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# Advocacy as an Exercise in Virtue: Lawyering, Bad Facts, and *Furman's* High-Stakes Dilemma

by Linda H. Edwards\*

Two of the conversations benefitting most from Jack Sammons's scholarship are conversations about legal rhetoric and about virtue ethics. Legal rhetoric is the study of the conventions of legal argument, specifically, the art of identifying and evaluating the best available means of persuasion<sup>1</sup> and implementing those means effectively in light of audience, purpose, and occasion.<sup>2</sup> Virtue ethics approaches moral reflection by asking what sort of person a particular moral choice encourages the actor to become.<sup>3</sup> It focuses on consequences to the moral agent herself rather than directly focusing on consequences to

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1. Linda Levine & Kurt M. Saunders, *Thinking Like a Rhetor*, 43 J. LEG. EDUC. 108, 108 (1993); Brett G. Scharffs, *The Character of Legal Reasoning*, 61 WASH. & LEE L. REV. 733, 745 (2004); Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1552-63 (1990).

2. Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. LEGAL EDUC. 155, 157-58 (1999); J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 56-61 (1994).

3. James F. Keenan, *Proposing Cardinal Virtues*, 56 THEOLOGICAL STUDIES 709, 710-15 (1995). MacIntyre proposed personal moral reflection in the form of three questions: "Who am I? Who ought I to become? How ought I to get there?" *Id.* at 711; see generally ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (3d ed. 2007).

others. The goal is to become a virtuous person,<sup>4</sup> that is, a person who possesses an integrated<sup>5</sup> set of virtues enabling her "to live and act morally well."<sup>6</sup> In the spirit of virtue ethics, this paper uses the primary defense brief in the consolidated cases known as *Furman v. Georgia*<sup>7</sup> as an example of how good advocacy can help a lawyer practice virtue, particularly in what may be the most difficult brief-writing dilemma of all: dealing with bad facts.

This inquiry has its roots in almost everything Jack Sammons has written, for as Jack has taught us so well, virtue is not an external constraint on good lawyering but rather a fundamental part of the narrative of good lawyering.<sup>8</sup> And the *Furman* brief is a relevant text for our inquiry, especially because years ago, Jack participated in the moratorium effort that was such an essential part of the *Furman* strategy. Also, the choices reflected in the *Furman* fact statement—especially the choices about how to deal with the disturbing facts of the case—are the product of the same kind of surprising and creative choices Jack has made time and again in his teaching and scholarship. A lifetime of practice and experience<sup>9</sup> with these choices builds virtues of character, just as they have in Jack.

Finally, Jack has always been more interested in inquiry than in accolades. On an occasion such as this, my guess is that Jack would like us to show him that we have learned a thing or two from him over the years. Of course I don't delude myself by thinking that Jack will just applaud and say, "Hear, hear." In all the years I've known Jack, I have never written anything that didn't prompt him to tell me how I got it wrong, or at least how I didn't get it entirely right. But that response is what I love most in Jack. He is never satisfied to leave his friends where he finds us. He would rather encourage us to think new thoughts and, most important, ask new questions. So to paraphrase Jack's own gracious attribution in *Rebellious Ethics*<sup>10</sup>: With a friend like Jack, I should have been able to get this right, and he is not to be blamed for my failure to do so.

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4. PAUL WADELL, *FRIENDSHIP AND THE MORAL LIFE* 136 (1989).

5. Keenan, *supra* note 3, at 714 (citing THOMAS AQUINAS, *SUMMA THEOLOGIAE* I-II, q. 61, a. 2). The virtues may be integrated, but they can also be in dialectical tension, challenging each other and therefore further defining each other. *Id.* at 721.

6. *Id.* at 714. "Virtues do not perfect powers or 'things' inside of us, but rather ways that we are." *Id.* at 723.

7. 408 U.S. 238 (1972).

8. Jack L. Sammons, *Rebellious Ethics and Albert Speer*, 1 *PROF. ETHICS* 77 (1992).

9. DANIEL MARK NELSON, *THE PRIORITY OF PRUDENCE: VIRTUE AND NATURAL LAW IN THOMAS AQUINAS AND THE IMPLICATIONS FOR MODERN ETHICS* xi (1992).

10. Sammons, *supra* note 8, at 77.

Two other limitations must be acknowledged at the outset. First, there is more to say about the *Furman* fact statement than space here permits. Second, no analysis of lawyering choices undertaken forty-three years later by strangers to the case can be complete or fully accurate, for we cannot account for the full rhetorical context of the case. Even so, we can learn important lessons by looking back on *Furman's* advocacy, especially in light of the four cardinal virtues of prudence, justice, temperance, and courage.<sup>11</sup> As Father James Keenan has reminded us, these cardinal virtues make only modest claims in that they are the "bare essentials" for virtuous action.<sup>12</sup> Modest they may be, but easy they are not.

### I. THE *FURMAN* DILEMMA

The death penalty has been described as "the most highly charged legal, emotional, and ideological issue to come before the United States Supreme Court."<sup>13</sup> When the Court considers capital punishment, human lives hang by a thread. The consolidated *Furman* cases came to the Court as the culmination of a long, hard-fought effort on the part of national teams of lawyers working to end the death penalty.<sup>14</sup> The use of capital punishment already had been in decline,<sup>15</sup> and the goal was to create an effective moratorium on its use, partly in preparation for a constitutional challenge before the Court.<sup>16</sup>

The day finally came. On June 28, 1971, the Supreme Court granted review in two murder cases (*Aikens v. California* and *Furman v. Georgia*) and two rape cases (*Branch v. Texas* and *Jackson v. Georgia*). In each case, the defendant had been sentenced to death. In each case, the Court limited proceedings to the question of whether "the imposition

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11. The list of cardinal virtues has been the subject of vigorous debate over the years, with various hierarchies and additions proposed. For a cogent summary of some relatively recent arguments, see Keenan, *supra* note 3, 709-23. Despite arguments about the relationships among the virtues or other virtues that could be deemed "cardinal," few would argue that the original four virtues are not qualities important for the making of a good life.

12. *Id.* at 714.

13. Sean D. O'Brien, *Furman v. Georgia and Roper v. Simmons*, in READINGS IN PERSUASION: BRIEFS THAT CHANGED THE WORLD 433, 433 (Linda H. Edwards ed., 2012).

14. MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 23-181 (Quid Pro 2011).

15. *Id.* at 37-38. During the 1950s, an average of 72 death row inmates were executed each year, but by the early 1960s the average had fallen to 19. *Id.* at 135.

16. By the time the primary merits brief in *Furman* was filed, there had not been an execution in the United States for over four years. On September 10, 1971, when the *Furman* brief was filed, the last execution had occurred in June 1967. *Id.* at 123. See also Brief for Petitioner at 37, *Aikens v. California*, 404 U.S. 933 (1971) (No. 68-5027).

and carrying out of the death penalty in this case constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."<sup>17</sup>

Legal argument would be limited to the question certified by the Court, but as any good lawyer knows, the fact statements had more complicated work to do. Rhetorically, death appeals fall into four major categories: (1) possible innocence;<sup>18</sup> (2) mitigation of crime or sentence; (3) procedural inadequacy;<sup>19</sup> and (4) constitutional challenges to the death penalty itself.<sup>20</sup> No matter what legal arguments are made later in the brief, a fact statement in a capital case should raise narrative concerns in as many of these areas as possible.

The facts of William Henry Furman gave his lawyers at least some room to work. *Furman's* facts could be written—and indeed were written<sup>21</sup>—to raise questions in the minds of its readers about all four of these categories. But the facts of Earnest James Aikens were potentially devastating. Aikens had been convicted of two first-degree murders committed in the course of entering the homes of two particularly sympathetic women victims. The women had been robbed, raped, and brutally killed. The sentencing record reflected a third first-degree murder as well. Aikens seemed like the poster child for the State's argument in favor of the death penalty.

Not only were the facts of the crimes horrendous, but there was no room for arguing innocence and little opportunity to argue mitigation.<sup>22</sup> The record reflected no procedural error sufficient to support an appeal. The only possible express argument was the constitutional challenge to the death penalty itself, but Aikens's facts elicited an unavoidable human reaction that the death penalty might be an appropriate response

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17. *Aikens v. California*, 403 U.S. 952 (1971) (emphasis omitted); see also MELTSNER, *supra* note 14, at 181.

18. A defendant might be completely innocent (for example, because of a misidentification) or innocent of the particular crime of which he was convicted (for example, because while he fired the shot, the killing was unintentional, making him innocent of the death-eligible crime).

19. Rhetorically, for a procedural issue, defendant's counsel needs to convince the Court that the procedural issue is serious enough to raise the concern of wrongful convictions in future cases, even if this particular defendant was guilty.

20. The appeal can challenge the death penalty across the board or in a particular kind of case such as minority, as in *Roper v. Simmons*, 543 U.S. 551 (2005), or mental retardation, as in *Atkins v. Virginia*, 536 U.S. 304 (2002).

21. O'Brien, *supra* note 13, at 434-36.

22. The record did include some mitigation facts, but only those typical to many capital defendants. Judges who deal with capital appeals are used to seeing facts like these, and trying to use them to make a mitigation argument likely would have been met with sighs and thoughts of "here we go again."

to his crimes. What's more, the Aikens case was the first-listed combined murder case. The primary defense brief would be filed in *Aikens*, not in *Furman* or either of the rape cases. Somehow Aikens's lawyers had to raise narrative concerns about innocence, mitigation, and procedural weakness. Hardest of all, they had to find a way to deal with the emotional impact of Aikens's facts.

The virtually unquestioned standard advice about writing a fact statement is to write in the voice of an advocate, minimizing bad facts and maximizing helpful facts,<sup>23</sup> but the *Aikens* fact statement made a different choice.

## II. TELLING THE TRUTH<sup>24</sup>

The *Aikens* fact statement is short, shocking, even disorienting.<sup>25</sup> Here it is, presented in its entirety<sup>26</sup>:

### STATEMENT OF THE CASE

Following a bench trial in the Superior Court of Ventura County, petitioner Earnest James Aikens, Jr., was convicted of the first-degree murder of Mrs. Mary Winifred Eaton, on April 26, 1965, and was sentenced to die for that offense. In consolidated proceedings, he was at the same time convicted of the first-degree murder of Mrs. Kathleen Nell Dodd on April 3, 1962, and sentenced to life imprisonment pursuant to Cal. Penal Code § 190.1, which prohibits the imposition of the death penalty upon any person who was under the age of eighteen when the murder was committed. Petitioner was not quite seventeen when Mrs. Dodd was murdered, and was twenty at the time of the murder of Mrs. Eaton.

Both of these killings were unmitigated atrocities, committed during robberies and rapes of the victims after the killer had entered their homes. Although not overwhelming, the circumstantial evidence presented by the prosecution was sufficient to identify petitioner as the killer. In the penalty trial that followed his conviction of Mrs. Eaton's murder, the prosecution also showed that petitioner had committed a

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23. But see generally Kathryn M. Stanchi, *Playing With Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 RUTGERS L. REV. 381 (2008).

24. Terms like "truth" and "veracity" are associated with many meanings. Here, I use them to refer to reporting the facts of these crimes straightforwardly, without trying to minimize or avoid them. I do not mean, however, to require naïve expression or to exclude craft and cunning in the telling. PETER GEACH, *THE VIRTUES* 114-15 (rprt. 1979).

25. Typically, defense counsel appear always to be trying to help their clients avoid the consequences of their crimes—helping them "get away with it." But this fact statement initially causes a reader to think that she is reading the state's brief rather than the defense brief.

26. Footnotes and citations to the record are omitted here.

third first-degree murder on June 7, 1962 and a forcible rape on December 25, 1962. The trial court found that:

"Earnest Aikens has since the age of eleven years of age, or thereabouts, been involved in an almost continuous pattern of anti-social and criminal behavior of one sort or another. He has graduated from petty and minor nuisances and offenses through more serious proceedings that have involved Juvenile Court wardship and a commitment to Los Prietos Boys' School and to more recent commitments at the Preston School of Industry and the Youth Training School, both administered by the California Youth Authority. In the instances of his parole from the Authority level, his periods of surcease from criminal behavior have been of short duration. Now he stands convicted of two brutal, cold-blooded and vicious killings, together with the finding that I have here earlier made of his responsibility for a third homicide. Interspersed with the foregoing have been instances of assault, rape and robbery. Such record, at the very least, demonstrated an indifferent, arrogant and obvious disregard for the dignity and value of human life and the rights of others."

