lay theme as well—in layman’s terms, “It’s just not right that a man whom a court deemed intellectually disabled is being executed.” While a court’s decisions must be based on legal reasoning, making a court want to rule in favor of the client helps.¹⁸¹

¹⁷⁴ See *Atkins v. Virginia*, 536 U.S. 304, 304 (2002); see also *Brumfield v. Cain*, 135 S. Ct. 2269, 2273 (2015) (summarizing this holding).

¹⁷⁵ See U.S. CONST. amend. VIII (prohibiting cruel and unusual punishment).

¹⁷⁶ See SUP. CT. R. 10 (establishing that an “important federal question” is a key element regarding the grant of review).

¹⁷⁷ *Id.*

¹⁷⁸ *Brumfield*, 135 S. Ct. at 2275-76.

¹⁷⁹ See *id.* at 2276.

¹⁸⁰ See *Brumfield*, 135 S. Ct. at 2276; *Brumfield v. Cain*, 854 F. Supp. 2d 366, 383-84 (M.D. La. 2012); *Brumfield v. Cain*, 744 F.3d 918, 926-27 (5th Cir. 2014); see also 28 U.S.C. § 2254(d)(1) (2012) (the basis for this habeas corpus relief).

¹⁸¹ See generally ARISTOTLE: THE “ART” OF RHETORIC (G.P. Goold ed., John Henry Freese trans., Harvard Univ. Press 1982) (1926) (discussing pathos, ethos, and logos); see also Marcel Becker, *Aristotelian Ethics and Aristotelian Rhetoric*, in ARISTOTLE AND THE PHILOSOPHY OF LAW: THEORY, PRACTICE, AND JUSTICE 109-122 (Liesbeth Hupperts-Clynsaer & Nuno M.M.S. Coelho eds., 2013); see ROBBINS, *supra* note 16, at 21-26, 28 (discussing how pathos, an appeal to emotion, can persuade); Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 J. LEG. WRITING INST. 127, 147 (2008); Johansen, *supra* note 9, at 58; Michael Frost, *Ethos, Pathos & Legal Audience*,

d. Priming

This beginning primes readers to accept the ultimate conclusions: (1) that the appellate court decided an important question of federal law in a way that conflicts with the United States Supreme Court's relevant decisions,¹⁸² (2) that the court below was unreasonable,¹⁸³ and (3) that the result was cruel and unusual.¹⁸⁴ Regarding unreasonableness, the reference to *Atkins*¹⁸⁵ relies on reader's past knowledge in a manner similar to *Mists of Avalon*'s reliance on reader's Arthurian knowledge.¹⁸⁶ Supreme Court justices and their staff likely recall that they already recently determined that it is cruel and unusual to execute an intellectually disabled person and that the courts must make a determination regarding a defendant's mental disability prior to execution.¹⁸⁷ That the court below deemed Brumfield "mentally retarded," yet executed anyway, raises questions about reasonableness.¹⁸⁸ Doubting reasonableness from the start, readers are primed to accept that the court below erred and that such an error conflicted with the Court's relevant decisions on an important federal question. Moreover, readers are primed to accept that this decision was based on an unreasonable determination of the facts, the result of which was cruel and unusual.

99 DICK. L. REV. 85, 86-91 (1994). SMITH, *supra* note 42, at 89-110 (discussing how pathos can be used to persuade).

¹⁸² See SUP. CT. R. 10 (setting the standards for granting a petition for a writ of certiorari).

¹⁸³ See *Brumfield*, 135 S. Ct. at 2273 ("That decision, we hold, was 'based on an unreasonable determination . . .'" (quoting 28 U.S.C. § 2254(d)(2) (2012))).

¹⁸⁴ See *generally* *Atkins v. Virginia*, 536 U.S. 304, 304 (2002) (finding the execution of a mentally disabled defendant to be cruel and unusual).

¹⁸⁵ *Id.*

¹⁸⁶ See *Johansen*, *supra* note 9, at 58-62 (comparing movie trailers to preliminary statements in briefs and discussing how the "stars" that reel the court in are the past precedents or established rules).

¹⁸⁷ *Atkins*, 536 U.S. at 304.

