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### **A Look Inside the Butler's Cupboard: Fiction Writers' Insights on How the External World Reveals Internal State of Mind in Appellate Briefs**

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# A LOOK INSIDE THE BUTLER'S CUPBOARD: HOW THE EXTERNAL WORLD REVEALS INTERNAL STATE OF MIND IN LEGAL NARRATIVES

CATHREN KOEHLERT-PAGE\*

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\* This Article is dedicated to my mother, Paulette Rudat Oxner, June 9, 1940–April 24, 2013. She instilled a love of reading and writing in me and taught me to edit my work, to use strong action verbs, to write short sentences with fewer clauses, and to work just one sentence at a time during overwhelming tasks. Thanks to Dean Leticia Diaz for all of her support and encouragement; to Dean Phill Johnson, Librarian Pat Brown, Librarian Louis Rosen, and Librarian Betty Vickers for their research assistance; to Professor Tim Wynne-Jones for his lecture on objective correlative and for his research references; to writer Sharry Wright for use of her essay on objective correlative; to Steve Johansen and David Thomson who first heard my idea and helped me to express it; to Benjamin Opipari for his thoughts on objective correlative; to Kenneth Chestek, Terri LeClerqc, Steve Bailey, Jennifer Romig, Robert Sachs, Ralph Brill, Mary Alegro, Bruce Ching, Mitch Nathanson, Susan Liemer, Sharon Pocock, Victoria Moshiashwili, and Ruth Anne Robbins for their advice on self-quoting; to Rita Barnett, Linda Berger, and Kathleen Dillon Narko for their critiques at the LWI Scholars Institute; to Professors Terry Phelps, Christy DeSantis, Elizabeth Keith, and Catherine Finn for their comments at the Capital Area Legal Writing Conference Scholars' Workshop; to Lou Sirico for all of his advice on scholarship; to Karin Mika for being a continual source of support to legal writing professors; to Jay Messenger and Joan Malmud Rocklin for providing a forum to explore some of the ideas in this Article; to Jamila Jefferson-Jones and Neelum Arya for all of their help with brainstorming; to architect Jacob Estes for sources on neuroscience and architecture; and to my research assistants, Angela Goodrum, Chris Cronin, John Gallagher, Caitlin Ehinger, Patrice Robinson, Chris Seckinger, Jonathan Sampas, Shanna-Kay Turner, and Patrick Shea who fulfilled so many unusual research requests so well; and to Kyle Beatty for mooting a discussion on this topic.

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## INTRODUCTION

“Gigi, I want to come over,” I said, and she didn’t say yes or no. I looked over at her. The space between Gigi Bodakian and the wall was plenty of space. She was huddled up on the edge of the bed and so there was more than enough room for me. It seemed all right. I thought about it—I did *not* think about it, which is a problem sometimes. And it felt all right.

Quietly, easily, I went to the edge of the bed and climbed my way into the space like a cat. Like a pet cat just coming up to get some warmth and not disturbing anybody.<sup>1</sup>

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1. CHRIS LYNCH, *INEXCUSABLE* 158–59 (2005).

In the excerpt above from the novel *Inexcusable*, Keir Sarafin's reaction to and interaction with the empty space on the bed conveys his complex state of mind to the readers.<sup>2</sup> This concept is known as an objective correlative, an external representation of an internal state of mind.<sup>3</sup> To Keir, the space is an invitation to climb into bed with the object of his obsession.<sup>4</sup> The space is the right size for him.<sup>5</sup>

Yet Keir's guilt for the rape that follows still seeps through the passage<sup>6</sup>: the space is between Gigi and the wall, rather than between Gigi and the open edge of the bed;<sup>7</sup> Gigi is huddled up on the edge of the bed as though to block ingress.<sup>8</sup> Although these facts alone might allow for other interpretations, other facts suggest that on some level Keir is aware of a prohibition.<sup>9</sup> He climbs into the bed "quietly" and "like a cat."<sup>10</sup> These characterizations suggest furtiveness. If Keir's only motive is to not disturb Gigi's sleep, then he would not kiss her in the passages that follow.<sup>11</sup> The line that follows the above-quoted excerpt is particularly telling. Keir belabors the cat analogy in a defensive manner and provides a false motive for his actions: he is "just coming up to get some warmth."<sup>12</sup> In the pages that follow, this motive is belied by Keir's hard and hurtful kisses.<sup>13</sup>

Nonetheless, his guilt is not the obvious guilt of one who takes ownership; it is that of a drug user who is full of self-denial.<sup>14</sup> Guilt, love, hate, happiness—these broad categories do not always capture

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2. *See id.*

3. OXFORD DICTIONARY OF LITERARY TERMS (2009) [hereinafter OXFORD DICTIONARY].

4. LYNCH, *supra* note 1, at 158–59.

5. *See id.*

6. *See id.* Since the passage is written in close, third-person perspective with respect to Keir, a character in denial, the reader must read between the lines of Keir's unreliable narration throughout the entire book to see that Gigi's accusation is likely true.

7. *See id.*

8. *See id.*

9. *See id.*; *see also supra* text accompanying note 6.

10. *See supra* note 4.

11. LYNCH, *supra* note 1, at 159–60 (stating that Keir kisses her so hard that he is hurt and he holds her hands tightly).

12. *See id.* at 158–59.

13. *See id.* at 159–60.

14. *See id.* There are references to Keir's drug use and instances of unreliable narration throughout the book. *See generally id.*

emotional quicksilver in the manner that objective correlative does.<sup>15</sup>

Attorneys seeking to establish state of mind, convey mental distress, or evoke emotion should examine the record for the empty spaces on beds, the insides of butlers' pantries, and the happenings in Russian train stations. There, they will discover the literary concept of objective correlative, which attorneys can use to include probative scenic evidence that may also form an emotional and psychological backdrop for the case. T.S. Eliot in his essay on Hamlet defines objective correlative as follows:

The only way of expressing emotion in the form of art is by finding an "objective correlative" [sic]; in other words, a set of objects, a situation, a chain of events, which shall be the formula of that *particular* emotion; such that when the external facts, which must terminate in sensory experience, are given, the emotion is immediately evoked.<sup>16</sup>

The temperature of the air; the objects in the room or on the landscape; the color, feel, and smell of everything; and the characters' interactions with all of these things and one another reveal psychological states.<sup>17</sup> This objective correlative conveys a character's psychological world without explicitly naming or describing that world.<sup>18</sup> Instead the character's view of the external setting reveals the internal state of mind.<sup>19</sup> As novelist and writing professor Tim Wynne-Jones instructs, "Don't look at that boy in love. Look at what he is looking at."<sup>20</sup> In so doing, the writer will flesh out much of the setting.<sup>21</sup> Professor Wynne-Jones explains, "A setting is . . . not just where a scene unfolds. It is part of the unfolding."<sup>22</sup> This symbolic subtext in the unfolding speaks to the

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15. Tim Wynne-Jones, Professor, Vermont College of Fine Arts, Summer 2006 MFA WYCA Residency Lecture: Tell It Slant (Summer 2006) (on file with author) (explaining that words like "love" do not capture emotional "quicksilver" the way that objective correlative does).

16. T.S. ELIOT, *Hamlet and His Problems*, in THE SACRED WOOD, ESSAYS ON POETRY AND CRITICISM 95, 100–03 (Methuen & Co. Ltd. 1950).

17. Wynne-Jones, *supra* note 15.

18. *See id.*

19. *Compare* ORHAN PAMUK, THE NAÏVE AND SENTIMENTAL NOVELIST 103 (explaining that objective correlative is seen through the character's eyes), *with* Wynne-Jones, *supra* note 15 (explaining how much is revealed about a character through objective correlative).

20. *See* Wynne-Jones, *supra* note 15.

21. *See supra* note 19.

22. *Id.*

reader's subconscious mind and evokes an emotional response.<sup>23</sup> Although this subtext does have a symbolic nature, Professor Wynne-Jones explains that it is not just a device.<sup>24</sup> Rather it is a natural way of reproducing a person's psychological state; it emulates the manner in which people actually experience emotions.

By studying the scene through the eyes of the client and the witnesses, the attorney can not only evoke this psychological subtext, but can also weave relevant and probative details into the statement of facts and the argument and elicit such detail at trial.<sup>25</sup> For instance, in a case involving a car accident, the weather, the temperature, the time of day, the traffic on the road, and the color of the cars, signs, and traffic lights can be relevant as to the degree that a driver was negligent.<sup>26</sup> Similarly, in a case involving child neglect, the smell of a home, the weather, the child's clothes, and any debris, pills, and poisons on the floor and counter-tops can all be relevant as to whether the parent neglected the child.<sup>27</sup> In fact, when a

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23. See CARL JUNG, *Instinct and the Unconscious* (1919), in THE PORTABLE JUNG 47, 55–58 (Joseph Campbell ed., R.F.C. Hull trans., Viking Press, Inc. 1971) [hereinafter *Instinct and the Unconscious*] (discussing how certain archetypal images speak to the unconscious mind and are somewhat universal); see also CAMPBELL, THE HERO WITH A THOUSAND FACES 18–19 (1972); cf. JOHN GARDNER, THE ART OF FICTION 30–31 (1991) (discussing how narrative invokes a dream for the reader); Linda Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275, 277 (2011) (discussing how story and metaphor have played a role in thinking, persuasion, and reasoning since Aristotle); Steven L. Winter, *Death is the Mother of Metaphor*, 105 HARV. L. REV. 745, 748 (1992) (reviewing THOMAS C. GREY, THE WALLACE STEVENS CASE: LAW AND THE PRACTICE OF POETRY (1991) (explaining that our mind is as metaphoric with respect to legal endeavors as it is with everything)).

24. See Wynne-Jones, *supra* note 15.

25. Cf. RUTH ANNE ROBBINS ET AL., YOUR CLIENT'S STORY 47, 59–64 (2013) (explaining that the details selected can create a vivid picture and explaining that investigation of details is necessary to determine relevant facts); James Parry Eyster, *Lawyer as Artist: Using Significant Moments and Obtuse Objects to Enhance Advocacy*, 14 LEGAL WRITING 87, 94, 100, 105 (2008) (encouraging attorneys to seek out physical details).

26. See, e.g., *Tolbert v. Tolbert*, 903 So. 2d 103, 105 (Ala. 2004) (considering rain slick in determining liability for car crash); *Catt v. Bd. of Comm'rs*, 779 N.E.2d 1, 2 (Ind. 2002) (considering rainstorm in determining county's liability for car wreck); *Hutton v. City of Savannah*, 968 S.W.2d 808, 810 (Tenn. App. 1997) (considering cloudy and rainy weather in determining liability for car accident).

27. See, e.g., *State v. Small*, 100 So. 3d 797, 804 (La. 2012) (finding that leaving children alone around household poisons could constitute criminal neglect); *In re J.L.B.*, 349 S.W.3d 836, 847 (Tex. App. 2011) (referencing an odor as support for endangerment grounds for termination of parental rights); *Jones v. Commonwealth*, 636 S.E.2d 403, 406 (Va. 2006) (finding that leaving medicine bottles with heroin in child's reach was sufficient evidence of felony neglect); *State v. Watson*,

case involves a “totality of the circumstances” analysis, the legal standard actually seems to call for a detailing of that very “chain of events” to which Eliot refers.<sup>28</sup>

This Article will present the literary concept of objective correlative and explain how the concept can be applied to legal narratives, providing examples from works of fiction, appellate briefs, and trial transcripts. Part I of this Article defines objective correlative and distinguishes it from related concepts. Part II explains why objective correlative is useful. Part III illustrates the characteristics of objective correlative done well in both fiction and in legal narratives. Part IV describes the process for developing objective correlative in both fiction narratives and legal narratives. Part V discusses the ethical issues regarding objective correlative in legal narratives.

## I. UNDERSTANDING OBJECTIVE CORRELATIVE

Eliot indicates that emotion is evoked by the “set of objects, situation, or chain of events” that “terminate[s] in a sensory experience.”<sup>29</sup> Although the Oxford Dictionary of Literary Terms explains that objective correlative means using external surroundings and events to reveal internal states,<sup>30</sup> the characters’ reaction to those external surroundings is also a part of objective correlative. While this concept may seem similar to other literary tropes such as symbols, metaphors, and endowed objects, there are important differences among them. This Section explores the distinctions among these concepts to provide a nuanced understanding of objective correlative.

### *A. Objective Correlative Compared to Symbols Generally*

Professor Wynne-Jones illustrates that objective correlative transcends symbolism.<sup>31</sup> At first blush, some might say that the “set of objects, situation, or chain of events”<sup>32</sup> is symbolic of an emo-

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751 A.2d 1004, 1007 (Me. 2000) (leaving a “lightly clad” child in the car on a cold winter day could be considered child endangerment); *Hunte v. Blumenthal*, 680 A.2d 1231, 1239 (Conn. 1996) (reciting provisions regarding keeping poisons away from children in foster care); *In re J.A.S.*, 627 N.E.2d 770 (Ill. App. Ct. 1994) (considering debris littering the home in upholding finding of neglect).

28. See generally ELIOT, *supra* note 16.

29. See generally *id.*

30. See OXFORD DICTIONARY, *supra* note 3. The skilled writer might include some internal sensations and perceptions as part of objective correlative as well.

31. Wynne-Jones, *supra* note 15.

32. See ELIOT, *supra* note 16.

tional or psychological state. *Penguin Reference* defines a symbol as an object, a gesture, an image, or a concept that represents something else.<sup>33</sup> However, objective correlative is a way of showing a more specific psychological state rather than generally symbolizing that state with a single word.<sup>34</sup> As Professor Wynne-Jones explains, words like “love” and “hate” do not capture all of the nuances of a specific love or hate feeling.<sup>35</sup> If Mirabelle loves her button collection, the odds are that she does not feel the same way about her button collection as Mother feels about her child, as Juanita feels about her first boyfriend, or as Mother Teresa feels about Jesus.<sup>36</sup> This shared word “love” does not capture how Juanita feels. If the writer details each giddy moment as Juanita spends all afternoon baking and decorating her boyfriend's favorite cookies, then the reader might understand Juanita's particular adolescent love. Juanita's love will still be different in some ways from Honaria's first love and from Ricardo's. Since objective correlative is the actual means by which people can experience their emotions and psychological states,<sup>37</sup> it cannot be too neatly collapsed into “X stands for Y.” Y is just a summary or a broad category. X is X. Tolstoy seemed to hint at this idea when he said, of *Anna Karenina*, “If I wanted to express in words all that I meant to express by the novel, then I should have to write the same novel as I have written all over again.”<sup>38</sup>

Objective correlative is not just a device but is actually how people experience emotions.<sup>39</sup> Most people do not spend their days analyzing their emotions and thinking, “I am bored now. Now I feel boredom mixed with apathy. It is a flatline feeling.” Instead, people react to their surroundings, often with little awareness as to their own current emotional state. Objective correlative is a more nuanced way to illustrate the emotions of a character than a simple emotion-signifying word like “anger.”<sup>40</sup> It is not meant to merely

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33. J.A. CUDDON, *DICTIONARY OF LITERARY TERMS AND LITERARY THEORY* 884–88 (Penguin Reference) (defining “symbol”).

34. See Wynne-Jones, *supra* note 15.

35. *Id.*

36. See *id.* (discussing Mirabelle's love of her button collection).

37. Cf. Wynne-Jones, *supra* note 15 (explaining that objective correlative is not a device).

38. Cf. Letter from Leo Tolstoy to N.N. Strakhov (Apr. 23, 1876), in C.J.G. TURNER, *A KARENINA COMPANION* 41–42 (1993).

39. Wynne-Jones, *supra* note 15.

40. *Id.*



exemplify emotion; objective correlative done well evokes emotion in the reader.<sup>41</sup>

*B. Metaphors Compared and Contrasted to Objective Correlative*

Although objective correlative has metaphoric aspects,<sup>42</sup> it is more intricate and elusive, and, in some instances, it is a better reproduction of an actual emotional state. A metaphor is “a figure of speech in which one thing is described in terms of another.”<sup>43</sup> However, objective correlative is more elaborate than a single-item metaphor in that the definition implies a collection; there is a “set” of objects or “chain” of events.<sup>44</sup> For example, a metal scale may be a metaphor for justice, but it is not an objective correlative because it is a single item rather than a set of objects.<sup>45</sup> In contrast, in the scene above from *Inexcusable*, the scene is more than just an empty space on the bed symbolizing Keir’s state of mind. There is an entire chain of events surrounding the space; Keir reacts to the space both internally and externally. Moreover, objective correlative is more nuanced than the ordinary metaphor; it will include some realistic details beyond the basic metaphor.<sup>46</sup> Indeed, just as objective correlative transcends symbol, it transcends metaphor.<sup>47</sup> It is a means of showing someone’s actual psychological state as opposed to collapsing that state into a single word. Finally, objective correlative is not meant merely to represent a feeling.<sup>48</sup> If done well, objective correlative should evoke a feeling.<sup>49</sup>

Nonetheless, when a metaphor infuses the entire scene, then it can overlap with an objective correlative.<sup>50</sup> For instance, the scene

41. *See id.*

42. *Compare id.* (discussing the concept of objective correlative), with CUDDON, *supra* note 33, at 884–88 (defining “symbol”).

43. CUDDON, *supra* note 33; *see also* Linda Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions of Campaign Finance Regulation*, 58 MERCER L. REV. 949, 952–53 (2007) (providing a similar definition for “metaphor”).

44. *See* ELIOT, *supra* note 16.

45. *See* Wynne-Jones, *supra* note 15 (describing objective correlative and providing examples); ELIOT, *supra* note 16 (describing objective correlative and providing examples).

46. *Compare* Wynne-Jones, *supra* note 15 (discussing the concept of objective correlative and illustrating all of its nuances), with CUDDON, *supra* note 33 (defining “metaphor”).

