

# LAWYER AS ARTIST: USING SIGNIFICANT MOMENTS AND OBTUSE OBJECTS TO ENHANCE ADVOCACY

*James Parry Eyster\**

*Of course, the law is not the place for the artist or the poet.*

—Oliver Wendell Holmes, Jr.<sup>1</sup>

Lawyers often act as storytellers, narrators of their clients' tales of injustice and conflict. These stories tend to be action-based: "He did this, then that happened, then this occurred . . . ." These skeletal narratives may lack the necessary substance and depth to be convincing. Lawyers can attain greater clarity and power in their advocacy by taking on the artist's mantle and becoming verbal painters of significant moments in their clients' dramas, complete with the background and accessory objects that best display the righteousness of the client and the failings of the adversary.

I hope to share with you here the tools of selection and enhancement that visual artists use in telling stories. Traditionally confined to a moment in time, the visual artist faces the challenge of condensing a complex issue or rich life into a frozen glimpse of what was, what is, and what will be. This limitation, this creative straitjacket, has forced visual artists to carefully develop techniques to achieve meaningful results. Whether through insight or trial and error, artists<sup>2</sup> have developed a number of tenets that have helped them to create powerful paintings, photos, and sculptures that reveal the souls and hearts of their subjects. What artists have learned through intuition, psycholinguists have confirmed through experimental research.

---

\* © 2008, James Parry Eyster. All rights reserved. Director, Asylum and Immigrant Rights Clinic, Assistant Clinical Professor, Ave Maria School of Law. This Article grew out of presentations delivered at the 2007 Annual AALS Clinical Conference held in New Orleans and the Applied Storytelling Conference held in London, United Kingdom, July 18–20, 2007, and draws on my fascination of more than thirty years with the relationship between art and the law.

<sup>1</sup> Oliver Wendell Holmes, Jr., *Collected Legal Papers* 29 (Harcourt Brace 1920).

<sup>2</sup> By artists, I mean representational painters, sculptors, and photographers, from both the East and the West.

In this Article, I first describe and critique the two leading techniques for legal advocacy—legal analysis and applied narrative. I then argue for the special usefulness of verbal images in conveying a memorable depiction of particular events and for enhancing the credibility of witnesses. In the third section, I suggest ways of extracting these images from witnesses' memories and fully developing these verbal pictures. Those in a hurry may choose to skip the first sections and plunge into the fourth section where I share two key techniques of the visual artist—"the obtuse object" and "the significant moment"—and show how to apply them to legal advocacy. I then explain why these techniques are effective, according to art history scholars, aestheticians, psychologists, and psycholinguists. I next discuss the significance of context in presenting images. In the final section, I warn of the dangers that lawyers face when they adapt artists' techniques due to the seductive power of verbal images and the inaccuracy of human memory. And so, get out your paint brushes and your easel, put on your smock, and let's learn how lawyers can become artists.

## I. THE SHORTCOMINGS OF LEGAL ANALYSIS AND STORYTELLING

Legal advocacy is traditionally defined as argument seeking to convince a judge or jury that a certain rule, when applied to a proffered set of facts, supports the desire of the client.<sup>3</sup> As such, law students and lawyers pore over published cases seeking another instance in which a judge in the same jurisdiction held in favor of someone else having a case that was "on all fours" with the present controversy.<sup>4</sup> This dry matching game requires the sophisticated analytical abilities of both legal counsel and the finders of law and fact. Evidence may be presented in an artificial manner that is so isolated and filtered as to be uninteresting and impotent,<sup>5</sup> with little regard for its meaning, but rather simply as a group of pegs

---

<sup>3</sup> See e.g. Michael R. Fontham et al., *Persuasive Written and Oral Advocacy in Trial and Appellate Courts* 3–4 (2d ed., Aspen Publishers 2007).

<sup>4</sup> See Linda H. Edwards, *Legal Writing: Process, Analysis, and Organization* 60 (4th ed., Aspen Publishers 2006).

<sup>5</sup> See Graham B. Strong, *The Lawyer's Left Hand: Nonanalytical Thought in the Practice of Law*, 69 U. Colo. L. Rev. 759, 776 (1998) ("The power of abstract analysis in dealing with complex natural data is, however, purchased at the price of a loss of concrete information: in the time-honored manner of classical science, abstract analysis reduces complexity by ignoring a portion of it.").

whose shapes fit the peculiar holes demanded to satisfy each element of a certain legal rule.

While judges have obtained training in such analysis through their own law school experience, other fact finders and, in particular, juries, struggle to understand and retain evidence that is presented through traditional abstract analysis.<sup>6</sup> Litigators and legal theoreticians have therefore come to realize the importance of storytelling in case advocacy as an alternative to abstract legal analysis and presentation.<sup>7</sup> The story method relies on recounting action from a beginning to a conclusion based on evidence that is consistent with the story.<sup>8</sup> Thus evidence is organized so that it makes logical sense based on the listener's experience with stories and expectations of how a story will develop and end.<sup>9</sup>

---

<sup>6</sup> "Notwithstanding the judge's instructions and the manner of presenting evidence at trial (which conforms to the orthodox idea of legal truthfinding), jurors construct episodes based upon the factual evidence they hear and the judge's instructions, and then search for goodness of fit between the possible episodes and the possible verdicts." Jane E. Larson, "A Good Story" and "The Real Story", 34 *John Marshall L. Rev.* 181, 184 (2000).

<sup>7</sup> See W. Lance Bennett & Martha S. Feldman, *Reconstructing Reality in the Courtroom* 5 (Rutgers U. Press 1981). "Stories are everyday communication devices that create interpretive contexts for social action. In isolation from social context, behaviors or actions are ambiguous." *Id.* at 7.

Legal writing expert Linda H. Edwards recognizes the power of facts, reciting the adage, "If you have to choose between the law and the facts, take the facts." Edwards, *supra*, n. 4, at 323. As she explains, many lawyers have found that a judge or jury will work diligently to avoid the application of an unfavorable law if the facts have convinced them of the injustice this would cause. *Id.* Professor Edwards also recommends that attorneys include "significant background facts" and "emotionally significant facts" in a Statement of Facts. *Id.* at 329.

<sup>8</sup> Many excellent articles and books have been written on the value of storytelling in a legal context. For a few of the many fine articles on the role of storytelling in legal advocacy, the reader may wish to consult the following sources: Anthony G. Amsterdam & Jerome Bruner, *Minding the Law* (Harv. U. Press 2001); Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 *Clin. L. Rev.* 1 (2005); Jane B. Baron, *Language Matters*, 34 *John Marshall L. Rev.* 163 (2000); Beryl Blaustone, *Teaching Evidence: Storytelling in the Classroom*, 41 *Am. U. L. Rev.* 453 (1992); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 *Mich. L. Rev.* 2411 (1988); Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 *Rutgers L.J.* 459 (2001); Sandra Craig McKenzie, *Storytelling: A Different Voice for Legal Education*, 41 *U. Kan. L. Rev.* 251 (1992); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 *Cardozo L. Rev.* 519 (1991).

For an insightful discussion of the role of folk tales and myths in effective lawyering, see 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 (2006).

<sup>9</sup> Bennett & Feldman, *supra* n. 7, at 8–10. The authors note, "The story is an everyday form of communication that enables a diverse cast of courtroom characters to follow the development of a case and reason about the issues in it. Despite the maze of legal jargon, lawyers' mysterious tactics, and obscure court procedures, any criminal case can be reduced to the simple form of a story." *Id.* at 4.

While the story method creates a cohesive structure, it encourages a sparse and abstract presentation of action, as opposed to the development of memorable mental images. Indeed, the whole focus of a story is action. It is movement; it is someone doing something to someone else. It races on to a resolution. In doing so it often omits significant evidence that is not directly relevant to the action. In addition, the participants in the legal story can be reduced to superficial stereotypes whom the listener too easily dismisses as lacking sufficient richness to be memorable or credible.<sup>10</sup> This is a grave mistake because such stories may fail to bring the key scenes to life for the fact finder. Such a method of fact presentation may also allow a listener to create mental constructs of the controversy that are far different from the actual circumstances.

## II. THE ROLE OF VERBAL IMAGES

While skillful legal analysis and narrative are essential skills for advocacy, *effective* advocacy requires more than the ability to associate facts with legal elements and to recount appealing stories. Lawyers must also be able to pluck vivid images out of their witnesses' minds and present them to the fact finder.<sup>11</sup> The advo-

---

Vicarious participation in the constructed world of a narrative opens access to an emphatic understanding of narrative events, different in kind from the conceptual understanding gained through analysis. It is an experiential understanding acquired by "trying on" a story imaginatively and testing its "fit" and its "feel" from within, and depends more upon a gestalt appreciation of context and connotation than upon a literal-minded focus upon isolated details. Such an understanding, not simply of the meaning of a story's details but of a "meaning beyond the details," turns out to be largely beyond the grasp of the lawyer's right hand, but within easy reach of the left.

Strong, *supra* n. 5, at 783–784.

<sup>10</sup> Jerome Bruner, *Making Stories* 60–61 (Farrar, Straus & Giroux 2002). In this essay, noted narrative expert Jerome Bruner wrestles with the distinction between fictional and legal storytelling. To him, the major difference is literature's attraction to the extraordinary with the law's preference for the recognizable. "Literature, exploiting the semblance of reality, looks to the possible, the figurative. Law looks to the actual, the literal, the record of the past. Literature errs toward the fantastic, law toward the banality of the habitual." *Id.* at 61. Bruner laments that this can limit the effectiveness and affect of legal narratives by making them trite and worn-out. Richly complex plaintiffs and defendants are reduced to superficial stock characters, such as the jealous lover and the lost child. *Id.* at 60. As a result, jurors rapidly lose interest in the story being told.

<sup>11</sup> Fred Wilkins urges, "Jurors (like the rest of us human beings) tend to remember *images* far better than individual words. . . . We accordingly have to be wordsmiths who search for graphic and vivid words which create images readily recalled. Choose words which propagate pictures in the mind." Fred Wilkins, *Persuasive Jury Communication: Case Studies from Successful Trials* 23 (Shepard's/McGraw Hill, Inc. 1994) (emphasis in original).

cate may choose to present his or her case by describing in detail a particular object, scene, or key moment in the case. Such descriptions may produce a more emotional response in the listener than action words,<sup>12</sup> riveting the listener's attention in a way that legal phrases and sterilized facts cannot. As discussed in detail below, psychologists Carl Jung and Joseph Campbell have identified elaborate universal structures of meaning that images possess: meanings that hold constant between cultures and throughout time periods.<sup>13</sup>

Where the decision maker is a juror, vivid images may have greater usefulness than they do for judges. While judges may be more skeptical of witness veracity and attempt to concern themselves predominantly with legal issues,<sup>14</sup> jurors—who are regularly insulated from the legal controversies of a case—may be moved by their feelings toward the witness or party, based on the testimony they hear.<sup>15</sup>

Images are powerful. Sometimes they are considered too powerful.<sup>16</sup> As such, they are not always welcome in the court. One author has suggested that the female embodiment of “Justice” found in law offices and courts is always blindfolded because we do not want justice to *see* anything.<sup>17</sup> Nonetheless, images have an

---

<sup>12</sup> Debate continues into the nature of mental images, since nearly all study must be based on subject self-reporting rather than on direct scientific observation. Nonetheless, researchers have made headway in analyzing certain aspects of mental images and have found that static images are rated as significantly more vivid than active images. *Imagery, Language, and Visuo-Spatial Thinking* 10 (Michel Denis et al. eds., Psychol. Press 2001).

Similarly, in five experiments, researchers found that recognition was significantly higher for high-imageability words than for low-imageability words. Stephan A. Dewhurst & Martin A. Conway, *Pictures, Images, and Recollective Experience*, 10 *J. Experimental Psychol.: Learning, Memory & Cognition* 1088, 1095 (1994); see also Allan Paivio & James M. Clark, *Static Versus Dynamic Imagery*, in *Imagery and Cognition* 221–245 (Cesare Cornoldi & Marc A. McDaniel eds., Springer-Verlag 1991).

<sup>13</sup> See *infra* nn. 79–89 and accompanying text.