¹⁸⁸ See *Brumfield*, 135 S. Ct. at 2276; *Brumfield v. Cain*, 744 F.3d 918, 926-27 (5th Cir. 2014); *Brumfield v. Cain*, 854 F. Supp. 2d 366, 383-84 (M.D. La. 2012); see also 28 U.S.C. § 2254(d) (the basis for this habeas corpus relief).

Ultimately, this petition succeeded; the Court not only granted certiorari,¹⁸⁹ but it also reversed the Fifth Circuit's decision and held that the state court's refusal to hold a hearing on the *Atkins* claim was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."¹⁹⁰ The Court held that Brumfield was entitled to have the federal court consider his *Atkins* claim on the merits.¹⁹¹ Since there had already been a federal court hearing, the one ignored by the Fifth Circuit, the District Court's decision stood.¹⁹²

2. *Obergefell v. Hodges*

Somewhat similar to the opening lines of Brumfield's petition, the opening lines of the brief for the petitioners in the gay marriage case, *Obergefell v. Hodges* establishes a logical yet indignant tone, employs contrasts to intrigue readers, alludes to theme of according the basic right of marriage to all people, and primes readers to accept that theme.

"Petitioners married seeking a cherished status that protects families throughout life, from cradle to grave. But Ohio refuses to respect the dignity and status conferred on Petitioners' marriages by other states."¹⁹³

a. *Tone*

Where *Brumfield* began with a logical yet astounded tone, *Obergefell* begins with a logical¹⁹⁴ yet indignant tone. Again, the attorneys use but one adjective and no adverbs to characterize or over-embellish.¹⁹⁵ But the verbs "refuse" and "respect"¹⁹⁶ reveal some indignation towards and condemnation of Ohio's actions.

¹⁸⁹ *Brumfield*, 135 S. Ct. at 2276.

¹⁹⁰ *Id.* at 2273 (citing 28 U.S.C. § 2254(d)(2)).

¹⁹¹ *Id.*

¹⁹² *Id.* at 2275-76, 2283.

¹⁹³ Brief for Petitioners at 3, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 WL 860738, at *3.

¹⁹⁴ See ROBBINS, *supra* note 16, at 49 (explaining how a serious tone can establish credibility).

¹⁹⁵ See BRIDGES & SCHIESS, *supra* note 153, at 90.

¹⁹⁶ See GARNER, *supra* note 152, at 37-38 (advising use of strong, precise verbs).

Just as the attorneys in *Brumfield* conveyed that it's alright to be shocked about executing a mentally retarded man, here the attorneys convey that it's acceptable to be indignant about denying the petitioners fulfillment of the same core needs as other families. This tone is further aided by the logical order and the factual information, that the petitioners were denied a life status.

b. *Intrigue*

The first two sentences of the petitioner's brief in *Obergefell v. Hodges* contain a contrast that creates curiosity. The word choices touch on core human needs and values— "married," "protects," "life," "cradle to grave." These things sound like things that all people want and should have.¹⁹⁷ Indeed, the Court ultimately held that marriage is a fundamental right.¹⁹⁸ Yet the next sentence states that Ohio has denied them to the petitioners. Curious about the contrast, some readers are compelled to read forward.

c. *Theme*

These first two sentences also establish the theme of the entire case—the petitioners should not be denied the basic life needs that all people should have. Notice, their sexual orientation is not mentioned yet. To do so, might convey the idea that their difference justified some discriminatory distinction.¹⁹⁹ Instead, the petitioners convey the idea that adults should have this right—that there is no fair denial. In other words, the petitioners' Due Process rights to life, liberty, and the pursuit of happiness included the fundamental right to marry and to deny that right to

¹⁹⁷ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597-2602 (2015) (recognizing the right to marry as a fundamental right); see also Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 163 (2015) (mentioning the deep roots of the right to marry in the country's history).

¹⁹⁸ *Obergefell*, 135 S. Ct. at 2602.