47. *Cf.* Wynne-Jones, *supra* note 15 (explaining that objective correlative is not a device).

48. *See supra* note 45.

49. *See id.*

50. *See supra* note 46.

from the train station in *Anna Karenina* could be viewed as both an extended metaphor and an objective correlative.<sup>51</sup> In this scene, Anna has already left her husband for her lover Vronsky.<sup>52</sup> She has been cast-out by the Russian aristocracy.<sup>53</sup> She has traded her position in society for Vronsky, but he offers none of the promise or escape that she had hoped.<sup>54</sup> Tolstoy illustrates her feelings regarding her situation and propels Anna towards her fate with this scene:

When the train came into the station Anna went out with the crowd of other passengers, and moving away from them as though they were lepers she stopped on the platform, trying to remember why she had come there and what she had intended to do. Everything that had seemed possible to her before was now too hard to imagine, especially in the noisy crowd of these monstrous people who would not leave her in peace. Either the porters would come running up to her offering their services, or the young men, clattering in their heels along the platform boards and talking in loud voices, would look her up and down, or the people she met would be walking on the wrong side.<sup>55</sup>

At a glance, this selection is about a train station.<sup>56</sup> However, the scene could be regarded as an extended metaphor.<sup>57</sup> The “noisy crowd” and “monstrous people” represent the rumormongers who have banned Anna from society.<sup>58</sup> The porter symbolizes her servants and, thus, her riches, which are of no use.<sup>59</sup> The young men represent Vronsky, who has failed her.<sup>60</sup> Further, everyone in the train station represents not only the individuals in Anna's life,

51. The author has previously used this example in Cathren Koehlert-Page, *Like a Glass-Slipper on a Step-Sister: How the One Ring Rules Them All at Trial*, 93 NEB. L. REV. 600, 621 (2013). This scene could be viewed as a seminal example. Novelist Orhan Pamuk uses *Anna Karenina* to illustrate objective correlative as well. PAMUK, *supra* note 19, at 103–05. See generally LEO TOLSTOY, *ANNA KARENINA* 814 (Joel Carmichael trans., Bantam Books 1981) (1877).

52. See Koehlert-Page, *supra* note 51, at 621 (analyzing TOLSTOY, *supra* note 51, at 814).

53. *Id.* (analyzing TOLSTOY, *supra* note 51, at 679, 814).

54. *Id.* (analyzing TOLSTOY, *supra* note 51, at 679, 785–88, 814).

55. TOLSTOY, *supra* note 51, at 679, 785–88, 814.

56. See Koehlert-Page, *supra* note 51, at 621 (analyzing TOLSTOY, *supra* note 51, at 814). Novelist Orhan Pamuk explains how another train scene from the same novel is also an objective correlative. PAMUK, *supra* note 19, at 103–05.

57. See Koehlert-Page, *supra* note 51, at 621 (analyzing TOLSTOY, *supra* note 51, at 814).

58. See *supra* note 57.

59. See *id.*

60. See *id.*

but Anna's emotions regarding each of them.<sup>61</sup> Anna's undercurrent of emotion is amplified by the metaphoric quality of this passage.

However, the passage also transcends metaphor to reveal and evoke Anna's state of mind.<sup>62</sup> Anna can turn to no one; she has no purpose and nowhere to go.<sup>63</sup> Thus in the pages following the passage, Anna commits suicide by throwing herself in front of the train.<sup>64</sup> Anna's emotion itself is not symbolic of anything; it is the actual emotion.<sup>65</sup> Moreover, some of Anna's reaction to the train station includes the ordinary irritation that anyone might feel in a similar setting.<sup>66</sup> Some of the specific details of the train station are not necessarily symbolic of anything else.<sup>67</sup> More importantly, the scene is Anna's emotional experience, which evokes emotion from the reader.<sup>68</sup> It is objective correlative because it both reproduces and evokes the emotion by using the whole scene.<sup>69</sup>

In this sense, objective correlative can transcend metaphor, but of course, metaphor is another effective means of conveying emotion. For instance, in the aftermath of Ysa's rape in the novel *Every Time a Rainbow Dies*, author Rita Williams Garcia describes Ysa's vagina as "a crushed rose, [ ] fully exposed, its petals dripping blood."<sup>70</sup> This metaphor evokes emotion, but it is a single instance rather than an entire set of objects, a whole situation, or a chain of events.<sup>71</sup>

A simple illustrative metaphor is also not an objective correlative.<sup>72</sup> For instance, a statement that an ecosystem is a game of pick-up sticks<sup>73</sup> may be a metaphor, but it is not an objective correlative on its own. The statement may help the reader understand that if a

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61. *See id.*

62. *See id.*

63. *See id.*

64. *See* TOLSTOY, *supra* note 51, at 816.

65. *See supra* note 57.

66. *See id.*

67. *See id.*

68. *See id.*

69. *See* Wynne-Jones, *supra* note 15 (illustrating how objective correlative reveals and evokes emotion).

70. RITA WILLIAMS-GARCIA, *EVERY TIME A RAINBOW DIES* 8–9 (2001).

71. *See id.* In the scene from which this example is drawn, Williams-Garcia does provide more than just the single metaphor.

72. *See* Berger, *supra* note 23, at 275, 277, 280 (showing how simple metaphors help people to understand everyday concepts such as the "mouth" of a river).

73. *See* *Climate Change Will Unbalance Ecosystems—Study*, REUTERS NEWS (Apr. 10, 2002) (explaining that as each species, each stick, is removed from the ecosys-

person removes one stick, one species, from the pile, the whole thing could collapse.<sup>74</sup> But the statement is not a situation, set of objects, or chain of events like the train station scene in *Anna Karenina*. It's more insular. Such general metaphors might still be useful to illustrate a point for the court in some instances.<sup>75</sup> But they serve a slightly different function than objective correlative, which actually reproduces the subject's psychological state and evokes a feeling.

C. *Endowed Objects Compared and Contrasted to Objective Correlative*

Both endowed objects and objective correlative are ways of revealing a character's subconscious emotional and psychological state, and both can be essential to stories.<sup>76</sup> But objective correlative is a way of revealing that emotional state through the whole scene, whereas an endowed object is a single object that reverberates with symbolic significance throughout the story.<sup>77</sup>

Unlike an endowed object, objective correlative is not a single thing; however, an endowed object can be a part of a scene that employs objective correlative. Both endowed objects and objective

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tem, which is represented by the pile, the risk that the whole ecosystem could collapse grows as the pile grows).

74. *See id.*

75. *Cf.* Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767, 769 (2006) (explaining that the fact-finder already has an experience base and that the metaphor is effective because it draws on that experience base); Bruce Ching, *Argument, Analogy, and Audience: Using Persuasive Comparisons While Avoiding Unintended Effects*, 7 J. ASS'N LEGAL WRITING DIRECTORS 311, 312 (2010) ("A well-chosen analogy accomplishes much of the work of persuasion for the advocate, because the analogy implicitly provides background information that the advocate does not have to spend time explaining."); Berger, *supra* note 23, at 275, 277, 280 (explaining how metaphor helps people to understand a wide variety of concepts, such as the "mouth" of a river).

76. *Compare* Rita Williams-Garcia, Professor, Vermont College of Fine Arts, Lecture: Objects, Artifacts, and Stuff (Winter 2011) [hereinafter *Objects, Artifacts, and Stuff Lecture*] (describing characteristics of endowed objects), *with* Wynne-Jones, *supra* note 15 (discussing objective correlative).

77. *See* GARDNER, *supra* note 23, at 30–31, 36–37 (discussing the emotion and character traits conveyed by a description of a barn); *Objects, Artifacts, and Stuff Lecture*, *supra* note 76 (describing traits of endowed objects); Wynne-Jones, *supra* note 15 (discussing the concept of objective correlative); Kimberly Winters, *The Things Stories Carry: How a Rope, a Loop of Red Thread, a Song-less Canary, and Other Collected Objects can Reveal the Heart of a Story*, at 11–12 (Fall 2004) (unpublished critical thesis, Vermont College/Union Institute & University) (on file with author) (explaining that objective correlative and endowed objects are different).

correlative can telegraph a character's state of mind and emotion, and both have symbolic aspects. However, an endowed object is a single material object, like a glass slipper, that reverberates with symbolic significance throughout the story.<sup>78</sup> It is metaphoric in some sense, but unlike the ordinary metaphor, it is a single object, and the character's interaction with the object endows the object.<sup>79</sup> It is further distinct from metaphor in that this interaction occurs over the course of the story.<sup>80</sup> Thus, glass slippers, swords in stones, and lucky baseball bats can create narrative cohesion<sup>81</sup> and can work well as a transition or a reminder of previous parts of the story.<sup>82</sup> They evoke an emotional response,<sup>83</sup> develop a character, and represent the theme.<sup>84</sup> They might even be a piece of an overall objective correlative, but unlike objective correlative, they are just single items that people can hold in their hands.<sup>85</sup> They do not include the whole environment.<sup>86</sup>

For instance, in Christopher Paul Curtis's Newberry award-winning book, *Bud, Not Buddy*, Bud's suitcase is an endowed object, but the entire interaction that endows the suitcase is objective correlative.<sup>87</sup> In the book, the protagonist, six-year-old Bud, has lost his mother and is living in foster care.<sup>88</sup> In the early pages of the book, he learns that he is leaving for a new foster home and begins packing his suitcase.<sup>89</sup> The suitcase itself conveys an idea of impermanence; most children do not tote around suitcases in their own houses on a regular basis. But it is also the storage place for something special. The first thing that Bud packs is a flyer with a picture of a man whom Bud believes is his father.<sup>90</sup>

Later, when Bud reaches his new foster home, readers see how invasive the new foster parents are when Bud says, "[Mr. Amos] was carrying my suitcase. Uh-oh, they'd looked inside. I could tell be-

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78. See Objects, Artifacts, and Stuff Lecture, *supra* note 76; Winters, *supra* note 77.

79. See Koehlert-Page, *supra* note 51, at 615, 621, 627 (explaining the difference between endowed objects and metaphors).

80. See *id.*

81. See *id.* at 602, 625.

82. See *supra* note 81.

83. See *supra* note 23.

84. See *infra* Parts II–IV.

85. Winters, *supra* note 77, at 11.

86. *Id.* at 11–12.

87. See CHRISTOPHER PAUL CURTIS, *BUD, NOT BUDDY* 6–8, 14–16, 31, 35, 37 (1999) (using the suitcase extensively in these scenes).

88. *Id.* at 2–6.

89. *Id.* at 1–8.

90. *Id.* at 6–8.

cause the twine that held it together was tied in a knot that I did not know.”<sup>91</sup>

Bud's reaction reveals he feels the violation of his privacy.<sup>92</sup> He even reveals to readers that he plans to get even, which he does by pulling a series of pranks shortly before running away from the foster home.<sup>93</sup>

The violation does not stop with the Amoses' examination of the suitcase.<sup>94</sup> Mrs. Amos withholds the suitcase to be sure that Bud will not steal anything.<sup>95</sup>

When Bud finally escapes, he is relieved to find the suitcase where Mrs. Amos left it.<sup>96</sup> One of his first tasks is to inspect it.<sup>97</sup> In so doing, he discovers that the Amoses did rummage through his belongings but that nothing was stolen.<sup>98</sup>

In this passage, the suitcase is an endowed object. It reverberates with symbolic significance in the story and reveals character. The suitcase symbolizes Bud's lack of a home. But it is also the storage place of his important treasure: the flyer about the man whom he believes to be his father. In fact, when Bud runs away, he goes on a journey to find his father.<sup>99</sup> As the storage place of the flyer, the suitcase symbolizes Bud's heart and his journey. Moreover, the suitcase reveals a lot about Bud and the Amoses.<sup>100</sup> Bud's interaction with the suitcase shows that he longs for a family and that at the same time he has a world that he wants to keep private and separate from foster parents.<sup>101</sup> The Amoses' interaction with the suitcase shows that they do not respect Bud and that they do not trust him not to steal; they are hardly the loving family a child would hope to join.<sup>102</sup> The characters' attitudes towards and interaction with the suitcase endows the object with meaning.

However, these scenes simultaneously function as objective correlative. They include a chain of events and a set of objects—the suitcase, the flyer, and the twine. These things terminate in a sensory experience that both conveys and evokes Bud's emotions; he

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91. *Id.* at 14.

92. *Id.* at 8–10, 14–15.

93. CURTIS, *supra* note 87, at 15.

94. *Id.*

95. *Id.*

96. *Id.* at 31.

97. *Id.* at 37–38.

98. *Id.* at 38.

99. CURTIS, *supra* note 87, at 31, 37–38.

100. *See id.* at 6–8, 14–16, 31, 35, 37.

101. *See id.*

102. *See id.* at 14–16 (mentioning the Amoses' withholding of the suitcase).

distrusts the foster parents and longs for a true father. Note that the suitcase alone is not an objective correlative. Rather, the objective correlative includes Bud, the foster parents, the items inside the suitcase, all of the attitudes towards the suitcase, and all of the interaction with the suitcase.

However, not every objective correlative will include an endowed object. For instance, the scene above from *Anna Karenina* does not include a single object that reverberates with symbolic significance throughout the story. Rather, all of Anna's experience at the train station as a whole conveys her psychological state.

Both endowed objects and objective correlative resonate in both litigation narratives and fiction narratives.<sup>103</sup> However, while an endowed object can gracefully carry much of a story's weight, it cannot carry all of the psychological nuance in a story on its own. Objective correlative allows the writer to burrow into the details without stretching a single item outside of its bounds.<sup>104</sup>

## II. REASONS FOR USING OBJECTIVE CORRELATIVE

The scene itself can form an emotional and psychological backdrop in a story and can help develop character and plot. In writing briefs or at trial, the attorney can develop relevant facts using the external world to reveal internal states of mind.

### *A. Overlapping Benefits of Objective Correlative*

In objective correlative, the interaction with and reaction to the external world of the scene reveals the internal state of mind. In fictional works, briefs, and litigation narratives, objective correlative works well to convey emotion, develop character, and drive plot. With respect to the first of these tasks, emotion signifying words like "grief" do not reproduce grief for the reader; something more is needed. Thus, if the writer shows the reader how grief affects the character's interactions with the setting and the character's reactions to the chain of events, then the reader will have a better sense of what it means to grieve. In fact, the reader will have a better sense of what it means for this character or witness to grieve. The interaction then propels the character or witness forward on the plotline.

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103. For examples of endowed objects used effectively in trial narratives, see Koehlert-Page, *supra* note 51.

104. See Objects, Artifacts, and Stuff Lecture, *supra* note 76; Winters, *supra* note 77.

## 1. Emotion-Signifying Words

In both fiction and law, objective correlative can work better than words like “sad” and “angry” to evoke emotion in the reader and accurately portray an emotional state. Objective correlative is more nuanced than emotion-signifying words. Such nuance is typically more objective, and our legal system prefers the fairness inherent in objectivity.

### a. Fiction

Professor Tim Wynne-Jones explains that a character's response to the scene can reveal character and evoke emotion in a way that a report of the emotion itself cannot.<sup>105</sup> Words like “hate” and “love” are clumsy and can mean many things depending on the context.<sup>106</sup> Protagonist Cal Stephanides seizes on this awkwardness of words that signify emotion in Jeffrey Eugenides's Pulitzer Prize winning novel, *Middlesex*:

Emotions, in my experience, aren't covered by single words. I don't believe in “sadness,” “joy,” or “regret.” Maybe the best proof that the language is patriarchal is that it oversimplifies feeling. I'd like to have at my disposal complicated hybrid emotions, Germanic train-car constructions like, say, “the happiness that attends disaster.” Or: “the disappointment of sleeping with one's fantasy.” I'd like to show how “intimations of mortality brought on by aging family members” connects with “the hatred of mirrors that begins in middle age.” I'd like to have a word for “the sadness inspired by failing restaurants” as well as for “the excitement of getting a room with a minibar.”<sup>107</sup>

Professor Wynne-Jones takes this idea further and explains that just saying something like, “Casey hated school,” does not convey Casey's feelings to the reader.<sup>108</sup> “If loathing of school is significant, we need to find a way to objectify it. Casey looked at the alphabet. Who wrote those letters? Not a kid, that's for sure. Those letters were written by aliens he thought, a kind of punishment for humans.”<sup>109</sup>

This scene may communicate Casey's emotions better than the characters themselves can, as most people are not self-aware

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105. See Wynne-Jones, *supra* note 15.

106. See *id.*

107. JEFFREY EUGENIDES, *MIDDLESEX* 217 (2002).

108. Wynne-Jones, *supra* note 15.

109. *Id.*



enough to identify and verbalize their own emotional state.<sup>110</sup> Despite this lack of awareness, readers need a sense of a character's emotions.<sup>111</sup> Objective correlative serves to provide that sense.

b. Law

Just as emotion-signifying words fail to capture the emotion itself in fiction, they similarly fail in law. For example, in *Voskuil v. Environmental Health Center*, the defendant wanted to access the psychological records of the plaintiff, Caryn Voskuil. The defendant sought to prove that Voskuil had put her emotional state at issue in her discrimination claim.<sup>112</sup> In this instance, it probably would not improve the defendant's case to convey the emotion since that emotion could establish empathy for the plaintiff.<sup>113</sup> Instead, the defense merely needed to show that Voskuil had invoked emotion in her claim.<sup>114</sup> Thus, it referred to the emotion-signifying words in her deposition: "Voskuil decided to leave the University of Texas and return to Dallas because she got very depressed, felt really sad and wasn't happy with the program. Voskuil's definition of this depression included feelings of hopelessness, unhappiness and that she was very miserable and things had to change."<sup>115</sup>

The words "very depressed, felt really sad and wasn't happy" along with "hopelessness, unhappiness . . . very miserable" let the reader know that Voskuil wanted people to know that she was severely depressed.<sup>116</sup> But they do not convey the depression itself as profoundly as objective correlative could.