The court credited psychiatric findings that petitioner was a sociopath; found that he had not benefited from rehabilitative efforts in the past and was not very likely to benefit from them in the future; found that his criminal behavior was not substantially explained or mitigated by his upbringing in a fatherless and economically deprived family, but was attributable to his failure to use those opportunities that society had given him for a free education and later for institutional rehabilitation; and, in view of his "multiple and aggravated crimes . . . against the victims . . . involved and, indeed, against society in general," concluded that he should be put to death.

Petitioner's crimes were indeed aggravated. Mrs. Eaton was a woman in her sixties, the mother of an acquaintance of petitioner's. While she was home alone in the middle of the day, her house was entered; her money and a sharp knife from her kitchen were taken; she was led to a bedroom; her arms were tied behind her with two belts; and she was then raped and killed by several wounds of the knife that plainly establish a deliberate and intentional murder.

Mrs. Dodd was twenty-five years old and five months pregnant when she was killed. Her house was entered in the late evening, while her husband was away and her two young children were sleeping. She ran or was taken from the house to a railroad embankment in the area, where she was raped. She then ran from the embankment, was overtaken in a neighbor's driveway, and was killed by numerous stabs of a knife that had been removed from her kitchen. Money was also removed from Mrs. Dodd's house.

A more detailed statement of the evidence relating to the killings of Mrs. Eaton and Mrs. Dodd is set forth in Appendix B to this brief. We do not place it here because it is lengthy and is not material to our

constitutional submission in this Court. Our submission is that the penalty of death is a cruel and unusual punishment for the crime of first-degree murder—or for any other civilian, peacetime crime—no matter how aggravated. We make no claim that if the death penalty can constitutionally be inflicted for any such crime, it cannot be inflicted upon this petitioner.

His were ghastly crimes—as any intentional killing of a human being is a ghastly crime—and were attended by aggravating features that must necessarily arouse the deepest human instincts of loathing and repugnance. But the issue before this Court cannot turn upon those features. This is so because if the state may constitutionally punish petitioner's crimes with death, it may also constitutionally use death to punish murders unattended by the same features. California's statutes and its courts in fact do so; and we can conceive no Eighth Amendment principle which, allowing death punishment in the particular circumstances of this case, could confine it to them.<sup>27</sup>

Many paragraphs of this fact statement seem almost to have been written by the State. The fact statement seems to agree with the State on nearly every factual point. It describes Aikens's acts with language like "unmitigated atrocities;" "brutal, cold-blooded and vicious;" "multiple and aggravated crimes;" "indeed aggravated;" "deliberate and intentional;" "ghastly;" and "arouse the deepest human instincts of loathing and repugnance." What were the defense lawyers thinking? Could this have been the prudential choice?

### III. THE TRUTH AS THE PRUDENTIAL CHOICE

In its classical sense, *prudence* (wisdom) is the virtue of discernment—of making wise choices.<sup>28</sup> It is the perfection of rational deliberation,<sup>29</sup> allowing the moral actor to see and select the appropriate action.<sup>30</sup> Prudence always considers context and practical con-

27. Brief for Petitioner, *supra* note 16, at 3-5 (internal citations omitted).

28. NELSON, *supra* note 9, at ix.

29. THOMAS AQUINAS, TREATISE ON THE VIRTUES 110 (John A. Oesterle trans., Univ. Notre Dame Press 1984).

30. Popular culture sometimes seems to misunderstand prudence in two equally problematic ways. Prudence can be confused with self-righteous rejection of pleasure (being "prudish"). MITCH FINLEY, THE CATHOLIC VIRTUES: SEVEN PILLARS OF A GOOD LIFE 49 (1999). Or prudence can be misunderstood as undue caution. NELSON, *supra* note 9, at ix. But prudence in the classical sense is quite another matter. If prudence referred to undue caution, it could hardly be practiced alongside its sister virtue of courage. Rather, prudence "discern[s] our true good in every circumstance and . . . choose[s] the right means of achieving it." CATECHISM OF THE CATHOLIC CHURCH 444 (Libreria Editrice Vaticana, 2d ed. 1994).



straints.<sup>31</sup> It is grounded in the messiness of human reality, ordering our practical wisdom toward a worthy goal.<sup>32</sup> At a minimum, prudence requires the actor to gather all available information, to seek and value input from others, and to weigh all possible options.<sup>33</sup> Most relevant here, prudence looks beyond conventional practice, searching for the best answer, not the safest or least surprising.

Conventional defense practice would try to put the best face possible on the facts. It typically takes what John Gardner has called the third-person subjective point of view.<sup>34</sup> The writer adopts a subjective perspective, presenting the facts either through the eyes of the client or through other eyes sympathetic to the client. After reading a conventional fact statement, a reader can easily identify the factual arguments being made. For example, if a mitigation fact is stated, the reader would know immediately and without question that the defense lawyer is trying to argue mitigation, whether expressly stated or not.<sup>35</sup> If facts are characterized, the characterizations are sympathetic to the client.

In the *Aikens* fact statement, the pressure to take that conventional route was surely overwhelming, but the conventional choice simply would not work here. The record would not support obvious arguments of innocence, mitigation, or procedural error. Pointing out the few, small, painfully inadequate helpful facts would send a message that the lawyers were simply going through the motions on a losing case. Nor could the brief avoid the emotional impact of the facts of the crimes. The State's brief would shortly follow.<sup>36</sup> Without doubt, the State's attorney was happily anticipating the chance to set out the *Aikens* facts in detail. Any emotionally laden fact omitted by the defense would be touted there, and it would seem that the defense was not being straightforward with the Court. And if these facts appeared first in response to the defense's constitutional argument, they would be positioned structurally to seem like a legitimate response to the constitutional question. In other words,

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31. FINLEY, *supra* note 30, at 51-52.

32. Keenan, *supra* note 3, at 717.

33. FINLEY, *supra* note 30, at 58-59.

34. JOHN GARDNER, *THE ART OF FICTION: NOTES ON CRAFT FOR YOUNG WRITERS* 155-59 (1984).

35. The writer's purpose could be express ("The State alleged that [insert allegation]. But [insert various contrary facts from the record].") or could be contextually implied (The first paragraph of the fact statement: "The defendant's parents had separated before his birth. He lived primarily with his alcoholic mother and her succession of male friends, some of whom sexually abused him beginning at about the age of eight."). The point is that either way, any reader can tell that the writer is attempting to make a particular point.

36. The brief for the State of California was filed on September 24, 1971. Brief for Respondent, *Aikens v. California*, 404 U.S. 933 (1971) (No. 68-5027).

it would seem that horrendous acts justify the death penalty. These crimes could not be minimized. Loathing and repugnance surely are the only possible human reactions.