¹⁹⁹ Cf. Richard A. Posner, *Eighteen Years On: A Re-Review*, 125 YALE L.J. 533, 541 (2015) (reviewing WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996)) (discussing the past public perception of homosexuality as outside the norm back when most gays and lesbians were closeted).

the petitioners based on their sexual orientation was to deny them equal protection of the law.²⁰⁰

In fact, in this opening, the petitioners not only convey this theme, but they turn their opponent's theme to their advantage. The terms "dignity" and "cherished" involve conclusions about the overall social effect of marriage. This word choice is clever because it's an appeal to audience members who are inclined to believe that marriage is cherished and that marital status accords dignity. In so doing, the petitioners turn the stance of many gay marriage opponents on its head. Gay marriage opponents frequently argue against gay marriage because they believe that marriage is sacrosanct.²⁰¹ If marriage is such an important sacrosanct life status, then the denial of the right to marry seems a greater infringement on a right that appears to be fundamental.²⁰²

Another clever thematic aspect of the word "dignity" is that it references the audience's prior knowledge, much as the Arthurian references in *Mists of Avalon* and the *Atkins* reference in *Brumfield* rely on prior knowledge. The word dignity appeared twelve times in the Court's previous gay marriage opinion in *Windsor*, indicating that this Court valued dignity with respect to gay marriage.²⁰³

²⁰⁰ See *Obergefell*, 135 S. Ct. at 2597-2604 (holding that petitioners had a Due Process and Equal Protection right to marry; yet, not discussing whether homosexuality was a suspect classification); David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 6-8 (2015) (indicating that the text of the Constitution itself was little analyzed in the opinion or the dissent and that both seemed to reason from common law).

²⁰¹ See, e.g., *Obergefell*, 135 S. Ct. at 2606-07 (stating that the respondents believed that allowing gay marriage would demean a timeless institution); Brief for Respondent at 13-15, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 WL 1384100, at *13-15 (asserting that domestic relations are an important aspect of federalism).

²⁰² See Johnson, *supra* note 20, at 422-23 (discussing how both the brief in a previous case, *Hollingsworth*, and the Court's opinion included this idea); see generally *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013).

²⁰³ Johnson, *supra* note 20, at 421-22; see *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013).

d. Priming

The beginning uses concrete facts and two seemingly contrasting ideas to prime the Court to accept the theme of according the petitioners the same rights that all people should have. Like *Mists of Avalon* and *Middlesex* this beginning starts with a contrast between Ohio's decision and the cherished status accorded by other states. These facts are concrete; other states have accorded the rights, and Ohio has not. That primes readers to accept the credibility of the story. Finally, the use of the term "dignity" primes the Court to view this case through the lens of its previous decision in *Windsor*, which relies heavily on the concept of dignity.²⁰⁴

3. Martha Stewart Stock Trial for Lying, Perjury, and Obstruction

Where the *Obergefell* brief primes the audience to view through a past lens, the opening statement of the Martha Stewart trial primes the jury to view this white-collar crime case through a new lens. The first lines of the Martha Stewart trial set the "gotcha" tone of an attorney who knows she's won, intrigue the audience with the extreme allegations, allude to a theme of deliberate malfeasance and harm to others, and prime the audience to believe this theme.

"This is a case about obstruction. It is about lying to federal agents. It is about perjury. It is about fabricating evidence, and it's about cheating investors in the stock market. These crimes were part of a cover-up, a cover-up by the defendants Martha Stewart and Peter Bacanovic, about something that happened on December 27, 2001."²⁰⁵

²⁰⁴ See Johnson, *supra* note 20, at 415-22 (discussing the role that dignity played in both opinions); *Windsor*, 133 S. Ct. at 2696; Johansen, *supra* note 9 at 58-62 (comparing movie trailers to preliminary statements in briefs and discussing how the "stars" that reel the court in are the past precedents or established rules).

²⁰⁵ Transcript of Government's Opening Statement at 769, *United States v. Stewart*, 323 F. Supp. 2d 606 (S.D.N.Y. 2004) (No. 03-CR-717), 2014 WL 5563104.

a. Tone

In this example, again the tone is logical with few embellishments, but it also has a “gotcha” quality. The rhythm in these opening lines is almost poetic. The first five clauses all follow the same structure. They begin the same, and each ends with an allegation. It’s as though Prosecutor Karen Seymour has fired five shots at Stewart and Bacanovic. The audience may have a sense that Seymour knows that she is about to “nail Stewart to the wall.” This tone is the tone of someone who already knows that she’s won.