## 2. Emotion-Conveying Events

While emotion-signifying words may fall short in both fiction and in legal narratives, the external world can work quite nicely to do what these words cannot. By burrowing into a person's reaction to events, objects, and scenery, a writer can reveal the subtle nuances of that person's state of mind.

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110. See Winters, *supra* note 77; see also ELIOT, *supra* note 16.

111. See Winters, *supra* note 77, at 11; ELIOT, *supra* note 16.

112. See Brief of Respondent in Opposition to Petition for Writ of Certiorari at 4, *Voskuil v. Env'tl. Health Ctr.*, 531 U.S. 1192 (2001) (No. 00-1044), 2001 WL 34116846, at \*4.

113. See *id.*

114. See *id.*

115. See *id.*, at \*2.

116. See *id.*

## a. Fiction

As she discusses revealing that internal state, novelist Kim Winters explains that most individuals are not hyper-aware of their own emotional states. Thus, she explains, “Clues [about emotion] are needed to entice and hook a reader—concrete clues that hint at the story’s heart.”<sup>117</sup> Concrete items in the characters’ objective worlds can correlate to their subjective states.<sup>118</sup> The reader need not notice the symbolic meaning for these concrete items to resonate.<sup>119</sup> In fact, symbolism is not the end goal.<sup>120</sup> As Professor Wynne-Jones says, objective correlative is not simply a device.<sup>121</sup> Rather, “[emotional] truths . . . are as slippery as quicksilver.”<sup>122</sup> Objective correlative is how people actually experience those truths.

Kazuo Ishiguro captures this quicksilver in *Remains of the Day*. In the novel, the English butler, Mr. Stevens, never acknowledges his feelings for the housekeeper, Miss Kenton, not even to himself.<sup>123</sup> Ishiguro illustrates Stevens’ reasons for withholding:

I have never allowed the situation to slip into one in which the housekeeper is coming and going from my pantry all day. The butler’s pantry, as far as I am concerned, is a crucial office, the heart of the house’s operations, not unlike a general’s headquarters during battle, and it is imperative that all things in it are ordered—and left ordered—precisely the way I wish them to be. I have never been that sort of butler who allows all sorts of people to wander in and out with all of their queries and grumbles. If operations are to be conducted in a smoothly coordinated way, it is surely obvious that the butler’s pantry must be the one place in the house where privacy and solitude are guaranteed.<sup>124</sup>

The interaction between Mr. Stevens and Miss Kenton over the pantry is an objective correlative; this glance inside his butler’s cup-

117. See Winters, *supra* note 77, at 11; see also ELIOT, *supra* note 16.

118. See Winters, *supra* note 77, at 11–12; ELIOT, *supra* note 16.

119. See CARL JUNG, *On the Relation of Analytical Psychology to Poetry*, in THE PORTABLE JUNG, *supra* note 23, at 314–15, 318–19 [hereinafter *On the Relation of Analytical Psychology to Poetry*] (discussing the dream brain and symbolism); Eyster, *supra* note 25, at 108.

120. Cf. Wynne-Jones, *supra* note 15 (explaining that objective correlative is not just a device).

121. *Id.*

122. *Id.*

123. KAZUO ISHIGURO, *THE REMAINS OF THE DAY* (1988).

124. See *id.* at 165.

board reveals his state of mind.<sup>125</sup> Shortly after the passage above, Miss Kenton intrudes into the pantry and demands to see the book he is reading, which turns out to be a simple romance.<sup>126</sup> Romantic tension between Mr. Stevens and Miss Kenton pervades the novel, but they never voice their feelings.<sup>127</sup> The pantry reveals Mr. Stevens's fears of intimacy and his worries regarding what might happen were he to share himself with Miss Kenton.<sup>128</sup> She might see his feelings and inner workings. That would give her the power to hurt him or to change his life in some way. He fears that change and that loss of control. However, Mr. Stevens is not on the therapist's couch examining his own true motivations, so the neatly-ordered pantry must reveal those motivations for the reader.

In contrast, more blatant proclamations of feelings often fall short and fail to capture the "quicksilver." For example, in the essay that started much of the discussion regarding objective correlative, T.S. Eliot criticizes Shakespeare's *Hamlet*. Eliot contends that the play does not ring true because the emotion is all detailed in soliloquies.<sup>129</sup> For example, in the passage below, Hamlet describes his grief in dialogue when his lover Ophelia kills herself.

What is he whose grief  
Bears such an emphasis, whose phrase of sorrow  
Conjures the wand'ring stars, and makes them stand  
Like wonder-wounded hearers? This is I,  
Hamlet the Dane!

[*Leaps into the grave.*]<sup>130</sup>

Shakespeare may have intended that this passage be melodramatic; it does not do justice to the grief one feels after a loved one commits suicide. In fact, some critics believe that Hamlet was trying to match Ophelia's brother Laertes's grief.<sup>131</sup> Others believe that the character Ophelia is thinly drawn,<sup>132</sup> being one-dimensional, she may not provide a fully-fleshed source of grief.

Regardless of Shakespeare's intent, the question for writers should be: "What feelings does this passage evoke?" It may be effec-

125. Compare *id.*, with Wynne-Jones, *supra* note 15 (explaining how external happenings in a scene represent the character's internal world).

126. ISHIGURO, *supra* note 123, at 165–67.

127. See generally *id.* The novel as a whole revolves around this tension.

128. See generally *id.* The novel as a whole makes this representation more clear.

129. ELIOT, *supra* note 16.

130. WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK* act 5, sc. 1.

131. JONATHAN GIL HARRIS, *SHAKESPEARE AND LITERARY THEORY* 99 (2010).

132. See *id.* at 121–22.

tive for conveying showy melodrama,<sup>133</sup> but the writer who wants to convey grief might examine different models. Each loss is different, and each person will experience the loss uniquely. But instead of just mouthing some version of “I am so sad, and I’m more sad than all of you,” in a rough iambic pentameter, most characters will encounter objects, a situation, or a chain of events that terminate in a sensory experience. For instance, in the book *Wench*, Sweet, Lizzie, and Reenie are slaves vacationing with their masters as mistresses.<sup>134</sup> While away, Sweet receives news that illness has struck her master’s plantation.<sup>135</sup> She is not allowed to return home to her children.<sup>136</sup> Sweet greets her friends carrying a newly made funeral dress for her first child; readers learn that the child has died.<sup>137</sup> Sweet cannot return home to bury her child, so Reenie and Lizzie bury the dress.<sup>138</sup> The two women then do not see Sweet for days. Then another dress appears on Lizzie’s porch, and Reenie and Lizzie bury the dress for Sweet.<sup>139</sup> Eventually, Sweet loses three children, has one child left, and does not come out of her cabin.<sup>140</sup>

[Lizzie] found Sweet in the middle of the room, sitting amidst a mountain of shredded fabric. Her hair was disheveled, lips covered with the white crust of dehydration. “What are you making, Sweet?”

“Making.”

“We ain’t seen you around in a few days.”

“I told you. Making.”

Lizzie took up some of the fabric in her hands. Some of it was coarse cloth. But some of it was good—muslin, cotton, wool. Parts of it looked like undergarments, lace, sackcloth. Lizzie recognized the top portion of a girl’s dress. The lower half of it was a neverending patchwork of textures. Lizzie went into the bedroom and saw that the bed was barren of sheets, the closets empty of clothes. Everything had been used. Maybe Sweet’s man was grieving, too. Surely he knew Sweet had sewn up everything in the cottage.

The stitches weren’t even either. Some were loose, others bunched the fabric into uneven folds.<sup>141</sup>

133. *See id.* (discussing Lacan’s discussion of Hamlet’s display).

134. DOLEN PERKINS-VALDEZ, *WENCH: A NOVEL* (2011).

135. *Id.* at 184.

136. *Id.* at 185.

137. *Id.* at 186.

138. *Id.* at 187.

139. *Id.* at 188.

140. PERKINS-VALDEZ, *supra* note 134, at 188.

141. *Id.* at 189.

Sweet neither wails like Hamlet nor makes a display of jumping into the grave. Rather, her obsession for making the clothes carries on for the rest of the chapter; Sweet is so incoherent that she drools as she works.<sup>142</sup> Not only is she obsessed, but the uneven stitches and the mismatched fabric show she is disoriented by grief.<sup>143</sup> That she has destroyed all of the sheets and clothes in the cabin shows her desperation.<sup>144</sup> This chain of events conveys her unique grief, the grief of a slave woman not allowed to bury her own children.<sup>145</sup>

b. Law

Lawyers can reveal what a witness's words do not reveal on their own by using objective correlative. For example, in *Davis*, the state sought to admit the out-of-court statements of a battered wife in the trial of the husband.<sup>146</sup> The defense argued that the statements violated the Sixth Amendment's Confrontation Clause.<sup>147</sup> The state argued that the statements were not testimonial.<sup>148</sup> Further, the state contended that battered spouses are frequently too intimidated to testify.<sup>149</sup> The facts in the state's brief underscored this contention:

[A]t 10:55 p.m. . . . Officers Jason Mooney and Rod Richardson responded to a dispatch concerning a domestic disturbance at . . . the home of Hershel and Amy Hammon. . . . Officer Mooney found Amy on the front porch of her house . . . Amy appeared "[t]imid" and "frightened." Officer Mooney asked Amy "if there was a problem and if anything was going on," and Amy answered "No," that "nothing was the matter" and "that everything was okay." . . .

[Officer Mooney entered the house. T]he Hammon living room was in disarray. In a corner of the room lay shattered glass from what had been the front panel of a gas heater. Flames from the heater flickered in the open.<sup>150</sup>

Here Hammon's words were that "nothing was the matter."<sup>151</sup> But the chain of events and set of objects indicated that something

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142. *Id.* at 190.

143. *Id.* at 189.

144. *Id.*

145. *Id.* at 189–91.

146. Brief for Respondent in *Hammon v. Indiana*, *Davis v. Washington*, 547 U.S. 813 (2006) (No. 05-5224), 2006 WL 271825.

147. *See id.* at 8.

148. *See id.* at 43–46.

149. *Id.* at 40–42.

150. *Id.* at 1–2.

151. *See id.* at 2.

was wrong.<sup>152</sup> First, there was the domestic disturbance call. Then the officers found Amy Hammon standing outside late at night.<sup>153</sup> These events in combination with the disarray, shattered glass, and flickering flames all tend to suggest that something was, in fact, wrong.<sup>154</sup> Ms. Hammon did eventually reveal that she was beaten.<sup>155</sup> Thus, the objective correlative spoke louder than Ms. Hammon's initial words.<sup>156</sup>

### 3. Character and Plot

In using objective correlative to reveal the individual's unique emotional state, the writer also reveals the person's character. In the process, the writer also establishes the motivations driving these people forward on their plotlines. Indeed, a chain of events can be the catalyst that pushes a character or witness to the next step.

#### a. Fiction

In fiction, objective correlative reveals the subtle inner-workings of a character and propels a character forward on his or her plotline. For instance, in the train station scene from *Anna Karenina* discussed in Part I.B., readers learn much about Anna's evolution.<sup>157</sup> She was once flattered by the attention of young Vronsky; so flattered that she fell in love with him.<sup>158</sup> Moreover, she once wanted something from society and attended social gatherings.<sup>159</sup> But now the people in the train station are "monstrous . . . lepers."<sup>160</sup> They will not leave her in peace.<sup>161</sup> The scene conveys that Anna believes that society can only take pieces of her and can offer nothing in return.<sup>162</sup>

Objective correlative not only develops Anna's character, but it is an impetus for the plot. The train station scene and Anna's reaction to it finally push Anna in front of the train.<sup>163</sup> The next move would have been hollow had Anna instead thought, "Gee, my life is a horrible mess ever since I started cheating on my husband with

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152. See Brief for Respondent, *supra* note 146, at 2.

153. *Id.* at 1.

154. See *id.* at 1–2.

155. *Id.* at 3.

156. See generally *id.*

157. See *supra* note 51.

158. See *id.*

159. See *id.*

160. See *id.* at 614–615.

161. See *id.*

162. See *id.*

163. See *supra* note 51.

Vronsky, and I don't get invited to any of the good parties anymore. I think I'll jump in front of a train." Such a passage would have seemed like a cheat. Instead, Anna's reaction to the station forces her in front of the train.

b. Law

Similarly, objective correlative can reveal the character of witnesses and reveal the impetus for their actions in the real-life plot of the case. For instance, in the *Hammon* case discussed in Part II.A.2.b, the chain of events and set of objects reveal Ms. Hammon's character and her motivations.<sup>164</sup> After establishing that the room was in disarray, the state's attorney went on to write:

Mr. Hammon, during the verbal part of the argument was breaking things in the living room . . . he broke the phone, broke the lamp, broke the front of the heater. When it became physical he threw her down into the glass of the heater. . . .

Mr. Hammon had pushed her onto the ground, had shoved her head into the broken glass of the heater and that he had punched her in the chest twice. . . .<sup>165</sup>

However, Ms. Hammon initially said that nothing was wrong, and she later refused to testify.<sup>166</sup> Objective correlative illustrates one potential motivation for her decision: she was afraid.<sup>167</sup> Mr. Hammon's violence, the broken glass, and the heater's flames all stand in for Ms. Hammon's fear.<sup>168</sup> Readers understand her a little more, why she first lied to the police, and why she later refused to testify.<sup>169</sup>

These reasons for her refusal to testify make the need for her out-of-court statements more understandable. While the U.S. Supreme Court did hold that Hammon's statements were testimonial, it recognized that this type of crime notoriously involves coercion of the witness to prevent the witness from testifying.<sup>170</sup>

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164. See Brief for Respondent, *supra* note 146, at 1–7.

165. *Id.* at 3–4.

166. *Id.* at 41.

167. See *id.* at 44.

168. See *id.* at 44–45.

169. See generally *id.*

170. *Davis v. Washington*, 547 U.S. 813, 832 (2006). Ms. Hammon also wrote an affidavit. *Id.* The Court deemed that the affidavit, like the account above, was testimonial and inadmissible. *Id.* at 833–34.

### B. *Legal Relevance*

Objective correlative does not merely impart these types of subtle psychological messages in a legal narrative; it plays an additional role in developing relevant evidence. Objective correlative is actually a means of discovering and capturing the past, building a coherent theory of the case, and conveying legally relevant facts.

Objective correlative can teach brief writers about including potentially important relevant details.<sup>171</sup> For instance, initially, the sculpture, tools, and equipment in a metal lab might not seem immediately relevant in a negligence case for a burning accident. Moreover, the fact that the lab was in a school might also initially seem incidental.<sup>172</sup> Some writers might instead focus on the hazardous materials or the mechanism of the burning accident itself; however, the laboratory itself can form a symbolic backdrop for the negligence. Being a school laboratory, it symbolizes education and its ancillary obligations such as oversight and nurturing students. Any clutter in the room can symbolize neglect in contrast to nurture.

As symbolic as these ideas are, they are also relevant. For instance, in *Lei v. City of New York*, the clutter and school setting illustrated in trial transcripts and an appellate brief underscored the claimant's argument that a college laboratory was negligent and that damages for pain and suffering and for future pain and suffering were reasonable.<sup>173</sup> The student, Manny Lei, was alone in the lab. His instructor, Mr. Keltner, was in his office on the phone.<sup>174</sup> The lab could not be seen from the office, which was across the hall and twenty-five feet away.<sup>175</sup> Such details as the lack of visibility and the distance underscore that Mr. Keltner was not supervising Manny. The appellate attorney further highlighted this neglect of his duty: "The room was cluttered with materials, including his

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171. Cf. ROBBINS, *supra* note 25, at 59–64 (explaining that investigation of details is necessary to determine relevant facts); Eyster, *supra* note 25, at 94, 100, 105 (2008) (encouraging attorneys to seek out physical details).

172. See generally Brief of Claimant-Respondent, *Lei v. City Univ. of New York (Lei II)*, 33 A.D.3d 467 (N.Y. App. Div. 2005) (No. 6905), 2005 WL 5950602 (describing an accident in a similar lab).

173. See *id.* at 4–5; see also Transcript of Mark Rubenstein, M.D., *Lei v. City Univ. of New York (Lei I)*, No. 99848 (N.Y. Ct. Cl. Feb. 18, 2004) (trial transcript speaking of the clutter).

174. Brief of Claimant-Respondent, *supra* note 172, at 4.

175. *Id.*



sculpture, a stool, an anvil and a machine to bend metal rods.”<sup>176</sup> Although clutter may convey carelessness in a more general sense, it might not have seemed immediately relevant when the attorney first learned of it. However, once Manny caught fire, he was unable to “stop, drop, and roll” because of the clutter in the room.<sup>177</sup> Ultimately, the trial court found the school negligent, and the appellate court upheld that finding, holding that the damages for pain and suffering were reasonable.<sup>178</sup> Using these variables in combination allows the attorney to paint one relevant picture that highlights the theory of the case.

This concept can potentially be relevant in a wide variety of cases. For instance, the scene, set of objects, or chain of events can be relevant in any trial regarding a negligent accident, self-defense, assault, or child protection.<sup>179</sup>

### III. TRAITS OF EFFECTIVE OBJECTIVE CORRELATIVE

Gaining an understanding of the meaning and purposes of objective correlative is simply the first step in the process of effective writing. The storyteller must also gracefully weave in details to convey a sense of naturalness and must reveal these details through the eyes and voice of the viewpoint character. Objective correlative works best when these elements seamlessly work together to convey the story through the eyes of the character.<sup>180</sup> The details all

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176. *Id.* at 4–5; *see also* Transcript of Leo J. DeBobes, *Lei II*, 33 A.D.3d 467 (trial transcript speaking of the congestion); Transcript of Mark Rubenstein, M.D., *supra* note 173 (trial transcript speaking of the clutter).