The risky unconventional choice, then, would be to say the worst before the State had a chance to say it. As it turns out, at least ten reasons support brutal honesty as the prudential choice:

*Credibility.* Most obviously, the choice was so surprising that it surely would earn big credibility points. If the defense lawyers are prepared to be this honest about these facts, the other parts of their brief must be taken seriously indeed.

*Preempting Opposing Strategies.* Presenting the facts so starkly confuses the State's expected response.<sup>37</sup> Simply repeating these facts would irritate the Court and make the State look silly. Adding more detail—detail already provided in the defense exhibit—would result in a lengthy fact statement made less readable by many distracting citations to the record. The Court might be tempted to skim or skip such a long and visually unappealing section, especially since the defense version seems to have already honestly provided what the Court needs to know.<sup>38</sup> The only other options would be to ignore the facts of the crimes or to treat them essentially as procedural background. Either way, the State would seem, rhetorically, to agree with the defense position that the facts of the crimes are irrelevant. None of these options seems ideal for the State's purposes.

*Inoculation.* Since these facts would be presented to the Court one way or another,<sup>39</sup> presenting them early may trigger some degree of reader inoculation. The social science theory of inoculation posits that a reader develops resistance to negative information disclosed early and by the party with the most to lose.<sup>40</sup> Voluntarily raising and refuting

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37. See, e.g., THOMAS MAUET, TRIAL TECHNIQUES 70-71 (7th ed. 2007).

38. The State chose this option. The brief for the State includes a thirty-four-page fact statement filled with individual facts and multiple record cites on many lines. Early pages squander valuable persuasive real estate with a description of procedural history, so it is tempting to stop reading and move on to the argument section.

39. Indeed, they already had been presented preliminarily since there had been filings below and filings pursuant to the certiorari procedure.

40. Stanchi, *supra* note 23, at 399-424; see also James F. Stratman, *Investigating Persuasive Processes in Legal Discourse in Real Time: Cognitive Biases and Rhetorical Strategy in Appeal Court Briefs*, 17 DISCOURSE PROCESSES 1, 7-13 (1994).

negative information is sometimes referred to as “stealing thunder,”<sup>41</sup> and studies show that early voluntary disclosure may be more effective than ignoring negative information that will shortly be raised by an opponent.<sup>42</sup>

*Boomerang Effect.* The inoculation effect is increased here by the fact statement’s insistence on using negative language that verges on overstatement. Yes, these crimes were very bad, and on first encountering the language, a reader does have a predictable emotional reaction. But after reading several pages of language like “unmitigated atrocities;” “brutal, cold-blooded and vicious;” “ghastly;” and “arouse the deepest human instincts of loathing and repugnance,” the reader can begin to tire of the extreme descriptors. A small resistance begins to build. The reader may find herself thinking, “Okay, this was bad, but the language is starting to seem a little strong.” Pushing a reader toward a particular reaction can trigger psychological reactance, a phenomenon in which a reader begins to defend her autonomous decisionmaking.<sup>43</sup> This reaction is sometimes called a “boomerang effect” and, perversely, causes the reader to lean in the opposite direction.<sup>44</sup> Usually, legal writers want to avoid psychological reactance because they are making an express argument they want their readers to accept. Here, though, the *Aikens* fact statement uses psychological reactance paradoxically, to overstate an argument the writers want their readers to resist.

*Point of View.* Instead of using an advocate’s voice (the third-person subjective), the fact statement uses what John Gardner has called the third-person objective point of view.<sup>45</sup> The writer uses a voice more like that of the judicial law clerk writing a bench memo than that of an advocate writing a brief. Because the perspective sounds objective, it seems more trustworthy. The third-person objective produces “an ice-cold camera’s-eye recording. We see events, hear dialogue, observe the

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41. Kipling D. Williams et al., *The Effects of Stealing Thunder in Criminal and Civil Trials*, 17 LAW & HUM. BEHAV. 597, 597 (1993).

42. Kathryn Stanchi, *What Cognitive Dissonance Tells Us About Tone in Persuasion*, 22 J.L. & POLY 93, 118-19 (2013).

43. Michael Burgoon et al., *Revisiting the Theory of Psychological Reactance: Communicating Threats to Attitudinal Freedom*, in THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 213, 215-16 (James Price Dillard & Michael Pfau eds., 2002); Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 MICH. ST. L. REV. 411, 428.

44. Burgoon, *supra* note 43, at 215-16; Stanchi, *supra* note 43, at 422.

45. GARDNER, *supra* note 34, at 155-59.

setting, and make guesses about what the characters are thinking.<sup>46</sup> The point of view is characterized by a certain "savage sparsity,"<sup>47</sup> and the reader, free of the claustrophobia of a subjective perspective,<sup>48</sup> is instead invited to wonder about what is not directly stated. Ostensibly presented for other purposes, small helpful facts take on increased credibility and importance, and a reader wonders what other facts might support an argument not made expressly here.<sup>49</sup>

*Smuggled Facts.* The third-person objective point of view and the brutal honesty about the crime allows the writer to smuggle into the fact statement Aikens's few helpful facts without appearing to use them to make a losing legal argument or a futile appeal to sympathy. Once we look, we can see this strategy subtly used throughout the entire fact statement. For example, we learn that Aikens was very young when his age is introduced purportedly as part of a procedural explanation for why the first murder did not result in a death sentence.<sup>50</sup> As part of the sentencing judge's explanation for choosing death, we learn that Aikens suffered from a mental disorder, having been diagnosed with sociopathy.<sup>51</sup> Rather than seeing Aikens's mental condition as a mitigating factor, this trial judge actually relied on the disorder to justify the death sentence. In fact, the judge's quoted language includes the finding that Aikens demonstrated an "indifferent, arrogant and obvious disregard for the dignity and value of human life,"<sup>52</sup> language a reader can recognize as almost a dictionary definition of sociopathy.<sup>53</sup>

46. *Id.* at 157.

47. *Id.*

48. *Id.*

49. The Justices had, after all, limited the issue to the constitutional challenge.

50. "Petitioner was not quite seventeen when Mrs. Dodd was murdered, and was twenty at the time of the murder of Mrs. Eaton." Brief for Petitioner, *supra* note 16, at 3.

