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Alternative Conceptions of Legal Rhetoric: Open Hand, Closed Fist

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5

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INTRODUCTION

An open-handed image of rhetoric presents an argument against the closed fist of logic[1] and the "nasty, brutish, and short" depictions associated with legal rhetoric. In 1985, Robert Cover laid bare the field of pain and death where legal interpretation plays itself out in human consequences.[2] Five years later, Gerald Wetlaufer described a landscape of brutal certainty as the backdrop for much of legal rhetoric.[3] And the arena of criminal trials has long been recognizable as a bleak setting within which "[j]ustice determines blame and administers pain in a contest between the offender and the state . . ."[4]

My purpose in this chapter is to explore alternative conceptions of legal rhetoric. These alternatives oppose both the Aristotelian view of rhetoric as the "faculty of observing in any given case the available means of persuasion"[5] and the closed

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1 Michael Billig, *Arguing and Thinking: A Rhetorical Approach to Social Psychology* (2nd ed. Cambridge: Cambridge University Press, 1996). Billig offers the metaphor of the open and closed fist for contrasting the opposing arguments provided by logic and rhetoric: "rhetoric possesses an openness not to be found in the context of logic." Ibid., 125.

2 Robert M. Cover, "Violence and the Word," *Yale Law Journal* 95 (1985): 1601.

3 Gerald Wetlaufer, "Rhetoric and Its Denial in Legal Discourse," Virginia Law Review 76 (1990): 1545, 1558–1559.

4 Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Scottdale, PA: Herald Press, 1990): 181.

5 Aristotle, *The Rhetoric of Aristotle* (Lane Cooper trans., New York: D. Appleton & Co., 1932): 224, bk. I, ch. I, 1355b, line 26.

system of legal rhetoric identified by Professor Wetlaufer. Within that system, Wetlaufer found a linked set of rhetorical commitments. These commitments included allegiance: "to a certain kind of toughmindedness and rigor, to relevance and orderliness in discourse, to objectivity, to clarity and logic, to binary judgment, and to the closure of controversies." There were commitments as well "to hierarchy and authority, to the impersonal voice, and to the one right (or best) answer to questions and the one true (or best) meaning of texts." All this led Wetlaufer to conclude that the dominant rhetoric of the law is "the rhetoric of foundations and logical deductions," a rhetoric that "relies, above all else, upon the denial that it is rhetoric that is being done."[6]

The practice of legal rhetoric in these terms aims at the construction of belief rather than the creation of knowledge or understanding. In the practice described by Wetlaufer, we favor arguments that are clear, orderly, linear, objective, and rational, and we argue as if the outcome was certain: "the lawyer is always right and his adversary is always wrong." If our arguments are the right ones, the already-certain outcome " 'follows' like the night follows the day."[7]

As counterpoints, this chapter follows the paths suggested by (1) the feminist proposal from Professors Sonja Foss and Cindy Griffin for an invitational rhetoric[8] and (2) the blend of rhetoric and social psychology proposed by Professor Michael Billig as constituting a dialogic "arguing as thinking."[9] Foss and Griffin proposed a rhetoric that would lead to understanding rather than persuasion. Billig proposed a rhetoric that would generate further thought rather than permanent changes of mind.[10]

Because we assume that legal rhetoric occurs in its most distilled form inside the courtroom, we may also assume that legal rhetoric is inevitably divisive. Not only does the courtroom present itself as an arena, the participants behave as if only one victor can emerge. Simply considering the possibility of alternatives to these assumptions carries the potential to transform.[11] That potential may be better realized outside the narrow context of the briefs filed in and the opinions issued by the U.S. Supreme Court.[12]

[6] Wetlaufer, "Rhetoric and Its Denial," 1551–1555.
[7] Ibid., 1558–1559.
[8] Sonja K. Foss and Cindy L. Griffin, "Beyond Persuasion: A Proposal for an Invitational Rhetoric," *Communication Monographs* 62 (1995): 2–18.
[9] Billig, *Arguing and Thinking*.
[10] Ibid., 111.
[11] Rosalind Dixon, "Feminist Disagreement (Comparatively) Recast," *Harvard Journal of Law and Gender* 31 (2008): 277.
[12] See Cheryl L. Nixon and Janet Landman, "Turning Our Minds to Minding the Law," *Social Justice Research* 16 (2003): 169, 187 (pointing out that legal rhetoric does not occur only in the courtroom nor does it belong only to lawyers and judges).

As the forum for considering these alternatives, this chapter thus turns to the transcripts of the death penalty sentencing hearing[13] that followed the 1991 murder trial and conviction of Troy Davis. Davis, a young black man, was convicted of killing an off-duty white police officer, Mark MacPhail, in Savannah, Georgia, in 1989. The same jury that found him guilty sentenced him to death, and he was eventually executed in 2011.

INVITATION AND DIALOGUE

Aristotle memorably defined rhetoric as the province of language use devoted to persuasion "in any given case." Contemporary rhetoricians define it more broadly, as encompassing all the ways in which humans use symbols to communicate.[14] Within this larger canvas, invitational rhetoric as proposed by Foss and Griffin and dialogic rhetoric as proposed by Billig may serve as "starting point[s] for thinking in new ways about communication."[15]

Feminism and rhetoric

Rhetoric and feminism are linked in the way that rhetoric is always related to movements seeking societal change. Women and other groups with little economic or political power recognize rhetoric as a potentially important source of influence. At the same time, rhetoric is not entirely friendly terrain. As Foss and Griffin put it, a "patriarchal bias undergirds most theories of rhetoric."[16] Such a bias implies that if there are distinctive features of a "feminist" rhetoric, they will battle for acceptance. And the claim that there is a distinctive feminist rhetoric runs into the arguments of the anti-essentialists as well as resistance from those not engaged in whatever features are claimed to be distinctive.

Despite its unitary implications, the concept of "feminist rhetoric" remains useful if it is viewed more metaphorically, as capturing and reflecting the quality of "otherness" attributed to groups and speakers that have traditionally been excluded.[17] In this way, feminist arguments can be seen to occur in particular rhetorical situations. When this situatedness was observed, some feminists claimed that "the rhetoric itself is intrinsically unique and that this uniqueness is linked specifically to gender."[18] Other rhetorical scholars described a "feminine style" that

[13] *Georgia* v. *Davis*, Transcript of the proceedings at the sentencing phase of the trial (August 29–30, September 3, 1991) (on file with author).

[14] Sonja K. Foss, Karen A. Foss, and Robert Trapp, *Contemporary Perspectives on Rhetoric* 1 (3rd ed. Long Grove, IL: Waveland Press, Inc., 2002).

[15] Bonnie J. Dow, "Feminism, Difference(s), and Rhetorical Studies," *Communication Studies* 46 (1995): 106.

[16] Foss and Griffin, "Beyond Persuasion," 2.

[17] Dow, "Feminism, Difference(s)," 107.

[18] Ibid., 108.

supports women and feminists in various ways.[19] The argument quickly encountered opposition on the ground that there is no one "essential" strand or style of anything feminist. Later descriptions recharacterized feminine style as a strategic approach that may be appropriate in particular circumstances, not as an innate characteristic nor as an approach used only by women.