<sup>14</sup> According to jurist Benjamin Cardozo, even judges are inexorably guided by subconscious forces. “All their lives, forces which they [judges] do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs . . . which, when [legal] reasons are nicely balanced, must determine where choice shall fall.” Benjamin N. Cardozo, *The Nature of the Judicial Process* 12 (Yale U. Press 1921).

<sup>15</sup> The significance of the emotive aspects of testimony is highlighted by a realization that jurors may have little interest in the legal questions they are authorized to answer. Gordon Tullock, *The Case Against the Common Law* 42–43 (Locke Inst. 1997).

<sup>16</sup> Judges have recognized that images, particularly photographs of a victim, can be so powerful that they can prejudice the fact finder. See e.g. *State v. Lafferty*, 20 P.3d 342, 369–370 (Utah 2001).

<sup>17</sup> Jay Martin wrote, “[Is Justice blind to] avoid the seductions of images and achieve the dispassionate distance necessary to render verdicts impartially”? Martin Jay, *Must*

important, but often overlooked role to play in fact investigation and in advocacy.

Lawyers are not generally fond of images. Words are their trade. Attorneys' antipathy toward visualization is confirmed in several psychological studies.<sup>18</sup> I suggest, however, that visualization skills are an integral part of legal advocacy and fit within the recommendations of the American Bar Association's MacCrate Report, which analyzed law schools and their role in preparing students to enter the legal profession, as well as the more recent studies of Roy Stuckey and the Carnegie Foundation for the Advancement of Teaching.<sup>19</sup>

In its designation of ten fundamental lawyering skills, the MacCrate Report states that graduating law students should be familiar with the skills and concepts involved in all aspects of factual investigation and presentation.<sup>20</sup> This specifically includes the determination of need, the planning and implementation of an investigative strategy, evaluation, and the persuasive presentation of the information.<sup>21</sup> Stuckey and the Carnegie Report expand on the MacCrate Report's call for lawyering skills, promoting the

---

*Justice be Blind? The Challenges of Images to the Law*, in *Law and the Image* 21 (Costas Douzinas & Lynda Nead eds., U. Chi. Press 1999).

<sup>18</sup> Two of these are summarized in Strong, *supra* n. 5, at 761 n. 13.

<sup>19</sup> See ABA Sec. Leg. Educ. & Admis. to the B., *Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (ABA 1992) [hereinafter *MacCrate Report*]. This report on the gap between law school education and the needs of the legal profession was presented by a task force of the American Bar Association chaired by Robert MacCrate in 1992. Although more than fifteen years old, the report remains robust and influential. Its findings and recommendations still guide the ABA in determining law school compliance with its standards. See Judith A. Frank, *Lessons and Ideas: Skills Instruction in Large Law School Classes*, 3 *Thomas M. Cooley J. Prac. & Clin. L.* 307, 312 (2000).

Numerous law review articles have been written about the application of the MacCrate report to the teaching of skills, including the following: Norman Fell, *Development of a Criminal Law Clinic: A Blended Approach*, 44 *Clev. St. L. Rev.* 275 (1996); Peter A. Joy, *The MacCrate Report: Moving Toward Integrated Learning Experiences*, 1 *Clin. L. Rev.* 401 (1994); Ann Juergens, *Using the MacCrate Report to Strengthen Live-Client Clinics*, 1 *Clin. L. Rev.* 411 (1994); Irene Scharf, *Nourishing Justice and the Continuum: Implementing a Blended Model in an Immigration Law Clinic*, 12 *Clin. L. Rev.* 243 (2005).

Two recently published reports confirm the MacCrate Report's views on the importance of vigorous fact investigation and presentation. See Roy Stuckey et al., *Best Practices for Legal Education: A Vision and a Road Map* (Clinical Leg. Educ. Assn. 2007); William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007) (commonly known as the Carnegie Report).

<sup>20</sup> *MacCrate Report*, *supra* n. 19, at 142–207.

<sup>21</sup> *Id.* at 163–172.

teaching of narrative thinking and ends-means thinking—in contrast to analytical thinking.<sup>22</sup>

In addition to word-based evidence, such as contracts and oral statements, non-verbal evidence can be of great significance. In many cases, the nature and even the existence of visual facts are in dispute.<sup>23</sup> Identifying, analyzing, and transforming these pictorial facts into words are skills that law students are not generally taught. This is unfortunate for two reasons. First, significant images may remain locked deep in the mind of a client or witness, absent an attorney's careful encouragement. Second, if they lack the ability to translate visual images and their significance into words, attorneys cannot effectively use important persuasive evidence to their clients' benefit. Simply put, facts matter. Attorneys must be able to find and skillfully organize and present all relevant facts, including visual facts, if they are to persuade fact finders of the justice of their case.<sup>24</sup>

Painters, photographers, and sculptors are often directly concerned with the identification and presentation of images, in a way that lawyers and storytellers may not be.<sup>25</sup> Visual artists are re-

<sup>22</sup> In the Carnegie Report, the authors urge law school professors to teach students how to shape a story that contains the significant facts and events in a case. Sullivan et al., *supra* n. 19, at 96–97. Stuckey laments that law schools often fail to teach professional skills, including factual investigation, even though experienced lawyers and judges value such skills in beginning lawyers far above law-related reading, legal analysis, and reasoning skills. Stuckey et al., *supra* n. 19, at 78–79.

<sup>23</sup> Visual facts include evidence that comes from a witness's visual memory as well as non-verbal physical exhibits that are presented to the fact finder.

<sup>24</sup> David A. Chavkin, *Clinical Legal Education: A Textbook for Law School Clinical Programs* 96–97 (Anderson Publg. 2002).

<sup>25</sup> It can easily be argued that poets, especially those writing lyric poetry are equally concerned with images. Ezra Pound, for example, in *The ABC of Reading* (17th ed., New Directions Publg. Co. 1987), praised the ancient Greek rhetorical figure of speech *phanopoeia*, which he defined as, "You use a word to throw a visual image on to the reader's imagination." *Id.* at 37. Pound stressed the centrality of images in poetry and participated in the founding of the Imagiste school of poetry in 1920s Paris. The famous short poem, *The Red Wheelbarrow* by William Carlos Williams, another member of Imagiste group, dramatically illustrates the reverence of some poets for images and objects.

*so much depends  
upon  
a red wheel  
barrow  
glazed with rain  
water  
beside the white  
chickens.*

William Carlos Williams, *Spring and All* 74 (Contact Publg. Co. 1923).

stricted in their ability to tell stories since, generally, they must select a specific moment and a specific point of view. In addition, they must consciously decide what parts of a scene to include. These choices have led to a number of proven techniques that are transferable to legal advocacy and are, therefore, useful.

There are, in fact, a number of limitations to the utility of recalled images in legal proceedings. The psychological study of episodic memory has revealed several truths that contradict widely-held views about the role of images and how and why we remember them. First, science has largely rejected the view that memories are like objects in the attic of a house, which one searches through to find the desired object.<sup>26</sup> Images and sensory impressions (in contrast to words) are likely remembered as a series of spatial and visual impressions.<sup>27</sup> This provides efficiency to mental processing. For example, a mouse is remembered for certain characteristics which can be changed independently in the brain.<sup>28</sup> Because images are remembered in a relational manner,<sup>29</sup> memories

---

<sup>26</sup> See William James, *The Principles of Psychology*, vol. 1, 654 (Harv. U. Press 1983). “In short, we may search in our memory for a forgotten idea, just as we rummage our house for a lost object. In both cases we visit what seems to us the probable *neighborhood* of that which we miss. We turn over the things under which, or within which, or alongside of which, it may possibly be; and if it lies near them, it soon comes to view.” *Id.* at 164.

<sup>27</sup> Andrew Hollingworth, *Scene and Position Specificity in Visual Memory for Objects*, 32 *J. Experimental Psychol.: Learning, Memory & Cognition* 58, 58 (2006). Psychologist Hollingworth conducted numerous experiments on the way in which we receive information about an event. He found that in viewing a scene, attention is directed serially to different objects. “For example, while viewing an office scene a participant might direct attention and the eyes to a coffee cup, then to a pen, then to a notepad. In each case, focal attention supports the formation of a coherent perceptual object representation.” *Id.*

<sup>28</sup> Imagine a mouse on an elephant’s back. Now imagine a tiny elephant on a giant mouse’s back. Now think of a pink mouse. Our ability to manipulate such images indicates their dispersed existences in our brains. It also illustrates that supposedly “hard” facts will not be isolated by jurors into a particular pigeon-hole, but will be interpreted and identified with respect to their perceived qualities.

<sup>29</sup> Steven L. Winter, *A Clearing in the Forest* 6 (U. Chi. Press 2001). As Winter demonstrates, in analyzing whether a criminal statute involving vehicles could be applied to airplanes, judges rely on radial categories when making law. *Id.* at 197–203. “A radial category consists of a central model or case with various extensions that, though related to the central case in some fashion, nevertheless cannot be generated by rule. Because they derive from the central case in different ways, the extensions may have little or nothing in common with each other beyond their shared connection to the central case.” *Id.* at 71.

These categories take the form of neural networks in our brain. When we see a dog, we may activate memories of our own dog, the name of our father’s dog that died long before we were born, the feeling of cold known to the protagonist in Jack London’s *To Build a Fire*, the smell of a wet dog, the recollection that our suit is at the cleaners because it was covered in dog hair, etc. Contemporary cognitive theory indicates that the same network of thoughts plays a role in legal decision-making. When considering a case of intentional infliction of emotional distress, a jurist may find that her mind reflects on memories of a tort law professor’s harsh questioning in front of her peers during the first year of law school, a

of them can be easily distorted: the image of a gun can be stored as larger or smaller than it actually was. Secondly, contrary to the intuitive convictions of most of us, memories of traumatic or unusual events are not captured with a special vividness or validity compared to memories of everyday occurrences.<sup>30</sup> These make truthful re-creation of a scene more difficult than might initially be expected. Nevertheless, images have a valid role in the law. They serve as potent hooks for the listeners' ears, compelling attention in ways that abstract and general words cannot.<sup>31</sup>

### III. EXPOSING AND DEVELOPING VERBAL IMAGES

Like an artist who sets an easel in a field, arranges fruit for a still life, or visits a homeowner whose portrait is to be painted, an attorney must conduct fact investigation to locate relevant images. These may be found at a crime scene or in a company's warehouse. They may also reside in a witness's mind, in which case the attorney must first retrieve the image. Next, the recollections must be translated into words. Finally, these words must be presented to a fact finder or judge in a way that correctly reconstitutes the memories in the receiver's mind. This is a challenging assignment, yet it is one that can yield rich rewards by creating a palpable sense of an event. In the following paragraphs I will describe each of these steps.

---

Marx Brothers' movie, and many other seemingly unrelated images and thoughts. And because of this network, one point of entry can lead us anywhere on the matrix. Thus, presenting an image of one thing makes it possible to reason about another image, by mapping "its inferential structure (with or without language) to the target domain." *Id.* at 38.

Trial lawyers recognize this mapping concept. See e.g. Steven Lubet, *Modern Trial Advocacy* 32 (Nat'l. Inst. Tr. Advoc. 2004). In a leading law textbook, Lubet refers to it as "script theory." "A 'script' is a person's mental image or understanding of a certain context or set of events. Script theory posits that human beings do not evaluate facts in isolation, but tend to make sense of new information by fitting each new fact into a preexisting picture." *Id.* at 32.

<sup>30</sup> William F. Brewer, *The Theoretical and Empirical Status of the Flashbulb Memory Hypothesis*, in *Affect & Accuracy in Recall*, in *Studies of "Flashbulb" Memories* 274-305 (Eugene Winograd & Ulric Neisser eds., Cambridge U. Press 1992). After reviewing ten years' worth of analysis of this popular theory, Brewer concluded that there was no justification for it. The detailed recall of long-past significant events is generally inaccurate and has far more to do with the repetition of retelling, than with a firmly etched memory of what really happened. *Id.* at 279.

<sup>31</sup> "[W]e need to think things instead of words—to drop ownership, money, etc., and to think of the stream of products; of wheat and cloth and railway travel." Oliver Wendell Holmes, Jr., *The Essential Holmes* 146 (Richard Posner ed., U. Chi. Press, 1992).