51. Sociopathy is the extreme form of antisocial personality disorder, classified as one of the recognized personality disorders, such as borderline personality, paranoia, and schizotypal disorder. The Diagnostic and Statistical Manual (DSM) in effect at the time of Aikens's sentencing classifies sociopathy in the broad category of "sociopathic personality disturbance" and the more specific forms of "antisocial reaction," and "dyssocial reaction." The DSM warns that "sociopathic reactions are very often symptomatic of severe underlying personality disorder, neurosis, or psychosis, or occur as the result of organic brain injury or disease. Before a definitive diagnosis in this group is employed, strict attention must be paid to the possibility of the presence of a more primary personality disturbance." THE COMM. ON NOMENCLATURE & STATISTICS OF THE AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS 38 (1952).

52. Brief for Petitioner, *supra* note 16, at 4.

53. "The court credited psychiatric findings that petitioner was a sociopath [citation to the record] . . . ." *Id.*

The fact statement has employed dramatic irony: A careful reader realizes the significance of the diagnosis, a realization that was lost on the sentencing judge.

Immediately following the description of the crimes as "unmitigated atrocities" and as part of the most serious concession of all (the identification of Aikens as the killer),<sup>54</sup> we learn that the evidence at trial was entirely circumstantial and was not especially compelling.<sup>55</sup> After the fact statement has called the crimes "unmitigated atrocities,"<sup>56</sup> the next phrase, "[a]lthough not overwhelming,"<sup>57</sup> has far more credibility than it otherwise would have, sounding almost like an understatement. A tiny seed of doubt has been planted. No direct argument of misidentification was made, however, so the fact statement does not have to detail the circumstantial evidence in the record. Even if the State's responsive brief describes the evidence sufficiently to eliminate doubt as to Aikens's guilt, the reader now knows that less-than-compelling circumstantial evidence can condemn a defendant to death. Aikens may be guilty in this case, but it is almost certain that if such circumstantial evidence can be sufficient, some innocent defendants will be sentenced to die.

Ironically and intentionally, the second paragraph asserts that the crimes were "unmitigated" and then sets out the mitigation facts of Aikens's life.<sup>58</sup> The story continues in the third-person objective voice, ostensibly as simple procedural history and as a statement of the justification for the death sentence. But dramatic irony again allows a careful reader to draw other conclusions. The section begins with quoted language from the trial judge, explaining the choice of death. In the judge's own words, we learn that since at least the age of eleven, Aikens was a fatherless,<sup>59</sup> lost boy. There is no evidence of any supportive adult in his life—only institutionalizations at the hands of the State. We learn that part of the justification for the death sentence was Aikens's "failure to use those opportunities that society had given him for a free

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54. While the fact statement appears to concede the sufficiency of the identification, as it surely must, the recitation of the facts of the crimes uses passive-voice verbs almost entirely. A reader imagines the visual images of these crimes, but the perpetrator remains in the shadows. The focus remains on the actions themselves. *Id.* at 3-4.

55. "Although not overwhelming, the circumstantial evidence presented by the prosecution was sufficient to identify petitioner as the killer." *Id.* at 3.

56. "Both of these killings were unmitigated atrocities, committed during robberies and rapes of the victims after the killer had entered their homes." *Id.*

57. *Id.*

58. *Id.* at 3-4.

59. "The court . . . found that his criminal behavior was not substantially explained . . . by his upbringing in a fatherless and economically deprived family . . ." *Id.* at 4.

education [the public school system?] and later for institutional rehabilitation.<sup>60</sup> A careful reader can see in these words the attitude of the sentencing judge toward young men like Aikens, and his naïve assumptions about the nature of “institutional rehabilitation.” A reader can also see what the trial judge did not—that the State failed this child and now intends to kill the young man he has become.

Further, the knowledge that the evidence was entirely circumstantial and “not overwhelming” combines with another fact—quietly dropped into the first paragraph—that Aikens was tried for these two completely unrelated murders in the same trial. A careful reader will realize that the consolidation surely would have been greatly prejudicial to Aikens. The combination of the consolidation and the quoted language from the sentencing judge smacks of a judicial desire simply to dispose of this young man as expeditiously as possible.

These facts, smuggled into the statement ostensibly for other purposes, have allowed defense lawyers to give us a picture of Aikens’s life without appearing to be using the facts to make an argument on his behalf. Instead, careful readers believe that they have thought of the mitigation, innocence, and procedural implications themselves and are therefore more inclined to give those implications at least some credence.<sup>61</sup> They may also be affected by the desire for self-affirmation, a psychological phenomenon in which a reader wants to demonstrate admirable characteristics and resists threats that imply less-than-admirable characteristics.<sup>62</sup> Here, the reader may want to avoid being (and avoid appearing to be) the kind of person who is untroubled by the implications raised by these smuggled facts.

The unobtrusive personalization also has been enhanced by the order of its appearance (preceding the facts of the crimes) and also by the language used to refer to capital punishment. In part because death is so difficult to consider in any concrete way, we have become almost immune to the reality of “the death penalty.” We read right over the words without noticing what we are really talking about. The routine usage of the term hides the deep emotionality and moral contestability of state-imposed killing. Having subtly personalized Aikens, the fact statement uses “the death penalty” only twice and only at points when the reader’s somnolence may be either desirable or irrelevant.<sup>63</sup> All other references use fresher terms in order to awaken the reader to the

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60. *Id.*

61. LINDA H. EDWARDS, *LEGAL WRITING AND ANALYSIS* 75 (3d ed. 2011).

62. KATHLEEN KELLEY REARDON, *PERSUASION: THEORY AND CONTEXT* 67 (1981); Stanchi, *supra* note 43, at 420-21.

63. Brief for Petitioner, *supra* note 16, at 3, 5.

reality of what truly is at issue here: "[he] was sentenced to die,"<sup>64</sup> "concluded that he should be put to death,"<sup>65</sup> "the penalty of death,"<sup>66</sup> "punish petitioner's crimes with death,"<sup>67</sup> "use death to punish,"<sup>68</sup> and "allowing death punishment."<sup>69</sup>

*Focus on Victims.* The fact statement's description of the crimes focuses on the victims, not on Aikens. The two paragraphs that set out the facts of the crimes are written almost entirely in the passive voice. The victims are the grammatical subjects of most sentences in these two paragraphs. The camera places the victims in their homes. Then they ran or were led. One was bound. They were raped and killed. The fact statement puts the actions themselves in clear focus, but avoids placing Aikens in the scenes. In this mental video, the actor remains a shadowy figure. The descriptions of the actions distract the reader from picturing Aikens as the perpetrator.

