

**Untold Stories:  
Restoring Narrative to Pleading Practice**

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## Untold Stories: Restoring Narrative to Pleading Practice

One of the oldest stories known to the common law lies buried in the terms “pleading” and “complaint”: the plaintiff complains of ill-treatment at the defendant’s hands and pleads for relief.<sup>1</sup> Indeed, in medieval English courts, plaintiffs were required to plead their case (pro se or through a “pleader”) by way of a detailed oral statement called “narratio” in Latin, translated as “tale” in English.<sup>2</sup> Over the centuries, this narrative aspect of the complaint, the telling of plaintiff’s tale through substantive allegations,<sup>3</sup> has been eclipsed by the several instrumental functions of complaints even as those functions—invoking the court’s jurisdiction, providing notice to the defendant, narrowing the issues, uncovering facts—have themselves waxed and waned in importance. In mainstream modern pleading practice, storytelling tends to be seen either as inimical to effective pleading or as applied decoration, rhetorical adornment to be

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<sup>1</sup> The complaint is not the only pleading document, of course. Though we focus on the complaint in this article, because it contains the central narrative of a civil action, there are other places for stories: affirmative defenses, cross-claims, counterclaims, and third-party complaints. Some states permit or even require defendants to tell their story in the answer. *See, e.g.*, Mich. Court R. 2.111(d) (requiring “the substance of the matters on which the pleader will rely to support the denial”).

<sup>2</sup> FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 605 (Cambridge U.P., Milsom ed., 1968). It was not sufficient, for example, to allege that defendant owed plaintiff money and had not repaid it; plaintiff was required to tell “how on a certain day came this William to this Alan and asked for a loan of 50 marks, how the loan was made and was to have been repaid, and how, despite frequent requests, William refused and still refuses to pay it.” *Id.*

<sup>3</sup> Our concern in this article is uniquely with the drafting of substantive allegations, not with allegations of subject matter jurisdiction, in personam jurisdiction, venue, or damages, the drafting of which is extensively covered elsewhere. *See, e.g.*, ROGER S. HAYDOCK, DAVID W. HERR, & JEFFREY W. STEMPEL, *FUNDAMENTALS OF PRETRIAL LITIGATION* (West Publ’g Co., 2<sup>nd</sup> ed. 1992).

reserved for compelling cases.<sup>4</sup> But we think that this creates a false choice for practitioners and teachers alike and that when narrative is seen as inherent in pleading, new methods of drafting and teaching follow. In short, the more useful question is not whether to tell a story, but how to tell it. That complaints are narratives that succeed or fail within a web of conventional, statutory, and tactical constraints does not make them any the less narrative.

In this article, we argue that practitioners whose skills do not go beyond bare-bones form-book pleading risk disserving their clients, because legal readers, judges included, are as responsive to the call of stories as other readers.<sup>5</sup> Part I provides an overview of the evolution of pleading practice and the relation of pleading and narrative, concluding that even in courts and claims where such minimal pleading is permitted—fewer today than the drafters of the Federal Rules of Civil Procedure might have intended<sup>6</sup>—the writer would do well to meld the skills of storyteller with the skills of tactician, balancing the instrumental and rhetorical functions of complaints. Part II gives an overview of basic narrative theory and narrative techniques and suggests how those techniques can be applied to complaint drafting. In particular, we discuss how storytelling techniques like character development, plot sequence, and detail can contribute to the creation of a complaint that has “narrative rationality”—that is, a complaint that tells a familiar “stock story” from the canon of legally cognizable wrongs, comports with the known

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<sup>4</sup> See below, text at notes 34-55.

<sup>5</sup> Some lawyers “argue that stories are fine for an argument to the jury, but misplaced in a pleading. . . . But they must stop and ask: Are judges any less interested than juries in the larger questions? And are juries more likely than judges to base their decisions on empathy? The available evidence suggest the answers to both questions is in the negative.” Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 *YALE L.J.* 763, 792 (1994).

<sup>6</sup> See below, text at notes 14-28.

facts, and provides a meaningful translation of the plaintiff's experience, evoking in the reader a desire that justice be done. Finally, Part III offers suggestions for teaching ourselves to draft complaints that use narrative techniques to advance the client's cause while remaining true to the client's experience.

## **I. The Story of Pleadings**

The story of pleading practice from the common law to the adoption of the Federal Rules of Civil Procedure and its many state analogues is a straightforward one with villains, victims, a hero, and a happy ending. At common law, every cognizable civil wrong was a separate "form of action" with its own intricate procedure.<sup>7</sup> The slightest misstep in pleading could leave the plaintiff on the courthouse steps. In mid-nineteenth-century America, this "cumbersome system of specialized allegation"<sup>8</sup> was supplanted by "fact" pleading, which granted access to the court by way of a generic civil "complaint" that typically contained only a "statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended."<sup>9</sup> Despite such plainly democratic rhetoric, fact pleading did not in fact open the courthouse doors much wider. Only "ultimate facts" could make out a cause of action; "evidentiary facts" and "conclusions of law" were not acceptable. The result was "a new quagmire of unresolvable

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<sup>7</sup> See generally F.W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES* (A.H. Chaytar & J.W. Whittaker, eds., Cambridge U. Press 1958).

<sup>8</sup> Christopher M. Fairman, *Heightened Pleading*, 81 *Tex. L. Rev.* 551, 555 (2002).

<sup>9</sup> Act of Apr. 12, 1848, ch 379, § 120(2), 1848 N.Y. Laws 521 (known as the "Field Code" after its drafter).

disputes”<sup>10</sup> as to whether allegations were indeed ultimate facts.<sup>11</sup> In the middle of the twentieth century, “notice” pleading rode into town, rescuing litigants from “the hypertechnical categorization of fact pleading under the codes and the sluggish formalism of common-law pleading.”<sup>12</sup> As typified by Rule 8 of the Federal Rules of Civil Procedure, notice pleading requires of a complaint only that it provide a “short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>13</sup> In the words of the Supreme Court in *Conley v. Gibson*, this means that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle him to relief.”<sup>14</sup> Rule 8 not only radically simplified the complaint-drafting process, but also deemphasized pleading itself. At common law and under fact-pleading codes, the back-and-

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<sup>10</sup> See Fairman, *supra* note 8, at 555.

<sup>11</sup> Evidentiary facts, ultimate facts, and conclusions of law can be defined with deceptive ease by way of example. One commonly employed example explains that “driving 50 miles an hour on an icy road” is an evidentiary fact, “driving too fast for conditions” is an ultimate fact, and “driving recklessly” is a conclusion of law. See, e.g., MARY BARNARD RAY & BARBARA COX, *BEYOND THE BASICS: A TEXT FOR ADVANCED LEGAL WRITING* (West Publ’g Co., 2nd ed. 2003). The real problem is that the categories in fact have no fixed boundaries; rather, a spectrum of infinite points runs from the plainest evidentiary fact to the baldest conclusion of law. See CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 5 *FED. PRAC. & PROC. CIV.* 2d at §1202 (West Publ’g Co. 1990).

<sup>12</sup> See Fairman, *supra* note 8, at 551.

<sup>13</sup> Fed. R. Civ. P. 8. The basic rules governing the drafting of pleadings are contained in Rules 7 through 14. Rule 9 requires that fraud and mistake be pleaded “with particularity” and specifically permits “malice, intent, knowledge, and other conditions of mind” to be pleaded “generally”; Rule 10(b) provides that “averments of claim or defense shall be made in numbered paragraphs, the contents of which shall be limited as far as possible to a statement of a single set of circumstances....” Additionally, under Rule 26(a)(1), any facts “alleged with particularity” trigger the obligation of initial disclosure.

<sup>14</sup> *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

forthing of pleading, the thrusting and parrying factual allegations of plaintiff and defendant in complaint, answer, reply, and beyond served several purposes in addition to notice: narrowing the issues, uncovering facts, and revealing and disposing of meritless claims.<sup>15</sup> These purposes were reassigned under the Rules, largely to the discovery and summary judgment processes.

That Rule 8 had a salutary door-opening effect is exemplified by *Conley* itself, where black railroad employees alleging discriminatory discharge were permitted to bring their grievances to the federal courts despite what would have been insurmountable obstacles under fact pleading. Yet despite such happy endings and the broader and easier access to justice that notice pleading promises, the subsequent plot-line is unclear, with several threads to follow, all of them suggesting that good lawyers need to learn artful pleading.

First, notice pleading has not entirely triumphed; a sizeable minority of states, including California, New Jersey, Florida, Louisiana, Michigan, and Oregon,<sup>16</sup> retain some form of fact pleading, thus requiring more skill and care on the complaint drafter's part. Second, notice pleading has given rise to a seeming backlash in the form of "heightened" pleading requirements imposed by Congress and by the federal courts.<sup>17</sup> Despite two rebukes by the Supreme Court,<sup>18</sup>

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<sup>15</sup> See Fairman, *supra* note 8, at 556.

<sup>16</sup> See Cal Civ. Proc. Code § 452; N.J. R. 4:4-2; Fla. R. Civ. P. 1.110(b)(2); La. Code Civ. P. 891; Mich. Ct. R. 2.111(B)(1); Or. R. Civ. P. Rules 13A & 18A.

<sup>17</sup> See generally, Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 987 (2003); see also Fairman, *supra* note 8.

<sup>18</sup> See *Swierkiewicz v. Sorema, N. A.*, 534 U.S. 506 (2002) (holding that an employment discrimination complaint need not contain specific facts making out a prima facie case); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (holding that federal courts may not apply "heightened pleading standards" in civil rights cases alleging municipal liability).

some federal courts require plaintiffs in civil rights actions to plead with particularity matters ordinarily beyond the plaintiffs' knowledge.<sup>19</sup> A federal statute similarly requires plaintiffs in private securities fraud litigation to plead with particularity allegations concerning misleading statements and allegations concerning defendant's state of mind, both very tall orders.<sup>20</sup> Heightened pleading requirements, often "targeted" to a particular element of a claim or particular factual context, have also been applied by some courts to anti-trust and CERCLA actions and to claims of civil conspiracy, defamation, and even negligence.<sup>21</sup> Some federal courts have even subscribed to the maxim, mind-boggling in a post-*Conley* and *Leatherman* age, that "[d]ismissal of a complaint for failure to state facts supportive even of the elements of such a claim is, of course, proper."<sup>22</sup> These heightened pleading requirements have been attributed to judicial and legislative perceptions that certain categories of claims are frivolous, vexatious, and

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<sup>19</sup> See Fairman, *supra* note 8, at 583-87.

<sup>20</sup> The Private Securities Litigation Reform Act of 1995, codified in pertinent part at 15 U.S.C.A. §§ 6601-6617 and 78 u-4(b) (2001). Should defendant move to dismiss for failure to state a claim, the statute further provides that discovery will be stayed during the pendency of the motion. 15 U.S.C.A. § 78 u-4(b) (3) (B).

<sup>21</sup> Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1011-59 (2003). The requirement of heightened pleading in negligence cases is especially surprising, given that the basic elements of the tort are so well known; indeed, the drafter of the Rules used a negligence claim as the prototype of notice pleading, Federal Form 9. *Id.* at 1049. In one recent high-profile case alleging that a fast-food restaurant chain knowingly sold unhealthy food that promoted childhood obesity, the complaint was dismissed for failure to comply with heightened pleading requirements. *See Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003). The court was motivated to require heightened pleading by its concern that "McLawsuits" would proliferate, creating "crushing exposure to liability." *Id.* at 518; *see also* Christopher M. Fairman, *No Mc Justice for the Fat Kids*, LEGAL TIMES, Feb. 17, 2003, at 42.

<sup>22</sup> *Iodice v. United States*, 289 F.3d 270, 273 (4th Cir. 2002); *see, e.g., Dickson v. Microsoft Corp.*, 309 F.3d 193, 212-13 (4th Cir. 2002) (citing *Iodice*).

expensive time-wasters to be discouraged.<sup>23</sup>

Third, there is resistance to minimalist one-form-fits-all pleading from a radically different quarter: practitioners and teachers who believe that such a practice often poorly represents clients' interests and some who believe, further, that it shows disrespect for the clients themselves and for their stories.<sup>24</sup> Rote, generic pleadings "do not translate [plaintiffs'] stories in the fullness of their drama. Nor do they persuade with the full force of their potential."<sup>25</sup> Certainly, the drafters of Rule 8 did not intend to prohibit or even discourage fuller pleading. The Rule was intended to "liberate lawyers from code pleading. It is not intended to restrict how they may choose to plead."<sup>26</sup> Indeed, the drafter of Rule 8 himself "did not favor bare-bones

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<sup>23</sup> See Fairman, *supra* note 8, at 617.

<sup>24</sup> See, e.g., Eastman, *supra* note 5, at 765-68 (expressing "frustration and disappointment" with traditional pleadings in civil rights cases, his own included, "sterile recitations of dates and events that lost so much in translation....los[ing] the identity of the person harmed...the fullness of the harm done...the significance of it all"); Stephen N. Subrin & Thomas O. Main, *Honoring David Shapiro: The Integration of Law and Fact in Our Uncharted Procedural Universe*, 79 NOTRE DAME L. REV. 1981, 1987 (2004) ("the idea of a 'plain and short statement of the claim' has not caught on. Few complaints follow the models in the Appendix of Forms. Plaintiff's lawyers, knowing that some judges read a complaint as soon as it is filed in order to get a sense of the suit, hope by pleading facts to 'educate' (that is to say, influence) the judge with regard to the nature and probable merits of the case, and also hope to set the stage for an advantageous settlement by showing the defendant what a powerful case they intend to prove"); George G. Mahfood, *Crafting Persuasive Complaints*, TRIAL BRIEFS Dec. 1992, at 39 ("[A]lthough attorneys no longer need to plead facts, this does not mean that they should eliminate them from complaints. Counsel's duty to a client is to plead enough facts to tell a good story—however many facts it takes to advocate and persuade. Persuasion is impossible without sufficient, reliable, and material data); Bill Bystrynski, *Drafting Complaints*, TRIAL BRIEFS April 1999, at 6 ("[T]he complaint can be a time to put your best foot forward, to draft the document a judge will look at first to get a sense of your case. The drafting of your complaint can be one of the important times for gathering the relevant facts and applicable theories together").

<sup>25</sup> See Eastman, *supra* note 5, at 808.

<sup>26</sup> *Id.* at 790 (citing the Report of the Advisory Committee).

complaints.”<sup>27</sup> The “global vision” of the drafters of the Rules was that “litigants should have their day in court.”<sup>28</sup> That means making access easier, of course, but surely, it also means ensuring that a litigant’s story is heard, so that justice can be done, but also out of simple respect. “Every client has a story that deserves to be told– from corporate client trying to survive in a harshly competitive climate to a spouse embroiled in a bitter divorce.”<sup>29</sup> And given that a very small percentage of suits filed are ever heard by a fact-finder, the complaint may be the plaintiff’s only opportunity to tell her story.<sup>30</sup> Decrying the “thinness” of the language of pleadings that he believes Rule 8 has encouraged, civil-rights lawyer and teacher Herbert Eastman advocates “thicker,” more literary pleading, particularly in civil rights cases, incorporating devices such as client narrative, metaphor, irony, and the lawyer’s voice.<sup>31</sup>

Where all these developments leave actual pleading practice in the majority notice-pleading jurisdictions in the early 21<sup>st</sup> century is not clear. In the absence of empirical data and based on our own informal, unscientific, anecdotal survey of pleadings, it would seem that although some federal statutory claims, in particular those alleging sexual harassment or

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<sup>27</sup> Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1768 (1998) (citing CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 38 (West Publ’g Co., 2nd ed. 1948).

<sup>28</sup> See Fairman, *supra* note 8, at 557.

<sup>29</sup> See Eastman, *supra* note 5, at 768.

