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## “All We Have to Decide is What to Do with the Time Given to Us”: Using Concepts of Narrative Time to Draft More Persuasive Legal Arguments

Jennifer Sheppard

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# **“ALL WE HAVE TO DECIDE IS WHAT TO DO WITH THE TIME GIVEN TO US”: USING CONCEPTS OF NARRATIVE TIME TO DRAFT MORE PERSUASIVE LEGAL DOCUMENTS**

JENNIFER SHEPPARD\*

*When taught to draft a statement of facts or a statement of the case, law students and new lawyers are often told to “tell a story” and that chronological order is usually the best organizational strategy to use when telling that story. While much has been written in recent years on how to draft a story in the legal context, little scholarship is devoted to how to draft a story using chronology or how a lawyer can shape and manipulate time within a story to better advocate for a client. Legal scholars seem to think that the use of chronology is not only the default organizational strategy but requires no greater thought than depicting in which order the events transpired. But any good legal storyteller knows that there is much more to the depiction of time in stories than that. The depiction of time in all but the simplest of stories is extremely complex—there is seldom a pure linear chronology available. And if there is, it is not always the most persuasive manner in which to present the story. Legal storytellers must determine, inter alia, where to begin the story, where to end the story, whether to use chronology to organize the events in the story or to deviate from chronological order, when to summarize facts to deemphasize them, and when to use detail to emphasize facts. They construct time within the*

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*story to satisfy the demands of the narrative they are telling and in a way that often appears as if it is presented in a linear chronological order. Depending on the legal storyteller's choices, he or she can tell a very different story.*

*This Article will examine narrative time and related concepts and how legal storytellers can use these concepts to manipulate time in their stories to tell a more effective and persuasive story. To that end, it will examine the concepts of "story time" and "discourse time"; chronology and chronological deviations that storytellers use to depart from chronology and move about in time; and the different facets of narrative tempo, including summary, scene, stretch, pause, and ellipsis.*

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## I. INTRODUCTION

When taught to draft a statement of facts or a statement of the case, law students are often told to “tell a story” and that chronological order is usually the best organizational strategy to use when telling that story.<sup>1</sup> Legal scholars give similar advice to practicing lawyers.<sup>2</sup> While much has been written in recent years on how to draft a story in the legal context,<sup>3</sup> little scholarship has been devoted to explaining how to draft a story using chronological order or how a lawyer can shape and manipulate time within a story to better advocate for a client. Legal scholars seem to think that using chronological order is not only the default organizational strategy but requires no greater thought than depicting in which order the events transpired. But any good storyteller knows there is much more to the depiction of time in stories than just depicting the order in which events occurred. The depiction of time in all but the simplest of stories is complex—there is seldom a pure linear, or literal, chronology available.<sup>4</sup> And if there is, it is not always the most persuasive manner in which to present the story. Legal storytellers must determine where to begin the story, where to end the story, what facts to include, which facts should be emphasized and which de-emphasized, and in what sequence those facts should be related for maximum persuasive effect. Legal storytellers construct time within the story to satisfy the demands of the narrative they are telling and in a way that *appears* as if it is presented in a linear chronology.<sup>5</sup> Depending on the legal storyteller’s choices, he or she can tell a very different story that leads to different legal consequences.<sup>6</sup>

As professional storytellers, legal writers should be familiar with the concept of narrative time and how to use it to their clients’ benefit. However,

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1. HELENE S. SHAPO, MARILYN R. WALTER & ELIZABETH FAJANS, *WRITING AND ANALYSIS IN THE LAW* 154 (2018).

2. PHILLIP N. MEYER, *STORYTELLING FOR LAWYERS* 185 (2014); G. Fred Metos, *Appellate Advocacy: Drafting a Statement of Facts*, 22 *CHAMPION* 33, 33 (1998).

3. E.g., Jennifer Sheppard, *Once Upon a Time, Happily Ever After, and in a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 *WILLAMETTE L. REV.* 255 (2009); Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 *LEG. WRITING* 127 (2008); Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Fact Sections*, 32 *RUTGERS L.J.* 459 (2001).

4. MEYER, *supra* note 2, at 185–86.

5. *Id.* at 185, 188.

6. Kim Lane Scheppele, *Forward: Telling Stories*, 87 *MICH. L. REV.* 2073, 2094 (1989).

molding time for persuasive effect in legal documents is not a concept that comes naturally to many legal writers, just as telling a story does not come naturally to many lawyers. Consequently, this Article will explain how lawyers can effectively employ time within their legal stories for greater persuasive impact. In Part II of this Article, I examine why storytelling is so important to legal writing and identify the components of an effective story, with a focus on plot, where concepts of narrative time are relevant. Part III explores narrative time itself. As part of that discussion, Section III(A) discusses “order,” which examines the differences in the sequence of events between story time and discourse time.<sup>7</sup> This section discusses different methods of organizing events in a story, including chronology and chronological deviations; the persuasive effect that each organizational method can have; and how legal storytellers can use these methods to increase the effectiveness of their advocacy.

Section III(B) discusses the narrative framework, or architecture, of a story, which concerns where to begin a story and where to end it. This section examines how beginning and ending the story in different places can impact the story that is told and have different impacts on the reader; how legal storytellers can begin and end stories in different places to increase the effectiveness of their advocacy; and how these concepts were employed by legal storytellers in the majority and dissenting opinions in *Rusk v. State*, a well-known rape case.<sup>8</sup>

Section III(C) explores “duration,” which examines the difference between the time that passes in the story and the time taken to narrate the story.<sup>9</sup> To that end, I will examine concepts related to the pacing of the narrative, such as “summary,”<sup>10</sup> “scene,”<sup>11</sup> and “stretch.”<sup>12</sup> These concepts will not only be explored, but I will examine the persuasive impact that each concept can have, how legal writers can use these concepts to increase the effectiveness of their advocacy, and how these concepts were utilized by legal storytellers in the majority and dissenting opinions in *Rusk*.<sup>13</sup>

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7. Brian Richardson, *Introduction: Narrative Temporality*, in NARRATIVE DYNAMICS: ESSAYS ON TIME, PLOT, CLOSURE, AND FRAMES 11 (2002); elvensilver, *Narrative Time*, EVERYTHING2 (Apr. 23, 2001), <https://everything2.com/title/narrative+time> [<https://perma.cc/GMM3-6X7R>].

8. 406 A.2d 624 (Md. Ct. Spec. App. 1979).

9. LUC HERMAN & BART VERVAECK, HANDBOOK OF NARRATIVE ANALYSIS 60 (2005); Gerard Genette, *Order, Duration, and Frequency*, in NARRATIVE DYNAMICS: ESSAYS ON TIME, PLOT, CLOSURE, AND FRAMES 28 (2002); Richardson, *supra* note 7, at 11; elvensilver, *supra* note 7.

10. MEYER, *supra* note 2, at 126. Summary is when the passage of time is compressed, events are glossed over. *Id.*

11. *Id.* at 126, 197. Scene is when the passage of time in discourse time is approximate to that in story time. *Id.*

12. *Id.* at 127, 198. Stretch is when the storytelling is slowed down so that discourse time exceeds story time. *Id.*

13. 406 A.2d 624 (Md. Ct. Spec. App. 1979).

Part IV puts it all together by looking at the judicial opinions in *Walker v. City of Birmingham*<sup>14</sup> and *Shuttlesworth v. City of Birmingham*<sup>15</sup> and scrutinizing how Justice Stewart used the above-mentioned narrative time concepts in drafting these two opinions, which were based on the same set of underlying facts, to tell two very different stories about what happened.

The goal of this Article is to provide practical advice that advocates can use when drafting documents on behalf of their clients and to help advocates understand that it is not only possible, but effective, to move beyond using chronological order in the legal stories they tell and utilize other techniques that allow legal writers to move about in time and shape and bend time to their will.<sup>16</sup>

## II. A QUICK INTRODUCTION TO NARRATIVE

### A. Storytelling Background

Lawyers “work in what is largely a storytelling or narrative culture.”<sup>17</sup> In fact, the law “appears to be shot through with narrative, and predicated on a narrative construction of reality.”<sup>18</sup> Lawyers tell stories during, inter alia, litigation and appeals as well as in transactional documents. However, traditionally, judges and some legal scholars have viewed legal stories with unease and suspicion.<sup>19</sup> They view narrative primarily as a tool that appeals to emotions, values, and beliefs rather than logic and cool reason,<sup>20</sup> and as “insufficiently analytic[al].”<sup>21</sup> Additionally, they view legal stories as being

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14. 388 U.S. 307 (1967).

15. 394 U.S. 147 (1969).

16. See MEYER, *supra* note 2, at 186. Philip Meyer notes that, “[a]lthough legal storytellers are not narratologists and do not need to have, at their fingertips, the esoteric vocabulary and definitions of aspects of narrative time,” it is important for professional storytellers, including legal storytellers, “to develop [a] conceptual understanding of” these important concepts as they allow them “to move beyond ‘chronology’ and understand the other techniques that enable us to move about in time within a story.” *Id.*

17. Philip N. Meyer, *Vignettes from a Narrative Primer*, 12 LEG. WRITING 229, 229 (2006).

18. JAMES PHELAN & PETER J. RABINOWITZ, *A COMPANION TO NARRATIVE THEORY* 415 (2005).

19. *Id.*

20. Sheppard, *supra* note 3, at 256; STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* 128 (2001).

21. WINTER, *supra* note 20, at 125–26. These judges and legal scholars view appeals to emotions, values, and beliefs as *inferior* to appeals to reason, Sheppard, *supra* note 3, at 256, as they are not sufficiently “rigorous and linear, cold and dispassionate, impersonal and objective.” WINTER, *supra* note 20, at 128.

exceedingly subjective<sup>22</sup> and one-sided.<sup>23</sup> They believe that, unlike logic, stories are too susceptible to the author's ulterior motives.<sup>24</sup> Consequently, these judges and scholars see narrative as "a parlor trick designed to draw attention away from the logic of the law"<sup>25</sup> and to lead the audience astray.<sup>26</sup>

So, what is a story? A story is a narrative that focuses on a central character, who is faced with a dilemma that develops into a crisis, the crisis builds through a series of complications to a conflict, and then the conflict is resolved.<sup>27</sup> Broadly speaking, all stories follow a similar arc: someone wants something, there are obstacles in the way, he still wants it, so he has to overcome those obstacles until he either gets what he wanted or not.<sup>28</sup> Thus, when I refer to a story, I mean "an account of a character running into conflict, and the conflict's being resolved."<sup>29</sup>

Why is storytelling important to lawyers? Cognitive researchers have discovered that narratives are an inherent way for humans to structure and understand human experience.<sup>30</sup> Humans are predisposed "to organize experience into a narrative form";<sup>31</sup> in fact, "this predisposition toward narrative is . . . as natural to human comprehension of the world as [an

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22. WINTER, *supra* note 20, at 128; Sheppard, *supra* note 3, at 256.

23. WINTER, *supra* note 20, at 133; Sheppard, *supra* note 3, at 257. These judges and legal scholars believe that such "one-sidedness is an endemic risk of the literary depiction of reality" that cannot be avoided. WINTER, *supra* note 20, at 133 (quoting RICHARD A. POSNER, *OVERCOMING LAW* 380 (1995)); Sheppard, *supra* note 3, at 257.

24. JEROME BRUNER, *MAKING STORIES: LAW, LITERATURE, LIFE* 5 (2002). Perhaps this skepticism is not unfounded given that stories "always have a message." *Id.* The stories that lawyers tell are "committed to an adversarial rhetoric. And everyone knows too that, despite the procedural limits designed to contain their rhetoric, that rhetoric influences the final judgment." *Id.* at 42.

25. Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767, 769 (2006).

26. Sheppard, *supra* note 3, at 257.

27. JAMES N. FREY, *HOW TO WRITE A DAMN GOOD NOVEL* xiii (1987); Foley & Robbins, *supra* note 3, at 466.

28. SOL STEIN, *STEIN ON WRITING: A MASTER EDITOR OF SOME OF THE MOST SUCCESSFUL WRITERS OF OUR CENTURY SHARES HIS CRAFT TECHNIQUES AND STRATEGIES* 224 (1995); Foley & Robbins, *supra* note 3, at 466.

29. Foley & Robbins, *supra* note 3, at 466.

30. Jeanne Gaakeer, Greta Olson & Franz Reimer, *Law's Narratives and Hermeneutics: The Perplexity of Judges Becomes the Scholar's Opportunity*, 18 GERMAN L.J. 331, 334 (2017); Brian J. Foley, *Applied Legal Storytelling, Politics, and Factual Realism*, 14 LEG. WRITING 17, 40 (2008); Sheppard, *supra* note 3, at 257; see JAMES BOYD WHITE, *HERACLES' BOW* 169 (1985).

31. JEROME BRUNER, *ACTS OF MEANING* 45 (1990); ROBERT P. BURNS, *A THEORY OF THE TRIAL* 159 (1999); J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEG. WRITING 53, 57 (2008); Sheppard, *supra* note 3, at 260.

individual's] visual rendering of what the eye sees."<sup>32</sup> Moreover, humans understand concepts expressed in stories better than they understand abstract principles.<sup>33</sup> This means that "we force facts into a story so that we can understand what happened, what will happen, as well as to decide what to think of what happened and will happen."<sup>34</sup> "The importance of narrative to cognition and the fact that humans understand concepts expressed in the form of stories better than they understand abstract principles mean that narrative reasoning is an essential tool in the lawyer's toolbox and should not be ignored."<sup>35</sup>

So how should lawyers deal with the competing facts that narrative is critical to the way humans understand events and experiences and that judges are highly skeptical of stories? Lawyers need to tell their clients' stories, but those stories need to be told in a sophisticated manner where the craft is invisible. The legal storyteller's goal when drafting a story should be to give "the appearance of artlessness and of objective transparency in the telling of the tale."<sup>36</sup> To that end, lawyers need to craft their stories to appear "untailored" and free of ulteriority.<sup>37</sup> Thus, lawyers need to be familiar with how to tell an effective story, including what the parts of an effective story are, and how to draft them.

### B. Storytelling Basics

An effective story includes several components, including character, conflict, plot, point of view, setting, theme, voice, and style.<sup>38</sup> This Article will narrow its discussion of the components of stories to plot, as narrative relates to that component. The plot provides the structure of the story<sup>39</sup> by sequencing the events that occurred so they have meaning<sup>40</sup> and are not "just a bunch of words on [the] page."<sup>41</sup> A plot is "what happens and in what order. It is cause

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32. Rideout, *supra* note 31, at 57–58; Sheppard, *supra* note 3, at 260–61.

33. Sheppard, *supra* note 3, at 261; MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* 259 (2002).

34. Jennifer Sheppard, *What if the Wolf in All Those Fairytales Was Just Misunderstood?: Techniques for Maintaining Narrative Rationality While Altering Stock Stories That Are Harmful to Your Client's Case*, 34 *HASTINGS COMM. & ENT. L.J.* 187, 188 (2012).

35. Sheppard, *supra* note 3, at 263–64.

36. MEYER, *supra* note 2, at 130.

37. BRUNER, *supra* note 24, at 48.

38. See Sheppard, *supra* note 3, at 268; Chestek, *supra* note 3, at 137; Foley & Robbins, *supra* note 3, at 466.

39. Sheppard, *supra* note 3, at 280.

40. Meyer, *supra* note 17, at 256; Sheppard, *supra* note 3, at 280. Karen Sneddon, *Once Upon a Transaction: Narrative Techniques and Drafting*, 68 *OKLA. L. REV.* 263, 276 (2016).

41. Sheppard, *supra* note 3, at 280 (alteration in original).



and effect.”<sup>42</sup> All narratives need a plot with a beginning, middle, and an end.<sup>43</sup> While all narratives must have a beginning, middle, and end, plot development requires more than just those three stages.<sup>44</sup> There are five stages to plot development: (1) introduction, (2) rising action, (3) climax, (4) falling action, and (5) resolution.<sup>45</sup>

The first stage of plot development, the introduction, serves as an exposition that identifies the “initial *steady state*,”<sup>46</sup> or the status quo, and provides background information about the characters, the setting, and the events.<sup>47</sup> Some commentators refer to the “steady state” as a condition of “stasis” or “tranquility,”<sup>48</sup> where the “ordinariness of things” is set forth.<sup>49</sup> Once the writer has set the stage in the introduction, he or she is ready to introduce the rising action, or the “Trouble” that gives birth to the conflict.<sup>50</sup> The Trouble

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[P]lot sequences events into a story. Plot provides a meaning to the sequence—a purposeful and intentional context [for the narrative], rather than a random selection of images and scenes, or pieces of perceptions and experiences. Plot points to something larger—a meaning and order beyond the events as merely interchangeable links in a random chain, or discarded pieces from a pile . . . [A] plot “goes somewhere.” It has purpose and trajectory; a forward momentum, as events build purposefully upon one another, directed toward some culmination or termination. An implicit promise is made that with the ending will come revelation of some meaning beyond merely the simple completion of the action.