*A. Discovering Images*

One of an attorney's first jobs may be to extract relevant memories from a client or a witness. This may best be accomplished by a questioner who is both an investigator and an artist: the investigator to carefully review and clarify each of the statements made by the witness, and the artist to imagine the scene in his or her own mind, filling in the missing areas of the mental canvas with creative suggestions and then testing out these hypotheses on the witness.<sup>32</sup> Encouraging the witness to use a pencil to sketch out each scene being discussed is also a valuable activity. Even if the people in the pictures are stick figures and none of the streets are straight, the process of transferring key images from the witness's mind to the white empty surface will often uncover facts that otherwise lay dormant.

One cannot overstate the importance of taking the time for exhaustive interviewing of witnesses to access these images. As David Binder wrote in his seminal work on fact investigation, "[E]ffective fact investigation is the underpinning for most of the other major tasks litigators undertake."<sup>33</sup>

*B. Capturing Images*

A listener who hears about an event uses previously obtained images to make sense of the words.<sup>34</sup> Often meaning is culturally derived. For example, when a Pakistani tells of being beaten in a parking lot in Karachi, American listeners may imagine a parking lot based on an expansive American urban model, which is, in fact, very different from the dark, narrow, alley-like lot in which the action occurred. The fact finder thus will try to see the scene, but it

---

<sup>32</sup> Philosopher Lévi-Strauss characterized these two roles as those of an engineer and a "bricoleur." Claude Lévi-Strauss, *The Savage Mind* 19 (U. Chi. Press 1962). He wrote, "[T]he engineer questions the universe, while the 'bricoleur' addresses himself to a collection of oddments left over from human endeavors, that is, only a sub-set of the culture. . . . [T]he engineer works by means of concepts and the 'bricoleur' by means of signs." *Id.* at 19–20. For example, a client in our asylum clinic was describing a living room, and the assigned student intern imagined that there were framed photos on a bookcase. I asked the client about this, and she revealed that there was a photo of her father embracing the country's president when they were both soldiers. Discussion about this image revealed rich detail and explained why she and her family were at special risk for persecution for their political opposition to the president.

<sup>33</sup> David A. Binder & Paul Bergman, *Fact Investigation from Hypothesis to Proof* 3 (West Publ. Co. 1984).

<sup>34</sup> *Id.* at 191.

will be constructed out of the building blocks that the person already has available in his memory, which may significantly vary from a witness's internalized view of the scene.<sup>35</sup> The same issues confront the viewer of an artwork: the cultural distance providing intellectual perspective, but at the loss of intuitive understanding.<sup>36</sup>

What makes one description effective, memorable, and living and another description stagnant? Certainly, it is the choice of words and clarity of portrayal. Nonetheless, it is also the unveiling of accessory objects that can give the scene a piquancy<sup>37</sup> and authenticity that a presentation of the elemental objects alone cannot. For example, picture the following scene: A woman is being held by her arms and roughly dragged out of her house into a police van. The police and the van are carefully described, as is the way in which she was held and pulled. All of these images support her claim that she was subject to government persecution. But what other accessory details can we discover from her? Imagine the scene for yourself. What do you see? Do you see her feet as she is dragged? What kind of shoes is she wearing? She revealed, when asked, that she had been wearing her bedroom slippers. Now do you see her slippered feet being dragged across the ground? Across gravel? Grass? Dirt? Again, in response to our query, she disclosed that the police dragged her through a bed of daisies that she had planted, trampling them and breaking their stems. Destruction of flowers is not grounds for asylum. It does, however, make the scene come to life.

The flowers are valuable as accessory details. They are also significant because they are objects with universally recognizable emotive qualities. Flowers are accessible to all of us regardless of class or background.<sup>38</sup> Why do we feel so concerned with the ruined

---

<sup>35</sup> *Id.* at 85–86.

<sup>36</sup> Michael Baxandall, *Patterns of Intention: On the Historical Explanation of Pictures* 109 (Yale U. Press 1985). Art historian Baxandall writes, “The participant [in a foreign culture] understands and knows his culture with an immediacy and spontaneity the observer does not share. . . . On the other hand, what the observer may have is perspective—precisely that perspective being one of the things that bars him from the native's internal stance.” *Id.*

<sup>37</sup> Peter L. Murray, *Basic Trial Advocacy* 110, 111 (Little, Brown & Co. 1995). While even the simplest experience may contain millions of individual facts, it is the attorney's responsibility to decide which facts are important and which are not.

<sup>38</sup> Philosopher Claude Lévi-Strauss distinguished between the ‘savage’ (wild, undomesticated) modes of thought that we all have in common and the civilized (tamed, domesticated) thought patterns of science and scholarship that are specific to each society. Claude Lévi-Strauss, *The Cerebral Savage: The Structural Anthropology of Claude Lévi-Strauss*, 28

flowers? Because the woman's concern reveals the sense of beauty that we share as human beings. In addition, the flowers serve as an ineffective talisman for protection.<sup>39</sup> Surrounding her home with a lovely garden failed to restrain the empire of force from entering. Finally, we may doubt that an amateur flower gardener could be a real threat to a national government.

### *C. Presenting Images*

Having an interest in details does not mean that an attorney must preserve and present all the facts he or she discovers. Art historian Edmund Burke Feldman notes that an artist's concern for accuracy does not demand that he or she paint in a photographically realistic way, including all details of substance, light, and color.<sup>40</sup> He comments on the artist's selective eye, "Often the illusion of reality is created by elimination of details which the eye might see."<sup>41</sup> How then does a lawyer select which details to reveal and which to omit?<sup>42</sup> Feldman suggests that one cannot make this decision until one is thoroughly and deeply knowledgeable about the scene.<sup>43</sup> Writing of the special importance of selected objects in a posed photograph, philosopher Roland Barthes stated:

The interest lies in the fact that the objects are accepted inducers of associations of ideas (book-case = intellectual) or, in a

---

Encounter 25, 25–32 (Apr. 1967).

Lévi-Strauss considered these civilized patterns (such as legal norms) to be useful, but inferior to the primary modes of thought, which are the foundations of human social life. Such modes are, he wrote, "undomesticated like the wild pansy." See also Clifford Geertz, *The Interpretation of Cultures: Selected Essays* 345–359 (Basic Bks. 1973).

<sup>39</sup> French artist Christine Arveil commented,

Each of us has a personal means to survive (I heard once a man saying that he resisted torture in Argentinean prisons by singing non-stop tangos to himself); yet these means, I gathered (this is my personal interpretation from a number of examples and personal experience) have one common factor: they focus the person on his/her personal sense of beauty. This, as you know, is extremely moving to narrate, as it describes something that belongs to the area of emotions in the person and is heard from the similar area in the audience: the area where art also takes place/happens.

Ltr. from Christine Arveil to Author (May 7, 2006) (copy on file with the Author).

<sup>40</sup> Edmund Burke Feldman, *Varieties of Visual Experience* 182 (2d ed., rev. & enlarged ed., H. N. Abrams, Inc. 1972).

<sup>41</sup> *Id.*

<sup>42</sup> Murray, *supra* n. 37, at 110–111.

<sup>43</sup> See Feldman, *supra* n. 40, at 184. Feldman notes, "Every work of art within the style of objective accuracy represents the end result of a long process of observation and simplification." *Id.* at 185.

more obscure way, are veritable symbols (the door of the gas-chamber for Chessman's execution with its reference to the funeral gates of ancient mythologies). Such objects constitute excellent elements of signification: on the one hand they are discontinuous and complete in themselves, a physical qualification for a sign, while on the other they refer to clear, familiar signifieds. They are thus the elements of a veritable lexicon, stable to a degree which allows them to be readily constituted into syntax.<sup>44</sup>

Barthes distinguishes three levels of meaning in a visual image: an informational level, a symbolic level, and an obtuse level.<sup>45</sup> Each of these has utility for the advocate. The informational level is the obvious or plain meaning of an object.<sup>46</sup> We are trained within our culture to ascribe an explicit meaning to images. Thus, we see a chair as a chair, and a rose is just a rose. We have also been taught to recognize a fat man in red clothes—seen during the Christmas season—as Santa Claus, although this might not be universally apprehended.<sup>47</sup> When an asylum seeker described a lake in the middle of his home town, in which the government had drowned his brother, he had difficulty in conveying to the immigration judge his certitude that the government was responsible for his brother's death. Finally he confided, after badgering by the government attorney, that all government opponents were drowned in this lake. Thus, for him, the image of his brother's body floating in this lake explicitly meant that the government had killed his brother. While the meaning of this image was obvious to the asylum seeker, it required further explanation to convey that meaning to the judge.

On the other hand, images can connote unanticipated meanings. That is, in one culture, objects can evoke meanings that are not directly related to their actual existence, and of which the ordinary observer may not even be aware. A painting of happy peasants in a field (figure 1, appendix A) served to reassure the wealthy landowning patrons that their own affluence was morally

---

<sup>44</sup> Roland Barthes, *Image, Music, Text* 22–23 (Stephen Heath trans., Farrar, Strauss & Giroux 1977).

<sup>45</sup> *Id.* at 37.

<sup>46</sup> *Id.*

<sup>47</sup> Art historian Erwin Panofsky famously commented that African Bushmen on seeing Da Vinci's "Last Supper" would merely recognize it as "an excited dinner party." Erwin Panofsky, *Studies in Iconology: Humanistic Themes in the Art of the Renaissance* 24 (Harper Collins 1967).

obtained.<sup>48</sup> Although this affluence was based on the back-breaking labor of peasants, according to the painting the peasants were reverent and blessed. The image further connotes the role of artists in affirming and solidifying the values of capitalism over socialism. It is likely that few French viewers in the nineteenth century saw such meaning, or that they even could have had the ability to perceive of this meaning. Nonetheless, it is a valid and powerful signification of the painting.

Images and objects contained in a scene can also have a symbolic meaning that can evoke a theme or reinforce the equity of a client's case. The growth of popularity of semiotics, the study of symbols, has led to acceptance of the stance that many, if not all, objects have symbolic meaning.<sup>49</sup> However, an object can symbolize different concepts or have no meaning at all depending on the viewer.<sup>50</sup> As art critic, Nelson Goodman, noted, "Almost anything can stand for anything else."<sup>51</sup> It is therefore a challenge and a gamble to describe an object and achieve the desired symbolic response.<sup>52</sup>

The advocate's test is to establish in the mind of the fact finder the particular symbolism that is beneficial to the theory of the case, making the image a surrogate<sup>53</sup> for the preferred symbol. Creating this referential relationship requires focusing on certain aspects of the scene and pointing out, or at least hinting at, relationships with certain ideas.<sup>54</sup>

---

<sup>48</sup> See e.g. Jean-Francois Millet, *The Angelus* (Musée d'Orsay, Paris 1859) (depicting a pair of praying farmers).

<sup>49</sup> The symbolic meaning often reflects the cultural significance of an object. All objects that we make, use, or display express cultural values. Thus the type of chair, the height of the grass in a lawn, and the position of a desk in an office are signs.

<sup>50</sup> A symbol "becomes meaningful and evokes human responses when, and only when, a perceiver of that symbol projects meaning into it and responds to it in terms of the meaning which he has learned as appropriate for that symbol." Lawrence Frank, *The World as a Communication Network*, in *Sign Image Symbol* 8 (Gyorgy Kepes ed., George Braziller, Inc. 1966).

<sup>51</sup> Nelson Goodman, *Languages of Art: An Approach to the Theory of Symbols* 8 (Bobbs-Merrill Co., Inc. 1968).

<sup>52</sup> The emotion that is excited in the listener will often differ from the emotion being expressed. *Id.* at 47. A face showing agony, for example, may not produce pain in the viewer, but pity. *Id.* A colorful painting does not make us feel colorful. *Id.* at 48.

<sup>53</sup> A surrogate here is defined as a stimulus produced by another individual that is relatively specific to some absent object, place, or event. James J. Gibson, *A Theory of Pictorial Perception*, in *Sign Image Symbol*, *supra* n. 50, at 93.