<sup>30</sup> See Subrin & Main, *supra* note 24, at 2001 (“Probably fewer than three percent of commenced civil cases reach trial . . .”).

<sup>31</sup> See Eastman, *supra* note 5, at 800. He borrows the term “thinness” from James Boyd White, who applies it to legal discourse as a whole: “thinness, so little life, but part of it is too much life of a certain kind, an insistent assertiveness.” JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL TRADITION 9 (Univ. of Chicago Press 1990).

violation of the Americans with Disabilities Act are somewhat more carefully and “thickly” pleaded, rote form-book pleading is the norm in complaints alleging common-law tort and contract claims.<sup>32</sup> Personal injury cases seem to elicit especially derisory pleading,<sup>33</sup> and we noted that one type of complaint was routinely and distressingly bloodless: complaints alleging the injury and wrongful death of nursing home residents.<sup>34</sup> At the other extreme of pleading

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<sup>32</sup> We consulted some 300 complaints in the course of this project, focusing first on common complaints like slip-and-fall, attractive nuisance, intentional infliction of emotional distress, false imprisonment. We looked at both boilerplate forms and actual complaints in Westlaw and Lexis databases. Still other complaints were obtained from courts. We also looked at complaints posted online by organizations like the ACLU that involved less common claims and told more extraordinary tales.

<sup>33</sup> A characteristic bare-bones slip-and-fall complaint filed in federal court, *Breeden v. Hilton Hotels Corp.*, 2004 WL 3054743 (N. D. Ala.), is reproduced as Example A in the Appendix to this article.

<sup>34</sup> The following is a typical allegation from such a complaint.

While under the exclusive care of the Defendants, individually and/or by and through their agents and/or employees and/or servants and/or officers and/or directors, Harold Wray was caused to suffer numerous severe injuries, he fell numerous times as the direct and proximate result of the negligence of the Defendants, he was caused to suffer fatal injuries, he was permitted to become very ill, his illness was not treated properly, and his physical condition was permitted to deteriorate, he was not assessed properly, he was not diagnosed properly, he did not receive adequate care and treatment after he suffered injury, all as a direct and proximate result of the negligence and/or recklessness of the Defendants and/or by and through their agents and/or employees and/or officers and/or directors.

*Wray v. Wyant Woods Care Center*, 2004 WL 5492400 (Ohio Com.Pl.)

What conditions caused Wray to fall? For how long did he lie on the floor after a fall? What were his injuries? Were they painful? Was he seen by a licensed physician? What care was and was not given? Was he toileted, bathed, and fed? What improper assessments were made? Did attendants answer his calls for assistance and speak to him with respect or disdain? The generic allegations leave poor Mr. Wray’s story untold, and given that it is most likely the story of so many other nursing home residents, this seems especially sad. That the particulars would undoubtedly be gruesome and pathetic, assuming the allegations to be non-frivolous, does not

practice are the rare complaints of epic proportions, some written to function as press releases as well as pleadings,<sup>35</sup> and some out of lack of skill or judgment; such complaints most usually evoke the court's wrath and scorn and are subject to dismissal for "prolixity."<sup>36</sup>

As for contemporary textbook advice,<sup>37</sup> it largely supports minimal pleading, and its

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seem sufficient reason to omit them. In fairness to the drafter, it could be that no one but the protagonist witnessed much of the story and that none of the other characters have come forward. But that, too, would be a story worth telling.

<sup>35</sup> See, e.g., Ashley Pelman et al v. McDonald's Corporation, 2033 WL 23474873. The complaint in the civil lawsuit against Kobe Bryant for sexual assault is another example. The Bryant complaint and other public relations complaints are discussed in Samuel A. Terrilli et al, *Lowering the Bar: Privileged Court Filings as Substitutes for Press Releases in the Court of Public Opinion*, 12 COMM. L. & POL'Y 143 (2007). The authors examine the legal ramifications of this practice and the doctrines of law that push lawyers to use pleadings as media tools and conclude that there are both adequate tools to punish those who write pleadings merely to defame and legitimate reasons in high profile litigation to write pleadings that promote public understanding.

<sup>36</sup> See, e.g., Gordon v. Green, 602 F.2d 743, 744-45 (5th Cir. 1979) (noting that complaint and related papers "required a hand truck or cart to move"); Bill Mears, *Lawyer's Complaint is Too Long*, CNN (July 7, 2007), available at <http://cnnwire.blogs.cnn.com/2008/07/07/lawyers-complaint-is-too-long/> (Title was 8 pages long, 18 pages of defendants were listed, none of the relevant facts were alleged until page 30, and the whole document was characterized by the judge as an "odyssey" of "useless repetition").

<sup>37</sup> We consulted chapters or sections on drafting pleadings in the following:

SUSAN L. BRODY, JANE RUTHERFORD, LAUREL A. VIETZEN, & JOHN C. DERNBACH, *LEGAL DRAFTING* (Aspen Publishers, 1994); CHARLES R. CALLEROS, *LEGAL METHOD AND WRITING* (Aspen Publishers, 5th ed. 2006); BARBARA CHILD, *DRAFTING LEGAL DOCUMENTS: PRINCIPLES AND PRACTICES* (West Publ'g Co., 2<sup>nd</sup> ed 1992); JOHN C. DERNBACH ET AL, *A PRACTICAL GUIDE TO LEGAL WRITING & LEGAL METHOD* (Aspen Publishers, 3rd ed. 2007); R. LAWRENCE DESSEM, *PRETRIAL LITIGATION IN A NUTSHELL* (Thomson West, 2nd ed.1998); LINDA H. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS AND ORGANIZATION* (Aspen Publishers, 4<sup>th</sup> ed. 2006); ELIZABETH FAJANS, MARY R. FALK, & HELENE S. SHAPO, *WRITING FOR LAW PRACTICE* (Foundation Press, 2004); BRYAN GARNER, *THE REDBOOK: A MANUAL ON LEGAL STYLE* (Thomson West, 2nd ed. 2006); CATHY GLASER ET AL, *THE LAWYER'S CRAFT: AN INTRODUCTION TO LEGAL ANALYSIS, WRITING, RESEARCH, AND ADVOCACY* (Anderson Publishing Co. 2002); HAYDOCK ET AL, *supra* note 3; THOMAS A. MAUET, *PRETRIAL*, (Aspen Publishing, 6<sup>th</sup> ed. 2005); MICHAEL D. MURRAY & CHRISTY HALLAM DESANCTIS, *LEGAL*

focus is largely on the instrumental rather than the narrative aspect of pleading.<sup>38</sup> Most texts focus on the complaint as tool of tactical advantage, providing savvy, if very general (and occasionally contradictory) advice. One suggests the “strategic advantages” of drafting allegations with “the maximum generality allowed,” because too much specificity “might prematurely commit the plaintiff to a factual theory of the case.”<sup>39</sup> Another text counters that “generalities make it easy for defendant to deny allegations containing them.”<sup>40</sup> Its authors suggest that providing more information than notice pleading requires may “induce settlement negotiations and may require the defendant to admit or deny information that will assist you with discovery.”<sup>41</sup> A third warns that “adding more than pleading rules require is usually surplusage that does not improve the legal adequacy of the complaint.”<sup>42</sup> Still another explains that a

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RESEARCH AND WRITING, (Foundation Press 2005); RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE (Aspen Publishers, 5th ed. 2005); RICHARD K. NEUMANN, JR. & SHEILA SIMON, LEGAL WRITING (Aspen Publishers 2008); LAUREL CURRIE OATES & ANNE ENQUIST, THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH, AND WRITING (Aspen Publishers, 4th ed. 2006); RAY & COX, *supra* note 11; NANCY L. SCHULTZ & LOUIS SIRICO, JR., LEGAL WRITING AND OTHER LAWYERING SKILLS, (Lexis Nexis, 4<sup>th</sup> ed. 2004); HELENE S. SHAPO, MARILYN R. WALTER & ELIZABETH FAJANS, WRITING AND ANALYSIS IN THE LAW (Foundation Press, 5th ed. 2008); THOMAS A. MAUET, PRETRIAL (Aspen Publishers, 6th ed. 2006); ROBIN WELLFORD SLOCUM, LEGAL REASONING, WRITING, AND PERSUASIVE ARGUMENT (Matthew Bender & Co., Inc., 2nd ed. 2006); MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING (Aspen Law & Business, 2<sup>nd</sup> ed. 2008).

<sup>38</sup> It should be noted, however, that advice of any sort on drafting the substantive allegations in a complaint is sparse. Compared to the reams written on drafting the far less common appellate brief, the literature of complaint drafting is at most a slim volume.

<sup>39</sup> CALLEROS, *supra* note 37, at 366.

<sup>40</sup> See RAY & COX, *supra* note 11, at 263.

<sup>41</sup> *Id.* at 255.

<sup>42</sup> See MAUET, *supra* note 37, at 123.

complaint will be judged adequate unless “the defendant can rightly ask, ‘Where’s the beef?’ or ‘What is plaintiff talking about?’ or ‘Do I know this character?’”<sup>43</sup> This text goes on to note that there is a tactical role for particularized allegations, however, insofar as they can be used to define the scope of disclosure and discovery and, by forcing specific admissions or denials, to seek discoverable information.<sup>44</sup>

In addition to this focus on tactics, most texts also recognize that narrative has a role to play in complaint drafting, that complaints don’t just *do* things (e.g., provoke settlement, narrow or broaden discovery, force admissions, gain tactical advantage by withholding facts), they also *say* things, they tell stories. But of all the texts consulted, only one sees the complaint as first and foremost a narrative, and even there, the writers feel compelled to characterize this as no more than their own personal take on the matter: “[I]t is our view that a good pleading tells a story in a persuasive way, and gives the court perspective on the case.”<sup>45</sup> “You will tell the story by arranging facts in chronological order and presenting the sequence of events from the client’s perspective.... [T]he reader of a well-drafted complaint should feel that a wrong has been committed, and that something should be done about it.”<sup>46</sup>

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<sup>43</sup> See HAYDOCK, *supra* note 3, at 89.

<sup>44</sup> See HAYDOCK, *supra* note 3, at 90.

<sup>45</sup> SCHULTZ & SIRICO, *supra* note 37, at 247.

<sup>46</sup> NANCY L. SCHULTZ & LOUIS J. SIRICO, JR., *LEGAL WRITING AND OTHER SKILLS*, 229 (Matthew Bender, 3<sup>rd</sup> ed. 1998). Our own chapter on pleadings in *WRITING FOR LAW PRACTICE* notes that “complaints have rhetorical as well as instrumental potential—that is, they can affect the course of litigation by persuasion as well as by legal effect,” and suggests that it may be “important, even vital, for the court to learn more than the bare outlines of the plaintiff’s story,” and that “respect for the plaintiff as a member of the human community suggests that his story should not be reduced to boilerplate.” ELIZABETH FAJANS ET AL, *supra* note 37, at 37.

Narrative is generally consigned by texts to a limited role, however. Overall, there is a seeming mistrust of stories, a sense that the complaint's ability to do things is inevitably compromised when it says things: telling the story may give the adversary some advantage. Thus, storytelling is most often characterized as an aspect of the drafter's personal style or a drafting technique best saved for the exceptional case: "if the plaintiff has a compelling story to tell, setting that story out for both the judge and later the jury to read can be an effective approach...."<sup>47</sup> Another text notes, "some attorneys allege events with greater specificity than is required, because they wish to present a more vivid and sympathetic story...."<sup>48</sup> A third recommends that favorable facts be presented "precisely and graphically" and unfavorable facts be presented generally.<sup>49</sup> Other than such recommendations on the level of detail, the only narrative techniques alluded to in the texts are chronology and tone, and those only very generally.<sup>50</sup>

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<sup>47</sup> See MAUET, *supra* note 37, at 124; see also FAJANS ET AL, *supra* note 37, at 37.

<sup>48</sup> CALLEROS, *supra*, note 37, at 367.

<sup>49</sup> CHILD, *supra*, note 37, at 43.

<sup>50</sup> One text urges readers to remember that allegations should use chronological order. BRODY ET AL, *supra*, note 37, at 300. On tone in complaints, the texts speak with one voice: facts should be stated "precisely and unemotionally," RAY AND COX, *supra* note 37, at 263, using "objective" words that avoid "loaded descriptions," CHILD, *supra* note 37, at 43 (adding the baffling thought that these objective words should be chosen with attention to their "positive or negative connotations"). They should be "quiet and understated" in order not to "alienate the court. . . because judges often view emotional language as a mask for a weak case." BRODY, *supra*, note 37, at 292. "Draft pleadings in plain English." GARNER, *supra* note 37, at 386. "[D]o not editorialize or use unnecessary modifiers." SCHULTZ & SIRICO, *supra* note 46, at 229. "Complaints should be written in short active sentences, eliminating adjectives and adverbs wherever possible." BRODY, *supra*, note 37, at 305; see also SCHULTZ & SIRICO, *supra* note 37, at 247 ("write short plain sentences."). In short, the consensus is that the good pleader's literary canon begins and ends with Hemingway.

Yet Herbert Eastman has harsh words for exhortations to "plain" and "objective" prose.

It is easy to criticize such advice, but very difficult to do better. Although notice pleading makes acceptable pleading easier, it does not, ironically, make the careful pleader's job or the new attorney's job or the pleading teacher's job any easier. If the obstacle to effective pleading was once suffocating technicality, in a notice-pleading jurisdiction it is now oppressive freedom and mind-boggling contingency. Surely, drafting the substantive allegations in a complaint presents the drafter more contingencies (and imponderables) to negotiate than any other document lawyers are called upon create. Once the facts have been gathered, the law researched, and the claims, defendants, jurisdiction, and venue settled upon, questions of what to say, how much to say, and how to say it remain. The necessity of advancing at least some minimum of facts in a fact-pleading jurisdiction rules out at least the option of entirely conclusory allegations, but it leaves many choices still to be made. To plead not just adequately, but effectively, the drafter must consider all too many factors. The nature of the action is a consideration (sexual harassment, say, as opposed to a contractual dispute between buyer and seller of widgets), as is the nature of plaintiff (war widow or porn star) and defendant (debt collector or veterinarian). How well developed the facts are matters, as do the strength of the case on the known facts, the likelihood of settlement, the relative resources of the parties, and the relative uniqueness of the

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We now find ourselves entering the era of plain writing...[but] 'simple prose depends on concepts like "objective fact.'" These premises are assumptions about reality that we can no longer accept as true.... Most problematic of all for the plain speakers, this pretense of objectivity is not self critical, and it assigns to itself an undeserved neutrality of belief and values. In any case, plain writing must evolve in some direction, since it situates itself on untenable premises. While no one need defend the virtue of abandoning nineteenth-century legalese, it does not follow that plain writing is anything other than the twentieth century's version of legalese, greatly improved, but still improvable." See Eastman, *supra* note 5, at 808-09, quoting GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* 148-49 (1992).

issues. The personality and preferences of the judge matter. The personality and experience of opposing counsel matter. Small wonder so many drafters give up and resort to boilerplate.

As noted at the outset, we believe that one way to make the practitioner's, student's, and teacher's tasks easier is to pay closer attention to the essentially narrative nature of pleading, and to apply narrative theory and narrative drafting techniques in an attempt to reconcile the instrumental and rhetorical aspects of pleading. Because whatever else they might be or do, whatever the wrongs alleged, complaints are always themselves narratives in which a client's troubles are folded into a cognizable legal claim.<sup>51</sup> The plaintiff complains of the disruption of "an initial steady state grounded in the legitimate ordinariness of things"<sup>52</sup> and seeks redress—restoration of the "old steady state."<sup>53</sup> The complaint ends with the plea for redress—the *ad damnum* clause—because a complaint is in fact an unfinished narrative, a half-told tale that awaits action by the court that will turn it into a comedy (if redress is granted) or tragedy (leading to the sacrifice and isolation of the plaintiff)<sup>54</sup> if it is denied.

