

ARE THE CHARACTERS IN A DEATH PENALTY BRIEF LIKE THE CHARACTERS IN A MOVIE?

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INTRODUCTION: THE BACK STORY

The Western conception of the person as a bounded, unique, more or less integrated motivational and cognitive universe, a dynamic center of awareness, emotion, judgment, and action organized into a distinctive whole and set contrastively against a social and natural background is, however incorrigible it may seem to us, a rather peculiar idea within the . . . world's cultures.¹

In legal storytelling and narrative persuasion—just as in popular cultural storytelling—characterization, character development, and correct casting choices are profoundly important. In popular storytelling, depiction of character draws readers or viewers into a narrative, facilitating empathy and understanding, and informing the audience's response to the story. Narrative theorists have argued that perspective, which is intrinsically tied to characterization, is “arguably the most important single decision” in some modern storytelling forms, especially the novel.² Indeed, theorists have observed that the primary subject of the modern novel is consciousness and that “the center . . . of all great literature[] is character.”³ Character is no less important in legal storytelling. Effective characterization, character development, and correct casting choices are often essential to crafting persuasive briefs.

Depicting characters in legal advocacy and argumentation, including the narrative components of brief-writing practice in post-conviction litigation in death penalty cases, is, however, quite different from character development in film or the novel. It is factual and truthful storytelling,

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1. Clifford Geertz, *The Nature of Anthropological Understanding*, 63 AM. SCIENTIST 47, 48 (1975), quoted in DAVID LODGE, CONSCIOUSNESS AND THE NOVEL 89 (2002).

2. DAVID LODGE, THE ART OF FICTION 26 (1992).

3. JOHN GARDNER, THE ART OF FICTION: NOTES ON CRAFT FOR YOUNG WRITERS 6 (Vintage Books 1991) (1984).

meticulously built upon a record. Obviously, there are additional constraints upon narrative practice that are not present in fictive storytelling.⁴ Nevertheless, narrative persuasion is at the core of post-conviction relief practice; it is, perhaps, “[t]he central task of postconviction counsel for a condemned inmate . . . to *change* a story that has been certified as The Truth.”⁵ Advocates doing so can benefit from studying the

4. Anthony G. Amsterdam has enumerated a checklist that identifies the following constraints and limitations upon narrative persuasion in post-conviction litigation:

1. The audience demands that the story be ‘*true*.’ S/he defines his/her job as discerning the truth. Usually s/he believes truth is ‘out there’ in the world.
 2. Certain facts are *given*—undeniable and undisputable—because it is inevitable that the audience will have them in mind and believe them to be either
 - a. Factually true, or
 - b. Required by legal rules to be viewed as true, whether
 - i. Categorically, or
 - ii. In the absence of contrary evidence you ain’t got.
- [Sometimes the facts that are *given* are ‘ultimate’ facts (for example, *your client was the triggerman*); sometimes they are evidentiary facts (for example, *your client’s fingerprints were in the murder weapon*).
3. There is an *opposing storyteller*, motivated and equipped to deconstruct your story and/or persuade the audience of the truth of a counterstory.
 4. You are *viewed as an interested pleader* and often you are suspected of being a trickier one, more prone to charlatanism, than the opposing storyteller.
 5. You are *retelling* a story and attempting to *change* at least some parts of a story that has been previously told and officially certified to be authentic.
 6. Your audience is a *judge* (not, as in many preconviction proceedings, a jury).
- ...
7. Usually, you must tell your story in *written form*, perhaps embellished with some pictorial exhibits or video clips but not (as in many pre-conviction proceedings), by presenting oral testimony of witnesses and physical displays or other living theater. You can get the opportunity to present live witness testimony only if and after you have convinced a judge in writing that you have a case.

Philip N. Meyer, *Adaptation: What Post-Conviction Relief Practitioners in Death Penalty Cases Might Learn From Popular Storytellers About Narrative Persuasion*, in 7 CURRENT LEGAL ISSUES: LAW AND POPULAR CULTURE 651, 652–53 (Michael Freeman ed. 2005) [hereinafter Meyer, *Adaptation*] (citing Collected Notes and Materials from the Planning Conference for a Possible Persuasion Institute, N.Y. Univ. Clinical L. Ctr. (May 15–17, 2003) [hereinafter Collected Notes]).

5. Meyer, *Adaptation*, *supra* note 4, at 652 (quoting Collected Notes, *supra* note 4). Amsterdam continues:

[Post-conviction counsel] has to deconstruct the story of people and events that was told in the appellate opinion affirming the inmate’s conviction and sentence, break that story down into pieces, and recombine those pieces into a new story capable of capturing the imagination and opening the minds of judges and clemency officials and media people and even state’s attorneys who think they already know the whole story. Every postconviction case starts with a story that these people believe has been officially stamped closed, so that they don’t have to think about it anymore. Postconviction counsel’s job is to CHANGE that story, to reconstruct the world in which that story happened, to force people who think they understand the story to THINK ABOUT IT IN A NEW WAY and to see enough new facts—facts that weren’t exposed before, or weren’t put into focus

dynamics of effective characterization in films and novels. Specifically, attorneys representing condemned inmates and drafting post-conviction relief briefs can learn how to develop effective characterization from other practitioners of narrative craft. Post-conviction relief attorneys can also learn how to critique the characterizations depicted in opposing stories or within the official version of events that resulted in the sentence of death. Also, post-conviction relief practitioners can develop a narrative theory specific to their brief-writing craft and practice, while cultivating a conceptual understanding of how effective characterization, character development, and casting choices in briefs are different from those in films and novels.

In this exploratory essay, I use the classic Western *High Noon*⁶ to introduce and discuss aspects of character, character construction, and casting. I then apply these concepts in my analysis of a traditional legal text, the *Statement of the Case* in the petitioner's brief in *Atkins v. Virginia*, which presented the question whether executing a mentally retarded adult violates the Eighth Amendment's prohibition on cruel and unusual punishment.⁷ I argue that it is helpful to foreground a conceptual narrative vocabulary pertaining to character. Some of these concepts, I argue, may be useful for developing effective characters in other death penalty briefs, and may even provide a better understanding of the narrative structure in a brief like *Atkins*. Finally, I conclude with some observations that I base upon my structural analyses of the brief in *Atkins* and of *High Noon* as melodrama, and upon the characters and characterizations as functions of this form.

Let me conclude this introduction by noting that during the past four years I have been privileged to serve on the faculty at the Narrative Persuasion Institute, where I have taught narrative skills to attorneys representing condemned inmates and worked with practitioners, clinicians, and legal writing teachers.⁸ At intensive three-day workshops held in 2003

before—so that the old facts make a new kind of sense and turn into a quite DIFFERENT STORY.

Id.

6. HIGH NOON (COLLECTOR'S EDITION) (Republic Pictures 2002) (1952). In a future essay, I plan to compare and contrast characters in a death penalty brief with characters in a novel.

7. Brief for Petitioner at i, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452) [hereinafter *Atkins Brief*]. The Court held that execution of mentally retarded persons is "excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." *Atkins*, 536 U.S. at 321 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

8. I originally discussed this material at the Persuasion Institute Advanced Training Program Workshop in Narrative Construction for Postconviction Lawyers, Plenary Session, "Casting, Character, and Scene" (Sept. 29, 2007). For the overall agenda and background materials from the Workshop, see Workshop in Narrative Construction for Postconviction Litigators (Persuasion Institute CD-ROM, Sept.

and 2007, the Institute employed the film *High Noon*, written by Carl Foreman and directed by Fred Zinneman, as a visual text to illustrate narrative theory in a way that might help practitioners in post-conviction relief practice. In 2003, attendees used the film as the basis for a discussion of “plotting.” In 2007, the film was revisited, this time to discuss character, casting, and scene.

This Essay presents some observations from these discussions. Petitioner’s brief in *Atkins v. Virginia* was also assigned as a text at the Persuasion Institute in 2003 and 2007. In addition to comparing and contrasting characters in *High Noon* with some characters depicted in petitioner’s brief in *Atkins*, I hope to develop a foreground of conceptual vocabulary pertaining to characterization and to illustrate how these concepts may be useful for developing effective characters in legal briefs.

I. HIGH NOON

A. Plot Summary: Applying the Amsterdam-Bruner Definition

High Noon is a classic 1950s Western: an evil antagonist ravages a fragile frontier community, and a protagonist, outnumbered and seemingly overmatched, stands up heroically against the outlaws to save the town and preserve the community. In the traditional heroic Hollywood Western, the hero teaches the townspeople an important lesson about the need for courageous struggle, the cost of preserving community, and the need for self-sacrifice and the use of violence in order to survive on a dangerous, primitive, and often lawless landscape.⁹

In *High Noon*, the story is transformed by screenwriter Carl Foreman and director Fred Zinneman. Foreman adapted the plot from the slick-magazine story *The Tin Star*,¹⁰ deepening the character of the protagonist Marshal Will Kane, and developing other complex characters, including Amy, Kane’s young wife; Helen Ramirez, Kane’s former mistress; and the villain Frank Miller, leader of the notorious Miller gang returning on the high-noon train to take revenge upon Kane and the town. These characters

27–30, 2007) (on file with author).

9. See SYD FIELD, *FOUR SCREENPLAYS: STUDIES IN THE AMERICAN SCREENPLAY* 240 (1994) (discussing the plots and themes characteristic to traditional Westerns); see also MICHAEL ROEMER, *TELLING STORIES: POSTMODERNISM AND THE INVALIDATION OF TRADITIONAL NARRATIVE* 275 (1995) (placing filmic Westerns within a larger landscape, a topography that connects the Wild West in our popular cinema with European literary traditions).

10. DVD: *Word Into Image: Writers on Screenwriting* – Carl Foreman (American Film Foundation 1984) (on file with author).

assume complexity and dimensions not customary in typical Hollywood Westerns. Foreman intentionally employs the story to serve as an allegory for persecution of politically active members of the Hollywood community during the McCarthy hearings in the early 1950s and the pressures placed upon individuals to sell out their community in the service of self-interest—to rationalize passivity and inaction, rather than to stand up against the darkly destructive forces of a villainous outlaw gang.¹¹

Like the plots in many post-conviction relief briefs, the story incorporates the dark theme of betrayal.¹² Unlike the traditional Western hero, Will Kane is a deeply conflicted character, and the plot is about resolution of both his inner conflict and his external confrontation with villain Frank Miller and his gang.¹³ Not only is Kane betrayed by the townspeople and by his closest friends, but he also betrays them and, perhaps, himself as well.

Amsterdam and Bruner usefully define plot as a basic instrument.¹⁴

11. *Id.*

12. *See, e.g.*, Brief for Petitioner at 6–7, *Williams v. Taylor*, 529 U.S. 420 (2000) (No. 99-6615) [hereinafter *Williams Brief*] (suggesting that the fatal shots were fired by Williams's co-defendant, whom he claimed lied about the murders); *see also* Philip N. Meyer, *Retelling the Darkest Story: Mystery, Suspense, and Detectives in a Brief Written on Behalf of a Condemned Inmate*, 58 *MERCER L. REV.* 665, 669–84 (2007) [hereinafter Meyer, *Retelling*] (analyzing the *Williams Brief*). In a conference held in 2003 on the formation of a “persuasion institute,” David Bruck observed that virtually all stories told in postconviction relief practice are about failures of the justice system and betrayals by the various characters in that system. Audio tape: David Bruck, Remarks at the Planning Conference for a Possible Persuasion Institute, held by the New York University Clinical Law Center (May 15–17, 2003) (on file with author).

13. *See* GARDNER, *supra* note 3, at 187, for a discussion of complex literary characterization.

Certain forces, within and outside the character, must press him toward a certain course of action, while other forces, both within and outside, must exert strong pressure against that course of action. Both pressures must come not only from outside the character but also from within him, because otherwise the conflict involves no doubt, no moral choice, and as a result can have no profound meaning.

Id.