177. Brief of Claimant-Respondent, *supra* note 172, at 4–5.

178. *Lei II*, 33 A.D.3d at 468–69. The court did not uphold the damages for lost wages, which are not a part of the objective correlative details mentioned above. *Id.* at 469.

179. *See, e.g.*, *State v. Watson*, 751 A.2d 1004, 1007 (Me. 2000) (leaving a “lightly clad” child in the car on a cold winter day could be considered child endangerment); *Hutton v. City of Savannah*, 968 S.W.2d 808, 810 (Tenn. App. 1997) (considering cloudy and rainy weather in determining liability for car accident); *Healey v. Playland Amusements*, 199 So. 682, 684 (La. App. 1941) (weighing a flashlight shoved in a plaintiff’s face in considering assault and self-defense issues).

180. *See PAMUK*, *supra* note 19, at 89 (discussing how the landscape is seen through the characters); Michaela Roessner, Instructor, Gotham Writers’ Workshop, Online World-Building Lecture in Advanced Science Fiction Writing (Aug. 8, 2012) (on file with author) (discussing how a good science fiction setting is seen through the eyes of the characters and thus “multitasks” by revealing not only the scene but the character and theme).

unfold the way they might if a person was actually there in the scene.<sup>181</sup>

### A. *Effective Objective Correlative in Fiction*

When objective correlative is done well, the elements of the scene are woven together in moment-by-moment action, thought, and dialogue.<sup>182</sup> Further, the scene is viewed through the character's eyes at that moment in the character's life and relayed in the narrator's unique voice.<sup>183</sup>

#### 1. Seamless Weaving

Thought, action, objects, gestures, sensations all unfold beat-by-beat in graceful objective correlative.<sup>184</sup> Objective correlative is not simply a catalogue of items in the scene.<sup>185</sup> The writer does not string together a list of adjectives and say, "[I]t was a hot, dry, bright, and clear day."<sup>186</sup> The only thing such a list telegraphs is a sense that the narrator might be inane and a little manic.<sup>187</sup> Moreover, objective correlative is not merely a catalogue of items in the room.<sup>188</sup> For instance, the writer does not simply state, "Chandra's room had a queen sized bed with a quilt, a white candle holder, a lamp, a plant, a mirror on the wall, and white curtains." Not only is such a description very boring, it simply is not the way we would experience Chandra's room at a given point in our lives. The only

181. See Wynne-Jones, *supra* note 15 (discussing how the scene is part of the unfolding of the action seen through the eyes of the viewpoint character).

182. See generally *id.* (illustrating the manner in which objective correlative unfolds).

183. Cf. PAMUK, *supra* note 19, at 98, 103 (explaining that the details keep readers attentive because of how they appear to the protagonist).

184. Cf. Roessner, *supra* note 180. Professor Roessner explains that simply describing the setting will seem like exposition. Thus, the setting must be a part of the interaction in the scene.

185. See *supra* note 182.

186. See *id.*; see also PAMUK, *supra* note 19, at 98, 103 (explaining that the details keep readers attentive because of how they appear to the protagonist); Roessner, *supra* note 180 (explaining that simply stuffing a story full of details is not the way to "world-build" and advising that the world unfold as seen through the eyes of the viewpoint character); cf. Cheryl Miller, *The Feminist Action Hero*, CLAREMONT REV. OF BOOKS, Winter 2010, at 98 (book review), available at <http://www.claremont.org/article/feminist-action-hero/> (complaining that *The Girl With the Dragon Tattoo* includes an entire list of the protagonist's Ikea purchases).

187. Cf. Miller, *supra* note 186. Perhaps the list of Ikea purchases made by the lead character in *The Girl with the Dragon Tattoo* is meant to convey a somewhat autistic state of mind.

188. See *supra* note 182.

thing that such a description might indicate about the narrator is that the narrator could be an appraiser or maybe someone with an obsession for cataloging items.

Rather, objects, weather, temperature, actions, gestures, and the like are all woven together seamlessly as the scene unfolds.<sup>189</sup> For instance, the heat of the Amazon is ever-present in Ann Patchett's *State of Wonder*.<sup>190</sup> In the book, medical researcher Marina is grieving the loss of her co-worker, Anders, who is presumed to have died from fever while researching fertility in the Amazon with Marina's former professor, Dr. Swenson.<sup>191</sup> The author, Patchett, includes several letters with tales of Anders's feverish state.<sup>192</sup> Marina travels to the Amazon jungle to verify the death, to find Anders's body, and to bring back the research results of Dr. Swenson.<sup>193</sup> Only Dr. Swenson does not want to be found and does not wish to produce her results.<sup>194</sup> Moreover, to survive the jungle, Marina must take mind-altering drug Lariam to prevent malaria.<sup>195</sup> Throughout the book, Patchett uses the conditions of the jungle to convey Marina's state of mind in passages like the one below.

Marina felt the top of her head turning soft as the sun worked into her brain, unloosening its coils . . . She mopped at her face with a large red handkerchief Rodrigo had pressed on her that morning. . . . Under her clothes she felt the swimsuit with every inhalation. It wrapped around her body like an endless bandage, growing larger and looser as it soaked her up. She kept pushing the cloth against her face. Her vision was clouded by the sweat in her eyes. She could only make out the most basic elements of the landscape: sand, water, sky.<sup>196</sup>

Notice, Patchett does not simply write, "It was still really hot outside, and Marina was sweating." Instead, Marina's reaction to the heat and to the Lariam is a natural part of the scene.<sup>197</sup> In fact, Patchett never says, "Marina was sweating." Rather, Marina's sweat is a part of the action, the face mopping, the swimsuit soaking, and

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189. See PAMUK, *supra* note 19, at 89 (discussing how the landscape is seen through the characters); ROESSNER, *supra* note 180.

190. ANN PATCHETT, *STATE OF WONDER* (2012).

191. *Id.* at 2–4, 8, 10, 12, 18, 25, 29–30.

192. *Id.* at 42–43, 113–14, 221.

193. *Id.* at 21–22, 45.

194. *Id.* at 7, 10.

195. *Id.* at 33–34, 37–38, 46, 48.

196. PATCHETT, *supra* note 190, at 101–02.

197. *Id.*

the vision clouding.<sup>198</sup> To some extent, Marina experiences what we all might experience moment-by-moment in the heat.<sup>199</sup>

However, Marina's individual state of mind also colors that experience.<sup>200</sup> In earlier scenes, Patchett has already included Anders's feverish letters and has established that Marina is grieving his death; in fact, finding Anders is one of the reasons she endures the sweltering jungle.<sup>201</sup> Moreover, throughout the book Patchett reminds readers that Mariana is using Lariam.<sup>202</sup> Thus, "the top of her head" turns "soft as the sun" works "into her brain, unloosening its coils."<sup>203</sup> It's hot out, but the heat also represents Marina's hazy state of mind.<sup>204</sup>

Further, the heat represents the seemingly impossible task that Marina is trying to accomplish:<sup>205</sup> finding a dead man in the Amazon jungle and bringing him back to civilization alive.<sup>206</sup> She is also charged with doing what Anders died trying to do: bring back Dr. Swenson's research results.<sup>207</sup> For reasons that remain mysterious through most of the book, Dr. Swenson and her adopted Amazonian tribe are bent on preventing the release of the research. Marina's tasks are overwhelming and oppressive, just as the heat is overwhelming and oppressive.<sup>208</sup> It loosens her brain coils.<sup>209</sup> She mops sweat from her face.<sup>210</sup> Her swimsuit soaks her.<sup>211</sup> Sweat clouds her vision.<sup>212</sup>

The heat is also evocative of fever. Anders died of fever.

All of these aspects are seamlessly woven together within the overarching framework of objective correlative, to create a physical and emotional backdrop for the dialogue.<sup>213</sup>

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198. *Id.*

199. *Id.*

200. *Id.* at 101–02.

201. *Id.* at 2–4, 8, 10, 12, 18, 25, 29–30.

202. PATCHETT, *supra* note 190, at 33–34, 37–38, 46, 48.

203. *Id.* at 101–02.

204. *Id.* at 33–34, 37–38, 46, 48, 101–02.

205. *Id.* at 101–02.

206. *Id.* at 29–30, 43–45.

207. *Id.* at 10, 21–22.

208. PATCHETT, *supra* note 190, at 101–02.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 101–02.

213. *Id.*

## 2. Perspective and Voice

Objective correlative is not merely a description of a scene, set of objects, or chain of events.<sup>214</sup> It is also a description of the characters' response to these things as seen through the character's eyes at that moment in the character's life and relayed in the narrator's unique voice.<sup>215</sup> For instance, in the National Book Award-Winning, *The Astonishing Life of Octavian Nothing, Traitor to the Nation, Volume I: The Pox Party*, Octavian begins his story with:

I was raised in a gaunt house with a garden; my earliest recollections are of floating lights in the apple-trees.

I recall, in the orchard behind the house, orbs of flame rising through the black boughs and branches; they climbed, spirituous [sic], and flickered out; my mother squeezed my hand with delight. We stood near the door to the ice-chamber.

By the well, servants lit bubbles of gas on fire, clad in frock-coats of asbestos.

Around the orchard and gardens stood a wall of some height, designed to repel the glance of idle curiosity and to keep us all from slipping away and running for freedom; though that, of course, I did not yet understand.

How doth all that seeks to rise burn itself to nothing.<sup>216</sup>

Octavian's eighteenth century world is fantastical to readers because it is fantastical to Octavian.<sup>217</sup> Octavian does not use scientific terms to describe the lights in the trees.<sup>218</sup> Rather they are "floating lights" and "orbs of flame" that climb "spirituous."<sup>219</sup> Readers experience the wonder that the boy feels for his own world; that of an intelligent eighteenth century child.<sup>220</sup>

Readers also sense the subtle tension in Octavian's life. They sense his privileged status when he mentions the servants, the orchard, and the gardens.<sup>221</sup> And yet, readers feel a strain between Octavian's privileged status and the limits on his freedom when he mentions "a wall of some height, designed . . . to keep us all from slipping away and running for freedom."<sup>222</sup> Moreover, readers feel

214. See Wynne-Jones, *supra* note 15.

215. See *id.*

216. M.T. ANDERSON, *THE ASTONISHING LIFE OF OCTAVIAN NOTHING, TRAITOR TO THE NATION, VOLUME I: THE POX PARTY* 3 (2006).

217. See *id.*

218. *Id.*

219. *Id.*

220. See *id.*

221. See *id.* at 3.

222. ANDERSON, *supra* note 216, at 3.

that something is not quite right regarding Octavian's situation upon learning that the wall is also "designed to repel the glance of idle curiosity."<sup>223</sup>

Thus Octavian's description of the house where he is raised is not just a description of a house.<sup>224</sup> It is the conveyance of Octavian's existence, of the story's conflicts, the central question of the story, and Octavian's state of mind.<sup>225</sup>

### 3. Touches of Detail

Specific details are all part of the subtle psychological picture in objective correlative. For instance, in the passage above the many details tell us a lot about Octavian and where he lives.<sup>226</sup> "Ice-house" and "frock-coat" are two small hints indicating that the story occurs in the past.<sup>227</sup> Octavian's mother squeezes his hand.<sup>228</sup> That gives readers a sense that Octavian is young and that he and his mother may have a loving relationship.<sup>229</sup> It also conveys that the two share a sense of wonder regarding the lights in the trees.<sup>230</sup>

In contrast, Steig Larsson's *The Girl with the Dragon Tattoo* omits scenic details in the following passage:

The Agency for Industrial Assistance was a project that was backed by the state and administered by representatives of about a dozen big Swedish firms. The AIA obtained government guarantees for a number of projects initiated in agreement with the governments in Poland and the Baltics. The Swedish Trade Union Confederation, LO, also joined in as a guarantor that the workers' movement in the East would be strengthened as well by following the Swedish model. In theory, it was an assistance project that built on the principle of offering help for self-help, and it was supposed to give the regimes in the East the opportunity to restructure their economies. In practice, however, it meant that Swedish companies would get state subventions for going in and establishing them-

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223. *Id.*

224. *See id.*

225. *See id.*

226. *See id.*

227. *See id.* at 3; *see also* Roessner, *supra* note 180 (discussing how little details like a butter churn in the kitchen can help establish that the story takes place in colonial America and how the mere mention of the Eiffel Tower will call up a very specific image for the reader).

228. *See* ANDERSON, *supra* note 216, at 3.

229. *See id.*

230. *See id.*

selves as part owners in companies in Eastern European countries.<sup>231</sup>

This passage is not the way a person experiences a scene in real life. It is simply a head talking in a vacuum.<sup>232</sup> During a real-life conversation with another person, one might notice that person's unique tics, gestures, or clothing choices. Particularly hot, cold, dry, or rainy weather might affect the conversation. If one's clothes are uncomfortable or one ate the wrong thing for dinner, that fact might be present during the conversation. If there is a distinct smell in the air, one might be distracted by it. One's state of mind during the conversation will shape which of these details jumps to the forefront, but jump to the forefront they will. Instead, the above is just an information dump full of back-story.<sup>233</sup>

#### 4. Naturally Coherent Details

Marina's heat, Octavian's lights, and Anna's train station are not simply devices forced into these scenes. They are natural parts of the scene. They belong there, and it seems fitting that they are part of the scene's unfolding. The manner in which these details unfold also seems natural. For instance, in *State of Wonder*, Marina is in the Amazon.<sup>234</sup> It is hot.<sup>235</sup> Thus, one would expect her to feel the heat. So in revealing Marina's state of mind, Patchett makes use of scenic elements that are already a logical part of the setting. Readers specifically see how the heat affects Marina in her given state.<sup>236</sup> Moreover, the manner in which the heat affects her also makes sense. Marina wipes her face because the sweat is getting in

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231. STIEG LARSSON, *THE GIRL WITH THE DRAGON TATTOO* 23 (2008).

232. See *id.*; see also Joan Acocella, *Man of Mystery*, *THE NEW YORKER*, Jan. 10, 2011, at 70 (book review), available at [http://www.newyorker.com/arts/critics/atlarge/2011/01/10/110110crat\\_atlarge\\_acocella?currentPage=all&mobify=0](http://www.newyorker.com/arts/critics/atlarge/2011/01/10/110110crat_atlarge_acocella?currentPage=all&mobify=0) (stating that the book opens with a long passage where one character relates information to another); but see Donna Rifkind, *The Girl with the Dragon Tattoo*, *BARNESANDNOBLEREVIEW.COM* (Oct. 21, 2008) (book review), <http://bnreview.barnesandnoble.com/t5/Reviews-Essays/The-Girl-with-the-Dragon-Tattoo/ba-p/686> (praising the book and stating that Larsson withholds just enough information).

233. Cf. Acocella, *supra* note 232 (stating that the book as a whole contains dumps of unnecessary detail); Lee Goldberg, *The Girl with the Dragon Tattoo*, *LEE GOLDBERG: A WRITER'S LIFE* (Mar. 15, 2009), [http://leegoldberg.typepad.com/a\\_writers\\_life/2009/03/the-girl-with-the-dragon-tattoo.html](http://leegoldberg.typepad.com/a_writers_life/2009/03/the-girl-with-the-dragon-tattoo.html) (complaining about the "numbingly dull" backstory in the book as a whole); but see Rifkind, *supra* note 232.

234. See PATCHETT, *supra* note 190, at 2–4, 8, 10, 12, 18, 25, 29–30.

235. See *id.*

236. See *id.*

her eyes and clouding her vision. If instead, Patchett had used some overwrought analogy about sweat pouring down her face like a waterfall, it would have seemed like an unnatural interruption of the scene. If Patchett had deviated onto a tangent about the New York City subway, then the passage would seem out of place.

In a different setting, the frustration, haziness, and impossibility conveyed by the heat in *State of Wonder* could also be conveyed by rain if viewed through the right lens. In the murder-mystery television show, *The Killing*, the climate of Seattle is used to create an effective objective correlative.<sup>237</sup> The main characters are two police officers investigating the murder of a teenage girl, Rosie.<sup>238</sup> The daytime scenes are often dark and cloudy, as Seattle actually is.<sup>239</sup> The nighttime scenes sometimes take place in a car out in the rain.<sup>240</sup> Voices punctuate the darkness.<sup>241</sup> Light catches a profile.<sup>242</sup> Viewers strain to see the faces of the mystery characters in the car.<sup>243</sup> This dark back-drop accentuates the mystery.<sup>244</sup> Rosie's family, her teacher, her friends, the police officers themselves, and the city's politicians are all hiding dark secrets.<sup>245</sup> Seattle mist shrouds these secrets.<sup>246</sup> Occasionally, the fog rolls back, and a secret is revealed.<sup>247</sup> But the sun never shines quite enough for the whole truth regarding Rosie's death to unfold until the final episode of Season Two.<sup>248</sup>

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237. *The Killing: Season One* (AMC television broadcast Apr. 3, 2011 through June 19, 2011); *The Killing: Season Two* (AMC television broadcast Apr. 1, 2012 through June 17, 2012); *The Killing: Season Three* (AMC television broadcast June 2, 2013 through Aug. 4, 2013); *The Killing: Season Four* (Netflix release Aug. 1, 2014).

238. *The Killing: Pilot* (AMC television broadcast Apr. 3, 2011).