When the complaint is viewed in this light, as a plot line to be developed effectively, the

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<sup>51</sup> One of the leading texts on legal storytelling characterizes pleadings as "rhetorical narratives," that is, texts that "use a story rather than a set of propositional assertions to *prove* something persuasively." ANTHONY AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 135 (Harvard Univ. Press 2000) (emphasis in original). Rhetorical narratives convince in part to the extent that they are "value-laden," that is, they contrast "the ordinary or expected state of things" with "the precipitating event that brings ordinariness into question." *Id.*; see also Jan Armon, *A Method for Writing Factual Complaints*, 1998 DET. C. L. MICH. ST. U. L. REV. 109, 120 (Noting that the elements of a claim tell its "paradigmatic story").

<sup>52</sup> See AMSTERDAM & BRUNER, *supra* note 51, at 113-14.

<sup>53</sup> *Id.* at 114.

<sup>54</sup> NORTHRUP FRYE, *FABLES OF IDENTITY: STUDIES IN POETIC MYTHOLOGY* 16 (Harcourt, Brace & World Inc. 1963).

careful drafter's job is to use traditional storytelling techniques to the client's advantage. How the drafter employs these techniques depends on the drafter's analysis of the rhetorical situation—the exigencies of audience and purpose.

A complaint with allegations made in spare (but carefully wrought) prose with a minimum of (carefully chosen) detail is as much a narrative as a “thicker” pleading elaborately developing the plaintiff's grievances and the defendant's shortcomings. The former narrative style would be appropriate if the particular judge was known to disapprove of all but bare-bones pleading, if the defendant is believed to be stonily opposed to settlement, and if the pleader hopes to develop the facts further through broad discovery. In contrast, where the facts are already well-developed, where quick resolution would be in defendant's as well as plaintiff's interest, and where the issue is one of interest to the wider community, a story told with more incident, more detail, and more color would seem to be more effective.

Of course, these are easy examples, cases where audiences and purposes work in harmony. Very often there are conflicts—for example, a judge hostile to all but bare-bones pleading and a plaintiff with a story that cries out to be told in its fullness—and for this quandary there is no easy answer, just the careful, hopeful exercise of the attorney's best judgment and craft in telling the tale.

## **II. The Nature and Practice of Narrative**

Narrative can help complaint drafters<sup>55</sup> avoid the simplistic (and inaccurate) dichotomy

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<sup>55</sup> Though we discuss only complaints, there are times when storytelling techniques are useful in answers, as well. Affirmative defenses are often their own narratives, and in some few fact-pleading jurisdictions, the defendants are required to give their side of the story when they deny allegations. *See supra* note 1 and accompanying text. Affirmative defenses do not

of default minimalist boiler-plate-driven pleading on the one side and, on the other side, the rare, more individualized pleading that tells the “exceptional” plaintiff’s story. Even in familiar and uncomplicated complaints, narrative techniques can capture a busy judge’s attention and shake opposing counsel’s confidence. Given the conventions of the form, however, drafting a cohesive and convincing narrative in a complaint is as challenging as it is desirable. Putting individual averments into numbered paragraphs that are gathered into counts too easily leads to a “syncopated rhythm that does not resemble a coherent narrative,”<sup>56</sup> much less a persuasive one.

To conquer such an unforgiving form, lawyers need first of all an understanding of narrative and narrative technique. A review of legal writing textbooks suggests that students get little schooling in either. And what instruction on narrative there is usually focuses on statements of fact in appellate briefs. Texts tell students to develop a theory or theme—that is, to tell the story from the client’s point of view—but give little advice about how to accomplish this.<sup>57</sup> Only a few texts explain what is involved in finding a theme or a story,<sup>58</sup> developing character,<sup>59</sup>

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ordinarily lend themselves to the full range of narrative techniques described in this article. For example, because in most jurisdictions, most defenses will be deemed waived if not raised in or before the answer, defenses should ordinarily be raised as generally and inclusively as possible. See FAJANS ET AL, *supra* note 37, at 71-72.

<sup>56</sup> See Subrin & Main, *supra* note 24, at 1998-99.

<sup>57</sup> What suggestions they give are sound but fairly general: humanize the client; emphasize favorable facts and de-emphasize or neutralize unfavorable facts (but do not omit or misrepresent significant facts); save the beginning and ending for favorable facts; use chronological or topical organization; find vivid nouns and verbs (but sound reasonable and not too emotional). See CALLEROS, *supra* note 37, at 385-87, 437-40; DERNBACH ET AL, *supra* note 37, at 279-89; EDWARDS, *supra* note 37, at 323-39; GLASER ET AL, *supra* note 37, at 358-67; MURRAY & DESANCTIS ET AL, *supra* note 37, at 379-89; OATES ET AL, *supra* note 37, at 387-96; RAY & COX, *supra* note 11, at 167-92; SHAPO ET AL, *supra* note 37, at 410-20; SLOCUM, *supra* note 11, at 472-73.

<sup>58</sup> See EDWARDS, *supra* note 37, at 327; FAJANS ET AL, *supra* note 37, at 174; see

or structuring a narrative creatively.<sup>60</sup> Thus, we take some time here to discuss narrative theory and narrative techniques before suggesting how these techniques can be applied to complaint drafting.

### **A. The Nature of Narrative<sup>61</sup>**

Perhaps the first point that needs to be made is that adding specific facts to a complaint—even those selected on the basis of their legal relevance—does not create a narrative. This is because “stories are not just recipes for stringing together a set of ‘hard facts’...[instead] stories construct the facts that comprise them. For this reason, much of human reality and its ‘facts’ are not merely recounted by narrative but constituted by it. To the extent that law is fact-contingent, it is inescapably rooted in narrative.”<sup>62</sup> And to the extent that a plausible story is the backbone of the theory of the case, lawyers must provide a context and structure that organize the facts into a legally sufficient, plausible, and persuasive narrative.

A plausible narrative also requires more than linear continuity. Simple succession is meaningless. It creates neither a story nor a lawsuit. As Northrup Frye says: “At a certain point in narrative, our sense of linear continuity changes perspective and we see design or unifying

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*also* NEUMANN, *supra* note 37, at 372 (Aspen 2005); NEUMANN & SIMON, *supra* note 37, at 199-202.

<sup>59</sup> See EDWARDS, *supra* note 37, at 328; *see also* FAJANS ET AL, *supra* note 37, at 187; NEUMANN & SIMON, *supra* note 37, at 202.

<sup>60</sup> See EDWARDS, *supra* note 37 at 325; *see also* FAJANS ET AL, *supra* note 37, at 181; NEUMANN & SIMON, *supra* note 37 at 208; NEUMANN, *supra* note 37, at 374-75.

<sup>61</sup> The heading comes from the title of a well known book by Robert Scholes & Robert Kellogg (Oxford Univ. Press 1966).

<sup>62</sup> See AMSTERDAM & BRUNER, *supra* note 51, at 111.

structure.”<sup>63</sup> Thus, traditional narratives are built on the “philosophical error of *post hoc, ergo propter hoc*: narrative plotting makes it seem that if B follows A it is because B is somehow logically entailed by A. And certainly, it is part of the ‘logic’ of the narrative to make it appear that temporal connection is also causal connection.”<sup>64</sup> In other words, “any narrative telling presupposes an end that will transform its apparently random details ‘as annunciations, as promises’ of what is to come, and that what-is-to-come transforms because it gives meaning to, makes significant the details as leading to the end.”<sup>65</sup>

For a story to have narrative significance there must be a “completed process of change.”<sup>66</sup> There is surprising agreement among narrative theorists about the elements of this process. As summarized by Amsterdam and Bruner, there is

- (1) an initial steady state grounded in the ordinariness of things
- (2) that gets disrupted by a *Trouble* consisting of circumstances attributable to human agency or susceptible to change by human intervention,
- (3) in turn evoking *efforts* at redress or transformation, which succeed or fail
- (4) so that the steady state is *restored* or a new (*transformed*) steady state is created,

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<sup>63</sup> Myth and Symbol: Critical Approaches and Applications 7-8 (Bernice Slore ed., Univ. of Nebraska Press 1963). See also Peter Brooks, *Inevitable Discovery*—Law, Narrative, Retrospectivity, 15 YALE J.L. & HUMAN. 71, 93 (2003) (If “narrative went nowhere—never became a complete story, there would be no decisive enchainment of incidents, no sense of inevitable discovery.”)

<sup>64</sup> See Brooks, *id.* at 94, citing Roland Barthes’ *Introduction to the Structural Analysis of Narrative*, in THE BARTHES READER 266 (Susan Sontag, ed. & Richard Howard, trans. 1982).

<sup>65</sup> *Id.* at 94; see also Steven L. Winter, *The Cognitive Dimension of the Agon between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2236 (1989) (“for an account to be perceived as a coherent narrative or story, it must be more than a simple succession...; it must be a configuration”).

<sup>66</sup> DAVID LODGE, THE ART OF FICTION 217 (Penguin Books 1992), citing A.R. Crane.

(5) and the story concluded by drawing the then-and-there of the tale that has been told into the here-and-now of the telling through some *coda*—say, for example, Aesop’s *moral of the story*.<sup>67</sup>

Although the components of narrative are stable, the nature of the trouble or conflict varies. It may stem from conflict with another, from conflict within the self, or from conflict with society.<sup>68</sup> But whatever the trigger, the conflict arises out of a disjunction between agent, act, purpose (or goal) and agency (or means).<sup>69</sup> If, for example, a protagonist has the honorable goal of procuring food for hungry children, but accomplishes that goal by breaking and entering, the act inappropriately achieves the goal, and conflict and disorder result. A similar conflict arises from the disjunction of purpose and agency when the police, seeking to rid a community of drug dealers, act hastily and in reliance on anonymous tips, invading the apartment of a frail 83-year-old woman.

This organization of events into a meaningful progression from steady state to conflict and then to resolution is one reason why narrative plays such a central role, and has such

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<sup>67</sup> See AMSTERDAM & BRUNER, *supra* note 51, at 114. See also Winter, *supra* note 65, at 2240 (“The antagonist is, typically, the agent that causes the imbalance. The protagonist meets the antagonist, and a struggle ensues. This provides an *agon* as a pivotal point of the narrative. Its resolution also restores the initial state of balance and provides a sense of closure.”); Brian 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, 466 (2001) (“a story focuses on a central character, the protagonist, who is faced with a dilemma; the dilemma develops into a crisis; the crisis builds through a series of complications to a climax; in the climax, the crisis is solved ...[the protagonist] getting or not getting what he wanted.”). Ruth Anne Robbins encourages lawyers to cast their clients as the heroes of their own lawsuit stories, heroes who are sufficiently imperfect to elicit audience identification, but who are also on a transformative journey that has the power to “change the hero and potentially the hero’s society.” *Harry Potter, Ruby Slippers and Merlin: Telling the Client’s Story Using Characters and Paradigms of the Archetypal Hero’s Journey*, 29 SEATTLE U. L. REV. 767, 790-91 (2006).

<sup>68</sup> See, e.g., Foley & Robbins, *id.* at 469 (quoting from a writing workshop by Josip Novakovich).

<sup>69</sup> See AMSTERDAM & BRUNER, *supra* note 51, at 130 (discussing Kenneth Burke).

persuasive force, in the law. But narrative is also persuasive because “narrative forms are not only immediately recognizable, but...they allow us to assign meaning to events through ‘pre-given understandings of common events and concepts, configured into the particular pattern of story-meaning.’ Narratives strike us as natural ways of understanding experience.”<sup>70</sup> “People, including judges and jurors, understand and restate events in terms of stories.”<sup>71</sup> Amsterdam and Bruner posit two theories for why this is true. First is the endogenous theory, which holds that “narrative is inherent either in the nature of the human mind, [or] in the nature of language....”<sup>72</sup> Narrative structures might be, for example, some type of Kantian category that fashions our understanding and experience of the world.<sup>73</sup> A second theory is that narrative structures model, are a reflection of, culturally-shared forms of experience,<sup>74</sup> perhaps because “humans experience social reality temporally or...the human life cycle itself contains the elements of a narrative structure—a beginning, middle, and end, to which we assign meaning.”<sup>75</sup> But regardless of the theory adopted,

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<sup>70</sup> J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEG. WRITING 53, 60 (2008), citing BERNARD JACKSON, LAW, FACT, AND NARRATIVE COHERENCE, 37-60 (Deborah Charles Publ’g 1988).

<sup>71</sup> See Eastman, *supra* note 5, at 769 (quoting MICHAEL E. TIGAR, EXAMINING WITNESSES 5 (1993)).

<sup>72</sup> See AMSTERDAM & BRUNER, *supra* note 51, at 115.

<sup>73</sup> *Id.* at 116.

<sup>74</sup> *Id.* at 117. Steven Winter sees the role of narrative in the process of social construction “as a link between experience and the effective crystallization of social mores.” *Supra* note 65, at 2228.

<sup>75</sup> See Rideout, *supra* note 70. Rideout provide a good summary of these theories in this article.

[t]raditional models of legal adjudication, which are based solely on informal or formal models of logic, are increasingly seen as incomplete, or inadequate, for fully describing the persuasiveness of legal arguments. The “deeper” logic of narrative structures adds to more traditional models for legal argumentation.<sup>76</sup>

In other words, in addition to abstract logic, there is such a thing as narrative rationality, a rationality that sees paradigms in human stories that help to explain the meaning of those stories.<sup>77</sup>

If these theories help to explain the centrality of narrative in law, they do not explain why one narrative might seem more rational, more credible, than another or how the audience of a story comes to believe one account of events rather than another. Some theorists think judgments about credibility depend on narrative coherence, correspondence, and fidelity.<sup>78</sup> In a legal context, narrative coherence requires a story to be both internally consistent—that is, the evidence and the story must comport with each other—as well as complete—that is, there must be sufficient facts to ground whatever inferences need to be made.<sup>79</sup> In a complaint, that means that there should be some specific support for the allegations, that the facts alleged must bear on, “go to,” the elements of the claim, and that every element of every claim must be alleged.

Narrative correspondence results when a party’s particular story corresponds with

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<sup>76</sup> See Rideout, *supra* note 70, at 60. As Ruth Anne Robbins notes, much legal narrative theory is indebted in part to Carl Jung’s notion of the collective unconscious, anthropologist Sir James Frazer’s observations on the similarity of tribal rituals throughout the world, and Joseph Campbell’s work demonstrating that “rituals mimic myths.” See Robbins, *supra* note 67, at 773-775 (2006).

<sup>77</sup> See, e.g., Rideout, *supra* note 70. Rideout traces the development of “narrative rationality” in the works of Robert Burns, Walter Fisher, W. Lance Bennett & Martha S. Feldman, and Bernard Jackson.

<sup>78</sup> *Id.* at 55.

<sup>79</sup> *Id.* at 64-66.

socially normative versions of similar stories. These normative versions have been described as “narrative scripts,” “schemata,” or “stock stories,” and are immediately recognizable, allowing for easy generalizations about the story’s significance.<sup>80</sup> Stock stories enable us to organize experience, even when we have limited information, because “(1) they draw upon direct physical and cultural knowledge, (2) they are highly generalized in order to capture and relate a broad range of particularized fact situations, (3) they are unconscious structures of thought that are invoked automatically and unreflexively to make sense of new information, and (4) they are not determinate, objective characterizations of reality, but rather idealized structures that effectively characterize some but not all of the varied situations that humans confront in their daily interactions....”<sup>81</sup>

Lawyers, of course, are familiar with stock stories peculiar to law.<sup>82</sup> In civil actions, the stock story is one “in which there has been trouble in the world that has affected the plaintiff adversely and is attributable to the defendant. The defendant must counter with a story in which it is claimed that nothing wrong happened to the plaintiff (or that the plaintiff’s conception of wrong does not fit the law’s definition), or, if there has been a legally cognizable wrong, then it is

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<sup>80</sup> See AMSTERDAM & BRUNER, *supra* note 51, at 121; *see also* Rideout, *supra* note 70, at 68-69. Rideout identifies the Conquering Hero turns Tyrant as one example of a stock script. The hero rescues the community and is rewarded with power. Then, because of some flaw or deception, he becomes a tyrant. The script can end either with his redemption or with his destruction.