*Showing and Telling.* The fact statement also artfully chooses between "showing" and "telling." Conventional advice teaches brief writers generally to show rather than tell, that is, to present the facts themselves rather than characterizing them for the reader. Showing rather than telling invites the reader to come to her own conclusions and therefore increases her attachment to those conclusions. When referring to the crimes, the *Aikens* fact statement tends to do more telling than showing, characterizing the crimes with negative labels and broad descriptions of actions.<sup>70</sup> But when referring to the mitigation facts, the statement tends toward "showing," providing factual details that invite the reader to reach her own conclusions.<sup>71</sup> In other words, the fact statement tends to "tell" when describing the crimes and the victims and tends to "show" when describing Aikens. The fact statement had to

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64. *Id.* at 3.

65. *Id.* at 4. The phrase was strategically placed at the end of the procedural history in a position of emphasis.

66. *Id.* at 5.

67. *Id.*

68. *Id.*

69. *Id.*

70. The description of the crimes is factual, but it is positioned at a fairly large psychic distance. "When psychic distance is great, we look at the scene as if from far away—our usual position in the traditional tale, remote in time and space, formal in presentation . . ." Gardner, *supra* note 34, at 111.

71. Specifically, the fact statement sets out facts about Aikens's life since the age of eleven. Other than referring to Aikens as growing up in a "fatherless and economically deprived family," the only characterizations in that section are those of the sentencing judge, included for the purpose of showing the judge's attitude and factual assessment.

do enough "showing" to satisfy a reader that the facts had been presented rather than avoided; but once that threshold had been met, the statement predominately uses the strategy of "telling." Even such strongly negative characterizations like "ghastly crimes" are less damaging than "showing" the facts.<sup>72</sup>

*Aikido Move.* The descriptions of the crimes, the focus on the victims, and the use of the third-person objective voice have led the reader to the crucial key clause: "His were ghastly crimes—as any intentional killing of a human being is a ghastly crime."<sup>73</sup> Everything in the fact statement has been leading up to these words. The strategy is a classic Aikido<sup>74</sup> move. Rather than resisting the opponent's attack, the fact statement redirects its force. The statement has elicited in us "the deepest human instincts of loathing and repugnance," but has postponed ever-so-briefly the moment at which it presents us with a target for those emotions. Now, in the last paragraph, the fact statement presents the target. It turns those instincts of loathing and repugnance back upon the State's desire to use the death penalty. The State wants to do what Aikens has done.

*Forming Relationships.* Finally we consider what may be the most important but least obvious advantage of the brutally truthful fact statement: crossing the rhetorical gulf potentially separating defense counsel from the crucial swing voters on the Court. Generally speaking, a capital defender representing a client with bad facts will be in an inherently difficult rhetorical position. A great personal, social, and moral gulf separates most judges from most capital defendants, making it extraordinarily difficult for a judge to identify with or understand what the defendant's experiences may have been.<sup>75</sup> That lack of

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72. The factual details were placed in an appendix.

73. Brief for Petitioner, *supra* note 16, at 5.

74. Aikido is a martial art in which the combatant redirects the opponent's attack rather than attempting to block it head on. Therefore, it uses the opponents own force against him.

75. On the occasion of remembering the life of Justice Lewis Powell, J. Harvie Wilkinson III, then the Chief Judge of the Fourth Circuit, wrote that "[i]t would be remiss . . . to think that anyone's judicial life could be wholly unaffected by background." In Memoriam, *Lewis F. Powell, Jr.*, 112 HARV. L. REV. 589, 592 (1999) (remarks by Chief Judge J. Harvie Wilkinson III of the United States Court of Appeals for the Fourth Circuit). The Aikens trial judge may serve as an example of this rhetorical difficulty, as shown by the judge's opinion that a young man in Aikens's situation could be expected, on pain of death, to appreciate the State's provision of a free education and various institutionalizations and to therefore choose to turn his life around.



understanding can overflow into personal disapproval of or at least puzzlement about a lawyer who chooses to represent such a client. Very few judges would identify career capital defenders as part of their own social or professional group.

All capital defenders face this distance to one extent or another, but at this particular time, in this particular case, we can be more specific about the rhetorical situation facing Aikens's lawyers. Justices Burger, Blackmun, and Rehnquist were thought to be irretrievably opposed to the defense position, and Justices Brennan, Douglas, and Marshall were thought to be safely in the defense camp.<sup>76</sup> The crucial votes would be cast by Justices Powell, Stewart, and White.

Predictably, these justices had little relevant experience with Aikens's experience or with the world of lawyers who would choose a career of representing the Aikenses of the world. Potter Stewart had grown up in a Cincinnati family deeply immersed in Republican politics and living in a "house of grand proportions."<sup>77</sup> He attended a private University School in his early years and subsequently attended Hotchkiss School, a Connecticut boarding school dedicated to preparing students for Yale.<sup>78</sup> After graduating from Yale Law School, Stewart had practiced at the Wall Street firm then known as Debevoise, Stevenson, Plimpton & Page for a total of about three years before returning to Cincinnati to begin his own political career.<sup>79</sup> He joined Cincinnati's most prestigious firm, Dinsmore, Shohl, Sawyer & Dinsmore, a blue-chip firm with a list of blue-chip clients.<sup>80</sup> He moved into an exclusive neighborhood and chose a house across the street from the Cincinnati Country Club.<sup>81</sup> He promptly began his own political career, and by the time he was appointed to the Sixth Circuit, at age 39, he had practiced law full time for only six years.<sup>82</sup>

Byron White's background was equally far removed from the world of Earnest Aikens. White had grown up in a frontier family on the Colorado prairie.<sup>83</sup> His early life was characterized by a stable family

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76. MELTSNER, *supra* note 14, at 205.

77. Potter Stewart once related the story that when the family moved into the house, his father had managed to get lost in it. Joel Jacobsen, *Remembered Justice: The Background, Early Career and Judicial Appointments of Justice Potter Stewart*, 35 AKRON L. REV. 227, 229-30 (2002).

78. *Id.* at 230.

79. *Id.* at 233-35.

80. *Id.* at 235.

81. *Id.*

82. *Id.* at 243.