Additionally, the sentences themselves are short and unembellished. That lends a logical, matter-of-fact tone to the presentation that makes the audience want to accept it as being simply the facts.

b. Intrigue

Here the intrigue is less about contrasts and more about events that seem to beg believability, like the ideas in *Peter Pan*. It seems somewhat shocking that these two seemingly responsible and upstanding people could have done such things.²⁰⁶

The audience may wonder, “How far does this conspiracy go? Just what exactly did they do? How could they think they could get away with something so blatant? Did they ever bother to think about whom they were hurting?”

Seeking an answer to these questions, the audience remains alert.

c. Theme

A theme echoing through this statement is that far from being simple technical mistakes, the actions of Stewart and

²⁰⁶ Cf. Patricia Hurtado, *Polling Jury Pool: Defense Lawyers, Not Martha, Take Hit*, NEWSDAY, Jan. 23, 2004, at A17 (indicating that the judge did not try to find jurors who had not heard of Martha Stewart’s case); *Jury Selected to Hear Martha Stewart’s Case: Diva of Domesticity’s Trial Set to Begin*, EDMONTON J., Jan. 27, 2004, at F2 (indicating that jury pool included jurors who were Stewart fans); Transcript of Defendant Martha Stewart’s Opening Statement at 823-25, *United States v. Stewart*, 323 F. Supp. 2d 606 (No. 03-CR-717), 2004 WL 5549059 (reminding the jury that they knew of Martha Stewart’s reputation).

Bacanovic were calculated actions that happened over a period of time and that hurt other people. White-collar crime may sound to the layperson like legal or financial mumbo-jumbo, mere harmless technical mistakes.²⁰⁷ A white-collar crime may also seem harmless to some people in comparison to the rapes, murders, and molestations they hear about on television.²⁰⁸

However, by beginning with “this case is about,” the prosecutor frames the idea that the case may be about something other than what they might believe. The “this case is about”²⁰⁹ approach works to establish the theme and to combat preconceived notions²¹⁰ regarding white-collar crime.

Overall, these opening lines make the actions of Stewart and Bacanovic sound deep and deliberate—like an involved conspiracy. It’s not just “lying” or “obstruction;” the prosecution lists a collection of multiple instances of dishonesty. “Fabricating evidence” is a more calculated and deliberate lie. “Lying,” “perjur[ing],” “fabricating,” “cheating,” and “cover[ing]-up” all sound like more than one simple mistake of a lay person.²¹¹ They

²⁰⁷ See Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 501, 508-10 (2004) (discussing white collar crime may sound too technical for people to reach a moral decision regarding it); cf. D. C. Toedt III, *Martha Stewart Juror Says Her Changing a Phone Message Brought Her Down*, ON CONTRACTS (Mar. 8, 2004), <http://www.oncontracts.com/martha-stewart-juror-says-her-changing-a-phone-message-brought-her-down/> [<https://perma.cc/83HF-V56E>] (explaining that trials about intellectual property can seem confusing and technical to jurors but that tampering with evidence is a more clear instance of wrongdoing).

²⁰⁸ See Green, *supra* note 207, at 517 (discussing how the media gives more attention to other crimes than white collar crime).

²⁰⁹ See MAUET, *supra* note 15, at 42 (advocating a “this case is about” approach when the judge will allow the lawyers to begin with a theme); but see Robinson, *supra* note 21, at 19 (advising attorneys to complete the sentence “This case is about___.” and to then eliminate “This case is about” language). While the approach may not work in every instance, here it seems to cut off any mistaken impression regarding what the case is about.

²¹⁰ See ROBBINS, *supra* note 16, at 31-34 (explaining that people rely on “stock structures,” and standardized pieces of information, and often subconsciously fill in the blanks based on these preconceived notions); see generally Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984); see also GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 68-76 (1987).