Meyer, *supra* note 17, at 256. “Without plot, events would be mere occurrences, discontinuous and separate moments, rather than episodes in an unfolding story.” Francesca Polletta, *Contending Stories: Narratives in Social Movements*, 21 QUALITATIVE SOC. 419, 421 (1998); *see also* Sneddon, *supra* note 40, at 276.

42. Sheppard, *supra* note 3, at 280. In fact, the plot of a story suggests that “there is some causal relationship between the events, that they are more than just a list of unrelated occurrences.” Meyer, *supra* note 17, at 256.

43. ARISTOTLE, ARISTOTLE’S THEORY OF POETRY & FINE ART 65 (Francis Fergusson ed., S.H. Butcher trans., 1961); Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 267 (2009); ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 113 (2000); Meyer, *supra* note 17, at 257; Sheppard, *supra* note 3, at 280.

44. Sheppard, *supra* note 3, at 280.

45. *Id.* at 281; Chestek, *supra* note 3, at 147.

46. AMSTERDAM & BRUNER, *supra* note 43, at 113; Joshua A. Newberg, *The Narrative Construction of Antitrust*, 12 S. CAL. INTERDIS. L.J. 181, 198 (2003).

47. Chestek, *supra* note 3, at 148; Sheppard, *supra* note 3, at 281.

48. Chestek, *supra* note 3, at 148 n.53.

49. AMSTERDAM & BRUNER, *supra* note 43, at 113; Meyer, *supra* note 17, at 257.

50. Chestek, *supra* note 3, at 148; AMSTERDAM & BRUNER, *supra* note 43, at 114; Newberg, *supra* note 46, at 198. According to Amsterdam and Bruner, this “trouble” “consist[s] of circumstances attributable to human agency or susceptible to change by human intervention.” AMSTERDAM & BRUNER, *supra* note 43, at 114.

consists of the complicating event or events that upset the status quo.<sup>51</sup> The rising action in a narrative builds until the climax of the story.<sup>52</sup> During the climax, the protagonist tries to redress or transform the situation, and either succeeds or fails.<sup>53</sup> “The climax is the moment when the protagonist accomplishes some great feat, such as getting the girl, defeating the monster, or making some profound discovery.”<sup>54</sup> The climax is the point at which the story’s main conflict is resolved.<sup>55</sup> The falling action quickly wraps up the minor plot threads that may remain unresolved and brings the story to a close.<sup>56</sup> For example, in *Star Wars*, the falling action is when Luke Skywalker and Han Solo are awarded medals by Princess Leia for their heroic efforts in destroying the Death Star.<sup>57</sup> At this point in the plot, the “old steady state is *restored* or a new (*transformed*) steady state is created.”<sup>58</sup> The final stage in plot development is the resolution, or conclusion, of the story.<sup>59</sup> The resolution ensures that all the conflicts, major and minor, are resolved.<sup>60</sup> “[T]he story concludes by drawing the then-and-there of the tale that has been told into the here-and-now of the telling” of the story.<sup>61</sup> “Overlaid upon this generic architecture is plot—the author’s selection and ordering of events in the story.”<sup>62</sup>

Narrative time and narrative movement are related to plot.<sup>63</sup> While narrative time concerns the temporal deviation between the passage of time in the story itself and the passage of time in the narration of that story,<sup>64</sup> narrative movement “refers to the story’s forward momentum that results in a culmination that the sequence of events anticipates.”<sup>65</sup> Narrative movement within the plot includes

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51. AMSTERDAM & BRUNER, *supra* note 43, at 114

52. Sheppard, *supra* note 3, at 281.

53. AMSTERDAM & BRUNER, *supra* note 43, at 114; Meyer, *supra* note 17, at 257.

54. Sheppard, *supra* note 3, at 281.

55. Chestek, *supra* note 3, at 149; Newberg, *supra* note 46, at 198.

56. Chestek, *supra* note 3, at 149.

57. STAR WARS IV: A NEW HOPE (Lucasfilms Ltd., 20th Century Fox, 1977).

58. Meyer, *supra* note 17, at 257 (quoting AMSTERDAM & BRUNER, *supra* note 43, at 114); Newberg, *supra* note 46, at 198.

59. Chestek, *supra* note 3, at 150.

60. *Id.*

61. Meyer, *supra* note 17, at 257; AMSTERDAM & BRUNER, *supra* note 43, at 114.

62. Newberg, *supra* note 46, at 198.

63. Sneddon, *supra* note 40, at 276.

64. See MEYER, *supra* note 2, at 186.

65. Sneddon, *supra* note 40, at 276.

concepts of sequencing, or the order of events,<sup>66</sup> and pacing, the tempo used within the narrative to relate those events.<sup>67</sup>

### III. NARRATIVE TIME

Narrative time in all stories encompasses two sequential progressions of time—story time and discourse time.<sup>68</sup> While the term “story time” invokes images of kindergarteners sitting cross-legged on a rug before a teacher reading from a book in an animated voice, here, the term is used to distinguish “between the time flow of a story’s contents and the story itself.”<sup>69</sup> In story time, “[t]he events depicted in the story follow one another in a temporal sequence. . . .”<sup>70</sup> Story time is “the sequence of events and the length of time that passes in the story.”<sup>71</sup> Story time flows in one direction and is measured in seconds and hours.<sup>72</sup>

Discourse time concerns the time flow of the narrated story as opposed to the time flow in story time.<sup>73</sup> Discourse time concerns the storyteller’s expression of the story and the time it takes to recount the story.<sup>74</sup> It is “the length of time that is taken up by the telling (or reading) of the story.”<sup>75</sup> Discourse time is the “time of narration” (though what is important is the time it takes to read the story).<sup>76</sup> It is “a spatial metaphor for the narrating or reading process.”<sup>77</sup> As such, assuming that the storyteller “needs a certain span of physical time,” there is essentially no “difference between counting the time of narration in minutes or in the number of printed pages.”<sup>78</sup> In discourse time, the recounting, or narration, of the events proceeds differently than the temporal

66. *Id.* at 287.

67. *Id.* at 276.

68. MEYER, *supra* note 2, at 186.

69. elvensilver, *Story Time*, EVERYTHING2 (Apr. 23, 2001), <https://everything2.com/title/story+time> [<https://perma.cc/XF4D-L227>].

70. MEYER, *supra* note 2, at 186.

71. Gaakeer, Olson, & Reimer, *supra* note 30, at 338 n.26.

72. elvensilver, *Story Time*, EVERYTHING2 (Dec 22, 1999), <https://everything2.com/title/story+time> [<https://perma.cc/C5D5-B78U>].

73. elvensilver, *Discourse Time*, EVERYTHING2 (Apr. 23, 2001), <https://everything2.com/title/discourse+time> [<https://perma.cc/N7C5-G8S9>].

74. *Id.*

75. Gaakeer, Olson, & Reimer, *supra* note 30, at 338.

76. Herman & Vervaeck, *supra* note 9, at 61.

77. Michael Scheffel, Antonius Weixler & Lukas Werner, *Time*, LIVING HANDBOOK NARRATOLOGY (Apr. 19, 2014), <http://www.lhn.uni-hamburg.de/node/106.html> [<https://perma.cc/ATM3-RG89>].

78. *Id.*

sequence of events in story time—the temporal sequence in discourse time may or may not parallel the temporal sequence in story time.<sup>79</sup> For example:

You ride the bus from your house to that of a friend. When you arrive, you decide to tell him/her about your trip. You describe in great detail that cute stranger you met, and skip over the dull twenty minutes of bus ride in which nothing important happened. The time it took to tell your friend of the trip, say 5 minutes, is the “Discourse Time.”<sup>80</sup>

While story time is fixed by the ticking of the clock, discourse time is malleable and can be a tool.<sup>81</sup>

Besides the two sequential progressions of time, narrative time also has different facets. The different facets of narrative time are commonly split into three measures—order, duration, and frequency.<sup>82</sup> The first facet of narrative time, order, focuses on the “relationships between the temporal *order* of the events that are being told and the pseudo-temporal order of the narrative.”<sup>83</sup> The second facet of narrative time, duration, concerns “the relationships between the *duration* of the events and the duration of the narrative.”<sup>84</sup> The final facet of narrative time, frequency, deals with “relationships of *frequency* of repetition between the events and the narrative.”<sup>85</sup> The next section will examine order and duration in more detail.

#### A. Order

Order examines the differences between the progression of events in the story and the sequence in which those events are related in the narrative.<sup>86</sup> Order thus considers differences in the arrangement of events between story time and discourse time.<sup>87</sup> “In story time, the order of events is fixed: 1-2-3-4.”<sup>88</sup> The events in story time occur in chronological order—they unfold in linear chronology one after the other until the end of the story to imitate how events

79. MEYER, *supra* note 2, at 186.

80. elvensilver, *supra* note 73.

81. *Id.*

82. HERMAN & VERVAECK, *supra* note 9, at 60; Genette, *supra* note 9, at 25; elvensilver, *supra* note 7.

83. Genette, *supra* note 9, at 25.

84. *Id.*

85. *Id.* Frequency concerns the number of times an event occurs in a story as opposed to the number of times it is recounted in the text (a single event can be narrated several times). Richardson, *supra* note 7, at 11.

86. HERMAN & VERVAECK, *supra* note 9, at 62. Richardson, *supra* note 7, at 11; elvensilver, *supra* note 7.

87. Richardson, *supra* note 7, at 11; elvensilver, *supra* note 7.

88. elvensilver, *supra* note 7.

transpire in “real time.” However, in discourse time, the order of events may be varied by the narrator (e.g. 2-1-3-4).<sup>89</sup> This changing of the order of events is called anachrony.<sup>90</sup>

#### i. Chronological Order

“Chronological order” is defined as “[t]he arrangement of . . . events in the order of their occurrence. ‘Harry washed, then he slept’ observes a chronological order, whereas, ‘Harry slept after he worked’ does not.”<sup>91</sup> When using chronology to organize events, a “story . . . appears to mimic how time unfolds in ‘real life.’”<sup>92</sup> Because chronological order imitates how time unfolds in “real life,” it is the primary approach used to organize events in time.<sup>93</sup> As one commentator noted, “The simplest way to tell a story, equally favored by tribal bards and parents at bedtime, is to begin at the beginning, and go on until you reach the end, or your audience falls asleep.”<sup>94</sup> Thus, chronology is the most commonly used method to organize events in a story because it “seems to order events onto a shared ‘one-size-fits-all’ narrative spine.”<sup>95</sup>

#### ii. Chronological Deviations, or Anachronies<sup>96</sup>

Storytellers use certain narrative devices to depart from chronology.<sup>97</sup> These narrative devices allow a storyteller to tell a story in discourse time that varies the order, or sequence, of the events from that in which those events transpired in the story itself (story time).<sup>98</sup> This departure from chronology, or change from the sequence of events in the story, is called “anachrony.”<sup>99</sup> Anachrony is the difference in “the order in which events [in the story] (are said to) occur and the order in which they are recounted” by the storyteller.<sup>100</sup>

89. *Id.*

90. *Id.*; MEYER, *supra* note 2, at 191.

91. MEYER, *supra* note 2, at 188–89.

92. *Id.* at 186.

93. *Id.* at 189.

94. *Id.* (quoting DAVID LODGE, *THE ART OF FICTION: ILLUSTRATED FROM CLASSIC AND MODERN TEXTS* 74 (1992)).

95. MEYER, *supra* note 2, at 186.

96. “Differences between the arrangement in the story and the chronology of the fabula we call *chronological deviations* or *anachronies*.” MIEKE BAL, *NARRATOLOGY: INTRODUCTION TO THE THEORY OF NARRATIVE* 53 (1985).

97. MEYER, *supra* note 2, at 191. In fact, “[t]he best-known principle of ordering is the presentation of events in an order different from their chronological order.” BAL, *supra* note 96, at 50.

98. elvensilver, *supra* note 7; MEYER, *supra* note 2, at 191.

99. elvensilver, *supra* note 7; MEYER, *supra* note 2, at 191; *see* BAL, *supra* note 96, at 53.

100. MEYER, *supra* note 2, at 191.

Two options exist for deviating from chronological order: the event presented in the anachrony can either delve into the past or travel into the future.<sup>101</sup> “Analepsis” is “[a]n anachrony going back to the past with respect to the ‘present’ moment; an evocation of one or more events that occurred before the ‘present’ moment (or moment when the chronological recounting of a sequence of events is interrupted to make room for the analepsis).”<sup>102</sup> Analepsis is also called a “flashback,”<sup>103</sup> “retro-version,”<sup>104</sup> or “retrospection.”<sup>105</sup> Analepsis serves two functions—it either can go back into the past or “fill in earlier gaps . . . in the narrative” or it can revisit past events and tell those events anew.<sup>106</sup> Analepsis, or flashback, can dramatically cut “to a scene from [a] character’s past that reveals crucial backstory . . . or some crucial aspect of a particular character’s motivations.”<sup>107</sup> For example, in *Harry Potter and the Sorcerer’s Stone*, J.K. Rowling begins the first Harry Potter book as Harry turns eleven years old.<sup>108</sup> It has been ten years since Lord Voldemort murdered Harry’s parents and Harry was left with his relatives, the Dursleys.<sup>109</sup> Rowling uses flashbacks to hint at Harry’s unique abilities by recounting the strange things that happened to him before the story takes place.<sup>110</sup> For example, when Aunt Petunia makes Harry get a haircut, he wakes up the next morning to find his hair has grown back to where it was.<sup>111</sup>

“Prolepsis,” is “[a]n anachrony going forward to the future with respect to the ‘present’ moment; an evocation of one or more events that will occur after the ‘present’ moment (or moment when the chronological recounting of a sequence of events is interrupted to make room for a prolepsis).”<sup>112</sup> “Prolepsis,” also called a “flash-forward,” “anticipation,”<sup>113</sup> or “prospection,”<sup>114</sup> springs forward into the future to relate events that occur later.<sup>115</sup> For example, in

101. BAL, *supra* note 96, at 54.

102. MEYER, *supra* note 2, at 192 (quoting GERALD PRINCE, A DICTIONARY OF NARRATOLOGY 82 (2003)).

103. MEYER, *supra* note 2, at 192.

104. BAL, *supra* note 96, at 54.

105. MEYER, *supra* note 2, at 192.

106. *Id.*

107. *Id.*

108. J.K. ROWLING, HARRY POTTER AND THE SORCERER’S STONE 43 (1997).

109. *Id.* at 12, 18, 29.

110. *Id.* at 24–25.

111. *Id.* at 24.

112. MEYER, *supra* note 2, at 194 (quoting PRINCE, *supra* note 102, at 78).

113. *Id.*; BAL, *supra* note 96, at 54.

114. MEYER, *supra* note 2, at 194.

115. *Id.* at 192. Bal, however, “avoid[s] the more common terms ‘flashback’ and ‘flash-forward’ because of their vagueness and psychological connotations.” BAL, *supra* note 96, at 54.

Charles Dickens' novel *A Christmas Carol*, when the Ghost of Christmas Yet to Come shows Ebenezer Scrooge the gravestone with his name etched on it, this is a flash-forward, or prolepsis.<sup>116</sup>

### iii. Application in Law

Law students and new lawyers are often advised to present the facts using chronological order.<sup>117</sup> Consequently, legal storytellers generally default to chronological order to structure their stories.<sup>118</sup> There are a couple reasons for using this approach to organize facts in a story. First, because people believe that “chronology embodies how events transpire in real time, . . . it . . . arouses the least suspicion . . . from highly skeptical judicial readers.”<sup>119</sup> Using chronology allows the legal storyteller to appear as though he or she is depicting events “objectively” and to convince the reader he or she is simply presenting the facts in an unbiased manner rather than manipulating them to suit his or her purposes.<sup>120</sup> Thus, it is conventional for legal storytellers to use a straightforward linear chronology to “show” the reader that the story is “controlled by the events unfolding in time rather than by the” manipulation of those facts by the storyteller.<sup>121</sup> By doing this, the legal storyteller is trying to convince the reader he or she is “subordinating narrative to legal argumentation.”<sup>122</sup>

Second, legal storytellers often default to chronological order to tap into the common misconception about the relationship between chronology and causality.<sup>123</sup> “[H]uman beings tend to interpret events succeeding each other in

116. CHARLES DICKENS, *A CHRISTMAS CAROL* 138 (1990). Prince provides another example of a prolepsis: “John became furious. A few days later, he would come to regret this attitude, but now, he did not think of the consequences and he began to scream.” PRINCE, *supra* note 102, at 79.

117. SHAPO, WALTERS, & FAJANS, *supra* note 1, at 154; MEYER, *supra* note 2, at 185. One commentator instructs legal writers that, when drafting a statement of facts:

[C]oherent narrative requires the facts to be addressed in chronological order.

....

... Describing the events in a chronological order tracks the factual basis for the appeal from the inception of the case to the outcome in the trial court.

....

... [Moreover, h]elpful facts can be emphasized by putting them in a chronological context that demonstrates their importance to the case.

Metos, *supra* note 2, at 33–34.