<sup>81</sup> See Winter, *supra* note 65, at 2234; *see also* Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 5-6 (1984). “Stock structures form an interpretative network: What goes on . . . is never approached *sui generis*, but rather is seen through these stock structures. Once the principal features of a given phenomenon suggest a particular stock story structure, that structure shapes our expectations and responses.”

<sup>82</sup> See SMITH, *supra*, note 37, at 44.

not the defendant's fault."<sup>83</sup> This generic script is further particularized by the claims or causes of action in a complaint and the affirmative defenses in an answer. Some examples of common stock stories in complaints are "slip-and-fall," "deadbeat dad," "corporate greed," "bait and switch," and "predatory lending."

In other words, a complaint achieves narrative correspondence by alleging a stock story that makes out a legally cognizable wrong. The writer taps into "stock" information and combines it with "new information," information that is a particularization, concretization, or illustration of the stock story.<sup>84</sup> Even then, the transformation or resolution and *coda* occur only when the dispute is resolved. In this sense, the complaint and answer together present a twice-told tale, but each is only half-told.

Finally, there is narrative fidelity, which persuades the audience to make a comparative judgment about the competing narratives based not just on stock scripts or abstract legal or moral principles, but on practical judgments about what the larger community would deem the right thing to do in that case.<sup>85</sup> As Eastman explicates, as translators for our clients' stories and voices "we have a responsibility to translate as truly as we can.... If language proves incapable of capturing the truth, if we cannot translate reality accurately, we can nonetheless translate meaningfully. Our language will be 'judged by its coherence, by the kinds of fidelity it establishes with the original, and by the ethical and cultural meaning it performs as a gesture of

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<sup>83</sup> See AMSTERDAM & BRUNER, *supra* note 51, at 177.

<sup>84</sup> See SMITH, *supra* note 37, at 45.

<sup>85</sup> See Rideout, *supra* note 70, at 69-86.

its own.”<sup>86</sup> In pleadings, narrative fidelity is achieved when our clients can recognize their own stories and, as Winters explains, when the rest of our audience instinctively feels “that really happened and justice must be done.”<sup>87</sup> Fidelity depends upon “a sense...[that] certain outcomes seem more legitimate than others. If not for that sense, no legal system could survive without the constant exercise of raw, repressive society.”<sup>88</sup> A complaint that has narrative correspondence and coherence will be a competent, even effective pleading. But a complaint that achieves narrative fidelity is a far greater achievement in professional and human terms.

In the course of a legal dispute, a client’s story is told and retold, and the listeners of that story (the parties; counsel; the court; and, in the rare case that goes to trial, the fact-finder)

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<sup>86</sup> See Eastman, *supra* note 5, at 856 (quoting JAMES BOYD WHITE, JUSTICE AS TRANSLATION 256 (1990)).

<sup>87</sup> See Winter, *supra* note 65, at 2257.

<sup>88</sup> *Id.* See also NORTHRUP FRYE, THE ANATOMY OF CRITICISM: FOUR ESSAYS 166-170 (Princeton Univ. Press 1957). Frye notes:

The action of comedy in moving from one social center to another is not unlike the action of a lawsuit, in which plaintiff and defendant construct different versions of the same situation, one finally being judged as real and the other as illusory. This resemblance of the rhetoric of comedy to the rhetoric of jurisprudence has been recognized from the earliest times. A little pamphlet called the *Tractatus Coislinianus*, closely related to Aristotle’s *Poetics*, which sets down all the essential facts about comedy in about a page and a half, divides the *dianoia* of comedy into two parts, opinion (*pistis*) and proof (*gnosis*). These correspond roughly to the usurping and the desirable societies respectively. Proofs (i.e., the means of bringing about the happier society) are subdivided into oaths, compacts, witnesses, ordeals . . . , and laws—in other words the five forms of material proof in law cases listed in the *Rhetoric*. We notice how often the action of a Shakespearean comedy begins with some absurd, cruel, or irrational law . . . , which the action of comedy then evades or breaks. . . . Thus the movement from *pistis* to *gnosis*, from a society controlled by habit, ritual bondage, arbitrary law and the older character to a society controlled by youth and pragmatic freedom is fundamentally, as the Greek words suggest, a movement from illusion to reality. . . . The watcher of death and tragedy has nothing to do but sit and wait for the inevitable; but something gets born at the end of a comedy . . . .”

Frye seems to be touching on something similar to narrative fidelity here.

construct and reconstruct it as they try to make sense of the evolving and conflicting narratives put before them.<sup>89</sup> Successful resolution of the dispute depends, in considerable part, on how well the storyteller imbues the client's story with narrative coherence, correspondence, and fidelity. And these, in turn, depend upon the storyteller's grasp of narrative theory and skillful use of the basic techniques of storytelling detailed below: sequence, characters, point of view and theory, scene, detail, and tone. For example, unless the allegations are supported by some specific detail—whether elaborate or spare, a litany of detail or just one telling quote— the story will lack coherence. Unless the plaintiff and defendant emerge as fully realized individuals, as characters rather than cardboard prototypes, the story will lack fidelity.

The techniques discussed below are all interrelated and often inextricably intertwined in practice. For example, we can create character through tone and detail, create tone through the use of detail, create point of view through sequence and tone. Nonetheless, we think separating out these techniques as discrete categories provides a useful structure for practitioners, students, and teachers, a way to talk about complaints, both in critiquing and in drafting.

## **B. Narrative Techniques and their Application**

### **1. Sequence**

As variable as the types of conflict and disjunction in a narrative are ways to present the sequence of events. The easiest and clearest structure is straight chronology. The writer begins

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<sup>89</sup> Nancy Pennington & Reid Hastie's work on jurors' decision-making indicates that jurors construct stories as they hear testimony and ultimately pick the story that makes the most sense. Increasingly, story construction is seen as playing a central role in decision-making. *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 *CARDOZO L. REV.* 519, 520 (1991).

at the beginning by describing the steady state, then chronicles its disruption, the quest for redress or transformation, and the consequences of that quest. And, indeed, in the law, this type of chronology is often the organization that is “the most effective....at least in legal prose as opposed to more inventive Hollywood scripts that use flashbacks, interwoven plot strands, and the like—stories are best told chronologically. Chronology is, then, the bread and butter of fact writers.”<sup>90</sup>

There are, however, a number of reasons—persuasion being one of the most important—for abandoning a linear structure. As two experts warn, “chronology can become what we call a ‘default organization,’ structurally similar to the automatic moves a computer program will make unless the user instructs it otherwise. Defaults can be quite dangerous.... Habitual chronology can distract us from telling an effective story that complements and enhances our legal argument.”<sup>91</sup> Altering the normal past-to-present sequence with a deft flash-back or flash-forward can be an effective way to focus the reader’s attention on a particular fact.

One of the most effective non-linear sequences begins *in media res*—in the middle of the story—starting at a critical point in the narrative and then drawing back in time to describe the characters in the story and the events that brought them to that critical point. Opening in this fashion with a compelling scene is an excellent way to hook the reader. The novelist Alice Adams often uses this formula, which she labels ABCDE, for

Action, Background, Development, Climax, and Ending. You begin with action that is compelling enough to draw us in, make us want to know more.

Background is where you let us see and know who these people are, how they’ve

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<sup>90</sup> Stephen V. Armstrong & Timothy P. Terrell, *Organizing Facts to Tell a Story*, 9 *PERSP.* 90 (2001).

<sup>91</sup> *Id.*

come to be together, what was going on before the opening of the story. Then you develop these people so we learn what they care most about. The plot—the drama, the actions, the tension—will grow out of that. You move them along until everything comes together in the climax, after which things are different for the main characters, different in some real way. And then there is the ending: what is our sense of who these people are now, what are they left with, what happened, and what did it mean?<sup>92</sup>

A variation on this organization begins by compressing time: providing a dramatic summary of the story before going back to start at the beginning.

Still another type of narrative sequence is the convergent narratives structure. Here the writer follows different characters through a series of events in a parallel structure until their stories converge and their lives are changed.<sup>93</sup>

Finally, in structuring a story, a writer must always think about where to begin and where to end it, a decision informed for lawyers by their theory of the case. For example, in a case involving a juvenile accused of breaking and entering, the defense counsel and prosecutor would likely start their narratives at different points:

If we begin at the Smithville orphanage, as [defendant] G.L. runs away with only the clothes she is wearing, we tell one story. If we begin with a list of G.L.'s alleged crimes, followed by a vignette of the Barrs [complainants] returning from a PTA meeting to find their home violated, we tell a very different story...[as we do if we end ] with an intruder running out of the house, or with a frightened child hiding in the bushes, then captured and “incarcerated” by the police[.]<sup>94</sup>

Defense counsel would rely on the stock story of the abused orphan. That story goes back in time to humanize the protagonist and de-emphasize her supposed offenses. The prosecutor is

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<sup>92</sup> ANNE LAMOTT, *BIRD BY BIRD: SOME INSTRUCTIONS ON WRITING AND LIFE* 62 (Anchor Books 1995), quoting Alice Adams.

<sup>93</sup> THEODORE A. REES CHENEY, *WRITING CREATIVE NONFICTION* 155 (Ten Speed Press 2001).

<sup>94</sup> See Armstrong & Terrell, *supra* note 90, at 90.

telling more of a 'home invasion' story. It begins in *media res*, with the complainants' return to their vandalized home, in order to emphasize the fear and sense of violation they experienced.

Like all storytellers, careful complaint drafters make conscious choices among these techniques for sequencing their narrative, suiting the technique to their audience and purpose. In a factually and legally complex case, more than one technique may be appropriate, especially when a sympathetic plaintiff complains of horrendous and protracted mistreatment. In such a case, the goals of narrative coherence, correspondence, and fidelity, and thus of persuasion, are well served by beginning the complaint, not with the expected jurisdictional allegations, nor with the beginning of the story, but *in medias res* with an "introduction" or "preliminary statement." This statement "creates a good first impression and demonstrates mastery of the facts and the law.... The ultimate purpose of the preliminary statement is to persuade the judge of the merits of the plaintiffs' claim before he or she undertakes any lengthy review of the case."<sup>95</sup>

This technique is used to good effect in a complaint in which an Ethiopian woman employed by a wealthy New Jersey couple alleges human trafficking and involuntary servitude, as well as many federal and state statutory violations and violations of New Jersey tort law.

1. In this action, Plaintiff Beletashachew Chere seeks damages from Defendants Fesseha Taye and Alemtashai Girma (collectively Defendants) under federal law, including the Fair Labor Standards Act and the Thirteenth Amendment to the United States Constitution; state law, including the New Jersey minimum wage and overtime laws and New Jersey tort law; and international law, including treaty and customary international law prohibitions against trafficking in persons, enslavement, involuntary servitude, and forced labor.

2. Defendants induced Ms. Chere to come to the United States from Ethiopia through fraudulent means and then held her as an involuntary servant for almost one and a half years. During this time, Defendants forced Ms. Chere to work in their home for as many as one hundred hours per week without pay.

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<sup>95</sup> Mahfood, *supra* note 24, at 39.

Defendants kept Ms. Chere in a condition of involuntary servitude and forced labor through threats of serious harm to her person and well-being and through a pattern of behavior that caused Ms. Chere to reasonably believe that harm would come to her if she failed to continue performing the household duties assigned by Defendants or if she otherwise reported Defendants' conduct to responsible authorities. Ms. Chere was finally able to escape Defendants' home with the assistance of acquaintances and family.<sup>96</sup>

This compressed narrative engages the reader's sympathies, establishes the drafter as a knowledgeable and skillful melder of law and fact, and provides a roadmap for the subsequent 60-some paragraphs in which the plaintiff's tale is told.<sup>97</sup>

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<sup>96</sup> Beletashachew Anyenachew Chere v. Fessha Taye & Alemtashai Girma No. 04-6264 (U.D.N.J. Filed June 30, 2005); available at <http://www.aclu.org/womensrights/gen/132721gl20041221/html>.

<sup>97</sup> Just as this introduction effectively begins the story of plaintiff's misfortunes, many introductions to complaints are missed opportunities. A complaint alleging that plaintiffs were negligently exposed to toxic substances as they participated in rescue and cleanup activities after the September 11 attack on the World Trade Center is so mired in boilerplate legalese and redundancy that the extraordinary story is effectively lost to view.

1. Plaintiffs bring this action against the Defendants seeking redress for injuries they have suffered in the past, and will continue to suffer, as a result of the Defendants' reckless, grossly negligent, and negligent operation, ownership, maintenance, control, supervision, and management of the premises or place of business known as and/or located at: [addresses]; all in the City, County and State of New York, following the terrorist attacks of September 11, 2001 (hereinafter referred to as "the locations").

2. Because of the damage sustained in the attacks, the Twin Towers and Seven World Trade Center collapsed, spreading known and unknown toxic substances throughout the World Trade Center Site and the surrounding areas, including "the locations," portions of which, although operated, owned, leased, maintained, controlled, supervised, and managed by the Defendants, remained dangerous, defective, hazardous, toxic, unguarded, unsupervised, and unprotected for multiple days, weeks, and/or months thereafter. The Plaintiff participated in rescue and/or recovery and/or construction, and/or excavation and/or demolition and/or clean-up operations at the buildings and/or place of business known as and/or located at the "locations," on or about October 1, 2001, and during the days, weeks and/or months that followed.

Sobol v. Syms, 2005 WL 2307834 (S.D.N.Y.).



Those detailed substantive allegations follow basic narrative chronology: a steady state of ordinariness (Ms. Chere's life in Ethiopia with her family), disruption (her emigration and employment by the defendants, who enslave and abuse her mentally and physically), and efforts at redress (she escapes and files suit against her tormentors). The last two stages of the narrative, "redress/transformation" and the "coda" or meaning of the story, will depend on the outcome of the litigation. Helpful headings in the complaint emphasize the elements of the narrative. For example, the steady state comes first, under the heading "Circumstances leading to Ms. Chere's employment." Succeeding headings describe the many varieties of disruption and trouble allegedly endured by the plaintiff. Her subsequent efforts at redress and transformation fall under the heading "Escape from Defendants."

In a complex case like Ms. Chere's, this detailed from-the-beginning telling of the tale is appropriately followed by the many separate claims that the allegations give rise to, with relevant paragraphs of the story realleged by reference. Thus, in such a case, the story is told and retold from the beginning multiple times: in the introduction, in a background narrative, and then in each of the separate counts. Realleging by reference saves the story from redundancy and tedium.

For a simple, familiar claim arising out of a familiar story, a slip-and-fall, for example, strict chronology is a good choice, but even with such a simple claim, there may be effective variations. The story might begin *in media res* with plaintiff innocently walking down the street, only to fall suddenly and violently on her back; the story might then flash back to the previous day's ice storm. On the other hand, if the stock story is "slum landlord," the chronology might begin earlier, with defendant's radical downsizing of the janitorial staff in a cost-cutting measure.