Some authors suggest that if feminists make distinctive rhetorical choices, it is because those choices emerge from particular rhetorical contexts with distinctive audiences, purposes, and constraints. For example, the purpose of much feminist rhetoric is to disrupt and transform the status quo while the purpose of at least a part of traditional legal rhetoric is to consolidate and support past practices. Others have suggested that if there is a primary area of difference in feminist rhetoric, it occurs when creative thought is generated. "That is, [upon encountering a particular situation], women may imagine different hypotheses and find different theories worthy of consideration . . ."[20] Thus, for instance, feminists may rely to a greater extent on the methods of practical reasoning (taking both individual stories and societal contexts into account) and posing questions that unearth hidden hierarchies and biases. Similarly, feminist rhetoric may (because of the underlying rhetorical situations) rely on genres – including personal stories, poetry, parody – and on forms of argument – including analogies, narratives, and metaphors – that are less explicitly visible and accepted in rhetoric's traditional realm.[21]

Foss and Griffin gave the feminist label to their invitational rhetoric proposal; in setting forth his conception of arguing as thinking, Billig responded with some heat to the claim that conventional legal rhetoric is intrinsically masculine. Billig acknowledged that it could be said that rhetoric that emphasizes "argumentation rather than . . . emotional pathos, may be especially masculine." Still, he responded, "the idea is based upon the assumption that men and women themselves speak in a single voice." Moreover, he wrote, arguing that men and women speak differently "seems to suggest that there is some sort of hidden biological essence, which leads to males and females possessing different ways of speaking and thinking." Instead of essentially feminist or masculine rhetoric, Billig proposed that "arguments are not characteristics of individuals, but they are 'occasioned,' occurring in particular sorts of context." When suited to the occasion, both the content and the form of the argument may be different than those appropriate for another occasion.

Seeking synthesis, Billig claimed that perceiving "rhetoric as dialogue" promises a more open conception of rhetoric: arguing as thinking is creative and exploratory. It requires "bonds of association," and recognizes that "rudeness, abrasiveness and

[19] Ibid., 109.

[20] Jeanne L. Schroeder, "Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination," *Texas Law Review* 70 (1991): 109, 210.

[21] For criticisms of the judicial voice as being linked with the class, race, and gender bias in the law, see Lucinda M. Finley, "Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning," *Notre Dame Law Review* 64 (1989): 888; Kathryn M. Stanchi, "Feminist Legal Writing," 39 *San Diego Law Review* 39 (2002): 387.

aggressive postures" threaten the conversation and lessen the intellectual exploration. Still, rhetoric as dialogue requires the "faculty of negation" because "without it, the argument, in its dialogic and creative senses, never starts."[22]

Invitational rhetoric

Foss and Griffin proposed invitational rhetoric in 1995. They framed it explicitly as an alternative to the patriarchal traditions of persuasion oriented toward changing others' minds.[23] Foss and Griffin asserted that invitational rhetoric is grounded in these feminist principles: "equality, immanent value, and self-determination." These principles were defined as a "commitment to the creation of relationships of equality," a belief that "every being is a unique and necessary part of the pattern of the universe and thus has value," and a "recognition that audience members are the authorities on their own lives" and have the "right to constitute their worlds as they choose."[24] Invitational rhetoric could be used for resistance because it "models an alternative" and "presents an alternative feminist vision rooted in affirmation and respect."[25]

As Foss and Griffin described it, the purpose of an invitational rhetoric is to move the speaker and the listener closer to understanding of one another; this is unlike the goal of persuasion in which the speaker aims to move the listener closer to accepting the speaker's view. Still, like persuasion, invitational rhetoric describes movement in only one direction: the speaker invites the audience to understand the speaker's world and not vice versa. Foss and Griffin put it this way:

> Invitational rhetoric is an invitation to understanding as a means to create a relationship . . . Invitational rhetoric constitutes an invitation to the audience to enter the rhetor's world and to see it as the rhetor does . . . [But] the result of invitational rhetoric is not just an understanding of an issue. Because of the nonhierarchical, nonjudgmental, nonadversarial framework established for the interaction, an understanding of the participants themselves occurs . . .[26]

Critics responded that the principles Foss and Griffin described were hardly unique to feminism and that the authors had provided no support for the claim that they were. In a later response to the critics, several proponents of invitational rhetoric set forth a more nuanced view. They were arguing neither that all persuasion is violent nor that invitational rhetoric is always the better alternative. Instead, they suggested that "some persuasive rhetoric is violent" and that rhetoric should be viewed as much more complex and far-reaching than communication based solely

[22] Billig, *Arguing and Thinking*, 26–29.
[23] Foss and Griffin, "Beyond Persuasion."
[24] Ibid., 4.
[25] Ibid., 16–17.
[26] Ibid., 5.

on persuasion.[27] Their ambitious effort hoped to "create a rhetoric built on a new set of values and to envision how such a rhetoric might work for both women and men in ways that contribute to the transformation of our culture."[28]

Invitational rhetoric's proponents imply that the encounter they envision is ethically superior to other rhetorical practice,[29] but they acknowledge that its use "presupposes conditions of economic, political, and social equality between and among interlocutors." Because such conditions are rare, some critics have asked whether invitational rhetoric could ever find a productive setting. These critics point out that invitational rhetoric assumes that the "oppressors and [the] oppressed" have shared interests, and they criticize the proponents for being too little concerned that invitations from those in power too often carry terms and conditions.

New Rhetoric: writing as thinking

In the field of English composition, New Rhetoric is associated with the work of I.A. Richards and the composition researchers and theorists who followed his lead. New Rhetoricians described the writing process in ways that foreshadow Billig's description of arguing as thinking:

> The process of making meaning [by writing] is messy, slow, tentative, full of starts and stops, a complex network of language, purposes, plans, options, and constraints. Its outcome is uncertain: "Composition requires choosing all along the way, and you can't choose if there are no perceived alternatives . . ." In the New Rhetoric, writing is a process for creating knowledge, not merely a means for communicating it. In the New Rhetoric, reading is a process for constructing meaning, not just an Easter egg hunt to find it.[30]

Rather than clothing already-formed thought in language, writing was recast as the weaving of thought and knowledge through language. From the New Rhetoric point of view, "knowledge is not simply a static entity available for retrieval. Truth is dynamic and dialectical, the result of a process involving the interaction of opposing elements." The elements of the communication process – writer, audience, reality, language – are not used simply to "provide a convenient way of

[27] Jennifer Emerling Bone, Cindy L. Griffin, and T. M. Linda Scholz, "Beyond Traditional Conceptualizations of Rhetoric: Invitational Rhetoric and a Move toward Civility," *Western Journal of Communication* 72:4 (2008): 434–462.

[28] Bone et al., "Beyond Traditional Conceptualizations."

[29] Sonja K. Foss, Cindy L. Griffin, and Karen A. Foss, "Transforming Rhetoric through Feminist Reconstruction: A Response to the Gender Diversity Perspective," *Women's Studies in Communication* 20:2 (1992): 117–136.

[30] Linda L. Berger, "Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context," *Journal of Legal Education* 49 (1999): 155, 155–157. See Ann E. Berthoff, "Rhetoric as Hermeneutic," *College Composition and Communication* (1991): 279, 281 (citing I. A. Richards, *How to Read a Page* 204, 217 (Boston, 1942)).

talking about rhetoric. They form the elements that go into the very shaping of knowledge."[31]

Michael Billig: arguing as thinking

Michael Billig's dialogic rhetoric builds on what he considers the fundamentally argumentative structure, or the two-sidedness, of human thinking. In his words: "[H]umans do not converse because they have inner thoughts to express, but they have thoughts to express because they are able to converse."[32] Dialogue offers the power to open up thinking by providing an argumentative heuristic that moves through recursive rounds of discussion, justification, and criticism, always considering the argumentative context (or, in other words, taking into account not only what is said but also what is being argued against).