118. MEYER, *supra* note 2, at 188.

119. *Id.* at 189.

120. *Id.*

121. *Id.* at 189, 197.

122. *Id.* at 189.

123. BAL, *supra* note 96, at 42; MEYER, *supra* note 2, at 189.

time as events with a causal connection.”<sup>124</sup> Because of this misconception about chronological and casual connections,<sup>125</sup> legal storytellers may use chronological order to trigger the reader’s presumption that “earlier events presented in a narrative sequence cause the later events.”<sup>126</sup>

While employing chronology is sometimes an appropriate choice,<sup>127</sup> the advice to default to chronological order when organizing events in a narrative is ill-advised.<sup>128</sup> Chronology is a tool for organizing events in a narrative, but it is not the *only* tool that legal storytellers should keep in their drafting toolbox. Nor should chronology be the primary strategy for organizing events in narrative time as it is just one approach to ordering events in a story.<sup>129</sup> This is because there is not “a standardized one-size-fits-all, strict and truly linear chronology available for telling legal stories.”<sup>130</sup> The “depiction of time in all but the simplest of stories is . . . extremely complex, far more complex than a strict and linear chronology contemplates or allows” for.<sup>131</sup> Even those legal stories that appear linear and straightforward are often “filled with departures from a literal chronology” where the storytellers bend and shape time within their stories to accommodate their purpose and the demands of the narrative.<sup>132</sup>

Although legal storytellers purport to use “chronology as the primary mode of legal storytelling, . . . [legal] stories [often] depart from a chronology, calibrating and coordinating ‘discourse time’ with the most effective presentation of the events of the plot in story time.”<sup>133</sup> In fact, legal storytellers often mark and adjust time within their stories, using flashbacks to delve into the past or flash-forwards to relate events occurring later in time.<sup>134</sup> These shifts in time can occur on a macro or micro level in the story. When the time shift occurs on a macro level, the legal storyteller will often mark the shift formally with “captions or headers that signal to the reader the shift in time that is taking place.”<sup>135</sup> On the other hand, micro time shifts are made on a grammatical level:

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124. HERMAN & VERVAECK, *supra* note 9, at 11.

125. BAL, *supra* note 96, at 42.

126. MEYER, *supra* note 2, at 189.

127. *Id.* at 188–89.

128. *Id.* at 185. Instructing law students and new lawyers to default to telling law stories in chronological order “is, at best, naïve, and, more accurately, deceptive and self-deluding.” *Id.*

129. *Id.* at 185–86.

130. *Id.* at 190.

131. *Id.* at 186.

132. *Id.* at 187, 190.

133. *Id.* at 195.

134. *Id.* Although both analepsis and prolepsis are commonly used in legal documents, prolepsis is used less often. *Id.* at 194.

135. *Id.* at 195.



“there are subtle movements and adjustments from sentence to sentence, and often even within sentences.”<sup>136</sup>

Flashbacks and flash-forwards, which alter the sequential ordering of events, are more than just a literary convention used to present a compelling story.<sup>137</sup> For legal storytelling, rhetorical sequencing is a persuasive tool.<sup>138</sup> “Rhetorical sequencing is an intentional arrangement set forth as advantageously as possible to produce a particular effect.”<sup>139</sup> An anachrony can draw attention to certain facts, highlighting or emphasizing them so the reader remembers them.<sup>140</sup> They can also be used “to bring about aesthetic or psychological effects, to show various interpretations of an event, to indicate the subtle difference between expectation and realization, and much else besides.”<sup>141</sup> Thus, rhetorical sequencing can be used to advocate on behalf of a client and to persuade the reader to adopt the beliefs of the legal storyteller.<sup>142</sup>

So, what are strategic reasons for departing from chronology and using flashbacks or flash-forwards in a legal story? Philip Meyer identified a list of reasons for such “time travel.”<sup>143</sup> Some of the more strategic reasons he identified relate to the need to present certain information earlier in the narrative to impact the reader’s interpretation of other information presented later:

- to create the kind of world in which your plot action will seem plausible, *before* you relate any pieces of the plot action that may be received skeptically;
- to depict features of that world that will drive plot action or mold one of your characters, *before* you show their effects;
- to provide information about [the parties in the case] that will build up a portrait of their characters, *before* they act in ways that you want interpreted in light of their character
- to provide whatever framing your story needs before it gets going; [and]
- to provide whatever foreshadowing your story needs, at

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136. *Id.*

137. BAL, *supra* note 96, at 52–53. While flashbacks are used regularly in legal storytelling, the use of flash-forwards is less common. MEYER, *supra* note 2, at 193–94. Flash-forwards tend to be used in trial storytelling. *Id.* at 194.

138. “The law abounds in rhetorical narratives: pleadings, stories told to persuade somebody to believe something or to do something, partisan briefs and arguments.” AMSTERDAM & BRUNER, *supra* note 43, at 134 (emphasis omitted).

139. PHELAN & RABINOWITZ, *supra* note 18, at 169.

140. BAL, *supra* note 96, at 52.

141. *Id.* at 52–53.

142. PHELAN & RABINOWITZ, *supra* note 18, at 169.

143. MEYER, *supra* note 2, at 201.

appropriate junctures.<sup>144</sup>

Meyer identifies additional reasons for departing from chronology that serve other strategic purposes, such as shoring up information presented earlier in the narrative:

- to reinforce the plot of your story with mini-stories at appropriate junctures;
- to reinforce the parties' characters with mini-stories at appropriate junctures;
- to reinforce the ordering principles of the world of your story with mini-stories at appropriate junctures; and
- to keep any ministories or subparts of the story properly subordinated to the larger story.<sup>145</sup>

Finally, he identifies more basic reasons for departing from chronology and engaging in time travel in legal stories:

- to implement the basic narrative structure underlying your story;
- to effectuate the particular sequence that your plot requires;
- to create and maintain suspense; [and]
- to serve any other function that your particular story may require.<sup>146</sup>

When employing these techniques to deviate from chronology and move about in time, their use must be invisible to the reader. The arrangement of events in the story must seem to be presented objectively; it must appear to be “a natural and sequential unfolding of the events in [the] story.”<sup>147</sup> The order of events must seem “untailored”<sup>148</sup> and free of manipulation.<sup>149</sup> Decision-makers, particularly skeptical judges, will view “any obvious departures from the supposed realism implicit in a pure linear chronology as subterfuge, as covering holes in the plot of the story, or as simply the gimmicks of a narrative trickster who cannot be trusted.”<sup>150</sup> Thus, to avoid this skepticism, legal storytellers should not emphasize or highlight departures from chronology.<sup>151</sup>

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144. *Id.* The listed points have been reordered from the original source.

145. *Id.*

146. *Id.* The listed points have been reordered from the original source.

147. *Id.* at 191.

148. BRUNER, *supra* note 24, at 48.

149. *See* MEYER, *supra* note 2, at 200. In fact, according to Meyer, “there are grave dangers in obvious manipulations of time.” *Id.*

150. *Id.*

151. *Id.*

*B. The Narrative Framework: Beginnings and Endings*

i. Generally

“[N]arrative time is not just about ordering events within a story; it is also about the architecture of the story itself.”<sup>152</sup> There are two crucial points in time that establish the architecture, or narrative framework, of a story—the beginning and the ending.<sup>153</sup> While beginnings are important in legal storytelling, “[t]he primary concern in legal storytelling is how the story will end.”<sup>154</sup> Though not necessarily intuitive, it is important to note that beginnings and endings are intertwined.<sup>155</sup> The storyteller’s choice of where to begin the story foreshadows the ending of the story.<sup>156</sup> Moreover, the choices of where to begin and end the story “compel the unfolding of the events of the story.”<sup>157</sup> Where a legal story begins has a significant impact because “it influences just how the story pulls in the direction of a legal outcome.”<sup>158</sup>

Thus, it is imperative that storytellers “know where the narrative is headed before the journey of the story begins.”<sup>159</sup> They must know “the narrative destination that is desired as the outcome of the” story before they can know where to begin the tale.<sup>160</sup> This creates a conundrum for legal storytellers given that the stories they tell have no endings—or at least not one that the storyteller delivers.<sup>161</sup> Unlike in popular storytelling, where the storyteller determines how the story will end, the legal storyteller does not have the same luxury.<sup>162</sup> The legal storyteller proposes, or suggests the “right” ending for the story,<sup>163</sup> but

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152. *Id.* at 186.

153. *Id.* at 199. “[A] beginning is what requires nothing to precede it, an end is what requires nothing to follow it, and a middle needs something both before and after it.” DAVID LODGE, *THE ART OF FICTION: ILLUSTRATED FROM CLASSIC AND MODERN TEXTS* 216 (1994); Meyer, *supra* note 17, at 258.

154. MEYER, *supra* note 2, at 71. “One obvious constraint on the trajectory of the plot of any well-wrought story, especially the plot of a legal story, is the ending—the point of the story—which gives the story closure and meaning.” *Id.* at 12–13.

155. *Id.* at 199.

156. *Id.* Foreshadowing is a narrative time concept where “an already told future . . . sends signals back to the present by backward causation . . . . The consequence is that the present becomes preparation for a hypothetical future.” Anne Reff Pedersen, *Moving Away from Chronological Time: Introducing the Shadows of Time and Chronotopes as New Understandings of ‘Narrative Time,’* 16 *ORG. ARTICLES* 389, 393 (2009).

157. MEYER, *supra* note 2, at 186–87.

158. Scheppelle, *supra* note 6, at 2094.

159. MEYER, *supra* note 2, at 199.

160. *Id.*

161. Legal stories are incomplete, unfinished. *Id.* at 186–87, 199, 208.

162. *Id.* at 199.

163. *Id.* at 187, 200.

ultimately, it is up to the judge or jury to decide how the story ends.<sup>164</sup> Therefore, legal storytellers must carefully and thoughtfully select where to begin the story since that choice strongly implies the ending of the story.<sup>165</sup> Besides anticipating the ending of the story, where the legal storyteller begins the story will also tend to “delimit the action—excluding or backgrounding everything that might have gone before.”<sup>166</sup>

So, given the significance of story beginnings, where should a story begin? “At the beginning, one might plausibly answer.”<sup>167</sup> But where is that? Unlike fairy tales that begin with “once upon a time” and end with “[a]nd they lived happily ever after,”<sup>168</sup> events in life have no “natural” beginnings and no “natural” endings.<sup>169</sup> The stories we tell about those events “have no natural beginning[s], in the sense of having only one particular place and time at which the story can begin.”<sup>170</sup> A portrayal of events can begin and end in different places, telling very different versions of what happened in the story based on the same set of underlying facts.<sup>171</sup> These different constructions of stories tell different narratives because they “take a different cut through events, beginning and ending at a different place.”<sup>172</sup> Where the story begins suggests to the reader what is ordinary or what matters to the story.<sup>173</sup> Furthermore, where the story begins, just as where it ends, can affect the reader’s sympathy for one party over another.<sup>174</sup> Beginning in one place rather than another, and telling one story over another can lead to different legal results.<sup>175</sup>

Though the boundaries of legal narratives are not fixed—there is no one place in time to begin or end a legal story—legal conventions and strategies regarding legal storytelling shrink the universe of possibilities so experienced legal storytellers believe that they have no choice but to work with what is

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164. *Id.* at 187, 199–200, 208–09. “It is up to a decision maker to write the ending, provide the closure . . . and determine the outcome [of the story].” *Id.* at 208–09.

165. *Id.* at 200; AMSTERDAM & BRUNER, *supra* note 43, at 152.

166. AMSTERDAM & BRUNER, *supra* note 43, at 152.

167. Scheppele, *supra* note 6, at 2094.

168. *Id.* at 2085.

169. AMSTERDAM & BRUNER, *supra* note 43, at 153; Scheppele, *supra* note 6, at 2094.

170. Scheppele, *supra* note 6, at 2094 (emphasis omitted). “A story may start anywhere—each story has an infinite number of possible beginnings. . . . Each of these beginnings can lead to a finite number of middles, but each of these middles must lead to one, and only one, end.” MEYER, *supra* note 2, at 38 (quoting Gerry Spence, Remarks at the NACDL Conference: Lawyering on the Edge (Nov. 3, 1999)).

171. Scheppele, *supra* note 6, at 2085.

172. *Id.*

173. AMSTERDAM & BRUNER, *supra* note 43, at 124.

174. Scheppele, *supra* note 6, at 2094.

175. *Id.* at 2085.

“obviously” the way to tell a particular story.<sup>176</sup> These legal habits play a significant role in shaping the boundaries of legal narratives—they often provide “such powerful background assumptions that a particular version [of the story] seems to be the only version” of the story to be told.<sup>177</sup>

Because standards of legal relevance seem to limit the gathering of evidence to just “what happened” at the time of “the trouble,”<sup>178</sup> the traditional strategy employed by many legal storytellers dictates that the narrative begin with the set of events giving rise to the legal action and only those contextual facts necessary to understand how or why those events occurred.<sup>179</sup> Narrowing the boundaries of the legal story to focus closely on the particular events at issue suggests that everything that the decision maker needs to know to assess culpability can be learned from that small sliver of time.<sup>180</sup> Yet narrowing the time frame to focus solely on the set of events giving rise to the legal action strips the narrative of all the potentially explanatory background information that may exculpate a defendant or other party to the legal case.<sup>181</sup> “[T]here is simply no background data one can use” to explain, or even justify, an individual’s actions.<sup>182</sup>

However, if the legal storyteller departs from the traditional incident focus and opens up the aperture on the time frame, he or she can begin the story at a

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176. Scheppelle, *supra* note 6, at 2094. The law’s adversarial process seemingly demands certain obligatory plots. AMSTERDAM & BRUNER, *supra* note 43, at 117. Counsel for the accusing party, or plaintiff, must relate a tale alleging that another party, the defendant, committed certain acts that harmed the plaintiff and were in violation of the law. BRUNER, *supra* note 24, at 37; AMSTERDAM & BRUNER, *supra* note 43, at 117. The plaintiff’s story is “a story in which there has been trouble in the world that has affected the plaintiff adversely and is attributable to the acts of the defendant.” AMSTERDAM & BRUNER, *supra* note 43, at 117. The defendant’s legal story, on the other hand, must counter the plaintiff’s story. *Id.*; see BRUNER, *supra* note 24, at 37. The defendant’s story will present another version of the events that happened which rebuts the plaintiff’s accusation of wrongdoing by the defendant. BRUNER, *supra* note 24, at 37. In the defendant’s legal story, counsel must claim that “nothing wrong happened to the plaintiff,” AMSTERDAM & BRUNER, *supra* note 43, at 117, because the alleged wrongful act did not harm the accuser, the alleged act did not violate the law, or the legal wrong was not the defendant’s fault. BRUNER, *supra* note 24, at 37; AMSTERDAM & BRUNER, *supra* note 43, at 117.

177. Scheppelle, *supra* note 6, at 2094.

178. *Id.* at 2097. “‘The trouble’ is that the set of events giving rise to the [legal case] and the legal statement of facts usually focuses narrowly on what made those events happen.” *Id.* at 2095.

179. *Id.* at 2094–95.

180. Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 594 (1981).

181. *Id.* at 666; Scheppelle, *supra* note 6, at 2097. “Drawing the boundaries of legal stories closely around the particular event at issue [tends to] exclude much of the evidence that [a party to a case] may find necessary to explain” or justify their actions. Scheppelle, *supra* note 6, at 2097.

182. Kelman, *supra* note 180, at 594.

different point and tell a different story.<sup>183</sup> This “broad time-framing,”<sup>184</sup> or “wide-angle beginning[,] puts the event before the court in a broader context than legal narratives usually invoke.”<sup>185</sup> This broader time frame can consider events both prior and after the events giving rise to the legal case<sup>186</sup> and present a broader view of the context in which the events giving rise to the legal case occurred.<sup>187</sup>

## ii. Application in Law

In terms of legal storytelling and persuasion, the prosecution in criminal cases and plaintiffs in civil cases use narrow “time-framing,” which focuses the beginning of the story on the events giving rise to the legal case and the defendant’s alleged bad action.<sup>188</sup> Beginning with the defendant’s alleged bad actions suggests how the story should end—with the defendant being found guilty of the crime or liable to the plaintiff for his or her injuries. Moreover, starting the narrative with the defendant’s alleged bad actions emphasizes those actions by tapping into the persuasion afforded by the principle of primacy.<sup>189</sup> The defendant’s alleged bad actions will be at the forefront of the reader’s mind as he or she reads the remainder of the narrative, shading the reader’s interpretation of the rest of the facts in the story.<sup>190</sup>

The broader time frame that allows for a wide-angle beginning, on the other hand, can shift some of the reader’s attention from the defendant’s alleged bad actions to the greater social or personal context in which those actions took place.<sup>191</sup> In terms of persuasion in legal storytelling, defense attorneys use broad time-framing because the wide-angle beginning takes the emphasis off the defendant’s alleged bad actions and spotlights the potentially explanatory background facts that narrow time-framing excludes.<sup>192</sup> Thus, due to the

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183. *See id.* at 611; Scheppele, *supra* note 6, at 2095.