14. *See* ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 113–14 (2000), for a discussion of the requirements of a plot.

The unfolding of the *plot* requires (implicitly or explicitly):

- (1) an initial *steady state* grounded in the legitimate 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 old steady state is *restored* or a new (*transformed*) steady state is created,
- (5) and the story concludes 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 characteristic *moral of the story*.

The participants at the Narrative Persuasion Institute Conference in 2003 applied this analysis to the plot of *High Noon* to understand better—or decode—the basic movements of a narrative. The beginning of *High Noon* is marked by what Amsterdam and Bruner characterize as “an initial [‘normative’] steady state grounded in the legitimate ordinariness of things.”¹⁵ In *High Noon*, this steady state is depicted visually in imagery of the townspeople celebrating the wedding and departure of their heroic marshal Will Kane, who has cleaned up the town, ridding it of the notorious Miller gang. After the wedding ceremony, Kane symbolically hangs up his guns and takes off his badge, turning over his job to the new marshal who will arrive the following morning.

Consistent with the Amsterdam-Bruner conceptualization of plot, this initial exposition is followed by an apparent *breach* of the steady state and the arrival of “the *Trouble*.”¹⁶ That is, the initial steady state “gets disrupted by a *Trouble* consisting of circumstances attributable to human agency or susceptible to change by human intervention.”¹⁷ This disruption sets the plot in motion and shapes subsequent events within this narrative: It is 10:00 a.m., just after Kane’s marriage to the beautiful Quaker pacifist Amy, when the townspeople attending the wedding receive word that the notorious villain—antagonist Frank Miller—just pardoned from prison—is returning to Hadleyville via the noon train. He will rejoin his gang and seek vengeance against Kane and perhaps the townspeople as well, who had sent him to prison. Initially, the nature of “the *Trouble*” that arrives—the band of evil outlaws in turn anticipating the arrival of Frank Miller—is external and apparent.

Next, as part three of the Amsterdam-Bruner definition stipulates, begin the “efforts at redress or transformation, which succeed or fail.”¹⁸ During this plot segment, competing forces struggle either to return to the initial steady state or progress forward towards a newly transformed steady state. This struggle—the core conflict that compels the audience to follow the story—is embodied within the “progressive complications” of the second “act,” or movement, of the plot as “the *Trouble*” assumes complexity perhaps not initially anticipated by either the protagonist Kane or the viewer. This movement follows the protagonist’s struggle against the antagonist or the various “forces of antagonism.”¹⁹ These struggles are both

Id.

15. *Id.* at 113 (emphasis added).

16. *Id.*

17. *Id.* at 114 (emphasis added).

18. *Id.* (emphasis added).

19. See ROBERT MCKEE, STORY: SUBSTANCE, STRUCTURE, STYLE, AND THE PRINCIPLES OF

internal, taking place within the psychology of the various characters, and external, occurring in the relationships among the various characters.

In the language of Hollywood, *High Noon* is a character-driven film, and the long second act develops the complex relationships and subplots that evolve between the various characters as they await the arrival of Frank Miller. First, the story identifies the internal struggle of protagonist-hero Will Kane: whether to leave town or to stand up to the Miller gang. Initially, Kane honors his promise to Amy to put down his badge and gun. The new spouses leave town in their buckboard, but they don't get far before Kane turns the rig around and heads back to Hadleyville to resume his duties as marshal, declaring to Amy, "I've got to go back . . . They're making me run. I've never run from anything before."²⁰ Like much of the film's dialogue, this statement may seem clichéd, but Gary Cooper's delivery to the luminous, young Grace Kelly transforms these words into an extremely powerful representation of choice and change. Kane then attempts to enlist townspeople in the struggle against Miller and his gang, but these friends refuse to join him, providing various rationales for their inaction. Simultaneously, progressive complications emerge in the various subplots as the townspeople await Miller's arrival. This in turn leads to the development of the characters and their relationships with Kane.

The plot develops a recurring and subtle theme²¹ about the meaning of loyalty and betrayal. Kane's new wife, Amy, is torn between her loyalty to her new husband and to her Quaker pacifist beliefs; at the same time, she feels betrayed by Kane's refusal to honor his promise to her that he would retire as marshal and leave town. Kane's former deputy, Harve,²² refuses to join Kane in the fight against the Miller gang, believing that Kane had

SCREENWRITING 317–18 (1997), for a discussion of the principle of antagonism. "A protagonist and his story can only be as intellectually fascinating and emotionally compelling as the forces of antagonism make them. . . . The more powerful and complex the forces of antagonism opposing the character, the more completely realized character and story *must* become." *Id.* at 317.

20. HIGH NOON, *supra* note 6.

21. See Philip N. Meyer, *Vignettes from a Narrative Primer*, 12 LEGAL WRITING: J. LEGAL WRITING INST. 229, 259–60 (2006) [hereinafter Meyer, *Vignettes*], for a discussion of the concept of narrative theme. I first offer several dictionary definitions of the term "theme": (1) "a subject on which a person speaks, writes, or thinks; a topic of discussion or composition"; (2) "a subject which provokes a person to act; a cause *of* or *for* action or feeling"; (3) "the principal melody or plainsong in a contrapuntal piece; a prominent or frequently recurring melody or group of notes in a composition." *Id.* (quoting 2 SHORTER OXFORD ENGLISH DICTIONARY 3234 (5th ed. 2002)). This essay also discusses screenwriting teacher Robert McKee's preference for using a synonymous term, "controlling idea," to help students better understand the concept of theme. Meyer, *Vignettes, supra*, at 259–61 (citing MCKEE, *supra* note 19, at 114–15). The essay concludes by noting the observations of John Gardner about the touchstone-like role that a theme plays in the legal storyteller's creative process. Meyer, *Vignettes, supra*, at 259–61 (citing GARDNER, *supra* note 3, at 177).

22. For purposes of this essay, I do not analyze this subplot or Harve's character.

betrayed him when he refused to recommend Harve to be the new marshal. Meanwhile, Harve is having an affair with Kane's former mistress, the saloon owner and businesswoman Helen Ramirez. Kane had betrayed Ramirez when he abandoned her to marry Amy, but Ramirez still loves Kane nevertheless. Kane, in turn, is betrayed by the same townspeople who were celebrating him at the start of the film. Despite their professed loyalty and indebtedness to Kane for ridding the town of the Miller gang, the townspeople now refuse to join him in the fight against Miller. They rationalize their inaction without understanding that Kane's struggle against Miller is also a struggle for the community's survival.

The events of the second movement of the narrative propel the plot to the film's third-act climax: the confrontation between Kane and the Miller gang. This climax and the accompanying resolution yield either a return to the restorative steady state (redress) or the appearance of a new and transformed steady state (apotheosis). The climax is the point at which the plot can go no further. In Amsterdam's and Bruner's language, the "efforts at redress or transformation [either] succeed or fail[] so that the old steady state is restored or a new (transformed) steady state is created."²³ In the final confrontation the various primary characters make important choices. Their actions and omissions define their characters, completing them in conjunction with the climax of the story. Kane acts heroically, standing up to Frank Miller and the Miller gang, alone. Amy disembarks the train when she hears gunfire, setting aside her pacifist beliefs to stand alongside the man she loves. Ramirez, despite her love for Kane, leaves town; Kane is no longer her man, the town is dead for her, and the struggle is no longer her own.

Finally, there is the strangely powerful, complex yet ambiguous "coda" that suggests the meaning of the tale. That is, as stipulated by Amsterdam's and Bruner's definition, "*the story concludes 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 characteristic moral of the story.*"²⁴ After Kane and Amy together defeat the Miller gang, the townspeople emerge from their hiding places. Kane throws down his marshal's badge and unceremoniously leaves town with Amy at his side. Is this the transformative ending? Is it a return to some anterior steady state? Or is it something else entirely?

23. AMSTERDAM & BRUNER, *supra* note 14, at 114 (emphasis added).

24. *Id.* (emphasis added).

B. *Characters and Characterization in High Noon*

E.M. Forster observed in his classic dictum about storytelling that there are “flat” and “round” characters.²⁵ A flat character is “[a] character endowed with one or very few traits and highly predictable in behavior.”²⁶ A round character is “[a] complex, multidimensional, unpredictable character, who is capable of convincingly surprising behavior.”²⁷ Flat characters are monochromatic or one-dimensional, often cast on stage to express an idea or to serve plot functions and keep the story moving inexorably forward. For example, many of the townspeople in *High Noon* are flat characters. Round characters are core characters in the story; they are more fully developed and reveal different aspects, or facets, as the story develops.

1. The Protagonist—Will Kane

The most complex character in filmic storytelling, especially in a “traditional” protagonist-driven Hollywood plot structure, is the protagonist. The protagonist is typically at the center of the story, and the film is shot from his perspective, or point of view. The narrative structure of the Hollywood-movie plot is usually linear, quickly paced with action and scene, and forward moving. Past events relegated to the “back story” of the film are sometimes developed through “flashbacks” or “flashforwards,” but rarely is there the extensive reordering of chronology often employed in the novel.²⁸ *High Noon* takes a carefully ordered linear chronology one step further, doing cinematically what cannot be done in a legal brief or a novel. The film is shot in what closely approximates “real time,” with one minute of screen time equivalent to one minute of “real” time.²⁹ Within this highly structured narrative framework, complex and

25. See GERALD PRINCE, A DICTIONARY OF NARRATOLOGY 12 (rev. ed. 2003) (comparing character types).

26. *Id.* at 31 (“Mrs. Micawber in *David Copperfield* is a flat character.”).

27. *Id.* at 85 (“Charlus in *Remembrance of Things Past* is a round character.”).

28. “Flashbacks” are not defined by Prince beyond noting that they are “often used in connection with cinematic narrative.” PRINCE, *supra* note 25, at 31. Prince uses the more general term “analepsis” to mean “[a]n anachrony going back to the past with respect to the ‘present’ moment.” *Id.* at 5. The same is true of “flashforwards,” which for Prince are a mere category of “prolepses,” defined as “[a]n anachrony going forward to the future with respect to the ‘present’ moment.” *Id.* at 79.

29. Further, *High Noon* is stripped bare of the double-telling that is characteristic of detective fiction in its various forms, where a detective goes back in time to solve the crime while the plot moves forward simultaneously to the apprehension of the real criminal who has been revealed by the intellectual work of the detective. See PETER BROOKS, READING FOR THE PLOT: DESIGN AND INTENTION IN NARRATIVE 24–25 (1984) (discussing the “inquest” and the “crime” as “two orders of story”).

shifting relationships develop among the primary characters as they await Miller's arrival.

High Noon is primarily about the character of Will Kane, and the core of the film is his story. *High Noon* appears to be the classical Hollywood Western,³⁰ and Will Kane initially presents many of the physical and mental characteristics of the Western hero.³¹ He is handsome, strong-willed, fair-minded, and willing to sacrifice himself in service to the community. But he also possesses certain psychological and physical characteristics atypical for the positivist, traditional Hollywood Western hero. He is fearful and capable of betraying those closest to him; he is also an older man, hesitant at times in his decisions and actions. Kane is present in most scenes, and

30. See FIELD, *supra* note 9, at 240, for the screenwriting guru's discussion of plots and themes characteristic to traditional Westerns.

Think of those classic Westerns we've seen since we were kids. They star the loner running from his past, a man with strong morals, an unshakable sense of honor, and humble dignity All of these movies dramatically portray the Western hero fighting against the injustice of the system; he is the true individual, true to himself and his ideals, unbending in spirit, unyielding in the belief of freedom.

Id. Michael Roemer, a narrative theorist and filmmaker, elegantly and accurately places filmic Westerns within a larger landscape, a topography that connects the Wild West in our popular cinema with European literary traditions.