<sup>54</sup> Goodman notes, "Pictures are no more immune than the rest of the world to the formative force of language even though they themselves, as symbols, also exert such a force upon the world, including language. Talking does not make the world or even pictures, but talking and pictures participate in making each other and the world as we know them."

One of the difficulties in using images for their symbolic meaning is that symbolism can be ambiguous and even yield contradictory meanings. The artist, however, provides aesthetic value to emphasize his intended meaning. Commenting on a frame from Eisenstein's classic film, *Ivan the Terrible*, Barthes writes, "Eisenstein's 'art' chooses the meaning, imposes, hammers it home. . . . How? By the addition of an aesthetic value or emphasis. Eisenstein's 'decorativism' has an economic function: it proffers the truth."<sup>55</sup>

#### *D. Enhancing Images*

How can the advocate add aesthetic value to his description of an image? In addition to the careful use of language, one can select the elements of a scene that enhance the theory of the case. However, this is not to say that the incidental object should acutely symbolize an intended theme. The bloody shirt, the doll thrown on the floor, and the children's book with its pages ripped are too obvious, too intense, too trite to affect seriously the fact finder's viewpoint. Such images prohibit our imaginations from exploring more ambiguous connections and possibilities. We struggle to divine additional significance. Barthes comments, "One could imagine a kind of law: the more direct the trauma, the more difficult is connotation; or again, the 'mythological' effect of a photograph is inversely proportional to its traumatic effect."<sup>56</sup>

Attorneys are wordsmiths and feel more comfortable with words than with images. However, in presenting images verbally, lawyers should resist the urge to talk too much about them. Rather, they will benefit most by describing the powerful moment or object and then refraining from explaining its significance, symbolism, or metaphor. Images serve as an alternative to legal analysis and do not benefit from extensive critical exposition.<sup>57</sup>

How then does one call attention to an image? As in paintings, this can be done by placing it in a central or conspicuous place in a

---

Goodman, *supra* n. 51, at 88–89.

<sup>55</sup> Barthes, *supra* n. 44, at 56.

<sup>56</sup> *Id.* at 31.

<sup>57</sup> Cf. James Elkins, *What Do We Want Pictures to Be? Reply to Mieke Bal*, 22 *Critical Inquiry* 590 (Spring 1996). Art theorist Elkins urges that viewers should resist the urge to interpret images: "[t]he longer I can hold out against the impulse to find narrative meaning, the more aware I become of the picture itself and of the workings of the desire to find words." *Id.* at 591.

legal discussion, by having the client or another actor in the legal story interact with the image, or by placing the image in a context that makes it stand out.<sup>58</sup>

#### IV. THE OBTUSE OBJECT

Art critics writing about successful still-life paintings and photos have identified a surprising aspect of art. Those pictures that provide prolonged aesthetic interest<sup>59</sup> do so by including both recognizable patterns, but also some unexpected element that disturbs our expectations. J.N. Findlay terms this “poignancy,”<sup>60</sup> while Barthes calls it the “gratuitous element.”<sup>61</sup> The preeminent art theorist, E. H. Gombrich, went so far as to say the mental friction caused by the juxtaposition of the beautiful and the abhorrent is one of the chief tools of the artist: “(Art) relies for its effect on the complex interplay of attraction *and* repulsion, gratification and renunciation for the sake of ‘higher’ values.”<sup>62</sup> Thus, a single missed stitch in a beautiful embroidery, Marilyn Monroe’s birthmark, and one overcooked entree in the midst of a tasty feast all seem more perfect because of their flaws.

The element that is out of place surprises the viewer, ironically creating a feeling of reality, of credibility.<sup>63</sup> This unexpected feature is especially powerful where its contrast with the rest of the scene highlights some antithetical quality that requires synthesis in the fact finder’s own mind.<sup>64</sup> In other words, the advocate

---

<sup>58</sup> Göran Hermerén, *Representation and Meaning in the Visual Arts: A Study in the Methodology of Iconography and Iconology* 83 (Berlingska Boktryckeriet 1969).

<sup>59</sup> This means that one is compelled to view the picture, read a poem, or listen to music for a longer time than is needed to merely identify its subject and contents. At its best the aesthetic object causes the viewer to forget his “self” in the act of contemplation. J. N. Findlay, *The Perspicuous and the Poignant: Two Aesthetic Fundamentals*, 7 *British J. Aesthetics* 89, 97, 102 (1972).

<sup>60</sup> *Id.* at 101.

<sup>61</sup> Barthes, *supra* n. 44, at 64.

<sup>62</sup> E. H. Gombrich, *Meditations on a Hobby Horse and Other Essays on the Theory of Art* 28 (Phaidon Press 1978).

<sup>63</sup> In an early case of mine concerning the validity of a marriage between an immigrant and a U.S. citizen, an immigration officer found that the parties were involved in a real marriage based on a description of the couple’s home. The deciding evidence appears to have been the wife’s description of the bathroom and her sudden anger over the husband’s repeated failure to put down the toilet seat after use. This arresting vision of a yawning toilet convinced the officer as proof of cohabitation, where insurance, mortgage, and affidavits had not.

<sup>64</sup> From the theater, another branch of the arts, comes an illuminating and reinforcing recollection of the remarkable acting director, Konstantin Stanislavski. In his memoir, he

should be receptive to visual details that seem out of place, even if they are immaterial to the cause of action. Students in Ave Maria Law School's Asylum and Immigrant Rights Clinic have identified such items as a necktie, an unfinished guest room, a coke bottle, and a pomegranate as obtuse objects that markedly strengthened their clients' cases. The more unanticipated the object, the more useful its addition to the description of the scene. "Unanticipated," does not mean weird.<sup>65</sup> The most successful "obtuse objects" are often the most common, the most intimate, as in a successful still life.<sup>66</sup> The advocate should try to transmit to the fact finder the unsettling feelings that the presence of this object causes.<sup>67</sup>

The juxtaposition of ordinary, but incongruous, objects was a commonly-used technique of artists in the sixteenth and seventeenth centuries in the design of devices and emblems.<sup>68</sup> Art theo-

---

recalled advising a young actor portraying a hypochondriac, "[Y]ou are painting the picture in only one color, and black only becomes black when some white is introduced for the sake of contrast. So let in just a bit of white color as well as some other colors of the rainbow into your role. There will be contrast, variety, and truth . . . . When you play a good man look for places where he is evil, and in an evil man look for places where he is good." Konstantin Stanislavski, *My Life in Art* 183 (J. J. Robbins trans., Routledge 1996).

Speaking also of colors, renowned trial lawyer Gerry Spence commented, "I learned that, like a painting, an argument could best be made with a variety of color. Yet it could not be a jumble of every color for sale at the artist's supply store. Simple words were enough. Too many colors caused the painting to lose its power. As in language, the colors become muddy, the design blurred, the meaning lost." Gerry Spence, *How to Argue and Win Every Time: At Home, at Work, in Court, Everywhere, Everyday* 169–170 (St. Martin's Press 1995).

<sup>65</sup> Reference to even seemingly innocuous common objects can dramatically affect a person's decision-making process. Researchers placed a briefcase on a table near students who were taking a test to reveal their charitable traits. They displayed greater stinginess than other students sitting in a room in which a backpack, not a briefcase, sat on the table. The researchers theorized that the mere presence of the briefcase made the students think of business leading them to compete more aggressively. Aaron C. Kay et al., *Material Priming: The Influence of Mundane Physical Objects on Situational Construal and Competitive Behavior Choice*, 95 *Org. Behavior & Human Decision Processes* 83, 95 (Sept. 2004).

<sup>66</sup> Writing of seventeenth century Dutch still life paintings, art historian John Rupert Martin notes that by concentrating attention on realistically painted tulips and lobsters, "(t)he beholder is enabled to pass from familiar, visible things to the contemplation of invisible ones." John Rupert Martin, *Baroque* 136 (Harper & Row 1977).

<sup>67</sup> "Painters have long appreciated the power that still life paintings harness through the contrast of a captured moment of life, permanently unchanging, with the viewer's recognition of the evanescence of flowers and food. While making a direct and visceral appeal to the viewer, the artist also invites him—paradoxically—to reflect on the brevity of man's existence and the insubstantiality of all worldly things." *Id.* at 134.

<sup>68</sup> In the twentieth century, Andy Warhol revived the power of still life painting, with his celebrated Campbell's Soup Cans and detergent boxes. In forcing viewers to contemplate everyday consumer products, Warhol "sought to set up a resonance between art and images, it having been his insight that our signs and images are our reality. We live in an atmosphere of images, and these define the reality of our existences." Arthur C. Danto, *Philosophizing Art: Selected Essays* 81 (U. Cal. Press 1999).

rist, E.H. Gombrich, studied artists' creation of enigmatic images, combining seemingly incompatible objects and words. One example he considered was the emblem depicting the sun hidden behind clouds coupled with the motto, *hinc clarior*, or "hence brighter." Initially, the paradox appears illogical, while on reflection: "[I]t reveals its applicability over a wide area. The paradox becomes a sample of the ineffable mystery that is hidden behind the veil of appearances. . . . It is this effort to transcend the limitations of discursive speech which links the metaphor with the paradox and thus pave[s] the way for a mystical interpretation of the enigmatic image."<sup>69</sup>

Adam Smith, better known for his authorship of political polemics that galvanized American colonists to revolt, served earlier as a professor of logic.<sup>70</sup> He urged students to include unexpected details when describing objects.<sup>71</sup> Written while a professor of logic at the University of Glasgow, more than twenty-five years before his influential *Wealth of Nations* (1776), *Lectures on Rhetoric* nicely summarizes the value of selecting curious details:

A 3d Direction may be, that, We should not only make our circumstances all of a piece, but it is often proper to Choose out some neice [sic] and Curious ones. A Painter in Drawing a fruit makes the figure very striking if he not only gives it the form and Colour but also represents the fine down with which it is covered. The Dew on Flowers in the same manner gives the figure a striking resemblance. In the same manner in description we ought to choose out some minute circumstances which can concur in the general emotion we would excite and at the same time but little attended to. Such circumstances are always attended with a very considerable effect.<sup>72</sup>

Best-selling horror author Stephen King may have intuitively followed this precept in describing his own near-fatal accident in which he was struck by a truck while strolling down a road near his house.<sup>73</sup> He recalled the dust on the tail lights and the dirt on

---

<sup>69</sup> See E.H. Gombrich, *Gombrich on the Renaissance, Volume 2: Symbolic Images* 168 (Phaidon Press 1985).

<sup>70</sup> For a detailed, but easily understood introduction to the life and writings of Adam Smith, see *The Authentic Adam Smith: His Life and Ideas* (W. W. Norton 2006).

<sup>71</sup> Adam Smith, *Lectures on Rhetoric and Belles Letters* 72 (J.C. Bryce ed., Liberty Fund 1985).

<sup>72</sup> *Id.* at 72.

<sup>73</sup> "This recollection is very clear and sharp, more like a snapshot than a memory. There is dust around the van's tail-lights. The license plate and the back windows are dirty.

the truck's windows, both evocative of the inattention of the driver to his vehicle. Such details will be retained by the listener, while others may be quickly forgotten.<sup>74</sup>

### *A. Perceiving the Unexpected*

How can an advocate identify an obtuse object? Two methods seem to work. Both involve acceptance that such objects may be imbedded in a client's story and a willingness to be vigilant in looking for them. In the first method, the advocate pays attention to every object that is mentioned, waiting for one that, like a loose tooth, makes him or her wince or feel uncomfortable. This attention should be directed to written testimony as well as to any photographs or physical evidence. In addition, in interviewing the client and witnesses, the advocate should seek out physical details—asking, for instance, about the contents of a desk or a purse. When an object is mentioned that seems out of place or surprising, the advocate should concentrate on determining why it was there.

The second method is more cerebral, starting with the theory of the case and applying it to the client's story then searching for an object that thematically represents this theory. Of particular value in this approach is the intent to locate an ironic object, one that justifies an opposite conclusion to the theory of the case. For example, where one is arguing that the government is persecuting a client for her political opposition, a paperweight given to her father by the country's president, with the etched remark "To my good friend and comrade," seems ironic when compared to the government's alleged persecution of the daughter. Upon closer reflection, however, it points out the dismay of the government at a rebellious child of a close contact of the president. It also solidifies the claim that the government knows who she is and is more likely to persecute her in the future, should she return to that country.