184. Kelman, *supra* note 180, at 611.

185. Scheppele, *supra* note 6, at 2096.

186. Kelman, *supra* note 180, at 611; *see* Scheppele, *supra* note 6, at 2094–95.

187. *See* Scheppele, *supra* note 6, at 2095.

188. Kelman, *supra* note 180, at 594.

189. The principle of primacy is a commonly accepted psychological phenomenon recognizing that “the first pieces of information a person obtains about an event or person colors that person’s thinking about the event or person and strongly influences how the person views information later learned.” L. Timothy Perrin, *From O.J. to McVeigh: The Use of Argument in the Opening Statement*, 48 EMORY L.J. 107, 124 (1999).

190. *Id.* Herbert Stern describes the primacy principle as “the notion that what we hear first is important because it colors our thinking, commits us to positions, and will heavily determine the way we will view what comes later.” HERBERT STERN, 4 TRYING CASES TO WIN: SUMMATION 115 (1995).

191. *See* Scheppele, *supra* note 6, at 2096.

192. Kelman, *supra* note 180, at 594; Scheppele, *supra* note 6, at 2097.

principle of primacy, the reader will focus on the explanatory background facts and keep those facts in mind while reading the remainder of the narrative. These facts will affect how the reader perceives the rest of the events in the story.<sup>193</sup> As a consequence, a wide-angle beginning and broader construction of the story can produce more sympathy for the defendant than do versions of the story beginning with the Trouble.<sup>194</sup> This is also true when the defendant is an outsider because the wider time-framing offers evidence necessary for the reader to understand the defendant-outsider's viewpoint.<sup>195</sup> However, the broader time frame construction will not always work to the advantage of outsiders.<sup>196</sup> The legal storyteller must evaluate the narrative and determine whether it is advantageous or not.

### iii. Example

Let's look at an example where beginning the story at a different point affected the story told and how the starting point affected each story. I will examine both the majority and dissenting opinions in a well-known Maryland rape case, *Rusk v. State*.<sup>197</sup> In *Rusk*, Eddie Rusk was convicted of raping a woman he had met at a bar, identified only as "Pat," in 1977.<sup>198</sup> Pat gave Rusk a ride home.<sup>199</sup> During the rape, Pat voiced her lack of consent, but she did not physically struggle.<sup>200</sup> On appeal, a majority of the Court of Special Appeals of Maryland reversed the conviction because the state had failed to present evidence that Rusk's behavior was sufficient to cause a reasonable fear of harm that overcame Pat's ability to physically resist.<sup>201</sup> Judge Wilner dissented, finding Rusk's behavior caused a reasonable fear sufficient to overcome Pat's ability to physically resist.<sup>202</sup>

#### *a. The Majority's Narrative*

The majority's technique when writing the legal narrative for *Rusk v. State* was fairly typical of legal narratives. The majority used the traditional legal

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193. Perrin, *supra* note 189, at 124; Stern, *supra* note 190, at 115.

194. Scheppele, *supra* note 6, at 2096.

195. *See id.* at 2096. Beginnings focusing on the events giving rise to the legal case, however, tend to "exclude much of the evidence that outsiders may find necessary to explain their points of view." *Id.* at 2097.

196. *Id.* at 2096–97.

197. 406 A.2d 624 (Md. Ct. Spec. App. 1979).

198. *Id.* at 625.

199. *Id.*

200. *Id.* at 625–26.

201. *Id.* at 628.

202. *Id.* at 629 (Wilner, J., dissenting).

strategy by beginning the story by focusing primarily on the events surrounding the rape and providing only those contextual facts needed to understand those events.<sup>203</sup> Thus, the majority's narrative examined when the interaction between the parties began, traced the course of events that lead to the alleged rape, and ended when the parties parted ways.<sup>204</sup>

The story the majority told when relating the facts focused narrowly on the events of the night that Pat claimed Rusk raped her.<sup>205</sup> The court ventured outside those bounds only to provide contextual information that bolstered its narrative account of what happened that night. In the first paragraph of the facts, the majority explains that Pat was a twenty-one-year-old woman separated from her husband but not yet divorced.<sup>206</sup> It explains that Pat and one of her friends "went bar hopping" that night and that Pat met Rusk at the third bar she attended.<sup>207</sup> The majority's story provides details regarding Pat and Rusk's interactions that evening, emphasizing facts that showed Pat's failure to struggle and characterizing Rusk's actions as lacking force.<sup>208</sup> The majority noted that Rusk asked Pat for a ride home from the bar and that Pat agreed.<sup>209</sup> Pat initially refused Rusk's request to come up to his apartment, but when Rusk took the keys out of the ignition, opened her car door, and again asked her to come up, Pat told him she would, though she claimed to fear him.<sup>210</sup> Pat then followed Rusk into the boarding house, up the stairs, and into Rusk's apartment.<sup>211</sup> "When they got into [Rusk's] room, he said that he had to go to the bathroom and left the room for a few minutes. [Pat] made no attempt to leave. When [Rusk] came back . . . [Pat] took off her slacks and removed his clothing because 'he[] asked [her] to do it.'"<sup>212</sup> Pat stated that she was begging him not to rape her and that she was crying.<sup>213</sup> When she cried, Rusk put his hands on her throat and began to "lightly . . . choke" her.<sup>214</sup> The story ended

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203. *Id.* at 625–26.

204. *Id.*

205. Scheppele, *supra* note 6, at 2095.

206. *Rusk*, 406 A.2d at 625.

207. *Id.*

208. *See* Scheppele, *supra* note 6, at 2095. Rather than characterizing Rusk's conduct as a "light choking," it would be characterized as a "heavy caressing." *Id.* at 2086; *Rusk*, 406 A.2d at 628.

209. *Rusk*, 406 A.2d at 625.

210. *Id.*

211. *Id.*

212. *Id.* at 625–26.

213. *Id.* at 626.

214. *Id.* The court later noted this light choke could have been "a heavy caress" based on statements made at oral argument. *Id.* at 628.



when the two parted company for the night and Pat reported the rape to the police.<sup>215</sup>

By beginning the story with the facts that Pat was married and not yet divorced and that she and her friend were “bar hopping” on the night of the incident,<sup>216</sup> the majority creates the “underlying suspicion, for which there is absolutely no support in the record, that Pat was somehow ‘on the make.’”<sup>217</sup> This “context” appeals to society’s widely held assumptions about how a woman trolling the bars looking for a man to bed behaves. Beginning the story with these “facts” suggest how this story will (and should) end—Rusk is not guilty of rape because Pat was “asking for it.” Further, “[t]his ‘context’ shades the reader’s understanding of Pat’s subsequent actions in agreeing to give Rusk a ride home, following him up to his apartment, remaining in the apartment while he left the room, taking off her clothes at his request, and engaging in sexual acts.”<sup>218</sup> The fact that Pat was “on the make” that night makes her actions appear consensual despite her repeated verbal objections.<sup>219</sup>

*b. The Dissenting Judge’s Narrative*

The dissenting judge opened up the aperture on the time frame and began the story at a different point. “Rather than narrowly focusing on the trouble between Pat and Rusk, Judge Wilner put Pat and Rusk’s story in a broader context.”<sup>220</sup> Besides “clarifying some . . . facts presented by the majority and supplementing other facts regarding the events of [that night], Judge Wilner zoomed out to provide a more expansive view and offered a more panoramic opening shot of the social landscape in which this individual rape took place.”<sup>221</sup> To help the audience (that is primarily male) “understand Pat’s actions, the dissenting judge showed how the circumstances in which Pat found herself and her response were typical of women who are raped.”<sup>222</sup>

How did Judge Wilner make Pat’s circumstances seem characteristic of those experienced by rape victims by using a wide-angle beginning? First, the judge noted that “[n]early half of [all] rapes occur when this one did, between 8:00 p.m. and 2:00 a.m.”<sup>223</sup> He also disclosed that “as in [Pat’s] case,

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215. Scheppele, *supra* note 6, at 2095.

216. *Rusk*, 406 A.2d at 625.

217. *Id.* at 633 (Wilner, J., dissenting).

218. Sheppard, *supra* note 34, at 208.

219. *Id.*

220. Scheppele, *supra* note 6, at 2095; Sheppard, *supra* note 34, at 209.

221. Scheppele, *supra* note 6, at 2095; Sheppard, *supra* note 34, at 209 (alteration in original).

222. Sheppard, *supra* note 34, at 209.

223. *Rusk v. State*, 406 A.2d 624, 634 (Md. Ct. Spec. App. 1979) (Wilner, J., dissenting).

approximately one-third of rape victims had come into contact with their assailant voluntarily.”<sup>224</sup> These statements address two often biasing facts in rape cases and implicitly suggest that it is normal for a woman, like Pat, to get raped late at night and for her to know her attacker.

Next, Judge Wilner addressed Pat’s failure to struggle. He began the discussion by revealing that law enforcement agencies throughout the country advise women not to fight back against their attackers because this increases the risk of serious bodily harm.<sup>225</sup> Additionally, the judge clarified that “because most women’s experience and expertise with violence tends to be minimal, they are unlikely to engage in physical combat.”<sup>226</sup> He disclosed that the resistance most often employed by rape victims are verbal resistance and other forms of passive resistance, such as “crying, being slow to respond, feigning an inability to understand instructions or telling the rapist they are pregnant, diseased or injured.”<sup>227</sup>

As a final point, Judge Wilner noted that, of the 12% of women who fight their attackers, “71% of the victims were physically injured, with 40% requiring hospitalization or medical treatment.”<sup>228</sup> He acknowledged that “[t]hese results indicate one possible danger of the popular notion (and some [legal] requirements) that a victim of an attack should resist to her utmost.”<sup>229</sup> While Judge Wilner’s panoramic shot of the social landscape in which Pat’s rape occurred “ ‘puts the events before the court in a broader context than that normally invoked by legal narratives,’ this context allowed the audience to better understand Pat’s reactions and to feel more sympathy for her than did the majority’s story” that focused on the events on the night of the rape.<sup>230</sup>

#### iv. Summary

The narrative framework, or the narrative architecture of the story, is important in legal storytelling. Beginning and ending a story in different places can produce vastly different versions of what occurred based on the same set of underlying events. We see this in the stories told in the majority and dissenting opinions in *Rusk*. In its opinion, the majority used the traditional legal strategy of zeroing in on the bad acts—it began the story by focusing primarily on the

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224. *Id.* (Wilner, J., dissenting).

225. *Id.* at 634–35 (Wilner, J., dissenting); Scheppele, *supra* note 6, at 2095.

226. *Rusk*, 406 A.2d at 634 (Wilner, J., dissenting) (quoting FED. BUREAU OF INVESTIGATIONS, 2 THE UNIFORM CRIME REPORTS, at 4).

227. *Id.* (Wilner, J., dissenting) (quoting FED. BUREAU INVESTIGATIONS, 2 THE UNIFORM CRIME REPORTS, at 4); Scheppele, *supra* note 6, at 2095.

228. *Rusk*, 406 A.2d at 634 (Wilner, J., dissenting).

229. *Id.* (Wilner, J., dissenting).

230. Sheppard, *supra* note 34, at 210 (quoting Scheppele, *supra* note 6, at 2096).

events surrounding the rape and providing only those contextual details needed to understand those events. However, the contextual details provided by the majority centered on Pat herself and presented her as a woman on the prowl. This shades the reader's understanding of the rest of the story, including why Pat gave Rusk a ride home, why she went up to his apartment, why she remained in the apartment when he left her alone for a short time, and why she didn't physically resist. The beginning of the majority's story implies that the interaction between Pat and Rusk was consensual and suggests that the story should end in favor of Rusk.

The dissenting judge, on the other hand, began his story in a less traditional fashion. His story began at a different point—he opened the aperture on the time frame and provided a broader context for the events. His story offered a more panoramic opening shot of the social landscape in which the rape occurred. Judge Wilner explained that most rapes occur late at night, one-third of women know their assailants, and most women are unlikely to physically resist rapists but rather resist verbally and with other forms of passive resistance (like crying). This information shades the reader's understanding of the rest of the story and shows that Pat's response of crying and bargaining was typical of women who are raped.

In sum, where legal storytellers begin and end their stories is a valuable tool in their legal writing toolbox. Beginning a story at a different point in time can have an enormous persuasive impact, and legal storytellers should carefully consider where to begin their stories rather than blindly accepting traditional legal conventions.

### *C. Duration*

Now that I've addressed the narrative time concepts relating to order, I will discuss the concept of duration. Like order, duration is another aspect of narrative movement. Duration explores the differences in the passage of time between story time and discourse time by comparing the time an event takes to occur in the story to the time needed to narrate the account of the event.<sup>231</sup> "In story time, time is fixed, like a clock."<sup>232</sup> Discourse time, on the other hand, can be contracted or expanded to move faster or slower.<sup>233</sup> "[D]iscourse time seldom, if ever, moves ineluctably forward matching the movements of the hands of the clock."<sup>234</sup> Duration is divided into several types of narrative

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231. HERMAN & VERVAECK, *supra* note 9, at 60; Richardson, *supra* note 7, at 11; elvensilver, *supra* note 7.

232. elvensilver, *supra* note 7.

233. *Id.*

234. MEYER, *supra* note 2, at 197.

movement, or “speeds,” including summary scene, stretch, ellipsis, and pause.<sup>235</sup> This section explores these facets of narrative pacing, describing each speed and identifying the persuasive affect each speed can have. After addressing each of these facets of narrative pacing, I discuss how legal storytellers can use these concepts to improve the effectiveness of their advocacy. Finally, I show how these concepts were employed by the majority and dissenting judge in their respective judicial opinions in *Rusk v. State*.

#### i. Summary

Summary is what it sounds like—a summary of events in a narrative.<sup>236</sup> In a summary, the passage of time is accelerated<sup>237</sup> and “the pacing of events is compressed.”<sup>238</sup> For example, an event that takes a long time can be summarized in one sentence.<sup>239</sup> In a summary, story time significantly exceeds discourse time.<sup>240</sup> In a summary, events are glossed over or portrayed more abstractly<sup>241</sup>; the details of events “are swallowed in a quick gulp of time.”<sup>242</sup> Summary constitutes “the main connective tissue” in stories.<sup>243</sup>

Legal stories, like most stories, use summaries a great deal.<sup>244</sup> Practically speaking, “[t]his is because there is often a great deal of information to convey to the reader and, although much of this information is important, it is not sufficiently important to warrant an entire scene.”<sup>245</sup> This is particularly true due to the time and space limitations constraining lawyers as well as the average attention span of a judicial reader and his or her willingness to engage with the story.<sup>246</sup> However, lawyers also use summaries for persuasive purposes, to de-emphasize information that is not favorable to their clients. Given that the events in a summary unfold quickly and without much detail, the importance

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235. Richardson, *supra* note 7, at 11; elvensilver, *supra* note 7.

236. See MEYER, *supra* note 2, at 126. The use of summary has been characterized as “telling” the reader information rather than “showing” the reader information, as is done with a scene. Meyer, *supra* note 17, at 235; HERMAN & VERVAECK, *supra* note 9, at 15. Summary is also referred to as “acceleration.” HERMAN & VERVAECK, *supra* note 9, at 61.

237. See MEYER, *supra* note 2, at 126, 197; HERMAN & VERVAECK, *supra* note 9, at 61.

238. MEYER, *supra* note 2, at 126, 197.

239. HERMAN & VERVAECK, *supra* note 9, at 61.

240. MEYER, *supra* note 2, at 126, 197; HERMAN & VERVAECK, *supra* note 9, at 61; see BAL, *supra* note 96, at 72. In a summary, “the narrative duration is greatly reduced with respect to the historical duration.” Genette, *supra* note 9, at 30.

241. MEYER, *supra* note 2, at 197; Meyer, *supra* note 17, at 241.

242. MEYER, *supra* note 2, at 198.

243. Genette, *supra* note 9, at 30.

244. MEYER, *supra* note 2, at 127.

245. *Id.*

246. *Id.*

of these events within the narrative are devalued.<sup>247</sup> Because summary glosses over or abstracts events, “specific scenes are not called forth readily in the mind of the . . . reader.”<sup>248</sup> Specificity is lost or blurred as a result of the summarization of events.<sup>249</sup> Consequently, legal storytellers can use summary to hurry the reader “through events which would be uninteresting, or *too interesting*[, and thus] distracting, if lingered over.”<sup>250</sup>

## ii. Scene

“Scene indicates an almost perfect overlap of the duration of an event,” or the time it takes for an event to occur in the narrative, with the time it takes for the author to represent that event.<sup>251</sup> Thus, in a scene, “events are . . . clearly . . . formed into visual images”<sup>252</sup> because of the storyteller’s use of “visual details to construct scenes.”<sup>253</sup> According to one narrative theorist, the “purest form” of scene is quoting the “speech of characters, in which language exactly mirrors the event.”<sup>254</sup> Here, “discourse time is roughly equivalent to story time—whether the scene is presented in dialogue or as a straightforward account of moment-to-moment visual action.”<sup>255</sup>

In legal storytelling, unlike popular storytelling, scenes are not used as often as summaries.<sup>256</sup> It is as if legal storytellers are “afraid of constructing scenes.”<sup>257</sup> Scenes are important in both popular and legal storytelling because their detailed depiction of events draws readers into the story.<sup>258</sup> However, for legal storytellers, scenes also have persuasive value. “If an event matters, we dwell on it; we take longer to tell it than it could ever take to happen.”<sup>259</sup> The

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247. *Id.* at 197.