239. *The Killing: Season One*, *supra* note 237; *The Killing: Season Two*, *supra* note 237; see also *The Killing: TV Review*, THE HOLLYWOOD REPORTER, <http://www.hollywoodreporter.com/review/killing-tv-review-171764> (last visited Jan. 26, 2013) (discussing the dark and gray setting); AMC, *Seattle and the Rain: Inside The Killing*, YOUTUBE (Feb. 29, 2012), <http://www.youtube.com/watch?v=7bvCeNwoRJs> (discussing the role that that rain plays in the show).

240. See *supra* note 239.

241. See *id.*

242. See *id.*

243. See *id.*

244. See *id.*

245. See *id.*

246. See *supra* note 239.

247. See, e.g., *The Killing: Ghosts from the Past* (AMC television broadcast Apr. 22, 2012) (revealing that the victim's biological father was not Stan Larsen, the man married to her mother).

248. *The Killing: What I Know* (AMC television broadcast June 17, 2012).



### B. *Effective Objective Correlative in Legal Narratives*

In both litigation narratives and appellate briefs, the use of objective correlative does not merely create a vivid and evocative statement of facts; it highlights significant facts in the argument and serves as a backdrop there as well. Below, I examine objective correlative first in the statement of facts and then in the argument.

#### 1. In the Statement of Facts and Testimony

Although attorneys have less liberty with respect to detail than fiction writers, trial attorneys can seek detail and appellate attorneys can use the record's details to craft a similarly effective objective correlative.<sup>249</sup>

##### a. Graceful Weaving

In *Johnson v. United States*, the state effectively elicited details at trial and weaved those details into its brief to the U.S. Supreme Court, creating an objective correlative.<sup>250</sup> The Court was determining whether a drug smell could support probable cause and exigent circumstances for a search.<sup>251</sup> Objective correlative developed at trial is gracefully weaved into the statement of facts in the brief.<sup>252</sup> That use of objective correlative paints a picture of probable cause, which is a totality of the circumstances determination.

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249. Cf. Eyster, *supra* note 25, at 94, 100, 105 (encouraging attorneys to seek out physical details). For an additional example of a well-written objective correlative, see Original Brief of Plaintiff-Appellant, *Coar v. Natl. Union Fire Ins. Co.*, 19 F.3d 247, 248 (5th Cir. 1994) (No. 92-357), 1993 WL 13101437. Although the plaintiff did not win its jurisdictional challenge to removing the case to the bankruptcy court, *Coar*, 19 F.3d at 248, the description of the airplane crash serves as an effective objective correlative for the child's resulting post-traumatic stress. In another case involving an industrial accident, the attorneys compiled a similarly vivid statement of facts that evokes emotion. See Petitioner's Brief on the Merits, *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999) (No. 98-0184), 1998 WL 34193041.

250. Brief for the United States, *Johnson v. United States*, 333 U.S. 10 (1948) (No. 329), 1947 WL 44223.

251. See *Johnson*, 333 U.S. at 11–12. The court did find that a magistrate could have found probable cause for the search under the circumstances. *Id.* at 16. However, it did not find exigent circumstances justifying a search without a warrant. See *id.* at 15, 17. For an explanation of the term “exigent circumstances,” see *Kentucky v. King*, 131 S. Ct. 1849, 1853–54 (2011). There, the Court explained that exigent circumstances can include the need to prevent the destruction of evidence. *Id.* In contrast, probable cause exists where “‘the facts and circumstances within their (the officers’) knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed.” *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949) (citation omitted).

252. See Brief for the United States, *supra* note 250, at 6–13.

The fully-fleshed scene primes readers to accept the most probative piece of evidence when it is finally divulged.<sup>253</sup> The writer first layers in details that would not be probative by themselves but that are all seeds that likely planted suspicion in the officers' mind. Likewise, readers may feel an unidentifiable discomfort that primes them for the evidence regarding the opium smell. Since the determination is a totality of the circumstances review, the Court could consider all of these little seeds in making its determination. These seeds are to be taken together, since each is insufficient on its own.

The first question about the owner is planted when the writer begins by telling readers that Johnson owns "the Europe Hotel" and describes the thirty-five guests of the hotel as "tenants."<sup>254</sup> Readers might wonder whether people with a transient lifestyle might live in the hotel and may have some questions about what happens at the hotel. While this little detail is too small on its own,<sup>255</sup> it prepares the readers to accept the more probative details that follow.

Readers may question the hotel further when next the writer tells readers about Johnson's "business office and . . . sleeping room," a small room that had one-way glass.<sup>256</sup>

The door to the room had three glass panels, each about eight inches wide, which had a silver coating on them. Petitioner was able to see through the panels from inside the room, but a person on the outside could not see into the room, except that "a little bit in one corner you can see through it."<sup>257</sup>

The fact that Johnson sleeps in her business office might seem a little odd. Moreover, the one-way glass is more unusual, and it feels a little sinister. It's not merely that Johnson could hide something in the room. Rather, many readers might be uncomfortable with the idea that she could see them when they cannot see her. That, combined with the fact that she is the owner of the hotel,<sup>258</sup> lends Johnson an overlord quality. Although, these facts could not establish probable cause on their own, they are consistent with the

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253. *See id.* at 8–10 (discussing the odor of opium in the hallway).

254. *Id.* at 7.

255. *Cf.* Johnson, 333 U.S. at 16 (basing the probable cause decision largely on the opium smell rather than any other factor); *United States v. Boyd*, 910 F. Supp. 2d 995 (W.D. Mich. 2011) (finding no probable cause in case where a young transient let officers into a hotel room); *but cf.* *United States v. Pollard*, 466 F.2d 1 (10th Cir. 1972) (reasoning that the transient lifestyle of the defendant made him more likely to flee than long-time resident defendants and thus provided evidence of exigent circumstances).

256. Brief for the United States, *supra* note 250, at 8.

257. *Id.*

258. *Id.* at 7.

more probative details that follow. Thus, these facts prime the reader to believe the subsequent evidence.

Those more probative details regarding the drugs are then conveyed in this passage:

[Detective] Belland also testified that Odekirk[, a drug-using informant] knew that someone was smoking opium, “because he could smell it right in the hallway . . . .” Belland . . . and narcotic agent Giordano . . . entered the hotel . . . . [Belland went in to interview] the manager of that hotel to ascertain what information she might give [the police] on anyone that would be using narcotics in there at that time. As [he] came up the stairs there was a strong odor of opium smell. It led [him] right to Room Number 1, the room of the defendant. As [he] stood in front of the door there was a strong odor coming out between the sill and the door.<sup>259</sup>

The opium smell was the heart of the case, and the writer wove it into the brief naturally by walking readers through Detective Belland’s shoes as he smelled the opium. First there was the informant’s tip, then the smell, and then the stronger smell seeping from the door.

However, the writer did not stop with the smell in weaving in details that amplify the totality of the circumstances. Once the detective smells the opium:

[He] rapped on the door and identified himself and, after some delay during which “some shuffling or noise in the room” was heard, petitioner opened the door and admitted them. . . . Belland . . . told petitioner, “I want to talk to you about this opium smell in the room here”. [sic] Petitioner denied the existence of the smell . . . . [A]gent Graben discovered concealed beneath the bedcovers, which had been “thrown back towards the wall,” a one-ounce ointment jar containing 85 grains of opium prepared for smoking with no marks or labels . . . .<sup>260</sup>

The delay and shuffling might cause readers to wonder whether Johnson was either out of sorts or hiding something.

Each of these details alone is not enough, but, as they unfold naturally in combination with the smell, they all convey a totality of the circumstances supporting probable cause. Through objective correlative readers sense Belland’s state of mind and feel his initial discomfort along with his growing suspicion that is eventually con-

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259. *Id.* at 8–9 (citations omitted).

260. *Id.* at 10–11.

firmed. Although the legal issue centers on the opium smell, other little details that unfold in the scene form the basis of Belland's suspicion.<sup>261</sup> Each of these details in a vacuum could be dismissed. However, in combination with the shuffling, delay, and opium smell,<sup>262</sup> readers cannot help but feel Belland's overall state of mind and think, "well, of course."

Notice also, the details are woven into the scene moment-by-moment.<sup>263</sup> Readers do not get a list of items, such as, "acting on a tip from an informant, Belland went to the hotel to discover approximately thirty-five tenants, an office used as a bedroom, a one-way glass window, and an opium smell."<sup>264</sup> Instead, the scene progresses in much the same way that it must have for Belland, and the details are woven in along the way in a natural fashion making readers feel as though they are there.<sup>265</sup> The details appear in the brief organically as a part of the story itself and lead us from a wide-shot of the hotel up to the room and then into the room itself.<sup>266</sup>

These naturally occurring details paint a picture of probable cause. Although the U.S. Supreme Court found that the police should have obtained a warrant for the search due to the lack of exigent circumstances, the Court noted that a magistrate might have found probable cause to issue such a warrant.<sup>267</sup>

b. Perspective and Voice

Objective correlative has a greater air of authenticity when the "characters," the witnesses and clients, relay objective correlative in their unique voice. At trial, these narratives are bookended by the attorney. On appeal, although the legal explanation will be in the voice of an attorney-narrator, the attorney will better preserve that same authenticity from the trial court by sampling the unique voices of the clients and witnesses to relay facts.

For example, a lawyer can use a party's voice to illustrate a party's cartoonish approach to violence; in a child protection case, such an illustration can have a bearing on the parent's abilities to care for the child. For instance, in *In re R.D.G.*, Child Protective Services sought to uphold a judgment for termination a mother's

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261. *See id.* at 6–13.

262. Brief for the United States, *supra* note 250, at 9–10.

263. *See id.* at 6–13.

264. *See generally id.*

265. *See id.* at 6–13.

266. *Id.*

267. *See Johnson v. United States*, 333 U.S. 10, 14–17 (1948).

parental rights to her son.<sup>268</sup> The state's brief quotes the mother: "[She] testified, 'Pow! Pow! Pow! I haul off and knock him out the other side of the door.'"<sup>269</sup> This small chain of events is filtered through the mother's unique perspective, and her word choices establish a unique voice that conveys that perspective. "Pow!" seems like a word straight from the comics. From there, the grammar is questionable, and the action itself is hyperbolic. Thus, the chain of events filtered through the mother illustrates her child-like view of her own violence and reflects an inability to parent.

Similarly, the events are relayed through a schizophrenic's lens in *Panetti v. Quarterman*, where the Supreme Court was determining whether a man who had been sentenced to death could be put to death while he was incompetent.<sup>270</sup> In Mr. Panetti's petition to the court, his appellate attorney sampled Mr. Panetti's voice for a particularly unique objective correlative.<sup>271</sup> Wearing a cowboy costume, Mr. Panetti represented himself as indicated below:

Mr. Panetti applied for over 200 subpoenas . . . . [He said,] "I turned the Pope loose and J.F.K. and I never subpoenaed them, but Jesus Christ, he doesn't need a subpoena. He's right here with me, and we'll get into that."

He made unintelligible comments . . . during general voir dire: "The death penalty doesn't scare me, sure but not much. Be killed, power line, when I was a kid. I've got my Injun beliefs as a shaman. I sent the buffalo horn to my sister." . . .

He became fixated on irrelevant issues when examining witnesses:

The Court: Mr. Panetti, . . . I don't see how the belt buckle is relevant . . . [and] if you can't explain the relevance to me, I'm going to sustain the objection. Can you explain to me how the belt buckle is relevant to any issue in this case?

Mr. Panetti: Yes, I can, Your Honor. It has to do with jailhouse religion. It has to do what some men would do for a belt buckle. It has to do with the difference between a rodeo hand and a buckaroo poet. It has to do with my whole outlook and this will come up, God forbid, in the punishment stage.

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268. *In re R.D.G.*, No. 06-00-00030-cv, 2001 WL 118220, at \*1 (Tex. App. Feb. 13, 2001).

269. Appellee's Brief, *In re R.D.G.*, No. 06-00-00030-cv, 2001 WL 118220 (on file with author).

270. 551 U.S. 930 (2007).

271. Brief of Petitioner-Appellant at 11-13, *Panetti v. Quarterman*, 551 U.S. 930 (2007) (No. 06-6407), 2007 WL 609763.

Before religion, when you got religion, prior religion, church member, I'm going to have witnesses from the church come in and Chaplain Bob got on his knees and read that buckle, Ranger Cummings, read this buckle and people go out of their way. At rodeos cowboys make sure they look at your buckle without you looking at it.<sup>272</sup>

Panetti's belt buckles and buffalo horns serve as objective correlative. He provides a random set of objects that represent his schizophrenic state of mind.<sup>273</sup> The objects are not directly connected to anything coherent or relevant to his case.<sup>274</sup> By describing the objects in Panetti's own voice, the attorney more vividly captures Panetti's psychological state to show that he was incompetent to stand trial.

In contrast, objective correlative is filtered through the educated voice of Oliver Brown through the testimony elicited by the trial attorney in *Brown v. Board of Education*, the case that ultimately resulted in school integration.<sup>275</sup> Segregation itself is an objective correlative for discrimination.<sup>276</sup> The physical separation and lesser conditions symbolize prejudice and inequality. Rather than using words like "prejudice" or "inequality," Brown—a black father whose daughter was a student in a segregated school—testified about life in the scene itself:

Q: [W]hat is the condition . . . between your residence and [the area] where your daughter boards the bus?

A: Well, there [is] a considerable amount of railroad tracks there; they do a vast amount of switching from the Rock Island Yards and from the time she leaves home until she gets to Quincy . . . to board the bus, she has to pass all of those switch tracks . . . ; there is a vast amount of traffic there morning and evening when she goes and returns. There [are] no provisions

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272. *Id.*

273. *See id.*

274. *Id.*

275. Transcript of Oliver Brown, *Brown v. Bd. of Educ. of Topeka*, 139 F. Supp. 468 (D. Kan. 1955) (No. T-316), available at <http://law2.umkc.edu/faculty/projects/ftrials/brownvboard/oliverbrowntestimony.html> (last visited July 23, 2014); see also *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

276. While working on this Article, the author visited Thomas Jefferson's Monticello estate in Charlottesville, Virginia, and was struck by the fact that the slave quarters were kept under the house hidden by the hill. If a slave owner truly believed that it was right to keep human beings enslaved, then one wonders why they would need to be hidden under the house.

at all made for safety precautions to protect those children passing these thorough-fares at all.<sup>277</sup>

The trial attorney's questions, such as this one and various other open-ended questions about the scene, were well-chosen.<sup>278</sup> They elicited a description of the conditions.<sup>279</sup> Those conditions say more about prejudice and inequality than the words "prejudice" or "inequality" themselves could. Moreover, the attorney let the witness speak.<sup>280</sup> Not only does Brown relay scenes from his daily life, but he does so in an educated voice.<sup>281</sup> His word choices "considerable amount," "vast amount," "provisions," and "safety precautions" are sophisticated and are in contrast to the caricature that bigoted society had drawn to justify separating the races.<sup>282</sup> Filtered through Brown's voice, the details paint a total picture of unfairness.<sup>283</sup> Thus, the trial attorney established a well-fleshed narrative on the record, and the attorneys and parties were ultimately successful when the Supreme Court of the United States declared the inherent inequality of segregated schools.<sup>284</sup>

c. Detail

Not only will quotes with specific word choices present the objective correlative in a party's voice and viewpoint, but specific touches of detail will also create a more vivid objective correlative. In *United States v. Johnson*, discussed above, the trial attorney elicited such details from the officer.<sup>285</sup> Then in the statement of facts, after describing the discovery of the opium, the writer includes additional details that lend an air of credibility to the story. The attorney writes:

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277. See Transcript of Oliver Brown, *supra* note 275.

278. See *id.*

279. See *id.*

280. See *id.*

281. See *id.*

282. See *id.*

283. See Transcript of Oliver Brown, *supra* note 275.

284. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1954). Although the case was not successful at trial, a trial attorney who fleshes out the record well enough to win on appeal has succeeded.

285. Brief for the United States, *supra* note 250. For another great example of an objective correlative with touches of detail, see the opening statement of the prosecutor in the case of Zacarias Moussaoui, one of the individuals involved in planning the attacks of September 11. The attorney sets up a contrast between a peaceful morning and the terrorist attack that followed. Trial Transcript, *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. 2003) (No. 01-455-A), available at <http://law2.umkc.edu/faculty/projects/ftrials/moussaoui/zmspencer.html> (last visited July 23, 2014).

[A]gent Graben discovered concealed beneath the bedcovers, which had been “thrown back towards the wall,” a one-ounce ointment jar containing 85 grains of opium prepared for smoking with no marks or labels, and a makeshift opium pipe. They also found under the covers a quantity of yen shee (partially smoked opium) lying, loose on a Chinese brass tray, a metal lamp base, a metal funnel, and two yen hocks (needles used for dipping into an opium jar). An additional small quantity of yen[ ] shee was found in a suitcase which was in the room.<sup>286</sup>

The little details make the reader trust the writer more.<sup>287</sup> The exact way that the bed covers were thrown does not seem particularly probative, but the fact Agent Graben could recount them makes him seem reliable. Moreover, it makes the picture come alive. All the details about the jar and the pipe also make the picture more vivid and credible. Additionally, there is the Chinese brass tray.<sup>288</sup> China was and remains one of the world's major opium producers.<sup>289</sup> So while the tray is not a part of the probable cause, the tray seems consistent with the narrative as a whole. The actual drug-trade names are used, like “yen shee” and “yen hocks.”<sup>290</sup> Again, the reference to “yen shee” and “yen hocks” make the narrative seem consistent and believable.

d. Naturally Coherent Details

The details above from *Johnson* also seem quite natural. They belong in this setting. The room is Johnson's “sleeping room,” so the bedcovers belong there. In the previous portion of the facts, the attorney had written about the opium smoke. Thus, it also seems natural that there was not just a “stash” of opium, but instead there was a tray full of partially smoked opium along with a pipe and yen hocks. Even the suitcase seems fitting since Johnson lived in a hotel. It makes sense that she would conceal opium by transporting it in and out with a suitcase.