83. Leon E. Irish, *Byron White: A Singular Life*, 52 CATH. U. L. REV. 883, 883 (2003).

life, hard work, and fishing trips with his father.<sup>84</sup> After graduating from Yale Law School in 1946, White settled in Denver to capitalize on the city's rapid growth and resultant professional opportunities.<sup>85</sup> He joined a well-respected firm, now known as Davis, Graham & Stubbs, with a long list of corporate and commercial clients.<sup>86</sup> White set about both representing these clients and bringing in similar clients of his own.<sup>87</sup> He married, began a family, continued fishing, and took up golf.<sup>88</sup> There is no indication that he spent time in the world of career criminal defense lawyers. Perhaps tellingly, he once explained his disapproval of "promot[ing] causes."<sup>89</sup>

Nor did Lewis Powell likely have a personal or professional understanding of someone like Earnest Aikens or his lawyers. Before joining the Court, Powell had been a "classic 'corporate lawyer' and a 'pillar of the American legal establishment.'"<sup>90</sup> He received his LL.M. from the Harvard Law School in 1932 and practiced commercial law with Hunton and Williams for nearly forty years.<sup>91</sup> He represented major corporate clients and served on the boards of directors of eleven major corporations.<sup>92</sup> One commentator observed that "[w]hen Justice Powell woke up in his sixty-fourth year a Justice of the Supreme Court, he remained very much the lawyer who for thirty-five years had gone to bed defending the interests of many of America's largest corporations."<sup>93</sup> His life before joining the Court did not include clients like Aikens and likely did not bring him into contact with lawyers like career capital defenders. Chief Judge J. Harvie Wilkinson used these words to describe Powell's life prior to taking the bench:

We cannot deny that Lewis Powell was an aristocrat. He lived in the most sequestered section of Richmond, Virginia. He managed the city's most prominent law firm. He represented its most affluent corporate clients, belonged to its most exclusive country clubs, sent his children

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84. *Id.* at 884-85.

85. Robert H. Harry, *Byron White: The Practicing Lawyer*, 75 U. COLO. L. REV. 203, 203-04 (2004).

86. *Id.*

87. *Id.* at 204.

88. *Id.* at 207.

89. *Id.* at 208.

90. Russell W. Galloway, Jr., *Justice Lewis F. Powell, Jr.*, 28 SANTA CLARA L. REV. 379, 380 (1988).

91. *Id.* at 379.

92. *Id.* at 380.

93. *Id.* at 384-85 (quoting Burt Neuborne, *Lewis F. Powell*, in *THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS*, THE BURGER COURT 79 (1978)).

to its most privileged schools, and became its most revered and reputable public servant.<sup>94</sup>

Powell was appointed to the Court as part of President Nixon's effort to shift the Court to favor the police and prosecutors.<sup>95</sup> Quite apart from any sense of professional mandate, Powell was inclined to be "suspicious" of lawyers and others who sought federal solutions to the issues of the day.<sup>96</sup> Perhaps as a result of his many years of practice and of some relevance here, Powell was known to pay particular attention to the facts of each case.<sup>97</sup>

Clearly, these three swing voters had little personal or professional association with the world of criminal defense and might wonder what kind of lawyer would choose a client like Aikens. Though they would not admit it, perhaps not even to themselves, one or more of these justices might personally disrespect criminal defense lawyers as a group. Yet later in the brief, Aikens's lawyers would call on "our" traditions, heritage, and aspirations<sup>98</sup> to critique what "we" now do<sup>99</sup> and to argue that it is time for "us" to reject the penalty of death.<sup>100</sup> The heart of the argument would center of the kind of a people "we" choose to be.

For such an ethical<sup>101</sup> argument to succeed, there must first be a "we." The defense lawyers must be in a relational position to use those pronouns with the Court. The effectiveness of any argument is affected

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94. In Memoriam, *supra* note 75, at 591-92 (remarks by Chief Judge J. Harvie Wilkinson III of the United States Court of Appeals for the Fourth Circuit).

95. Galloway, *supra* note 90, at 383.

96. In Memoriam, *supra* note 75, at 608 (remarks by Christina B. Whitman).

97. "For Powell, the facts always came first." David O. Stewart, *Lewis Powell: A Lawyer's Justice*, 73 A.B.A. J. 46 (1987).

98. See, e.g., Brief for Petitioner, *supra* note 16, at 36 ("[T]he nations of the world most closely allied with our own in traditions, and sharing our heritage and aspirations . . . have now overwhelmingly rejected the death penalty.").

99. See, for example: "The concealment, the secrecy, with which we hide away our executions . . ." *Id.* at 43; "We hide our executions because we are disgusted to look at them . . ." *Id.* at 48; "The one way of killing a human being is not more cruel to him than the other, although it is intolerably more cruel to us." *Id.* at 49; "As rarely as we tolerate the infliction of the death penalty today, we still more rarely tolerate its infliction upon us." *Id.* at 54; "[O]ur modern development of large-scale penal and correctional institutions which we must maintain whether or not we use them for 'capital' criminals, and into which we can now also place our 'capital' criminals if we choose." *Id.* at 55.

100. See, e.g., *id.* at 56 ("It is the profound appreciation that, once we have developed an alternative, it would be intolerably cruel not to use it." (footnote omitted)).

101. Ethos is an appeal based on character. Linda L. Berger, *Studying and Teaching "Law as Rhetoric": A Place to Stand*, 16 J. LEGAL WRITING INST. 3, 48-51 (2010). An ethical argument can rely on the character of the writer and also on the character of the reader. Both are implicated here.

by the reader's perception of the writer's ethos,<sup>102</sup> but an argument about "us" makes a relationship of trust and understanding an absolute necessity.<sup>103</sup> The acid test would be these lawyers' reaction to the facts of these crimes. They would need to join the justices' reaction to "these ghastly crimes," for a judge surely could not identify with someone who would not find these murders ghastly.

But a lawyer who shares the justices' near-certain reaction to these facts can effectively ask the Court to do something hard—that is, to decide that Aikens and others like him should be allowed to live. The lawyers had to do more than tell the Court that the facts were irrelevant. They had to show the Court that "we" can react to these facts with the "deepest human instincts of loathing and repugnance" and still reject the sentence of death. Only someone who could join the Court in its visceral reaction to these facts could effectively argue that the facts, though horrendous, were irrelevant to the constitutional question. Demonstrating a human reaction to these crimes was, in a sense, the price of admission to this legal conversation.