248. *Id.* at 126.

249. *Id.*

250. Meyer, *supra* note 17, at 241 (emphasis added).

251. HERMAN & VERVAECK, *supra* note 9, at 61. In a scene, narrative duration and historical time within the story are nearly equal. Genette, *supra* note 9, at 30.

252. MEYER, *supra* note 2, at 126.

253. Meyer, *supra* note 17, at 235.

254. *Id.* at 241.

255. MEYER, *supra* note 2, at 126, 197. “Roughly equivalent” is used because, while a “dialogue that appears word for word in a [document] will take almost as long in the text as in the story,” story time and discourse time can never really be identical. HERMAN & VERVAECK, *supra* note 9, at 61. “For instance, it is almost impossible to make pauses in the story conversation last equally long in the text.” *Id.*

256. MEYER, *supra* note 2, at 199.

257. *Id.* at 128.

258. *Id.* at 127. Scenes are used far more than summaries because “flat, abstract summaries” do not draw readers into the story. *Id.*

259. AMSTERDAM & BRUNER, *supra* note 43, at 124 (emphasis omitted).

presentation of visual details with regard to actions and/or precise dialogue is used to highlight information or emphasize it.<sup>260</sup> Given that legal storytellers employ fewer scenes, those scenes are often a central moment in the narrative,<sup>261</sup> or of vital importance to the narrative.<sup>262</sup>

### iii. Stretch

Stretch is akin to slow motion in a movie—the time to read the description of an event is longer than the event itself.<sup>263</sup> In stretch, the storytelling is slowed down to examine an important event and expand on the moments within that event in minute detail.<sup>264</sup> In stretch, discourse time significantly exceeds story time.<sup>265</sup> The dramatic slowing down of time in stretch “stands in direct contrast to summary,” where time is sped up.<sup>266</sup> “The slow motion of a stretch” is used sparingly in legal storytelling.<sup>267</sup> When legal storytellers do use this technique, it is for persuasive purposes, to shine a light on, or to emphasize, information as the significant slowing down of time “work[s] like a magnifying glass.”<sup>268</sup> The slow pace of the storytelling alerts the reader to “the relative importance of specific sections of the story,”<sup>269</sup> and the meticulous portrayal of the details of the event emphasizes the importance of this part of the story.<sup>270</sup>

### iv. Ellipsis

In ellipsis, an event in the story is absent from the narrative.<sup>271</sup> Ellipses are voids within a narrative that occur while the flow of events in the story keeps unfolding.<sup>272</sup> In an ellipsis, a certain duration of time passes in the story while zero time is spent in the narrative depicting that time.<sup>273</sup> There are no words or

260. *Id.* at 152–53.

261. BAL, *supra* note 96, at 71.

262. MEYER, *supra* note 2, at 199.

263. HERMAN & VERVAECK, *supra* note 9, at 61; Richardson, *supra* note 7, at 11.

264. MEYER, *supra* note 2, at 127.

265. *Id.* at 127, 198.

266. BAL, *supra* note 96, at 75.

267. MEYER, *supra* note 2, at 127. According to Bal, stretch is used very seldom even in literary storytelling. BAL, *supra* note 96, at 75.

268. *Id.*

269. MEYER, *supra* note 2, at 127.

270. *Id.*

271. HERMAN & VERVAECK, *supra* note 9, at 61. Ellipses omit an element within a series of events in story time. MEYER, *supra* note 2, at 195–96.

272. Genette, *supra* note 9, at 29. Another way to think about “an ellipse is as an open space in story time [that is] not yet filled in by events.” MEYER, *supra* note 2, at 195.

273. Genette, *supra* note 9, at 30.

sentences devoted to portraying certain events in a narrative.<sup>274</sup> In an ellipsis, story time is much longer than discourse time.<sup>275</sup> Ellipsis can be explicitly identified by the storyteller or “implicit, ‘inferable from a break in the sequence of events recounted.’”<sup>276</sup> When an ellipse is implicit, the reader must logically deduce that something has been omitted based on the information presented in the narrative.<sup>277</sup> However, when an ellipsis occurs, a “period of time is skipped, often without being noticed by the reader.”<sup>278</sup>

In terms of popular storytelling, an ellipsis may forcefully emphasize, rather than deemphasize, the omitted event.<sup>279</sup> The omitted material is emphasized because the reader is left wondering what happened next—his or her imagination will fill in what the reader thinks happened until the narrative itself provides that information later in the discourse time of the story.<sup>280</sup>

Although in popular storytelling, “[e]vents that remain untold can be very important,”<sup>281</sup> legal storytellers rarely use an ellipsis to omit important information. On the contrary, because lawyers have to explain away or justify behavior that may hurt their clients, the legal storyteller typically uses ellipsis to omit only unimportant information.

#### v. Pause

A pause<sup>282</sup> is “an extreme form” of slow-down, where the story comes to a complete standstill while discourse time continues on.<sup>283</sup> It is literally a pause in story time. With a pause, “[a] great deal of attention is paid to one element, and in the meantime the [story itself] remains stationary.”<sup>284</sup> For example, the

274. MEYER, *supra* note 2, at 195–96.

275. HERMAN & VERVAECK, *supra* note 9, at 61. Ellipses is also referred to as “elimination” or “condensation of duration.” See BAL, *supra* note 96, at 41.

276. MEYER, *supra* note 2, at 196 (quoting PRINCE, *supra* note 102, at 25).

277. BAL, *supra* note 96, at 71.

278. *Id.* at 41.

279. MEYER, *supra* note 2, at 196–97.

280. *Id.*

281. HERMAN & VERVAECK, *supra* note 9, at 61. BAL, *supra* note 96, at 71. In popular storytelling, “the event about which nothing is said may have been so painful that it is precisely for that reason it is being elided. Or the event is so difficult to put into words that it is preferable to maintain complete silence about it. Another possibility . . . is the situation in which, though the event has taken place, the actor wants to deny that fact. By keeping silent about it, he attempts to undo it. Thus the ellipsis is used for magical purposes, as an exorcism.” BAL, *supra* note 96, at 71.

282. A pause is also referred to as “stasis.” Genette, *supra* note 9, at 30.

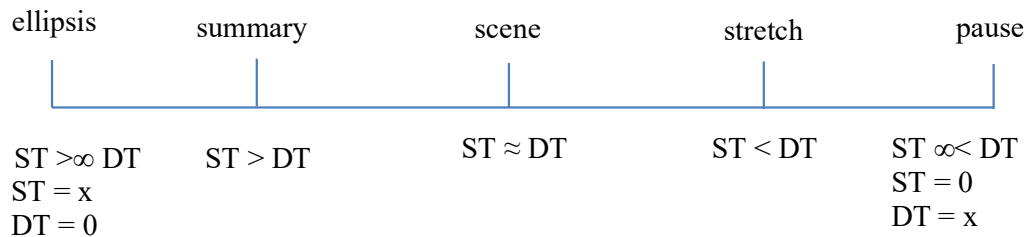
283. HERMAN & VERVAECK, *supra* note 9, at 62; Genette, *supra* note 9, at 30. When pause is utilized, “narrative discourse continues while historical time [within the story] is at a standstill.” Genette, *supra* note 9, at 30.

284. BAL, *supra* note 96, at 76.

story may halt while the storyteller describes a character, object, or event or makes “generalized, argumentative expositions.”<sup>285</sup> When the story continues later, no time has passed in the story itself.<sup>286</sup> With a pause, “the reader easily forgets that the [story] has been stopped, whereas in a [stretch the reader’s] attention is directed towards the fact that the passage of time has slowed down.”<sup>287</sup> Though pauses and stretch are similar in that they both slow down the narrative, storytellers use pauses much more frequently than stretch.<sup>288</sup>

#### vi. Visualizing the Differences in Tempo

With ellipsis, omitting an event or events from the narrative, story time can span hours, days, months, or even years while no discourse time at all is spent to depict that event. With pause, the opposite is true: no story time passes, but some amount of discourse time is dedicated to description or exposition.<sup>289</sup> The differences in tempo between story time and discourse time for summary, scene, and stretch are more complicated than for ellipsis or pause—the differences in tempo between those techniques are relative and should be viewed in relation to each other.<sup>290</sup> Thus, while the line between summary, scene, and stretch is not always clear,<sup>291</sup> a clear distinction exists between these types of narrative movement, and a storyteller must establish a purposeful rhythm between his or her placement of summary, scene, and stretch in a narrative.<sup>292</sup>



285. *Id.*; Genette, *supra* note 9, at 30.

286. BAL, *supra* note 96, at 76.

287. *Id.*

288. *Id.* at 75–76.

289. *Id.* at 76.

290. BAL, *supra* note 96, at 70.

291. MEYER, *supra* note 2, at 198.

292. *Id.* Rhythm is defined as “[a] recurrent pattern in narrative speed and, more generally, any pattern of repetition with variations. The most common rhythm in classical narrative [as well as in legal storytelling] results from the regular alteration of scene and summary.” PRINCE, *supra* note 102, at 84; MEYER, *supra* note 2, at 198–99. Meyer more plainly describes “rhythm in narrative as the purposeful alteration between scene and summary.” Meyer, *supra* note 17, at 235 (emphasis omitted).



### vii. Applicability to Legal Storytelling

Just as sequential ordering is more than just a literary convention and can be used for persuasive purposes in legal storytelling,<sup>293</sup> the legal storyteller can also use these techniques for altering narrative tempo for persuasive purposes. To tell an effective and persuasive legal story, lawyers must learn to deliberately manipulate the tempo of the narratives they tell in order “to produce a particular effect [and] to bring the mind of the reader into closer conformity with the beliefs of the author.”<sup>294</sup> Scene, stretch, and pause can emphasize, or highlight, certain actions or events as a function of the details they include.<sup>295</sup> Ellipsis and summary can omit or understate actions or events because they provide little to no detail regarding those actions or events.<sup>296</sup> The sophisticated legal storyteller will employ “the ‘virtues’ of each technique, often choosing to build briefs largely from verbatim excerpts of transcripts, direct quotations from opinions, and from external and purportedly objective sources.”<sup>297</sup>

However, legal storytellers often fail to consciously and deliberately use the techniques for altering tempo. This is particularly true regarding the two most commonly used techniques, scene and summary. This failure occurs due to the legal storyteller’s ignorance regarding these techniques: “the writer simply does not know how to construct or employ appropriate and strategic *scenes* to supplement *summaries*; that is, the legal writer does not know when it is appropriate to use [scene] instead of [summary].”<sup>298</sup> While summary has its place in legal stories,<sup>299</sup> and “no brief or . . . statement of a case is ever exclusively a composition of scenes, akin to a movie,”<sup>300</sup> the overuse of summaries can have a deadening effect that makes the legal brief nigh “unreadable.”<sup>301</sup> “Many briefs . . . despite the best intentions of the writer, are often painful to read because the writer fails to know what to put in, what to leave out, and how and when to use [scene] instead of [summary].”<sup>302</sup> Thus, a good legal storyteller should be purposeful and intentional regarding the

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293. BAL, *supra* note 96, at 52. PHELAN & RABINOWITZ, *supra* note 18, at 169.

294. PHELAN & RABINOWITZ, *supra* note 18, at 169.

295. AMSTERDAM & BRUNER, *supra* note 43, at 124; MEYER, *supra* note 2, at 127; BAL, *supra* note 96, at 73.

296. MEYER, *supra* note 2, at 126, 195–96.

297. Meyer, *supra* note 17, at 241.

298. MEYER, *supra* note 2, at 128.

299. In fact, summary is the most commonly used tempo for a variety of reasons. *Id.*; Meyer, *supra* note 17, at 241.

300. MEYER, *supra* note 2, at 128.

301. *Id.*; Meyer, *supra* note 17, at 241; LODGE, *supra* note 153, at 122.

302. Meyer, *supra* note 17, at 241.

construction and placement of scenes and summaries in their legal narratives.<sup>303</sup> This strategic placement of scenes and summaries within the narrative will make it more engaging for the reader and more persuasive.

viii. Example

Let's look at *Rusk v. State* again to see how the majority's and the dissent's use of narrative tempo affected the story told and how those techniques impacted each story.

*a. The Majority's Narrative*

The majority begins the narrative by summarizing Pat's life up to the point she met Rusk. This summary is sparse, using only two sentences to introduce Pat and two sentences to explain what happened on the night of the alleged rape before she met Rusk. In the two sentences introducing Pat, the majority states she "was a twenty-one year old mother of a two-year old son. She was separated from her husband but not yet divorced."<sup>304</sup> After summarizing the first twenty-one years of Pat's life, the majority summarizes the events that happened before Pat met Rusk on the night of the rape. The majority explains that, after leaving her son with her mother, Pat attended a high school reunion, and afterward, she and a female friend named Terry went "bar hopping in the Fells Point area of Baltimore."<sup>305</sup> The majority notes that the two women drove in different cars.<sup>306</sup> The point of the majority's characterization of Pat and its summarization of the events before she met Rusk that night was to imply that Pat was "on the make"<sup>307</sup> or "on the prowl" for a man to bed. Otherwise, what is the relevance of the fact that she was separated from her husband but not yet divorced in a rape case? When you couple that fact with the fact that Pat and Terry went "bar hopping" after leaving the reunion and that the two women drove separate cars,<sup>308</sup> the implication that Pat was "on the make" becomes more apparent.

The majority then uses an ellipsis to skip ahead to where Pat met Rusk: "At the *third* bar [Pat] met [Rusk]."<sup>309</sup> The majority's retelling of the story then slows somewhat, quoting Pat's testimony regarding her first meeting with Rusk. Pat testifies that she and Terry were standing against the wall, and Terry

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303. MEYER, *supra* note 2, at 198.

304. *Rusk v. State*, 406 A.2d 624, 625 (Md. Ct. Spec. App. 1979).

305. *Id.*

306. *Id.*

307. *Id.* at 633 (Wilner, J. dissenting).

308. *Id.* at 625 (majority opinion).

309. *Id.* (emphasis added).

was talking to a man Pat didn't know when Rusk walked up.<sup>310</sup> Pat didn't know Rusk either.<sup>311</sup> He said "hi" to Terry, and Terry said, "[H]i, Eddie," and went back to her conversation.<sup>312</sup> Rusk then spoke to Pat.<sup>313</sup> The court summarizes what happened next by explaining that Pat and Rusk "had a five or ten minute conversation in the bar; at the end of which [Pat] said she was ready to leave. [Rusk] requested a ride home and she agreed."<sup>314</sup>

The majority uses another ellipsis to skip ahead to where the two arrive outside Rusk's home. It then slows the story dramatically, using scene to relate the events that occurred outside Rusk's home:

When they arrived at [Rusk's] home, [Pat] parked at the curb on the side of the street opposite his rooming house but did not turn off the ignition. She put the car in park and [Rusk] asked her to come up to his apartment. She refused. He continued to ask her to come up, and she testified she then became afraid. While trying to convince him that she didn't want to go to his apartment she mentioned that she was separated and if she did, it might cause her marital problems particularly if she were being followed by a detective. [Rusk] then took the keys out of the car and walked over to her side of the car, opened the door and said, "Now will you come up?" [Pat] then told him she would.<sup>315</sup>

In this paragraph, the majority's focus is on Rusk's asking Pat to come up to his apartment and on her refusal to do so. The majority notes that after his initial request and Pat's initial rejection, Rusk continued to ask her come up, and Pat stated that she became afraid.<sup>316</sup>

As presented, her fear seems strange or unreasonable—all Rusk had done up to this point is ask her to come up to his apartment. The majority then states that "[w]hile trying to convince him that she didn't want to go to his apartment she mentioned that she was separated and if she did, it might cause her marital problems particularly if she were being followed by a detective."<sup>317</sup> By juxtaposing her seemingly unreasonable fear of Rusk with this statement suggests that the problem wasn't that Pat didn't want to go up to Rusk's apartment but that she feared the marital trouble it would cause if her estranged

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310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

husband learned that she had. She wasn't afraid of Rusk so much as she feared getting caught committing adultery. The majority then relates Rusk's taking her car keys. His actions are presented as though a response to Pat's fear of the trouble going up to his apartment would cause her—by taking her keys, Rusk gives Pat an excuse to go up to his apartment, one that would provide an alternative explanation were she being observed by a detective. She didn't go up to his apartment to have sex with him; she went up to his apartment to retrieve her keys.