The "converging destinies" sequence can also be a useful technique in a complaint. The

traditional introduction of the parties at the beginning of a complaint can be expanded to tell the story of the plaintiff and defendant up to the time of the disruption. Obviously, plaintiff has every interest in using this structure when plaintiff's history enhances his credibility or defendant's puts him in a bad light. For example, a plaintiff alleging police brutality might be introduced through his history as a recent immigrant, employed and supporting a family, with no arrest record, a man walking home from his night shift. The defendant, a relatively new officer, was discharged from the armed forces for undisclosed reasons, and has a history of disciplinary violations and civilian complaints, one of them alleging that the officer targets people from plaintiff's ethnic group. On the day in question, shortly before he went out on foot patrol, he had been informed that one of those complaints was proceeding to a hearing. The destinies of plaintiff and defendant then converge in the rest of the allegations, as the officer approaches the plaintiff.

Similarly, in commercial litigation, the complaint can effectively lead up to the dispute in question by "describing the evolution and development of the client's business or financial condition... [because] [t]he client's behavior will be measured against his or her sophistication, wealth, and business practices."<sup>98</sup> Counsel should then "focus[] attention on the manner in which the defendant has institutionalized abusive practices to sustain wealth and to dominate the market....to convey to the reader that the defendant has made a practice of commercially unreasonable and exploitive conduct."<sup>99</sup> The stage is thus set for the story of the parties' mutual

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<sup>98</sup> See Mahfood, *supra* note 24, at 39.

<sup>99</sup> *Id.* at 40.

dealings, the convergence of their destinies.<sup>100</sup> Allegations concerning the claims themselves can also be organized around parallel stories. For example, a drafter can begin with an account of a plaintiff's movements in the store and then cut to the movements of the store's security guards as they become suspicious and begin tracking the plaintiff. These narratives converge when the guards confront the suspected shoplifter.

Finally, it should be noted with respect to chronology that rote, unthinking use of "on or about..." or "at all times material and relevant to this case" in complaints neither enhances the credibility of the narrative in a complaint nor provides tactical advantage. As readers, we want to know *when* a significant event happened; if the narrator is not certain of the timing, perhaps the account is not to be trusted in other respects. We know that "once upon a time" introduces a fairy-tale; "on or about" is not much more persuasive. Alleging exact dates makes a story feel real. Although exact dates should not be alleged unless the drafter is certain of them,<sup>101</sup> exact dates, or at a minimum, exact months, should ordinarily result from proper investigation of a client's claim. Allegation of exact dates will both add credibility to the story and render defendant's eventual admission or denial more meaningful. As for the stale, legalese formulation "at all times material and relevant," "[i]t is often unnecessary, because specific dates can be

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<sup>100</sup> Converging destiny structure is also appropriate in a class action since, by its nature, a class action tells many stories.

<sup>101</sup> This is because "an allegation of a date or time is considered material, and by pleading the date or time, the pleader makes a judicial admission of that date [an admission that could prove damaging should the defendant advance a statute of limitations defense]. Qualifying the date by adding 'on or about' results in the pleading not constituting an admission." *See HAYDOCK ET AL, supra* note 3, at 102. Moreover, the defendant may ordinarily deny an allegation containing the wrong date, even if the rest of the allegation is true.

provided.”<sup>102</sup> Moreover, it ill-serves the client’s interest, because “it is an open invitation to denial of the fact. Because the phrase has no precise or clearly understood meaning, no attorney could admit that a fact was true ‘at all times material and relevant to this case.’”<sup>103</sup>

## 2. Characters

In a credible narrative, the characters need to be developed so that they feel real to the reader, not like cardboard prototypes. The reader must be persuaded to empathize with them or disapprove of them. That means that the writer must both understand the characters—their needs, dreams, fears, weaknesses, experiences, circumstances—and know how to convey that understanding.

Character can be established directly, by describing a protagonist’s thoughts or by describing physical appearance, dress, possessions, hobbies, upbringing, employment—all of “which act as indices of class, character, status and social milieu.”<sup>104</sup> Describing body language is another effective way to suggest character. For example, there is a difference between persons making eye contact and a person becoming aware that he or she is the object of someone’s unblinking stare. The former suggests a moment of shared intimacy, the latter an uncomfortable intrusion.

Character can also be established indirectly through action and dialogue. In fact, dialogue is one of the best ways to show character. One writer of creative nonfiction reports the ancient

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *See* LODGE, *supra* note 66, at 204.

Greeks to have said, “Speak so I may see you.”<sup>105</sup>

In pleading practice, some practitioners think that establishing the characters of plaintiff and defendant is so important that it should be done up front, expanding the traditional identification of the parties in the beginning of a complaint into descriptions of them calculated to create sympathy for the plaintiff and suspicion of the defendant from the first moment.<sup>106</sup> In commercial litigation, for example,

[i]f the client is a small-business woman...a thumbnail sketch of her business activities should be included. If the defendant is a large bank, insurance company, manufacturer, or publicly-traded conglomerate, the size of its operations and assets are pertinent. Specific descriptions of a particular enterprise can build empathy for the client and set the tone for what constitutes commercially reasonable conduct.<sup>107</sup>

When an organization or government entity rather than an individual is the plaintiff, it too can profitably be given a personality and characterized likeably at the outset of the complaint, as in the following description of the National Federation of the Blind, which goes well beyond the required jurisdictional information to create a character with a worthy mission.

4. The National Federation of the Blind, the leading national organization of blind persons, is a not-for-profit corporation duly organized under the laws of the District of Columbia with its principal place of business in Baltimore, Maryland. . . . The Federation is widely recognized . . . as a collective and representative voice on behalf of blind Americans and their families. The purpose of the NFB is to promote the general welfare of the blind by (1) assisting the blind in their efforts to integrate themselves into society on terms of equality and (2) removing barriers and changing social attitudes, stereotypes and mistaken beliefs held by sighted and blind persons concerning the limitations created by blindness that result in the denial of opportunity to blind persons in virtually every sphere of life . . . . The NFB and many of its members have long been actively involved in

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<sup>105</sup> See CHENEY, *supra* note 93, at 137.

<sup>106</sup> See Mahfood, *supra* note 24, at 39.

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

promoting adaptive technology for the blind, so that blind persons can live and work independently in today's technology-dependent world. . . .<sup>108</sup>

But a lengthy description of a party is not always necessary. Sometimes a single, well-chosen quotation can establish character in a complaint. In the involuntary servitude complaint of the Ethiopian immigrant described earlier, one can “see” the character of the defendant, plaintiff’s “employer,” when the defendant is quoted as telling plaintiff, “you are my punching bag—the one on which I can take out my anger and you have nowhere to go.”<sup>109</sup>

Careful research can also turn up telling statements recorded by respected journalists or historians, as in the following excerpt from a complaint filed by the ACLU in a “forced disappearance” case.

16. In providing its services to the CIA, Jeppesen knew or reasonably should have known that Plaintiffs would be subjected to forced disappearance, detention, and torture in countries where such practices are routine. Indeed, according to published reports, Jeppesen had actual knowledge of the consequences of its activities. A former Jeppesen employee informed *The New Yorker* magazine that at an internal company meeting, a senior Jeppesen official stated: “We do all of the extraordinary rendition flights—you know, the torture flights. Let’s face it, some of these flights end up that way.” Jane Mayer, *Outsourced: The C.I.A. ’s Travel Agent*, *The New Yorker*, Oct. 30, 2006.<sup>110</sup>

Here, the quotation effectively counters any competing narrative Jeppesen may offer. The quotation also helps to establish narrative coherence, showing how the facts and the plaintiffs’ stories comport with each other.

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<sup>108</sup> Nat’l Fed. of the Blind Inc., et al v. America Online, 1999 WL 66756896 (D. Mass.), CA No. 99 CV12303 EFH (U.S. District Ct D. Massachusetts, Nov. 9, 1999)..

<sup>109</sup> Chere v. Taye, *supra*, note 96, at ¶47.

<sup>110</sup> Mohamed, Britel, Agiza, Bashmilah, Al-Re v. Jeppesen Dataplan, Inc. (US District Court for District of Northern California, San Jose Division. filed Aug. 1, 2007) (Civil Action No. 5:07-CV-02798 (JW)), *available at* <http://www.aclu.org/safefree/torture/311641gl20070801.html>.

Juxtaposition of quotations is another effective technique for establishing character, as demonstrated by the contrasting voices in the following excerpts from a civil rights complaint alleging racial discrimination. One of the defendants is alleged to have said “I’m looking for a good colored leader who can control his people. Everybody looks for a good black these nowadays. You find one and you’ve got liquid gold.”<sup>111</sup> In contrast, the following is attributed to an 84-year-old black plaintiff: “I don’t see a bit of difference now than I did way back in ‘51 or ‘52 in the civil rights. It hasn’t reached us. I reckon it’s on its way, but it ain’t got here yet.”<sup>112</sup> The defendant’s racism is reflected in his suggestion that good black men can’t be found and that a leader is good only if he “controls” his people. In contrast, the plaintiff’s statement establishes her patient, long-suffering character and seems like a reliable, unpretentious statement of the truth. This kind of juxtaposition helps the drafter to achieve narrative fidelity: the audience is not only convinced that plaintiff’s suffering as a result of racial discrimination is real, but also desires redress for her injury.

It should be noted by way of caveat, however, that quotes should ordinarily be used judiciously in complaints—whether to establish character or for other purposes—and ideally, should be documented. Defendants will most usually deny uttering the precise words attributed to them.<sup>113</sup> Moreover, since plaintiff’s specific allegations in a complaint will

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<sup>111</sup> See Eastman, *supra* note 5, at 846-47.

<sup>112</sup> *Id.*

<sup>113</sup> The prevailing wisdom is, of course, that the drafter’s first concern should always be to frame allegations in such a way as to elicit the maximum of admissions. Yet some practitioners dissent, arguing that defendants will always find a way to deny allegations, no matter how carefully they are framed, and that “forcing” admissions is just one of the goals of an artfully drafted complaint. See CHILD, *supra* note 37, at 34.

ordinarily be held to be admissions, quotations should be carefully vetted for unintended consequences. Finally, with the exception of claims that turn on words–libel, for example–no conscientious drafter would want to depend entirely on quotations to make out a claim. To do so could make proof of the claim depend on proof of the utterance.<sup>114</sup> Yet despite these caveats, the drafter should not automatically rule out using quotations liberally to establish character. Only by careful analysis of the factual and legal specifics of the case, the nature of the audience, and the goals the drafter seeks to achieve with the complaint can the drafter determine whether to use no direct quotations, just one telling quote, juxtaposed quotes, or many quotes.

Details about plaintiffs’ backgrounds can also provide a vivid and sympathetic picture, as in the following excerpt from a complaint alleging discrimination based on sex-segregation in a middle school. The details that the drafter chose concerning plaintiff’s upbringing and avocations do more than just create a likeable character; rather, by challenging gender stereotypes, they relate directly to her sex discrimination “story,” thus enhancing the coherence of the narrative.

75. Michelle Selden has grown up with role models that have shown her that females need not behave according to gender stereotypes. For instance, both her father and her mother have served in the military. Both her father and her mother are volunteer firefighters....

76. Michelle Selden herself has sought out activities that require physical exertion, strict discipline, performance under stress, quick decisions, and risk-taking. For instance, she has a purple belt in Shaolin Kung Fu. She is a certified scuba diver. She is a volunteer firefighter cadet. She is comfortable interacting with both boys and girls.<sup>115</sup>

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<sup>114</sup> For example, a plaintiff suing a landlord for improperly securing the premises should not have her claim depend upon proving that the landlord said “I’ll fix that lock when hell freezes over.” The addition of the more general allegation that the landlord, although aware of the faulty lock, failed to have it repaired, would be prudent.

<sup>115</sup> Selden v. Livingston Parish School Board, U.S. District Court, Middle District of Louisiana, filed August 2, 2006, *available at* <http://www.aclu.org/womensrights/edu/263241gl20060801.html>.

Still another way to make plaintiff come alive is to allege thoughts and feelings, including, for example, plaintiff's assessment of defendant's mental state:

Plaintiff was shocked, stunned, thought he was going to die right there, and was especially horrified by the deadly threat to his son. Plaintiff had no idea of what was on the guard's mind, and what was going to happen in the next moment. The exposure was multiplied by the sudden realization that the conduct of the defendant Doe 1 "Security guard" was irrational....<sup>116</sup>

Since plaintiff's counsel is rarely privy to defendant's thoughts and feelings, defendants are inevitably known by their actions. In the following excerpt from the Ethiopian woman's involuntary servitude complaint mentioned earlier, defendant's actions are described with a clinical precision and simplicity that make them all the more chilling and credible. A quotation from the defendant and a description of the plaintiff's feelings round out our knowledge of the characters in these skillfully drafted allegations.

43. In the fall or winter of 2002, Defendant Taye called Ms. Chere into his room and ordered her to massage his back, which he said was sore.

44. Approximately one week later, Defendant Taye again ordered Ms. Chere to massage his back but this time he told her to take off his pajamas and "go lower." He lifted his legs to touch her breast with his foot. While Ms. Chere massaged his back, Defendant Taye ejaculated on his blanket. Ms. Chere was horrified and afraid, so she left the room.

45. On four or five subsequent occasions, Defendant Taye required her to "massage" him in this same manner. Ms. Chere was unable to refuse because she was frightened of the Defendants.<sup>117</sup>

Sometimes it is hard to make a client likeable. When the client is a convicted drug-dealer

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<sup>116</sup> Roman Preys v. Downtown L.A. Motors Mercedes, 2004 WL 3184156 (Cal.Superior) ¶ 43. Contrast this account of plaintiff's thoughts and feelings with the rote allegation of injuries in another false imprisonment case, Youngblood v. Hy-Vee Food Stores, Inc. ¶ 35: "Plaintiff was embarrassed, afraid, inconvenienced, insulted, mentally distressed, humiliated, anxious, and he suffered emotionally."

<sup>117</sup> Chere v Taye, *supra*, note 96, ¶¶ 43-45.

complaining of mistreatment by law enforcement, one approach might be to “downplay facts about the client, and instead make him a proxy for an ‘ideal,’”<sup>118</sup> such as the right to walk the streets unmolested by over-zealous police officers. Portraying the problem plaintiff as one embroiled in a “man against self” conflict is another option. For example, a recovering drug addict can be portrayed “as a hapless victim of drugs, a nemesis that is in essence a character in the case story.”<sup>119</sup> Similar techniques can be used in a civil case, such as a custody battle.

However, the pleader’s efforts to make the client sympathetic and the adversary dislikeable should respect the reader’s intelligence and capacity for empathy. Judges routinely see through obvious ploys for sympathy and even “[j]urors readily see through gratuitous praising of the virtues of the parties.”<sup>120</sup> There must be narrative coherence, that is, “a fit between the character of a person and the relevant conduct of the person.”<sup>121</sup> Moreover, if the

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<sup>118</sup> See Foley & Robbins, *supra* note 67, at 474.

<sup>119</sup> *Id.*

<sup>120</sup> It is easy for the zealous advocate to go over the top. A complaint alleging that a town engaged in a “blunderbuss effort to drive away [an] unwanted residence for recovering addicts” tries too hard to make the plaintiffs appealing and to demonize the town. The opening paragraph alleges that the lawsuit

is about a village’s...*knowing, intentional, and deliberate* discrimination against a protected class of individuals, recovering drug and alcohol addicted persons, seeking *nothing more than* to reside within a community near to an addiction treatment center. This action seeks...to redress the *egregious* and unconstitutional efforts by the Defendant... to block Plaintiff’s *lawful and legally protected* ownership and use of premises... as a residence....”

Woodfield Equities, L.L.C. v. Village of Patchogue, 2004 WL 2992172 (E.D.N.Y.) (Emphasis added). Instead of convincing, the pounding legalese redundancy here alienates the reader. The qualifier “seeking nothing more than to reside...” is particularly unsuccessful, in that it suggests that the reader might otherwise unfairly suspect plaintiffs’ motives.