The Western—which had established its popularity in printed form—became a favorite subject of early American cinema. From 1910 to 1960 one-fourth of our films were set on the frontier. Westerns employed standard melodramatic ingredients but enhanced their credibility by placing them in an American context and substituting American values and attitudes for those of nineteenth-century Europe. The hero's active will and skill, rather than the passive virtues of endurance and faith, carry the day. He can outride and outshoot the villain, and overcomes the obstacles nature places in his path on his own. Providence and fate no longer play a critical role and while he may, on occasion, profess his faith in God, he expects no help from the supernatural.

ROEMER, *supra* note 9, at 275.

31. Roemer on the character of the Western hero:

The Western hero often saves an entire community. He guides wagon trains through Indian territory, knows how to ford raging rivers, and protects women, children, and the infirm. But while he is the leader, he remains a 'common,' democratic man, and his actions, unlike those of King Lear or Julien Sorel, meet with the approval of the audience. If he opposes his fellow townsmen to prevent the lynching of an innocent prisoner, the community will eventually see the light. *Conflicts and problems are invariably solved by courage and reason, and there is no need for suffering or self-division.*

Id. (emphasis added). *High Noon* is a particularly compelling story because it takes the form of a classical heroic Hollywood Western, yet the complex characters cut against the genre's melodramatic stereotypes. The hero's courageous action does not fully solve the problem, nor does the townspeople's "reason" provide answers to the situation. The primary characters are sufficiently round and complex that there is, in each of them, room for a plenitude of the self-division and suffering perhaps more characteristic of classical tragedy than the melodrama of the heroic Hollywood Western.

even when he is not physically present—for example, in the scenes with Amy and Helen Ramirez or those with the young deputy Harve and Helen—he is nevertheless the subject of the scenes. The dialogue is invariably about him. The other characters develop exclusively through their relationships to Kane, and each scene sheds new light on Kane’s complex character. Indeed, the various scenes with other characters are interspersed with scenes of Kane walking the streets urgently, of clocks ticking, and of railroad tracks. Through visual shorthand, these scenes foreshadow Frank Miller’s impending arrival. They also add to the mounting anticipation surrounding the final showdown between Miller and Kane, which will give the preceding events meaning and provide narrative closure to the story.³² Thus, it is Kane’s story that is the subject matter of the film.³³ Other characters diminish in significance as they orbit farther away from Kane, who is at the center of the constellation of characters.³⁴

Hollywood screenwriting terminology provides a template that helps clarify the construction of Kane’s character. Kane has a clear and apparent external “plot goal”: to stand up heroically against the villain who threatens the survival of the community. Kane also has compelling inner “personal goals”³⁵: to maintain his inner self-esteem and to act honorably and with integrity, honoring his wife and the community. As befits a heroic protagonist in a Hollywood film, Kane also has what is referred to as a compelling “inner contradiction.”³⁶ His external plot goal and his internal

32. As Leonard Maltin observes in his supplementary commentary to the film on the DVD, screenplay writer Carl Foreman and Director Fred Zinnemann were careful to ensure that the viewer’s attention systematically returns to the impending showdown. Leonard Maltin, Commentary, *Making of High Noon*, in *HIGH NOON*, *supra* note 6. This suspense carries the viewer through the long middle of the film, between sometime shortly after 10 a.m. when Kane returns to Hadleyville and when Frank Miller arrives on the noon train.

33. Likewise, in the *Atkins* brief, the defendant Atkins is at the “center” of the story. See *Atkins Brief*, *supra* note 7, at 1–18 (statement of the case). This monologic structure is unlike the often dialogic structure of many novels. See *PRINCE*, *supra* note 25, at 54 (comparing monologic and dialogic narratives and explaining that in the former, “the narrator’s views, judgments, and knowledge constitute the ultimate authority with respect to the world represented”).

34. See *MCKEE*, *supra* note 19, at 379–81 (explaining character structure).

35. See *MARGARET MEHRING, THE SCREENPLAY: A BLEND OF FILM, FORM AND CONTENT* 54 (1990) (describing the “personal goals” that “drive the characters to reach their plot goals”), discussed in Philip N. Meyer, “*Desperate for Love*”: *Cinematic Influences upon a Defendant’s Closing Argument to a Jury*, 18 VT. L. REV. 721, 742 (1994) [hereinafter Meyer, *Desperate*]. Mehring, former Director of the Filmic Writing Program for the School of Cinema-Television at the University of Southern California, Los Angeles, describes character goals as “the voices within the character that yearn for fulfillment, that must be satisfied” and as “the needs that create the energy to overcome obstacles.” *MEHRING*, *supra*, at 54. Mehring observes that “[a] good character has compelling personal goals. These goals spring from very deep emotional needs, deprivations, and scars. The need for self-respect; for self-actualization. The need to be loved; to be respected.” *Id.* at 195.

36. See Meyer, *Desperate*, *supra* note 35, at 743, for an analysis of criminal defendant Louis

personal aspirations are inconsistent. He cannot satisfy both at the same time. Kane is compelled on one hand to honor his promise to his new wife that he will resign as marshal, leave Hadleyville before Frank Miller's arrival, and begin a new life as a shopkeeper. At the same time, Kane is compelled to preserve his honor and integrity and in the tradition of the heroic Western, stand up courageously to the threat posed by the antagonist regardless of the consequences.

Another readily identifiable aspect of Kane's character is described in screenwriting manuals as a discrete internal "character arc."³⁷ That is, the composition of Kane's character changes in relation to the events of the story and their impact upon him, affecting his subsequent decisions. This character arc is conveyed visually through his actions. F. Scott Fitzgerald observed that "action is character."³⁸ Ernest Hemingway added to Fitzgerald's perception, "Everything changes as it moves."³⁹ This is especially so in popular film where character is revealed primarily through decisive action. Changes in character seldom take place at the same pace as do the events of the story itself. Hemingway observed: "Sometimes the movement is so slow it does not seem to be moving. But there is always change and always movement."⁴⁰ Katherine Anne Porter labels these "consequences of acts" the characters' "reverberations."⁴¹

Actions, which are external and visible on the screen, are especially crucial in character development in a film.⁴² As Margaret Mehring

Failla's "inner contradiction." Failla's case presents another protagonist-driven linear narrative in the form of a closing argument. *Id.* I analyze the protagonist's "inner contradiction" as the conflict between his need for the love of his adopted mob family on the one hand and his need for the love of his biological family on the other. *Id.* Ordered to murder the father of his grandson and his daughter's common-law husband, he must choose between these divided loyalties; he cannot have both at the same time. *Id.* at 738. See also MEHRING, *supra* note 35, at 34, 74, for a description of the inner contradiction of Charley Davis in Abraham Polonsky's classic film, *Body and Soul*. "His internal conflict is between his need for fame and fortune and his need to maintain his sense of self-esteem. He cannot have both at the same time. It's one or the other." *Id.*

37. See MCKEE, *supra* note 19, at 104 ("The finest [screen]writing not only reveals true character, but arcs or changes that [character's] inner nature, for better or worse, over the course of the telling.").

38. F. SCOTT FITZGERALD, *THE LAST TYCOON* 163 (Charles Scribner's Sons 1970) (1941).

39. WRITERS AT WORK: THE PARIS REVIEW INTERVIEWS 233 (George Plimpton ed., 2d series, Penguin Books 1977) (1963).

40. *Id.*

41. *Id.* at 151.

42. The screenwriter and director Robert Towne observes:

[One] way great movie actors do much by doing little, [and] without benefit of dialogue[:] They move.

The Aristotelian postulate that character creates action gave rise to its corollary, that action is character. If it's thought of at all in Hollywood, it's usually translated to mean the more action for Arnold [Schwarzenegger], the better.

observes: “[C]haracter traits have to be compressed and condensed. All non-essential character traits must be eliminated and then compacted—layered—into a denser form.”⁴³ There is no time for digression.⁴⁴ Character arcs are completed much faster and are far more visible than in novels. Viewers never get to look inside Kane’s thoughts, as is possible in novels when an omniscient narrator tells us precisely what a character is thinking. Instead, we intuit visually Kane’s thoughts from his actions.

Typically, an audience assesses film characters based on their actions and often distrusts and discounts characters’ literal words. For example, the audience judges Kane upon his decision to stand up and fight for his beliefs. Viewers are more skeptical, however, of the townspeople’s spoken justifications for their inaction. The audience disbelieves the conflicting rationales that the townspeople offer to explain why they prefer not to fight against Frank Miller, although some of these rationales seem quite thoughtful and logically persuasive. Thus, the film intrinsically prefers the external action of characters. As the novelist E.L. Doctorow, who has had many of his novels translated and adapted into excellent popular films, observes:

Film de-literates thought; it relies primarily on an association of visual impressions or understandings. Moviegoing is an act of inference. You receive what you see as a broad band of sensual effects that evoke your intuitive nonverbal intelligence. You understand what you see without having to think it through with words.⁴⁵

Additionally, Doctorow emphasizes the self-referential nature of film: the audience understands Will Kane and evaluates his predicament in relationship to previous roles that the actor Gary Cooper has portrayed in other films. This referential universe of film is important as the actor evokes other past characters he has played. Thus, Gary Cooper calls forth his prior heroic roles and the audience intuits Kane’s character in

Conversely, the clichéd art-house movie reaction to such reasoning is film that scorns action—and often, energy, vitality and relevance. But it has always struck me that in movies, far more than in any other dramatic medium, *movement*, not simply action, is most defining of character.

ROBERT TOWNE, 2 SCREENPLAYS: *CHINATOWN, THE LAST DETAIL*, at viii (1997).

43. MEHRING, *supra* note 35, at 187.

44. See Phil Meyer, *Why a Jury Trial Is More Like a Movie Than a Novel*, 28 J. L. SOC’Y 133, 135 (2001) (noting that to be effective, advocates must present their arguments in “unitary and focused narratives”).

45. E.L. Doctorow, *A World of Fewer Words*, in *THE BEST AMERICAN MOVIE WRITING 1999* 251, 253 (Peter Bogdanovich ed., 1999).

relationship to this filmic past. Doctorow observes, “Now, after a century of development, the medium of film generates its own culture. . . . Films work off previous films. They are genre referential”⁴⁶ The same may be said about the actors who portray the characters, especially the protagonists who inhabit these films.

In *High Noon*, Gary Cooper plays against type. Will Kane is a much older man than audiences at the time were used to seeing Cooper play. He is also a more complex and ambivalent character, one capable of betraying the women he loves, Helen and Amy. Kane is also initially fearful—he races out of town upon hearing of Frank Miller’s arrival—and must overcome his fear to act heroically at the end of the film, regardless of the consequences. He is certainly a much less commanding figure, a more fearful and ambivalent character, than the men Cooper typically portrayed in his earlier films.⁴⁷ There is, for example, a cinematic emphasis placed upon an uncharacteristic physical hesitancy and forced urgency in Cooper’s step, different from Cooper’s heroic “walk” in earlier films.⁴⁸ The audience identifies with Cooper in *High Noon* differently than it does in his past portrayals of more traditional, and less conflicted, heroic protagonists.

46. *Id.*

47. See, e.g., *SERGEANT YORK* (Warner Bros. Pictures 1941); *MEET JOHN DOE* (Frank Capra Productions 1940); *THE PRIDE OF THE YANKEES* (The Samuel Goldwyn Company 1942). For a discussion of Cooper’s acting career, see Gary Cooper: Films as Actor, <http://www.filmreference.com/Actors-and-Actresses-Co-Da/Cooper-Gary.html> (last visited Feb. 12, 2008).

48. Robert Towne describes how Cooper’s presence and wordless physicality conveys character and profound meaning:

Gary Cooper walked and used his hands like a man who’d spent years on horseback, riding across open plains and under endless sky. When the camera photographed him, it seemed to catch the reflection of those vistas in his eyes—or, more to the point, the *wonder* they evoked. Coop was great at suggesting wonder.

In *Sergeant York* he and his mule are struck by lightning and knocked flat in the mud beside the barrel of Cooper’s rifle, melted by the same lightning bolt. Cooper’s wild-eyed wonder perfectly expresses the shock of survival. It quickly gives way to a more bemused wonder at the reason for it, and then to the wonder of incredulity as he sees and can’t believe what he takes to be the reason: the little white church down the road suggests He’s been on the case.