Before moving on to relate what happened inside Rusk's apartment, the majority pauses to reflect on Pat's conduct and why Pat went with Rusk. It quotes Pat's testimony from court:

At that point, because I was scared, because he had my car keys. I didn't know what to do. I was someplace I didn't even know where I was. It was in the city. I didn't know whether to run. I really didn't think, at that point, what to do. Now, I know that I should have blown the horn. I should have run. There were a million things I could have done. I was scared, at that point, and I didn't do any of them.<sup>318</sup>

Inserting Pat's reflection into the story at this point seems more to question why she went with Rusk and why she didn't do more to get away from him than explaining why she didn't do any of the "million things" that she could've done. This questioning is particularly effective when considered immediately following the majority's implication that she wasn't scared of Rusk but of the trouble sleeping with him would cause her in terms of her marriage.

The majority returns to the action in the story, again using scene to set forth the events that occurred:

[Pat] followed [Rusk] into the rowhouse, up the stairs, and into the apartment. When they got into [Rusk's] room, he said that he had to go to the bathroom and left the room for a few minutes. [Pat] made no attempt to leave. When [Rusk] came back, he sat on the bed while she sat on the chair next to the bed. He turned the light off and asked her to get on the bed with him. He started to pull her onto the bed and also began to remove her blouse. She stated she took off her slacks and removed his clothing because "[he] asked [her] to do it."<sup>319</sup>

The majority details each leg of the trip from Pat's car to Rusk's apartment to make it seem as though that journey was long. Consequently, during that long trip, it is implied that Pat had the opportunity to resist at any time—as they were entering the rowhouse, as they were climbing the stairs, and as they were

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318. *Id.*

319. *Id.* at 625–26.

entering Rusk's apartment—yet she did not. The majority more explicitly makes this point once the two entered Rusk's apartment; the court notes that *he left her alone for a few minutes* and Pat “made no attempt to leave.”<sup>320</sup> Implied here is that Pat stayed because she wanted to stay. Who in their right mind would have just sat there when Rusk left if she had been scared he would harm her?

When Rusk returned from the bathroom, the majority characterized his behavior in a non-threatening and non-forceful manner. For example, Rusk “asked” Pat to get on the bed with him—he did not order her to do so or command her to do so.<sup>321</sup> He simply *asked* her to join him. The majority's characterization of Rusk's behavior also makes him seem *polite*. Further, the majority noted that Rusk “started to pull her onto the bed and also began to remove her blouse.”<sup>322</sup> By stating that Rusk “started” to pull her onto the bed, the majority implies that, somewhere between the chair and the bed, Pat had taken over, completing the trip to the bed of her own volition. That he had begun removing her blouse further supports this implicit claim. Had he been actively pulling Pat to the bed, Rusk would not have been able to remove her blouse. His hands would have been occupied with yanking her to the bed. The majority also seems to ask, without putting the question into actual words, why Pat took off her own pants and removed Rusk's clothing if her participation in the events was not consensual.

The majority's narrative then quotes Pat's testimony regarding what happened after the two took off their clothes. Pat testified that she was still begging him to let her leave and that she told Rusk he could “get a lot of other girls” for what he wanted, but he kept telling her no.<sup>323</sup> She then testified that she was “really scared” and because she didn't know what he would do, she said, “If I do what you want, will you let me go without killing me?”<sup>324</sup> She testified that she then cried and when she did, Rusk put his hands on her throat and started lightly choking her.<sup>325</sup> She then asked, “If I do what you want, will you let me go? And he said, yes, and at that time, I proceeded to do what he wanted me to do.”<sup>326</sup> The majority concludes the story by stating that Pat then performed oral sex and then they had sexual intercourse.<sup>327</sup>

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320. *Id.* at 625.

321. *Id.* at 626.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

The majority's language regarding what happened when Pat did what Rusk wanted her to do is important. It characterized the events as Pat "performing" oral sex and as Pat and Rusk "having" sexual intercourse. This wording has a consensual ring to it. That the two "had" sexual intercourse suggests that Pat was a willing participant in the act, not someone being forced to participate. Moreover, stating that Pat "performed" oral sex on Rusk suggests again that her actions were voluntary and consensual.

Though in the text of the opinion, the story appears to end here, the majority does relate in a footnote what happened following the sexual acts. However, before setting forth those events by examining Pat's testimony, the majority pauses briefly to interject its thoughts about whether Rusk had used force to overcome Pat's will to resist. The majority states: "If we could say at this point that there is enough evidence for a reasonable fact finder to say such *threat* of force is solely that which overcame her will to resist, the conduct of both following intercourse would belie that conclusion."<sup>328</sup> The story is then told via Pat's testimony. Pat stated that she asked Rusk if she could leave, and he said yes.<sup>329</sup> She then got dressed as did Rusk.<sup>330</sup> He walked her to her car and asked if he could see her again.<sup>331</sup> Pat said yes, but when he asked for her telephone number, she said no, telling him she would see him at Fell's Point some time.<sup>332</sup> She testified that she told him she would see him again "just so [she] could leave."<sup>333</sup> When asked by counsel why she told Rusk she would meet him the next day, Pat stated, "I didn't say the next day, and I just said I would see him down there only so I could leave. I didn't know what else to say. I had no intention of meeting him again."<sup>334</sup> The majority uses a short ellipsis and picks the story up again when Pat arrived home. The majority again quotes Pat's testimony: "I sat in the car, thinking about it a while, and I thought I wondered what would happen if I hadn't of done what he wanted me to do. So I thought the right thing to do was to go to report it" and she went to the police.<sup>335</sup> The events of the story end there, but the majority pauses one final time to interject its thought about these events. The majority opines:

If, in quiet contemplation after the act, she had to wonder what would have happened, her submission on the side of prudence seems hardly justified. Indeed, if [s]he had to wonder

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328. *Id.* at 626 n.1.

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

afterward, how can a fact finder reasonably conclude that she was justifiably in fear sufficient to overcome her will to resist, at the time.<sup>336</sup>

So, how did Rusk's actions following the rape belie the conclusion that his threat of force was sufficient to overcome Pat's will before and during the rape? The majority explained that Rusk allowed Pat to leave following the rape, walked her to her car, and asked if he could see her again and for her phone number.<sup>337</sup> Apparently, that Rusk acted as though he and Pat had just "hooked up" indicates that the sexual acts were consensual. The majority presents his behavior and that Pat told him he could see her again at Fell's Point as indicating that he had not threatened her with force. In doing so, the majority ignores or discredits Pat's previous testimony about Rusk's persistence in getting Pat to come up to his apartment, his taking her car keys, her fear of him, her pleading with him to let her go, her refusal to give him her telephone number, and her telling him he could see her again at some unspecified time at Fell's Point "just so [she] could leave" and that she "had no intention of meeting him again."<sup>338</sup>

After relating Pat's thoughts about the rape once she arrived home and the fact that she went to report it to the police, the majority does not allow the reader to come to his or her own conclusion about these facts and what they suggest regarding whether Rusk threatened Pat with force. Instead of letting the facts speak for themselves, the majority feels the need to *tell* the reader how he or she should interpret those facts. The majority interpreted Pat's contemplation about what would have happened if she had not complied with Rusk's wants as *doubting herself and her choices*.<sup>339</sup> She was not contemplating the possibility of whether he would have killed or just severely injured her had she resisted. Oh no, she was doubting whether he would have harmed her *at all* if she had refused to cooperate with his demands.<sup>340</sup> While this is admittedly a possibility, this interpretation makes little sense given that Pat decided that "the right thing to do was go report" the rape.<sup>341</sup> Had she doubted her choice to submit, why would she have concluded that reporting the rape was the right thing to do? Thus, because the majority's interpretation of these facts makes a leap in judgment that most readers might not have come to on their own, the majority

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336. *Id.*

337. *Id.*

338. *Id.*

339. See *id.*

340. See *id.*

341. *Id.*

had to tell the reader what those facts meant rather than allowing the reader to interpret them his or herself.

*b. The Dissenting Judge's Narrative*

When Justice Wilner begins his version of the story, he noted that the majority opinion “recounts most, but not quite all, of the victim’s story.”<sup>342</sup> This immediately lets the reader know that the majority omitted facts from its story that Justice Wilner believes important. Then, Justice Wilner recounts his version of what happened on the night of the rape. Other than introducing Pat as the victim, Justice Wilner does not initially provide any character information about her. However, like the majority, Justice Wilner’s story begins by relating events that occurred on the night of the rape before Pat met Rusk. The Justice summarizes that Pat “attended a high school reunion. She had arranged to meet her girlfriend Terry there. The reunion was over at 9:00, and Terry asked Pat to accompany her to Fell’s Point.”<sup>343</sup> Justice Wilner then uses a short pause in the action to provide some additional information. He notes that while “Pat had gone to Fell’s Point with Terry on a few prior occasions,” she had met no one that she dated there.<sup>344</sup> While Pat chatted with people when there, these individuals were mostly people that Terry knew.<sup>345</sup> Justice Wilner returns to the action, noting that Pat agreed to accompany Terry to Fell’s Point, but that she first called to tell her mother, who was babysitting her two-year-old son, what she was doing and that she would not be late returning home.<sup>346</sup> Pat and Terry then drove their separate cars to Fell’s Point.<sup>347</sup>

This summary of events accomplishes a couple things. First, it puts an innocent spin on how Pat came to be in Fell’s Point that night. It shows that Pat was not “on the make” when she went to Fell’s Point. She had not gone “bar hopping” to find a man to bed. She had simply agreed to go to a bar with her friend after they left the school reunion fairly early in the evening.<sup>348</sup> She and Terry drove separate cars to Fell’s Point because they had met at the reunion and driven separately to the reunion.<sup>349</sup> On the occasions that Pat had gone to Fell’s Point before, she had been with Terry, talking to people that Terry knew,

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342. *Id.* at 631 (Wilner, J., dissenting).

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*



and had dated no one that she came to know there.<sup>350</sup> Pat did not have a history of meeting strange men at Fell's Point and going home with them to have sex.<sup>351</sup>

Second, Justice Wilner is characterizing Pat, though differently than did the majority. He immediately characterizes her as the victim<sup>352</sup> to remind the reader, and maybe the majority, that Pat is the wronged party here and not the one on trial. Moreover, he uses her behavior to show that Pat is a responsible person—not only does she not go home with strange men, but when Pat goes to Fell's Point with Terry, she phones her mother to notify her of her plans and that she won't be late.<sup>353</sup>

Unlike the majority's story, which uses an ellipsis to skip straight to Pat and Rusk's meeting at the third bar, Justice Wilner's story summarizes what Pat did at the first two bars she attended before meeting Rusk. Pat and Terry first went to an establishment named Helen's, where they stayed for one hour and had one drink.<sup>354</sup> Then they left and walked to another establishment, where they stayed for about a half-hour and drank another drink.<sup>355</sup> Finally, the women went to a third establishment.<sup>356</sup> The Justice notes that “[u]p to this point, Pat conversed only with Terry, and did not strike up any other acquaintanceships.”<sup>357</sup> Justice Wilner included this additional information to show that Pat had been drinking responsibly and had not been chatting up strange men. At the point she met Rusk, Pat had consumed only two drinks in almost as many hours and had spoken solely to Terry—her behavior was hardly that of a woman on the prowl.

The dissent then relates Pat meeting Rusk. Justice Wilner slows down the retelling of the events by providing more detail than before, using more scene than summary. Just as related by the majority, Pat and Terry were standing against a wall when Rusk came over and greeted Terry.<sup>358</sup> Because Terry was speaking with someone else, she said hello to Rusk and returned to her conversation.<sup>359</sup> Rusk then spoke to Pat.<sup>360</sup> Justice Wilner again supplements the information provided by the majority, explaining that, during the five or ten minutes they spoke, Pat and Rusk discussed that they were each separated from

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350. *Id.*

351. *See id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.*

their respective spouses and each had young children.<sup>361</sup> The Justice explains, “Pat said that she had been ready to leave when [Rusk] came on the scene . . . and that [i]t was then about midnight. [She] had to get up with her baby in the morning and did not want to stay out late.”<sup>362</sup> Terry wasn’t yet ready to leave, and “[a]s Pat was preparing to go, [Rusk] asked if she would drop him off on her way home. She agreed because she thought he was a friend of Terry’s.”<sup>363</sup> As the two walked to her car, Pat told Rusk, “I’m just giving you a ride home . . . as a friend, not anything to be, you know, thought of other than a ride.”<sup>364</sup> Rusk agreed to that condition.<sup>365</sup> This additional information shows that Pat had been ready to leave *before* Rusk approached her. Justice Wilner explored what the two discussed to show it was small talk, not a scheme to “hook up.” Thus, Pat did not leave the bar in Fell’s Point to have a romantic rendezvous with Rusk. She only agreed to give him a ride because she believed he was friends with Terry—a friend of a friend. She did not make a habit of giving strange men a ride home. And Terry herself did not give this friend a ride because she was not yet leaving the bar. Finally, and most important, Pat told Rusk she was only giving him a ride as a friend and that he should read nothing more into it, implicitly putting him on notice she would not have sex with him when they got to his apartment. Pat made her intent clear to Rusk, and he claimed to understand and agree.

Justice Wilner’s narrative continues, relating what happened once the two arrived outside Rusk’s apartment. His version of the events is substantially the same as the majority’s narrative except that he notes that Pat was unfamiliar with the neighborhood and that she did not know where she was.<sup>366</sup> When she pulled up to where Rusk said he lived, she put the car in park but left the engine running.<sup>367</sup> She told Rusk, “Well, . . . you are home.”<sup>368</sup> Rusk then asked her to come up, and Pat refused.<sup>369</sup> Rusk persisted in asking her to come up to his apartment, and Pat continued to refuse him.<sup>370</sup> She explained that “even if she wanted to come up, she dared not do so” because “[s]he was separated and it might cause marital problems for her.”<sup>371</sup> Rusk then “reached over, turned off

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361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

the ignition, took her keys, got out of the car, came around to her side, opened the door, and said to her, ‘Now, will you come up?’<sup>372</sup> The additional information that Justice Wilner included shows why Pat might have felt uncomfortable and at Rusk’s mercy—she was lost. Pat had no idea where she was once she got to Rusk’s apartment. Additionally, once Rusk took her keys, Pat *was* at his mercy. She could not leave with her car, and if she fled on foot, she would not know where to go to get help since she was unfamiliar with the neighborhood. Moreover, when Pat was trying to convince Rusk she did not want to go up to his apartment because she was separated and it might cause her marital trouble, she reiterated that *she did not want to come up* when she prefaced that comment with the statement that “even if she wanted to come up, she dared not do so.”<sup>373</sup> It was unspoken, but it was there.

Justice Wilner then notes that Pat followed Rusk to his apartment after he took her keys.<sup>374</sup> And just as in the majority’s narrative, here, Justice Wilner pauses to interrupt the flow of the events in the story. He pauses to criticize the majority for “substitut[ing] its judgment for that of the trial court and jury” regarding whether to believe Pat or Rusk.<sup>375</sup> The trial judge and jury, who had observed the two individuals in court and “listen[ed] to what they said and how they said it,”<sup>376</sup> had accepted Pat’s version of events. However, the majority, who sat on an appellate court, could not observe the two individuals and their testimony and demeanor in court.<sup>377</sup> It based its judgment on the bare trial transcript and other documents. Justice Wilner points out:

We know nothing about Pat and [Rusk]. We don’t know how big they are, what they look like, what their life experiences have been. We don’t know if [Rusk] is larger or smaller than she, stronger or weaker. We don’t know what the inflection was in his voice as he dangled her car keys in front of her. We can’t tell whether this was in a jocular vein or a truly threatening one. We have no idea what his mannerisms were.<sup>378</sup>

The dissenting Justice notes that the trial judge and the jury could discern some of this information and uses this statement to make an implicit point that the majority not only ignores its judgment but takes the opposite stance.<sup>379</sup>

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372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.* at 632.

377. *See id.* at 631–32.

378. *Id.*

379. *See id.* at 632.

Finally, Justice Wilner declares that “all we know is that, between midnight and 1:00 a.m., in a neighborhood that was strange to Pat, [Rusk] took her car keys, demanded that she accompany him, and most assuredly implied that unless she did so, at the very least, she might be stranded.”<sup>380</sup>

In the next paragraph, Justice Wilner continues to pause the story by examining Pat’s testimony about how she reacted to Rusk’s taking her keys after repeatedly asking her to come up to his apartment despite her steadfast refusals. Much of his retelling is similar to the majority’s examination of her reaction—each opinion quotes her directly. However, Justice Wilner’s version includes some additional information and commentary:

Now, let us interrupt the tale for a minute and consider the situation. Pat did not honk the horn; she did not scream; she did not try to run away. Why, she was asked. “I was scared. I didn’t think at the time what to do.” Later, on cross-examination: “At that point, because I was scared, because he had my car keys. I didn’t know what to do. I was someplace I didn’t even know where I was. It was in the city. I didn’t know whether to run. I really didn’t think, at that point, what to do. Now, I know that I should have blown the horn. I should have run. There were a million things I could have done. I was scared, at that point, and I didn’t do any of them.”<sup>381</sup>

Unlike the majority’s opinion, Justice Wilner’s opinion continues on, clarifying *what* Pat feared—when counsel asked Pat what she was afraid of, she replied that she was afraid of “*Him*,” Rusk.<sup>382</sup> When asked “[w]hat was she scared . . . he was going to do,” Pat stated, “Rape me . . . . It was the way he looked at me, and said ‘Come on up, come on up;’ and when he took the keys, I knew that was wrong. I just didn’t say, are you going to rape me.”<sup>383</sup>

It is in Pat’s last statement that Justice Wilner’s criticism of the majority flares to life. Pat feared that Rusk would rape her based on the way he looked at her, the way he said what he said, and the manner in which he took her keys.<sup>384</sup> If Rusk had said and did things differently, in a less threatening or jocular manner, Pat likely would have had a different reaction.