## 2. Argument

Skillful use of objective correlative in the statement of facts not only paints a more, vivid, evocative, and ultimately accurate picture,

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286. Brief for the United States, *supra* note 250, at 11 (citations omitted).

287. Cf. ROBBINS, *supra* note 25, at 28; Eyster, *supra* note 25, at 87, 94, 100, 105.

288. See *supra* note 287.

289. Alfred W. McCoy, *From Free Trade to Prohibition: A Critical History of the Modern Asian Opium Trade*, 28 FORDHAM URB. L.J. 307, 308–15 (2000).

290. Brief for the United States, *supra* note 250, at 11.



it can also shape the argument in a brief or a memorandum in support of a motion. This section is based on an argument that follows the CREAC organization paradigm, which stands for conclusion, rule, explanation of the rule, analysis, and conclusion, but it can apply to other similar organization paradigms as well.<sup>291</sup> Explanation of the rule is the portion of the argument where the writer provides examples from case law.<sup>292</sup> Analysis is the portion of the argument where the writers compare their facts to authority facts and weighs the significance of comparisons and distinctions.<sup>293</sup>

The case law used in an explanation can itself include some objective correlative, and thus the details in the explanation will be shaped by the objective correlative in the statement of facts. Those details can then be used for comparisons and distinctions in analysis.

For example, to demonstrate that the Warsaw Convention prohibits recovery for post-traumatic stress alone, in *Doe v. United Airlines*, United Airlines relied on a case where relief was denied despite the objective correlative for fear.<sup>294</sup>

The *Floyd* case involved a flight from Miami, Florida to the Bahamas. Shortly after takeoff the aircraft lost an engine. The crew turned back toward Miami and then lost a second engine and then the third engine. The plane was quickly losing altitude and the crew advised the passengers that they would have to ditch the aircraft in the Atlantic Ocean. The crew was able to re-start an engine and land safely in Miami.<sup>295</sup>

This explanation of authority serves a miniature narrative of the *Floyd* case and contains an objective correlative.<sup>296</sup> The chain of events conveys the fear of death.<sup>297</sup> Indeed, a phobic flyer may get nervous just reading it. The Court in *Floyd* did not question the fear.<sup>298</sup> Rather, it found that this fear did not provide a basis for recovery under the Warsaw Convention, which only covers physical injuries and psychological distress resulting from them.<sup>299</sup> Thus, by rendering the *Floyd* plaintiffs' fear palpable through objective cor-

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291. RICHARD K. NEUMANN, JR. & SHEILA SIMON, LEGAL WRITING (2011).

292. *Id.*

293. *Id.*

294. Appellant's Opening Brief, *Doe v. United Airlines*, 73 Cal. Rptr. 3d 541 (Cal. Ct. App. 2008) (citing *Eastern Airlines v. Floyd*, 499 U.S. 530 (1991)).

295. *See id.* at 20.

296. *See id.*

297. *See id.*

298. *Floyd*, 499 U.S. 530.

299. *Id.* at 542.

relative and including the court's rejection of that ground for relief, United Airlines persuasively demonstrated in its brief that fear, no matter how compelling, is not a basis for recovery under the Warsaw Convention without physical injury.

The foundation laid by this objective correlative helped United overcome particularly disturbing facts in the analysis of the *Doe* case.<sup>300</sup> The plaintiff, Doe, was a female minor who awoke on the airplane to find that a male passenger had placed her hand outside his clothes on his penis.<sup>301</sup> In the analysis, having already established the irrelevance of fear, the attorney for United did not burrow into fear-inducing aspects of this incident.<sup>302</sup> Instead, United's attorney focused on the lack of cuts or bleeding of any kind, the absence of bruises, the lack of injury to the plaintiff's arm or hand, and the absence of pain or discomfort.<sup>303</sup> United effectively used objective correlative to show that the Warsaw Convention was not designed to address this particular kind of wrong.<sup>304</sup>

Thus, the elements of objective correlative must still intersect with the legal standard. Objective correlative can be used to illustrate both psychological states that are covered by the Warsaw Convention and those that are not. Attorneys who want to convey a psychological injury will likely need objective correlative to make a strong case. These objective correlatives are not only psychologically effective, but they also establish more concrete and measurable proof that is often preferred in law.

Therefore, not only can attorneys use objective correlative to effectively convey their clients' facts, but they can also create "miniature" objective correlatives by relying on the facts in other cases that serve as authority in their explanation. That explanation then lays the foundation for analysis and shapes the outcome of the case.

#### IV. THE PROCESS OF DEVELOPING OBJECTIVE CORRELATIVE

The process of creating objective correlative is the process of burrowing into all of the details in a dream. This process applies to

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300. See Appellant's Opening Brief, *supra* note 294, at 2–7.

301. See *id.* at 2.

302. See *id.* at 28–35.

303. See *id.* at 30–31.

304. See *Doe v. United Airlines*, 73 Cal. Rptr. 3d 541, 547 (Cal. Ct. App. 2008) (“The trial court granted the motion for summary judgment, finding that Doe's deposition testimony established that Samson's misconduct had not resulted in any bodily injury to her within the meaning of the Warsaw Convention.”).

law as well as fiction. In fiction, that dream comes from the ether of the author's mind. In law, the dream is a mental re-creation of the details of events past. While the details of those events may have a different type of reality than a fictional account, in the present, the past exists in our minds as a dream. By exploring the look, feel, taste, and smell of everything, storytelling fleshes out objective correlative in either a fiction or non-fiction narrative.

#### A. *The Writer's Process*

The process of creating objective correlative is organic and involves right brain imagining. Most writers do not likely sit down and say, "I am going to create an objective correlative;" instead, they view their story through their characters and reproduce that viewpoint. Novelist and *The Art of Fiction* writer John Gardner elaborated on this idea: "[The author] begins to brood over what he's written, reading it over and over. [The author] discovers odd tics that his unconscious has sent up to him, perhaps curious accidental repetitions of imagery."<sup>305</sup> Novelist Robert Olen Butler contends that much bad writing tends to come from the head rather than the heart.<sup>306</sup> The flaw is not in dreaming, but in failing to fully explore the dream.<sup>307</sup> A third novelist, Orhan Pamuk, captures the objective correlative aspect of this dream when he says, "[T]he art of writing novels is the ability to perceive the thoughts and sensations of the protagonists within a surrounding landscape."<sup>308</sup> Diving into the dream as described by Robert Olen Butler and John Gardner includes an examination of all of those scenic details that comprise objective correlative; Gardner speaks of vividness.

When I was still a novice fiction writer, I engaged more frequently in what Butler calls "from the head writing." I often thought that I had to describe emotion in detail and convey all of

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305. GARDNER, *supra* note 23, at 69; *see also* Janet Burroway, *Introduction to ROBERT OLEN BUTLER, FROM WHERE YOU DREAM 2* (2005) ("And it is the realm of unconscious rather than that of technique or intellect that the writer seeks fictional truth."). Psychologist Carl Jung thought the poet's images had symbolic meaning unknown to the poet's conscious. Jung speaks of "compulsive artistic choices" controlled by "unconscious will." *See On the Relation of Analytical Psychology to Poetry, supra* note 119, at 301, 314, 318–19, 321; Eyster, *supra* note 25, at 107 (discussing Carl Jung and symbolism).

306. *See, e.g.,* BUTLER, *supra* note 305, at 13, 114–16 ("Art comes from your subconscious. It comes from the white hot center of you."); *see also* Burroway, *supra* note 305, at 2 ("And it is the realm of unconscious rather than that of technique or intellect that the writer seeks fictional truth.").

307. BUTLER, *supra* note 305, at 114–16.

308. PAMUK, *supra* note 19, at 89.

the physical sensations and gestures that accompanied the emotion. At a Vermont College MFA Program event, novelist Trent Reedy, author of *Words in the Dust*, joked about these emotion-conveying gestures. "Everyone is shrugging and smiling in Reedy's world." He then walked around the room while, in rapid succession, he shrugged and smiled repeatedly while we all laughed. In my own fiction writing, my characters tended to furrow their brows, raise their brows, roll their eyes, and stare a little too much. Readers might have wondered whether my characters were having a seizure.

Just as an overabundance of gestures can fall short of conveying emotion, so can detailed description of the emotion itself. No one wants to read a page about how guilt gnawed at Frederica's stomach like a rat. It boiled around in her stomach as the thoughts echoed in her head, "You stole Lana's boyfriend. She will never forgive you. You are a horrible person, Frederica." Finally, while a little bit of heart-racing or sweating can be good if woven deftly into the scene, these sensations cannot carry the emotion on their own.

Fortunately for the writer, the process of developing objective correlative can cure these defects. Once I learned about objective correlative and realized that I could just burrow into the dream, fiction writing, while still painful, got a whole lot easier. Luckily, the novel that I have been working on the past few years is about a mermaid-siren named Song who sees everything through an oceanic lens.<sup>309</sup> Since the ocean is her context for understanding everything, objective correlative naturally flows into the story.

For instance, when Song sees her first ship, she does not know what it is. So she sees:

[A]n odd floating reef. But it's not made of coral or rock. It's brown. Driftwood, it's like a big mass of driftwood, as big as a small cay.

But on top there are thin, white fins, thin as an angel shell, flapping like a sea fan.

Moving about on its surface is a school of creatures like none I had ever seen.<sup>310</sup>

Objective correlative helped me out of a particularly tricky spot with her after the first fifteen pages. Song encounters the ship mentioned above, and through her empathic powers she receives bits and pieces of the emotions regarding a "four-limbs" whom she calls

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309. Cathren Koehlert-Page, *The Drowning Song 2* (unpublished manuscript) (on file with author).

310. *Id.*

Sea-Eyes.<sup>311</sup> But she misinterprets everything. She falls in love with Sea-Eyes and thinks that she has to save him from the “land madness” that is killing his crewmates by getting him back into the ocean.<sup>312</sup> But she is totally wrong. His crewmates are dying of scurvy, not “land madness.”<sup>313</sup>

Song does not know that Sea-Eyes could not survive under water. So in trying to save him, she drowns him.<sup>314</sup>

Where does a writer go from there? How does a writer move forward from that event without creating an anti-hero? It cannot be all sunshine and seashells for Song. She committed a horrible act. At the same time, I needed to preserve Song’s pureness of heart.

Instead of just asking logically, “What do I do now?,” trying to describe all of Song’s emotions and the sensations created by them, or even asking myself how I could use the ocean as an objective correlative to illustrate Song’s psyche symbolically, I dove into the dream. I invoked the process needed to develop objective correlative. I paid attention to how everything looked, felt, tasted, and smelled as Song moved through the ocean at this particular moment in her life. After exploring Song’s world, I transcribed her experience moment-by-moment.

Where does a writer go? To a sea-cave:

I hide. It’s dark here, like my memory. It seems as though I was always here. In some sandy haze I see two frozen sea-glass eyes. Then drifting and floating. Somewhere in the haze is a reef. I reach out to feel it, and there is no reef here. Just dark. Yes, dark. Sleep here in the dark sea cave. Sleep in the deep bowels of the ocean.<sup>315</sup>

The sea-cave and Song’s reaction to all of the slimy, cold, and dark things in it are an objective correlative. These things are an unintentional means of showing the nuances of Song’s denial, grief, and guilt. I am aware of that now, but I did not start by saying, “I am going to use the ocean as an objective correlative for Song.” Writing objective correlative is like having a dream and later figuring out what the dreamt meant. Each time I received a critique of that section, I dove into the dream again. The work is still in progress, and as I receive critiques and examine my work, I may explore the sea-cave more to flesh out the details of the dream.

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311. *Id.*

312. *Id.* at 4–15.

313. *Id.* at 12–13.

314. *Id.* at 14–15.

315. Koehlert-Page, *supra* note 309, at 17.

In fact, although the scene may flow from the writer's subconscious, it's dangerous to end the writing process after the subconscious spews words onto the screen in a first draft. In these instances, the reader will probably feel too much like he or she is hearing someone talk in circles about fragments of the strange dream from the night before.<sup>316</sup> The good writer edits;<sup>317</sup> Hemingway revised the last chapter of *A Farewell to Arms* seventeen times.<sup>318</sup>

The writer can self-critique and receive critiques from others to flag the awkward moments. However, Robert Olen Butler also warns about "from the head critiques."<sup>319</sup> Although I may ultimately dismiss some critiques of my own writing, each comment always leads me to explore the dream anew, as Butler recommends.<sup>320</sup> He advises writers to explore their work in a "moment-to-moment sensual experience."<sup>321</sup> That means invoking a trance and using all of the senses to explore the scene.<sup>322</sup> Echoing this advice, Vermont College of Fine Arts Professor Rita Williams-Garcia advised me several times to go back into the scene, back inside the character, and think about what the character really feels and sees.<sup>323</sup>

Developing awareness of the meaning behind an objective correlative facilitates this process.<sup>324</sup> However, intentionally devising objective correlative rather than simply exploring the scene from the character's point of view will probably result in an unnatural or heavy-handed feel.<sup>325</sup> Gardner explains that good description "is symbolic not because the writer plants symbols in it but because, by working in the proper way, he forces symbols still largely mysterious to him up into his conscious mind where, little by little, as his fiction progresses, he can work with them and finally understand

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316. Cf. BUTLER, *supra* note 305, at 118 (warning against "over-confident" writing).

317. See EUGENE VOLOKH, *ACADEMIC LEGAL WRITING* 105–09 (4th ed. 2003); see also PAMUK, *supra* note 19, at 13–29 (explaining how a novelist must be simultaneously naively unaware and sentimentally reflective to the point of focusing on word choice, structure, and all the elements of writing).

318. JEFFREY MYERS, *HEMINGWAY, A BIOGRAPHY* 215 (1985).

319. BUTLER, *supra* note 305, at 116.

320. See *id.* at 114–15.

321. See *id.* at 12; see also Burroway, *supra* note 305, at 2–5 (discussing invoking the dream brain to develop story).

322. BUTLER, *supra* note 305, at 12–21.

323. *Id.*

324. See *Objects, Artifacts, and Stuff* Lecture, *supra* note 76.

325. Cf. BUTLER, *supra* note 305, at 116 (warning against "bad from the head writing"); GARDNER, *supra* note 23, at 37 (discussing how intellectual study cannot govern what the writer will include).

them.”<sup>326</sup> Gardner has a writing prompt that is a means of evoking objective correlative from the heart rather than the head. He instructs, “Describe a lake as seen by a young man who had just committed a murder. Do not mention the murder.”<sup>327</sup> Depending on the murderer and how he or she felt about the murder, the lake may look very different.<sup>328</sup> Most readers might expect the lake to be murky and holding secrets.<sup>329</sup> But it could seem like baptismal water.<sup>330</sup>

However, if the writer forces the objective correlative and engages in the bad “from the head writing” of which Robert Olen Butler complains, the overall effect may be that of a campy spoof. In fact, in a sketch known as *Guy Noir*, radio personality Garrison Keeler frequently spoofs artificial objective correlative in his National Public Radio show, *A Prairie Home Companion*. For instance, one of his *Guy Noir* sketches begins with, “It was one of those perfect October days when the trees are red and gold and the air is rich with compost and if you’re into the life cycle, this is probably a great time for you.”<sup>331</sup>

In a similar vein, another starts with, “It was February in St. Paul, it was colder than a witch’s brass monkey—forty below, everything frozen solid—polar bears migrating south, and some bi-polar bears. The wind was brutal. You could see people in vestibules weeping. People trying to get their dogs to go outdoors alone.”<sup>332</sup>

*Guy Noir*’s description is over the top. His analogies are stretched, and his examples are strange. The overall feeling is forced, but also hysterical. If satire is the goal, as it is for Keeler, then this description works. Otherwise, forced objective correlative will miss the mark.

To capture the objective correlative, the writer must channel the viewpoint character and describe moment-by-moment how all

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326. GARDNER, *supra* note 23, at 36.

327. *Id.* at 203.

328. *See id.* at 36–37 (“One does not simply describe a barn . . . . One describes a barn as seen by someone in a particular mood . . .”).

329. *Cf. id.* (describing the changes and emotional significance of a description of a barn right after a murder).

330. *Cf. id.*

331. *A Prairie Home Companion: Guy Noir* (NPR radio broadcast Oct. 16, 1999), available at <http://prairiehome.publicradio.org/programs/19991016/guynoir.html> (last visited July 24, 2014).

332. *A Prairie Home Companion: Guy Noir* (NPR radio broadcast Feb. 2, 2007), available at <http://prairiehome.publicradio.org/programs/2007/02/03/scripts/noir.shtml> (last visited July 24, 2014).

of the details would look and feel to that character at a given point in time.

### B. *The Lawyer's Process*

The concept of developing an objective correlative in a legal narrative is similarly recursive and still involves diving into the dream. The attorney must imagine the details and empathize with the “characters,” the parties, and witnesses.<sup>333</sup> Both in litigation and in writing, this process involves empathizing with the clients and witnesses and examining the look, feel, taste, and smell of everything while imagining walking in the shoes of the clients and witnesses as they move through the events of the past.

#### 1. In Discovery and Litigation

During trial preparation, empathy for the client and witnesses can guide the attorney to specifics that will flesh out the objective correlative. Some attorneys may want to dismiss a detail that might not initially appear relevant.<sup>334</sup> However, by cultivating empathy for the client's position, asking open-ended questions about the scene, and following up to discover details, the attorney may unearth an objective correlative that underscores the legal issues.<sup>335</sup> For example, law professor Jason Eyster discusses how in the preparation stages for an immigration hearing a group of clinic students initially had difficulty empathizing with an asylum seeker whose experience was so far removed from their own.<sup>336</sup> But one detail—the woman's stolen bookbag—eventually jumped to the forefront as they inter-

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333. Cf. ROBBINS, *supra* note 25 (advising lawyers to build empathy for their clients' positions); DIANA R. DONAHOE, EXPERIENTIAL LEGAL WRITING 65–66, 71 (2011) (explaining that the legal writing process involves creativity but that the ideas must still always be tied to the law); LINDA H. EDWARDS, LEGAL WRITING AND ANALYSIS 67–68 (2011) (stating that writing is recursive and that the writer must understand the client's facts and goals).