When Cooper, cold and wet and shivering, enters the church and is swiftly led to the pulpit and embraced by the congregation, disbelief gives way to religious awe—the wonder of revelation, of being filled with gratitude and humility for his newfound faith in God. All this and more Cooper could and did suggest in a few seconds of film without opening his mouth, or opening it to speak, at any rate. No actor ever had words fail him more eloquently.

TOWNE, *supra* note 42, at vii.

2. Amy Kane and Helen Ramirez—Complex Characters

In addition to the protagonist–hero, there are other complex, or round,⁴⁹ characters in *High Noon*, including the two women in the film: Kane’s new young bride Amy, portrayed by a young Grace Kelly, and Kane’s former mistress, portrayed by Katie Hurado. Like Kane, Amy and Helen are compelling, attractive, and sexually charged characters. Also like Kane, these characters rivet the visual and imaginative attention of the audience. Both women, although extremely different, are incandescent on the screen. They represent clear and oppositional archetypes: the blonde, patrician, and initially dependent Amy; and the darker, street-smart, mercurial Mexican businesswoman Ramirez. Both are highly sexual, and both have deep relationships with Kane. Both Amy and Ramirez, in the course of the movie, are betrayed by Kane.⁵⁰ These betrayals and the women’s responses to Kane’s actions are at the core of their characters’ development in the movie.

Both Amy and Helen Ramirez are round characters. Both have a complex inner psychology that is revealed through their choices and actions. Both follow the clear character arcs characteristic of Hollywood films. For example, Amy begins the film as a Quaker who does not believe in violence; both her father and brother were killed in a gunfight. She has married Kane, but the marriage is conditioned on Kane’s promise to put down his badge, give up violence, and leave Hadleyville to become a shopkeeper. When Kane returns to Hadleyville to resume his job as marshal and to confront Frank Miller and the Miller gang, Amy feels betrayed. She leaves Kane, sacrificing her love to her beliefs, and plans to leave Hadleyville. But when she is on the train, ready to depart town, there is a character reversal: at the sound of gunfire she runs to assist her man. Although Amy is a pacifist, she picks up a gun and shoots the outlaw Corey in the back to protect Kane. And when Frank Miller takes her hostage, Amy defends herself. She claws at Miller’s face—freeing herself physically and perhaps also liberating herself from her beliefs—so that Kane has a clear shot at Miller and can kill him in the final shoot out. At the end of the movie, Amy leaves town with Kane, completing her character arc. She has moved from dependency and passivity to strength and action; her beliefs have been modified by the knowledge that she has gained

49. See *supra* notes 25–27 and accompanying text.

50. Curiously, many post-conviction relief briefs are also “betrayal” stories, where defendants are betrayed by attorneys, prosecutors, jurors, state courts, federal courts, and the criminal justice system. See, e.g., Meyer, *Retelling*, *supra* note 12, at 669–84 (analyzing the Williams Brief, *supra* note 12).

throughout the film, and this enables her to overcome her past.

Helen Ramirez follows an equally clear character arc. Like Amy, her character is defined exclusively through her relationship with Kane. Note that these complex characters are highly structured according to conventional screenwriting principles. The audience readily identifies and empathizes with these characters; we understand through their choice of actions who these characters are. Their choices affirm, rather than defy, our expectations.

3. Frank Miller—The Villain

Alfred Hitchcock has observed that “the more successful the villain, the more successful the picture.”⁵¹ The villain in *High Noon* is Frank Miller. He provides the oppositional, or antagonistic, force that creates the conflict that compels the characters to act and change. In *High Noon*, Frank Miller does not appear onscreen in person until the arrival of the noon train, in the final fifteen minutes of the film. Instead, his identity and character are established beforehand by what others say about him, from his reputation, and from the townspeople’s fear of him. Visual imagery (clocks, railroad tracks) foreshadows and sets the stage for Miller’s cinematic arrival, when he finally steps down off the train and out of the shadows. It might be difficult for an actor to maintain such sustained villainy for the full length of the movie. But Frank Miller does not have to do this; his villainy is anticipated by the viewer, who expects that Miller will prove a worthy adversary for Kane and will test both the strength of Kane’s beliefs as well as his physical abilities.

II. STATEMENT OF THE CASE IN PETITIONER’S BRIEF IN *ATKINS*

A. Illustrative Excerpts

There are two simple thematic stories told in the *Statement of the Case* in the petitioner’s brief written on behalf of Daryl Atkins. The first, *The Evidence Concerning the Crime*,⁵² recounts the story of Atkins’s trial; the second, *The Evidence at Atkins’s Sentencing Hearings*,⁵³ retells the story of

51. FRANCOIS TRUFFAUT, *HITCHCOCK* 141 (1967); see also *Pete Martin Calls on Hitchcock*, in *FILM MAKERS ON FILM MAKING* 123, 127–28 (Harry Geduld ed., 4th printing, Indiana Univ. Press 1971) (1967) (discussing Hitchcock’s preference for “charming and polite” villains).

52. Atkins Brief, *supra* note 7, at 1–8.

53. *Id.* at 8–18.

Atkins's initial sentencing and resentencing. Both stories are narratives about storytelling in legal proceedings. The first story compares the competing versions of the narratives Daryl Atkins and co-defendant William Jones present about who did what and why in the murder of Eric Nesbitt. The second primarily compares versions of the two testimonial stories told at Atkins's sentencing and resentencing. One version is presented by Atkins's defense witnesses, especially the clinical psychologist Dr. Evan Nelson, while a competing version is presented by the State, especially the rebuttal expert Dr. Stanton Samenow. The two elliptical narrative pieces of the *Statement of the Case* are parallel in construction and in the roles they assign to the competing storytellers (protagonists and antagonists, respectively) in the legal drama. Both halves of the story are equally compelling and purposeful, and both provide the necessary "hooks" upon which to hang the legal argument that follows. For the purposes of this essay, however, which is to compare and contrast the characters with those in *High Noon*, I focus primarily upon the first story.

There is, of course, also a third story: the powerful and architecturally complex legal argument about why it is cruel and unusual punishment under the Eighth Amendment to execute mentally retarded defendants.⁵⁴ The *Argument* integrates medical information about the effects of mental retardation with close readings and analyses of various cases. It is only at the end of the *Argument* that the factual particulars of Daryl Atkins's case are revisited.⁵⁵

Nevertheless, the *Argument* may be read, especially in the context of the *Statement of the Case*, as part of the overall structure of a story. Components of narrativity exist within the *Argument* as much as the *Statement of the Case*. These components are supported by an underlying story frame, and they fit together upon a thematic narrative spine. Further, the *Argument* implicates narrative theory in that it is predicated on the "identity," or "character," of a mentally retarded defendant and how the defendant fares in legal proceedings (his fate, destiny, or doom). These terms, of course, are never foregrounded explicitly in the *Argument*. To raise this narrative terminology would simply not fit the argument and could destroy its analytical power and logical coherence.

Read as narrative, however, it is the law, the powerful and controlling legal precedent of *Penry v. Lynaugh*,⁵⁶ that is "cast" in the role of an

54. *Id.* at 19–41.

55. *Id.* at 42–45.

56. *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) (holding execution of mentally retarded persons not categorically prohibited by the Eighth Amendment).

antagonist or a “force of antagonism,” and given a new name, “*Penry I.*”⁵⁷ This antagonist, *Penry I.*, creates the legal “trouble,” and may be revisioned creatively as quite an interesting villain, more complex and compelling than the antagonists whom the reader meets in the *Statement of the Case*: co-defendant Jones in Part 1 and the callous Dr. Samenow in Part 2. Certainly, the character Atkins, or any other mentally retarded defendant, is no match for *Penry I.* These defendants are thus akin to the townspeople in *High Noon*.

The Brief also contains stories-within-stories, which the author specifically highlights as “cautionary tales.”⁵⁸ The last-minute pardons of Earl Washington and Anthony Porter provide narrative material that illustrates the fate that inevitably awaits mentally retarded defendants under the *Penry I.* standard.⁵⁹ These are far more factually compelling cases than *Atkins* itself. They are cases in which the mentally retarded defendants who were sentenced to execution were actually innocent. That is, a strong underlying but implicit narrative frame shapes the legal argument’s many pieces into a compelling legal story. This story, in turn, is integrated into an overall story-structure that complements the stand-alone architecture of a complex and compelling paradigmatic legal argument. The key point is that the pieces of this extremely persuasive and effective brief are conceptually integrated through narrative strategies. Unlike the outline structure of the *Argument*, these narrative strategies are not explicitly revealed or initially apparent.

The factual and legal stories, for example, are developed as melodrama, as in *High Noon*. The sequential telling of the related stories has a rhythmic intensity. Each discrete section marks the arrival of a new and more overwhelming trouble. Indeed, the *Argument* may be read as a plea to the Supreme Court—a call to the hero—to intervene on behalf of Atkins and the other townspeople, who cannot protect themselves in the final legal showdown with *Penry I.* The brief and film are also similarly suspenseful; just as defendant Atkins awaits his impending execution, so too does Will Kane await the black smoke from the train signaling the arrival of the villain Frank Miller.⁶⁰ While Foreman provides closure in *High Noon*, the ending of the *Atkins* brief is unclear and open; it is left to the Court to provide narrative closure and a coda of meaning.

57. Atkins Brief, *supra* note 7, at 19.

58. *Id.* at 35.

59. *Id.* at 35–36; *see also infra* note 125.

60. *See Meyer, Retelling, supra* note 12, at 692–96 (discussing suspense and surprise as components of effective plotting in mystery and detective fiction—and perhaps in narrative persuasion in legal briefs).

B. Excerpts from the Initial Crime Story

The *Statement of the Case* begins with Atkins's initial trial and sentencing proceedings.⁶¹ It uses dialogue extensively to compose, develop, and contrast the two primary characters: petitioner Daryl Atkins and co-defendant William Jones, who testifies against Atkins. The story employs testimonial excerpts presented as dialogue to illustrate how the mentally retarded defendant is disadvantaged in litigation.⁶² These excerpts demonstrate that the defendant's condition makes it difficult for him to participate effectively in his own defense and to tell his story. This allows another version of events to be privileged over his less coherent story.

Implicitly, Atkins's voice also reveals his state of mind. His mental retardation prevents him from possessing the culpability to be sentenced to death. The narrative is presented like a radio play; it reenacts selected portions of the trial proceedings almost exclusively through edited testimonial excerpts arranged "dialogically."⁶³ The edited testimonial narrative is presented as competing versions of the story of the murder. The narrative is developed through a sequence of courtroom scenes. These scenes contrast the motivations, words, and actions of the co-defendants—that is, the composite *character* of Atkins, who is convicted of capital murder and sentenced to death, with the *character* of the cleverer and more intellectually capable co-defendant William Jones, who avoids imposition of the death penalty by testifying against Atkins.⁶⁴ Jones is depicted as being more capable of concocting a persuasive story, of negotiating the criminal justice system, and of participating effectively in his defense by identifying co-defendant Atkins as the triggerman eligible for the death sentence.

The first section of the *Statement of the Case*, subtitled *The Evidence Concerning the Crime*, locates the crime itself in the "back story"—the

61. Atkins Brief, *supra* note 7, at 2–18.

62. See, e.g., *id.* at 6 (contrasting the co-defendants' conflicting stories about the shooting).

63. See PRINCE, *supra* note 25, at 19 (defining "dialogic narrative" as "characterized by the interaction of several voices, consciousnesses, or world views, none of which unifies or is superior to (has more authority than) the others").

In dialogic as opposed to monologic narrative, the narrator's views, judgments, and even knowledge do not constitute the ultimate authority with respect to the world represented but only one contribution among several, a contribution that is in dialogue with and frequently less significant and perceptive than that of (some of) the characters.