Both methods for identifying obtuse objects demand an openness to their existence and a sensitivity to one's feelings, as opposed to thoughts. Providing directions for identifying such objects has its limits. The object that gives one person an electrifying feeling may, of course, provide someone else with only a yawn or no

---

I register these things with no thought that I have been in an accident, or of anything else. It's a snapshot, that's all. I'm not thinking; my head has been swopped clean." Stephen King, *On Writing: A Memoir of the Craft* 258–259 (pocket ed., Pocketbooks 2002).

<sup>74</sup> See Gerald R. Powell, *Opening Statements: The Art of Storytelling*, 31 *Stetson L. Rev.* 89, 97 (2001).

reaction. An emotional response to the unexpected presence of an object in a legal story, even if ill-founded, can be the catalyst for further fact research and the basis for greater enthusiasm and passion for representing a client. Thus, the conscious and conscientious struggle to identify obtuse objects benefits clients and their advocates, even if others find the objects identified trivial or unconvincing.

Once identified, the visual image must be translated into words.<sup>75</sup> It is the advocate's job not to merely describe an image but to make the fact finder actually see it in his or her mind.<sup>76</sup> This brings up the question of the attorney's role in creating the presentation. Just as one of the goals of art is to infuse the subject matter of an artwork with feeling and meaning, the goal of an attorney is to make the judge see the meaning of the facts presented, not just the facts themselves. Thus, in describing a police station in which a refugee was beaten, one might elicit testimony that depicts the building as a structure of government power. In addition, a lawyer might ask the witness why a particular scene or motif created meaning for her.

### *B. Giving Meaning to Obtuse Objects*

Who creates meaning in an image? Only the witness? Or do the attorney and even the fact finder also have an equal right to recreate the scene and give it meaning?<sup>77</sup>

This dilemma highlights a danger in encouraging a fact finder to create meaning in images. As an art critic may deconstruct a scene by examining a work of art for "‘fissures’ and ‘slippages’ that give away—reveal, unmask—the underlying political and social realities that the artist sought to cover up with sensuous appeal,"<sup>78</sup> so a judge may seek to find negative or harmful meanings in images. Meanings of images may not be as arbitrary as some assume. As discussed in the next section, Jungian psychoanalysis, cognitive

---

<sup>75</sup> Novelist Joseph Conrad wrote that his aim as a writer was, "before all, to make you see" in Joseph Conrad, *The Nigger of the Narcissus* 14 (Doubleday & Co. 1959). This is a valid goal for an attorney as well.

<sup>76</sup> "Art does not reproduce the visible; rather, it makes visible." Paul Klee, *The Inward Vision: Watercolors, Drawings, Writings* 5 (2d ed., Henry N. Abrams, Inc. 1958). When the advocate enables the fact finder to visualize an experience, he intensifies it.

<sup>77</sup> See Sylvan Barnet, *A Short Guide to Writing about Art 2000*, at 84 (6th ed., Addison Wesley, Inc. 2000).

<sup>78</sup> *Id.* at 85.

linguistics, and classical rhetoric provide guidance on the likely interpretation and uses of images.

Swiss psychoanalyst Carl Jung and his disciple, Joseph Campbell, contended that certain images serve as universal symbols. Jung defined a “symbol” as “an expression of an intuitive idea that cannot yet be formulated in any other or better way.”<sup>79</sup> And he stressed the significance in art and poetry of those images that have symbolic meaning outside the range of the creator’s and the viewer’s conscious understanding.<sup>80</sup> Jung believed that these symbolic images gain their power from the sphere of unconscious mythology, which he referred to as “the collective unconscious.”<sup>81</sup>

Jung believed that the impulse for artistic expression often comes from an unconscious imperative that leads the creator to make compulsive artistic choices as dictated by his unconscious will.<sup>82</sup> Such artworks exhibit an effect of the

suprapersonal that transcends our understanding to the same degree that the author’s consciousness was in abeyance during the process of creation. We would expect a strangeness of form and content, thoughts that can only be apprehended intuitively, a language pregnant with meanings, and images that are true symbols because they are the best possible expressions for something unknown—bridges thrown out towards an unseen shore.<sup>83</sup>

Nationally-renowned trial attorney Gerry Spence confided that a similar unconscious imperative guided some of his best advocacy. Commenting on a successful final argument that he delivered after dropping and disarranging his carefully drafted written notes,

---

<sup>79</sup> Carl Jung, *On the Relation of Analytical Psychology to Poetry*, in *The Portable Jung* 301, 307 (Joseph Campbell ed., R.F.C. Hull trans., Viking Press, Inc. 1971). Jung’s work was expanded upon by Campbell, his student, who analyzed fundamental similarities among folktales throughout the world. He concluded that all stories are variations of the hero’s quest for individuation. See generally Joseph Campbell, *The Hero with a Thousand Faces* (2d ed., Princeton U. Press 1968).

<sup>80</sup> Jung, *supra* n. 79, at 319.

<sup>81</sup> Jung wrote powerfully,

Whoever speaks in primordial images speaks with a thousand voices; he entralls and overpowers, while at the same time he lifts the idea he is seeking to express out of the occasional and the transitory into the realm of the ever-enduring. He transmutes our personal destiny into the destiny of mankind, and evokes in us all those beneficent forces that ever and anon have enabled humanity to find a refuge from every peril and to outlive the longest night.

*Id.* at 321.

<sup>82</sup> *Id.* at 313.

<sup>83</sup> *Id.* at 313–314.

Gerry Spence discovered that “[s]ome mysterious force, some guiding, unconscious intelligence had taken over, picked the words, and formed the thought line.”<sup>84</sup> Although these words that powerfully moved the jury were disjointed and syntactically illogical, “the jury heard with the ear of their hearts”<sup>85</sup> and returned a verdict in favor of his client.

Continuing down the path blazed by Jung and Campbell, we may expect to find an object in the client’s story that serves as a talisman, a powerful gift that protects the client on his or her journey.<sup>86</sup> In the archetypal story, this gift is not received until the hero has committed himself to the quest. For an asylum seeker, this talisman might be a forged passport and visa.

Perhaps these obtuse objects contain unconscious archetypes,<sup>87</sup> and this is what causes them to possess the peculiar emotional intensity that keeps a person awake at night, trying unsuccessfully to resolve the meaning of the object and to attempt to discover why the object has such an overwhelming power.<sup>88</sup> However, if Jung is correct, we will not be able to fully decode or explain the power of these images because their force is inaccessible to the conscious mind. The useful object transmutes the receiver’s individual concerns into the collective human comedy, making it “possible for us to find our way back to the deepest springs of life.”<sup>89</sup>

<sup>84</sup> Spence, *supra* n. 64, at 179.

<sup>85</sup> *Id.* at 180.

<sup>86</sup> See Campbell, *supra* n. 79, at 69.

<sup>87</sup> See Jung, *supra* n. 79, at 321.

<sup>88</sup> Psychologist Elizabeth Loftus wrote of the unbidden and abstruse visions that she retains from her role as an expert witness in numerous murder cases involving the potential misidentification of defendants as perpetrators. Having investigated the gruesome abduction and murder of a young boy, Dr. Loftus wrote,

I remembered, too, the mother’s description of her lost boy. . . . [His shirttail was out; he wore a Polar Fleece jacket] “Oh, yes,” [his mother] said, “I almost forgot—his shoes were tied in double knots.”

Those are the minor details, inconsequential to my work, that come back later to disturb my sleep. Those are the facts, typed on clean white paper, stapled into lengthy reports, placed in folders and shut up in files labeled “case pending,” that break the heart.

Elizabeth Loftus & Katherine Ketcham, *Witness for the Defense: The Accused, the Eyewitness, and the Expert Who Puts Memory on Trial* 184 (St. Martin’s Press 1991).

In debates over the meaning and value of art, adherents to the Phenomenological school viewed art as “valuable to the extent it is capable of stimulating and sustaining intense and prolonged aesthetic attention.” Harold Osborne, *Introduction*, in *Aesthetics* 15 (Harold Osborne ed., Oxford U. Press 1972). The boy’s shoelaces meet this test well. They also, tragically, represent a talisman that failed.

<sup>89</sup> Jung, *supra* n. 79, at 321.

*C. Learning from Rhetoric and Cognitive Science*

Those readers who question the validity of Jungian theory may be convinced by similar, though non-metaphysical, theories of cognitive linguists. Some of these researchers have concluded that the objects can be used as metaphors that serve as “conduits for conceptualizing communication.”<sup>90</sup> As explained by linguist Johan Vanparys, “ideas (or meanings) are objects and words (or other linguistic expressions) are containers; speakers put ideas into words and transfer through a kind of conduit to the hearer, who extracts the ideas from the words.”<sup>91</sup> This contrivance is in part due to the challenges of communicating ideas because the speaker often has a more sophisticated understanding of an idea he or she is seeking to relate than does the listener and because “we tend to understand abstract phenomena in terms of more concrete things.”<sup>92</sup> Thus, we use metaphors and metonyms as tools to transfer an idea to another person using objects that represent, but also characterize, those ideas.<sup>93</sup>

For example, a putative murder victim’s profession may serve as a powerful metaphor for his itinerant lotharian tendencies. Law professor and novelist Marianne Wesson conducted meticulous research into the well-known *Hillmon* case,<sup>94</sup> which served as the basis for the hearsay exception allowing the statement of the declarant’s then existing state of mind.<sup>95</sup> In 1879, F.A. Walters was a traveling cigarmaker, whose alleged but unconfirmed murder was the centerpiece in the *Hillmon* case.<sup>96</sup> Before his disappearance,

<sup>90</sup> Michael J. Reddy, *The Conduit Metaphor—A Case of Frame Conflict in Our Language about Language*, in *Metaphor and Thought* 284 (Andrew Ortony ed., Cambridge U. Press 1979).

<sup>91</sup> Johan Vanparys, *A Survey of Metalinguistic Metaphors*, in *By Word of Mouth: Metaphor, Metonymy, and Linguistic Action in a Cognitive Perspective* 1, 2 (Louis Goossens et al. eds., John Benjamins Publ. Co. 1995).

<sup>92</sup> *Id.* at 4; see also Mark Johnson, *The Body in the Mind: The Bodily Basis of Meaning, Imagination and Reason* 57–59 (U. Chi. Press 1987).

<sup>93</sup> Friedrich Nietzsche saw such figures of speech as primary devices for creating “truth” in a society. He wrote, “What is truth? a mobile army of metaphors, metonyms, anthropomorphisms, in short, a sum of human relations which were poetically and rhetorically heightened, transferred, and adorned, and after long use seem solid, canonical, and binding to a nation.” Friedrich Nietzsche, *On Truth and Lying in an Extra-Moral Sense*, in *Friedrich Nietzsche on Rhetoric and Language* 246, 250 (Sander L. Gilman et al. eds. & trans., Oxford U. Press 1989).

<sup>94</sup> *Mut. Life Ins. Co. of N.Y. v. Hillmon*, 145 U.S. 285 (1892).

<sup>95</sup> Fed. R. Evid. 803(3).