334. Peter Tillers & David Schum, *A Theory of Preliminary Fact Investigation*, 24 U. CAL. DAVIS L. REV. 931, 949 (1991) (“Consequently, a detail that seems irrelevant at Time “x” may become highly relevant at Time “x + 1.”).

335. See, e.g., Ian Gallacher, *Why Empathy Is a Core Lawyering Skill and Why Legal Education Should Change to Reflect Its Importance*, 8 LEGAL COMM. & RHETORIC: J. ALWD 109, 123–24 (2011); Cara Cunningham & Michael Streicher, *The Methodology of Persuasion: A Process-Based Approach to Legal Writing*, 13 LEGAL WRITING: J. LEGAL WRITING INST. 159 (2007) (discussing how empathy is necessary to understand clients, witnesses, judges, and juries); Emily J. Gould, *The Empathy Debate: The Role of Empathy in Law, Mediation, and the New Professionalism*, 36 VT. B.J. 23 (2010) (discussing how empathy helps clients to tell their stories).

336. Eyster, *supra* note 25, at 113.



viewed the client and helped the students to identify with her.<sup>337</sup> The students imagined how their own lives would be affected if their bookbags were stolen. The bag became a centerpiece of the narrative.<sup>338</sup> Thus, the message to attorneys is to continue to dig and mine for details during preparation until either they are able to see the case through the client's point of view or until it becomes clear that the client is more suited for a different attorney.<sup>339</sup>

Trial testimony from *Brown v. Board of Education* illustrates the kinds of questions that an attorney might ask.<sup>340</sup> Initially, the following statement might not seem significant: "My daughter goes to a different school than other children." Similarly, Oliver Brown's testimony that his daughter was twenty-one blocks from the Monroe school might not have seemed relevant.<sup>341</sup> However, the attorney followed up with questions about the time that the daughter had to leave for school, what she did while waiting for the bus, how much family time parent and child had together given the travel schedule, and the conditions of the area through which the girl had to travel.<sup>342</sup> In response to this questioning, Mr. Brown testified that his daughter had to wait thirty minutes outside in the rain and snow and that he never saw her until she was home in the evening.<sup>343</sup> He further testified that his daughter had to hike to the bus through the "vast amount of traffic" and many railroad switchbacks, all without any provisions for her safety.<sup>344</sup>

Thus, the attorney can start by assuming that the odds and ends mentioned by clients and witnesses have meaning. He or she can listen with understanding and continue to probe those odds and ends to discover whether they form a coherent objective correlative that the attorney can then elicit at trial through open-ended questions about the scene.

## 2. In Writing

Although novice legal writers often expect step-by-step instructions on writing a brief, the process involves circling, dovetailing,

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337. *Id.*

338. *Id.*

339. *Id.*

340. See Transcript of Oliver Brown, *supra* note 275; see also *Brown v. Bd. of Educ.*, 349 U.S. 294 (1954).

341. See Transcript of Oliver Brown, *supra* note 275.

342. See *id.*

343. See *id.*

344. See *id.*

critical thinking, and imagination.<sup>345</sup> That process can vary from person to person and even from case to case.<sup>346</sup> The writing and researching can alternate between intuitive subconscious choices and deliberate editing and examination.<sup>347</sup> Although the process can vary and alternate, it does share commonalities with other types of storytelling.<sup>348</sup> The writer will visit details in the record and envision the scene<sup>349</sup> through the eyes of the protagonist, the client, in the same way that Pamuk discusses viewing the protagonist's landscape.<sup>350</sup> These details may prompt the writer to research certain avenues.<sup>351</sup> As the research bears fruit, the details can shape the legal theories, the case law included, the detail included from case

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345. Compare Miriam Felsenburg & Laura Graham, *Beginning Legal Writing Students in Their Own Words: Why the First Weeks of Legal Writing Are So Tough and What We Can Do About It*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 223, 225 (2010), with Gallacher, *supra* note 335 (stating that the process is creative); see also EDWARDS, *supra* note 333, at 67–68 (stating that the writing process is recursive and involves circling until the writer understands both the law and the facts).

346. See NEUMANN & SIMON, *supra* note 291, at 79 (explaining that process varies from writer to writer); EDWARDS, *supra* note 333, at 67 (stating that writing processes are as personal as signatures and fingerprints); see also MARTHA M. PETERS & DON PETERS, JURIS TYPES: LEARNING LAW THROUGH SELF-UNDERSTANDING (2007) (devoting the entire book to a discussion on how different Myers-Briggs personality types have different legal learning and essay writing styles). Compare Felsenburg & Graham, *supra* note at 345, with Gallacher, *supra* note 335, and Cunningham & Streicher, *supra* note 335, at 162.

347. Cf. JOHN DERNBACH, A PRACTICAL GUIDE TO LEGAL WRITING & LEGAL METHOD 168, 168, 205 (3d ed. 2007) (explaining that legal writing is recursive rather than linear); Sheila Rodriguez, *Using Feedback Theory to Help Novice Legal Writers Develop Expertise*, 86 U. DET. MERCY L. REV. 207, 213 (2009) (explaining that while students may view legal writing as linear it is recursive); Cunningham & Streicher, *supra* note 335, at 159, 164, 169 (discussing how drafting a brief is a cyclical and recursive process as well as how the facts are written in tandem with the argument).

348. NEUMANN & SIMON, *supra* note 291, at 79.

349. If the attorney on appeal was trial counsel, then the attorney may have even conducted an actual field trip to the scene and envisioned the events during that process. On appeal, such a field trip would likely not be billable. Moreover, the benefits of visualizing the actual site are likely outweighed by the time lost in taking the trip, though there could be rare instances in which an attorney might find such a trip beneficial.

350. Compare PAMUK, *supra* note 19, at 89 (advising viewing the protagonists' landscape), with EDWARDS, *supra* note 333, at 68 (stating that the writer must understand the client's goals and facts), and ROBBINS, *supra* note 25, at 66–67 (urging the writer to “get inside the heads” of the witnesses to determine whether the story makes sense).

351. See MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 31 (2006) (noting that facts at hand can help a writer to generate search words to use in research).

law, and the analogies made.<sup>352</sup> The writer cross-references these things with one another the whole way through and must also envision the picture to determine whether it resonates.<sup>353</sup> At the same time, the writer must continually verify the accuracy of the picture that forms in the imagination and must ensure that the legal theories are supported.<sup>354</sup> As new details appear, the writer may revise both the theory of the case and the overall picture. Despite the fact that these steps are listed in an order, the writer may circle around each of these steps in varying orders throughout the process until there is a coherent whole.<sup>355</sup>

Where the fiction writer begins with fragments from a dream, the appellate brief writer begins with the record.<sup>356</sup> Some instructors may advise that a writer start with notes on the record.<sup>357</sup> Others may advise reading through the record once first to get a sense for the whole case and then taking notes. However, writers differ in their processes and learning styles.<sup>358</sup> A tactile-kinesthetic learner might find it easier to read the record while taking notes; such learners sometimes have to interact with the record.<sup>359</sup> Others may need quiet processing time before they can take notes.

Either way, scenery and other description that may fit into an objective correlative will often appear in the record, and witnesses

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352. *See id.* at 31–40 (showing how the legal and factual issues dovetail one another during research and how analogies can evolve during the research phase).

353. *Cf. id.* (detailing the cross-referencing process that takes place between facts and authority during the research phase).

354. *See* ROBBINS, *supra* note 25, at 28 (explaining that rigorous accuracy enhances the credibility of both the lawyer and the client); DONAHOE, *supra* note 333, at 65–66, 71 (explaining that the law is the starting point and that the writing must be accurate but that creativity is important as well).

355. EDWARDS, *supra* note 333, at 67–68 (stating that writing is recursive and that the writer must understand the client’s facts and goals).

356. *See* BEAZLEY, *supra* note 351, at 28–31 (advising writers to start by creating an abstract of the record).

357. *Cf. id.*

358. NEUMANN & SIMON, *supra* note 291, at 80–84; *see* DONAHOE, *supra* note 333, at 65–67 (referring to creating one’s own writing process); *see also* M.H. Sam Jacobson, *A Primer on Learning Styles: Reaching Every Student*, 25 *Seattle U. L. Rev.* 139, 155 (2001) (discussing how personality type and learning styles can affect learning in law school); PETERS & PETERS, *supra* note 346.

359. *Cf.* Jacobson, *supra* note 358 (stating that tactile learners benefit from touching materials and kinesthetic learners benefit from moving around); NEUMANN & SIMON, *supra* note 291, at 83 (describing tactile-kinesthetic learners’ need to interact).

may even testify in an objective correlative without realizing it.<sup>360</sup> Objective correlative works in story because it is how people think and emote.<sup>361</sup>

On that first reading, the record still will be like the fiction writer's amorphous dream in some respects, and the writer must continue to examine it and the case law through the eyes of the "characters" to develop coherence.<sup>362</sup> In the beginning, the writer has glimpsed a few details that may become a part of the overall objective correlative. At this stage, the only difference between appellate brief writing that includes an objective correlative and appellate brief writing that does not is that in the writing which includes an objective correlative the writer is trying to step into the shoes of the client and other witnesses to see how they interacted with the setting. In fact, throughout the process, the writer may recall the Gardner exercise regarding describing the lake as seen by a murderer.<sup>363</sup> The writer might ask, "If I did not mention the ultimate issue or the mental state, how would the facts on the record appear should my client's theory and assertions prove true?"<sup>364</sup> Later, the writer may fill in the ultimate issue or the mental state at certain spots. But prior to that, the writer is looking around the room and thinking about how the smell of the place, the color of the paint on the house, the throng of people on the street, the moisture in the air, and the blink of a cat's eye might all form a coherent picture that illustrates the state of mind of the characters. These characters are the parties, the witnesses, and even invisible entities like the state itself.<sup>365</sup> All while looking around the scene,

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360. See, e.g., Brief for the United States, *supra* note 250 (including testimony of Detective Belland that created the objective correlative analyzed earlier in this Article).

361. See Wynne-Jones, *supra* note 15 (explaining that objective correlative is not just a device but is the way people actually experience the world); cf. Berger, *supra* note 23 (explaining that narratives help people to understand and make sense of life events). Other disciplines seem to be recognizing the impact of the external world on the psyche as well. Neuroscientists and architects are now collaborating on design and studying the effects of design on the brain. See, e.g., DESIGN AND HEALTH, <http://www.designandhealth.com/People/Eve-Edelstein.aspx> (last visited July 25, 2014); HMC DESIGN, [http://hmcarchitects.com/ideas/evidence\\_based\\_design](http://hmcarchitects.com/ideas/evidence_based_design) (last visited July 25, 2014); NEW SCHOOL OF ARCHITECTURE AND DESIGN, <http://www.newschoolorch.edu/about/neuroscience.html> (last visited July 25, 2014).

362. Cf. BEAZLEY, *supra* note 351, at 37–38 (explaining that the theme may be tentative in the beginning).

363. GARDNER, *supra* note 23, at 203.

364. Cf. ROBBINS, *supra* note 25, at 44–45.

365. See *id.* at 241 (urging the writer to show rather than to tell).

the writer is double-checking the record to fill in the details of the picture and to verify that the room in the writer's mind is an accurate depiction of the room on the record.<sup>366</sup>

While the writer starts with the record, the objective correlative used in the statement of facts can inform the research and the argument as well.<sup>367</sup> Some detail that the writer notices while writing the facts may prompt a question that leads the writer to search for supporting case law.<sup>368</sup> Once the case law is found, then the authority case may have some details similar to the details on the record.<sup>369</sup> Those details are a part of the objective correlative for the authority case. When the writer explains the rule, telling the story of the authority case, the details can be included in the explanation of the rule.<sup>370</sup> Then finally, the details from each case can appear side by side in the analysis. Thus, objective correlative can sometimes open avenues for research, serve as a guide for including details in explanation of the rule, and lay the foundation for arguments to make in analysis.<sup>371</sup>

For instance, in the attractive nuisance case, *Bush v. Edison*, the defense attorney may have noticed barbed wire on the record and mentioned it in the statement of facts, which may have subsequently prompted the writer to list “barriers” as a search term. Barbed wire enclosed the electrical substation where young Matthew Bush was injured.<sup>372</sup> Such a small detail can provide a seed for research that leads the writer to case law.<sup>373</sup> After listing “barriers” as a potential factor in an attractive nuisance case, the writer can search the case law to determine whether that general rule is borne out by case law.

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366. *Cf. id.* at 28 (explaining that accuracy is part of the credibility of both lawyer and client).

367. *Cf.* BEAZLEY, *supra* note 351, at 27–31, 39–40 (explaining how the writer's facts serve as a touchstone for determining relevant authority facts).

368. *Cf. id.* at 39–40.

369. *Cf. id.*

370. *See, e.g.,* NEUMANN & SIMON, *supra* note 291, at 129–31 (labeling a section of a brief that includes mini-narratives full of authority facts as “explanation”); *cf.* ROBBINS, *supra* note 25, at 205 (describing explanation as including examples from case law); Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 127, 152 (2008) (discussing how storytelling elements can play a role in the entire brief).

371. *Cf.* BEAZLEY, *supra* note 351, at 28–31, 39–40.

372. Brief of Appellees at 2, *Bush v. Edison*, No. 23077, 2006 WL 2485013 (Ohio Ct. App. Aug. 30, 2006), 2006 WL 5098180, at \*2.

373. *See* BEAZLEY, *supra* note 351, at 31 (noting that facts at hand can help a writer to generate search words to use in research).

However, the initial stages of research can also be like the fragmented dream that must be made coherent.<sup>374</sup> Some avenues will not be fruitful, and the writer will have to abandon those.<sup>375</sup> For instance, “barriers” are an unnamed subcategory of other elements of attractive nuisance.<sup>376</sup> Where the client’s facts and the case law are inconsistent, then the writer may have to re-think the theory of the case.<sup>377</sup> The writer must examine the record and the objective correlative anew and examine the legal theories anew.<sup>378</sup> If theories are not supported by the record or the law, the writer must be willing to consider settlement or risk dismissal of the case.<sup>379</sup>

If, on the other hand, the writer can refine the theory of the case and the objective correlative, the writer will find new avenues to explore in both the record and the case law.<sup>380</sup> For example, the barbed wire around the electrical station in *Bush* is still relevant to the rule that there is no cause of action for attractive nuisance in Ohio if the child has the capacity to comprehend the danger.<sup>381</sup> Further, if the child admits that he knew that the condition was dangerous, the child had the capacity to comprehend the danger.<sup>382</sup> This detail from the case law could have then led the writer back to the record, to the warning signs posted outside the station,

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374. See ROBBINS, *supra* note 25, at 74 (comparing the initial stages of research to looking outside an airplane window to determine where one is).

375. *Id.* at 75, 81, 85 (stating that some issues can be dismissed quickly and that only some issues will be viable after research).

376. See, e.g., *Texas Utils. Elec. Co. v. Timmons*, 947 S.W.2d 191 (Tex. 1997). (considering a barricade as a factor in the analysis of the elements of attractive nuisance).

377. Cf. BEAZLEY, *supra* note 351, at 37–38 (explaining how the theme may develop or change as the writer researches and writes).

378. See ROBBINS, *supra* note 25, at 63–64 (discussing how the research and the facts may dovetail one another as the lawyer refines the approach).

379. An appeal is frivolous, as required to support sanctions, if the result is obvious or the arguments are wholly without merit. See *Pimentel v. Jacobsen Fishing Co., Inc.*, 102 F.3d 638, 640 (1st Cir. 1996); cf. *Anders v. California*, 386 U.S. 738, 741 (1967) (explaining that appointed counsel in a criminal case who determines that an appeal is frivolous should ask to withdraw only after filing a brief that includes anything from the record that “might arguably support the appeal”). See generally Irving R. Kaufman, *Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan*, 95 YALE L.J. 755 (1986) (discussing the viability of dispute resolution on appeal); Kathleen M. Scanlon, *Federal Appellate Mediation Programs*, 20 ALTERNATIVES TO HIGH COST LITIG. 1 (2002) (discussing various appellate mediation programs).

380. Cf. BEAZLEY, *supra* note 351 (discussing how writers may begin with a tentative theme and refine it throughout the research and writing process).

381. Brief of Appellees, *supra* note 372, at 8.

382. *Id.* at 16.

to the child's admission that these things meant he was prohibited, and to all of the other details that show that the child actually comprehended the danger.<sup>383</sup> The whole way through, the writer will also be chasing those details.<sup>384</sup>

At some point during this process, the writer has an idea of the theory of the case and can draft the statement of facts. In so doing, the writer needs to picture the record through the eyes of the client and other witnesses. Like the fiction writer, the appellate brief writer must tell a "true" story.<sup>385</sup> That means that the story must be supported by the evidence, but also that it must feel true.<sup>386</sup> While appellate judges may sometimes say that feelings play no role in their decision, in a study by law professor Kenneth Chestek, judges preferred the storytelling briefs that he sent to them as opposed to the non-story telling briefs.<sup>387</sup> Coherent and eloquent narrative is part of how the human animal thinks and decides.<sup>388</sup> Thus, an appellate brief cannot be any more heavy-handed than a fiction story.<sup>389</sup> The judge should not feel manipulated by the brief.<sup>390</sup> Rather, those details should be used to tell a story that is more "true," one that feels more fully fleshed and credible because it more accurately represents human experience.<sup>391</sup> That means the writer must picture the story and all of the details through the cli-

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383. *See id.* at 22.