<sup>121</sup> Gerald Reading Powell, *Opening Statements: The Art of Storytelling*, 31 STETSON

pleader tells a credible and individualized tale of conflict and disjunction, the reader does not need to believe the plaintiff is a paragon of virtue in order to feel that he deserves to be made whole. None of the readers of a complaint, not the judge, not even the adversary's counsel, could believe that it is right to throw a convicted drug dealer on the ground and stomp on his head.

### **3. Point of View and Theory of the Case**

“Point of view concerns through whose eyes the reader views the scene.”<sup>122</sup> Artful exploitation of point of view is essential to effective storytelling. Fiction writers sometimes use omniscient narrators whose account of events the reader is intended to take as true. Sometimes the point of view is that of one character, whether told in the first person or a third- (or even second- ) person narrative. In other stories, point of view alternates among several characters, all with their own complementary or conflicting versions of events. In still other stories, point of view is subtly manipulated so that the reader comes to see that the narrator is unreliable and that the facts may well be other than as the narrator describes them.<sup>123</sup> In short, point of view is intricately bound up with credibility or its lack.

In traditional complaints, the attorney is the narrator, telling plaintiff’s story from a lawyer’s point of view. (The introductory clause reinforces this, *e.g.*: “Plaintiff Peter Pi, represented by his attorney, Alma Alpha, makes the following allegations against defendant David Delta.”) The voice is unmistakably that of a lawyer, and at best, the uninflected, unemotional language produces an appearance of objectivity that enhances credibility. Yet, thoughtlessly done, this point of view merely distances the reader from the narrative and induces her to withhold judgment as to the truth of the matter.

The allegations in a more artful complaint comprise a third-person narrative told from the

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<sup>122</sup> See CHENEY, *supra* note 93, at 120.

<sup>123</sup> Omniscient narrators are prevalent in the works of Jane Austen, Charles Dickens, and George Eliot. See, for example, PRIDE AND PREJUDICE, BLEAK HOUSE, MIDDLEMARCH. Ford Maddox Ford’s THE GOOD SOLDIER is a fine example of a first person narrative, as is Laurence Sterne’s TRISTRAM SHANDY. Point of view shifts in the novels of Henry James, *e.g.*, WINGS OF A DOVE or THE GOLDEN BOWL, where competing interpretations of events are manifold. Kazuo Ishiguro’s THE REMAINS OF THE DAY is an excellent example of an unreliable narrator.

plaintiff's point of view and told, if not in the plaintiff's own voice, at least, in a voice the plaintiff can recognize. The reader sees what plaintiff saw, hears what plaintiff heard, and feels what plaintiff felt. In order to persuade, however, the drafter must convince the reader that the plaintiff is a reliable source, that his or her "take" on events, reflected in the lawyer's theory of the case, has narrative coherence. The drafter does that, first of all, by creating an individual and positive character for the plaintiff, using the techniques noted above, and by careful use of detail and tone, especially diction.<sup>124</sup> The plaintiff's story must also be supported with verifiable facts if the reader is to believe "this really happened" the way the plaintiff says.

For example, in the following allegations describing how a noise complaint escalated into a violent encounter between police and plaintiffs, the drafter shows us the event from plaintiffs' perspective, successfully creating narrative coherence through the use of verifiable details.

Despite plaintiff's explanation that he had long since turned down the volume, the police pushed into the apartment; when the plaintiff tried to write down the badge numbers of the officers,

Mr. Caraballo's nephew Jose Anthony Montolio (a minor) was grabbed by the arm and neck by Officer Bolte. Jose Anthony Montolio was then slammed face-first onto the floor by Officer Bolte, and jumped on by other officers who kned him in the back and forcefully pulled his arm up to his shoulders. Clariluz Caraballo, the mother of Jose Anthony Montolio, was peppersprayed by Officer Bolte when she ran toward her son asking Officer Bolte to release him. Clariluz Caraballo was grabbed and arrested by officers when she attempted to get to the bathroom to wash out the pepper spray. . . . Mr Caraballo, Clariluz Caraballo, Jose Montolio and the stereo were taken to the 46<sup>th</sup> Precinct. Ms. Caraballo's eyes were treated by EMS for the harm caused by the pepper spray.<sup>125</sup>

Given the large cast of characters and the specific details given in this account, the mayhem described seems entirely credible. (Mentioning that the stereo was taken to the 46<sup>th</sup> Precinct

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<sup>124</sup> See below, in our discussion of "Tone."

<sup>125</sup> Caraballo, et al v. City of New York, 2005 WL 1803399 (S.D.N.Y.) ¶s 28-34.

along with the plaintiffs was an especially nice touch.)

This account would have been less credible had a less able drafter qualified the specifics of the narrative, as too many do, with the disclaimer “on information and belief.” This formulation is rarely necessary, since there is no requirement that pleadings be made on personal knowledge. By signing the complaint, the attorney warrants only that there is a good faith basis for its allegations. Although appropriate only in affidavits, “on information and belief” is too often sprinkled on complaints like magic dust, where it has only the effect of distancing the reader from the narrative by suggesting that the facts are not necessarily as represented.<sup>126</sup>

#### 4. Setting a Scene

“A scene makes the past present.”<sup>127</sup> It lets the reader see the event unfold, and this can be very effective in a complaint. For example, in the forced-disappearance case mentioned earlier, one alleged terrorist “was kept in near permanent darkness. His cell was pitch black for twenty-three hours a day. There was a bucket in the corner for a toilet, but it was difficult to use in the dark without spilling the contents over his only blanket.”<sup>128</sup> This description succeeds through its evocation of visual (darkness), tactile (feeling around in the darkness, cold enough to need a blanket) and olfactory (the spilled bucket) phenomena. In a similar example from the

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<sup>126</sup> The phrase is only appropriate when the complaint is “verified,” that is, the truth of the allegations is sworn to by the plaintiff, thus converting the complaint in effect into an affidavit. Some courts require verification by the plaintiff when particular claims are raised, for example, defamation. Plaintiff also often has the option of verifying the COMPLAINT. The advantage of verification for the plaintiff is that the defendant must then verify the answer and is thus exposed to the penalties of perjury.

<sup>127</sup> See CHENEY, *supra* note 93, at 54.

<sup>128</sup> See Mohamed, Britel, Agiza, Bashmilah, Al-Re v. Jeppsen Dataplan, Inc., *supra* note 110, at ¶ 78.

involuntary servitude complaint,

Ms. Chere was required to sleep on a thin mat on the floor in Kaleb's room throughout the length of her employment. During the last nine months of this period, no rug covered the hardwood floors on which she slept. Every night, Ms. Chere rolled out her mat and covered herself with the *gabi* (light blanket) she had brought with her from Ethiopia, because Defendants did not provide other bedding. Each morning she was required to roll up the mat and put it away.<sup>129</sup>

But a case need not be extraordinary to set a scene well, as in the following excerpt from a garden-variety slip-and-fall case.

4. On March 5, 2002, plaintiff was on the campus of Haskell Indian Nation University in Lawrence, Kansas, when she slipped and fell on clear ice or packed snow on a sidewalk. The snowy ice she slipped on was relatively clear and colorless and was in a location where it was shaded by a building most of the day. Therefore, it was not readily noticeable to the plaintiff or those similarly situated walking towards that area.

5. Snow on all of the sidewalks not located in the shade of the building had melted or been cleared at the time plaintiff fell.

6. The packed snow or ice had not been cleared from the sidewalk despite the fact that the precipitation that resulted in the accumulation of icy snow on the sidewalk had stopped a few days previously.<sup>130</sup>

We see the scene as we imagine the plaintiff saw it, and we are inclined to believe that she slipped on almost invisible ice that defendant had inexcusably neglected to remove.

## 5. Detail

Detail is crucial to effective narration. Details elicit emotion, create mental pictures, stimulate associations, and lend coherence and fidelity to narratives. "If the selection of event and detail is good, it won't need much commentary from the author to show what it means."<sup>131</sup>

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<sup>129</sup> Chere, *supra* note 96 at ¶ 35.

<sup>130</sup> *Arkeketa v. The United States of America*, 2004 WL 2007234 (D. Kan.). The skillful scene-setting here is in sharp contrast to the boilerplate allegations of the bare-bones slip-and-fall complaint reproduced as Example A in the Appendix.

<sup>131</sup> CHENEY *supra* note 93, at 52.

There is no rule of thumb about how much detail to use. “Sometimes a litany of details will be effective in their cumulative power; sometimes a single detail will suffice; other times, the best method is to weave the details into the description or the narratives as they come up, logically.”<sup>132</sup>

In a complaint, the decision to use just a single, telling detail, several details, or even elaborate detail, is dictated for the drafter by the intersection of the reasonably certain facts with the claims asserted, the audience, and the goals the complaint is intended to achieve. This is not always an easy decision.

A practitioner who has a client who tells a credible and compelling tale of wrongdoing and injury, a story that cries out to be told, may nonetheless conclude that the judge’s known hostility to anything but the dry bones of a case make it imprudent to file a complaint that details the allegations in a way that truly allows the plaintiff to be heard. Similarly, a practitioner who does not wish to trigger the mandatory disclosure provisions of Federal Rule of Civil Procedure 26(a) or who wishes broad discovery will do best not to allege with particularity facts likely to be disputed—although the drafter should be sure to bear in mind the countervailing consideration that disclosure will be triggered for the defendant as well. Facts that have the ring of truth but which cannot be verified, or even investigated, should likewise be omitted, for fear of invoking Rule 11 or its state analogues.<sup>133</sup> Moreover, minutely detailed allegations run the risk of minute inaccuracies and are likely to elicit only denials. In short,

[t]o change the story through a happy ending, we need to win. That means omitting from our thicker pleadings facts we may not be able to prove. It means

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<sup>132</sup> *Id.* at 39.

<sup>133</sup> FED. R. CIV. P. 11.

omitting facts we prefer to conceal until the most strategic time.... We may sacrifice creativity in situations where translation matters less than persuasion, and persuasion may demand resort to plainer language. For some audiences (in some cases, on some occasions) we aim...to persuade by ordinariness instead of outrage.<sup>134</sup>

Fortunately, a single descriptive detail can have enormous impact. The allegations in an age and disability discrimination complaint against a restaurant recount how a middle-aged woman who had undergone a mastectomy was told a new uniform policy required her to wear one of two bathing suit tops. She “tried on the tops in the restroom and was dismayed to see that her surgical scars were visible from various angles.”<sup>135</sup> The single detail that it was in the restaurant restroom that she tried on the tops, rather than in the privacy and comfort of her home, lends poignancy and vividness to the story. The reader can see her standing there and sense her misery as she watches herself in the mirror. Simply noting that “she tried on the tops and was dismayed to see...” would not have been nearly so effective. A telling detail, like a single telling quote, can be extremely effective.

But whether the drafter chooses a single detail or many, the important thing is to choose details that not only capture the essence of the person, place, or event, but that establish narrative coherence and fidelity. In the sex discrimination complaint mentioned earlier, plaintiff’s claim gains strength as the drafter provides a litany of quotes from psychological works, one more ridiculous than the next, that the defendants relied upon to justify sex-segregated classrooms.

58. In *Why Gender Matters*, Dr. Sax explains that because of sex differences in the brain, girls need real world applications to understand math,

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<sup>134</sup> See Eastman, *supra* note 5, at 858.

<sup>135</sup> EEOC v. Mears Marina Associates Limited Partnership, 1:07cv02515. U.S. Dist Ct, D Maryland, 2007, 2007 W.L. 3124273. This complaint is reproduced in the Appendix to this article.

while boys naturally understand math theory. For instance, girls understand number theory better when they can count flower petals or segments [sic] of artichokes to make the theory concrete.

...

62. In *Why Gender Matters*, Dr Sax explains that “anomalous males”—boys who like to read, who don’t enjoy competitive sports or rough-and-tumble play, and who don’t have a lot of close male friends—should be firmly disciplined, should spend as much time as possible with “normal males,” and should be made to play competitive sports.

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70. In *The Boys and Girls Learn Differently Action Guide for Teachers*, Mr. Gurian explains that when young male elephants are brought up without parents, they begin killing rhinoceroses and trying to mate inappropriately, until alpha male elephants are introduced into their group. Mr. Gurian concludes that “alphas” must be brought in to manage students seeking to dominate.<sup>136</sup>

The cumulative effect of absurd, even sinister, gender stereotyping comes from both the type and number of details. The image of rows of girls sitting at their desks, artichokes before them, counting leaves is so unexpected, but so laughable, that a school’s reliance on this authority elicits wonderment. The analogy between young teenage boys and orphan male elephants killing rhinoceroses and (in a phrase heavy with innuendo) “mating inappropriately” until set straight by “alpha” males is also bizarrely laughable. More disturbing, however, is the image of ““anomalous males”” who prefer reading to rough-housing and need to be “disciplined” and subjected to the enforced company of ““normal males.”” Here, the drafter uses the technique of the telling quote within the technique of massed details. The quotation marks around “anomalous males” and “normal males” makes clear that this is the language of the school’s expert, Dr. Sax. The number and selection of details in this complaint make the school’s reasons for single-sex education seem no more than bizarre pretexts for sex discrimination, effectively reinforcing the credibility of

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<sup>136</sup> Seldon v. Livingston Parish School Board, *supra*, note 115.

plaintiff's story.

The drafter who, after analyzing the case in the context of audience and purpose, chooses to make highly detailed, “thicker,” allegations faces yet another tactical and stylistic choice: whether to allege details in many separate paragraphs, or to aggregate them in longer paragraphs. In notice-pleading jurisdictions, Federal Rule 10 (b) and its state analogues require only that “so far as possible” the contents of each numbered paragraph be limited to a “single set of circumstances,”<sup>137</sup> giving the drafter much latitude in this respect. At the extremes, a drumbeat of paragraphs each containing one short sentence and a fugue of long paragraphs would seem inappropriate to most stories— yet in rare cases, even those techniques are appropriate. For example, where repeated acts of physical abuse are alleged, describing each blow and each injury in its own paragraph can be effective. In contrast, some cases may lend themselves to longer paragraphs of detail, for example a civil rights claim painting the historical background to a claim of racial discrimination. The prevailing wisdom is that paragraphs should be quite short, for readability and in order to make denial harder.<sup>138</sup> Certainly, as a “default” strategy, this makes sense, but a more individualized strategy that finds the rhythms of the particular story and varies the paragraph lengths to suit will produce a more readable and effective narrative.

## **6. Tone**

All the techniques discussed thus far help a writer to create tone. We can hear malice or sincerity in speech, catch irony in juxtaposition, sense a writer's empathy or disapproval in

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<sup>137</sup> FED. R. CIV. P. 10(b).

<sup>138</sup> As noted above, there are dissenting voices on this issue, practitioners who believe that defendants will always find a way to deny allegations, no matter how short and precise. *See supra* note 113.

description, but diction—word choice—is perhaps the best way of conveying tone. And poor word choice—empty legalese, redundant synonyms, tired verbs—can spoil the narrative’s effect and destroy credibility, even though it otherwise has a sympathetically drawn plaintiff, graphic action, and telling details.

The following paragraph is from a complaint alleging that the 83-year-old complainant was brutalized and traumatized when police burst into her apartment in the middle of the night based only on an uncorroborated anonymous tip alleging that drugs were sold from that address.

44. The Plaintiff suffered serious and severe psychological and physical trauma, mental anguish and emotional distress, humiliation and embarrassment, bruises and contusions to her face, legs, back and upper torso, soreness to her legs, back and upper torso, aches and pains, chest pains, dehydration and low blood sugar, including the loss of her independence and her ability to participate in the activities of daily living, the loss of her ability to ambulate without assistance, persistent fear, inability to sleep, inability to eat, nervousness, anxiety and exacerbation of a pre-existing heart condition, diabetes and arthritis.<sup>139</sup>

This is an example of the “thinness” of traditional legal rhetoric that James Boyd White and Herbert Eastman deplore.<sup>140</sup> The tone is overly insistent, yet lifeless and unconvincing. The reader’s reaction is, “Well, yes, that’s lawyer talk all right; might be true, or it might not.” The plaintiff herself is entirely out of the frame. The litany of redundant pairs—“serious and severe,” “mental anguish and emotional distress,” “humiliation and embarrassment,” “bruises and contusions”—turn the allegations into a lifeless ritual. The pretentious latinate diction—“ambulate without assistance” for “walk without help,” for example—also keeps plaintiff’s injuries conjectural.