²¹¹ See *supra* note 198 and accompanying text.

sound like the actions of someone who knew that she had done wrong and continued.²¹²

Moreover, “cheating investors” sounds harmful. While violent crime does continuing damage to one person or a small group, this kind of deception potentially harms an extensive group of people over a long period of time.²¹³ Many jurors may also feel their own powerlessness in a society where the mega-rich rule and may finally feel that they have the chance to balance inequality; in fact, one juror complained that the previous Enron scandal hurt his investments.²¹⁴

d. Priming

This beginning also primes jurors to accept this theme of lying and cheating. The “this case is about” approach²¹⁵ plays a role in that priming. It seems the prosecution is aware that it must overcome a contradiction and is in a sense, inoculating the jury against that contradiction in advance.²¹⁶ People may view

²¹² See Toedt, *supra* note 207 (explaining that jurors said that Martha Stewart’s changing of her phone message sealed their decision as it destroyed her credibility).

²¹³ See Green, *supra* note at 207, at 508-10 (discussing how the difficulty the public has with white collar crime is that it seems difficult to trace the harm).

²¹⁴ Kathleen F. Brickey discusses this juror’s complaints while also indicating that the trial itself was about false statements and not corporate greed. Kathleen F. Brickey, *Mostly Martha*, 44 WASHBURN L.J. 517, 519-20 (2005). However, if corporate greed motivated the lies, then corporate greed is still a relevant theme at trial. *Cf.* Ben White, *Juror Chappell Hartridge, Man of the Martha Moment*, WASH. POST (Mar. 7, 2004), <https://www.washingtonpost.com/archive/lifestyle/2004/03/07/juror-chappell-hartridge-man-of-the-martha-moment/296a1b6a-cf34-472b-8578-2621142e9f2a/> [<https://perma.cc/Z3SC-TYLJ>] (indicating that one juror stated that the verdict struck a blow for “the little guy” whereas two others indicated that was not what their decision was about); Leslie Eaton, *Working Women Dominate the Jury for Stewart’s Trial*, N.Y. TIMES (Jan. 27, 2004) http://www.nytimes.com/2004/01/27/business/working-women-dominate-the-jury-for-stewart-s-trial.html?_r=0 [<https://perma.cc/W72Y-AYET>] (indicating that jurors were successful but not as successful as Stewart and that one juror stated that Enron hurt his investments).

²¹⁵ *Cf.* MAUET, *supra* note 15, at 42 (advocating a “this case is about” approach when the judge will allow the lawyers to begin with a theme); *but see* Robinson, *supra* note 21, at 19 (advising attorneys to complete the sentence “This case is about____” and to then eliminate “This case is about” language).

²¹⁶ See Kathryn M. Stanichi, *Playing with Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 RUTGERS L. REV. 381, 395 (2008); ROBBINS, *supra* note 16, at 171-80 (discussing managing adverse materials); Timothy Perrin, *Pricking Boils, Preserving Error: On the Horns of A Dilemma After Ohler v. United States*, 34 U.C.

white-collar crime as a technical mistake that does no real harm.²¹⁷ This theory can work well in the hands of the defense. The defense tried to argue that there were alternate reasons for selling the stock and tried to indicate that mere mistakes were made.²¹⁸ By beginning each of these lines with “this case is about,” the prosecution seems to already be planting a seed that cuts that theory off at the knees by already telling the jury, “Here is what this case is really about.”

The defense tried to argue that there were alternate reasons for selling the stock. However, as indicated by the jurors in their interviews, the pattern of lies, themselves, weaken the credibility regarding alternate reasons for selling the stock.²¹⁹

Ultimately, the jury found Stewart guilty of two charges of making false statements in an investigation, found Bacanovic guilty of making false statements and perjury, and found both defendants guilty of conspiracy and obstruction of an agency proceeding.²²⁰

4. Trial of Dr. Conrad Murray for Michael Jackson’s Death

The beginning also paved the way for a guilty verdict in the trial of former Doctor Conrad Murray for Michael Jackson’s death. The trial opened with two sentences that set a tone by blending

DAVIS L. REV. 615, 619-25 (2001) (contending that revealing weaknesses enhances credibility, stating that the conventional wisdom supports disclosure of weaknesses, and providing data refuting arguments that attorneys should not disclose harmful evidence); Quentin Brogdon, *Inoculating Against Bad Facts: Brilliant Trial Strategy or Misguided Dogma?*, 63 Tex. B.J. 443, 444 (2000) (discussing how disclosing harmful evidence enhances credibility); Douglas S. Rice & Ellen L. Leggett, *Empirical Study Results Contradict Sponsorship Theory*, INSIDE LITIG., Aug. 2003, at 20, 20; Daniel G. Linz & Steven Penrod, *Increasing Attorney Persuasiveness in the Courtroom*, 8 LAW & PSYCHOL. REV. 1, 17-25 (1984); see generally William J. McGuire & Demetrios Papageorgis, *The Relative Efficacy of Various Types of Prior Belief-Defense in Producing Immunity Against Persuasion*, 62 J. ABNORMAL & SOC. PSYCHOL. 327 (1961).