At this point, Justice Wilner’s careful characterization of Pat pays off. He has presented Pat as a responsible young woman who tries to act sensibly and exercise good judgment. She called her mother to inform her that her plans had

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380. *Id.*

381. *Id.*

382. *Id.* (emphasis added).

383. *Id.*

384. *Id.*

changed and to let her know that she wouldn't be home late.<sup>385</sup> Further, Pat drank responsibly while at the bars with Terry, consuming only two drinks in almost as many hours.<sup>386</sup> She went home at midnight because she wanted to wake up early the next morning to be with her child.<sup>387</sup> Finally, Pat only agreed to give Rusk a ride home because she believed he was a friend of Terry's.<sup>388</sup>

Justice Wilner has presented Pat as responsible, sensible, and rational. She is a *reasonable* person—why shouldn't the court find her credible when she says she feared Rusk and that he might rape her? The jury believed that her fear was reasonable given it convicted Rusk of rape and assault. Moreover, neither Justice Wilner nor the jury found it unreasonable that Pat was so scared she failed to run or honk the horn. It might not have been what the justices on the appellate court would have done if they had found themselves in Pat's situation, but it was not an unreasonable response given her fear, her lack of knowledge as to where she was, and the time of night.

After pausing his narrative to present Pat's actions up to that point as reasonable and to shroud her future conduct in the cloak of reasonableness, Justice Wilner restarts the story—"So Pat accompanied [Rusk] to his apartment."<sup>389</sup> He uses an ellipsis to skip their trek up to the apartment and recounts the story once the two are actually present in the apartment. The Justice acknowledges that as the majority points out, Rusk "left her in his apartment for a few minutes."<sup>390</sup> He uses a footnote to clarify that Rusk ordered her "to sit down" before leaving the room for possibly a minute but no more than five minutes.<sup>391</sup> Justice Wilner notes that "[a]lthough there was evidence of a telephone in the room, Pat said that . . . she didn't notice one."<sup>392</sup>

The story slows here because the dissent supplies more details to set the scene. He notes, as did the majority, that, "[w]hen [Rusk] returned, he turned off the light and sat on the bed. Pat was in a chair."<sup>393</sup> Justice Wilner adds facts that the majority's narrative omitted: he includes what Pat said to Rusk. Pat testified that "I asked him if I could leave, that I wanted to go home, and I didn't

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385. *Id.* at 631.

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.* at 632.

390. *Id.*

391. *Id.* at 632 n.5. Pat twice testified that Rusk left the room "for a minute," but on cross-examination testified that she could not remember how long Rusk was actually gone but said that it was not longer than five minutes. *Id.*

392. *Id.* at 632.

393. *Id.*

want to come up. I said, ‘Now, I came up. Can I go?’ ”<sup>394</sup> The dissent notes that Rusk told her he wanted her to stay and reminds the reader he still had Pat’s car keys.<sup>395</sup> Rusk then told Pat “to get on the bed with him, and, in fact, took her arms and pulled her on to the bed.”<sup>396</sup> Justice Wilner’s story clarifies that Rusk didn’t *ask* Pat to get on the bed—he *told* her to get on the bed. *And when she didn’t comply, he pulled her onto the bed.* Rusk then undressed Pat, removing her blouse and bra and unzipping her pants.<sup>397</sup> The Justice notes that “[a]t his direction, she removed his clothes.”<sup>398</sup>

Then, just as the majority did, Justice Wilner quotes Pat’s testimony regarding what happened after the two took off their clothes. Pat testified that she was still begging him to let her leave and that she told Rusk he could “get a lot of other girls” for what he wanted but he kept telling her no.<sup>399</sup> She then testified that she was “really scared” and because she didn’t know what he would do, she said, “If I do what you want, will you let me go without killing me?”<sup>400</sup> She testified that she then cried and when she did, Rusk put his hands on her throat and started lightly choking her.<sup>401</sup> She then asked, “If I do what you want, will you let me go? And he said, yes, and at that time, I proceeded to do what he wanted me to do.”<sup>402</sup> However, rather than characterizing what happened next as Pat “perform[ing]” oral sex followed by the two “ha[ving]” sexual intercourse,<sup>403</sup> which language implies Pat’s consent, Justice Wilner once again quotes Pat’s testimony. Pat testified that Rusk “*made* me perform oral sex, and then sexual intercourse.”<sup>404</sup> Thus, Justice Wilner clarifies that Pat did not voluntarily engage in oral sex and sexual intercourse with Rusk; rather, *he made her do it.*

Justice Wilner’s story then relates what happened following the sex acts. Again, he quotes Pat’s testimony. Pat stated that she asked Rusk if she could leave, and he said yes.<sup>405</sup> She then got dressed as did Rusk.<sup>406</sup> He walked her to

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394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.* at 626 (majority opinion).

404. *Id.* at 632 (Wilner, J., dissenting) (emphasis added).

405. *Id.*

406. *Id.*

her car and asked if he could see her again.<sup>407</sup> Pat said yes, but when he asked for her telephone number, she refused to give it to him, telling him she would see him at Fell's Point some time.<sup>408</sup> She testified that she told him she would see him again "just so [she] could leave."<sup>409</sup> In a footnote, Justice Wilner clarified this testimony, noting that "Pat explained this last comment further" by stating that she "had no intention of meeting him again."<sup>410</sup> Rusk returned her keys and walked Pat to her car.<sup>411</sup> Pat then drove away.<sup>412</sup> She later stopped at a gas station, then drove straight home, not intending to say anything about the rape.<sup>413</sup> However, while she was sitting in her car thinking about what had happened, Pat "wondered what would [have happened] if [she] hadn't of done what he wanted [her] to do. So [she] thought the right thing to do was to go report it," and she went to the police.<sup>414</sup> When asked why she initially was not going to tell anyone about the rape, Pat testified: "*Because I didn't want to go through what I'm going through now.*"<sup>415</sup>

While the majority interpreted Pat's quote about wondering what would have happened if she hadn't done what Rusk wanted her to do as questioning whether she should have cooperated with him, the dissent allows Pat's testimony to speak for itself. Her words reveal that Pat wasn't doubting whether her actions were reasonable; she was wondering if Rusk would have killed her had she not cooperated. That she concluded that she needed to report the rape suggests that Pat thought Rusk might have killed her. *That's why reporting the rape was the right thing to do.* Additionally, Pat reported the rape to the police despite her not wanting to be forced to repeatedly relive the experience and suffer character assassination at the hands of the defense and the court. Had Pat truly doubted that Rusk would have hurt her had she not cooperated with him, why would reporting the rape to the police have been the right thing to do?

#### IV. PUTTING IT ALL TOGETHER

Now that the general principles regarding narrative time have been identified and explained, I will examine the facts sections from two United States Supreme Court cases based on the same set of underlying facts and

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407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.* at 632 n.6.

411. *Id.* at 633.

412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.* (emphasis added).

analyze how those techniques are used to tell very different stories. These competing stories come from *Walker v. City of Birmingham*<sup>416</sup> and *Shuttlesworth v. City of Birmingham*,<sup>417</sup> where the underlying facts related to Dr. Martin Luther King's 1963 protest against segregation in Birmingham, Alabama.<sup>418</sup> The underlying facts are:

The events leading up to Reverend King's Good Friday march in 1963 were dramatic. Two other civil rights leaders (and named defendants in the opinions) were involved with Reverend King in the organization of the civil disobedience and non-violent protests in Birmingham: Reverend Frederick Lee Shuttlesworth, a prominent civil rights activist in Birmingham, and Dr. Wyatt Tee Walker, Executive Director of the Southern Christian Leadership Conference.

....

The day before the marches leading up to the Good Friday march were scheduled to begin, the protesters requested the necessary parade permit. The permit was denied, and the marchers went ahead with their protests. The Alabama legislature responded by statutorily raising bail "for misdemeanor arrests in Birmingham, from \$300 to \$2,500." On Wednesday, April 10, 1963, two days before the scheduled Good Friday march, City attorneys also petitioned the state court for and received, an injunction against further demonstrations. King, Walker and Shuttlesworth decided to march, knowing they would be arrested and also knowing that they could not afford to pay the bail. Dr. King wrote *Letter from Birmingham Jail*, his "greatest written work," on "the edges of newspaper" while being held in solitary confinement for his arrest in *Walker*.<sup>419</sup>

In *Walker v. City of Birmingham*, the United States Supreme Court upheld the injunction issued by the state court that prohibited the protesters from marching.<sup>420</sup> Two years later, in *Shuttlesworth v. City of Birmingham*, the Supreme Court held that the parade ordinance violated the constitution.<sup>421</sup> Justice Stewart authored the Court's majority opinion for both *Walker* and

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416. 388 U.S. 307 (1967).

417. 394 U.S. 147 (1969).

418. Julie M. Spanbauer, *Teaching First Semester Students that Objective Analysis Persuades*, 6 LEG. WRITING 167, 178 (1990).

419. *Id.* at 179–80 (footnotes omitted).

420. 388 U.S. at 320–21; Spanbauer, *supra* note 418, at 180.

421. 394 U.S. at 159; Spanbauer, *supra* note 418, at 181.



*Shuttlesworth*.<sup>422</sup> Below, this Article compares the stories told by Justice Stewart in *Walker* and *Shuttlesworth*. The stories are different for a variety of reasons, mainly because of where he begins each story.

*A. Walker v. City of Birmingham*

In *Walker*, Justice Stewart began the story by explaining that, on Wednesday, April 10, 1963, officials of Birmingham, Alabama filed a complaint in a state circuit court seeking injunctive relief against a group of 139 individuals and two organizations.<sup>423</sup> In this complaint, City officials explained that the individuals and organizations identified by the complaint had previously violated several City of Birmingham ordinances and Alabama statutes by participating in, sponsoring, and conspiring to commit or participate in several sit-in and kneel-in demonstrations, large parades on the streets of Birmingham, trespasses on private property, congregating in mobs upon the public streets and other public places, and unlawfully picketing private businesses in Birmingham.<sup>424</sup> The City officials claimed this misconduct was “ ‘calculated to provoke breaches of the peace,’ ‘threaten[ed] the safety, peace and tranquility of the City,’ and placed ‘an undue burden and strain upon the manpower of the Police Department.’ ”<sup>425</sup> The City officials informed the court that “these infractions of the law were expected to continue and would ‘lead to further imminent danger to the lives, safety, peace, tranquility and general welfare of the people of . . . Birmingham,’ ” and that the injunction was necessary to prevent this outcome.<sup>426</sup> Justice Stewart notes that the circuit judge granted a temporary injunction that enjoined the petitioners in this appeal from participating in or encouraging mass street parades or other mass processions without a permit.<sup>427</sup>

Justice Stewart does not begin his story by focusing on the “bad acts” of the petitioners during the march on Good Friday, some of the events giving rise to the legal action before the Court. Rather, he opens the aperture by beginning the story a little further back in time, with the City officials’ request for injunctive relief and the factual and legal basis for that request.<sup>428</sup> Although beginning the story with this information seems like simple background information needed to understand what gave rise to the legal action before the

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422. *Shuttlesworth*, 394 U.S. at 148; *Walker*, 388 U.S. at 308; Spanbauer, *supra* note 418, at 178.

423. 388 U.S. at 308–09.

424. *Id.* at 309.

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.*

Court, it is so much more than that. By beginning the story with the allegations in the complaint and the accompanying affidavits, which Justice Stewart insinuates must have had some credence given that the circuit judge granted the injunction,<sup>429</sup> he expands exponentially on the petitioners' bad acts. He associates the petitioners with a long string of "lawless" actions and suggests that they routinely flout the law.<sup>430</sup> Beginning the story in this way, with the petitioners' lengthy line of lawless acts and their complete and utter disregard for the law, shades how the reader will interpret the rest of the facts in the story. And by highlighting the petitioners' habitual lawlessness, Justice Stewart foreshadows that the petitioners will ignore the injunction. This beginning also suggests how this legal story will end—the injunction will be upheld as constitutional and the petitioners will be, and should be, held accountable for their complete disregard of the law.

Though the narrative Justice Stewart tells is fairly short, he dedicates four of the seven paragraphs in his story to the allegations lodged in the complaint and the accompanying affidavits.<sup>431</sup> While he did not quote those documents in their entirety, he quotes significantly from them, drawing out his discussion of the petitioners' previous lawless behavior for more than half the story. Thus, while not using pure scene when discussing the complaint, Justice Stewart slows down the discourse time significantly when discussing the petitioners' previous lawlessness to place it center stage in the readers' mind.

The story continues, explaining that several petitioners were served with copies of the writ early the next day.<sup>432</sup> Justice Stewart explains that, later that day, the petitioners held a press conference where they announced their intention to disobey the injunction.<sup>433</sup> One petitioner even declared that they respected the federal courts, but that the state courts favored local law enforcement, "and if the police couldn't handle it, the mob would."<sup>434</sup> The story continues, noting that later that night during a meeting, one petitioner declared that "[i]njunction or no injunction we are going to march tomorrow."<sup>435</sup>

This part of the story, while still not yet detailing the petitioners' actions in violation of the injunction, confirms what Justice Stewart suggested initially—

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429. *See id.*

430. *See id.*

431. *Id.* at 308–09. This excludes the final two paragraphs dedicated to procedural history. *Id.* at 311–12.

432. *Id.* at 310. This was the Thursday before Good Friday. *Id.*

433. *Walker*, 388 U.S. at 310.

434. *Id.*

435. *Id.*

that the petitioners intended to ignore the injunction and flout the law. He quotes the petitioners, using their own words to reveal their intent.

The story marches on, revealing that a large crowd amassed near Sixteenth Street and Sixth Avenue North on the afternoon of Good Friday.<sup>436</sup> A group of approximately fifty to sixty people, including at least three of the petitioners, marched on the sidewalk while the rest of the crowd (1,000 to 1,500 onlookers) clapped, hollered, and whooped.<sup>437</sup> Some of these onlookers followed the marchers and spilled out into the street.<sup>438</sup>

This is the point where Justice Stewart's previous foreshadowing is realized. Given the petitioners' long history of flouting the law by marching and demonstrating, and the petitioners' contempt for state courts and declarations they would march despite the injunction, not surprisingly, some petitioners participated in the parade on Good Friday. In fact, the reader would have been surprised if the petitioners had not marched in the parade. Justice Stewart presents the crowd that gathered on Good Friday as one group of individuals with a common purpose. Although only fifty to sixty people actually marched, he makes it seem that the onlookers *supported the marchers* by clapping and following them. Justice Stewart also presents the crowd of onlookers as aggressive and disorderly<sup>439</sup> given their "hollering[] and [w]hooping" and "spill[ing] out into the street."<sup>440</sup> However, given that the onlookers supported the petitioners and had a common purpose, Justice Stewart treats the marchers (who were orderly) and the onlookers (who were disorderly) as one group and so makes the petitioner-marchers responsible for the onlookers' bad conduct.

But this is not the end of the petitioners' bad acts. Justice Stewart adds onto their bad acts by pointing out that some petitioners sponsored meetings held on the night of Good Friday and the next night.<sup>441</sup> During these meetings, volunteers were sought who would "walk" and go to jail.<sup>442</sup> Then, on April 14, Easter Sunday, a crowd consisting of 1,500 to 2,000 people gathered near Seventh Avenue and Eleventh Street North.<sup>443</sup> Justice Stewart highlights that "[o]ne of the petitioners was seen organizing members of the crowd in formation," while three other petitioners led a group of fifty people down the

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436. *Id.*

437. *Id.* at 310–11.

438. *Id.* at 311.

439. Spanbauer, *supra* note 418, at 182.

440. *Walker*, 388 U.S. at 310–11.

441. *Id.* at 311.

442. *Id.*

443. *Id.*

sidewalk two abreast.<sup>444</sup> Furthermore, at least one other petitioner was among the marchers.<sup>445</sup> Although only approximately fifty people were marching in formation down the sidewalk, another “300 or 400 people from among the onlookers followed in a crowd” that filled the width of the street and flooded onto the sidewalks.<sup>446</sup> The story explains that “[v]iolence occurred” when “[m]embers of the crowd threw rocks that injured a newspaper man and damaged a police motorcycle.”<sup>447</sup>

Justice Stewart mentions that some petitioners sponsored meetings where volunteers were sought to march and get arrested to again emphasize the petitioners’ utter disregard for the law. The petitioners knew what they were doing and what the consequences would be—the law be damned! He reveals that the petitioners did not just seek individuals willing to march and go to jail but also took active roles in the Easter Sunday parade by organizing members of the crowd, leading the group down the sidewalk, and marching. He again treats the approximately fifty marchers and the 300 or 400 onlookers that followed them as one cohesive group to make the marchers equally responsible for the safety risk that the people in the street presented and for their aggressive and dangerous behavior that culminated in violence.