Within Billig's dialogic rhetoric, there are two primary movements. First, the movement from categories to particulars and back (and forth and back) constitutes the basic form of dialogue. Second, the movement from criticism to justification and back (and forth and back) is the basic form of thinking. In the first movement, Billig focuses on the back-and-forth "battle" of the logos of the general and the anti-logos of the particular. In his version of this dialogue, the rules and approaches are necessarily provisional or contingent because the uniqueness of each moment and each rhetorical situation produces ambiguity and uncertainty. Billig calls this Quintilian's Principle of Uncertainty,[33] that is, uncertainty exists because each human situation is different and they are infinitely varied. Still, we learn from the experience we gain from each situation. In the second movement, every justification begins with a criticism, implied or explicit. Thus, offering a justification presupposes that someone already has criticized or will soon criticize our stance.[34] The criticism depends on some deviation from an accepted norm. As a result, to understand an argument, we should ask, "What is the object of the argument's attack?" Only when we understand what the speaker is arguing against are we able to fully grasp the argument itself.[35]

This principle is illustrated by Billig's own discussion. His meanings become clear when read within their argumentative context.[36] Billig is criticizing a particular view of the relationship between rhetoric and social psychology. That is, he doubts that psychologists are correct when they assume or claim that there is a real difference between rhetoric and modern scientific research and that the scientists (but not the rhetoricians) are in possession of "practices and routines, which, if followed, will

[31] Berger, "Applying New Rhetoric," 155.
[32] Billig, *Arguing and Thinking*, 141.
[33] Ibid., 92–93.
[34] Ibid., 117.
[35] Ibid., 117.
[36] Ibid., 121–122.

reveal the hidden truths."[37] Unlike Aristotle, modern psychologists (Billig argues) are more concerned with the form than they are with the content of the arguments. For Billig, as you move from the rhetoric of form to the rhetoric of content, you realize that the rhetoric of content is the active and "irreducibly argumentative" process of constructing thought.[38]

INVITATIONAL AND DIALOGIC RHETORIC IN THE WORLD

If invitational rhetoric consists of an invitation to try on the speaker's view of the world as a means to create a relationship, what might invitational rhetoric look like in everyday life? Invitational rhetoric surely does not appear (except in a manipulative way) during a job interview or on a first date. Something like invitational rhetoric may take place in the practice of transformative mediation,[39] or perhaps within some settlement negotiations – those between relatively equal parties with strong incentives to settle and remain in a beneficial relationship. As for dialogic rhetoric, Billig's perspective that "[t]hinking is a form of internal argument, modeled on outward dialogue"[40] hints at the illustrative example of the active debate that the writer may have about the pros and cons of a series of arguments, either with herself or with others in a collaborative or workshop format.

Beyond the examples provided by Foss and Griffin, several authors have suggested that the introductory speeches given by the wives of U.S. Presidential candidates at nominating conventions are exemplars of invitational rhetoric. Though this setting seems far afield from legal rhetoric, the qualities making these speeches representative of invitational rhetoric may translate to other settings.[41]

According to Elizabeth Petre, a communications researcher, invitational rhetoric is designed to offer perspectives and create external conditions that allow others to listen to ideas openly and without predetermined judgment. The forms of invitational rhetoric do not necessarily lead to persuasion, but they may encourage audience members to understand and participate in the perspectives of the speaker

[37] Ibid., 95.

[38] Ibid., 113.

[39] Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (San Francisco: John Wiley & Sons, Inc. 2005) (defining transformative mediation as suggesting that "[t]he unique promise of mediation lies in its capacity to transform the quality of conflict interaction itself, so that conflicts can actually strengthen both the parties themselves and the society they are part of"): 13.

[40] In response to the anticipated feminist argument that he had "taken a predominantly masculine activity – arguing – and celebrated it as the basis of thinking," Billig sought to differentiate "rhetoric" from "dialogue" and to suggest that the rhetoric of dialogue should be reclaimed. Billig, *Arguing and Thinking*, 26–29.

[41] Elizabeth A. Petre, "Understanding Epideictic Purpose as Invitational Rhetoric in Women's Political Convention Speeches," *Kaleidoscope: A Graduate Journal of Qualitative Communication Research* 6 (Fall 2007) 21–37; Gwen Brown, "Change in the Communication Demands of Spouses in the 2012 Nominating Convention," in ed. Robert E. Denton, Jr., *The 2012 Presidential Campaign: A Communication Perspective* (Rowman & Littlefield 2014).

and to "try on" the speaker's view of the world. Petre identified several aspects of invitational rhetoric in representative speeches by the Presidential candidates' wives, including the women's references to American history and culture as markers of values shared with audiences and their use of storytelling to show the human side of the candidate. For example, in 2008, Michelle Obama began her introduction of her Presidential candidate husband by saying that he served as a reminder to the nation of the great American success story. She went on to tell the story of Barack Obama as a young man who picked her up for dates in a car so rusted out that she could see the pavement below.[42]

In addition to references that identify or forge shared values and personal stories that show shared humanity, Gwen Brown pointed to three other strategies of invitational rhetoric that were present in the speeches. First, the candidates' wives began their speeches with allusions designed to create a sense of intimacy, thus constituting an "invitation to understanding as a means to create a relationship." Through conversational beginnings, the speeches encouraged rapport, building on the feeling of an interpersonal relationship and an informal exchange. Next, the candidates' wives depended on a sense of "positional advantage," that is, the spouse was uniquely positioned not only to know but also to verify the candidate's character. Third, the candidates' wives defined their husbands by defining themselves in favorable ways, suggesting that the audiences could "see" the candidates better by understanding the candidate's wives as a reflection of the candidate's achievements and qualities.

Although not labeled invitational rhetoric, analogous examples have been offered by scholars in other disciplines. For example, Cheryl Nixon and Janet Landman observed a transformative rhetorical change in the course of their research into the ethical development of Katherine Power, a 1970s antiwar militant. Power was waiting in a getaway car when a police officer was killed during a bank robbery undertaken by members of her group.[43] After more than twenty years in hiding, Power turned herself in, pleaded guilty, and began serving a prison sentence. Later, she requested early parole, and during the parole hearing, she expressed remorse and took responsibility for the death. The daughter of the slain police officer responded skeptically, saying that any criminal seeking parole would express similar sentiments. Power withdrew her request so that her apology would not be tainted by self-interest. According to the authors, Power's act of withdrawing the request apparently allowed the daughter to "try on" Power's perspective and to see her in a different light: Powers had shifted out of the category of "remorseless

[42] Petre, "Understanding Epideictic Purpose."

[43] Nixon and Landman, "Turning Our Minds." In their review of Amsterdam and Bruner's *Minding the Law*, Cheryl Nixon and Janet Landman, professors of English and pshychology, respectively, raised the question of positive uses of rhetoric. They note that Amsterdam and Bruner convincingly show the problems of categorization and then offer counter-examples relating to the positive effects of categories.

murderer/adversary/enemy" and into the category of "sincerely remorseful and self-admittedly culpable human being."[44]

Nixon and Landman attributed this rhetorical change (rhetorical because a category shift) to Power's action of withdrawing her request rather than to her rhetoric. Nonetheless, they proposed that dialogue (without accompanying action) might be used to effect similar category shifts.[45] Here, the authors recounted an interview in which Landman matched Power with former Defense Secretary Robert McNamara and proposed to ask him questions similar to those she had asked Power, questions about how writing his memoir might have helped him transform himself. Landman discussed with Power the nervousness she felt about the prospect of the interview. "Power suggested that when Landman talked with McNamara, she should forget about his fame – and his reputation as something of a bully – and remember that he is just a flawed and suffering human being – like [Power herself.]" The authors speculated that in contrast to her original antipathy for McNamara, Power's new empathy for McNamara might have been influenced by Landman's admiration for McNamara's admissions of regret and by Landman's linking Power and McNamara together as counterparts. In other words, the dialogical process brought about the change: "human dialogue was a source of Power's newfound ability to extend her sympathy to the formerly demonized Robert McNamara."[46]

Dialogue is of course central to Billig's conception of rhetoric, in which the elements of dialogue and two-sidedness inherent in argumentation make it essential to thinking. A similar connection between arguing and thinking is well established in classical and contemporary rhetorical thought.[47] Aristotle "showed how arguments could always be opposed by counter-arguments, justification by criticisms . . . in the looser atmosphere of rhetoric."[48] Protagoras elaborated from the practice of rhetoric a philosophy suggesting that in every question there were two sides to the argument.[49]