²¹⁷ Cf. Toedt, *supra* note 207 (explaining that trials about intellectual property can seem confusing and technical to jurors but that tampering with evidence is a clearer instance of wrongdoing).

²¹⁸ Defendant Martha Stewart’s Opening Statement, *supra* note 206, at 832-34 (providing alternate reasons for selling the stock).

²¹⁹ See Toedt, *supra* note 207 (explaining that jurors said that Martha Stewart’s changing of her phone message sealed their decision as it destroyed her credibility).

²²⁰ U.S. v. Stewart 323 F. Supp. 2d 606, 609-11 (2004).

logic and horror to intrigue the jury with the contrast between duty and disregard for life. These sentences also conveyed the shock of the event while setting the theme of abuse of trust and priming the audience to accept that theme.

“The evidence in this case will show that Michael Jackson literally put his life in the hands of Conrad Murray. The evidence in this case will show that Michael Jackson trusted his life to the medical skills of Conrad Murray.”²²¹

a. Tone

Similar to the previous opening lines, this opening establishes a tone that blends logic and emotion and perhaps a bit of horror.²²² The standard use of “the evidence will show” and, again the same absence of a bunch of flowery adjectives and adverbs may make the audience feel as though the story they are hearing is logical, serious, and trustworthy.²²³

At the same time, the facts themselves along with the word choices strike an emotional chord.²²⁴ “Life,” “trust,” and “medical” are emotionally significant words. By converting a metaphor into literal expression, the prosecutor drives home this emotional impact. Placing “his life in the hands” is often a hyperbolic and metaphorical expression people use when turning important matters over to another person. However, in this instance, Conrad Murray, used his own hands to administer medications that killed

²²¹ *Conrad Murray Trial Opening Statement by Prosecution, Sept. 27, 2011, (Part 1)*, YOUTUBE, <https://www.youtube.com/watch?v=701EXbmG6F8> [<https://perma.cc/P4ZL-A972>] (last accessed Feb. 10, 2016).

²²² See ROBBINS, *supra* note 16, at 25, 49 (explaining how serious tone establishes credibility and explaining how emotional appeals can be persuasive); MAUET, *supra* note 19, at 43 (explaining that the jury sees the story through “emotional eyes”).

²²³ See ROBBINS, *supra* note 16, at 25, 49 (explaining how serious tone establishes credibility and explaining how emotional appeals can be persuasive); BRIDGES & SCHIESS, *supra* note 153 (advising to avoid hyperbolic adverbs and inflammatory adjectives).

²²⁴ See ROBBINS, *supra* note 16, at 25 (explaining how word choice establishes tone and how emotional appeals can be persuasive); SMITH, *supra* note 42, at 89-91 (discussing how emotional appeals and appeals to values can be persuasive).

Michael Jackson. Hyperbole has become reality. This reference resonates emotionally.²²⁵

b. Intrigue

Like the intrigue in *Mists of Avalon*, the intrigue in the Conrad Murray case relies in part on the audience's previous knowledge. Jurors know that they are present for a murder trial, and it's likely that they have at least a passing familiarity with the world famous Michael Jackson.²²⁶ Jurors may wonder why Jackson trusted Murray with his life and what Murray's medical experience was.²²⁷ More importantly, jurors may wonder how Murray abused his position of trust and used his medical experience to kill Michael Jackson.

c. Theme

This statement also contains the theme of the entire case—as a medical doctor, Conrad Murray abused his life and death position of trust with Michael Jackson—thus, the requirement that he fail to take due caution is met.²²⁸ But the statement goes beyond simply showing that this element met; it strikes a thematic emotional chord. Conrad Murray's position of trust was not just any position of trust; he was supposed to guard Michael Jackson's life, not bring about his death.