<sup>96</sup> John Hillmon had taken out three sizeable life insurance policies before leaving his wife and going West to become a rancher. Soon after his departure, his partner reported

Walters had informed his fiancée by letter that he would not return to her for a long time because he had been offered a position working on Hillmon's ranch.<sup>97</sup> This letter—the centerpiece of the defense's position that Walters and not Hillmon had died—was likely a prevarication created to allow him to engage in romances transgressing his vows of betrothal as he wandered from town to town, plying his trade. I suggest that his profession stands metaphorically for his sexual promiscuity.<sup>98</sup> The phallic significance is borne out by an account of him in the testimony of one of his employers: “[H]e was a young man who was all the time talking to the men about him and telling of his many travels. He had been in a large number of towns in different places and he also talked a great deal of his love scrapes and how he had gotten out of them.”<sup>99</sup> Itinerant cigarmaking as a metaphor for licentiousness is valid here because it is probable that Walters was promiscuous and therefore had reason to lie to his betrothed. Walters' reason to lie undermines the Supreme Court's reliance on his letter's stated intentions connected him to Hillmon and the letter's admission under the existing state-of-mind exception to the hearsay rule. As

---

that he had accidentally shot and killed Hillmon. Hillmon's widow then demanded the proceeds of the insurance policies. The insurance companies hired investigators who suggested that the body presented by Hillmon's partner was not Hillmon, but F.A. Walters, an unlucky victim of Hillmon's scheme to defraud the insurance companies. *Mut. Life Ins. Co.*, 145 U.S. at 285–287. The insurance companies' success at trial rested on the admission of a letter from Walters to his fiancée in which he stated his intention to go work on a ranch for a man named Hillmon. *Id.* at 287–288. This statement could have been used to establish a relationship between Hillmon and Walters if it did not fall under the evidentiary rule against the admission of hearsay. In allowing this letter into evidence, the U.S. Supreme Court fashioned a novel exception to the hearsay rule for statements of intention, which courts and the Model Rules of Evidence still cherish. Marianne Wesson, *The Hillmon Case, the Supreme Court, and the McGuffin*, in *Evidence Stories* 277, 277–278 (Richard Lempert ed., Found. Press 2006) [hereinafter *The Hillmon Case*]. Professor Wesson questioned the basis for this exception. Her digging into the facts was not limited to reading old court briefs and newspapers. *Id.* at 285–286. She also exhumed the body of the murder victim and discovered that he was very likely Hillmon, but definitely not F.A. Walters. Marianne Wesson, “Remarkable Stratagems and Conspiracies”: *How Unscrupulous Lawyers and Credulous Judges Created an Exception to the Hearsay Rule*, 76 *Fordham L. Rev.* 1675, 1697–1698 (2007). Thus, the facts—the “intention”—established by the exception to the hearsay rule were incorrect. Hillmon had indeed died as his partner stated. For further discussion of this case and Professor Wesson's dogged pursuit of the truth, see Marianne Wesson, “Particular Intentions”: *The Hillmon Case and the Supreme Court*, 18 *L. & Lit.* 343 (2006) [hereinafter *Particular Intentions*].

<sup>97</sup> 145 U.S. at 288.

<sup>98</sup> Recall as well Kipling's adage, “A woman is only a woman, but a good Cigar is a Smoke.” Rudyard Kipling, *The Betrothed*, in *The Works of Rudyard Kipling* 47, 49 (Wordsworth Eds., Ltd. 1994).

<sup>99</sup> *Claims Walters Was in Leavenworth in May 1879*, *Leavenworth Times* 4 (Nov. 14, 1899) (quoted in Wesson, *Particular Intentions*, *supra* n. 96, at 381).

interesting is the question of whether Walters' profession unconsciously communicated the "idea" of his promiscuity to Professor Wesson, encouraging her to question his veracity in letters to his fiancée.<sup>100</sup>

According to psycholinguists, metonyms are equally as powerful as metaphors in communicating abstract ideas. While the metaphor reminds us of something else because of its similarity (a cloud is similar to a sheep), a metonym brings an association because it is part of something else (a pair of earrings reminds us of a particular woman). More than a poetic tool,<sup>101</sup> a metonym is "recognized as a particular type of mental mapping" presented to call to mind "an entire person, object, or event."<sup>102</sup>

The metonym is found in great works of art, such as Van Gogh's painting, *A Pair of Shoes* (figure 2, appendix A).<sup>103</sup> The debate over what person had worn those shoes set off a searing argument between philosopher Martin Heidegger and art historian Meyer Schapiro, cheerfully recounted by Jacques Derrida, who noted, "It's certainly a question of feet and of many other things, always supposing that feet are something, and something identifiable with itself<sup>104</sup> . . . . [W]hat a trip and what a story, for almost a century for these shoes of Van Gogh's. They haven't said anything, but how they've made people walk and talk!"<sup>105</sup>

<sup>100</sup> Wesson opines that Walters's last letter to his fiancée was full of lies and that Walters had been persuaded by the insurance companies to manufacture this correspondence after the fact and in support of their defense to paying their policies' proceeds to Hillmon's widow. Wesson, *The Hillmon Case*, *supra* n. 96, at 299–304.

<sup>101</sup> One should not discount metaphors and metonyms for their rhetorical power. Quintilian, a master of classical rhetoric, "looked upon the figures [of speech] as another means of lending "credibility to our arguments," of "exciting the emotions," and of winning "approval for our characters as pleaders." Edward Corbett, *Classical Rhetoric for the Modern Student* 424 (3d ed., Oxford U. Press 1990) (citation omitted) (quoting Marcus Fabius Quintilian, *Institutio Oratoria of Quintilian* vol. III, 359 (H.E Butler trans., Harv. U. Press 1920)). Figures of speech, such as metaphors, offer a vivid and concrete way to express our abstract thoughts, creating emotional responses in the listener. "[B]ecause they stir emotional responses, they can carry truth, in Wordsworth's phrase, 'alive into the heart by passion'; and because they elicit admiration for the eloquence of the speaker or writer, they can exert a powerful ethical appeal." *Id.* at 459.

<sup>102</sup> Raymond W. Gibbs, Jr., *Speaking and Thinking with Metonymy*, in *Metonymy in Language and Thought* 61, 66 (Klaus-Uwe Panther & Günter Radden eds., John Benjamins Publ. Co. 1999).

<sup>103</sup> Vincent Van Gogh, *A Pair of Shoes* in Van Gogh Museum, Amsterdam (1886).

<sup>104</sup> Jacques Derrida, *The Truth in Painting* 260 (Geoff Bennington & Ian McLeod trans., U. Chi. Press 1987).

<sup>105</sup> *Id.* at 272. Derrida deconstructed Heidegger's and Schapiro's arguments, showing how prejudices and unconscious suppositions caused both scholars to reach conclusions that, although strongly held, have little basis in the work of art itself.

Typically, a metonym allows the use of one idea as a vehicle to reach a “target” idea, but what if there are several targets to choose from? If one says, “Give me a hand,” the listener could choose either to applaud (hitting hands together) or to provide manual labor (using hands, arms, and body to assist in a task). Researchers have established that the listener will usually choose the clearest and the most relevant interpretation of a metonym.<sup>106</sup>

Why then is a doll found lying in the rubble of a bombed home ineffective as an “obtuse object”? Why do we consider it to be trite and unmoving? Despite the usual function of metonyms in clarifying an idea by transmitting an object to the mind of the listener, they are most effective in describing an unsettling or taboo target by presenting a vehicle that mystifies or ostentatiously hides the target. If the vehicle transports the listener too easily to the taboo target, it will be rejected.<sup>107</sup>

This obscuring of meaning makes metonyms especially useful as euphemisms when the target is socially unacceptable or disturbing,<sup>108</sup> such as referring to a worker’s dismissal as “reduction in force.” While such reduction is a consequence of firing an employee, it does not directly describe the event of the dismissal. Another example of a euphemism is referring to someone’s death as “his time ran out.”

Consider a set of false teeth found on the living room floor of a victim’s apartment, the metonym used by a prosecutor in trying a grisly case of the rape and murder of an elderly woman.<sup>109</sup> Rather than concentrate on the bloody carnage found in the bedroom, he focused the jury’s attention on the dentures that had been knocked out of the victim’s mouth by one of the assailant’s blows. The listener could choose several targets of this metonym:<sup>110</sup>

- (1) dentures as one of an elderly person’s possessions  
(PART FOR WHOLE);

---

<sup>106</sup> Günter Radden & Zoltán Kövecses, *Towards a Theory of Metonymy*, in *Metonymy in Language and Thought*, *supra* n. 102, at 17, 50–51.

<sup>107</sup> *Id.* at 53.

<sup>108</sup> *Id.*

<sup>109</sup> From a transcript of an interview with Ann Arbor, Michigan defense attorney Michael Vincent, on March 23, 2006. (On file with the Author).

<sup>110</sup> For a complete description of this categorization of metonyms based on the relationship of the metonym to its target meaning, identifying it as either part of a physical or a temporal whole, see Radden & Kövecses *supra* n. 106, at 17–59.

- (2) dentures as one of the objects found at the crime scene (PART FOR WHOLE);
- (3) dentures on the floor as one of the results of being brutally punched in the face (EFFECT FOR CAUSE); or
- (4) dentures on the living room floor as the beginning of a horrific rampage (SUBEVENT FOR WHOLE EVENT)

While the listener might consider the third or fourth choices as the clearest and the most relevant targets of the metonym, he or she may be so repulsed by the attendant mental imagery that another target will be preferred. And yet, the mind vacillates between the brutal scene and other less disturbing targets. Like staring between the fingers that cover our eyes while watching a scary movie, we painfully delight in shifting between the shocking target of a metonymic vehicle and its less frightening alternative.

The safety of the mystifying, or obscuring, metonym is a characteristic that makes it useful in describing a disturbing target. This is at the core of the obtuse object's power.

Another example of the effects of metonyms arose when two law students represented an asylum seeker who claimed political persecution. Both students expressed difficulty in relating to the client and her story. The client's story was horrific and too intense for their imaginations and their hearts. She came from the capital city in a central African country and had experienced shocking violence, including the murder of her two brothers and her own beating and rape by soldiers, because of her brothers' support for a pro-democracy political party. However, this story was simply too removed from the students' own experience to be more than an abstraction. Consequently, the students were not fully engaged by the client's story. Then in one of their interviews, when the students sought to create vivid depictions of the story using the techniques described in this Article, the client mentioned that her book bag was stolen when she was attacked. The students were surprised by the existence and the loss of this book bag. Being academically engaged themselves, the theft of the book bag suggested a loss of security far more accessible to the students, than the murders and the rape. It also classified the client as a student, someone like them. After that interview, the students changed gears in their representation, becoming zealous and dedicated.

The client subsequently related that, prior to her flight, she had been admitted to law school in her country. The stolen book bag was then seen by the students as part of the loss of the client's

education, of her career, and of her middle-class expectations. For the law students, the book bag was an obtuse object, having the metonymic target of the politically induced rape and murders as well as the process of academic attainment.

## V. CONTEXTUALIZATION OF THE IMAGE

Just as a painting of a flower hanging on a museum wall is far removed from the flower growing in the field, the verbal image conveyed by a witness in a court room can suffer from lack of context because the fact finder is in a different location, and perhaps even a different country, from the described scene. This lack of context can be either helpful or damaging to an attorney, depending on whether this contextualization can be used to further the theory of the case. In any event, an advocate must be aware of the impact of decontextualization of images.<sup>111</sup>

The importance of image context is evident in one of the most significant Supreme Court cases of this decade, *Bush v. Gore*.<sup>112</sup> In that case, the Court reviewed court transcripts to determine whether there was consistency in the various Florida counties in counting votes when a voter had failed to completely make a hole in the voting ballot. The language used in the discussion has a pithy, Anglo-Saxon bluntness, devoid of the multi-syllabic, Latin-based, legal jargon that one might expect in a significant legal decision. The Court wrote,

The law does not refrain from searching for the intent of the actor in a multitude of circumstances; and in some cases the general command to ascertain intent is not susceptible to much further refinement. In this instance, however, the question is not whether to believe a witness but how to interpret the marks or holes or scratches on an inanimate object, a piece of cardboard or paper which, it is said, might not have registered as a vote during the machine count. The factfinder confronts a thing, not a person. The search for intent can be confined by specific rules designed to ensure uniform treatment.

The want of those rules here has led to unequal evaluation of ballots in various respects. *See [Gore v. Harris, 772 So. 2d*

---

<sup>111</sup> A similar decontextualization occurs when a crucifix is taken out of a church and placed on the white wall of a museum. This act changes the way it is perceived and thought about. "The frame is not neutral; rather it becomes part of what it frames." David Carrier, *Writing about Visual Art* 22 (Allworth Press 2003).

<sup>112</sup> *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

1243, 1267 (Fla. 2000)] (Wells, C.J., dissenting) (“Should a county canvassing board count or not count a ‘dimpled chad’ where the voter is able to successfully dislodge the chad in every other contest on that ballot? Here, the county canvassing boards disagree”). . . .