Id. at 19–20; see also *id.* at 54 (defining "monologic narrative" as "characterized by a unifying voice or consciousness").

64. Atkins Brief, *supra* note 7, at 2.

narrative time before the presentation of evidence.⁶⁵ The first paragraph only briefly references the robbery and murder of Eric Nesbitt. “He was robbed of the money in his wallet, driven in his own truck to an ATM and required to withdraw more money, then driven eighteen miles to York County, where he was shot eight times and killed with a semi-automatic handgun.”⁶⁶ After the body is discovered, a videotape from the ATM transaction reveals Nesbitt sitting between two African American men, later identified as twenty-six-year-old William Jones and eighteen-year-old Daryl Atkins.⁶⁷

The scene then shifts to the investigation and trial, and it is here that the story begins. It is told primarily through the competing first-person voices of Atkins and Jones. The reader is given selected excerpts from their testimonies, which have been cut and spliced together. The reader is invited to weigh the testimony and assess Atkins’s ability to assist in his capital defense, despite his apparent mental retardation. The shrewder Jones, in contrast, seems far more capable of directing and shaping the outcome of the story by casting blame and responsibility upon co-defendant Atkins. Their voices are presented as unmediated dialogue, and the reader is left to infer the characters of Atkins and Jones.

Atkins gives a statement the day of his arrest identifying Jones as the triggerman.⁶⁸ Jones, however, does not give a statement, playing his legal hand more carefully.⁶⁹ Both are indicted for capital murder, but in Virginia, “only the triggerman could be convicted.”⁷⁰ A year later Jones tells the authorities that he took part in the robbery and abduction but “blame[s] Atkins for the shooting.”⁷¹ Jones pleads guilty to first degree murder, “a plea that made him ineligible for the death penalty—with a requirement that he testify against Atkins.”⁷² The scene then shifts to the “guilt phase” of Atkins’s trial. The scene is initially set from Jones’s point-of-view: Jones and Atkins spend the day drinking, smoking marijuana, and watching television.⁷³ They go to a convenience store for beer and then to a liquor store; running low on money, Atkins panhandles.⁷⁴

65. *Id.* at 1–8. I focus upon the initial portion of the *Statement of the Case*, entitled *The Evidence Concerning the Crime*, for purposes of this illustrative excerpt.

66. *Id.* at 1.

67. *Id.* at 1–2.

68. *Id.* at 2.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 3.

74. *Id.*

Here, the two stories of Jones and Atkins diverge. Their voices are presented in sequence, which enables readers to assess the characters, their identities, and their credibility in relationship to one another. For example, first Jones asserts Atkins had a gun in his belt.⁷⁵ Then Atkins speaks: “Me and William Jones was on the side of the 7-Eleven and we planning to rob somebody. And William Jones had the gun.”⁷⁶ In contrast, Jones’s sentences are clear, his grammar correct, but there seems to be a self-serving purposefulness and manipulation to his recollections. In Jones’s version of the story, Atkins is the dominant actor and initiator, while Jones is the submissive and subservient actor. For example, when Jones is close enough to hear what is occurring, the robbery is already well underway; as Jones gets into the car, he realizes “at that point” he is involved in a robbery.⁷⁷

In contrast, Atkins’s syntax is convoluted and ungrammatical. His speech draws attention to itself and confuses the events of the story it tells. Nevertheless, his story is filled with images, sharp visual fragments that arrest the reader’s attention, inviting the reader to speculate on Atkins’s character. Atkins’s voice foregrounds the mental retardation that limits his abilities and, perhaps implicitly, also limits his culpability. For example, as Atkins describes the scene, the victim Nesbitt is backing out of the 7-Eleven parking lot when “William Jones waved him down.”⁷⁸ While Jones talks with Nesbitt, Atkins emerges: “We started chatting for a while, and then William Jones pulled out the gun.”⁷⁹ The writer composes the testimonial fragments in a way that invites the reader to visualize Atkins imaginatively and to speculate upon his acts and motivations. Atkins’s voice provides the only clues to his character; no additional description of Atkins’s or Jones’s physicality, or the setting and scene is offered.

The story also provides an illustrative case study that must support the complex theoretical argument that will be made in the next section of the Brief. This argument explores how mental retardation limits the culpability of the defendant and how mentally retarded defendants are inherently disadvantaged in the legal system.⁸⁰

The writer walks a tightrope. The retelling of Atkins’s story must be compelling and persuasive. It must engage the reader imaginatively. At the same time, however, it cannot present the story in such a way that the reader

75. *Id.*

76. *Id.*

77. *Id.* at 4.

78. *Id.*

79. *Id.*

80. *Id.* at 20–37.

speculates about why Atkins wasn't believed in the initial trial proceedings. The reader should not feel manipulated by the innovative form of the narrative. Nor should the reader feel compelled to challenge implicit assertions about Atkins's character (and whether Atkins is indeed so mentally retarded that his condition prevents him from forming the mens rea required to be convicted of capital murder).

The quotes are carefully selected, the scenes woven together as sequences.⁸¹ For example, Atkins says, "Jones 'told me get around.' So Atkins '[g]o around in the passenger.'"⁸² After Atkins enters on the passenger's side, and Jones takes the driver's seat, Atkins explains that Jones "handed me the gun with both of his hands and I hold the gun."⁸³ Atkins repeats himself, he refers to himself in the third person, and his grammar is poor. The writer presents and focuses upon excerpts in the dialogue that reveal Atkins's simple character. There is no commentary on this dialogue. It is cinematic rather than novelistic in that there is no authorial intrusion and certainly no direct movement into the consciousness or thoughts of the speaker (although this material might be available in the transcripts of Atkins's testimony).

There are two competing versions of the initial armed robbery and the drive to the bank where the murder victim Nesbitt is forced to withdraw another \$200 from an ATM. The roles of the participants are reversed in the two tellings.⁸⁴ Together, they obscure who is the dominant initiator and who is the more passive accomplice. Likewise, the two versions of the murder itself are presented dialogically,⁸⁵ alternating the perspectives of Jones and Atkins. Jones's version of the killing is presented in an active voice with short, grammatically correct sentences: "'Mr. Atkins got out. He directed Mr. Nesbitt out.' Atkins still had the gun. 'As soon as Mr. Nesbitt stepped out of the vehicle and probably took two steps, the shooting started.'"⁸⁶ In Jones's version, Jones even visualizes himself in the role of the hero: Jones goes "around the back of the truck, aiming 'to get the gun away from Mr. Atkins,' 'to stop him from killing Mr. Nesbitt.'"⁸⁷ Jones's

81. As Peter Brooks observed at the planning conference for the Narrative Persuasion Institute, the "*fabula*" of the evidence presented in the trial proceedings is reshaped into the rigorous structure of the "*sjuzet*," or plot. Audio tape: Peter Brooks, Remarks at the Unpublished Planning Conference at the Narrative Persuasion Institute (May 15–17, 2003) (on file with author); see also BROOKS, *supra* note 29, at 12 ("*Fabula* is defined as the order of events referred to by the narrative, whereas *sjuzet* is the order of events presented in the narrative discourse.>").

82. Atkins Brief, *supra* note 7, at 4.

83. *Id.*

84. *Id.* at 4–5.

85. See *supra* note 63 for a definition of dialogic narrative.

86. Atkins Brief, *supra* note 7, at 6.

87. *Id.* (citations omitted).

telling, at least to this reader, seems rehearsed, pat. Jones avoids assuming any major role in the killing and instead depicts himself as an unwitting accomplice.

The ungrammatical and less coherent version that Atkins presents seems far more authentic and persuasive. Here, for example, is an illustrative paragraph from the petitioner's brief, which presents Atkins's version of the same events. It splices together quotations and spare authorial intrusions that allow readers to make their own assessments of Atkins's character. Several vivid details are captured.

Atkins's version was that Jones stopped the truck and "told me to get out, me and Eric Nesbitt to switch places. He never said why. So I hand—he told me to hand him the gun. I hand him the gun. I got out first. Eric Nesbitt got out behind me. I got back in. Eric Nesbitt got back in. William Jones still had the gun. He put it in a holster that he had on his belt, a black nylon holster. Then he drove up the street a little more. And then I noticed it was like a fork in the road. So then he stopped and backed up, and then he backed up, parked the car, and he opened up the door. . . . He told Eric Nesbitt to get out. . . . Eric Nesbitt got out." Atkins was in the truck, "in the middle." "As Eric Nesbitt was getting out, William Jones got out, too. So by the time Eric Nesbitt got out the vehicle, William Jones was there. He had come around the back of the truck. . . . He—Eric Nesbitt bend over and William Jones told him to get up. And he didn't get up. And then the shooting started." Jones did the shooting. Atkins was still in the truck. There were a lot of shots. After they started, Atkins's "leg was hurting, so I reached down to look at my leg. . . . Then I didn't hear no more shots. And then William Jones got inside the driver's—he came back around, got inside the driver's and took off." Atkins asked Jones why Jones had shot him, and Jones tried to figure out how he shot Atkins. Atkins asked Jones to take him to the hospital "[b]ecause my leg was hurting." Atkins also "asked . . . [Jones] where did he shoot him [Nesbitt] at. He said he shot him in the body."⁸⁸

From his testimony, it appears that Atkins is speaking for himself, with unmediated language and quotation. But this presentation is a meticulous and well-crafted narrative; it shifts perspectives, creates a rhythm, and builds the scenes into careful sequences. When writing purposefully, such as he does when depicting the murder itself, the writer slows the pace of the

88. *Id.* at 6–7 (citations omitted).

telling. He reconstructs the murder by splicing scenes together and editing the transcript into a montage. Although the jury initially disbelieved Atkins's testimony and sentenced him to death, the reader is invited to revisit Atkins's story to assess his mental retardation. The narrative emphasizes Atkins's inability to convey this complex story effectively because of his disability. Since the story is told through direct quotation, the reader does not challenge the composition of the pieces as a unitary story or question the narrative intelligence and strategies at work.

C. *The Characters*

The depiction of credible and persuasive characters is crucial to the powerful legal argument that follows. The initial section of *The Statement of the Case* must establish a narrative context that enables readers to understand why Atkins's mental retardation inherently disadvantaged him during the investigation and the trial. The facts of the case may distinguish it from several other examples cited in the brief since in those cases, mental retardation resulted in the conviction of defendants who were actually innocent.⁸⁹ Given that Atkins was indisputably involved in a murder, this crucial initial portion of the narrative must be presented so the reader does not feel led or manipulated. Instead, the narrative should invite the reader to assess for himself the two competing stories. It should also prompt the reader to consider why Jones fares better in the process than does Atkins, which of the two is telling the truth, and to what extent Atkins is responsible for the murder. Atkins must also engender some sympathy, although he is clearly guilty of participating in the horrific killing of the victim Eric Nesbitt.

The art of narrative persuasion—telling a story to make a point—is often best achieved not by summary, but rather by recreating illustrative scenes, such as those from the trial and investigation. The dialogical positioning of the co-defendants' competing versions sets one voice against the other, as if in structured scenes. This method invites the reader to speculate upon the relationship between Atkins and Jones. The reader implicitly understands that Jones is the dominant character, while Atkins is passive. The reader understands that Jones is manipulating the system to avoid execution and also why Atkins will inevitably be condemned to death, while Jones will not.

Careful selection of testimonial pieces and construction of these pieces into a whole further enable the reader to understand Atkins's psychology

89. *Id.* at 35–36; see also *infra* note 125.

and make determinations about Atkins's "character." The advocate must be careful not to manipulate the reader overtly, however, or he risks being cast, as is Jones, in the role of manipulator and fabricator of stories. The narrative is extremely economical and stylistically understated. Nevertheless, it is sufficient to depict Atkins's character and illustrate the points of the analytical argument.