What we see in the Aikens fact statement, then, is a strategy that tells the truth, yet turns traditional factual assumptions on their heads. The choice was risky to be sure, and not all of the strategies would succeed. The defense brief had to rely on its key readers—Justices Powell, Stewart, and White—to be smart, careful, sophisticated readers who might be willing to engage the issues afresh. Since so much of a reader's reaction is out of the writer's control, the risk was high. But the alternatives were worse.

When *Furman*'s nine opinions were finally filed, Justices Stewart and White had voted to overturn these death sentences, resulting in a five-four win. We cannot know which lawyering decisions affected that outcome the most, but the honesty of the fact statement may well have played a key role.

#### IV. TRUTH-TELLING AND THE CARDINAL VIRTUES

We have been speaking primarily of the cardinal virtue of prudence, but all the cardinal virtues are integrally related,<sup>104</sup> and choosing to tell the truth requires practice in the other virtues as well.<sup>105</sup> The

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102. *Id.* at 45-50. Steven D. Jamar, *Aristotle Teaches Persuasion: The Psychic Connection*, 8 SCRIBES J. LEGAL WRITING 61, 73 (2002); Levine & Saunders, *supra* note 1, at 112.

103. Jamar, *supra* note 102, at 73.

104. Keenan, *supra* note 3, at 728.

105. GEACH, *supra* note 24, at 110-17.

virtue of justice (fairness) is inherently associated with equality<sup>106</sup> and with giving each individual her due.<sup>107</sup> Justice's goals are not primarily about some superficial notion of fair play, with each person entitled to retribution for suffered wrongs or to her own slice of some metaphorical pie.<sup>108</sup> Rather justice acts out of the conviction that all people—both Aikens and his victims—deserve to live as human a life as possible and deserve to have their stories told.<sup>109</sup> The decision to frankly admit Aikens's crimes acknowledges the lives of his victims while working to save his life as well.

The virtue of temperance, perhaps better called restraint, controls personal desire so that craving does not overpower wise choice.<sup>110</sup> More than merely controlling bodily cravings (food, drink, sex), temperance also controls powerful emotional reactions. It enables wise action in spite of anger, fear, or even passionate conviction. This fact statement required practice in temperance. Aikens's lawyers had devoted most of their professional lives to ending the death penalty.<sup>111</sup> To say that they were passionate about their cause would be an understatement. Yet, to implement their strategy, they had to write a fact statement that sounded objective<sup>112</sup> and that exposed their most vulnerable positions. Telling the truth probably felt like a self-inflicted wound.<sup>113</sup> These lawyers had to control their own strong emotional responses for the sake of prudential advocacy.

The final cardinal virtue, courage, allows the actor to forge ahead in the face of fear, uncertainty, and intimidation. Courage enables fidelity

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106. "Paul Ricoeur notes that from Aristotle to Rawls *justice* is always associated with equality." Keenan, *supra* note 3, at 724.

107. *Id.* at 719.

108. FINLEY, *supra* note 30, at 71-72.

109. *Id.* at 70-72.

110. GEACH, *supra* note 24, at 131.

111. MELTSNER, *supra* note 14, at 23-181.

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If briefs to the court were gymnastics events, their statements of fact would be performed on the balance beam. Writing a persuasive statement is accomplished not by following one set of rules, but by balancing your use of various techniques to maintain credibility while achieving the stance needed to highlight favorable facts. It does not require the brute force of emphatic language so much as a subtle blend of strength and control of structure and detail. It involves much thought, consideration of alternatives, and monitoring the interactions of various techniques. Yet an excellent statement of facts looks natural and effortless, just like a complex routine looks easy when performed by a skilled gymnast.

MARY BARNARD RAY & BARBARA J. COX, *BEYOND THE BASICS: A TEXT FOR ADVANCED LEGAL WRITING* 167 (2d ed. 2003) (footnotes omitted).

113. Stanchi, *supra* note 23, at 381.

in the face of divided loyalties and chooses hope over despair, even in the darkest situation.<sup>114</sup> Choosing the truth about Aikens's crimes required practice in courage. The overwhelming urge to downplay bad facts comes directly from fear, and defying convention when so much is at stake is a truly frightening choice. It required Courage with a capital "C."

Facing the Aikens facts head-on required Aikens's lawyers to practice all four cardinal virtues while balanced precariously on the life and death high-wire of capital defense. Their choices provide us with a telling example of how good advocacy can help a lawyer learn and practice virtue even in the most difficult settings and roles.

## V. CONCLUSION

Aikens's lawyers achieved their most immediate goal.<sup>115</sup> They saved the lives of their clients and the 628 other men and two women then on death row.<sup>116</sup> Most were southern black men without a history of serious violence.<sup>117</sup> About half were eventually paroled. Only a small percentage have committed new crimes, very few of which were violent.<sup>118</sup> Seven were subsequently proven completely innocent.<sup>119</sup>

And the goal of virtue ethics—to practice the virtue necessary to become more fully and deeply human<sup>120</sup>—was achieved as well. That goal is, for each of us, a life-long project. But happily, the practice of law

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114. FINLEY, *supra* note 30, at 84. Choosing hope over despair is a fundamental necessity for a capital defender, who must go to work each day knowing that some of her clients will die despite her greatest efforts. Yet she must continue to work to save as many as possible, all the while hoping for repentance and reform, healing and reconciliation.

115. Four years after the *Furman* decision, *Gregg v. Georgia*, 428 U.S. 153 (1976), approved a new version of the death penalty, but subsequent cases have further limited its use. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280 (1976) (mandatory death penalty statutes unconstitutional); *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty for adult rape unconstitutional); see *Roper*, 543 U.S. 551 (death penalty for juveniles unconstitutional); *Atkins*, 536 U.S. 304 (death penalty for mentally retarded unconstitutional). In nearly all successful death penalty challenges since 1971, the *Aikens* brief has provided the blueprint for the defense argument.

116. MELSTNER, *supra* note 14, at 216. Lawyers for the NAACP Legal Defense Fund were counsel in three of the four consolidated cases, including those of Aikens and Furman. *Id.* at 181.

117. James W. Marquart & Jonathan R. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 LOY. L.A. L. REV. 5, 15 (1989).

118. *Id.* at 23-26.

119. O'Brien, *supra* note 13, at 437-38.

120. FINLEY, *supra* note 30, at 116.

provides us with what Jack Sammons has called "the imaginative and intellectual skills" we need to achieve it.<sup>121</sup>

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121. Sammons, *supra* note 8, at 141.