As a doctor, Murray is supposed to be a life-saver, but he caused Michael Jackson's death. For two months or more, at Michael Jackson's home,²²⁹ Murray, not an anesthesiologist,

²²⁵ See ROBBINS, *supra* note 16, at 25 (explaining how emotional appeals can be persuasive); SMITH, *supra* note 42, at 11-13, 89-91 (discussing how emotional appeals and appeals to values can be persuasive).

²²⁶ See Linda Deutsch, *Jury Selection Begins in LA for Jackson Doctor*, WASH. POST (Mar. 24, 2011), <http://www.washingtonpost.com/wpdyn/content/article/2011/03/24/AR2011032401017.html> [<https://perma.cc/T9CM-K8NG>] (indicating that only two jurors in the potential jury pool had not heard about the accused, Conrad Murray).

²²⁷ See Johansen, *supra* note 9, at 60 (indicating that case law that the Court is familiar with serves as a "star" attraction).

²²⁸ CAL. PENAL CODE § 192(b) (West 2015).

²²⁹ *Conrad Murray Trial Opening Statements, Sept. 27, 2011, (Part 6)*, YOUTUBE, https://www.youtube.com/watch?v=qEsJg_SjLbg [<https://perma.cc/TNX5-UF36>] [hereinafter *Conrad Murray Trial Part 6*] (last accessed Feb. 8, 2016).

administered an anesthetic meant to put people under in a hospital setting.²³⁰ He lied to get the drug²³¹ and did not have the life-saving equipment that was recommended in the package, did not monitor Jackson as required,²³² and did not call 911 for at least thirty minutes after seeing that Jackson was in trouble.²³³

The abuse of life trust theme is key to overcoming a difficult culpability hurdle. Dr. Murray was charged with involuntary manslaughter;²³⁴ thus, jurors had to decide whether Murray's conduct objectively endangered life regardless of whether he subjectively understood the risk.²³⁵ This standard is in contrast to second-degree murder where a defendant must subjectively understand the death risk the defendant's conduct poses.²³⁶ Therefore, the law placed the jury in the uncomfortable position of finding Murray criminally guilty despite whether Murray understood the risk. In fact, the court even instructed the jury that Murray could be found guilty if he "should have foreseen the possibility of harm that could result from his act."²³⁷ Further, the judge instructed them that, to find Murray guilty, they must decide that he had either "committed a lawful act with criminal negligence" or "failed to perform a legal duty due to criminal negligence."²³⁸

²³⁰ *Conrad Murray Trial Opening Statement by Prosecution, Sept. 27, 2011, (Part 3)*, YOUTUBE, <https://www.youtube.com/watch?v=UtnmL5lQ5fw> [<https://perma.cc/55XH-ZSYU>] [hereinafter *Conrad Murray Trial Part 3*] (last accessed Feb. 8, 2016).

²³¹ *Conrad Murray Trial Opening Statements by Prosecution, Sept. 27, 2011, (Part 4)*, YOUTUBE, <https://www.youtube.com/watch?v=v4yURamePCw> [<https://perma.cc/X249-VU2P>] [hereinafter *Conrad Murray Trial Part 4*] (last accessed Feb. 8, 2016).

²³² *Id.*

²³³ *Conrad Murray Trial Opening Statements by Prosecution, Sept. 27, 2011, (Part 8)*, YOUTUBE, <https://www.youtube.com/watch?v=lhXsUugBBAU> [<https://perma.cc/PP65-HH2P>] [hereinafter *Conrad Murray Trial Part 8*] (last accessed Feb. 8, 2016).

²³⁴ Christopher J. Kim, *The Trial of Conrad Murray: Prosecuting Physicians for Criminally Negligent Over-Prescription*, 51 AM. CRIM. L. REV. 517, 531 (2014); see also CAL. PENAL CODE § 192(b) (West 2015).

²³⁵ Kim, *supra* note 234, at 531.

²³⁶ *Id.*

²³⁷ *Id.* at 522.