Recognizing that there is also an ancient connection between persuasion and rhetoric, Billig disputes the related conclusion that "arguments are countered and justifications are offered primarily in order to alter the opinions of the other." Instead, he suggests that rhetoric's purpose is the never-ending "search for the last word."[50] The outcome of dialogue in Billig's terms is not accord: instead, "[t]he image is one of chatter and discussion. Any accord which is reached is to be breached. The power of speech is not the power to command obedience by

[44] Nixon and Landman, "Turning Our Minds," 179–180.
[45] Ibid., 183.
[46] Ibid., 183.
[47] See Anthony T. Kronman, "Rhetoric," *University of Cincinnati Law Review* 67 (1999): 677, 691 (discussing rhetoric as a place to stand between pure power and pure reason).
[48] Billig, *Arguing and Thinking*, 126.
[49] Billig documents the long-recognized connection between thinking and argument, quoting philosophers and rhetoricians from Isocrates to William James. Billig, *Arguing and Thinking*, 140–147.
[50] Billig, *Arguing and Thinking*, 135–136.

replacing argument with silence. It is the power to challenge silent obedience by opening arguments."[51]

To explain this perspective, Billig provides numerous examples from classical rhetorical texts and from the Talmud, including the following account. First, Billig recounts the debate between the Jewish Elders and some others (apparently Romans) who worship idols:

> The debate starts with the Romans challenging the Elders with the reasonable, but tricky question: Why, if God so disapproves of idolatry, does He not destroy all the idols? The Elders reply that He would certainly do so if the idolators only worshipped useless objects. The problem was that idolators worshipped necessary objects such as the sun, moon, stars and planets. Destruction of these would entail God destroying His whole creation: "Shall He then make an end of His world because of fools?" The Romans are not satisfied by this answer, but they counter it with a further, and more difficult challenge: If God does not want to destroy the world, then let Him destroy only the useless idols. Back comes the reply of the Elders. If God destroyed your useless idols, but kept the sun, moon, stars and planets, what would you say? You would, of course, say that these were the true deities, because they had been untouched by the destruction of idols.[52]

This might appear to be a fitting ending to the conversation. But Billig points out that this example is taken from the Mishnah and may be only the starting point for further discussions and stories in the Gemarah.[53] In the Gemarah, as Billig recounts it, there is a continuing debate between rabbinical sages as they argue the merits of various replies to a further question from the Romans: "Why did I not reply: if your God does not wish to destroy the useful or the useless idols, then why, oh why, does He not destroy us useless idolators?" The first account satisfies the need for the last word and neatly resolves a dilemma. "On the other hand, the more sophisticated are encouraged to see the need for further thought . . . Here there is no clear last word, but different argumentative themes seek their last word in various directions."[54]

IN RE DAVIS: THE SUPREME COURT

In 2011, Troy Davis was executed for the 1989 murder of police officer Mark MacPhail. In the twenty years between his sentencing and his execution, Davis

[51] Ibid., 78.

[52] Ibid., 130–131.

[53] Ibid., 130. Billig explains the two parts of the Talmud as follows:

> there is the older Mishnah, which consists predominantly of the decisions of Rabbinical authorities on basic questions of Jewish Law. Typically, the Mishnah presents a compressed statement of the difference of opinion between two authorities . . . The largest part of the Talmud is the Gemarah, which uses the decisions of the Mishnah as a starting-point for further discussions and story-telling.
>
> Ibid.

[54] Billig, *Arguing and Thinking*, 139–140.

raised the claim of "actual innocence," the label used by lawyers to distinguish a claim that a defendant was in fact innocent from a claim that relies on constitutional error in the proceedings. To succeed, the claim of "actual innocence" usually requires the defendant to do more than establish innocence; instead, the defendant must submit additional evidence not available at the time of trial. As Justice Scalia was to proclaim, "[t]his Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent."[55]

In a highly unusual decision in 2009, the U.S. Supreme Court transferred Davis's petition for a writ of habeas corpus to the U.S. District Court for the Southern District of Georgia for further "hearing and determination," ordering that "[t]he District Court should receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."[56]

Switching the usual order, Justice Stevens' concurrence responded to the criticism contained in Justice Scalia's dissent. In dissenting, Justice Scalia had characterized the ruling that the claim should be heard by a lower court as an "extraordinary step – one not taken in nearly fifty years – of instructing a district court to adjudicate a state prisoner's petition for an original writ of habeas corpus."[57] Summarizing his objections, Justice Scalia wrote that the Court "proceeds down this path even though every judicial and executive body that has examined petitioner's stale claim of innocence has been unpersuaded, and (to make matters worst) even though it would be impossible for the District Court to grant any relief." Relief would be impossible, Justice Scalia said, because "petitioner's claim is a sure loser." Thus, asking the District Court to review his petition "can serve no purpose except to delay the State's execution of its lawful criminal judgment."[58]

Justice Stevens countered that Justice Scalia was wrong in assuming that Davis had committed murder and that the trial court would have no power to grant relief.[59] Instead, Justice Stevens concluded, the risk of putting an innocent man to death was an exceptional one that sufficiently justified the transfer. Justice Stevens pointed out that seven of the State's key witnesses had recanted their trial testimony; several individuals had implicated the State's principal witness as the shooter; and "no court," state or federal, "has ever conducted a hearing to assess the reliability of the score of [postconviction] affidavits that, if reliable, would satisfy the threshold showing for a truly persuasive demonstration of actual innocence."[60] As for Justice Scalia's claim that the district court would have no power to do anything about

[55] In re Davis, 557 U.S. 952, 130 S. Ct. 1, 3 (2009) (Scalia, J., dissenting).
[56] 130 S. Ct. at 1 (Stevens, J., concurring).
[57] Ibid. at 2 (Scalia, J., dissenting).
[58] Ibid.
[59] Ibid. at 1 (Stevens, J., concurring).
[60] Ibid.

Davis's claim, Justice Stevens responded that there were a number of unresolved issues of interpretation that might allow the district court to act:

> Justice Scalia would pretermit all of these unresolved legal questions on the theory that we must treat even the most robust showing of actual innocence identically on habeas review to an accusation of minor procedural error. Without briefing or argument, he concludes that Congress chose to foreclose relief and that the Constitution permits this. But imagine a petitioner in Davis's situation who possesses new evidence conclusively and definitively proving, beyond any scintilla of doubt, that he is an innocent man. The dissent's reasoning would allow such a petitioner to be put to death nonetheless. The Court correctly refuses to endorse such reasoning.[61]

After holding a hearing, the U.S. District Court for the Southern District of Georgia found that even though "executing an innocent person would violate the United States Constitution, Mr. Davis has failed to prove his innocence."[62]

THE SETTING OF THE SENTENCING HEARING

When he was charged in 1989, Troy Davis was twenty years old. The slain police officer, Mark MacPhail, was twenty-seven, married, and the father of a two-year-old daughter and an infant son. Officer MacPhail was off duty and working as a security guard when he apparently tried to defend a homeless man being assaulted in a parking lot. He was shot and killed by one of the several men involved in the assault. MacPhail had spent six years as an Army Ranger before joining the Savannah police in 1986.

During the August 1991 trial, several witnesses testified that they saw Davis shoot MacPhail, and other witnesses testified that Davis had confessed the murder to them. Testifying in his own defense, Davis denied the shooting, saying that he had fled the scene before any shots were fired. The jury, which included seven black members, took two hours to find Davis guilty of the murder. The sentencing hearing followed almost immediately. The jurors saw the same attorneys, and they heard from the defendant, his family members, and some neighbors. They did not hear from the victim's family. Following seven hours of deliberation, the jury recommended the death penalty, and Davis was sentenced to death. Davis continued to maintain his innocence through his execution in 2011.[63]

[61] Ibid.