Some of the screenwriting terminology used to analyze characters in *High Noon* helps us to understand how the initial section of the *Statement of the Case* accomplishes its purposes. Initially, like *High Noon*, the *Statement of the Case* in Atkins presents a linear, protagonist-driven, character-based story. As in many, but not all, death penalty briefs, the defendant-petitioner Atkins is at the center of the tale, and he remains so throughout the story.⁹⁰ Unlike Will Kane, however, Atkins is a pathetic character, the antithesis of a hero. He is not charismatic or attractive—at most he may engender sympathy. Nor does his situation automatically move the reader. The reader doesn't identify with the character, isn't attracted to him, and feels no empathy for him or for his predicament. Nevertheless, the writer must depict Atkins in such a way, with such steadfast care, that the reader will recognize Atkins's humanity, try to understand his predicament, and entertain the possibility that he does not deserve to be executed. The reader must be motivated to take action on Atkins's behalf.

Here, the writer makes a shrewd and confident choice. He simply steps out of the way. He avoids extraneous physical description and tells the story, almost exclusively, with Atkins's own voice. The writer lets Atkins speak for himself; the selected excerpts from Atkins's ungrammatical and confused presentation of his own story allow the reader to draw inferences about Atkins's character. The positioning of these testimonial pieces in relationship to Jones's telling of the same story is equally shrewd; it is as if the two characters are in dialogue, presenting contrasting versions of the murder of Eric Nesbitt. This is, of course, a function of the storytelling form.

Atkins is in some respects a round rather than flat character in that he seems to have some psychological depth. Yet he is certainly not complex in any literary sense (as characters in briefs seldom are). As compared to the complex characters in *High Noon*, there is no discrete character arc, no identifying movement or change within the psychology of the character. Of course, this is precisely the point: Atkins remains, by design, a static and

90. See, e.g., Brief for Respondent at 1–9, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633) (using Simmons's name sixty-eight times in the *Statement of the Case*).

unchanging character; his limited abilities make him incapable of change or of participating effectively in his own defense.

In contrast, Jones is the antagonist in the initial portion of the *Statement of the Case*.⁹¹ Just as in all melodrama, there must be a clear villain or forces of antagonism that confront and oppose the protagonist. In each portion of the typical post-conviction relief brief, there is clear and discrete “villainy” or “trouble” (including the story told in the *Argument*). That is, post-relief briefs are typically stories about systemic victimization and villainy that build throughout the narrative.

In the initial section of the *Statement of the Case*, it is Jones who is the antagonist; he condemns Atkins to death in order to escape death himself. The second part of the *Statement of the Case*, which tells the story of Atkins’s sentencing and re-sentencing, is peopled by new villains. Among them is the State’s expert, Dr. Samenow, whose rogue medical approach allows him to conclude, without ever bothering to conduct a full examination or administer relevant testing, that Atkins is not mentally retarded.⁹² Likewise, “villainy” recurs throughout the legal story.⁹³

III. OBSERVATIONS

A. *Theme Shapes Character*

Theme has become a rather vague term in the writer’s vocabulary. . . . I prefer the phrase *Controlling Idea*, for like theme, it names a story’s root or central idea, but it also implies function: The Controlling Idea shapes the writer’s strategic choices. It’s yet another *Creative Discipline* to guide your aesthetic choices toward what is appropriate or inappropriate in your story, toward what is expressive of your Controlling Idea and may be kept versus what is irrelevant to it and must be cut.⁹⁴

Carl Foreman intended *High Noon* to be an explicitly polemical film about a judicial-type proceeding: the hearings of the House Un-American Activities Committee (HUAC).⁹⁵ He tells a single, integrated narrative

91. Atkins Brief, *supra* note 7, at 1–8. The State’s expert witness, Dr. Stanton Samenow, assumes this role in the second part of the story, when competing experts battle over the question of Atkins’s mental retardation. *Id.* at 8–18.

92. *Id.* at 15–18.

93. *See infra* text accompanying notes 111–14.

94. MCKEE, *supra* note 19, at 114–15; *see also* Meyer, *Vignettes*, *supra* note 21, at 260 (noting Mckee’s emphasis on illustrating theme through “depiction” rather than “explanation”).

95. Foreman, *supra* note 10.

from which the reader can derive clear meaning. To do so, he depicts compelling characters who are portrayed by a company of superb actors. Although Foreman wrote, directed, and produced many films with explicitly political messages, he identifies *High Noon* as the only “polemical” film he ever made; it is an argument repackaged as a narrative. Foreman began writing the film in 1949, in the time leading up to the HUAC hearings, when he believed the Hollywood community “beg[an] to crumble around the edges.”⁹⁶ Foreman perceived his community to be under attack by “political gangsters,” whom he brought to life onscreen as the Miller gang. Foreman observed that he could “almost smell the fear that rose . . . like the smog we have now.”⁹⁷ Foreman speaks of his ostracism from the Hollywood community for refusing to testify before the HUAC and cites Gary Cooper’s lines when he determines to return to Hadleyville to take his stand against the Miller gang: “I’ve got to go back They’re making me run; I’ve never run from anything before.”⁹⁸ In *High Noon*, Foreman recasts his personal drama as allegory about a community where “people cross the street, just like in the movie, so as not to have to speak to you.”⁹⁹

Foreman selected the narrative frame of the traditional Western to transform his personal drama into a compelling movie. Unlike traditional Westerns, however, the emphasis is not exclusively on the external heroic actions of the protagonist battling against the evil villain. Instead, the core of the picture is the long second act, commencing with Kane’s initial reversal and return to Hadleyville to await Frank Miller’s arrival. This act is about character, about fear and betrayal, and about the psychological pressure that the pending arrival of Frank Miller places upon the various characters, including the townspeople of Hadleyville. The characters respond to these internal and external forces of antagonism and to one another. Specifically, the pressures on the various characters—particularly the primary round characters, Will Kane, Helen Ramirez, and Amy—develop and emphasize their psychological complexity. Relationships are tested and the pressure forces character development and the completion of character arcs. With Kane and Amy, this occurs through heroic external actions. It is inaction, however, that completes the character of the mercurial and passionate Helen Ramirez, who rationally leaves town rather than participate in a fight that is no longer her own. The complex depiction of these characters draws the viewer in. Viewers measure how they might

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

respond to similar pressures, and they are satisfied that each character has completed their psychological journey by the end of the movie.

Similarly, the narrative in the *Atkins* petitioner's brief presents story themes that are primarily about the inability of Atkins and other similarly situated defendants to respond psychologically to the pressures placed upon them both by judicial proceedings and, as discussed below, by the arrival of a shadowy legal villain that needs to receive comeuppance in the final act of the legal melodrama. The story, however, appears as a literal rendering of past-tense legal proceedings. Unlike *High Noon*, the pressure on Atkins—or upon other similarly situated characters, secondary characters akin to the townspeople in *High Noon*—does not reveal complex psychology or inner contradictions; nor does it yield the compact yet satisfying developmental arcs typical of filmic characters responding to external pressure. Indeed, the pressure results in just the opposite. Defendant Atkins simply cannot respond appropriately to the situation. Likewise, similarly situated mentally retarded defendants cannot respond to the pressures that judicial proceedings place upon them; they cannot make informed choices; they cannot develop or change.

The theme of the *Atkins* brief, as well as the way the narrative illustrates the *Argument's* generalizations, diminishes character complexity, particularly that of Atkins, who becomes but one of a class of defendants victimized by his environment. The audience never fully visualizes Atkins. He is never described physically. There is no revelation or change in his character. Atkins has no character arc; he undergoes no transformation and experiences no awareness of himself as a murderer or an accomplice to a murder. Atkins is just one of many mentally retarded defendants unable to negotiate the intricacies of the criminal justice system and thus subject to manipulation.

Nevertheless, the initial section of the *Statement of the Case* must present enough sense of Atkins's character to draw readers into the story so that they can understand Atkins's situation, appreciate his predicament, and if not empathize with him, then at least perceive his humanity. The brief chooses an interesting narrative strategy. It presents and emphasizes what may be Atkins's most compelling and character-revealing quality: his voice, particularly as it sounds in dialogue with Jones, his co-defendant and adversary. The brief focuses on the ways Atkins flounders during the trial proceedings. It also reveals Atkins's internal struggle. That struggle is not between conflicting and subtle psychological forces inside himself (for example, remorse, regret, sadness, or rage) akin to the complex conflicts that affect Kane. Rather, Atkins's struggle is simply to express himself clearly in order to negotiate the criminal justice system and avoid execution.

B. Characters in Melodrama

Melodramatic good and evil are highly personalized: they are assigned to, they inhabit persons who indeed have no psychological complexity but who are strongly characterized. Most notably, evil is villainy; it is a swarthy, cape-enveloped man with a deep voice.¹⁰⁰

The more successful the villain, the more successful the picture.¹⁰¹

Though Hitchcock may have been *compelled* to tell his stories, as far as the audience is concerned, he remains in charge and is applauded by critics for ringing changes on a narrative form that openly identifies itself as artifice.¹⁰²

In *High Noon*, screenwriter Carl Foreman transforms a story of fear and betrayal into a traditional Western melodrama; the rendering of the theme is allegorical and imaginative. The story is populated by compelling characters with whom the audience readily identifies and a villain who can properly test the protagonist's character and his capacity for selfless heroism. Despite their scripted complexity, the characters are conceived and developed within the framework of a traditional Hollywood form. The story is, at its positivist core, a melodrama about the confrontation of good and evil, the heroic protagonist battling against the evil villain.

Within this archetypal battle, Alfred Hitchcock suggests that the depiction of the character of a powerful villain is as important as that of a protagonist hero. Nevertheless, despite the power of the villain, the hero must in the end defeat the villain and the forces of antagonism; “[m]elodrama denotes a story that ‘ends on a happy or at least a morally reassuring note.’”¹⁰³ As Peter Brooks notes, melodrama requires the “persecution of the good, and final reward of virtue.”¹⁰⁴ Under Brooks's requirements, however, there is additional room in the outcome for determination of the victor: “The ritual of melodrama involves the

100. PETER BROOKS, *THE MELODRAMATIC IMAGINATION* 16–17 (1976); *see also* NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* 89 (2000) (quoting Brooks, *supra*, and noting that “melodrama is populated with easily recognizable character types”).

101. TRUFFAUT, *supra* note 51, at 141 (quoting Alfred Hitchcock).

102. ROEMER, *supra* note 9, at 75.

103. FEIGENSON, *supra* note 100, at 90 (quoting David Thorburn, *Television Melodrama*, in *UNDERSTANDING TELEVISION: ESSAYS ON TELEVISION AS A SOCIAL AND CULTURAL FORCE* 73, 74 (Richard P. Adler ed. 1981)).

104. BROOKS, *supra* note 100, at 11–12.

confrontation of clearly identified antagonists and the expulsion of one of them.”¹⁰⁵

The filmmaker and literary theorist Michael Roemer observes that the viewer of melodramatic and “positivist” popular film always roots for the hero and against the villain. This, Roemer proposes, is not the case with readers of literature, especially readers of the modern novel of the nineteenth and twentieth centuries. Roemer notes that because “the audience of . . . melodrama is expected to *accept* the status quo, evil can be projected onto a villain.”¹⁰⁶ Roemer expands upon his perception:

Whereas Dostoevski makes an absolute connection between evil and suffering—we understand *why* Rogoshin and Raskolnicov do what they do—popular story has no sympathy for the devil. . . . Popular story is judgmental: It knows right from wrong and identifies wholeheartedly with the hero. If *he* does the forbidden, it is with good reason and the best of intentions.¹⁰⁷

Roemer continues:

Popular story shows us as we are supposed to be and wish to see ourselves. Like the community itself, it represses what tragedy includes. By projecting evil onto the other, it purges us of our dark and dirty secrets, frees us from self-division, and fosters *communitas* by giving us someone to hate and fear. . . . [W]ithout a destructive threat—whether it be divine or human—there *is* no story. Most narratives begin when something goes wrong, and evil is often the energy that drives it forward.¹⁰⁸

At its core, and despite the scripted complexity of the various round characters in *High Noon*, at least as compared to most traditional Western films, and despite its purpose to encapsulate a clearly “polemical” and political theme, *High Noon* adopts the conventions of the traditional

105. *Id.* at 17.