²³⁸ *Id.*

This last instruction was key because the defense claimed that Michael Jackson administered his last dose of the anesthetic propofol himself.²³⁹ However, under the prosecution's theme, Murray's failure to monitor Jackson after drugging him with various drugs that evening and making propofol available was enough.²⁴⁰ Michael Jackson had placed his life in Murray's hands. With one hand Murray endangered his life, and then he pulled away his other hand letting Michael Jackson's life slip through.

d. Priming

This beginning, Michael Jackson placing his life in Murray's hands, primes the jury to accept the ultimate conclusion and to reject contradictory evidence. The defense put on evidence that showed that Michael Jackson himself made unwise or mentally unbalanced decisions.²⁴¹ They contended that he administered the last dose of propofol himself.²⁴² However, the suggestion that as a medical doctor Murray had a duty to protect Michael Jackson from himself overcomes this notion.

The physicality of the "life in the hands" metaphor itself plays a large role in this priming. The audience might subconsciously imagine Michael Jackson's soul or some ethereal cloud of life essence. In this daydream, perhaps, Dr. Murray agrees to hold that life essence in his hands. Then if he pulls his hands away, leaving Jackson's essence to spill to the floor, the audience feels a chill.

Having planted this seed, the prosecution then nurtured it with evidence showing that Murray lied, flouted multiple major precautions, and dosed Jackson with life threatening and mind altering drugs.²⁴³ Murray then left the room whereas, in a normal

²³⁹ *Id.*; Luchina Fisher & Bryan Lavietes, *Key Moments from Michael Jackson Death Trial*, ABC NEWS (Nov. 4, 2011), <http://abcnews.go.com/Entertainment/key-moments-michael-jackson-death-conrad-murray-manslaughter/story?id=14873219> [<https://perma.cc/V6S4-BYRV>].

²⁴⁰ Kim, *supra* note 234, at 522.

²⁴¹ *Cf.* Kim, *supra* note 234, at 522 (discussing video of Jackson in a "drug-addled state").

²⁴² *Id.*; Fisher & Lavietes, *supra* note 239.

²⁴³ See *Conrad Murray Trial Part 6*, *supra* note 229; *Conrad Murray Trial Part 4*, *supra* note 231; *Conrad Murray Trial Part 8*, *supra* note 233; *Conrad Murray Trial*

hospital setting, Jackson would have been monitored and would have had life-saving equipment on hand.²⁴⁴ He did not administer CPR until after notifying Michael Williams, an assistant, that Jackson was in trouble.²⁴⁵ He did not call 911 until after beginning CPR.²⁴⁶ Then he lied both to EMT's and doctors about the drugs that Michael Jackson received.²⁴⁷ In our metaphorical daydream, Murray poisoned Michael Jackson's life essence and then let it spill to the floor. The prosecutions' approach was successful, and Conrad Murray was convicted.²⁴⁸

CONCLUSION

Whether the storyteller first presents the audience with an image of a soul held in two hands, a boy who never grows up, or a man on death row whose mind's growth is hampered, the storyteller's words work overtime in those first few lines. The storyteller influences our trust and emotions by setting a tone, grabs our attention, hints at the meaning of the story, and primes us to accept the story's truths.

Opening Statements by Prosecution, Sept. 27, 2011, (Part 10), YOUTUBE, <https://www.youtube.com/watch?v=Mdoe9Sg3OaY> [<https://perma.cc/RBA2-CZJC>] [hereinafter *Conrad Murray Trial Part 10*] (last accessed Feb. 8, 2016).

²⁴⁴ *Conrad Murray Trial Part 4*, *supra* note 231; *Conrad Murray Trial Part 10*, *supra* note 243.

²⁴⁵ *Conrad Murray Trial Opening Statements by Prosecution, Sept. 27, 2011, (Part 7)*, YOUTUBE, <https://www.youtube.com/watch?v=b1Wui7Moi4k> [<https://perma.cc/DU9M-9BD3>] (last accessed Feb. 8, 2016).

²⁴⁶ *Conrad Murray Trial Part 8*, *supra* note 233.

²⁴⁷ *Conrad Murray Trial Opening Statements by Prosecution, Sept. 27, 2011, (Part 12)*, YOUTUBE, <https://www.youtube.com/watch?v=ZydusBHvLc8> [<https://perma.cc/TD2Q-XP7R>] (last accessed Feb. 8, 2016).

²⁴⁸ Kim, *supra* note 234, at 522.