[62] Order, In re Davis, Case No. CV4090130, U.S. District Court for the Southern District of Georgia (August 24, 2010).

[63] These facts are taken from different sources, including the Supreme Court decision and the U.S. District Court decision. For an expanded summary, see Michael McDonnell Hill, "Seen but Not Heard: An Argument for Granting Evidentiary Hearings to Weigh the Credibility of Recanted Testimony," *Georgia Law Review* 46 (2011): 213, 215–222.

To save the lives of their clients, death penalty lawyers often identify two complementary goals. First, they hope to show that the defendant shares with the jurors some of the qualities and characteristics of being human. Recognizing a common humanity, the jurors may be open to considering whether everything they need to know about the defendant's life has been revealed by their knowledge of the defendant's actions in the few moments that led to the defendant's conviction. To accomplish this first goal, death penalty lawyers need to tell stories that widen the lens and fill out the jurors' picture of the defendant while remaining believable and consistent with what the jurors already know about the world. Second, death penalty lawyers hope to show that their defendant's life is worth saving. For this goal, they need to tell stories that may be much more difficult to construct, ones that are individual, unique, full of tragedy, yet hinting at the possibility of redemption.[64]

Only the first of these goals will be discussed in this chapter. Putting flesh on the bones of the defendant's acts is important because of "the widely held belief that jurors and judges will only condemn those whom they see as fundamentally 'other,' as inhuman, and as outside the reach of the community of compassionate beings."[65] Even when the particular defendant is not sympathetic, the use of a "narrative strategy ensures that this audience is confronted with humanity in all of its complexity and with all of its failings."[66]

The capital sentencing hearing is a complex rhetorical situation.[67] As Billig points out, in every trial, both direct examination and "cross-examination represent[] a peculiar discourse, in which the audience overhears a conversation between the advocate and another person, which is spoken in order to be overheard."[68] In the sentencing hearing, the peculiarity is multiplied. First, who is the rhetor, the person taking purposeful rhetorical action? Although the prosecution and defense attorneys shape and elicit the rhetoric of the hearing, they most often do so through the medium of witnesses. Next, what is the "exigence" or the imperfection in the world needing to be addressed by rhetoric? Fittingly, rhetoric is needed here to address the lack of a "last word" pronouncing the ultimate outcome for a criminal defendant who has already been found guilty of murder in a situation that the prosecutor found suitable for the death penalty. The immediate, internal audience of the jury members – the audience that can do something to resolve the exigence – is joined by a number of future and more or less external audiences, from the media reporters to the appellate court to later decision makers and beyond. The constraints in this rhetorical situation are not only those associated with any legal trial but also the complications and exaggerated concerns that arise because of the special circumstances of capital sentencing.

[64] Austin Sarat, "Narrative Strategy Death Penalty Advocacy," 31 *Harvard Civil Rights-Civil Liberties Law Review* 31 (1996): 353.
[65] Ibid., 370–371.
[66] Ibid., 373.
[67] See Lloyd Bitzer, "The Rhetorical Situation," *Philosophy & Rhetoric* 1:1 (January 1968): 3.
[68] Billig, *Arguing and Thinking*, 118.

Many factors make it more difficult to communicate a fuller and more human portrait of the defendant in a capital sentencing hearing. Not only is the jury the same jury that heard the guilt phase of the trial, the jury has also been death qualified (or found to be capable of rendering a verdict of death), indicating that the jurors may have underlying values, beliefs, and predispositions that will be hard to overcome. To satisfy the jurors' needs for coherence and consistency, a jury having found a defendant guilty of murder may be likely to follow through with the sentence that seems fitting. Doing something other than meting out the punishment sought would disrupt the cultural narrative that tells us that wrongdoing is to be followed by the punishment the wrongdoer deserves.

THE SENTENCING PHASE FOR TROY DAVIS

The sentencing phase of the trial was held in late August and early September of 1991. Defense attorneys Robert Barker, Robert Falligant, and Nancy Askew introduced testimony from Troy Davis's mother, Virginia Davis, and his two sisters, Martina Correia and Kimberly Shawn Davis. His family continued to work for Troy's[69] exoneration during the twenty years that he would be in prison before being executed in 2011. His mother, Virginia Davis, died a few months before the execution. Martina, the older sister who was in the military at the time of the murder, died of breast cancer several months after the execution. Kimberly, known by her family as Shawn, was Troy's younger sister with multiple sclerosis.

Friends and neighbors

Other than the family members, the defense witnesses were largely ineffective from any rhetorical point of view. William Van Antwerp testified that Troy worked for him, but under cross examination, he said that Davis's reputation in the community was "of mixed reviews" and that his reputation for violence or peacefulness "varies also, depending upon the situation and at what particular time."[70] Silas Frazier, who testified that Davis was a nephew by marriage, was asked whether he saw "Troy step in and practically take over as the father of the house." His response: "Well, I wasn't living there in that section at the time, so I didn't know too much what was happened, but I know he was, because my wife, we're not together now, but I've heard her tell about that."[71]

[69] Because this section focuses on the invitation to see the defendant as his family saw him, I refer to Mr. Davis as Troy.

[70] *Georgia* v. *Davis*, Transcript of the proceedings at the sentencing phase of the trial (August 29–30, September 3, 1991) (on file with author).

[71] *Georgia* v. *Davis*, Transcript 44.

The sole exception was Jonathan Julius Law, better known as Joe. He testified that as a young boy, Troy came over to his house and tried to comfort the family after Law's son died. According to Law,

> It really was hard for me to believe when I heard that he was involved in this. I still don't hardly believe it, but still, the Lord knows worse than I do . . . she would take them to church and they were very good neighbors. I don't know nothing bad about them or wrong about them. It's very hard to me – his father left them. I guess everything went wrong.[72]

The mother

Virginia Davis's testimony provided a potential opening for invitational rhetoric. Although she had testified in the guilt phase of the trial that Troy was home with her the night of the shooting, testimony that undermined her later credibility, the defense attorney might have used Mrs. Davis as the medium for inviting the jury to enter the world of the defendant. In this way, the jurors might have been able to see Troy as his mother, sisters, and brothers saw him: one member of an ordinary family engaged in the struggles and commonplaces of daily life.

Mr. Barker conducted the direct examination of Virginia Davis, establishing that Troy was twenty when the murder occurred, the family included five children and had lived at the same address for more than twenty years, she had worked in a hospital for much of that time, and she had been divorced for seven or eight years at the time of the trial. This line of questioning placed Troy within a new context, an effort designed to broaden and deepen the jury's understanding as they considered the next stage of Troy's life. The Davis family members were long-time residents of Savannah; they were stable and well established in their neighborhood; Mrs. Davis was a hard-working single mother of five children; Troy Davis was a teenager when he had to take on a good deal of responsibility after his father left the house.

Q: Since the age of fourteen, has Troy been pretty well the man of the house?
A: Yes, he has.

Troy's younger sister Shawn contracted multiple sclerosis when she was sixteen and he was seventeen. While Shawn was in the hospital and learning to walk again, Troy worked, went to school, and took care of the family during the day while Mrs. Davis was at work.

Q: Did you ever have to worry about your children being in Troy's company or in his custody?
A: No, sir, I never had to worry about them, because after he would pick them up from school, and took them home and fed them, he would bring them back and

[72] *Georgia* v. *Davis*, Transcript 42.

they would stay to the hospital until about nine or ten o'clock at night, then he would take them home.[73]

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So Troy would take [Shawn] to [school] in the mornings, come back home, and he would take Nicky and Lester to school, and then maybe about a quarter to twelve he would pick her up from [school]. He would bring her to Candler to therapy, and after therapy, . . . they would wait 'til one-thirty, and I would knock off and I would go home and then he would take the car and go on to Captain D's.