106. ROEMER, *supra* note 9, at 281–82.

107. *Id.* Roemer instructively adds illustrations from recent popular films:

The ‘antihero’ of recent movies is simply a hero with dirty fingernails, who—unlike Hamlet and Othello—is never cruel to the innocent and defenseless. When Paul Newman initiated the sequel to *The Hustler*, he chose to play the villain, but unlike George [C.] Scott—who, in the original film, seduces the hero’s girl and causes her suicide—Newman caters to what the audience expects of a “leading man” and ends up *protecting* the couple.

Id. at 281.

108. *Id.* at 281–82.

positivist Hollywood Western. The viewer responds to the film because it is at its core a melodrama, rooting for the good guys against the bad, for the ultimate victory of good over evil. At the end of the movie, the viewer does not sympathize with the murdered Miller or with the other members of the Miller gang who have been killed.

Could the story have been shaped otherwise? Theoretically, the narrative could have been a tragedy, if, for example, Will Kane had died in the shootout with Miller, his hubris and desire to save the townspeople propelling him to his tragic end. This might have been more akin to the self-sacrifice of those, including Foreman himself, who refused to testify as cooperating witnesses before HUAC. But this ending would have defied audience expectations and the conventions of the Western melodrama, and such a film would probably never have been made. Instead, Foreman provides a delicate and ambiguous coda at the end of the movie.

The Brief in *Atkins* may likewise be understood as a legal argument encased in the form of a traditional melodrama; the simple “positivism” of melodrama naturally complements and showcases the analytical positivism of the legal argument itself. Consequently, the characters assume—are cast into—identities appropriate to their roles in the legal drama. What, exactly, do I mean by this? How can the narrative frame of the *Argument* presented in the petitioner’s brief in *Atkins* be read as a melodrama? And how can the characters populating the story be interpreted within the framework suggested by a traditional Western melodrama?

Atkins, as he is depicted in the initial *Statement of the Case*, does not appear to be a protagonist in the heroic sense, but the facts of his case are at the center of the legal drama. Although the advocate may wish that it were otherwise, Atkins is neither an attractive nor a sympathetic character. He lacks the carefully structured complexity of Will Kane. He follows no character arc and makes no choices that reveal his character positively to the reader. Of course, the advocate cannot exaggerate or transform his predicament or his character; he is constrained by the record. Also, it does not serve the advocate’s purpose to reveal any traits that distinguish Atkins’s character from that of any other mentally retarded defendant, since his objective is not just to argue on behalf of Atkins, but rather on behalf of all similarly situated defendants.

Instead, the initial section of the *Statement of the Case* simply emphasizes the literal sound of Atkins’s voice. His is the voice of a damaged person, a mentally retarded man. It is a voice that is capable of evoking sympathy, especially when contrasted with the voice of the slicker, and in many ways, less believable and more manipulative character Jones. Atkins’s voice provides the narrative hook, and the story of the judicial

proceedings that resulted in Atkins's initial conviction is a composite of edited "scenes," a dialogue constructed with testimonial excerpts and fragments from the transcripts. There is no authorial intrusion or summary that interconnects the scenes or provides meaning for them. The reader revisits the trial proceedings and speculates on Atkins's and Jones's conflicting versions of events. The intended overall effect of this presentation is to create some discomfort, confusion, and irresolution for the reader.

Likewise, Jones is not the obvious or powerfully exaggerated villain characteristic of melodrama. We cannot see or clearly visualize Jones; he is not described or clearly depicted. There is no scene where the "real" Jones, the man in the dark cape, finally emerges and steps down off the train, moving, metaphorically, from the darkness and shadows into the clear high-noon sunlight. Nevertheless, the reader is invited to explore the subtext of Jones's version of the story of Eric Nesbitt's murder; to speculate on how Jones escapes the death penalty by casting blame entirely upon Atkins. Although Jones is articulate in comparison to Atkins, his insistence that he is a victim and his surprise at Atkins's actions do not ring true, at least to this reader. In *High Noon*, Will Kane, the protagonist, is the more complex character, and the villain Frank Miller is merely an image, the man in the black cape, who arrives late in the movie, but is preceded by his character-establishing reputation. In contrast, the reader might speculate that Jones is psychologically more complex than Atkins; that Jones is also cleverer and more capable of making shrewd choices to avoid imposition of the death sentence. But neither Jones nor the character of the State's expert, Dr. Samenow, from the second section of the *Statement of the Case*, are depicted as villains, especially as exaggerated in melodrama.

Where, then, in the *Atkins* Brief is the "melodramatic" framework that can shape plot design and, with it, characterization? This framework is apparent when the first and second sections of the *Statement of the Case* are read in anticipation of the complex legal argument that follows. The legal argument does not appear to present a narrative, or even components of narrative. In fact, until the end of the *Argument*, there are few, if any, references back to any of the specific facts of *Atkins*.

The *Argument* formulates a cohesive and architecturally compelling assemblage of pieces. It presents medical evidence about the effects of mental retardation.¹⁰⁹ It also discusses the legal ramifications of executing mentally retarded defendants.¹¹⁰ The discussion explores how mentally

109. Atkins Brief, *supra* note 7, at 20–24.

110. *Id.* at 24–31.

retarded defendants are profoundly disadvantaged within the legal system, how they lack the personal culpability to be executed, and how they are, by virtue of their mental retardation, inevitably condemned to suffer horrific and unjust outcomes.

Simultaneously, the *Argument* may be read as presenting a compelling legal story. It is, like many briefs in death penalty cases, a call to the hero. Here, the Supreme Court is cast in the role of the hero and protector, so that it might intervene to protect a class of defendants from victimization and villainy. These defendants are simple characters who cannot protect themselves, akin to the townspeople in *High Noon*. Unlike the completed story in popular film, it is open-ended, written as a final and compelling plea for the Court to intervene and write a new coda for the tale.

In this third movement of the Brief, the legal argument itself, another, truer villain takes the stage: the Court's decision in *Penry I*,¹¹¹ which allows defendants "to plead mental retardation in mitigation on a case-by-case basis,"¹¹² but does not categorically prohibit execution of the mentally retarded. This villain—*Penry I*—allows and encourages co-defendants like Jones or the equally unscrupulous Dr. Stanton Samenow¹¹³ to victimize defendants like Atkins. As the *Summary of Argument* observes, the "right vouchsafed by *Penry v. Lynaugh*" is "insufficient to prevent the risk that retarded persons will be sentenced to death despite their lack of the requisite culpability—and even in some cases despite their innocence—because the characteristics of their condition make them unusually susceptible to mistaken and arbitrary condemnation."¹¹⁴

The *Argument* presents a careful sequence of well-developed analytic points. These points include:

- A. Mental retardation impairs understanding and functioning in ways that substantially reduce personal culpability;¹¹⁵
- B. A sentence of death is grossly disproportionate to the personal culpability of defendants afflicted by mental retardation;¹¹⁶
- C. Executing individuals with mental retardation serves no

111. *Penry v. Lynaugh*, 492 U.S. 302, 337–38 (1989).

112. *Atkins Brief*, *supra* note 7, at 19.

113. *See id.* at 17 (noting that Dr. Samenow "attributed [Atkins's] 'terrible' performance to a bad 'attitude'" (citations omitted)).

114. *Id.* at 19.

115. *Id.* at i, 20–24.

116. *Id.* at i, 24–30.

legitimate penal objective;¹¹⁷ and

- D. The system of case-by-case determination in capital cases has not protected defendants with mental retardation from improvident death sentences.¹¹⁸

These points in turn build toward the second general proposition, the title of the second part of the *Argument*: “EXECUTING PERSONS WITH MENTAL RETARDATION OFFENDS ‘EVOLVING STANDARDS OF DECENCY’” in violation of the Eighth Amendment.¹¹⁹ And this, in turn, leads back to the facts of Atkins’s case, as applied in part three of the *Argument*: “A SENTENCE OF DEATH IS EXCESSIVE AND DISPROPORTIONATE FOR DARYL ATKINS BECAUSE OF HIS MENTAL RETARDATION.”¹²⁰

Strategically, this point is presented last, despite the dialogue presented in the *Statement of the Case* implying that Atkins is mentally retarded and has difficulty telling his own story in a way that serves his purposes, because the facts of Atkins’s case are not especially compelling. Certainly, the facts of *Atkins* are not as powerful and persuasive as the illustrative stories from other cases cited within the *Argument* itself.¹²¹ These “cautionary tales” include cases where mental retardation led to wrongful convictions and death sentences for defendants who were later exonerated. *Atkins* itself is not a case about factual or actual innocence; Atkins is guilty of participating in the murder. Prematurely incorporating the *Atkins* facts into the initial sections of legal argument would diminish its power and the breadth of the legal narratives incorporated within it. A far more compelling narrative strategy uses the Court’s decision in *Penry I* to create a new adversary, making a villain of the law itself.

The persuasive power of this well-developed brief cannot be understood merely as legal argument without perceiving the underlying form of the accompanying legal melodrama. The forces of antagonism are aligned against Atkins. The Supreme Court is called upon to intervene heroically and save Atkins and similarly situated defendants from their fate—the *doom* that awaits them.¹²² The legal argument specifically

117. *Id.* at i, 30–31.

118. *Id.* at i, 31–37.

119. *Id.* at 37–41.

120. *Id.* at 42–45.

121. *See id.* at 35–36 (discussing two cases of mentally retarded death-row inmates exonerated at the final hour).

122. The role of the judicial decision-maker from the criminal defendant’s perspective has been characterized as the “quest of the hero.” *E.g.*, Meyer, *Retelling*, *supra* note 12, at 697–98 (citing Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55, 64–65 (1992)).

emphasizes the narrative consequences of judicial inaction upon mentally retarded defendants: “These various problems combine to produce an unacceptable risk that defendants who have mental retardation and are innocent have been, and will continue to be, sentenced to death.”¹²³

The narrative framework provides a unifying theme incorporating other compelling stories nested within the framework of legal melodrama. Here, for example, the brief observes: “Reports of the recent cases of Earl Washington and Anthony Porter, among others, provide sobering cautionary tales”¹²⁴ where innocent mentally retarded defendants were condemned to death.¹²⁵ This shows the fallacy of the rule in *Penry I*. That is, these sections of the brief, taken together, while presenting an architecturally well-structured and complete analytical argument combining medical testimony and analysis of legal authority, simultaneously relate a tragic story of villainy and victimization that provides the thematic narrative framework for the *Argument*. The Brief implicitly casts the Supreme Court in the role of the hero asked to write the ending and save the townspeople from the fate that awaits them under *Penry I*. To borrow from cinematic Westerns, the brief asks the Court to civilize the primitive and violent landscape under a new rule of law that brings peace and order (and a legally transformative steady state marking the end of the story with a coda of meaning).

123. Atkins Brief, *supra* note 7, at 35.

124. *Id.*

125. The brief tells these “cautionary” tales:

In 1983, Earl Washington, who has mental retardation, was arrested in the state of Virginia on a charge of assault. Under interrogation, Washington confessed to the rape and murder of a young woman—as well as to numerous other crimes that police recognized he could not possibly have committed. Notwithstanding many inconsistencies in his statements, Washington was convicted of murder and sentenced to death. In 1994, only days before his scheduled execution, Governor Douglas Wilder commuted his death sentence to life imprisonment because DNA evidence created doubt about Washington’s guilt. On October 2, 2000, Governor James Gilmore granted Washington a full pardon, stating that a jury presented with modern DNA evidence “would have reached a different conclusion” in his case despite his confession.