The record provides some examples. . . . Palm Beach County, for example, began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a *per se* rule, only to have a court order that the county consider dimpled chads legal. This is not a process with sufficient guarantees of equal treatment.<sup>113</sup>

The Court stated that it was confronted with “a thing.” Yet the image of the very human scene of a canvasser squinting as he lifts a ballot over his head to see if any rays of light shine through does make the controversy personal and, in a way, both humorous and pathetic. In this age of hyper-technological advances, the leader of the free world is chosen using such a primitive, vulnerable method.

This contrast perhaps resonates with our recollection of the events of September 11, 2001, when terrorists used simple box cutters to commandeer the planes for their destructive actions. But it also seems noble, symbolizing man’s quest to discern “the light.”<sup>114</sup> We may see this as echoing the plea in *The Star-Spangled Banner*, “O say can you see, by the dawn’s early light[?]”<sup>115</sup> The dimpled chad may even remind us of the dimpled lad in Whittier’s poem,<sup>116</sup> or the theme of any number of spiritual songs in which seeing the light is life’s most important goal and most valuable gift.<sup>117</sup> Although these associations may seem unlikely as a group, highly

<sup>113</sup> *Id.* at 106–107.

<sup>114</sup> Such related phrases as “a ray of light,” “the light at the end of the tunnel,” and “glimmer of hope” suggest themselves.

<sup>115</sup> Smithsonian Natl. Museum of Am. History, Francis Scott Key, *The Star-Spangled Banner*, [http://americanhistory.si.edu/ssb/6\\_thestory/6b\\_osay/fs6b.html](http://americanhistory.si.edu/ssb/6_thestory/6b_osay/fs6b.html) (accessed Feb. 15, 2008).

<sup>116</sup> “Blessings on thee, little man, / Barefoot boy with cheeks of tan!” John Greenleaf Whittier, *The Barefoot Boy*, in *The Complete Poetical Works of John Greenleaf Whittier* 396, 396 (Horace E. Scudder ed., Houghton Mifflin Co. 1892).

<sup>117</sup> *E.g.* Spiritual Workshop, *This Little Light of Mine*, *Negrospirituals.com*, [http://www.negrospirituals.com/news-song/this\\_little\\_light\\_of\\_mine.htm](http://www.negrospirituals.com/news-song/this_little_light_of_mine.htm) (accessed Feb. 15, 2008); Chris Machen & Robert Sterling, *I Have Seen the Light* (Robert Sterling arr., Alfred Publ. 1989); David Roth, *May the Light of Love (Thanksgiving Song)*, on *Rising in Love* (Folk Era Recs. 1993).

individual metonymic and metaphorical relationships make such associations much more likely.

By describing the scene of a person attempting to see light through a dimpled chad, the Court has contextualized the chad. The case is no longer about a thing. It is personal. And it reveals the scene of a person in a rather undignified position. We may share in the embarrassment that would accompany being seen in this vulnerable and foolish stance. One may even feel a voyeuristic shame in witnessing this frailly human response to our human shortcomings. In any event, the test of searching for a ray of light through a dimpled chad to select a president is poetic,<sup>118</sup> prophetic,<sup>119</sup> and foolish—a powerfully metonymic activity.

## VI. THE SIGNIFICANT MOMENT

Art theory has a further role to play in informing us about effectively describing legally momentous activities. While filmmakers and novelists may present scenes, they usually emphasize action—a succession from one image to another. The painter, the sculptor, and the photographer, on the other hand, are limited to a single moment in a story.<sup>120</sup> Thus they must carefully choose an instant that best presents the theme and the story. It is their task to choose which moment to memorialize. Different times have seen different solutions. For example, while Renaissance artists tended to depict the crucifixion of Christ during the crucifixion itself, with

---

<sup>118</sup> One is reminded of the most celebrated case of the previous decade, *People v. Simpson*, BA097211 (Cal. Super. Ct. L.A. Co. 1994), and the couplet, “If it doesn’t fit, you must acquit.” *People v. Simpson*, 1995 WL 697930 at \*46 (Cal. Super. Ct. L.A. Co. Sept. 28, 1995) (closing argument). Attorney Johnny Cochrane’s use of a leather glove as a symbol is particularly obtuse, because most people thought of football star O.J. Simpson as someone who used his bare hands to carry a soiled piece of leather, not someone who donned leather gloves to avoid soiling his hands.

<sup>119</sup> The appeal by Athens to the oracle at Delphi when attacked by Xerxes, see J. A. S. Evans, *The Oracle of the Wooden Wall*, 78 *Classical J.* 24, 24–29 (1982), and President Ronald Reagan’s reliance on astrology in responding to the Soviet Union, see Frances Fitzgerald, *Way Out There in the Blue: Reagan, Star Wars and the End of the Cold War* 370 (Simon & Schuster 2000), show the timeless plea to divination in resolving vital national issues.

<sup>120</sup> An alternative used by some artists to depict a narrative in images is to present “two or more images of the same event” in a series of pictures. See Peter Burke, *Eyewitnessing: The Uses of Images as Historical Evidence* 151 (Cornell U. Press 2001). Burke references artists’ work that depicts both antithetical images, such as Hogarth’s contrasting pictures of “industrious and idle apprentices,” and scenes presenting before and after an event, *id.*, such as *A Rake’s Progress*, a series of eight paintings. William Hogarth, *A Rake’s Progress* in Sir John Soane’s Museum, London (1732–1733).

the raised cross bearing Jesus,<sup>121</sup> Baroque artists preferred to depict either the raising of the cross or its lowering, with the dead, pale body of Jesus slumping in the disciples' arms (figure 3, appendix A).<sup>122</sup>

Eighteenth century French sculptor Jean-Antoine Houdon chose not a "moment of battle," but an "anticipatory moment" for a life-size marble statue of French general Charles Bertin Gaston Chapuis de Tourville.<sup>123</sup> In the selected scene, de Tourville is about to convey to his staff orders that he knows are wrong and the impact of which will be the destruction of his ships and his men.<sup>124</sup> This moment displayed his remarkable loyalty and obedience to the ruler who had authored these flawed orders. According to art historian Francis Dowley, artists of the eighteenth century tended to select a scene from a story that favored "a moment which is not the climax or culmination of action or emotion, but a previous one which allows further play for the imagination. . . . [For] the moment of the highest emotional pitch, or we might say, the height of action, consumes the imagination, allowing it no further free range."<sup>125</sup>

Similarly, in painting *The Raft of the 'Medusa'* (figure 4, appendix A), French artist Théodore Géricault chose the moment just before the rescue of the shipwrecked survivors, conveying a heroic aspect to the men on the raft.<sup>126</sup> Géricault painted a giant scene of the survivors who have just spotted a rescue ship. With this painting, Géricault brought attention to a national political scandal involving the wreck of a government ship and the failure to rescue most of the men on board. The artist chose not to paint the moment the ship foundered, nor the drownings and cannibalism that took place on the overburdened raft as the men awaited salvation.<sup>127</sup> Any other moment would have revealed them as victims, not heroes on a quest.

---

<sup>121</sup> See e.g. Matthais Grünewald, *The Crucifixion*, from the *Isenheim Altarpiece*, in Musée d'Unterlinden, Colmar (1512–1516).

<sup>122</sup> See e.g. Peter Paul Rubens, *The Descent from the Cross* in Courtland Institute Galleries, London (c. 1611).

<sup>123</sup> Jean-Antoine Houdon, *Le Maréchal de Tourville* in Sèvres, Musée National de Céramique (1783).

<sup>124</sup> *Id.*

<sup>125</sup> Francis H. Dowley, *D'Angiviller's Grands Hommes and the Significant Moment*, 39 *Art Bull.* 259, 262 (1957).

<sup>126</sup> Théodore Géricault, *The Raft of the 'Medusa'* in Musée du Louvre, Paris (1819).

<sup>127</sup> Christine Riding, *The Raft of the Medusa in Britain*, in *Crossing the Channel: British and French Painting in the Age of Romanticism* (Patrick Noon & Stephen Bann eds.,

Likewise, American painter Edward Hopper recognized that the most significant and revealing moments in life often occur while we are waiting. It is at these times that genuine internalized human dramas can be best observed and recorded.<sup>128</sup> Hopper painted scenes of urban life, ignoring the hustle and bustle in favor of unguarded quiet moments, between lines of conversation and sips of coffee in a restaurant, before a movie let out.<sup>129</sup>

Lawyers used the same techniques in the trial of police officers accused of beating Rodney King. A videotape showing the callous and unprovoked bashing of the victim, King, by the defendant-policemen was repeatedly broadcast throughout the country and seemed to confirm the culpability of the officers.<sup>130</sup> “However, the defense team successfully reframed the issue by emphasizing over and over again—The issue in this case is not what is shown on the video tape; the issue is what happened before the camera began to run!”<sup>131</sup> By carefully creating a picture in the jurors’ minds of the aggressive stance and acts of Rodney King prior to the beating, the attorneys won acquittal for their clients.

The successful “significant moment” is one that encourages the listener to confront deep questions of his own. Like Stendhal’s goal in writing, the advocate’s aim should be “to make each spectator question his own heart, articulate his own feelings, and thus form a personal judgment and a vision based on his own character, tastes, and predominant emotions.”<sup>132</sup> To do so, the advocate must pay attention to the feelings that a moment in the client’s story arouses in his own heart. Lawyers may wish to write down their feelings or explain their interest in a particular moment or detail and then try to analyze why they are fixated on it and why others might as well. What does this moment tell the listener about the chain of events or the participants in the activity?

It is held by some aestheticians that

emotional communication through the arts is usually not conceived as simply conveying factual information about the occurrence of real or imaginary emotional situations, in the manner

---

Tate 2003).

<sup>128</sup> John Updike, *Still Looking: Essays on American Art* 188 (Knopf 2005).

<sup>129</sup> See e.g. Edward Hopper, *Automat* in Des Moines Art Ctr., Des Moines (1927); *New York Movie* in Museum of Modern Art, New York (1939).

<sup>130</sup> Russ Herman, *Courtroom Persuasion* 233–234 (Am. Tr. Laws. Assn. Press 1997).

<sup>131</sup> *Id.* at 234.

<sup>132</sup> Carrier, *supra* n. 111, at 19 (quoting Stendhal (Marie-Henri Beyle), *Stendhal and the Art* 94 (David Wakefield ed., Phaidon Press Ltd. 1973)).

in which a newspaper report gives information about events; artistic communication is thought of as inducing a special sort of sympathetic sharing of concrete affective situations, so that the observer not only receives information about situations of feeling already familiar to him but . . . achieves emotional experiences he has not known before and could not otherwise know.”<sup>133</sup>

An example from one of my own cases comes to mind. I attended an immigration hearing to establish the bona fides of a marriage between a U.S. citizen and his wife, a slight Trinidad native with a melodic, syrupy voice. She was wearing an elegant black embroidered dress and crucifix earrings. On being asked how the couple had spent the previous Saturday evening, her husband revealed that he had spent the evening hiding in their bedroom, watching a show about fishing on a small television, while his wife watched “professional wrestling” in the living room on their wide-screen television. He said he was afraid to be in the same room with his wife when she watched wrestling. “She gets pretty emotional!” he opined. This odd special moment convinced the immigration officer that they were really living together as a married couple in a way that admissions about the color of the bedspread or the type of birth control used could not.

And finally, an example from one of our clinic’s cases combines both the significant moment and the obtuse object. Our client had been working in her country of birth in Africa as a live-in maid for an expatriate French army officer and his family. When the French air force destroyed all the African nation’s planes, the local government sent its soldiers to harass the French citizens living there. Our client was sitting at the kitchen table sharing a pomegranate with the French wife, when troops broke down the door, accused her of being a traitor and assaulted and beat her. In her application for asylum, considerable detail was provided about the kitchen, the kitchen table and chairs, and the sharing of the pomegranate. This moment was judged significant for several reasons. By sharing food with the French, our client had become their companion.<sup>134</sup> Based on this one scene, the local government had

---

<sup>133</sup> Osborne, *supra* n. 88, at 18.

<sup>134</sup> “Companion” is from the Old French *compaignon*, based on the Latin *com* (“together with”) and *panis* (“bread”). *Oxford Dictionary of English* 351 (2d ed., Catherine Soanes & Angus Stevenson eds., Oxford U. Press 2003).

imputed political opinion to her: they believed her to support the French position.