Q: Did you force him to do all of this?

A: No, sir, I did not force him to do it, because he was my eldest son, and he was just like a father figure to them, because their father wasn't at home, so he took on the responsibility of being a father and a son.[74]

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Mrs. Davis also testified about how Troy had provided financial support for the family.

Q: [W]hat would he do with his check from work?

A: Well, when Troy got paid off, wherein it was like every other week, well, when I come home from work, Troy would go to the Savannah Bank and cash his check . . . and he would leave his check on the dresser with a note and he say, mama, you take this for the bills. He say, I have enough money for gas. That's all I need.

He say, you pay the light bill or either you go to the grocery store, and I didn't even have to ask him for a certain amount of money. If he made a hundred dollars, Troy would give me eighty dollars or eighty-five dollars out of that hundred dollars, which was voluntary. I did not have to ask him for it.[75]

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Finally, the defense attorney asked the mother to speak directly to the jury.

Q: Ms. Davis, do you have anything you want to say to the jury?

A: Yes, I do. Ladies and gentlemen of the jury, Troy Davis, he is not a bad person they way it was put out, looked like, like all the evidence say. He was a good person. He was a father and a brother to my children. He was a good son, he was a good provider for his family.

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Courtroom rules and conventions as well as practical constraints interfered with the defense attorneys' ability to use the mother's testimony as an invitation to the jury to "try on" her perspective of Troy. Having just been through a trial with a good deal of conflicting testimony that at least some of the jury members found unbelievable or

[73] *Georgia* v. *Davis*, Transcript 16.
[74] *Georgia* v. *Davis*, Transcript 17–18.
[75] *Georgia* v. *Davis*, Transcript 18–20.

disregarded, the jurors might have listened skeptically from the start. To maintain consistency, they would have to try to understand the new evidence as not being contradictory to the finding of guilt they had just returned. In any trial, the mother of the defendant likely would be viewed as capable of lying to protect her child. Here, that skepticism was heightened. Given Mrs. Davis's testimony during the guilt phase of the trial, some of the jurors were already persuaded that Mrs. Davis was not only capable of lying but was likely to lie for her son. Added to that incredulity, the jurors might have viewed this entire line of direct questioning and apparently rehearsed answers as an attorney-authored and attorney-concocted storyline rather than an authentic recounting.

As for coherence and plausibility, all the evidence the jury had heard during the guilt phase of the trial left them with an entirely different picture of Troy. Invitational rhetoric's goal is not to replace that picture with an image of perfection, but instead to put flesh on the stark outlines drawn by the trial. Given all they had heard before, to succeed in using the mother's testimony to invite the jury to understand her view of Troy would require her to acknowledge that Troy was sometimes an imperfect son and brother as she depicted in small, concrete, and specific ways that he often behaved and acted in ways and manners that were like the conduct and characteristics of other people the jurors know. Instead, her characterizations were too lacking in details, too rote, too abstract, and too good to be true. To be plausible, to invite understanding, her testimony should have captured and displayed believable, familiar, and recognizable snapshots of daily life. In that way, the characterizations might have been accepted as authentic and reliable details adding depth and dimension to the jurors' understanding of Troy.

The older sister

In contrast, the older sister told several stories that might have allowed the jury to see Troy as a fully formed character, neither a hero nor a villain. Martina Correia, Troy's older sister and a combat medical specialist who was on a leave of absence from the military for the trial, was also working at Candler Hospital at the time of her testimony.

Q: Start back when Troy was a little boy and tell of your personal relationship with him.

A: Well, as we were growing up, by me being the oldest daughter, and Troy being the oldest son, Troy was taught mostly to protect the household and to look after his younger brothers and sisters . . .

Q: . . . did Troy take part in your marriage?

A: When I got married, for different reasons my father was unable to give me away, and I thought I was going to have to postpone my wedding or either cancel it, and my brother Troy came to me and told me that, you know, I wouldn't have to

cancel my wedding, that he would give me away and be the best man, 'cause he told me that we always had to stick together, and that I was going to get married on time with my plans.

In this way, Marina invited the audience members to "try on" her perspective of her brother, someone who would stand by his sister and help her go ahead with her plans in the absence of her father. This characterization did not seek to persuade the jury but instead invited the jury inside to picture and understand how Marina saw her brother – as someone whose character and humanity went beyond the acts associated with the murder of Officer MacPhail.

When Marina was asked to directly address the jury, she told another story that invited understanding of Troy's relationships with others and provided context for a comment that the defense would use against him later ("things happen for a reason").

Q: Marina, is there anything else you want to tell the jury?

A: Yes. I'm asking the jury to spare my brother's life . . .

I've seen my brother with a man that used to live down the street. His young son died, and my brother went down there and told them that he would be their temporary son until they got over their grief for their child. And my brother would go down there and help them do things around the house, and he'd sit up with this man and his wife, and sit and talk to them and comfort them, and he would always say, well, mama, I'm going down to Mrs. Joe's house, and I used to sit and watch this lady hug my brother and comfort my brother like he was her son. He would never say anything. He would always comfort them and make them feel like, you know, their son has gone to a better place, that they didn't have a real bad loss, that he was with God.[76]

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The youngest children

The judge said no when the defense asked to introduce letters from the younger brother and the younger sister who wanted to express their feelings that way "rather than bring them in here." The judge responded: "Counselor, they can express them on the witness stand . . ."[77]

The younger sister

Troy's younger sister, Kimberly Leshawn Davis, testified that she was diagnosed with multiple sclerosis when she was sixteen and that she was in the hospital for three months. Like her older sister, Shawn provided small snippets of life events, capturing

[76] *Georgia* v. *Davis*, Transcript 29.
[77] *Georgia* v. *Davis*, Transcript 32.

believable moments in which Troy appeared genuinely and ordinarily human, a big brother who was pushing his little sister to do more than she wanted to do.

A: if it was not for Troy, I wouldn't be walking now. Troy told me, Shawn, you gotta have that strength, and you gotta have that faith. I used to be in my wheelchair. He'd put me in the driveway in my wheelchair, and he'd say, Shawn, he'll say, stand up and walk to me . . .

I first started out walking in my walker for a couple of months, and then he told me, he say, we gonna have to put this walker down, and I want you to walk on your own, and we would be in the yard, and Troy, he would stand up, he would say, Shawn, walk to me.[78]

Troy Davis

Mr. Barker conducted the direct examination of Troy, now twenty-three. He testified in what the prosecution later characterized as a robotic manner. The attorney asked about the aftermath of his father's leaving and his sister's becoming ill.

Q: Did you get an afternoon job also?

A: I wanted to stay away from needing, you know, saying, my father do things for me. So that's when I went to Cap'n D's to get a job on my own to see how I do it by myself.[79]

Viewed as invitational rhetoric, this short answer invited the audience members to understand Troy's need to do things for himself, by himself, after his father left. The next answer invited understanding of the shock to the family that came from Shawn's onset of illness.

Q: Did [Shawn's] illness hurt the family . . . [?]

A: Well, her illness, it hurt the whole family a great deal because just out of the blue it just happened.

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Another piece of testimony seemed to presage the comment that would be used by the prosecution to indicate Troy's lack of remorse.

Q: Tell the jury what you would do in reference to your sister . . .

A: . . . I had so much faith, I told her, you know, 'cause she used to constantly cry and say, Troy, why me? You know, and I would like, Shawn, you can't just say why me, because things in life, you know, they happen for a reason. And for that reason she had to find out herself.

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Because it appeared several times, in a string of unrelated references, "things happen for a reason" might have been perceived as more understandable, and less unfeeling,

[78] *Georgia* v. *Davis*, Transcript 50–51.

[79] *Georgia* v. *Davis*, Transcript 56.

had it been accompanied by an explanation of its relationship to some specific influence or person in Troy's life.