Anthony Porter, an Illinois man with an IQ of 51, was on the verge of being executed in 1998 when his lawyers obtained a stay of execution in order to raise the issue of his competence to be executed . . . and the question whether execution of an individual with mental retardation was precluded by the Illinois Constitution. During the period of the stay, conclusive evidence establishing Porter’s innocence fortuitously came to light. This incident was a primary factor in Governor George Ryan’s decision to institute a moratorium on the execution of death sentences in Illinois.

Id. at 35–36 (citing Francis X. Clines, *Virginia Man Is Pardoned in a Murder; DNA Is Cited*, N.Y. TIMES, Oct. 3, 2000, at A20; Eric Zorn, *Questions Persist as Troubled Inmate Faces Electrocution*, CHI. TRIB., Sept. 21, 1998, Metro Chicago Section, at 1).

C. Do We Still Believe in Character?

[T]here is no such thing as an intuitively obvious and essential self to know, one that just sits there ready to be portrayed in words. Rather, we constantly construct and reconstruct our selves to meet the needs of the situations we encounter, and we do so with the guidance of our memories of the past and our hopes and fears for the future. Telling oneself about oneself is like making up a story about who and what we are, what's happened, and why we're doing what we're doing.¹²⁶

We no longer believe in character.¹²⁷

Characters depicted in popular film, including *High Noon*, are carefully conceptualized, clearly composed, and differentiated according to their various, yet curiously symmetrical and purposeful, roles in service of the plot. Characters are internally coherent and psychologically consistent within the purposeful arcs of their change and development within the overall progression of the plot. The conclusion of their internal movement—the termination of their character arc at some point of psychological resolution—typically coincides with the end of the narrative and emphasizes the closure at the end of the story. To illustrate: Kane departs unceremoniously from the community that he has saved after he learns a dark lesson about the nature of that community; Amy comes full circle after she chooses to save her husband and kill an outlaw rather than adhere to her Quaker-pacifist beliefs; the fiery and passionate Helen Ramirez moves in a different direction when she separates herself from her love for Kane and boards a train, leaving her past and Hadleyville behind. And, of course, there is the satisfaction and completion of the hero's final and ultimate victory over the villain and his evil minions; in melodrama, we do not mourn the death of Frank Miller and his gang.

Typical of popular film, the characters are part of a cast that is singular in its collective purpose: characters are on stage to push or drive the plot purposefully towards a satisfactory resolution. Events in the plots of popular films, especially American commercial films designed to engage emotionally, don't just happen; there are no prolonged departures from tightly wound plots, no digressive exploration of characters' inner psychology. The number of sub-plots—including flashbacks and

126. JEROME BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE 64 (2002) (footnote omitted); see also Meyer, *Adaptation*, *supra* note 4, at 664 (quoting BRUNER, *supra*, and calling this concept the "narrative composability of self or identity").

127. ROEMER, *supra* note 9, at 16.

flashforwards—are typically limited, at least in contrast with the aesthetic structure of the modern novel. Characters and characterization in popular film are carefully pared down and shaped in service of the plot. Within the framework of the commercial movie plot, characters' actions may sometimes surprise the audience, but these actions never overtly defy audience expectations by sending the character off in unanticipated directions. Once the plot is set in motion, characters can never break free from the plot or violate the narrative's framework or its inevitable logic.

Second, characters in popular film are developed visually, primarily through their external actions and physical interactions. Dialogue is typically secondary, supplementing visual communications. Literally, in popular film, "action is character."¹²⁸ Characters are not described. We know who these characters are and the roles they fulfill by how they appear; further, characters in commercial films are often grounded in the cinematic identities of the actors who portray them. Some characters must engage us sympathetically, and although these characters may have structured complexity, they also have core identities. Reversals and changes in these characters are consistent with the viewer's expectations; the actions of characters in popular films may surprise, but seldom defy, the audience. Thus, for example, Kane initially leaves town with Amy when he hears of Frank Miller's anticipated arrival. Kane soon reverses course, however, and returns to face Miller; he does not, for example, continue his flight, rationalizing that decision with his promise to Amy.

Of equal importance, the characters in *High Noon* are highly empowered; this is typical of characters in American commercial popular film. The characters exist within the narrative framework of a shared and singular story, and their actions have dramatic consequences that control a unitary fate and the story's outcome. These characters do what many of us cannot: they act powerfully upon the world in accordance with clear and apparent motivations. Although they are often internally conflicted, round characters are seldom depicted by actors as muddled or opaque; their internal processes are never beyond the comprehension or understanding of the audience. Although characters may make mistakes, or make difficult choices, good characters generally do good deeds and bad characters do bad deeds. Actions taken by these characters are consistent with their motivations and in accord with their identities and the roles ascribed to them within the drama.

This clarity is especially important in popular film, where the emphasis is upon external action and the audience is unable to look directly inside the

128. Meyer, *Vignettes*, *supra* note 21, at 237 (quoting FITZGERALD, *supra* note 38, at 163).

characters' thoughts and psychology (for example, through first person self-reflection or through the perspective of an omniscient narrator). The perspective of the narrative is fixed outside the character, and we infer motivation based upon action and physicality. Thus it is often the visual subtext of the scene that matters; the dialogue, or surface explanation, does not provide the meaning. It is part of the Hollywood screenwriter's wisdom to "never write a scene on the nose." Scenes should not be exclusively or primarily about what the characters say the scene is about in their dialogue. Nevertheless, the meaning of the scene must be apparent to viewers from images and actions of characters, even when those images and actions contradict their words.

Consider, for example, the scene after Will Kane hears of the impending arrival of the Miller gang. He honors his promise to Amy, follows the advice of his good friends, hangs up his guns, climbs in a buckboard, and leaves town. But then there is the anticipated reversal in his character. He realizes, of course, that he cannot simply leave town. As a hero in a melodrama, he can make no other choice than to return and fight. Besides, to do otherwise would prematurely end the story and destroy the structure of the plot.

Is life really like this? Do we still believe in fixed and stable characters who control the outcome of the story through consistent actions borne of a core psychology? In another article about the influences of popular storytelling on narrative persuasion, I have identified this post-modern proposition as the principle of "narrative composability of self or identity."¹²⁹ That is to say, there may be a shared popular notion that we are all elastic and permeable in our psychological natures, capable of acting in many different ways at many different moments, often as affected by external environments as by internal psychologies. As the post-modernist filmmaker Michael Roemer puts it, "Traditionally, in both life and fiction, character or self derived from and served a stable context, though it also preserved our integrity when the context crumbled. . . . [W]e have been forced to recognize that what we are and do is largely beholden to circumstance."¹³⁰ Or, as Bob Dylan suggests, "Take what you have

129. Meyer, *Adaptation*, *supra* note 4, at 664.

130. ROEMER, *supra* note 9, at 17; *see also* Meyer, *Adaptation*, *supra* note 4, at 664 (noting that Roemer here is moving towards a "narrative" mode). Roemer offers the following non-fictional story to illustrate his point:

On a construction detail at Buchenwald, two Jews whose strength was failing drew the angry attention of an SS sergeant. He pushed them into a ditch and commanded a Polish prisoner to bury them alive. When the Pole refused, the sergeant, instead of shooting him at once, pushed *him* into the ditch and ordered the Jews to bury him:

gathered from coincidence.”¹³¹ That is, we may possess multiple possibilities within our personalities, rather than a fixed, stable character or psychology. Further, we may be far more responsive to environments and circumstances in our actions than we imagine ourselves to be. And, in this way, we are all very much alike.

Some of these shared, and often competing, notions of character inevitably find their way into the stories told in briefs such as *Atkins*. First, the *Atkins* brief attempts to persuade the reader that, implicitly, Atkins is profoundly influenced by his environment, his social history, and his particular susceptibility. The brief emphasizes, for example, how Jones influenced Atkins during the Nesbitt murder and, perhaps more importantly, how the legal system influences him in a way that makes him particularly susceptible to victimization.

The brief characterizes Atkins in a way very different from how Will Kane is characterized in *High Noon*. It presents Atkins’s voice as a singular tool wielded subtly to persuade the reader that Atkins is a weak character, profoundly affected by his environment and social history. He is clearly not a character in control of his own destiny; if character is fate for a man,¹³² then Atkins’s fate is not in his own hands. He is a malleable character who is profoundly affected by his circumstances and is readily manipulated by other more skillful actors. He has no control over his fate or destiny within the complex legal system. Further, Atkins is not depicted as a singular actor or character. His voice is representative of other mentally retarded defendants who possess the psychological characteristics and limitations presented artfully in the legal argument. They are all disempowered and lack the personal culpability to be condemned to death—defendants unable to fend for themselves within the system, readily victimized by *Penry I*.

The narrative design, however, also provides the protagonist with a fixed identity. He is controlled by values that are unaffected by either

“In terror of their lives and in the hope of escaping the ghastly fate themselves, (they obeyed). When only the head of the Pole was still uncovered, the SS man called a halt and had the man dug out.” Once again he commanded the Jews into the ditch and again ordered the Pole to bury them. This time he did. “Slowly the ditch was filled with soil. When the work was done, the Detail Leader personally trampled down the soil over his two victims.”

ROEMER, *supra* note 9, at 17 (quoting EUGEN KOGON, *THE THEORY AND PRACTICE OF HELL: THE GERMAN CONCENTRATION CAMPS AND THE SYSTEM BEHIND THEM* 91–92 (Heinz Norden trans., Farrar, Straus 1949)).

131. BOB DYLAN, *It’s All Over Now, Baby Blue*, on BRINGING IT ALL BACK HOME (Columbia Records 1965).

132. See G.S. KIRK ET AL., *THE PRESOCRATIC PHILOSOPHERS: A CRITICAL HISTORY WITH A SELECTION OF TEXTS* 211 (2d ed. 1983) (discussing Heraclitus’ adage, “Man’s character is his daimon.”). “Daimon” is translated here as “personal destiny.” *Id.*

circumstance or convenience; he is compelled to stand up heroically against forces of antagonism and to act in accord with his role in the legal melodrama. Characteristically, the petitioner's argument in a death penalty brief attempts to cast the Supreme Court in the protagonist's role and to incline the hero towards action. If, indeed, character is action, then the call to action in a legal argument about how it is cruel and unusual punishment to execute mentally retarded defendants may be read as a plea, a call to the hero not to back down from a confrontation with bad precedent. The Supreme Court must do what is necessary to heroically uphold constitutional values. In the same manner, Will Kane must do what is right and take a final stand against Frank Miller and the Miller gang, regardless of what Kane himself might sacrifice in the process. Kane does this on behalf of the townspeople, who may little understand or appreciate the cost of his intervention and may not all deserve his heroism.

CONCLUDING NOTE

I shall end this essay by answering the question its title poses: Are the characters in a death penalty brief—the petitioner's brief in *Atkins*—like the characters in a movie—*High Noon*? In some ways, yes; in many ways, no. Nevertheless, character is still important in the telling of legal stories in briefs and, indeed, in fashioning legal arguments, just as it is in popular film. Consequently, it is important to develop an analytic vocabulary to better understand character, characterization, casting and scene in legal narrative persuasion.

In this essay, I employed several illustrative concepts and notions about character drawn from screenwriting texts and narrative theory. I experimentally applied this vocabulary to understanding the characters in a movie. Then, I attempted to determine whether this apparatus is relevant in reading a death penalty brief. The results of the experiment are mixed. I hope, nevertheless, that this analysis may serve as a starting point to understand better the significance of character, character development, and casting in legal narrative persuasion. Finally, I discussed several points of comparison and contrast between characters and characterizations in the *Atkins* Brief and *High Noon*.

The aesthetics of, and constraints upon, depicting characters in a brief clearly differ from the depiction of characters in a popular movie. Although some conceptual terminology from screenwriting and film is useful, legal storytellers must develop a specific narrative toolkit relevant to their practice. This is especially true for attorneys representing condemned inmates in death penalty cases. The choices made shaping the characters in

the *Atkins* Brief seem intuitively correct, but an analytical vocabulary pertaining to character would be extremely useful to practitioners crafting and creating characters and characterization in other cases.