These allegations could easily have been given a more credible tone and one more

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<sup>139</sup> Kirkland v. City of New York, 2007 WL 1853785 (E.D.N.Y.).

<sup>140</sup> See *supra* note 31.

faithful to plaintiff's story.

The midnight “no-knock” entry by the police into her home was physically and mentally traumatic for Ms. Kirkland. It left her with bruises over much of her body. It also left her so terrified that she did not eat, sleep, or leave her apartment for a week, becoming dehydrated and confused. Her diabetes and heart condition also worsened as a consequence, and she is no longer able to live on her own or to walk without using a walker.

This simple account told in words the plaintiff can understand tells the story credibly from her point of view, conveying her experience with an immediacy entirely lacking in the legalese version.

Often one word can set the tone of a complaint. Verbs are particularly useful. In one false imprisonment complaint, the plaintiff alleges that she was “handcuffed and paraded back and forth in the Mall.”<sup>141</sup> Not “walked.” Not “taken through” the Mall. But “paraded”: put on public display and humiliated. Similarly, in the “forced disappearance” complaint, one alleged terrorist “was stripped and diapered.”<sup>142</sup> His mortification is captured in the second verb.

Adjectives, though discouraged in many legal writing texts, can be put to good effect in a complaint. One of our clinical colleagues tells the story of a complaint drafted by her students in a prisoners' rights case. The plaintiffs complained of the conditions of their pre-trial detention in a local jail. Among other allegations, the complaint alleged that the air in the facility was “malodorous.” Our colleague was convinced that it was the addition of that single adjective that lifted it above the ordinary pro se inmate complaint and helped it to survive a motion to dismiss.

Finally, punctuation helps to create tone. When a store “loss prevention” guard (a job

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<sup>141</sup> Melanie D. Allen, v. Montgomery Ward & Co., et al. Civil Action 1:98 CV7-T, 12/1/98, (W.D.N.C.).

<sup>142</sup> Mohamed, Britel, Agiza, Bashmilah, Al-Re v. Jeppesen Dataplan, Inc., *supra*, note 110, at ¶ 10.

description noteworthy for its own point-of-view) “barks” ( a vivid verb) at a suspected shoplifter, “Go up the stairs! I said go! I said move it!” the reiteration and exclamation marks convey the bullying hostility.<sup>143</sup>

These, then, are some of the techniques that can be used to transform a complaint, even one in a garden-variety civil case, from a generic “stock story” into a narrative that carries the reader along from the introductory clause to a plea for redress that appears logically entailed. Such a complaint can incline the judge to believe that events transpired as related; it will almost certainly create respect for the drafter and induce opposing counsel to “to be afraid, very afraid” of plaintiff’s story. Form-book complaints achieve none of this. Thus practitioners and law students have every interest in mastering the basic narrative techniques that turn a complaint into a persuasive rhetorical tool.

### **III. [Re]learning the Language of Narrative**

In order to represent our clients not just acceptably, but fully– that is credibly, artfully, authentically– we need not only to learn how narrative works, but also, to *relearn* the language of storytelling. Understanding the rhetorical force of narrative, recognizing storytelling techniques, and developing a vocabulary for describing them– the focus of the preceding sections– is just the beginning. The most difficult part of the process lies in accepting the uncomfortable truth that the syllogistic analysis and “objective” language we absorbed in law school, which for many of us all too quickly became our first language,<sup>144</sup> is not the only

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<sup>143</sup> Madden v. The Home Depot, ¶123 2006 WL 1306365 (D. Hawai’i).

<sup>144</sup> Our own experience as teachers has shown that by the second year of law school, many students have already developed a resistance to telling stories. We often assign an exercise in which we ask our upper-class students to draft an affidavit for a divorced mother petitioning for permission to move out-of-state with her minor child. A simulated interview with the “client”

discourse we need to use as practitioners and teachers, “and that others may more fully translate the reality of clients and persuasively advance the legal argument . . . .”<sup>145</sup> So the first step in our re-education is to remind ourselves how far we have traveled as professional writers and of the return trip we must make before we can claim not just competence, but true mastery of the discourse.

One good way to begin the return trip is to read Ruthann Robson's article “Notes from a Difficult Case.”<sup>146</sup> This essay chronicles Robson's ordeal when she was misdiagnosed with terminal cancer. In the essay, she shuttles between medical discourse, legal discourse, and personal experience. What makes this essay so instructive is watching Robson translate her experiences into different discourses. She moves

(1) from a human dilemma expressed in non-formal terms—from . . . [her] words, her emphases, her inflection—to a legal framework that matches facts to

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gives them a compelling story to work with. Some students frame the client's request unhelpfully in generalities and conclusions of law, as though afraid they might be giving something away or behaving unprofessionally by telling the judge their client's story.

<sup>145</sup> See Eastman, *supra* note 5, at 453.

<sup>146</sup> In *IN FACT: THE BEST OF CREATIVE NONFICTION* 226 (Lee Gutkind ed., Norton 2005). We were directed to this article by Andrea McArdle, who suggests that law teachers assign it to help students understand how and when to speak with a personal voice in the law. Andrea McArdle, *Teaching Writing in Clinical, Lawyering, and Legal Writing Courses: Negotiating Professional and Personal Voice*, 12 *CLINICAL L. REV.* 501 (2006). This skill “presupposes an ability to understand and then reframe formal language, an ability that novice legal writers are still developing...especially law students . . . [who] are still struggling to make legal language a part of their ‘lexicon.’” *Id.* at 534. To this same end, Herbert Eastman suggests using a famous civil rights case to sensitize students in a simulation pre-trial practice course to the complexity of clients' real-life stories. Students begin by reading and briefing a casebook version of *Walker v. City of Birmingham*, 388 U.S. 307 (1967). Students are then exposed to the real-life context of the case, by watching a portion of the PBS television documentary, “Eyes on the Prize,” focusing on Martin Luther King's campaign to desegregate Birmingham. See Eastman, *supra* note 5 at 453 (crediting David B. Oppenheimer, *Martin Luther King, Walker v. City of Birmingham, and the Letter from a Birmingham Jail*, 26 *U.C. DAVIS L. REV.* 791 (1993).

legal terms of art; and (2) back again from the language of legal pleading and argument –lawyer's words–to more generally accessible terms....

...*Notes* raises questions that every legal writer who writes on behalf of a client should consider: are the allegations in a legal complaint a fair representation of a client's words and experience? What aspects of the client's narrative remain? What has been lost in translation? What has been added, and why is it there? What is its source? Focusing attention in this way on preserving the client's voice within the formality of legal language...can make legal writers conscious as well of the modulation of their own professional voice in written legal argument and analysis.<sup>147</sup>

Robson's essay, perhaps more than any learned exegesis, can begin our re-education by its compelling demonstration of the different discourses central to effective and ethical pleading practice.

Another important step in the process is to become a close and critical reader of pleadings, analyzing how they succeed—or fail—as narratives. The Appendix to this article reproduces three complaints—a pair of slip-and-fall complaints, *Breeden v. Hilton Hotels*<sup>148</sup> and *Bork v. Yale Club*,<sup>149</sup> and an age-discrimination complaint, *Equal Employment Opportunity Comm. v. Mears Marina Associates, L.L.P.*<sup>150</sup> The two slip-and-fall complaints, both filed in federal court, are in sharp contrast one to another. The *Breeden* complaint seems straight from a notice-pleading form-book while the *Bork* complaint makes plaintiff's tumble from a speaker's dais almost filmic in its narrative impact. The third complaint, *Mears Marina*, is an example of narrative pleading at its very best, a complaint that has correspondence, coherence, and fidelity.

We offer the following narrative analyses as sample readings. They are indeed, samples,

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<sup>147</sup> See McArdle, *supra* note 145, at 536-37.

<sup>148</sup> *Supra* note 33.

<sup>149</sup> 77-CV-02516-RDB (S.D.N.Y.).

<sup>150</sup> *Supra* note 135.

not models, and by no means exhaust the potential lessons to be drawn from these complaints. It is in the nature of narrative that our take on it varies with the life experience we bring to it.

#### A. *Bare-bones "Slip-and-Fall"*

The bare-bones complaint in *Breeden* never goes beyond the "stock story" level; it has the correspondence to the basic negligence schema that conforms it to the minimal requirements of Rule 8, but it has little else. The drafter makes no attempt at character development, providing only jurisdictional information— "The plaintiff, Mary Sue Breeden, is a resident citizen of Morgan County, Alabama..." (¶ 4.)—and the conclusory generic description "business invitee." (¶ 9.) There is similarly no attempt to set a scene. The only visual detail in the entire complaint is "a dangerous condition in the form of water on a tiled surface." (¶ 11.) The reader's expectation of finding out where this water was (public restroom? pool area? bathroom? lobby?) is frustrated, and narrative coherence suffers. As to the action of the story, we learn only that the plaintiff "was caused to slip and fall, and to incur . . . injuries and damages." (¶ 12.) She "incurred hospital, doctor and medical expenses, and suffered physical pain, permanent disability and impairment, and mental anguish." (¶ 12.) But because Breeden's actual injury, pain, impairment, and disability and their impact on her life remain abstract, the reader's sympathy is not engaged, and the reader has no opinion about the truth of the accident and injury allegations.

Moreover, her story is told from the lawyer's point of view in language both verbose and generic, replete with redundancy and legalese: "at all times relevant hereto," (¶ 10) "exercised control, maintenance, supervision, and/or management," (¶ 10) "aforesaid" (¶ 12). The narrator appears remote from the story, unacquainted with its details, neutral as to its truth or falsity.

In brief, the complaint entirely lacks narrative coherence and fidelity— unnecessarily so, since it is difficult to see how context could require a complaint this bare. Although the incident

took place at a hotel in Egypt, surely some verifiable facts could have been provided about the plaintiff, about the location of the slippery tile, and about plaintiff's injury and disability, without requiring expensive investigation or incurring tactical disadvantage.

*B. "Slip-and-Fall" as Narrative*

In contrast, the *Bork* slip-and-fall complaint goes beyond the stock story to tell an individual tale that is surprisingly compelling and credible, despite its familiarity. Character development begins with the identification of the parties:

2. Plaintiff Robert H. Bork is a resident and citizen of Virginia. He was injured while visiting the Yale Club in New York, New York, to give a speech at an event there on June 6, 2006.

Even if the reader never heard of Bork's controversial nomination to the Supreme Court, the paragraph introduces the plaintiff as a figure of enough gravitas to be a speaker at an event at an elite venue. Moreover, unlike Mary Sue Breeden in the previous complaint, he remains an individual throughout— "Mr. Bork," not "plaintiff."

The factual allegations are detailed; the scene is carefully set.

7. The New Criterion hosted the event in a banquet room at the Yale Club. As the host of the event, the Yale Club provided tables and chairs where guests could sit during the reception and the evening's speeches. At the front of the room, the Yale Club provided a dais, atop which stood a lectern for speakers to address the audience.

8. Because of the height of this dais, the Yale Club's normal practice is to provide a set of stairs between the floor and the dais. At the New Criterion event, however, the Yale Club failed to provide any steps between the floor and the dais. Nor did the Yale Club provide a handrail or any other reasonable support feature to assist guests attempting to climb the dais.

With the banquet room visualized, the narrative commences with the incident that disrupted the steady state. The reader is put at the scene: "When it was his turn to deliver remarks to the audience, Mr. Bork approached the dais." (¶ 9.) But because there was no support, "Mr.

Bork fell backwards as he attempted to mount the dais, striking his left leg on the side of the dais and striking his head on a heat register.” (¶ 9.) The reader sees him falling, as though in slow motion.

The aftermath of this incident is vividly depicted. The plaintiff developed a “large hematoma” that “burst” (a forceful verb) and required “surgery, extended medical treatment, and months of physical therapy.” (¶ 10.) He experienced “excruciating pain.” (¶ 11.) Because it is the only emotionally charged adjective in the complaint, “excruciating” is effective. The injury’s effects are spelled out: it kept him “immobile,” interfered with “his typical schedule,” and “weakened his leg so that he still requires a cane . . . [and] continues to walk with a limp.” (¶ 10.) All his efforts to return to the steady state he enjoyed before his injury are as yet unrealized.

Although—like Ruthann Robson—Robert Bork is clearly able to understand traditional legal discourse, his attorneys wisely chose to retranslate his story into everyday language that makes this stock slip-and-fall individual and real. Possessed of all the characteristics that create narrative rationality, it is a credible story.

### *C. A Well-Told Tale*

Underlying the complaint in *E.E.O.C. v. Mears Marina* is the explicit stock script of “cancer survivor” (¶ 1). The term evokes the scenario of a fighter trying to rise above the trauma of life-threatening illness, mastectomy scars, and hair loss (¶s 8, 9, 14, 16). This script is combined with another prototypical story, that of the “loyal employee” and the “sexist boss from hell” who uses unlawful employment practices to rid himself of a middle-aged convalescent whose appearance he deems detrimental to business (¶s 10, 11, 15, 16). The scripts resonate with the reader, establishing narrative correspondence. Life experience makes it easy to believe that an employer would rather hire an attractive young waitress than retain a battle-scarred cancer

survivor.

The narrative rationality of this story is further enhanced by storytelling techniques. Ms. Finley is not a prototype but a person earnestly trying to resume her livelihood and her life. She assures her supervisor she has “been building up her strength in preparation for the season.” (§ 9). The drafter’s choice of words—she “was sure she could handle it”—reveals a distinctive individual voice. (Id.)

In addition to being conscientious, Ms. Finley is fair-minded: she does not want to believe that her employer is discriminating against her and does everything she can to comply with demands that (in a narrative *tour de force*) the reader is led to find unacceptable even before she does. Despite suffering hair loss as a result of chemotherapy, she agrees to comply with the new “no hat” rule—although this must have been distressing. In a restrained but deft choice of adjective, she is merely “taken aback”—not “appalled,” “devastated,” or “outraged.” (§ 10).

In a finely set scene using spare but telling details, she gamely tries on the restaurant’s swim suit tops in the facility’s restroom: but this proves too much—the tops expose her surgical scars “from various angles,” and she urges her supervisor to reconsider—albeit unsuccessfully. (§s 12, 13). These carefully chosen details about Ms. Finley and her plucky attempts to comply with management’s punitive dress codes are so skillfully individualized that her story is both real and moving.

In contrast, Finley’s supervisor appears to be a weasel. We know him only through his actions, but that is sufficient. Unmoved by Finley’s reassurances that she is able to perform her duties, he imposes a series of obstacles intended to discourage her. The “no hat” and “swim suit top” rules target her post-treatment appearance in the most humiliating way (§s 10, 11). That these policies are scams masking discriminatory animus becomes even more apparent when he

rehires a younger woman who refuses to comply with them, but he never returns Ms. Finley's calls. (¶s 15, 18, 16,17, 19.) Through the use of character development, tone, detail, and point of view, narrative coherence, correspondence and fidelity coalesce in this complaint.

\* \* \*

The final step in the [re]learning process is to take the plunge and start telling stories in our pleadings, honing our skills case-by-case as we learn to adapt narrative development to audience and purpose. For many practitioners, and even law students, storytelling is a childhood language buried under the successive discourses that adulthood imposes, most totally by traditional legal discourse. Indeed, in time, this comes to seem the only language at a practitioner's disposal. But to serve our clients well, we lawyers must become bilingual and [re]learn the language of narrative.