Q: Troy, do you have anything you want to tell the jury before you come down?
A. Yes, sir. I would like for y'all to take into consideration to spare my life, because I understand y'all came to a decision about me personally through what witnesses stated. But really what I want to say is, you have to get to know me to understand me. I was never a bad person. I never did bad things through my life. I was always a loving person. I would never do anything to hurt anyone.

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Just give me my life back, you know, because what happened to Officer MacPhail, it was bad, you know, and my sympathy goes out to his wife and the rest of the family. I was praying for them ever since day one this incident happened, that they be strong and that she will one day know that everything in life happens for a reason, and I was praying that her family members, you know, don't hate me what I'm accused of.[80]

During cross examination, prosecutor Lawton asked Davis to confirm that he had testified that he used to say to Shawn that "things happen for a reason" and that he had just said that he prayed that the MacPhail family would realize that things happen for a reason.

Q: What reason would you offer that Officer MacPhail was shot and killed by you?
A: Well, personally I couldn't offer for a reason, but it states in the Bible that everything in life happens for a reason. But it's not up to man to decide what that reason is. Only God knows.[81]

The attorneys' arguments

After the jury had lunch and returned, the prosecutor made his argument. First, he pointed out that even though Davis's mother had testified tearfully and sincerely at the sentencing hearing, she had also testified during the trial itself: then, "she simply did not tell you the truth."[82] Moreover, he said, "[i]t's also reasonable to ask why she didn't cry for what he had done, but instead reserved all of her tears for what may be done to him in answer for that."[83]

Using the required forms of the sentencing hearing to set up his argument, the prosecutor pointed out that most of the other witnesses were questioned by leading questions and thus "[i]t must be left to your judgment to determine to what extent those questions and those answers were essentially orchestrated."[84] He further

[80] *Georgia* v. *Davis*, Transcript 60.
[81] *Georgia* v. *Davis*, Transcript 61.
[82] *Georgia* v. *Davis*, Transcript 70.
[83] *Georgia* v. *Davis*, Transcript 72.
[84] *Georgia* v. *Davis*, Transcript 73.

maligned the defense attorneys by saying, "[t]he way this has been set up, poor Shawn, the most helpless member of the family, has been made the vehicle in here by which the entire burden of the defense in the penalty phase is being carried." Nonetheless, he acknowledged that "it can't be denied that the Davises are a respectable family, they live in a respectable neighborhood."[85]

Next, he characterized Davis's testimony: "He testified like an automaton. He testified like a robot. There was no change in the inflection of his voice, whether he was talking about cutting the lawn, taking care of his sister, or shooting Officer MacPhail, which, by the way, he continues to deny. But you saw him. He'd just sit there and blandly shrug his shoulders and say, there's a reason for everything."[86] Listing seven reasons for imposing the death sentence, the prosecutor focused on Davis's lying to the jury and then called upon the jury to use Davis's refusal to admit guilt as a justification for showing him no compassion: "And yet he has the gall to sit up here this morning and in that grand way of his insist that you should give him – you should show him pity, while he denies even his own responsibility . . . Of what is pity given, except to an acknowledgement of responsibility."[87]

Responding, another of Troy's attorneys, Ms. Askew, listed the mitigating circumstances: "[Troy] has never had a childhood . . . He just simply had to grow up too soon . . . these are family-oriented people . . . [Martina testified that] my brother is the foundation of my family . . . [Kimberly testified that] if it were not for Troy, I would not be walking today." These factors, she said "show that Mr. Davis is redeemable . . . Is there no good that you can see in this man? . . . Don't you feel that it's better to be on the side of compassion than severity? It's your decision, irreversible, if you impose the death penalty . . . I feel that you will go back and that you will do the right thing, and that you will return a life sentence."[88] The jury deliberated for the afternoon and part of the next day, and then returned a sentence of death. Twenty years later, it was carried out.

Reimagining the sentencing hearing

Using a capital sentencing hearing to explore invitational and dialogic conceptions of rhetoric is not the same thing as advocating restorative justice[89] nor is it analogous

[85] *Georgia* v. *Davis*, Transcript 73.
[86] *Georgia* v. *Davis*, Transcript 73.
[87] *Georgia* v. *Davis*, Transcript 75–76.
[88] *Georgia* v. *Davis*, Transcript 79–80.
[89] The most common form of restorative justice (RJ below) has been characterized as a dialogue:

> As a component of the sentencing process, I take it that the essential features of RJ dialogue would include the following: (1) the offender meets face-to-face with the victim, representatives of the victim, and/or representatives of the community; (2) the meeting involves a facilitated dialogue in which all participants are given an opportunity to share their views of the offense and its consequences; (3) participants seek consensus as to appropriate restorative measures to repair harm

to calling for the inclusion or exclusion of victim impact statements.[90] Those initiatives share with invitational rhetoric a preference for engaging in dialogue leading to greater understanding rather than the more traditional preference for engaging in argument leading to victory or defeat. But they differ from invitational and dialogic rhetoric in their purposes and in their corresponding assumptions about who or what is to be centrally transformed.

Recall that "[i]nvitational rhetoric constitutes an invitation to the audience to enter the rhetor's world and to see it as the rhetor does." Add Billig's advocacy of the long-recognized connection between arguing and thinking, and his claim that an argument can only be understood within its argumentative context. In this context, then, in contrast with the prosecution's focus on Troy as no more than the sum of his criminal acts, the defense attorneys might use their witnesses as the media through whom an invitation is conveyed to the jury to see Troy in a different light. The defense witnesses invite the jury to see Troy as his family has known him through the years before the murder – as a sixteen- or seventeen-year-old looking after his younger brothers and sisters, as a helpful big brother to his closest sister struggling with a serious and frightening disease, as a helpful younger brother when his oldest sister planned to marry, as a son who took on the role of caregiver and provider when his father left the family.

Through invitational rhetoric, communication takes place between the jury members and the defendant as the witnesses seek to transform the jurors' understanding of Troy and of the conflict about the outcome. To aid this communication, the witnesses should share with the jury some values, beliefs, or history that will allow the jurors to find common ground (or to identify) with the witnesses. The witnesses should be capable of being viewed as knowledgeable and truthful, if

caused by the offense, which might include apology, restitution, and community service, in addition to (or in lieu of) more traditional penal sanctions; and (4) mechanisms are put into place to ensure the offender's accountability in performing agreed-upon restorative measures. The RJ dialogue occurs prior to judicial sentencing. If the dialogue is unsuccessful, or if the offender chooses not to participate, then the offender might be sentenced in the conventional manner. If the dialogue produces an agreement, then the agreement might take the place of a formal judgment or, alternatively, be embodied in the terms of the formal judgment, possibly along with additional judicially-determined sanctions or conditions.

Michael M. O'Hear, "Is Restorative Justice Compatible with Sentencing Uniformity?" 89 Marquette Law Review 89 (2005): 305, 306–307. For one critic's view of restorative justice, see Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* 136 (Vancouver: UBC Press 2004).

[90] After the Supreme Court decided that a state's decision to admit victim impact evidence in a capital sentencing hearing did not violate the Eighth Amendment, the Georgia Supreme Court upheld the constitutionality of the Georgia statute allowing and limiting such evidence. For example, that statute states that such evidence "shall be permitted only in such a manner and to such a degree as not to inflame or unduly prejudice the jury." *Livingston* v. *State*, 444 S.E.2d 748, 751 (Ga. 1994). Studies indicate that allowing such statements increases the likelihood of a capital defendant receiving a death sentence. Jeremy A. Blumenthal, "Affective Forecasting and Capital Sentencing: Reducing the Effect of Victim Impact Statements," 46 *American Criminal Law Review* 46 (2009): 107, 125.

only about the events they are describing and not about larger questions of character, moral blameworthiness, or future dangerousness.