And the obtuse object? In an exercise involving this fact pattern that I gave at the 2007 National Clinical Conference in New Orleans and at the 2007 Midwest Clinic Conference in Des Moines, most of the attendees identified the pomegranate as an object that stood out. Some, with a knowledge of the classics (and one hopes that immigration judges recall their Bullfinch), recalled the tale of Persephone, Goddess of Spring, who was kidnapped by Hades and taken to the Underworld.<sup>135</sup> Zeus demanded her release, but because Persephone had eaten a few pomegranate seeds down there, she had to remain underground for several months a year.<sup>136</sup> Even without the classical association, the fruit that takes such great effort to eat, since the hard shell must be removed and each of the numerous seeds picked out one by one, might represent the great efforts that our client had taken to flee, leaving her family and friends for a difficult future in the United States. If nothing else, the presence of a pomegranate, rather than an apple or an orange, catches the listener's attention, bringing new focused attention to the story.

## VII. A FEW WARNINGS AND CAUTIONARY STATEMENTS

The techniques discussed above can strengthen an advocate's case, but are they ethical, and are the results true? Are the results admissible?

American law cherishes the principle that judges and juries can determine whether a witness is telling the truth.<sup>137</sup> Recent studies have established, however, that we cannot correctly assess the truth or accuracy of testimony on the basis of a witness's confidence or the vivid detail of his testimony.<sup>138</sup>

---

<sup>135</sup> Thomas Bullfinch, *Bullfinch's Mythology* 52–57 (Avalon Bks. 1979). Like Persephone, our client was forced to leave the land of her birth because she had eaten a pomegranate. Could this association with a Greek goddess enter a judge's thinking and elevate our client's status? Such a view may be far-fetched. However, I cannot pass by the pomegranate display in a supermarket without recalling the client and the goddess.

<sup>136</sup> *Id.* at xx.

<sup>137</sup> Lubet, *supra* n. 29, at 42.

<sup>138</sup> See Deborah Davis & William C. Follette, *Foibles of Witness Memory for Traumatic/High Profile Events*, 66 *J. Air L. & Com.* 1421, 1428 (2001) ("Notwithstanding the potential for error in memory, American courts rely extensively, and in some cases exclusively, on witnesses' recollections to provide the 'facts' of the cases before them.").

Despite popular belief, memory does not exist to assist us in recalling Babe Ruth's batting average in 1923.<sup>139</sup> We use memories, not to store up the truth about past experiences, but to help us steer a course toward the future. As a result, we are constantly rewriting our memories to make them conform to more recent incidents and discoveries.<sup>140</sup> Thus a witness's confidence in a memory provides little assurance that it is correct.<sup>141</sup> Where a witness minutely describes a significant moment or an obtuse object, the fact finder is more likely to believe and to remember this testimony.<sup>142</sup> This may create an unfair and unjust advantage for the client.<sup>143</sup> The attorney's obligation to promote only meritorious causes,<sup>144</sup> however, appears to permit that lawyers use rhetorical devices, such as those detailed in this Article, to present the strongest case for the client, subject, of course, to the lawyer's reasonable belief that the witness's statement of facts is true.<sup>145</sup> In addition, resulting testimony may be challenged as inadmissible if it is irrelevant.<sup>146</sup> As long as a description of a significant moment or a symbolic accessory makes the existence of a material fact more or less likely, a federal judge, following the Federal Rules of Evidence, should admit the testimony, provided that the testimony is not confusing, prejudicial, misleading, or dilatory.<sup>147</sup> With that

<sup>139</sup> In case you have forgotten, it was ".393." *The Baseball Encyclopedia* 323 (Macmillan 1984).

<sup>140</sup> "A growing body of research shows that memory more closely resembles a synthesis of experiences than a replay of a videotape." Elizabeth Loftus, *Our Changeable Memories: Legal and Practical Implications*, 4 Nat. Revs.: Neuroscience 231, 231 (2003); see also Frederick E. Chemay, Student Author, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases*, 45 La. L. Rev. 721, 724 (1985).

<sup>141</sup> Loftus, *supra* n. 140, at 232.

<sup>142</sup> Experimental studies and interviews have established that jurors place greater reliance on witnesses who provide much detail, even if the details are irrelevant to the subject of the testimony. Elizabeth F. Loftus & James M. Doyle, *Eyewitness Testimony: Civil and Criminal* 6-7 (2d ed., Michie Co. 1992); see also Richard C. Waites, *Courtroom Psychology and Trial Advocacy* 399, 400-401 (ALM Publg. 2003).

<sup>143</sup> Larson, *supra* n. 6, at 181. "Stories are regarded as appealing to intuition and emotion, thus operating as a vehicle for 'irrational means of persuasion.' Although the dangers are varied, what we fear is that good stories will push out true stories." *Id.* at 186-187.

<sup>144</sup> See e.g. Model R. Prof. Conduct 3.1 (2004) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. . .").

<sup>145</sup> See Model R. Prof. Conduct 3.3 (Candor toward the Tribunal).

<sup>146</sup> See e.g. Fed. R. Evid. 401 (Definition of "Relevant Evidence": "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

<sup>147</sup> Fed. R. Evid. 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time) ("Although relevant, evidence may be excluded if its probative value

in mind, it should be noted that vivid visual imagery can interfere with analytic ability.<sup>148</sup> An array of psychological tests have shown that visual imagery that is irrelevant to a logical inference may even impede reasoning and slow down comprehension.<sup>149</sup> Researchers have even concluded that presenting vivid details may impair a fact finder's ability to think clearly and judge wisely. In addition, those qualities in a person that promote accurate memory may increase false memories for analogous events.<sup>150</sup> Thus, the witness who tends to be the most accurate about an actual event is also the most likely to manufacture false memories of similar events.

The identification and presentation of vivid scenes and details can heighten the credibility of a client and the theory of the case. Given their power, they, like the hero's talisman, should be used wisely and ethically.

---

is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

Cases finding such prejudice tend to concern the admissibility of photos, rather than oral testimony. See e.g. *Lafferty* 20 P.3d 342. In this case, the Utah Supreme Court refused to overturn a criminal conviction for murder, despite the screening to the jury of a videotape that showed the murdered victims, one an infant in a crib. The court held that the videotapes accurately presented facts, not “prejudicial conjectures designed to inflame a jury.” *Id.* at 369. In practice, courts generally allow admission of evidence unless it is “unduly” prejudicial. For an exhaustive listing and analysis of cases involving the exclusion of photos, see 29A Am. Jur. 2d *Evidence* §§ 961, 963 (2007). One poignant example of this is the Minnesota Supreme Court's decision to permit the admission of a toy car (allegedly belonging to a murdered child), found in the defendant's own car. See *State v. Ture* 632 N.W.2d 621, 630–631 (Minn. 2001). The defendant claimed that the prejudicial effect of admitting the toy car substantially outweighed its probative value. *Id.*

He argues that the toy must have had “a powerful effect on the jury” because “the incredibly sad events that befell William Huling” must have made them want to believe that it was William's. This argument lacks merit. While it suggests that *William Huling's experience* had a prejudicial effect on the jury, it says little if anything about the *toy car's* prejudicial effect. Ture has offered no other basis on which we can conclude that the prejudicial effect of admitting evidence related to the toy car substantially outweighed its probative value. We therefore conclude that the district court did not abuse its discretion when it admitted evidence related to the toy car at trial.

*Id.* at 631 (emphasis in original).

<sup>148</sup> Markus Knauff & P.N. Johnson-Laird, *Visual Imagery Can Impede Reasoning*, 30 *Memory & Cognition* 370 (2002).

<sup>149</sup> *Id.*

<sup>150</sup> Harvey H.C. Marmurek & Melinda E. Hamilton, *Imagery Effects in False Recall and False Recognition*, *J. Mental Imagery* 83, 94 (Spring 2000).

## VIII. CONCLUSIONS

The success of advocacy is based on the ability to convince a judge, jury, or other decision maker that our view of the facts, of the story, and of the law is the most probable. To do so, we must create an argument that resonates with the listener, that fits with his or her own world view. As J.B. White, the father of the Law and Literature movement, intones:

(L)anguage has its roots not in ideas, but in social relations; and its deepest motives and meaning are social still. . . . To put it differently, our language is at the deepest level, the expression of a set of motives and gestures we share with all mammals; its radical meaning is social and relational. Who are we to each other? What place is there for me in your universe, or for you in mine?<sup>151</sup>

Showing the listener significant moments and obtuse objects that represent the heart of your position can convince them of the validity of your argument in ways that legal analysis and action-based narrative may not, reaching their hearts as well as their minds with an intuitive certainty of the truth. It is perhaps emblematic of the common law's respect for equitable principles that metonymic devices, such as the significant moment and the obtuse object are respected.

Justice Holmes, quoted at the beginning of this Article, expressed an aversion for artists in the law. And yet, he admitted in one of his Supreme Court decisions, "many honest and sensible judgments . . . express an intuition experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth."<sup>152</sup>

Like perfume, the obtuse object, the significant moment, and other artistic devices should not drench the legal audience. They should be discreetly and innocently introduced into the legal narrative in the appropriate places. While it is hard to overlook attorney Johnny Cochran's success with the jury in making an extra-large brown glove the centerpiece of the O.J. Simpson murder

---

<sup>151</sup> James B. White, *Justice as Translation* 223 (U. Chi. Press 1990).

<sup>152</sup> *Chi., Burlington & Quincy Ry. Co. v. Babcock*, 204 U.S. 585, 598 (1907); see also Robert P. Burns, *Notes on the Future of Evidence Law*, 74 Temp. L. Rev. 69, 73 (2001); Larson, *supra* n. 6, at 184 (discussing the perceived dangers and benefits of intuitively persuasive legal stories).

trial, lawyers are not granted “artistic license” to disregard the truth and paint pictures that lie. Ethics, professional responsibility, and morality demand more.

These codes cannot, however, deny advocates the use of significant moments or obtuse objects to generate conclusions that “outrun analysis.” Learning of a significant moment or an obtuse object produces a vicarious participation in the audience and opens access to empathetic understanding of the legal narrative.

Why do artists concentrate on capturing certain moments and particular details? Why should lawyers imitate artists? Beyond achieving greater effectiveness as advocates, the attorney gets the chance to share in and transmit flashes of consciousness as clients “self-remember”<sup>153</sup> the sights and sounds of a moment in the past. By absorbing that moment into one’s own consciousness, the indescribable wonder of life is revealed. Just as we tend to see more intensely our surroundings after a visit to an art exhibition, we can gain insights in seeing the world as it truly is by approaching clients’ stories as a painter would. “What exactly did you hear? What did you see?” Through these techniques, we perceive, not only the tiniest details of an isolated incident, but also the grandest designs of the universe.<sup>154</sup> The lawyer as artist may then “see the world as it really is—without values, judgments, or preconditions,”<sup>155</sup> while at the same time paradoxically seeing

*a World in a Grain of Sand,  
And a Heaven in a Wild Flower,  
Hold[ing] Infinity in the palm of your hand,  
and Eternity in an hour.*<sup>156</sup>

---

<sup>153</sup> Russian mystic P.D. Ouspensky lamented that much of the time we go through life in wakeful sleep, our imaginative thoughts about the future, recollections about the past, and analytical self-talk rendering us oblivious to what is actually happening. *Conscience: The Search for Truth* 17–26 (Penguin 1988).

<sup>154</sup> Master jeweler and artist Robert Eberdorf sees attention to visual details and to the moment as a remedy for stress and depression. “As we get older our world gets bigger and the challenges get bigger. We are always worried about what we did wrong yesterday or thinking about what we have to do a week from now. But the gift of the day, the beauty of the day and the challenge of the day lies in the moment.” Nancy McGillicuddy, *Artistic Gem*, ECU E. J. 37 (Fall 2003).

<sup>155</sup> Tom Brown, Jr., *Tom Brown’s Field Guide to Nature Observation and Tracking* 46 (Berkley Bks. 1983).

<sup>156</sup> William Blake, *Auguries of Innocence*, in *The Portable Blake* 150 (Viking Press 1968).