## **Conclusion**

By their nature, the pleadings in a civil action tell stories, but too often the stories are buried, barely discernible stock scripts, "thin" discourse mired in legalese. Such pleadings are missed opportunities for the advocate, not only because this is the plaintiff's first, and perhaps only, opportunity to tell her story, but also because readers—judges included<sup>151</sup>—instinctively look for stories when they read, and credible stories have great rhetorical power.

Thus, we have tried in this article to show how traditional narrative techniques can be used

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<sup>151</sup> Judge Patricia Wald writes, "[J]udges react negatively to the 'gotcha' lawsuit. . . . based on some technical nonobservance of a law or regulation where consequences are undocumented . . . . We judges want to know the facts, the real-life conditions, the actual practices underlying a legal challenge . . . . Judges search for meaning in what we do. You need to convince us that the law or the regulation is important in poor people's lives." See Eastman, *supra* note 5, at 771, citing Patricia M. Wald, *Ten Admonitions for Legal Services Advocates Contemplating Federal Litigation*, CLEARING HOUSE REV. May 1993, at 11, 13.

to enhance all complaints, not just those telling extraordinary tales. Whether litigating a civil rights, sexual harassment, negligence or contract claim, a lawyer ought to be able to tell a story that engages and convinces the reader— that has, in other words, the narrative rationality that comes from the presence of correspondence, coherence and fidelity. We have also attempted to show how specific techniques such as character development and detail can be used in complaints to achieve narrative rationality. Sometimes, as in the story of the Ethiopian woman lured into domestic slavery, the tale cries out for a full panoply of narrative techniques. At other times—as in the story of Ms. Finley, the cancer survivor—a few well chosen techniques quietly, but effectively, convey the plaintiff's experience. In addition, we have endeavored to show that narrative is not simply a persuasive tool or a literary enhancement, but has tactical advantages as well. It can, for example, trigger or foreclose immediate disclosure, or narrow or broaden discovery. Thus, we have tried to harmonize instrumentality with the narrative aspect of pleadings. Finally, we have made an effort to provide some practical guidance on the [re]learning that is necessary if we are to restore narrative to its central place in pleading practice.

In short, we have tried to show that pleadings are narrative and can and should be artfully drafted. However, because the contextual variables are numerous—jurisdiction, court, judge, adversary, plaintiff, defendant, and claim are just the beginning—it is difficult to come to a single resolution and *coda*. What we can do is aspire to positive transformation.

**APPENDIXES**

**EXAMPLE A: BARE-BONES “SLIP-AND-FALL”**

**UNITED STATES DISTRICT COURT,  
NORTHERN DISTRICT, ALABAMA**

-----X  
: MARY SUE BREEDEN, :  
: Plaintiff, : **COMPLAINT**  
: :  
: v. :  
: :  
: HILTON HOTELS CORPORATION, :  
: a Delaware corporation; et al. :  
: Defendants. :  
-----X

**COMPLAINT**

\* \* \* \* \*

Plaintiff Mary Sue Breedon hereby complains of the defendants Hilton Hotels Corporation, a Delaware corporation, [and other named defendants]. . . . The claims, actions and causes of action described herein arise out of a March 21, 2002, injury event occurring in Alexandria, Egypt.

**JURISDICTION**

\* \* \* \* \*

## **IDENTIFICATION OF PARTIES**

4. The plaintiff, Mary Sue Breeden, is a resident citizen of Morgan County, Alabama, residing at 2805 Lexington Avenue, SW, Decatur, Morgan County, Alabama 35603.

5. Defendant Hilton Hotels Corporation is a Delaware corporation whose principal place of business is located in the State of California (hereinafter "Hilton Hotels")— Hilton Hotels, however, conducts business in at least two locations within the Northern District of Alabama.

\* \* \* \*

## **FACTS**

9. On March 21, 2002, the plaintiff was a business invitee on the premises of the Hilton Borg El Arab Resort, Matrouh Desert Road, Borg El Arab, Egypt, in or near Alexandria, Egypt (hereinafter, "the Premises").

10. At all times relevant hereto, . . . [the Defendants] were the owners of; through their agents, the possessors of; and otherwise through such agents and employees, exercised control, maintenance, supervision and/or management over the Premises.

11. On March 21, 2002, the Defendants negligently and/or wantonly caused, permitted, allowed, or created a dangerous condition to exist on the Premises in the form of water on a tiled surface over which pedestrian traffic was allowed. The Defendants had actual notice and/or had constructive notice of this condition and/or failed to exercise reasonable care with respect to their maintenance of the Premises, thereby negligently and/or wantonly failing to discover and remove this condition.

12. As a proximate consequence of the aforesaid negligence and/or wantonness, the plaintiff was caused to slip and fall, and to incur the following injuries and damages:

injury, incurred hospital, doctor and medical expenses, and suffered physical pain, permanent disability and impairment, and mental anguish.

WHEREFORE, . . . the plaintiff Mary Sue Breeden demands judgment against the Defendants, jointly and severally, in the amount of Five Hundred Thousand And No/100 Dollars (\$500,000.00), plus costs.

\* \* \* \*



## **FACTUAL ALLEGATIONS**

6. On the evening of June 6, 2006, the New Criterion magazine held an event (the “New Criterion event”) at the Yale Club. The New Criterion invited Mr. Bork, among other guests, to deliver remarks at the event.

7. The New Criterion hosted the event in a banquet room at the Yale Club. As the host of the event, the Yale Club provided tables and chairs where guests could sit during the reception and the evening’s speeches. At the front of the room, the Yale Club provided a dais, atop which stood a lectern for speakers to address the audience.

8. Because of the height of this dais, the Yale Club’s normal practice is to provide a set of stairs between the floor and the dais. At the New Criterion event, however, the Yale Club failed to provide any steps between the floor and the dais. Nor did the Yale Club provide a handrail or any other reasonable support feature to assist guests attempting to climb the dais.

9. When it was his turn to deliver remarks to the audience, Mr. Bork approached the dais. Because of the unreasonable height of the dais, without stairs or a handrail, Mr. Bork fell backwards as he attempted to mount the dais, striking his left leg on the side of the dais and striking his head on a heat register.

10. As a result of the fall, a large hematoma formed on Mr. Bork’s lower left leg, which later burst. The injury required surgery, extended medical treatment, and months of physical therapy.

11. Mr. Bork suffered excruciating pain as a result of this injury and was largely immobile during the months in which he received physical therapy, preventing him from working his typical schedule before the injury. The months of relative inactivity weakened Mr. Bork’s legs so that he still requires a cane for stability. In addition, Mr. Bork continues to have a limp as a result of this injury.

## **FIRST CAUSE OF ACTION**

### **[Negligence]**

12. The allegations set forth in paragraphs 1 through 11 of this Complaint are realleged and incorporated by reference as if fully set forth herein.

13. The Yale Club had a duty to provide reasonably safe facilities in its reception and meeting rooms, including providing a safe dais of reasonable height and with stairs between the floor and the dais and a supporting handrail.

14. At the New Criterion event, the Yale Club breached its duty to provide reasonably safe facilities by failing to provide a safe dais and stairs between the floor and the dais, a supporting handrail, or any other reasonable support feature to protect its guests attempting to mount that dais.

15. It was reasonably foreseeable that, by failing to provide a safe dais and stairs between the floor and the dais, a supporting handrail, or any other reasonable support feature, a guest such as Mr. Bork attending the New Criterion even would be injured while attempting to mount the dais.

16. The Yale Club's negligent failure to provide reasonably safe facilities, and in particular, its failure to provide a safe dais and stairs between the floor and the dais, a supporting handrail, or any other reasonable support feature to protect its guests attempting to mount the dais, caused Mr. Bork to fall while attempting to mount the dais and caused his extensive and continuing injuries.

17. As a result of the Yale Club's negligence in failing to provide reasonably safe facilities, Mr. Bork has suffered actual damages. These damages include pain and suffering, a continuing leg injury, medical bills and related costs of treatment, and lost work time and income. The long-term effects of his injuries continue to manifest themselves.

## **SECOND CAUSE OF ACTION**

### **[Gross Negligence]**

18. The allegations set forth in paragraphs 1 through 11 of this Complaint are realleged and incorporated by reference as if fully set forth herein.

19. The Yale Club had a duty to provide reasonably safe facilities in its reception and meeting rooms, including providing a safe dais of reasonable height and with stairs between the floor and the dais and a supporting handrail.

20. The Yale Club breached its duty to provide reasonably safe facilities by wantonly, willfully, and recklessly failing to provide a safe dais and stairs between the floor and the dais, a supporting handrail, or any other reasonable support feature to protect its guests attempting to mount that dais.

21. It was reasonably foreseeable that, by failing to provide a safe dais and stairs between the floor and the dais, a supporting handrail, or any other reasonable support feature, a guest such as Mr. Bork attending the New Criterion event would be injured while attempting to mount the dais.

22. The Yale Club's wanton, willful and reckless disregard for the safety of its guests, and in particular, its failure to provide a safe dais and stairs between the floor and the dais, a supporting handrail, or any other reasonable support feature to protect its guests attempting to mount the dais, caused Mr. Bork to fall while attempting to mount the dais and caused his extensive and continuing injuries.

23. As a result of the Yale Club's gross negligence and wanton, willful and reckless disregard for the safety of its guests, Mr. Bork has suffered actual damages. These damages include pain and suffering, a continuing leg injury, medical bills and related costs of treatment, and lost work time and income. The long-term effects of his injuries continue to manifest themselves.

24. Because the Yale Club's gross negligence was wanton, willful and in reckless disregard for the safety of its guests, punitive damages should also be awarded against it in an amount to be determined at trial.

\* \* \* \*

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff demands the following relief against Defendant:

- A. Awarding actual damages resulting from Defendant's wrongdoing in excess of \$1,000,000;
- B. Punitive damages in an amount to be proven at trial;
- C. Pre- and post-judgment costs, interest and attorney's fees;
- D. Such other and further relief as this Court may deem appropriate and equitable.

\* \* \* \*

**APPENDIX C: A WELL-TOLD TALE**

**UNITED STATES DISTRICT COURT  
DISTRICT OF MARYLAND**

-----X  
:  
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, :  
Plaintiff, :  
:  
v. : **COMPLAINT**  
:  
MEARS MARINA ASSOCIATES LIMITED :  
PARTNERSHIP d/b/a Red Eye's Dock Bar, :  
Defendant, :  
:  
Margaret Finley, Intervener, :  
-----X

\* \* \* \*

**INTRODUCTORY MATTERS**

1. The Equal Employment Opportunity Commission ("EEOC") has previously brought an action under Title I and Title V of the Americans with Disabilities Act ("ADA") to correct unlawful employment practices on the basis of disability and retaliation and to provide appropriate relief to Margaret Finley ("Ms. Finley"), a 55-year-old breast cancer survivor, who was adversely affected by such practices.

2. In addition to being adversely affected by defendant's violations of the ADA, Ms. Finley was subjected to illegal discrimination and termination on the basis of her age in violation of the federal Age Discrimination in Employment Act ("ADEA"). As a result of the illegal discrimination, Ms. Finley brings this action for all of the foregoing and to seek the full measure

of relief provided for under the ADEA, including but not limited to double damages for defendant's willful actions.

3. The causes of action which form the basis of this matter arise under the Age Discrimination in Employment Act, as amended, 29 U.S.C. § 621 et seq. ("ADEA").

4. The District Court has jurisdiction over this matter under 28 U.S.C. §1331 and 29 U.S.C. § 626.

5. Venue is proper in the District Court under 28 U.S.C. §1391(b).

\* \* \* \*

### **FACTUAL ALLEGATIONS**

7. Ms. Finley was a seasonal employee at the Red Eye's Dock Bar beginning in 1995, working as a bartender.

8. Ms. Finley was diagnosed with breast cancer and underwent treatment, including surgery, chemotherapy and radiation, in 2005, causing her to miss the entire 2005 season.

9. In May, 2006, Ms. Finley sought to return to work as she had in the past. Robert Wilson, ("Wilson") her direct supervisor, expressed concern that she would not be able to perform her job duties. Ms. Finley assured him that she had been building up her strength in preparation for the season and was sure that she could handle it.

10. Wilson also informed Ms. Finley that there was a new policy prohibiting employees from wearing hats. In the past, Ms. Finley and others had been allowed to wear hats at work. Ms. Finley, who had lost all of her hair as a result of her chemotherapy and radiation, was taken aback by this new rule, but complied.

11. On or about June 24, 2006, the assistant manager told Ms. Finley that there was a

new uniform policy in effect, and handed her two bathing suit tops. Up to that point, Red Eyes bartenders had worn shorts and a Red Eyes' T-shirt or sweatshirt, depending on the weather.

12. Ms. Finley tried on the tops in the restroom and was dismayed to see that her surgical scars were visible from various angles.

13. Ms. Finley put her Red Eyes' T-shirt back on and explained why she could not wear the top. She was sent home for refusing to wear the new "uniform."

14. Ms. Finley returned to work the next day, certain that management would reconsider making her wear a top that exposed her surgical scars. Ms. Finley offered to wear something under the top, or alter the top with additional material to provide proper coverage. Wilson refused and ordered that Ms. Finley and another employee, Tiffin Lilly, who also objected to wearing the bathing suit top, be fired immediately and escorted from the premises.

15. Two days later, Ms. Lilly was called back to work, and was told that the new bathing suit top would be optional, not mandatory.

16. Ms. Finley was never called to return to work. When she called Red Eyes to see if she, too, could have her job back, her calls were not returned.

17. Ms. Finley was 54 years old at the time of her termination.

18. Tiffin Lilly is substantially younger than Ms. Finley, and is believed to be in her mid-twenties.

19. Ms. Finley's age was a motivating factor in connection with Defendant's termination and failure to rehire Ms. Finley.

20. Upon information and belief, Defendant has a pattern and practice of discriminating against older women.

21. As a direct and proximate result of Defendant's unlawful, improper, and

discriminatory conduct, Ms. Finley has incurred and continues to incur, a loss of earnings and/or earning capacity, loss of benefits, pain and suffering, humiliation, and mental anguish, and has incurred attorney's fees and costs associated with bringing this claim.

22. Defendant's conduct, as set forth above, was willful, intentional and outrageous under the circumstances.

### **COUNT I**

23. Plaintiff-Intervener incorporates by reference all of the above paragraphs as if set forth herein in their entirety.

24. By committing the foregoing acts of discrimination against Ms. Finley, Defendant has violated the ADEA.

25. Said acts were intentional and warrant the imposition of liquidated damages.

26. As a direct and proximate result of the Defendant's violation of the ADEA, Ms. Finley has sustained the injuries, damages and losses set forth herein and has incurred attorneys' fees and costs associated with bringing this claim.

27. Ms. Finley is now suffering and will continue to suffer irreparable injury and monetary damages as a result of Defendant's discriminatory and unlawful acts unless and until this Court grants the relief requested herein.

### **RELIEF**

**WHEREFORE**, Plaintiff-Intervener respectfully requests that this Court enter judgment in her favor and against Defendant:

- A. Declaring the acts and practices complained of herein to be in violation of the ADEA;
- B. Enjoining and restraining permanently the violations alleged herein;

- C. Awarding compensatory damages to make Plaintiff-Intervener whole for all past and future lost earnings, benefits and earnings capacity which Plaintiff-Intervener has suffered and will continue to suffer as a result of Defendant's discriminatory and unlawful conduct;
- D. Awarding liquidated damages to Plaintiff-Intervener;
- E. Awarding Plaintiff-Intervener costs of this action, together with reasonable attorney's fees;
- F. Awarding Plaintiff-Intervener such other damages as are appropriate under the ADEA; and
- G. Granting such other and further relief as this Court deems appropriate.

\* \* \* \*