384. *Cf.* BEAZLEY, *supra* note 351, at 28–31, 39–40 (explaining how the writer's facts serve as a touchstone for determining relevant authority facts).

385. ROBBINS, *supra* note 25, at 28, 41–44 (explaining that accuracy establishes both the lawyer's credibility and the client's, and explaining that humans are biologically wired to respond to "deep-frame" stories).

386. *Cf. id.* at 66–67 (urging lawyers and law students to determine whether the facts make sense from inside the heads of the witnesses).

387. *See* Kenneth D. Chestek, *Judging By the Numbers: An Empirical Study of the Power of Story*, 7 J. ASS'N LEGAL WRITING DIRECTORS 1 (2010).

388. *See id.*; ROBBINS, *supra* note 25, at 41–43 (explaining how people are biologically wired to understand the world through narrative); *cf.* Berger, *supra* note 23, at 277–80 (discussing how metaphor and narrative are how people understand the world).

389. *Cf.* ROBBINS, *supra* note 25, at 34–36 (explaining that persuasion is preferable to coercion).

390. *Cf. id.* at 34–36 (explaining that persuasion is preferable to coercion).

391. *Cf.* Roessner, *supra* note 180 (explaining that world-building details convey verisimilitude); Berger, *supra* note 23, at 955–56 (explaining that people often think in metaphor); Winter, *supra* note 23 (explaining that metaphor is the foundation of much human reasoning); ROBBINS, *supra* note 25, at 28, 41–44 (explaining that accuracy establishes both the lawyer's credibility and the client's and explain that humans are biologically wired to respond to "deep-frame" stories).

ent's eyes.<sup>392</sup> The appellate attorney must cultivate empathy to see the scene as though he or she was experiencing it for himself or herself.<sup>393</sup> The attorney must explore the story with all the senses.<sup>394</sup> The attorney is imagining how everything would smell and feel if the client's story was "true" and then searching the record for those details.<sup>395</sup>

In so doing, the writer will have new questions and will need to review the record again and notice new details or reorder the statement in a manner that seems to be a more logical unfolding of events.<sup>396</sup> The writer might ask, "Does it matter that the electrical station in Matthew Bush's case was humming?" The humming of the electrical station prompted Matthew Bush to ask about the noise.<sup>397</sup> That in turn prompted his parents to warn him about the station, which provided further evidence of Bush's capacity to understand the danger.<sup>398</sup>

By including those details in the statement of facts narrative, the writer now also has a guide for exploring those details in case law to determine what to include in the explanation section of the argument.<sup>399</sup> In fact, I first became intrigued by the use of objective correlative in legal writing when I realized how it could aid students in fleshing out potentially dispositive details that they sometimes omit. For instance, once, when discussing explanation of the rule, a student said to me, "I have just always been taught not to put a bunch of extra stuff in my writing." This student is correct that extraneous fluff has no place in a brief.<sup>400</sup> But a collection of seem-

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392. Gallacher, *supra* note 335, at 123–24 (explaining that a lawyer must empathize with witnesses and clients to properly represent them).

393. *Cf.* Robbins, *supra* note 25, at 28 (advising lawyers to build empathy for their clients' positions); Gallacher, *supra* note 335, at 112, 138, 151 (explaining that a metaphor falls short if a lawyer fails to use empathy and chooses logical overlap alone, and that a lawyer requires empathy to understand witnesses and clients).

394. *Cf.* Eyster, *supra* note 25, at 94, 100, 105 (2008) (encouraging attorneys to seek out physical details).

395. *See id.*

396. *Cf.* ROBBINS, *supra* note 25, at 46, 65–66 (encouraging lawyers to view the insides of the characters' head to determine whether the facts make sense and discussing organization).

397. *See* Brief of Appellees, *supra* note 372.

398. *See id.*

399. *Cf.* BEAZLEY, *supra* note 351, at 28–31, 39–40 (explaining how the writer's facts serve as a touchstone for determining relevant authority facts).

400. *See* DONAHOE, *supra* note 333, at 65 (stating that the legal reader does not want to be bothered with "too much detail or tangential information"); *cf.* Roessner, *supra* note 180 ("Stuffing a narrative with too many details and too



ingly miniscule yet potentially relevant details can matter.<sup>401</sup> Objective correlative is likely to help some writers conceptualize and incorporate those details. The writer can also search for similar specific details in the facts of case law to cobble together a picture of totality of the circumstances.<sup>402</sup>

Once the writer finds ample case law with overlapping details, some writers may outline the argument and include the parallels between case law and the statement of facts in that outline.<sup>403</sup> That is fine if that is part of their process. Other writers may find that outlines do not provide them with the needed sense of flow when they write.<sup>404</sup> They have to write it all down and then review for organization later.<sup>405</sup> They move the blocks around, cut and paste, eliminate repetition, and weave in new transitions and topic sentences after cutting and pasting.

Either way, the writer may find some new nugget from case law that leads the writer to review the trial court's record again.<sup>406</sup> Then the writer may notice some new fact and revisit the dream in the same way the fiction writer does. Then the writer must picture the details on the record to see whether they form a coherent picture.<sup>407</sup> Once that portion of the statement of facts is revised, the writer may then need to change a portion of the rule, the explanation, or analysis for consistency.<sup>408</sup> The writer will continually visit the record, the case law, the brief, and the dream and ask, "Did it really happen this way?" Thus the writer circles until there is a polished and coherent whole.<sup>409</sup>

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much Setting-background can drive . . . overwhelmed reader[s] right out of a tale or suffocate them.").

401. See ROBBINS, *supra* note 25, at 59–60, 130–32 (explaining how details that may not initially seem relevant to the client can alter the entire presentation of the case).

402. See generally Chestek, *supra* note 370 (discussing how storytelling elements can play a role in the entire brief).

403. See Cunningham & Streicher, *supra* note 335; DONAHOE, *supra* note 333, at 66–67 (explaining that outlining may be part of the process for some writers and not for others); EDWARDS, *supra* note 333, at 69 (explaining that some writers need to outline in advance while others do so after writing).

404. Cf. DONAHOE, *supra* note 333, at 66–67; EDWARDS, *supra* note 333, at 69.

405. EDWARDS, *supra* note 333, at 69.

406. Cf. ROBBINS, *supra* note 25, at 59–72 (discussing investigating the facts and fine-tuning the legal theories as new information develops).

407. Cf. Eyster, *supra* note 25, at 94, 100, 105 (encouraging attorneys to seek out physical details).

408. Cf. DERNBACH, *supra* note 347, at 275–77 (stating that emotionally significant facts bearing no relevance to the legal issues should be excluded).

409. Cf. *id.* at 168, 205 (explaining that legal writing is recursive rather than linear); Rodriguez, *supra* note 347, at 207, 213 (explaining that while students may

What matters is that the final product includes an objective correlative that reveals state of mind and shapes the argument. Thus, in the instance of *Bush v. Edison*,<sup>410</sup> even if the attorney himself were queried, it is possible that he might not remember the order of this process. He might not be aware that he used an objective correlative. There may well have been some dove-tailing between the record and the research.<sup>411</sup> Regardless, the important thing is that these details were fleshed out in the attorney's statement of facts and created an objective correlative for the child's capacity to comprehend.<sup>412</sup> That objective correlative then laid the foundation for one of the legal issues presented in the argument: The child's capacity.<sup>413</sup> The details in the objective correlative were also reflected in the case law and the analogies the writer included.<sup>414</sup>

## V.

### ETHICAL CONCERNS REGARDING ACCURACY

Objective correlative is actually a more truthful means of conveying state of mind. Thus, although words like "storytelling" and "fiction techniques" may register initially with some readers as "making stuff up," these techniques are actually the means that literary fiction writers use to tell a more honest and coherent story. Used in law or even non-fiction, the techniques are a way of getting closer to what actually happened and are also a better method of reproducing what actually happened for readers.

The most accurate way to present a person's state of mind is through the actual way that the person experienced events, which is often through objective correlative. Therefore, studying objective correlative can become part of a lawyer's duty to provide competent representation and can even become a part of the lawyer's duties with respect to accuracy.<sup>415</sup> A lawyer cannot make "a false statement

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view legal writing as linear it is recursive); Cunningham & Streicher, *supra* note 335, at 164, 169 (discussing how drafting a brief is a recursive process and how the facts are written in tandem with the argument).

410. Brief of Appellees, *supra* note 372.

411. *See supra* note 409.

412. *See* Brief of Appellees, *supra* note 372.

413. *See id.*

414. *See id.*

415. *See* MODEL RULES PROF'L CONDUCT r. 1.1 (instructing that lawyers provide competent representation to clients); *cf.* MODEL RULES PROF'L CONDUCT Preamble and Scope (advocating zealous advocacy of clients); *see also* Steven J. Johansen, *This Is Not the Whole Truth: The Ethics of Telling Stories to Clients*, 38 ARIZ.

of material fact or law to a third person,”<sup>416</sup> and a more accurate and fully fleshed representation of the client’s experience is actually a means of approaching the client’s truth. Thus, objective correlative may better represent the truth than a mere list of facts.<sup>417</sup> Although some may argue that objective correlative is symbolic and thus evades reality,<sup>418</sup> all language is symbol.<sup>419</sup> For example, the word “chair” is not a chair in and of itself.<sup>420</sup> Moreover, it does not necessarily capture all the properties and principles of a given chair, and people may differ in their perceptions of its meaning.<sup>421</sup> Rather “chair” is a shorthand or symbol of the actual thing in the same way that “love” is shorthand for how Michele feels about her cat, Leona.<sup>422</sup>

Similarly, any report of the past is symbolic, so even a brief that uses objective correlative will be only an approximation.<sup>423</sup> The lawyer cannot conjure up the past for a judge to experience for his or herself.<sup>424</sup> Rather, it is through symbols like words and physical evidence that the lawyer constructs a representation of the past.<sup>425</sup> Therefore, any trial will resemble the shadows acting out dramas in

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ST. L.J. 961 (2006) (explaining that the truth is the client’s individual truth within limits).

416. MODEL RULES PROF’L CONDUCT r. 4.1(a).

417. *Cf.* Berger, *supra* note 23, at 277 (noting the argument that “literal” truth might be non-existent in law); Wynne-Jones, *supra* note 15 (explaining that objective correlative is often the way that people experience the world); ROBBINS, *supra* note 25, at 37–44 (discussing how people think in narrative).

418. *See* Winter, *supra* note 23 (taking issue with Thomas Grey’s contention that metaphor creates a new reality); Berger, *supra* note 23, at 277 (noting the argument that “literal” truth might be non-existent in law).

419. Roderick A. Macdonald, *Legal Bilingualism*, 42 MCGILL L.J. 119, 140 (1997); Leonard R. Jaffee, *The Troubles with Law and Economics*, 20 HOFSTRA L. REV. 777, 932 n.6 (1992); *see also* Berger, *supra* note 23, at 954 (explaining how concepts are often rooted in metaphors). *See generally* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 56–57 (2011) (explaining that people think in symbols); Winter, *supra* note 23, at 748 (discussing metaphor, language, and notions of objective reality).

420. *Cf.* Macdonald, *supra* note 419, at 140 (explaining how all language is symbolic); Jaffee, *supra* note 419, at 932 (explaining how all language is symbolic). *See generally* Winter, *supra* note 23, at 748 (discussing metaphor, language, and notions of objective reality). The author has previously used a similar example. *See* Koehlert-Page, *supra* note 51, at 663.

421. *See supra* note 420.

422. *See id.*

423. *Cf.* Berger, *supra* note 23, at 277–80 (explaining that literal truths are hard to come by and providing examples of how metaphor infuses our everyday language).

424. *See supra* note 423.

425. *See id.*

Plato's cave, and the appellate brief writer must work with the record to construct the truest approximation possible.<sup>426</sup>

A fully-fleshed cave shadow, one that contains a detailed objective correlative, will actually be more accurate rather than less. Objective correlative appears to be a natural part of the human psyche.<sup>427</sup> So if a case involves state of mind, objective correlative is often the most accurate portrayal of a witness's state of mind.<sup>428</sup>

That being said, an attorney's job is to present the client's accurate truth in a world where individual perceptions of reality differ while, at the same time, the attorney is ensuring that the client's perception comports with the evidence. Litigation typically involves competing truths, and "reality" is often in the eye of the beholder.<sup>429</sup> Because people think in terms of a coherent whole, sometimes they miss details that do not seem relevant to their focus.<sup>430</sup> For instance, Christopher Chabris and Daniel Simons provide the example of the invisible gorilla.<sup>431</sup> Chabris and Simons filmed a basketball game and asked viewers to count how many times players wearing white shirts passed the ball.<sup>432</sup> The majority of viewers missed the gorilla-suited person who walks through during the game.<sup>433</sup> The gorilla is not relevant to viewers' task and, thus, is

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426. Plato, *The Republic*, in *THE COLLECTED DIALOGUES OF PLATO* 575, 747–51 (Edith Hamilton & Huntington Cairns, eds., Paul Shorey trans., Princeton Univ. Press 1961) (1938).

427. Compare Wynne-Jones, *supra* note 15, with *Instinct and the Unconscious*, *supra* note 23, at 55–58 (discussing how certain archetypal images speak to the unconscious mind and are somewhat universal), Berger, *supra* note 23, at 277 (discussing how story and metaphor have played a role in thinking, persuasion, and reasoning since Aristotle), and Winter, *supra* note 23 (explaining that our mind is metaphoric with respect to legal endeavors as it is with everything).

428. Cf. Wynne-Jones, *supra* note 15 (explaining that objective correlative is not just a device but is how people actually experience the world).

429. See Cathren Koehlert-Page, *Come a Little Closer So I Can See You My Pretty: The Use and Limits of Fiction Point of View Techniques in Appellate Briefs*, 80 UMKC L. REV. 399 (2011); Johansen, *supra* note 415 (explaining that the truth is the client's truth within limits); cf. Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L.J. 459, 472 (2001) (discussing two parties' competing truths). But see Wendy Nicole Duong, *Law Is Law and Art Is Art and Shall the Two Ever Meet? Law and Literature: The Comparative Creative Processes*, 15 S. CAL. INTERDISC. L.J. 1 (2005) (arguing that to see multiplicity and relativity to truths is to rethink jurisprudence).

430. See KAHNEMAN, *supra* note 419, at 23, 34–35 (describing an experiment regarding this phenomenon).

431. THE INVISIBLE GORILLA, <http://www.theinvisiblegorilla.com/videos.html> (last visited July 25, 2014); *supra* note 430.

432. See *supra* note 431.

433. See *id.*

not a part of the focus.<sup>434</sup> In a car accident case, the accident may have happened in the first place because the driver missed something that did not seem relevant to the task at hand. So if the client-driver is focused on adjusting the windshield wipers, the client's objective correlative testimony might exclude the gorilla that jumped in front of the other car and forced the other driver to break suddenly in the middle of nowhere. The battle of competing truths then ensues. Was there a gorilla in the middle of the road or not? If the other driver's testimony involves a random gorilla leaping from out of nowhere into suburbia, then that driver's testimony may seem like the objective correlative of a madman. The appellate brief writer can mention the gorilla along with all of the details that make the gorilla appear out of place and let readers reach their own conclusions based on context. However, if it turns out that traffic cameras caught the gorilla on film, then it is time to revisit the theory of the case in light of all of the evidence.<sup>435</sup> The argument may change or the attorney may offer to attend mediation and settle the case.<sup>436</sup>

Where emotional material is involved, objective correlative is even more necessary to preserve accuracy. So for instance, the writer might be accused of inaccuracy and pandering if the writer wrote something like, "Tiny, little Cindy-Sue was so terribly sad after the horrible injustice exacted on her by the vicious telephone company. It just broke her sweet, little heart, and she cried and cried for days and days." Such a passage contains emotion-signifying words; it is problematic because it characterizes the facts. It tells rather than shows.<sup>437</sup> It is actually the opposite of a well-crafted objective correlative and is unlikely to evoke the emotions that it describes.

Where the objective correlative is consistent with the evidence and the theory of the case as in the other examples above, a lawyer meets the highest ethical standards of accuracy by using it.

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434. *See id.*

435. *Cf.* Johansen, *supra* note 415 (urging the telling of accurate yet individual truths).

436. *See generally* Kaufman, *supra* note 379 (discussing the viability of dispute resolution on appeal); Scanlon, *supra* note 379 (discussing various appellate mediation programs).

437. *Cf.* FRANCINE PROSE, *READING LIKE A WRITER* 24–25 (2006) (explaining that some "telling" is recommended in fiction as long as specific important story points are shown).

## CONCLUSION

If an attorney visualizes the external world involved in a case, he or she can both discover relevant details in the record and case law and create an emotional and psychological backdrop that amplifies persuasion. This objective correlative frequently portrays state of mind more accurately and forcefully than mere emotion-signifying words like “anger” or “malice” can. Objective correlative is more than just a single symbol or even a set of symbols. It is an entire backdrop, and it is a part of the unfolding of events and the manner in which we think and emote. To successfully create this backdrop, the writer must gracefully weave all of the elements of the scene together in a moment-by-moment unfolding of events that is seen and told from the character’s perspective. In crafting this objective correlative, the writer engages in a recursive process, revisiting and visualizing the record and the case law continually until the picture is fully-fleshed. If an attorney seeks coherence in the narrative and searches the record, objective correlative will actually meet higher ethical standards than any dry list of events can. Thus, to look inside Mr. Steven’s, the butler’s, pantry is to look inside Stevens himself in the best manner.