To communicate effectively, the witnesses need not be completely neutral. Neither the attorneys nor the witnesses in a sentencing hearing are "neutral" as to the result: simply being called by one side or the other implies partiality. Still, a juror should be able to set aside the lack of neutrality as to the result in order to understand that a non-neutral witness can be knowledgeable and truthful about an event that is tangential to the crime but central to the witness's relationship with the defendant. Thus, a juror likely would assume that Mrs. Davis wishes to present the most favorable picture possible of her son. When she testifies that he was a good substitute father and a good provider for his family, the juror may discount those summary characterizations as little more than what any mother would say in any case. But if Mrs. Davis were to testify about a specific incident – Troy had been given a job by one of his father's friends, but when his father left the family, Troy insisted on going out to get a part-time job on his own because he no longer wanted to depend on his father – the juror would begin to be able to understand Troy as a person.

The testimony of Troy's two sisters supports this suggestion. Their believability was less suspect because they had not testified in the guilt phase of the trial. More important, they testified about specific moments in their lives, filling in details and enhancing the jurors' comprehension of Troy by providing more complicated accountings of Troy's conduct and character – Troy stepping in for his absent father so that Marina could get married, Troy pushing his sister Shawn to stand up and walk on her own, perhaps coming at a time when she would have preferred to be sheltered rather than prodded.

Even if invitational rhetoric shows promise when the invitation to understand is mediated through a witness, it is much more difficult to effectively recast the testimony of the defendant himself as invitational rhetoric. Even more so than Mrs. Davis's, Troy's testimony would be immediately suspect and incredible to the jury: they have already found him guilty and that finding required them to disbelieve much of what he said before. The prosecutor characterized him as testifying during the penalty phase as an automaton or a robot, a demeanor that likely made it easier to view him as something other than human. Troy failed to exhibit the emotional markers that might have humanized him had he shown outward signs of empathy for the MacPhail family or spoken words of remorse. His testimony that "things happen for a reason," which might have been understandable given his religious beliefs, especially when he used the phrase in so many different contexts, sounded like a lack of human feeling.

Practical and legal considerations erect high barriers to the use of a defendant's testimony as an invitation to the jury to understand another perspective on the defendant's life and actions. Admissions of guilt in the sentencing phase carry consequences. By using the following example, I do not intend to suggest that any of the alleged confessions recounted by witnesses during the trial were actually true;

doubt was cast on each of these statements both during and after the trial. Instead, my intent is to suggest that if a jury had been offered an invitation to understand a similar situation from the point of view of a similar defendant, that jury would not have imposed the death penalty. Even if these confessions truthfully described the actions of anyone who was present, what happened the evening of the murder of Officer MacPhail seems very far removed from warranting the death penalty, a penalty that is to be meted out only when it is a just desert, truly fitting the crime.

Would a jury understand the actions of any one of the young men who were present that evening if the jurors had heard a first-person account of what happened?

> On the evening of the shooting, I was with friends. We had gone to a party and then we were going to a convenience store. One of my friends began arguing with a man coming out of the convenience store. The man would not give my friend one of the beers he had just purchased. They argued some more, and then my friend chased the man toward the Burger King parking lot. I was following them. When they got close to the Burger King drive-through, they stopped and they started yelling insults at each other. I was just behind the man when he said something to me. Because he wouldn't stop arguing and yelling, I hit him in the head with a gun that my friend handed me earlier. The man ran to the drive-through window, yelling, "call the police!" My friend and I started to run. A police officer came around the corner and told us to "hold it." "Freeze."[91]
>
> The police officer started running towards me. I stopped. I was trying to put the gun back in my pants to hide it. I couldn't do it. I couldn't hide the gun, and I panicked. The officer was running towards me. He reached for his firearm. He was about fifteen feet away, and I shot him.[92] I thought he got a good look at me and so I thought, "I have to finish the job." I shot him again.[93]

In this version, a defendant who shot a police officer has admitted the murder to a jury that has already found him guilty of that murder. He becomes recognizably human if the jurors believe that they share common ground with the defendant: they have experienced the same emotions (anger and fear) and they have displayed similar personality traits (loyalty and selfishness). Some measure of understanding and compassion might follow if the jury members were able to consider the situation from another perspective, when, for example, the defendant explains to the jurors why he became angry and struck the man who was arguing and shouting, why he became panicked when he could not hide the gun, and even why he shot the officer the second time to protect himself. As an invitation to understand a defendant's perspective, this version may be believable and effective because it holds together. It accords with the jurors' sense of what happened that night based on their

[91] This version is compiled from the testimony as recounted in the Order of the District Court on the specific pages cited. Order of the District Court 35–36.

[92] Order of the District Court 22–23.

[93] Order of the District Court 40.

experience in the guilt phase of the trial. It rings true because it carries echoes of other stories the jury members have heard.

CONCLUSION

Can the law encompass rhetoric that fails to deliver an ending? As envisioned by their proponents, invitational rhetoric creates a relationship between an audience and an "other" by building understanding of the other's perspective while Billig's dialogic rhetoric leads to thought and further argument, thus ensuring a continuing relationship among the arguers. Together, these visions virtually guarantee continuing uncertainty and open-endedness, not the closed and certain sphere that Wetlaufer described.

As noted earlier, invitational and dialogic rhetoric already exist within some law settings. Transformative mediation seems to draw on the same impetus as invitational rhetoric. So may settlement negotiations among equals with continuing relationships. Courtroom arguments and lawyers' examinations of witnesses are dialogic in form if not in substance or desired outcome.

Although this discussion is a preliminary sketch, it suggests several characteristics of situations in which an emphasis on a more invitational and dialogic rhetoric may prove valuable. First, the practice of invitational–dialogic rhetoric might flourish in situations whose purpose is to establish the terms of a future relationship rather than solely to settle a past score. When there is no last word to be had, that setting may be most fitting for invitational–dialogic rhetoric. As transformative mediators point out, this does not mean that those involved must necessarily have an ongoing relationship that continues after the settlement. Instead, the transformative approach "assumes that all interactions between people carry relationship significance, for however long their interactions last. Therefore, in any situation where the quality of the interaction matters to the parties and . . . will have an impact on other possible outcomes," these approaches have value.[94] Second, we might consider these rhetorical practices in situations in which various actors already fill the role of witnesses who bring about change in the understanding of intended audiences. And third, we may focus on particular argument settings in which concrete and specific incidents recounted by the witnesses might transform understanding.[95]

Linda Meyer conceives of punishment as "a work," that is, a working through the shared memory of a wrong as a wrong.[96] The work begins with the drama of a trial that establishes the shared memory of the wrong between the jury and the defendant. The sentencing is both a settlement of that wrong and the establishment of the terms of a future relationship. Meyer considers this relationship to involve the witness (the jury), the defendant, and the victim.

[94] Baruch and Folger, *The Promise of Mediation*, 219.
[95] See Ibid., 215 ("The transformation of conflict always occurs at the level of specific comments").
[96] Linda Ross Meyer, *The Justice of Mercy* (Ann Arbor: University of Michigan Press 2010): 83–103.

Through invitational rhetoric, a sentencing may similarly be seen as a settlement of a wrong that emerges from the more exacting relationship between the defendant and the jury. Again, this would be a relationship between those who have together determined (although they have not agreed) that a wrong occurred. In Foss and Griffin's description, invitational rhetoric is "a means to create a relationship rooted in equality, immanent value, and self-determination."[97] For the capital sentencing hearing, this translates into an invitation from the witness to the jury to see and understand the defendant through the witness's eyes. Understanding among the participants would create a relationship between the jury and the defendant, and in invitational rhetorical, that relationship would be rooted in equality, the value of every being, and the right to self-determination. This is the promise of invitational rhetoric. If we can even imagine such a relationship, wouldn't that be transformative?

[97] Foss and Griffin, "Beyond Persuasion," 4.