While the first four paragraphs of the story take a long, slow look at the allegations in the complaint and the petitioners’ previous lawless action, the remainder of the story summarizes the events that occurred in the four days following the circuit judge’s grant of the injunction. Four days of story time are summarized in just three paragraphs. This summary accomplishes two goals. First, the Justice gives the appearance of discussing only the relevant facts.<sup>448</sup> Second, the story hits the reader in quick succession with the petitioners’ bad actions over those four days. Justice Stewart demonstrates that the petitioners intended to disobey the injunction when they learned of it and that they were so brazen that they declared it publicly in a press conference within hours of being served.<sup>449</sup> Then, later that night, one petitioner reiterated their intent to ignore the injunction at a meeting.<sup>450</sup> These declarations of intent to disobey the injunction were followed the next day by the petitioners’ actual bad act—participation in the Good Friday march.<sup>451</sup> Following the march, petitioners

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444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.*

448. I say “appearance” here because he omits several important facts, as will be discussed later when discussing *Shuttlesworth v. City of Birmingham*. See *infra* Section IV.C.

449. *Walker*, 388 U.S. at 310.

450. *Id.*

451. *Id.* at 310–11. Or at least the bad acts of “[a]t least three of the petitioners.” *Id.* at 311.

sponsored meetings that night and the next seeking volunteers to march on Easter Sunday and go to jail, again demonstrating their intent to break the law.<sup>452</sup> Finally, the petitioners organized and led the march on Easter Sunday, which resulted in violence.<sup>453</sup> In three short paragraphs, the petitioners demonstrated their intent to flout the law by ignoring the injunction three times and actually disregarded the law twice when they marched in the Good Friday and Easter Sunday parades. By beginning the story with the petitioners' long history of lawlessness and then focusing on their oft-repeated intent to disobey the injunction and their actual disregard of it on two occasions, Justice Stewart makes clear that there can be only one outcome here, and that is that the petitioners must be held accountable for their disregard of the law.

*B. Shuttlesworth v. City of Birmingham*

In *Shuttlesworth*, Justice Stewart begins the story with the events on April 12, 1963, the day of the Good Friday march in Birmingham.<sup>454</sup> He begins by noting that that afternoon, “three Negro ministers,” including the petitioner Frank L. Shuttlesworth, led “52 people, all Negroes” out of a Birmingham church and these fifty-two people walked on the sidewalk in an “orderly fashion”—two abreast—for four blocks.<sup>455</sup> After briefly identifying the petitioners' behavior that is at issue, Justice Stewart acknowledges that “[t]he purpose of their march was to protest the alleged denial of civil rights to Negroes in the city of Birmingham.”<sup>456</sup> The story then describes in more detail the petitioners' conduct and the conduct of the marchers generally:

The marchers stayed on the sidewalks except at street intersections, and they did not interfere with other pedestrians. No automobiles were obstructed, nor were traffic signals disobeyed. The petitioner was with the group for at least part of this time, walking alongside the others, and once moving from the front to the rear.<sup>457</sup>

Justice Stewart then notes that, as the marchers proceeded down the sidewalk, “a crowd of spectators” followed them “at a distance,” and they sometimes “spilled out into the street, but the street was not blocked and vehicles were not obstructed.”<sup>458</sup> He explained that the Good Friday march ended after four blocks, when the Birmingham police arrested the marchers for

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452. *Id.* at 310.

453. *Id.* at 311.

454. 394 U.S. at 148.

455. *Id.* at 148–49.

456. *Id.* at 149.

457. *Id.*

458. *Id.*

violating a Birmingham ordinance that prohibited parading or demonstrating on streets or other public ways without a permit issued by the city.<sup>459</sup>

Although the story begins on the macro level with the petitioners' actions during the Good Friday march,<sup>460</sup> on the micro level Justice Stewart accomplishes a different goal—he introduces the petitioners and humanizes them. The first sentence of the story identifies petitioner Shuttlesworth by name and explains that he is a Negro pastor, one of three who lead the other fifty-two Negro marchers out of the church. For many readers in Western society, the fact that Shuttlesworth and the other leaders of the march were religious leaders automatically cloaks them with an aura of respectability—they should be fervent in their beliefs, but we do not expect them to behave in an unruly or illegal manner. Regarding the other fifty-two marchers, their association with the pastors and the fact that they walked out of a church suggests to the reader they too are law-abiding citizens. Justice Stewart then does something else that he did not do in *Walker*; he identified the purpose of the march—“to protest the alleged denial of civil rights to Negroes in the city of Birmingham.”<sup>461</sup> This purpose is one that the reader can understand and sympathize with. Thus, in the first three sentences of the story, Justice Stewart humanizes petitioner Shuttlesworth and the other marchers, explains what they were doing and why, and creates sympathy for their mission.

After introducing petitioner Shuttlesworth and the marchers, and intimating that they were law-abiding citizens, Justice Stewart then focuses on their actions in more detail. He *shows* they were law-abiding citizens by observing that the marchers did not interfere with automobile or foot traffic as they “walked in orderly fashion,” “stayed on the sidewalks except at street intersections,” and obeyed traffic signals.<sup>462</sup> And, unlike in *Walker*, where Justice Stewart portrays the marchers and the onlookers as part of the same group, in *Shuttlesworth*, he states that, “[a]s the marchers moved along, a crowd

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459. *Id.*

460. While generally beginning with the bad actions of a party tends to favor the other party or the prosecution in a criminal trial and opening the aperture a bit to broaden the discussion to take other things into account tends to favor the party whose actions are under attack, notice that in *Walker* and *Shuttlesworth*, the opposite is true. In *Walker*, Justice Stewart took a broader view, looking back in time to pull in even more bad acts by the petitioners, which favored the City of Birmingham. However, in *Shuttlesworth*, Justice Stewart narrowed where he began the story to focus exclusively on the events that took place during the Good Friday march and immediately after (e.g. the arrest of the marchers by the police). This more narrow focus favored the petitioners. Thus, it is important to remember that there are no hard and fast rules to follow when it comes to deciding where to begin a story. The advice provided by this article provides suggestions only—legal writers must use their own judgment when deciding where to begin their client's story.

461. *Shuttlesworth*, 394 U.S. at 149.

462. *Id.* at 148–49.

of spectators fell in behind them at a distance.”<sup>463</sup> Thus, Justice Stewart uses physical distance to literally separate the marchers and the spectators into different groups and to figuratively dissociate the two groups from one another. This suggests that the marchers should not be held responsible for the actions of the spectators, and that even if they are, the crowd of spectators did not obstruct traffic though they sometimes spilled out into the street. By dissociating the “orderly” marchers from the somewhat unruly spectators, Justice Stewart presents the marchers as respectable law-abiding people and makes their arrest at the end of the march seem like an abuse of power by the Birmingham police, justifying the marchers’ purpose for the march. This also suggests to the reader how this story should end—in favor of the petitioner.

Following the arrest, the story continues with Justice Stewart pointing out that, “over a week before the Good Friday march,” a representative of petitioner Shuttlesworth went to the Birmingham City Hall to apply for a parade permit.<sup>464</sup> When this representative asked to speak to the individual or individuals responsible for issuing permits for “parading, picketing, and demonstrating,” she was sent to Commissioner Connor.<sup>465</sup> Commissioner Connor “denied her request in no uncertain terms.”<sup>466</sup> He told her, “No you will not get a permit in Birmingham, Alabama to picket. I will picket you over to the City Jail.”<sup>467</sup> He repeated this denial twice.<sup>468</sup>

Petitioner Shuttlesworth then sent a telegram to Commissioner Connor two days later requesting a permit that would allow his organization to “picket ‘against the injustices of segregation and discrimination.’”<sup>469</sup> In his request, Shuttlesworth identified the sidewalks where they would picket and stated that the picketers would obey “the normal rules of picketing.”<sup>470</sup> Commissioner Connor responded with a telegram that claimed that “permits were the responsibility of the entire Commission rather than of a single Commissioner.”<sup>471</sup> He also admonished, “I insist that you and your people do not start any picketing on the streets in Birmingham, Alabama.”<sup>472</sup>

Although the arrests are a natural stopping point for the story, Justice Stewart does not end the story with the arrests and the Birmingham police’s

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463. *Id.* at 149.

464. *Id.* at 157.

465. *Id.*

466. *Id.*

467. *Id.*

468. *Id.*

469. *Id.*

470. *Id.*

471. *Id.*

472. *Id.* at 157–58.

abuse of power. Instead, he continues the story and deviates from chronological order to take the reader back in time to a little more than a week before the Good Friday march. By taking the reader back in time, Justice Stewart shows that petitioner Shuttlesworth did twice request a parade permit in an effort to abide by the law. The flashback reiterates that Shuttlesworth, and by association the other marchers, are respectable, law-abiding citizens. By setting forth Commissioner Connor's responses to the requests for a permit, the flashback also reveals that the City of Birmingham's abuse of power was not limited to the police department but was endemic of a problem with the City of Birmingham in general. Commissioner Connor made it *very* clear that the City Commission would not grant Shuttlesworth's "people" a permit to demonstrate under *any* circumstances, regardless of the impact such a demonstration would have on traffic and public safety. Given Commissioner Connor's language and the Commission's refusal to follow regular procedures regarding granting or denying a parade permit, Justice Stewart's story stops by suggesting that the City of Birmingham was engaged in the very injustices of segregation and discrimination that the marchers wished to demonstrate against. Thus, Justice Stewart uses the flashback to double down on suggesting how this story should end—by holding the City of Birmingham accountable for its discriminatory actions.

### C. *Contrasting the Walker and Shuttlesworth Narratives*

Although the *Walker* and *Shuttlesworth* cases are based on the same set of operative facts, Justice Stewart told very different stories in each case by using a variety of narrative time techniques. First, by beginning the stories at different points in time, Justice Stewart presented the petitioners in a very different light. In *Walker*, he presents the petitioners as deviant lawbreakers by examining the petitioners' conduct that took place well before the Good Friday march. But in *Shuttlesworth*, Justice Stewart presents the petitioners as respectable, law-abiding people protesting violations of their civil rights by starting the story at the beginning of the march, as the petitioners and other marchers were leaving the church. While generally beginning by narrowly focusing on the alleged bad actions of a party tends to favor the other party or the prosecution in a criminal trial and opening the aperture to broaden the discussion to take other things into account tends to favor the party whose actions are under attack, notice that in *Walker* and *Shuttlesworth*, the opposite is true. In *Walker*, Justice Stewart took a broader view, looking back in time to pull in even more bad acts by the petitioners, which favored the City of Birmingham. However, in *Shuttlesworth*, Justice Stewart narrowed where he began the story to focus exclusively on the events that took place during the Good Friday march and immediately after (e.g. the arrest of the marchers by the police). This more narrow focus favored the



petitioners. Thus, there are no hard and fast rules to follow when deciding where to begin a story. Legal writers must use their own judgment when deciding where to begin their client's story and what impact it will have on the reader.

Justice Stewart also used different ordering techniques when drafting the two stories. In *Walker*, he used a traditional chronological order that set forth the facts in a linear fashion: the City of Birmingham sought an injunction, the state circuit court granted the injunction, the petitioners were served with the injunction, they held a press conference where they voiced their distrust of the state legal system, they held meetings where they articulated their intent to march despite the injunction, and then they marched on Good Friday. Then, the petitioners held more meetings where they sought volunteers to march and go to jail on Easter Sunday, and these volunteers marched on Easter Sunday and got arrested. This linear sequence of events makes sense to the reader. People often voice their intent to do something before they actually do it, just as happened here.

In *Shuttlesworth*, on the other hand, Justice Stewart did not use pure chronology in telling the story. Instead, he used chronological order to lay out the events surrounding the Good Friday march and the subsequent arrests, presenting petitioner Shuttlesworth and the other marchers as reasonable and law-abiding people. Also, by identifying the purpose for the march (to protest racial discrimination and segregation), showing that the marchers conducted themselves in an orderly and organized manner, and then explaining that the police arrested the marchers, Justice Stewart uses this linear order to suggest that the police abused their power and violated the civil rights of the marchers. He then used a flashback to a week before the Good Friday march to show that Shuttlesworth had tried to abide by the law in seeking a petition to picket and that he had been repeatedly denied by the City of Birmingham. Commissioner Connor's refusal to grant the permit appears to be based on racial animus given the statements he made to Shuttlesworth and his representative. Thus, Justice Stewart used the flashback to identify previous events that reinforced the suggestions and implications he had made when discussing the parties involved and the events on Good Friday.

With regard to narrative tempo, in *Walker*, Justice Stewart used scene to spend a great deal of time, relatively speaking, in detailing the allegations in the complaint and focusing on the petitioners prior demonstrations, sit-ins, etc. His detailed focus on their alleged prior bad acts (four of seven paragraphs) emphasized the petitioners' prior defiant disregard of the law and set up Justice Stewart's discussion of their defiant disregard of the injunction regarding the particular demonstrations on Good Friday and Easter Sunday. He then uses summary to present the events of Good Friday through Easter Sunday in just

three short paragraphs, a whirlwind of press conferences and meetings and marches where the petitioners actively violated the law.

However, in *Shuttlesworth*, Justice Stewart sets out the events of the Good Friday march in one paragraph, using summary to depict the marchers as respectable and law-abiding people, identify their purpose as opposing racial discrimination, show that the marchers behaved in an orderly and organized fashion when they walked down the sidewalks, and suggest wrongdoing by the Birmingham police given that the arrests of the marchers seem incongruous with their conduct. In the flashback, Justice Stewart slows down and draws out the discussion more, revealing that Shuttlesworth twice tried to secure a parade permit to ensure that the marches complied with the law. The story quotes Commissioner Connor's responses to these requests, using these quotations to slow the discussion even more to establish not only that he repeatedly denied Shuttlesworth's requests for a parade permit and that his refusals smacked of racial animus rather than legitimate reasons for denying the requests.

Justice Stewart used a variety of narrative time techniques in the stories he told in the *Walker* and *Shuttlesworth* cases to tell the story that best supported the Court's decision on the legal issue in each case. These techniques included beginning the stories at different points, employing chronological order to suggest causation (or lack thereof), using flashback to provide factual support for previous suggestions that the marchers were law-abiding people and the Birmingham police abused their power in arresting the marchers, drawing on elements of scene to slow down and highlight certain facts, and summarizing facts to move the story along and omit facts unnecessary to the story. Each technique served a different persuasive purpose and allowed Justice Stewart to tell the story that led logically to the outcome reached by the Court on the different legal issues.

## V. CONCLUSION

Legal stories, despite all the procedural and ethical restraints imposed on them by the law, are still stories and must draw on “established narrative tradition.”<sup>473</sup> To be effective, legal stories must “honor the devices of great fiction if they are to get their full measure from judge and jury.”<sup>474</sup> One aspect of narrative practice that legal storytellers need to appreciate to craft effective and persuasive stories is narrative time—lawyers need to understand how to employ the facets of narrative time to better move around in time and shape events to influence how those events are understood by the reader.

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473. BRUNER, *supra* note 24, at 12.

474. *Id.* at 13.

Despite the importance of narrative time concepts to drafting an effective plot, most law students and new lawyers are not given much guidance with regard to these concepts. Regarding narrative time concepts, legal convention seems to demand that legal storytellers (1) use chronology as the primary means of organizing the events of a story,<sup>475</sup> (2) begin the story with the defendant's alleged bad acts,<sup>476</sup> and (3) emphasize material by providing more detail and de-emphasize material by offering less detail. They are not told when and why deviating from chronology may provide a strategic advantage. They are not told that beginning the story somewhere other than with the defendant's alleged bad acts may lead more naturally to a result favorable to their client. And they are not told about the nuances of narrative tempo and how they can use the various speeds for maximum persuasive effect. As a result, many lawyers draft legal stories that fail to engage the reader and are difficult to read. Consequently, those stories are less effective and persuasive than they should be.

In this Article, I have explained why lawyers should have a basic understanding of concepts of narrative time, described those concepts generally, explained how they could be used strategically in the legal context, and provided specific examples of how judges have used those concepts effectively in judicial opinions. My goal is to help lawyers become better storytellers by providing them the tools necessary to manage the flow of time within their stories and within the telling of their stories. When lawyers can more intentionally decide what to do with the time given to them, and can more effectively manipulate time, the stories they draft on behalf of their clients will be more effective and persuasive.

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475. SHAPO, WALTER & FAJANS, *supra* note 1, at 154.

476. Scheppele, *supra* note 6, at 2094–95, 2097.